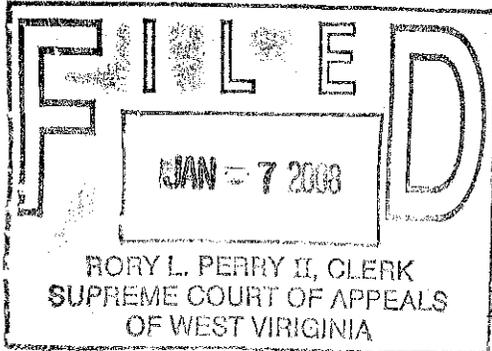


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO.: 33710

IN RE: FLOOD LITIGATION

Raleigh County Civil Action No. 02-C-797
Honorable John A. Hutchison,
Mass Litigation Panel
(Upper Guyandotte River Watershed –
Subwatershed 2a – Mullens)



BRIEF OF APPELLEES

Richard J. Bolen-WV State Bar ID No. 392
Cindy D. McCarty-WV State Bar ID No. 9456
HUDDLESTON BOLEN LLP
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722-2185
Phone: (304) 529-6181
Facsimile: (304) 522-4312
*Counsel for Defendants Western Pocahontas
Properties Limited Partnership and Western
Pocahontas Corporation*

David E. Goddard-WV State Bar ID No. 8090
John Greg Goodykoontz-WV State Bar ID No. 1437
STEPTOE & JOHNSON PLLC
P. O. Box 2190
Clarksburg, WV 26302-2190
Phone: (304) 624-8139
Facsimile: (304) 624-8183
*Co-counsel for Defendant Western Pocahontas
Corporation*

I. INTRODUCTION 1

II. ARGUMENT IN SUPPORT OF THE TRIAL COURT’S GRANT OF JUDGMENT AS A MATTER OF LAW 4

A. The Standard for Granting Judgment as a Matter of Law and the Standard for Appellate Review of Judgments as a Matter of Law 4

B. Appellants Presented No Evidence Regarding Issue Two upon which a Reasonable Jury Could Properly Proceed to Find a Verdict for Appellants 6

 1. Appellants Failed to Assign Error as to Issue Two, and thus, Their Arguments as to Issue Two Cannot Be Considered on this Appeal 6

 2. As Judge Hutchison Correctly Found, the Plaintiffs Presented No Evidence Sufficient to Permit a Verdict in Their Favor Regarding Issue Two 8

 a. Mr. Morgan Offered No Competent Testimony with Respect to Issue Two 10

 b. Dr. Bell, Like Mr. Morgan, Offered No Competent Testimony with Respect to Issue Two 16

C. Dr. Bell and Mr. Morgan Were Not Qualified to Testify as Experts in this Case, and Their Testimony Was Unreliable, Irrelevant, and Was Properly Stricken from the Record, Absent Which the Plaintiffs Failed to Discharge Their Burden of Proof as to Issue One 20

 1. The Only Evidence Offered by the Plaintiffs as to Issue One Was the Testimony of Dr. Bell and Mr. Morgan 21

 2. Contrary to Appellants’ Arguments, Mr. Morgan Was Not Qualified to Offer Opinions as to the Effect of Diameter Limit Cutting on Surface Water Runoff 22

 3. Like Mr. Morgan, Dr. Bell Lacked Scientific, Technical, or Other Specialized Knowledge that Would Have Been of Assistance to the Jury 27

 4. The Testimony of Both Dr. Bell and Mr. Morgan as to Issue One Was Also Unreliable Because it Was Primarily Based on Result-Oriented Computerized Mathematical Models of Surface Water Runoff – Which Had Predetermined Results 29

5.	As Judge Hutchison Has Properly Held, He Erred in Allowing the Opinions of Dr. Bell and Mr. Morgan to Be Submitted to the Jury After Dr. William Martin (upon whom Both Dr. Bell and Mr. Morgan Relied) Was Withdrawn as an Expert Witness by Appellants	41
6.	The Alleged “Literature Review” Performed by Dr. Bell and Mr. Morgan Does Not Enhance Their Qualifications to Testify in this Matter, nor Does it Render their Methods Reliable or Relevant	46
7.	Judge Hutchison Correctly Applied the <u>Daubert/Wilt</u> Analysis in Concluding that neither Dr. Bell’s nor Mr. Morgan’s Testimony Should Have Been Presented to the Jury	50
a.	The Testimony of both Mr. Morgan and Dr. Bell Was “Scientific” in Nature	51
(i.)	The “Reliability” Element	54
(ii.)	The “Relevancy” Element	61
b.	Even if the Testimony of Dr. Bell and/or Mr. Morgan is Considered Technical, rather than Scientific, Judge Hutchison Properly Exercised His Discretion to Consider the Reliability and Relevancy of the “Technical” Opinions in Granting Western Pocahontas’ Motion for Judgment as a Matter of Law	62
D.	Even if Dr. Bell and Mr. Morgan Had Been Qualified and Their Testimony Had Been Reliable and Relevant, Judge Hutchison Correctly Ruled that, as to Issue Three, the Timber Operations on Western Pocahontas’ Properties Cannot Be Deemed Unreasonable, as a Matter of Law	64
1.	The Evidence Was Undisputed that BMPs Function as Stormwater Runoff Controls and that BMPs Were Required to be Followed on Every Timber Operation on Western Pocahontas’ Properties in the Slab Fork Subwatershed	65
2.	Absent a Foundation for Including All Timber Operations that Occurred in the Ten-Year Period Prior to July 8, 2001, Mr. Morgan’s “Cumulative Hydrologic Impact” Analysis Cannot Be Supported	68

- 3. Western Pocahontas Ensured that Both the Manner and the Amount of Timber Harvesting on its Properties Were Reasonable, Lawful, and Not Only Met, But Exceeded, Industry Standards 70
- 4. Judge Hutchison Properly Applied this Court’s Holding in In re Flood Litigation to Conclude that Appellants had the Burden to Prove that Western Pocahontas Knew or Should Have Known of Some Risk that Could Have Been Prevented by Additional Measures Other Than the BMPs 73

III. ARGUMENT IN SUPPORT OF THE TRIAL COURT’S CONDITIONAL GRANT OF A NEW TRIAL 77

- A. Judge Hutchison’s Ruling to Grant a New Trial Should be Reviewed Under an Abuse of Discretion Standard 77
- B. Plaintiffs’ Experts, Dr. Bell and Mr. Morgan, Were Not Qualified to Testify under Rule 702 78
- C. Western Pocahontas Was Prejudiced by Irrelevant Evidence Relating to Dismissed Defendants 78
- D. Judge Hutchison Correctly Ruled that Western Pocahontas’ Proffered Photographs of Flooding on July 8, 2001 at Twin Falls State Park, and Supporting Testimony, Should Have Been Admitted 79
- E. Judge Hutchison Correctly Ruled that a New Trial Was Warranted, Based on Plaintiffs’ Counsels’ Repeated Presentation of Prejudicial and Inadmissible Evidence 81
 - 1. Plaintiffs’ Counsels’ Use of Anecdotal Comments from Public Meetings, Quoted in the FATT Report, Tainted the Proof as to Issue Three (Reasonableness), and the Court’s *in limine* Ruling to Exclude Such Anecdotal Comments Could Not and Did Not Cure this Prejudicial Error 82
 - 2. Plaintiffs’ Counsel’s Repeated References to Deaths Allegedly Resulting from the July 8, 2001 Flood Violated the Trial Plan and Constituted Prejudicial Error 84
 - 3. Plaintiffs’ Counsels’ Repeated Suggestion Regarding the Limited Role of the Phase I Jury Created the False Impression that the Phase I Jury Did Not Need to Take its Responsibilities Seriously, Since Another Jury Would Ultimately Determine Liability and Damages, if any 86

4.	Plaintiffs' Counsel Engaged in Prohibited and Inappropriate Nonverbal Contact with Jurors in Open Court During the Trial, Even After Admonishment from the Trial Court to Cease Any Such Contact, and Such Conduct Had a Clear Prejudicial Effect on Western Pocahontas	90
F.	Judge Hutchison Correctly Ruled that it Was Error to Admit the FATT Report into Evidence	94
1	The Content of the FATT Report Does Not Support the Conclusion that Logging Increased Surface Water Runoff in any Material Respect	95
2.	The FATT Report Contains Conclusions Reached from Models of Three Watersheds (Seng Creek, Scrabble Creek, and Sycamore Creek) that Were Not at Issue in this Case	96
3.	The FATT Report Is Only One Part of a Continuing Investigation by the State. As Additional Peer Reviews and Reports Have Emerged, the Inherent Unreliability of the FATT Report, Particularly as to the Forestry Issues Considered, Has Been Confirmed	97
G.	The Verdict Was Against the Clear Weight of the Evidence	102
IV.	ARGUMENT IN SUPPORT OF CROSS ASSIGNMENTS OF ERROR AS TO ADDITIONAL GROUNDS WARRANTING THE GRANT OF A NEW TRIAL	104
A.	This Court May Affirm the Judgment of the Trial Court Where it is Correct on any Legal Ground, Regardless of the Ground, Reason or Theory Assigned by the Trial Court for its Judgment	105
B.	The Trial Court Committed Error in Adopting an Unconstitutional and Prejudicial Trial Plan	106
1.	In West Virginia Jurisprudence, There Is a Strong Presumption in Favor of Unitary Trials of all Legal Issues and Against Bifurcation	107
2.	It is Well-Settled that Ordering a Separate Trial of an Issue that is Not Entirely Separate and Distinct Violates the Constitution	108

3. The Trial Plan Was Unconstitutional and Prejudicial Because it Bifurcated the Issue of Reasonableness from the Remaining, Interwoven Issues of Liability 116

 a. "Reasonable Use of Land" under the Morris v. Priddy Balancing Test Is Based on Several Factors, Some of Which the Trial Plan Erroneously Bifurcated for Phase II Consideration 120

 b. Reasonableness Is Also a Component of a Nuisance Claim ("Unreasonable Interference" with the Private Use and Enjoyment of Another's Land) Which Was Erroneously Bifurcated for Phase II Consideration under the Trial Plan 122

 c. A Negligence Claim Also Contains a Reasonableness Component, in that Negligence Requires an Analysis of What a Reasonable, Prudent Person Would Do and That Too Was Erroneously Bifurcated for Phase II Consideration under the Trial Plan 124

 d. Interference with Riparian Rights Also Contains a Reasonableness Component, i.e., Reasonable Use of Water, an Issue Erroneously Bifurcated for Phase II Consideration Under the Trial Plan 125

 e. The Trial Plan Requires the Phase II Jury to Re-examine the Same Facts and Factors as to Reasonableness as were Adjudicated by the Phase I Jury 126

C. Because the Trial Court Adopted a Trial Plan that Was Inherently Flawed, the Trial was Likewise Inherently Flawed and Prejudicial to Western Pocahontas 128

 1. Absent Discovery of and Evidence as to "Harm Caused," the Jury Was Required to Reach its Verdict Based on Speculation, Conjecture or Their Own Prejudices 129

 2. The Jury Was Improperly Misled and Confused by Unfounded Comments and Improper Arguments from Plaintiffs' Counsel and Their Witnesses that Certain Harm Was Caused by the Conduct of Western Pocahontas 131

D. The Trial Court Erred by Admitting Photographs of Alleged Flood Damage Without a Proper Foundation to Establish Whether the Source of the Water and Debris Depicted Originated from Appellee's Property 134

E.	Western Pocahontas was Prejudiced by the Trial Court's Determination that the Appellants Could Attack Operations of Defendants that Were Voluntarily Dismissed with Prejudice	136
F.	Western Pocahontas Was Wrongfully Denied a Trial by Jury of the Issue of Whether it Was Vicariously Liable for the Timber Harvesting Practices of White Oak Lumber Company	140
G.	The Charge Given to the Jury Contained Errors that Materially Prejudiced Western Pocahontas	142
1.	The Jury Instructions Regarding Sediment and Debris Control Allowed the Jury to Consider Irrelevant Factors in Answering the Questions Presented to Them	143
2.	The Trial Court Erroneously Gave Inconsistent Instructions as to Whether the Jury Should Consider "Potential Harm" Rather Than Actual "Harm Caused" in Determining "Reasonable Use," and These Instructions Were Particularly Prejudicial Since No Discovery Was Allowed as to Actual Harm	144
H.	The Jury Verdict Form Utilized by the Trial Court Unfairly Prejudiced Western Pocahontas Because it Failed to Follow the Trial Plan Requirement that Operations be Assessed Individually	148
I.	Western Pocahontas Is Entitled to a New Trial Because Juror 20 Should Have Been Disqualified for Reasons that Were Not Discovered by Western Pocahontas until after the Verdict was Rendered, Despite the Exercise of Ordinary Diligence	152
1.	The Discovery Responses in the <u>Mountaineer Hyundai</u> Case Indicated That Mrs. McGraw's Husband Was Centrally Involved in the Underlying Events and the Prosecution of that Case	154
2.	The Deposition Transcripts of Ernie McGraw and Diana McGraw in the <u>Mountaineer Hyundai</u> Case Further Establish that Sherry McGraw was Disqualified to Serve as a Juror in the Case at Bar	156
a.	In Both the <u>Mountaineer Hyundai</u> Case and the Case at Bar, the Plaintiffs Allege that Land Disturbances, Particularly the Creation of Roads, Caused Increased Runoff and Flooding	157

3. Members of Juror Sherry McGraw's Family (and Perhaps Juror Sherry McGraw) Were Privy to Alleged Negotiations and Discussions with White Oak that Likely Resulted in a Bias Against White Oak and, by Extension, against Western Pocahontas 161

4. Because Juror Sherry McGraw Was Disqualified to Serve as a Juror in this Action, Western Pocahontas Is Entitled to a New Trial 163

V. CONCLUSION 169

Table of Authorities

<u>In Re: Flood Litigation</u> , 216 W.Va. 534, 607 S.E.2d 863 (W. Va. 2004)	1, 3, 73-76, 117-122, 125, 127-129, 137, 144, 146, 148.
<u>Robertson v. Opequon Motors, Inc.</u> , 205 W.Va. 560, 519 S.E.2d 843 (1999)	4, 5
<u>Barefoot v. Sundale Nursing Home</u> , 193 W.Va. 475, 457 S.E.2d 152 (1995)	5
<u>Neely v. Mangum</u> , 183 W.Va. 393, 396 S.E.2d 160 (1990).....	5
<u>Brannon v. Riffle</u> , 197 W.Va. 97, 475 S.E.2d 97 (1996)	5
<u>Johnson by Harper v. Hills Dep't Stores</u> , 200 W.Va. 196, 488 S.E.2d 471 (1997).....	5
<u>Brady v. Deals on Wheels, Inc.</u> , 208 W.Va. 636, 542 S.E.2d 457 (2000).....	5
<u>State v. Sprague</u> , 214 W. Va. 471, 590 S.E.2d 664 (2003).....	8
<u>Gentry v. Mangum</u> , 195 W.Va. 512, 466 S.E.2d 171 (1995).....	27, 52
<u>Jones v. Patterson Contracting, Inc.</u> , 206 W.Va. 399, 524 S.E.2d 915 (1999).....	27
<u>Ayers v. Robinson</u> , 887 F.Supp. 1049 (D .Ill. 1995)	38
<u>Wilt v. Buracker</u> , 191 W.Va. 39, 443 S.E.2d 196 (1993), <i>cert. denied</i> , 511 U.S. 1129 (1994)	42, 51, 52, 61
<u>Riccardi v. Children's Hosp. Medical Ctr.</u> , 811 F.2d 18 (1 st Cir. 1981)	44
<u>Brian v. John Bean Div. of FMC Corp.</u> , 566 F.2d 541 (5 th Cir. 1978).....	44, 45
<u>Horton v. W.T. Grant</u> , 537 F.2d 1215 (4th Cir. 1976)	44
<u>Gilbert v. Summers</u> , 240 Va. 155, 158, 393 S.E.2d 213, 215.....	45
<u>United States v. Tran Trong Cuong</u> , 18 F.3d 1132 (4 th Cir. 1994)	45
<u>In Re: Imperial Credit Industries, Inc. Securities Litigation</u> , 252 F.Supp.2d 1005 (C.D.Cal.2003)	45
<u>Sisler v. Hawkins</u> , 158 W.Va. 1034, 217 S.E.2d 60 (1975)	46
<u>Newton v. Roche Labs, Inc.</u> , 243 F. Supp. 2d 672 (W.D.Tx. 2002)	47

<u>United States v. Paul</u> , 175 F.3d 906 (11 th Cir. 1999)	47
<u>Smith v. Rasmussen</u> , 57 F. Supp. 2d 736 (D. Iowa 1999)	47, 48
<u>Overton v. Fields</u> , 145 W. Va. 797, 117 S.E.2d 598 (1960)	51
<u>Watson v. Inco Alloys Intern., Inc.</u> , 209 W. Va. 234, 545 S.E.2d 294 (2001)	51, 53
<u>Daubert v. Merrell Dow Pharmaceuticals, Inc.</u> , 509 U.S. 579 (1993)	52, 54, 60, 61
<u>Coffey v. Dowley Manufacturing, Inc.</u> , 187 F.Supp.2d 958 (M.D.Tenn. 2002)	55
<u>Thomas v. FAG Bearings Corp.</u> , 846 F.Supp. 1382 (W.D.Mo. 1994)	62
<u>Oates v. Continental Ins. Co.</u> , 137 W. Va. 501, 72 S.E.2d 886 (1952)	63, 129
<u>Lacy v. CSX Transp. Inc.</u> , 205 W. Va. 630, 520 S.E.2d 418 (1999)	64, 88, 89
<u>Crane & Equipment Rental Co., Inc. v. Park Corp.</u> , 177 W. Va. 65, 350 S.E.2d 692 (1986)	63, 129
<u>Queen v. Sawyers</u> , 148 W. Va. 130, 133 S.E.2d 257 (1963)	63
<u>Payne v. Ace House Movers, Inc.</u> , 145 W. Va. 86, 112 S.E.2d 449 (1960)	64
<u>Miller v. Warren</u> , 182 W.Va. 560, 390 S.E.2d 207 (1990)	75
<u>Summers v. Martin</u> , 199 W. Va. 565, 486 S.E.2d 305 (W. Va. 1997)	78
<u>Horton v. Horton</u> , 164 W.Va. 358, 264 S.E.2d 160 (1980)	80
<u>Crum v. Ward</u> , 146 W. Va. 421, 122 S.E.2d 18 (W. Va. 1961)	85
<u>State v. Bennett</u> , 179 W. Va. 464, 370 S.E.2d 120 (W. Va. 1988)	85
<u>State v. Stephens</u> , 206 W. Va. 420, 525 S.E.2d 301 (W. Va. 1999)	85
<u>Hamer v. School Board of Chesapeake</u> , 240 Va. 66, 393 S.E.2d 623 (Va. 1990)	85, 86
<u>Caldwell v. Mississippi</u> , 472 U.S. 320 (1985)	88-90
<u>Tamme v. Commonwealth</u> , 759 S.W.2d 51 (Ky. 1988)	88
<u>Mann v. Dugger</u> , 844 F.2d 1446 (11 th Cir. 1988)	88
<u>Colosimo v. Penn. Electric Co.</u> , 337 Pa. Super. 363, 486 A.2d 1378 (Penn. Super. Ct. 1984)	92, 93

<u>Baker v. Ohio Ferro-Alloys Corp.</u> , 261 N.E.2d 157 (Ohio Ct. App. 1970)	92, 93
<u>Barnett v. Wolfolk</u> , 149 W. Va. 246, 140 S.E.2d 466 (W. Va. 1965)	105
<u>Bowman v. Barnes</u> , 168 W. Va. 111, 282 S.E.2d 613 (W. Va. 1981)	107
<u>Bryan v. Big Two Mile Gas Co.</u> , 213 W. Va. 110, 577 S.E.2d 258 (W. Va. 2001)	107
<u>State ex rel. Crafton</u> , 207 W. Va. 74, 528 S.E.2d 768 (W. Va. 2000)	108
<u>State ex rel. Cavender v. McCarty</u> , 198 W. Va. 226, 479 S.E.2d 887 (W. Va. 1996)	107, 108, 115
<u>Gasoline Prods. Co. v. Champlin Ref. Co.</u> , 283 U.S. 494 (1931)	109-111
<u>Munden v. Johnson</u> , 102 W. Va. 436, 135 S.E. 832 (1926)	110
<u>Dunlap v. Graves</u> , 2004 ML 4067 (Mont. Dist. 2004)	110
<u>Laitram Corp. v. Hewlett-Packard Company</u> , 791 F. Supp. 113 (E.D. La. 1992)	110
<u>Carlson v. Carlson</u> , 836 P.2d 297 (Wyo. 1992)	110
<u>Swofford v. B & W Inc.</u> , 336 F.2d 406 (5th Cir. 1964)	111
<u>In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.</u> , 209 F.R.D. 323 (D.N.Y. 2002)	111, 112
<u>F & G Scrolling Mouse L.L.C. v. IBM Corp.</u> , 190 F.R.D. 385 (D.N.C. 1999)	112
<u>Benner v. Becton Dickinson & Co.</u> , 214 F.R.D. 157 (S. Dist. N.Y. 2003)	112, 113
<u>Matter of Rhone-Poulenc Rorer, Inc.</u> , 51 F.3d 1293 (7th Cir.)	111-114
<u>Sydenstricker v. Mohan</u> , 217 W. Va. 552, 618 S.E.2d 561 (W. Va. 2005)	116
<u>Celestine v. Union Oil Co.</u> , 636 So. 2d 1138 (La. Ct. App. 1994)	117
<u>Morris v. Priddy</u> , 181 W. Va. 588, 383 S.E.2d 770 (W. Va. 1989) ...	118, 120, 122, 132, 146
<u>Keys v. Romley</u> , 64 Cal. 2d 396, 412 P.2d 529 (Cal. 1966)	121
<u>Hendricks v. Stalnaker</u> , 181 W. Va. 31, 380 S.E.2d 198 (W. Va. 1989)	122-124
<u>Strahin v. Cleavenger</u> , 216 W. Va. 175, 603 S.E.2d 197 (W. Va. 2004)	125

<u>Adams v. Sparacio</u> , Syl. Pt. 3, 156 W. Va. 678, 196 S.E.2d 647 (W. Va. 1973)	129
<u>Blake v. Charleston Area Med. Ctr., Inc.</u> , 201 W.Va. 469, 498 S.E.2d 41 (W. Va. 1997)	138, 139
<u>State ex rel. Division of Human Services by Mary C.M. v. Benjamin P.B.</u> , 183 W.Va. 220, 395 S.E. 2d 220 (W. Va. 1990)	138
<u>Litten v. Peer</u> , 156 W.Va. 791, 197 S.E.2d 322 (W. Va. 1973)	138
<u>Sattler v. Bailey</u> , 184 W.Va. 212, 400 S.E.2d 220 (W. Va. 1990)	140
<u>Shaffer v. Acme Limestone Co.</u> , 206 W. Va. 333, 524 S.E.2d 688 (W.Va. 1999)	141
<u>Snyder v. Scheerer</u> , 190 W.Va. 64, 436 S.E.2d, 299 (W. Va. 1993)	147
<u>Blyden v. Mancusi</u> , 186 F.3d 252 (2 nd Cir. 1999)	150, 151
<u>Proudfoot v. Dan's Marine Serv.</u> , 210 W. Va. 498, 558 S.E.2d 298 (W. Va. 2001)	163, 164
<u>State v. Dennis</u> , 216 W. Va. 331, 349, 607 S.E.2d 437, 455 (W. Va. 2004)	169

BRIEF OF APPELLEES

Western Pocahontas Properties Limited Partnership and Western Pocahontas Corporation (hereinafter collectively referred to as "Western Pocahontas," "Appellee," or "Defendant") pursuant to Rule 10(b) of the West Virginia Rules of Appellate Procedure, hereby submit their appellate brief. Western Pocahontas respectfully requests that this Court affirm the trial court's March 15, 2007 Order granting judgment as a matter of law in favor of Western Pocahontas.

I. INTRODUCTION

Torrential downpours on July 8, 2001 caused severe flooding throughout southern West Virginia. Subsequently, over fifty actions were filed by firms representing several thousand plaintiffs against companies in the extractive industries and the owners of the lands upon which extractive activities had occurred.¹ Those suits theorized that mining coal, cutting timber and drilling for gas "disturbs" the land, and that such "disturbance" exacerbates flooding. These actions were referred by Chief Justice Robin Davis, by Order dated May 16, 2002, to the Flood Litigation Panel ("Panel") for determination. By Order entered August 1, 2003, the Panel certified nine questions to this Court. The certified questions, as reformulated by this Court were answered in In Re: Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (W. Va. 2004).

¹ Illogically, none of the hundreds of landowners in the flooded areas whose lands have been used for non-extractive purposes were named as defendants, even though under the Plaintiffs' "disturbance of land" theory, the landowners who have cleared their lands, built homes, farms, businesses, driveways, and otherwise improved/"disturbed" their property, and whose lands are closer to the rivers and streams at issue, in almost every case, would have been far more logical defendants than timber owners who have, by comparison, only minimally "disturbed" their lands, by selectively cutting only the largest trees -- on roughly twenty-five year intervals -- but otherwise have left in place the forest cover which has existed for thousands of years.

Thereafter, the Panel determined that the most appropriate and expeditious manner in which to try the July 8, 2001 flood cases would be "through the conduct of trials for separate watersheds, with each such watershed trial to be conducted in phases, with one of the Panel Judges presiding at each of the trials of the claims in the different watersheds." (Trial Plan at p. 2).²

Judge John A. Hutchison, Chief Judge of the Tenth Judicial Circuit, was assigned the trial of the Upper Guyandotte Watershed. After conducting "numerous conferences with all parties" and hearing argument on "different approaches for the conduct of a trial for the Upper Guyandotte Watershed," Judge Hutchison determined that "the best way to move forward was to further subdivide the claims in the Upper Guyandotte Watershed by subwatersheds." (Trial Plan at p. 2).

Judge Hutchison determined that the first phase of the Upper Guyandotte trial would include both the Mullens and Oceana subwatersheds. Judge Hutchison further decided that the first phase of the trial ("Phase I Trial") would "not determine issues of legal causation for any conduct of the defendants' operations for any damages allegedly suffered by any plaintiff involved in the Phase I Trial," and would "not determine the legal liability of any of the defendants, nor shall it determine the damages, if any, of any of the plaintiffs." (Trial Plan at p. 3). Rather, Judge Hutchison limited the Phase I Trial to three preliminary issues:

- "A) ["Issue One"] whether, as to each defendant's individual operation(s), the defendants' use of its properties materially increased the rate of surface water runoff that left that operation as a result of a storm event on or about July 8, 2001, compared to the rate of surface water runoff that would have left that operation but for the defendant's use of that property; and if so,

² The Trial Plan for Subwatersheds 2A & 2E of the Upper Guyandotte Watershed dated January 26, 2006 is referred to herein as the "Trial Plan."

- B) ["Issue Two"] whether the water from the individual defendants' operation(s) materially caused or contributed to the stream or streams into which they discharged overflowing their banks, and
- C) ["Issue Three"] regardless of the findings made in A and B above, was the use by the defendants of the property in question unreasonable under the circumstances set forth by the Supreme Court of Appeals in the case of In Re: Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004)." (Trial Plan at p. 3).

Following several weeks of trial, a Raleigh County jury answered these three questions in the affirmative. Western Pocahontas, the sole remaining defendant at the time the jury returned its verdict, timely filed its post-trial motion for judgment as a matter of law under Rule 50 of the West Virginia Rules of Civil Procedure³ on the ground that there was no legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiffs on any of the three issues. Judge Hutchison agreed and entered judgment as a matter of law in favor of Western Pocahontas on March 15, 2007.⁴ Judge Hutchison also conditionally granted Western Pocahontas' motion for a new trial.

Judge Hutchison's grant of judgment as a matter of law in favor of Western Pocahontas was based on at least three separate, independent, and alternative grounds:

(1) Dr. Bruce Bell and Mr. John Morgan were not qualified to testify as experts in this case, and their testimony was unreliable and was properly stricken from the record. Accordingly, Judge Hutchison ruled that the Plaintiffs failed to discharge their burden of proof as to Issue One (whether the timbering operations on Western Pocahontas' properties materially increased the rate of surface water runoff leaving its properties). (March 15, 2007 Order at pp. 10-27);

³ In the alternative, Western Pocahontas moved for a new trial.

⁴ The "Order Granting In Part And Denying In Part Defendant's Motion For Judgment As A Matter Of Law Or A New Trial" dated March 15, 2007 is referred to herein as the "March 15, 2007 Order."

(2) Even if Dr. Bell and Mr. Morgan had been qualified and their testimony had been reliable and relevant, no evidence was submitted regarding Issue Two (whether the timbering operations on Western Pocahontas' properties materially contributed to streams overflowing their banks., i.e., flooding). (March 15, 2007 Order at pp. 28-31); and

(3) Even if Dr. Bell and Mr. Morgan had been qualified and their testimony had been reliable and relevant, and even if a jury could properly infer proof of Issue Two solely from evidence regarding Issue One, Western Pocahontas would prevail on Issue Three (whether Western Pocahontas' use of its land was unreasonable) because the timber operations on Western Pocahontas' properties cannot be deemed unreasonable, as a matter of law. (March 15, 2007 Order at pp. 31-36).

Each of these three grounds is well supported in the record.

II. ARGUMENT IN SUPPORT OF THE TRIAL COURT'S GRANT OF JUDGMENT AS A MATTER OF LAW

A. THE STANDARD FOR GRANTING JUDGMENT AS A MATTER OF LAW AND THE STANDARD FOR APPELLATE REVIEW OF JUDGMENTS AS A MATTER OF LAW.

Effective April 6, 1998, some of the terminology employed by Rule 50 of the West Virginia Rules of Civil Procedure was changed to mirror an earlier modification of Rule 50 of the Federal Rules. As a result, this Court, in Robertson v. Opequon Motors, Inc., 205 W.Va. 560, 563 n. 3, 519 S.E.2d 843, 846 n. 3 (W. Va. 1999) instructed that "litigants should employ the phrase 'judgment as a matter of law' in place of the phrases 'directed verdict' and 'judgment notwithstanding the verdict.'" Robertson, 519 S.E.2d at 846. More importantly, this Court noted that "the amendment did not ... affect either the standard by which a trial court reviews motions under the rule or the standard by

which an appellate court reviews a trial court's ruling." Robertson, 519 S.E.2d at 846, quoting Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 482 n.7, 457 S.E.2d 152, 159 n.7 (W. Va. 1995).

The standard by which the trial court must review a motion for judgment as a matter of law under Rule 50 is, simply, whether the evidence, taken in the light most favorable to the plaintiff, creates an issue of fact. Importantly, the standard is not "whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict" Neely v. Mangum, 183 W.Va. 393, 395, 396 S.E.2d 160, 162 (W. Va. 1990). See also, Brannon v. Riffle, 197 W.Va. 97, 100, 475 S.E.2d 97, 100 (W. Va. 1996).

The appellate standard for reviewing a trial court's decision to enter judgment as a matter of law under Rule 50 is, in general, de novo. Johnson by Harper v. Hills Dep't Stores, 200 W.Va. 196, 199, 488 S.E.2d 471, 474 (W. Va. 1997); Brannon, 475 S.E.2d at 100. However, in this case, Judge Hutchison's decision to grant judgment as a matter of law regarding Issue One was based largely on his decision that the Plaintiffs' proffered experts should have been excluded. Judge Hutchison's decision that these witnesses were not sufficiently qualified to testify as experts with respect to the effects of diameter limit timbering on surface water runoff was a decision within his discretion and must be reviewed under an abuse of discretion standard. Brady v. Deals on Wheels, Inc., 208 W.Va. 636, 642-43, 542 S.E.2d 457, 463-64 (W. Va. 2000) ("whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.... Determinations of whether a witness is sufficiently qualified to testify as an expert on a given subject and whether such expert

testimony would be helpful to the trier of fact are committed to the sound discretion of the trial court. The trial court's ruling in this sphere should be upheld unless manifestly erroneous.").

Appellants bear the burden of showing that Judge Hutchison abused his discretion in determining that Dr. Bell and Mr. Morgan did not have scientific, technical or other specialized knowledge in a relevant field of expertise which would assist the trier of fact to understand the evidence or to determine a fact in issue.

B. APPELLANTS PRESENTED NO EVIDENCE REGARDING ISSUE TWO UPON WHICH A REASONABLE JURY COULD PROPERLY PROCEED TO FIND A VERDICT FOR APPELLANTS.

Appellants devote much attention in their brief to arguing that it was improper for Judge Hutchison to strike the testimony of two expert witnesses, Dr. Bruce Bell and Mr. John Morgan. Importantly, the ruling to strike Dr. Bell and Mr. Morgan's testimony is only relevant to Judge Hutchison's grant of judgment as a matter of law in favor of Western Pocahontas as to Issue One. The judgment as a matter of law as to Issue Two is not dependent on the exclusion of Dr. Bell's and Mr. Morgan's testimony. As Judge Hutchison correctly found, neither Dr. Bell nor Mr. Morgan gave any testimony sufficient to support a verdict in favor of the Plaintiffs as to Issue Two.⁵

1. APPELLANTS FAILED TO ASSIGN ERROR AS TO ISSUE TWO, AND THUS, THEIR ARGUMENTS AS TO ISSUE TWO CANNOT BE CONSIDERED ON THIS APPEAL

It is important to note that Appellants did not assign error to, or even discuss in their Petition for Appeal, Judge Hutchison's ruling as to Issue Two, which is a

⁵ "[I]f a reviewing tribunal were to determine that this Judge's granting of the Defendants' motion to strike Plaintiffs' experts was improper and should thereafter reverse the decision of this Judge as to the propriety of admitting that expert testimony, the granting of Defendants' motion under Rule 50 of the West Virginia Rules of Civil Procedure would nonetheless still be

completely separate and independent basis for Western Pocahontas' judgment as a matter of law. Full review of their Petition for Appeal reveals that Appellants only challenged: (1) Judge Hutchison's decision to strike the testimony of Dr. Bell and Mr. Morgan, which resulted in judgment as a matter of law in favor of Western Pocahontas as to Issue One; (2) Judge Hutchison's ruling regarding Issue Three (that Western Pocahontas' operations cannot be deemed unreasonable as a matter of law); and (3) the various grounds stated in support of Judge Hutchison's grant of a conditional new trial.

The March 15, 2007 Order contains specific findings in support of the trial court's ruling that no sufficient evidence was offered regarding Issue 2:

"Complete review of the Plaintiffs' case reveals that **there is no evidence proffered by their expert witnesses with regard to Issue Two**. In fact, both Mr. Morgan and Dr. Bell opined that it would be impossible for them to determine whether an increase in peak flow off of a particular geographical area would, in relation to the non-questioned landholdings, have caused the streams and rivers to materially overflow their banks. Mr. Morgan specifically opined that it would be impossible for him to state an opinion as to whether the increase in peak flow materially caused the streams and tributaries of Slab Fork Creek Subwatershed to overflow their banks, because there were too many unknown variable factors in making that determination. Me. Morgan further opined that it would be impossible for him to tell when the water coming off of Western Pocahontas' land holdings in the Slab Fork Creek Subwatershed actually arrived in the town of Mullens and whether, upon its arrival, it had any material impact on the flooding that took place there." (March 15, 2007 Order at p. 30) (emphasis added).

Appellants did not refute these findings and did not present any evidence from the record contrary to these findings in their Petition for Appeal. Rule 3 of the West Virginia Rules of Appellate Procedure requires that a Petition for Appeal expressly state each assignment of error along with points, authorities, and law in favor thereof. It has long been held under West Virginia law that an issue not assigned as error is deemed

proper....Complete review of the Plaintiffs' case reveals that there is no evidence proffered by

waived. Further, even if a ruling is assigned as error, it will be deemed waived if it is not discussed in the petition or if no authority or evidence is offered in support.

In State v. Sprague, 214 W. Va. 471, 477 n. 4, 590 S.E.2d 664, 669 n. 4 (W. Va. 2003), this Court stated that:

“The appellant also makes a brief final statement portrayed as a third argument asserting that ‘the charges are not consistent with the laws of the State of West Virginia, and are not supported by the evidence and facts adduced at trial.’ The appellant’s general accusation ***does not discuss this issue with any meaningful specificity or particularity or provide authority to support his contention*** that the trial court’s ruling was erroneous or that the charges were not consistent with the laws of West Virginia. ***In the absence of such supporting arguments or authority, we deem this assignment of error to have been waived.*** See State v. LaRock, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996) (‘Although we liberally construe briefs in determining issues presented for review, ***issues which are . . . mentioned only in passing but are not supported with pertinent authority are not considered on appeal.***’); Syllabus Point 6, Addair v. Bryant, 168 W.Va. 306, 284 S.E.2d 374 (1981) (‘Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.’); Sale ex rel. Sale v. Goldman, 208 W.Va. 186, 199-200 n. 22, 539 S.E.2d 446, 459-60 n.22 (2000) (per curiam) (***deeming assignment of error that ‘is terse and lacks any authority to support it’ to have been waived***); Tiernan v. Charleston Area Med. Ctr., Inc., 203 W.Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n.10 (1998) (‘***Issues not raised on appeal or merely mentioned in passing are deemed waived.***’ (citation omitted)); State v. Lilly, 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n.16 (1995) (‘***Casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.***’ (internal quotations and citation omitted)).” (emphasis added).

In this case, Appellants did not even make “casual mention” of or “mention in passing” the Issue Two ruling. Because of Appellants’ failure to assign error as to this issue in their Petition for Appeal, the appeal should be denied.

2. **AS JUDGE HUTCHISON CORRECTLY FOUND, THE PLAINTIFFS PRESENTED NO SUFFICIENT EVIDENCE TO PERMIT A VERDICT IN THEIR FAVOR REGARDING ISSUE TWO.**

their expert witnesses with regard to Issue Two.” (March 15, 2007 Order at pp. 29-30).

Issues One and Two address related, but very different, questions. Issue One asks whether the timbering operations on Western Pocahontas' properties resulted in a material increase in the peak flow of stormwater runoff that left the operations on July 8, 2001. Issue Two, on the other hand, focuses on the end result: whether the increased runoff, if any, from the individual operations "materially caused or contributed to receiving streams overflowing their banks." Appellants did not provide, or even attempt to provide, any evidence regarding Issue Two.

In order to prove Issue Two, Appellants would have had to present evidence regarding how much of an increase in runoff actually resulted from the various timber operations on Western Pocahontas' properties. They did not do this. Appellants would then have had to present evidence as to whether the actual amount of increased runoff proximately caused or contributed to streams overflowing their banks, i.e. flooding. They did not do this. They did not even attempt to do this. Accordingly, as Judge Hutchison correctly held, Appellants cannot prevail on Issue Two as a matter of law.

Neither Dr. Bell nor Mr. Morgan attempted to determine whether there was an increase in peak flow from Western Pocahontas' properties. Both Dr. Bell and Mr. Morgan utilized models of hypothetical conditions of areas other than Western Pocahontas' properties merely to show that various ranges of increases in peak flow can result from timber operations, in general. Both Dr. Bell and Mr. Morgan presented ranges of possible increases, but did not determine what increase, if any, resulted from any operations on Western Pocahontas' properties. These "ranges" of "potential" increases in peak flow are completely useless in analyzing Issue Two, which asks

whether the actual increase in peak runoff from Western Pocahontas' properties, if any, materially contributed to flooding on July 8, 2001.

Appellants brought suit alleging that timbering operations on Western Pocahontas' properties in the Slab Fork Subwatershed contributed to flooding, i.e. increased the elevation of water. The Trial Plan in this matter required Appellants to prove what they alleged, i.e. that there was an increase in the rate of runoff from Western Pocahontas' properties (Issue One) and, more importantly, that the increased rate of runoff materially contributed to higher water elevations (Issue Two). Issue Two (which addresses whether there was actually an increase in water elevation, i.e. flooding) was arguably the most important issue under consideration at the Phase I Trial. Yet, neither Dr. Bell nor Mr. Morgan adequately addressed Issue Two at the Phase I Trial, as Judge Hutchison correctly found.

a. Mr. Morgan offered no competent testimony with respect to Issue Two.

Mr. Morgan never drew any final conclusions as to Issue One, peak flow, and thus, by his own admission, could not draw any conclusions as to Issue Two, water elevation or flooding. As to the amount of increase in peak flow from Western Pocahontas' operations, Mr. Morgan testified that there was some increase, but he could not give any opinion as to how much of an increase. Mr. Morgan gave only a range of "possible" increases in peak flow based on the hypothetical assumptions he put into his model⁶:

⁶ It is important to remember that neither Dr. Bell nor Mr. Morgan modeled Western Pocahontas' timber operations in the Slab Fork Subwatershed. Instead, they modeled hypothetical timber operations and argued that the results could be extrapolated to all timber operations in southern West Virginia.

"Q. And that's because you can't really tell, because you don't have enough information with your model to be able to say that with that model what the peak flow increase was from Western Pocahontas land?

A. As I said, I did not conduct a watershed model of the Slab Fork Watershed. That was not my intent, and I was not predicting an exact number as to what the discharge or increase in peak flow was for Slab Fork.

Q. I understand that's what you were doing. But the question was: You can't tell, with your model and the model that you used and the information you had available to you, what the real increase in peak flow was from Western Pocahontas land, can you?

A. No." (Tr. Vol. X at pp. 2185-2186) (emphasis added).

* * *

"A. I want to be totally clear. As I've said the last couple of days, I was looking at a watershed solely for looking at sensitivity. I was looking for an area which was a defined watershed with a defined shape, and then I made assumptions about changes in run -- in humus depths, changes in percentage disturbance. I was not trying to model actual runoff from the watershed to say it meant any more than just the sensitivity." (Tr. Vol. X at p. 2135) (emphasis added).

* * *

"A. Again, you're -- you're misunderstanding the approach. The approach is trying to look at the range of effects from changes in variables. So we've said the slow response hydrograph is applicable when you've got no disturbance. We're saying in the analysis of those conditions when there's a medium compaction of the humus, we used the medium response, and under the high or severe compaction, we used the fast response, for the table utilized to show the effect of changes in humus on runoff. Subsequently, we picked the medium response hydrograph and four inches of humus to do the sensitivity to disturbed areas. I'm not saying that these are the flow rates that you are going to get from the Slab Fork watershed or the Guyandotte watershed; what I'm saying is that you'll get an effect on the runoff resulting from change in the humus depth. That's all, nothing more than that. So I haven't got to pick a type of hydrograph for the Mullens watershed because that's not what I'm trying to show." (Tr. Vol. IX at p. 2051) (emphasis added).

Thus, Mr. Morgan chose not to calculate and chose not to offer to the jury any opinion as to the actual amount of increase in peak flow from Western Pocahontas' properties. Without this information, Mr. Morgan could not opine regarding Issue Two. Mr. Morgan recognized this and admitted that he did not even try to make a determination regarding Issue Two, i.e. the elevation of receiving streams:

"A. **I haven't given you any opinion at all in the work which we did about change in elevation of the flow in the watershed we analyzed.** I was looking at runoff -- changes in runoff, **not changes in stream elevation.**" (Tr. Vol. X at p. 2159) (emphasis added).

In regard to Issue Two, it is important to understand that the Appellants all live in the town of Mullens or in the immediate vicinity of the town of Mullens. Mullens was built, years ago, at the confluence of the Guyandotte River and one of its major tributaries, the Slab Fork. As such, Mullens sits directly at the mouth of the entire 83,990 acre Mullens Subwatershed, nearly all of which experienced torrential rain and flooding on July 8, 2001. No evidence was introduced as to the cause of flooding at Mullens. Although, at first glance, it might seem reasonable to infer that any increase in peak flow of storm water leaving Western Pocahontas' land on July 8, 2001 must have contributed to downstream flooding that day at Mullens, no such inference is possible, as Appellants' own witness explained.

As quoted above, Mr. Morgan plainly testified at trial that he was not giving any opinions as to water elevation (Issue Two). In his prior deposition, Mr. Morgan had explained exactly why he could not give any opinion as to Issue Two. Mr. Morgan pointed out that even if it is assumed that there is an increase in peak flow "in the ranges that he had calculated in his modeling" it would still be almost "impossible" to calculate the actual impact of those increased flows on flooding at Mullens. Mr. Morgan

explained that a vast amount of additional information would be required to even attempt to calculate the impact on flooding, which "I cannot do" and "have not done":

"Q. ... if we assume an increase in peak flow in the ranges that you've found at some point in time, what, if anything, does that tell us about the level of flooding at a point at Mullens?

A. That's a totally different question because peak flow -- changes in peak flow and the routing of that increase in flow is a totally different analysis of what it is going to do for a flooding analysis. And a flooding analysis, to say that an increase -- let's say hypothetically a 50% increase in peak flow that is going to result in 1.2 feet of increase in flood level at point x, I would suggest to you, almost impossible to calculate.

Q. Because there is --

A. You're talking about multiple variables?

Q. Whatever variables you would have to have to make that calculation.

A. In order to get to that calculation, we would need to know the size of every single culvert in that flow path, you need to know the size of every single diversion ditch, every single bridge abutment, every washing machine that's stuck in a culvert, every bit of timber trash that is stuck in a culvert, every encroachment onto the flood plain, a cross section of the flood plain, any alterations to the flood plain, any over excavations that's been conducted of the channels in that area. All those variables would need to be analyzed and modeled, the right way to do the whole of that flow path, in order to come up with the calculation of what effect it would have on raising the flood level.

Q. I take it that you have not attempted in any fashion to try to extrapolate what numbers you found about impeach -- about peak flow and runoff to what stream channel depth would be in any tributaries that would runoff for, say, for example, of your model property?

A. No.

Q. And when you talk about the impacts on July 2001 in terms of timbering contributing to peak flow and the runoff as it relates to that flood event, you've not tried in any way to calculate what the impact would be, say, for example, on flooding at Mullens as one example, right?

A. Uh-huh.

- Q. Is that a yes?
- A. Yes.
- Q. And you've not given any thought or you've not tried to calculate what the -- what the increase in channel depth or channel -- channel depth would be really at any point on any stream or tributary in the Mullens Subwatershed as a result of this increased peak flow.
- A. No.
- Q. You have done --
- A. I have not done any calculations to try to indicate changes in flood level.
- Q. So, in other words, as it relates to your opinions on July 2001, there is no stream or no tributary or no waterway of any kind on the Mullens Subwatershed that you can -- you can look at me and say the increased peak flow and the increased runoff increase the channel depth at any given point this much.
- A. No. I cannot do that, and I have not done that." (John Morgan Depo. Tr. of January 20, 2006 at pp. 289-293) (emphasis added).

At another point in his testimony, Mr. Morgan explained that in addition to the multiple variables noted above as to which he had no information, there is also a timing issue with respect to the impact of peak flow on flooding, if any. In the 83,990 acre Mullens Subwatershed, water comes from many different streams that all eventually flow into the Guyandotte River at or above the town of Mullens, and the peak flows coming out of all of those individual streams might or might not be "additive" to the flooding at Mullens; depending on timing:

- "A. The difficulty in modeling is you go into a larger, larger watershed is its the interrelationship with the subwatersheds becomes more complex. It's a matter of timing that when is the first portion -- the water which comes out of one watershed, the timing of that as comes from the second one and the third one, it's like sound waves. You can sometimes get them additive and you can sometimes get them and they can average each other out. So as you get to a more complex watershed you get different effects." (John Morgan Depo. Tr. of January 20, 2006 at 278- 279).

It's possible, of course, that all of the high water in all of the streams in the 83,990 Mullens Subwatershed coincidentally reached the Town of Mullens at the same time, i.e., that the flows were "additive" in Mr. Morgan's terminology. On the other hand, what seems far more likely is that some of the high water from some of the streams reached – and passed – Mullens without causing any actual out of bank flooding long before the remainder of the high water reached Mullens.⁷ A quick glance

⁷ During his deposition, Mr. Morgan confirmed this, i.e., confirmed that where and when the rainwater falls is critically important and that "some of the water is going to arrive at an evaluation point in Mullens earlier than others because of (the) distance from that point."

- "Q. ... basically what we're -- what we're saying here is that water from Slab Fork, Allen Creek, Winding Gulf, Stonecoal, Guyandotte, all that water is going to drain basically into the outlet at Mullens right?
- A. That's correct.
- Q. So if we were -- if we basically had a situation say where we had somebody who had 10 feet of water in their house and we were trying to figure out where that water came from in terms of what contributed to getting that 10 feet of water in their house, that water is going to have to come from basically all these subwatersheds within this area, correct?
- A. You're making some major assumptions to come to that conclusion.
- Q. How so?
- A. You're making the assumption that the storm event was consistent across the whole watershed.
- Q. Okay, you're right.
- A. And also at the time of concentration, the time when that water went into Slab Fork was the same as when it arrived at Stonecoal.
- Q. Okay.
- A. So, it's a matter of timing, as well, I think I said that earlier, that some of the water is going to arrive at an evaluation point in Mullens earlier than others because of a distance from that point.
- Q. You can have basically phased flood peaks given the timing, the time of concentration --
- A. Multiple, coincident, or, yes.
- Q. Okay. And then to -- basically to determine, say, for example, whether the water that came from Slab Fork was the contributing factor to 10 feet of water in someone's house in Mullens versus water that comes from Allen

at a map of the Mullens subwatershed reveals the sub-subwatershed closest to the town of Mullens is Slab Fork. Therefore, it seems quite possible that water emanating from Slab Fork (and Slab Fork was the "problem" area according to Mr. Morgan and Dr. Bell) had reached and passed the town of Mullens without causing any damage whatsoever before the more damaging high water from the various other tributaries of the Guyandotte River reached Mullens. This possibility seems particularly likely in view of the fact that the storm itself moved from west to east and the torrential downpours would have hit the Slab Fork sub-subwatershed before falling on the other sub-subwatersheds of the Mullens subwatershed. Admittedly, this is all speculation, and there is not sufficient evidence in the record from which to draw any conclusions. For present purposes, it is sufficient to note that no reasonable jury could possibly have inferred that an increase in peak flows leaving Western Pocahontas' properties in the Slab Fork Subwatershed, if any, materially contributed to increased stream elevations or necessarily caused flooding damage at Mullens. There was no evidence at trial to support such an inference, and, in fact, Mr. Morgan has testified that this is not a reasonable inference.

b. Dr. Bell, like Mr. Morgan, offered no competent testimony with respect to Issue Two.

Although Dr. Bell offered opinions with respect to potential increases in peak flow that can result from timbering operations, he offered no testimony as to what the

Creek or Guyandotte, you basically have to consider all those to determine where the water came from, right?

A. Yes.

Q. Okay. And you'd have to look at Guyandotte and Stonecoal and Winding Gulf and Allen Creek and all those as well?

actual amount of increase in peak flow, if any, may have been from Western Pocahontas' properties. Dr. Bell also gave no testimony as to whether any such peak flow increases actually contributed to flooding at Mullens or at any other location in the Mullens subwatershed. Essentially, Dr. Bell offered no evidence regarding Issue Two.

In addition to the fact that Dr. Bell did not model any property in the Oceana or Mullens subwatershed (Tr. Vol. VI at p. 1303), he also did not do any models or investigation regarding surface water elevations. "I didn't model stream channels; I modeled runoff." (Tr. Vol. VI at p. 1379). Dr. Bell conceded on cross-examination that the modeling he did on very small watersheds located miles away from the Mullens subwatershed were in no way comparable to much larger watersheds and that the results could not be extrapolated from one to the other:

- "Q. Oh. So you don't think that there really is a dramatic difference between zero to 5.9% for FATT and 54% for you? That's not a dramatic difference?
- A. If they were -- if I had modeled what FATT did and modeled the same areas and got that kind of difference, I would say one of us did something wrong or just made some wildly different assumptions. But when you compare 70- acre modeling and changes in 70 acres to 5,000-acre modeling and changes in 5,000, the proportioning of timber was different in which there was mining in some cases and not in others, I just don't think you're -- again, you're not trying to compare two of the same things. So the differences just don't surprise me." (Tr. Vol. VII at p. 1681).

Thus, even as to Issue One, i.e., increases in peak flow, Dr. Bell admitted that it would be difficult to extrapolate his results and apply them to even a 5,000 acre watershed -- much less the 22,650 acres of the Slab Fork Subwatershed or the entire 83,990 acre watershed above the town of Mullens.

-
- A. Yes. And I think that's what I said earlier when we said about detailed hydrologic model." (John Morgan Depo. Tr. of January 20, 2006 at pp. 313-315).

Like Mr. Morgan, Dr. Bell explained in his testimony why it is impossible to look at flooding at the mouth of the watershed (such as flooding at Mullens) and relate that to assumed increases in peak flow upstream. Dr. Bell conceded that it would be "somewhat disingenuous to just look at the mouth of the watershed":

"Q. As a scientist -- actually as a PhD environmental scientist and engineer, if you assume that -- that the flooding of July 8, 2001 was -- occurred in multiple different -- in multiple places, there was flash floods in many different places and you -- you wanted to get some idea about the -- the impact of timbering or mining runoff, how do you look at it? Do you look at it as the entire watershed or try to see the entirety of the impact, or do you look at the impact of each place where it flooded.

A. But I would look at individual flooded areas. I suppose if you wanted to look at the whole watershed at once too, you could. But I -- it's pretty clear that flooding -- you know, upstream or way up midway in the watershed, you're not going to learn a whole lot about it by looking at flooding as the water leaves the watershed. There's too much else going on.

If you wanted to look at the watershed in its entirety, I think it would be somewhat disingenuous to just look at it at the mouth of the watershed, because you certainly could do every little piece of this watershed if you had enough time and money and data and work your way through the entire watershed.

Q. Why do you say that?

A. Because at the bottom of the watershed, you are looking at not only the effect of all the areas that were disturbed and all the areas that were undisturbed in the entire watershed, it takes -- as we were talking about in the other models -- it takes room for these flows to work their way down.

Q. The many funnels.

A. Down to the mouth of the watershed. And as that happens, the flood peaks are reduced basically by friction in the streams, they get lower and longer. And, at the same time, they are being reduced by -- flood peaks are being reinforced by tributaries bringing more water in. And if you just pick the end of the watershed -- I don't know of anybody who can do that in their head." (Tr. Vol. V at pp. 1185-1188).

In short, Dr. Bell, like Mr. Morgan concluded that flood peaks are "reduced" as they move away from individual properties and that depending on the timing of all of the flows from all of the tributaries moving toward the mouth of the watershed may or may not have any impact on flooding. As to the elevation of streams in the Slab Fork Subwatershed, Dr. Bell testified unequivocally that: "*I didn't model water surface elevations.*" (Tr. Vol. VI at p. 1378) (emphasis added). Yet, he briefly described that if he "wanted to get some idea about the impact of timbering" on flooding, he "would look at individual flooded areas." (Tr. Vol. V at pp. 1185-1186). For whatever reason, Dr. Bell chose not to look at the "individual flooded areas," made no determination about stream elevations anywhere, and did not "get some idea about the impact of timbering" on flooding.

The bottom line is that Dr. Bell, like Mr. Morgan, offered no evidence as to whether timbering on Western Pocahontas properties contributed to flooding, which is really what this case is all about.

Finally, during the Phase I Trial, Dr. Wade Nutter, a forest hydrologist called by Western Pocahontas and the only forest hydrologist that testified at the Phase I Trial⁸, explained that one cannot infer that surface water elevations are increased even if there is an increase in the rate of runoff:

"Q: What I want to ask you about is the relationship between peak flow and flooding. If you assume – contrary to the opinion you have now expressed, but if you assume that there was an increase in peak flow, does that necessarily mean that there would also have been an increase in flooding?"

⁸ Forest hydrology is the area of expertise that was at issue in this case. Forest hydrologists are trained to examine the effect of water flow in the forest. The Plaintiffs did not call any forest hydrologist to testify and did not identify any forest hydrologist.

A: No. I think our earlier statements have, hopefully clarified that. But as was done in the FATT report, there are – they broke the watersheds up into nodes, and they modeled flow coming into the stream channels at those nodes. And although there might be a peak discharge, none of those nodes rarely ever arrive at the same time. All those basins are different shapes, different sizes, they arrive at different times. So the peak flows are not additive; it's how the water goes down the stream channel, is what determines the peak flow downvalley, and so it's the volume of flow that is delivered off these – each of these individual watersheds that is the important factor. And although they modeled volume of flow in order to develop the unit hydrograph to get the peak flow, they focused just on peak flows at those nodes, and it really is – that's not – that's not the issue. It's the volume and downstream issues of adding those flows together." (Tr. Vol. XVIII at pp. 3802-3803).

Importantly, Dr. Nutter's testimony was never refuted by any of the Plaintiffs' witnesses, and the Plaintiffs called no rebuttal witnesses. Further, Dr. Nutter's testimony is confirmed by the deposition testimony of Mr. Morgan and the testimony of Dr. Bell.

Because Appellants have not presented any evidence or authority to contest Judge Hutchison's ruling regarding Issue Two (which is a separate and fully dispositive basis for judgment as a matter of law in favor of Western Pocahontas) the appeal must be denied.

C. DR. BELL AND MR. MORGAN WERE NOT QUALIFIED TO TESTIFY AS EXPERTS IN THIS CASE, AND THEIR TESTIMONY WAS UNRELIABLE, IRRELEVANT, AND WAS PROPERLY STRICKEN FROM THE RECORD, ABSENT WHICH THE PLAINTIFFS FAILED TO DISCHARGE THEIR BURDEN OF PROOF AS TO ISSUE ONE.

Judge Hutchison properly struck the testimony of Dr. Bruce Bell and Mr. John Morgan regarding Issue One because neither Dr. Bell nor Mr. Morgan was qualified to give the testimony they presented, and their testimony was unreliable and irrelevant. Neither Dr. Bell nor Mr. Morgan has any qualifications in forestry or forest hydrology, which were the only relevant subjects in determining whether the timber operations on

Western Pocahontas' properties materially increased the rate of stormwater runoff from the properties. Furthermore, neither Dr. Bell nor Mr. Morgan ever set foot in the Oceana or Mullens subwatershed, and they had no factual knowledge regarding the operations about which they sought to opine. Instead, they derived their opinions by extrapolating ranges of potential increases in water runoff from result-oriented models that they were unqualified to use for the proposed application. Indeed, the models they chose to use were not designed for analyzing forested watersheds like the ones at issue in this case. Essentially, Dr. Bell and Mr. Morgan did not use reliable techniques, did not consider the relevant facts, and did not have the qualifications necessary to give the testimony they were allowed to give.

1. THE ONLY EVIDENCE OFFERED BY THE PLAINTIFFS AS TO ISSUE ONE WAS THE TESTIMONY OF DR. BELL AND MR. MORGAN.

Consistent with their pleadings naming only entities associated with the extractive industries, the Plaintiffs, at the Phase I Trial, offered evidence broadly attacking both coal and timber operations. As Judge Hutchison correctly noted, a large portion of the evidence, including days of testimony and exhibits as to coal operations, had become completely irrelevant by the time the case was submitted to the jury. All of the defendants other than Western Pocahontas, including all of the coal defendants, had been dismissed from the trial, either by judgment as a matter of law, voluntary dismissal, or by settlement. Certainly some of this irrelevant evidence, including many photographs of surface disturbance (e.g., mountaintop removal mining) far more extensive than ever exists in timbering operations, must have had a significant and prejudicial impact on the thinking of the jury. As Appellants have noted, the case against Western Pocahontas was solely and only a timber case.

As it turned out, the only witnesses offered by Appellants who testified with respect to timbering issues were Dr. Bruce Bell and Mr. John Morgan, both called as experts, and Joe Newlon and Mark Babcock, foresters employed, respectively, by Western Pocahontas and White Oak Land Company, a defendant that was later dismissed from the action. Neither Joe Newlon nor Mark Babcock offered any testimony as to Issues One or Two. Their testimony related primarily to the quantity of timber harvested and when and how harvesting occurred. No testimony was elicited from either of these witnesses as to whether timbering had increased surface water runoff (Issue One) or as to whether timbering had contributed to flooding (Issue Two).

The only witnesses called by Appellants as to Issue One were Mr. Morgan and Dr. Bell, both of whom have now been excluded by Judge Hutchison.⁹ Judge Hutchison correctly concluded that Mr. Morgan and Dr. Bell were not qualified to offer opinions as to Issue One, and that the testimony they gave, over objection, was unreliable and irrelevant. Absent the unqualified, unreliable, and irrelevant opinions of these witnesses, Appellants had no case regarding Issue One.

2. CONTRARY TO APPELLANTS' ARGUMENTS, MR. MORGAN WAS NOT QUALIFIED TO OFFER OPINIONS AS TO THE EFFECT OF DIAMETER LIMIT CUTTING ON SURFACE WATER RUNOFF.

In the March 15, 2007 Order, Judge Hutchison correctly sustained the repeated objections of Western Pocahontas as to Mr. Morgan's lack of qualification as a timber/forest hydrology expert under Rule 702 of the West Virginia Rules of Evidence.

⁹ The Plaintiffs had originally announced their intention to call Dr. William Martin, a forester, who had visited some of the timber operations in at least the Oceana Subwatershed. However, for reasons of their own which were never explained, the Plaintiffs at the Phase I Trial elected not to call Dr. Martin or any other witness who had ever visited the properties in question or who had any knowledge of the conditions in the Mullens subwatershed generally.

In arguing that Mr. Morgan's testimony was improperly stricken, Appellants point out that "... Mr. Morgan is educated, highly qualified and experienced." (Brief of Appellants at p. 17). They are right about that. He is, in fact, all of those things, but his education, qualifications and experience relate solely to mining. He has no expertise in timbering or forestry. More specifically, he has no expertise as to the effect, if any, of diameter limit timbering on surface water runoff, and that was the sole subject of his testimony in this case.

It was made clear during voir dire of Mr. Morgan that he, in fact, has no expertise with respect to Issue One, whether by knowledge, skill, experience, training, or education. Mr. Morgan testified that he owns a consulting firm in Lexington, Kentucky, called Morgan Worldwide Consultants. When asked to tell the jury the types of work in which Morgan Worldwide Consultants has been involved, Mr. Morgan admitted that it was all mining related:

"Morgan Worldwide is very similar to my previous company which I owned, which was Morgan ***Mining*** and Environmental Consultants, and I basically provided technical support to mining and energy industries worldwide, so we're involved in mining projects principally, but looking at sediment control for mining, mine permitting, looking at the effects of mining and how it affects the environment." (Tr. Vol. VIII at pp. 1803-1804) (emphasis added).

Mr. Morgan went on to explain that his formal education had been received at the University of London, Royal School of Mines. (Tr. Vol. VIII at p. 1805). Mr. Morgan testified that he received a degree in Mining Engineering. (Tr. Vol. VIII at p. 1805). However, Mr. Morgan is not a licensed engineer in West Virginia or any other state. (Tr. Vol. VIII at p. 1812). Mr. Morgan conceded that he had studied hydrology only as it

relates to mining.¹⁰ Mr. Morgan never studied hydrology as it relates to any form of timbering, much less diameter limit timbering of the type done on Western Pocahontas' property in the Slab Fork Subwatershed.

In fact, Mr. Morgan testified that he was originally contacted as an expert regarding mining related issues:

"A. Well, when we were first given the assignment by your firm, you basically said, 'Something's happened in Mullens, what caused it.' And **the initial idea that people had was it was mining-related**, so you asked us to look at the mining disturbances and other disturbances within the Mullens subwatershed.

So I looked at mining, I looked at oil and gas sites, I looked at abandoned mine land sites and, because of the amount of area which they covered and where they were distributed through the watershed, my recommendation to you was that those land uses did not have a significant affect on flooding in the town of Mullens." (Tr. Vol. VIII at pp. 1813-1814) (emphasis added).

When Mr. Morgan, the mining consultant, advised Appellants' counsel that this was not a case about mining, Appellants could have and should have consulted with a different expert, one who would be qualified to opine regarding the issues relevant to this case. Appellants chose not to do so. Appellants chose to rely solely on a mining consultant, with no experience in forestry related issues or forest hydrology, to testify regarding the effects of timbering operations on Western Pocahontas' properties.

Mr. Morgan admitted that he is not a logger, not a forester, and not a forest ecologist. (Tr. Vol. VIII at pp. 1812-1813). Mr. Morgan's only connection with forestry was in "supervising" the logging of some of his mining clients' property, and he

¹⁰ Mr. Morgan testified that: "... the actual course work which I took, was actually fluid dynamics, which is the more engineering side of how water moves in various structures, whether it be a ditch or a pipe. So we studied hydrology as part of the mining activity, as part of the dewatering of mines, and then also in a more engineering sense of fluid dynamics." (Tr. Vol. VIII at p. 1807).

conceded that this logging was all done as a prelude to surface mining operations. (Tr. Vol. VIII at p. 1815). More importantly, the logging he "supervised" was clear-cutting, not diameter limit selective harvesting as was done on Western Pocahontas' properties. Diameter limit harvesting involves identifying and harvesting only the largest trees and leaving the remainder of the growing forest intact, whereas clear cutting consists of the cutting and removal of all trees and plant life.¹¹ Mr. Morgan's "supervision" on these occasions consisted of making sure that the timber cutter "stayed within the boundaries." (Tr. Vol. VIII at p. 1816). In short, Mr. Morgan functioned, more or less, as a surveyor and certainly not a forester. Mr. Morgan admitted that his "supervision" of clear cutting had nothing to do with diameter limit harvesting of the type involved in the trial below.¹² Mr. Morgan's only other experience with respect to timber is that he has walked through the woods on a number of occasions -- although on none of those occasions was he there to analyze or examine timber activities.¹³

¹¹ Mr. Morgan stated that: "Admittedly, they were clear cut, because obviously, we wanted to remove all the timber from those areas because we were going to either fill it or mine it." (Tr. Vol. VIII at p. 1816).

¹² Mr. Morgan testified as follows:

"Q. Okay. And in each of those cases, what you did is: You went out and hired a logger to clear cut an area prior to the installation of some sort of mining facility, correct?

A. Yes.

Q. Okay. Had nothing to do with diameter limit timbering of the type we're talking about in this action, correct?

A. Correct." (Tr. Vol. VIII at p. 1845).

¹³ Mr. Morgan testified that:

"Q. Okay. Well, I mean, that is -- that is accurate as to what your testimony was, though, isn't it? I mean, you testified that you had walked through

Mr. Morgan admitted that none of the entries on the seven pages of his resume (Defendants' Ex. No. 17) relate to the effects of diameter limit harvesting on surface water runoff. (Tr. Vol. VIII at p. 1824).¹⁴ Mr. Morgan admitted that he had never testified in any court proceeding with respect to diameter limit timber harvesting and the effects it might have on water flow and that if he were allowed to so testify in the Phase I Trial, that would be a "first" for him.¹⁵

Mr. Morgan went on to concede during voir dire that he had testified at another trial that "I'm not an expert in hydrology" (Tr. Vol. VIII at p. 1837), and he admitted that Judge Thornsbery (Mingo Circuit Court) had specifically ruled that he could not testify

numerous forests in east Kentucky, West Virginia and, I believe, the northwest. Correct?

A. Yes.

Q. Okay. You weren't there to examine the -- the possible effect, if any, of diameter limit timbering on surface water runoff, correct?

A. No.

Q. When you were walking through the forest, did you learn anything about the effects of diameter limit cutting on surface water runoff?

A. I wasn't there to look at diameter-limited cutting." (Tr. Vol. VIII at pp. 1846-1848).

14

"Q. Okay. ..., is it true Mr. Morgan, that every single instance you mentioned was in relationship to mining activity?

A. Surface disturbance associated with mining projects, yes." (Tr. Vol. VIII at p. 1824).

15

"Q. You've never testified with respect to diameter limit timber harvesting and the effect, if any, on -- on water flow, have you?

A. No.

Q. Okay. So if you are allowed to testify here today, it will be a first, won't it?

A. On that specific subject you've just mentioned, yes." (Tr. Vol. VIII at p. 1834).

in the field of hydrology (Tr. Vol. VIII at p. 1844). In preparation for his testimony, Mr. Morgan never even bothered to visit the Mullens subwatershed or any forested watershed, or to examine any diameter limit timbering activity anywhere.

In Gentry v. Mangum, Syl. Pt. 5, 195 W.Va. 512, 525, 466 S.E.2d 171, 184 (W. Va. 1995) and Jones v. Patterson Contracting, Inc., Syl. Pt. 6, 206 W.Va. 399, 404, 524 S.E.2d 915, 920 (W. Va. 1999), this Court outlined a two-step inquiry for determining who is or is not an expert:

"In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to a subject under investigation (c) which will assist the trier of fact. Second a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify."

Clearly, Mr. Morgan did not qualify as an expert under the required two-step inquiry. He did not meet the minimal educational or experiential qualifications. He, in fact, has no education with respect to timbering of any kind or the effects that such activity may have on surface water runoff. He likewise has no experiential qualifications with respect to diameter limit cutting or its hydrologic effects. He has never visited the areas in question, and he has no education or experience that could possibly have been of any assistance to the jury in this case; rather, his testimony could only confuse and mislead the jury. Further, his only area of expertise -- mining -- did not cover the particular opinions as to which he sought to testify.

3. LIKE MR. MORGAN, DR. BELL LACKED SCIENTIFIC, TECHNICAL OR OTHER SPECIALIZED KNOWLEDGE THAT WOULD HAVE BEEN OF ASSISTANCE TO THE JURY.

By his own admission, Dr. Bell has no education, training or experience in forestry or forest hydrology. His undergraduate degree is in civil engineering and his

Ph.D. degree is in environmental engineering. (Tr. Vol. V at p. 1057). Dr. Bell readily admitted that he is not a forest hydrologist or a forest ecologist and has "no experience with regard to timbering." (Tr. Vol. V at p. 1057). Although Dr. Bell has experience in stormwater runoff modeling, this experience has all been in an urban/suburban setting. He has modeled stormwater runoff in connection with commercial developments, office buildings, parking lots, residential developments, commercial wastewater treatment plants, and even a NASCAR racetrack. (Tr. Vol. V at p. 1063).

The sole instance in which Dr. Bell had ever focused on stormwater in a "rural" watershed was, according to him, his design of a stormwater treatment or management system for the thirteen-acre piece of property immediately behind his own office building in suburban New York. (Tr. Vol. V at pp. 1062-1064).¹⁶ Dr. Bell has had absolutely no experience with respect to stormwater runoff in large, steep, forested watersheds, such as the Slab Fork Subwatershed.

Despite the fact that Dr. Bell had never performed any modeling regarding the effects of timbering operations in forested watersheds, he did not even visit any of the areas or operations in question to try to get an understanding of the conditions prior to forming his opinions and giving testimony. Dr. Bell, on cross-examination, admitted that he had been on a timbering operation only once - years ago, "I think." (Tr. Vol. VI at p. 1304). He also testified that he had "driven past" timbering operations in West Virginia, but not in either the Mullens or Oceana subwatersheds. (Tr. Vol. VI at p. 1305). Dr. Bell admitted that he had never actually watched a timber operation and had only a "general understanding" of how timbering is conducted, how the cutting is done, how

¹⁶ New York City and the suburban areas surrounding it, all in close proximity to the Atlantic Ocean, are, of course, flat or nearly flat.

the timber is removed, etc. (Tr. Vol. VI at p. 1306). What little "general" understanding Dr. Bell does have is based on "just reading some of the materials in this case." (Tr. Vol. VI at p. 1306).

Dr. Bell admitted that, like John Morgan, he had zero knowledge of the Mullens and Oceana Subwatersheds. In fact, at one point in his testimony he stated that these watersheds are located in "Fayette and Raleigh" Counties (Tr. Vol. VI at p. 1328), but then admitted his error when it was pointed out to him that they are actually in Raleigh and Wyoming Counties. (Tr. Vol. VI at p. 1329). Wherever these watersheds are located, Dr. Bell, like Mr. Morgan, never bothered to go there.

4. THE TESTIMONY OF BOTH DR. BELL AND MR. MORGAN AS TO ISSUE ONE WAS ALSO UNRELIABLE BECAUSE IT WAS PRIMARILY BASED ON RESULT-ORIENTED COMPUTERIZED MATHEMATICAL MODELS OF SURFACE WATER RUNOFF – WHICH HAD PREDETERMINED RESULTS.

As Judge Hutchison correctly pointed out in the March 15, 2007 Order, both Dr. Bell and Mr. Morgan, in arriving at their opinions, "resorted to the use of certain waterflow models commonly used in engineering to predict peak surface flow, based upon a variety of factors selected by engineers in running the model computation." (March 15, 2007 Order at p. 18). Dr. Bell and Mr. Morgan used slightly different versions of very similar computer based mathematical waterflow models. Mr. Morgan used the SEDCAD proprietary version of the HEC-1 modeling program, and Dr. Bell used a different version of HEC-1, as well as the TR-55 model. All of these models are designed to accomplish the same thing, i.e., predict potential changes in the quantity of sheet water peak flows resulting from changes in certain types of land use. In short, these models estimate the quantity of change in peak flow after the modeler himself

assumes that there is a change, assumes whether the change is an increase or decrease, assumes how drastic the change is, based on his best professional judgment, and assumes what soil type, slope, and ground cover are involved. Because Mr. Morgan and Dr. Bell have no experience, qualifications, education, or knowledge regarding how the land is impacted by BMP-compliant¹⁷ diameter limit timber operations, and because they never visited the site, they had no basis on which to validly make any of these assumptions.

As Appellants themselves concede, and as their own expert witnesses testified at trial, the models they used were only designed to quantify potential increases or decreases in peak flow based on certain hypothetical assumptions; these models cannot answer the fundamental question posed to the jury, i.e., whether a particular activity or change in land use did, in fact, increase or decrease surface water peak flow during a particular storm event. These models may only be used when attempting to quantify possible ranges of increases in surface water peak flow by making different assumptions for the pre-disturbance model and the post-disturbance model. The most critical assumptions that are considered are soil type, slope of the terrain and ground cover, which, as Dr. Bell pointed out in his testimony are all "agglomerated" in something called a "curve number":

"We'll talk about this throughout the modeling -- these models use something called curve numbers that represent an agglomeration of soil type, slope, cover, ground cover." (Tr. Vol. V at p. 1161).

¹⁷ The "West Virginia Silviculture Best Management Practices for Controlling Soil Erosion and Sedimentation from Logging Operations" or Best Management Practices ("BMPs") are the rules promulgated and enforced by the West Virginia Division of Forestry as required by West Virginia Code § 19-1B-7.

Of course, neither soil type nor slope of the terrain is altered by timbering, and therefore any change in curve number in the pre-disturbance and post-disturbance modeling necessarily relates exclusively to assumed changes in ground cover brought about by the timbering activity. For example, in the case of Dr. Bell's modeling, he picked a curve number of 70 to represent the untimbered forest for his pre-disturbance model. Then, for his post-disturbance model, he picked the number 71.9 to represent the same forest after timbering. (Tr. Vol. VI at pp. 1408-1409).

As Dr. Bell frankly admitted, the moment he chose a higher curve number for the post-disturbance model, i.e., before he even turned on his computer, it was a necessary and foregone conclusion that the modeling would show an increase in surface water peak flow:

"Q. You agree with me, the higher the curve number, the greater the runoff.

A. Yes.

Q. So if I assign a curve number of 70 to one thing, that will have a certain runoff; and if I assign a curve number of 73 to something else, that will be higher?

A. Yes.

Q. And when you go into a model, who picks the curve number?

A. The modeler.

Q. And that would be you, with regard to TR-55 [one of the models Bell used]?

A. Yes.

Q. And again, the higher the curve number, the higher the runoff?

A. All else being equal." (Tr. Vol. VI at pp. 1407-1408).

More specifically, Dr. Bell admitted that once he selected a higher curve number for his post-disturbance models, he knew that his modeling results were going to show a post-disturbance, i.e., post-timbering, increase in peak water surface flow:

"Q. Now, would I be correct -- all other things being equal -- that if I start with -- start with a forest number, an undisturbed number of 70 for the curve number, and then I rerun the model, disturbed, and I take the curve number to 71.5 or 71.9 or 72, 73, a higher number, I will produce greater runoff from that area?

A. From the disturbed area, yes.

Q. Is that right?

A. Yes." (Tr. Vol. VI at p. 1409).

With the results being predetermined, Dr. Bell and Mr. Morgan "didn't need" to even run their models, as Dr. Bell frankly admitted:

"Q. What I am saying is: When you set up the model, you knew to start with -- you didn't even need to run the model. You knew that you were going to come up with a greater runoff after you ran the model, didn't you?

A. Of course." (Tr. Vol. VI at p. 1410).

It is critically important in this case to remember that Issue One did not ask the jury to quantify the amount of any increase in surface water flow brought about by timbering activity.¹⁸ Issue One asked the jury to determine whether timbering increased the rate of surface water runoff in any material respect. The models used by both Dr. Bell and Mr. Morgan could not and did not determine whether timbering causes a material increase in surface water flow. Rather, all of the models assumed that timbering caused a material increase in the rate of surface water runoff.

It would be difficult to conceive of a more result-oriented "test" than the models used by Dr. Bell and Mr. Morgan. Step number one is for the modeler himself to determine whether timbering causes an increase in surface water runoff and, if so, by approximately how much, which is done by the selection of pre-disturbance and post-disturbance "curve numbers." The greater the spread or difference in curve numbers

chosen for the pre-disturbance and post-disturbance models, the greater the peak runoff shown in the model results. Thus, in reality, the opinions of Dr. Bell and Mr. Morgan were not based on the results of the "dog and pony shows" they put on for the jury in the form of computerized modeling. Instead, the computerized modeling results were based on their own preconceived notions of what affects diameter limit timbering might have on a steeply forested watershed in southern West Virginia, which they had never seen.

Dr. Bell concluded that it was okay for him to select a post-disturbance curve number that was higher than the pre-disturbance number, because he "knows" that "simply by disturbing the land, you're going to get an increase":

"Q. So simply by assigning the curve number, I know that I'm going to get an increase?

A. Yeah, and I think us engineers know that simply by disturbing the land, you are going to get an increase. The point of the model is to try and quantify it." (Tr. Vol. VI at pp. 1409-1410).

Ultimately, the models which Mr. Morgan and Dr. Bell were permitted to repeatedly show to the jury were based on one thing, their own preconceived notions as to the effects of diameter limit timbering on surface water peak flow -- a subject of which neither of them had any knowledge or any experience or any expertise.

In addition to changing the curve numbers in their pre-disturbance and post-disturbance models, both Dr. Bell and Mr. Morgan made other assumptions and other changes. Dr. Bell changed something called the "Manning's n," number which is a friction coefficient:

"A. Manning's n is a friction coefficient that goes into an equation that deals with surface water flow, not partitioning of flow, and Manning's n will determine for any slope, any channel or a sheet

¹⁸ Of course, both Dr. Bell and Mr. Morgan explicitly stated that they did not attempt to quantify any actual change in peak flow. They merely presented ranges of possible increases derived entirely from hypothetical assumptions from models of hypothetical operations.

configuration, the velocity of flow and the depth of flow." (Tr. Vol. VII at p. 1485).

As Dr. Bell explained, if the modeler elects to reduce the Manning's n number in the post-disturbance model, that will cause an increase in peak flow just as increasing the curve number will cause an increase in peak flow:

"Q. And if you take the Manning's n number down, that also will cause an increase in runoff, correct?

A. Yes. It actually won't cause an increase in runoff; it causes an increase in peak flow.

Q. Because what it actually causes is a decrease in the time of concentration, correct?

A. Yes." (Tr. Vol. VII at p. 1493).

For his modeling, Dr. Bell arbitrarily elected to reduce the Manning's n number from .8 to .4, i.e., a 50% reduction, .8 representing "dense underbrush" and .4 representing "light underbrush." In other words, in running his post-disturbance models, Dr. Bell, without any training or experience in forestry or the effects of diameter limit timbering, assumed that the entire forest on the watershed he was modeling had dense underbrush prior to timbering but only light underbrush afterward:

"Q. And the other number that you varied was that you took the Manning's n number that we talked about from dense underbrush, which was a .8, to light underbrush, which was a .4, correct?

A. Yes." (Tr. VII, at 1510).

Dr. Bell admitted that once he made the decision to cut the Manning's n number in half that would "absolutely, positively, without doubt, cause an increase in peak flow":

"Q. And you know, when you take the Manning's n number and you put it in from .8 down to .4, you know absolutely, positively, without doubt, that also will cause an increase in peak flow, and in the volume of runoff."

A. Of course it will." (Tr. Vol. VII at p. 1516).

Dr. Bell also admitted that he knew that the 50% change in the Manning's n number that he arbitrarily chose would have a "big impact" on his results:

- Q. Because the Manning number, that Manning fraction, has a huge impact on the result in this hydrograph, doesn't it?
- A. Manning's n has a big impact on the hydrograph, yes." (Tr. Vol. VII at p. 1520).

Although Dr. Bell admitted that the selection of curve numbers and Manning n numbers are "both important" (Tr. Vol. VII at p. 1520), he also admitted that, in selecting these numbers, he didn't bother to go out and look at any undisturbed forest in southern West Virginia and then compare that to a piece of timbered forest in southern West Virginia:

- "A. Modelers make a choice based on the available information and based on their best professional judgment, and that's what we did.
- Q. Well let me ask you this: Did you or your modeler or anybody else, in making this choice, talk to somebody who knew what the situation was in forested land in southern West Virginia?
- A. No.
- Q. Did you, or the person who did this -- or made this decision for you, go out and look at a piece of undisturbed forest in Southern West Virginia and then compare it to a piece of timbered forest in Southern West Virginia to see what the underbrush circumstances were in those two compared locations?
- A. No." (Tr. Vol. VII at pp. 1518-1519).

Thus, Dr. Bell's choices of both curve number and Manning's n number were necessarily based solely on his "best professional judgment." The problem was he had no professional education or experience upon which to make such a judgment with respect to timbering activities.

Although Dr. Bell denied that his selection of a higher curve number and a significantly lower Manning's n number was an effort on his part to manipulate the

results to show that timbering had a significant affect on stormwater runoff, he conceded on cross-examination that absent calibration and validation "a model can be manipulated to return any results the modeler wishes to show":

"Q. Dr. Bell, do you remember preparing a declaration to the West Virginia Supreme Court of Appeals in a case involving modeling that was done at Princess Beverly Mine?

A. Yes.

Q. The same Princess Beverly Mine that you modeled in this case?

A. Yes.

Q. Do you remember stating in that declaration that a 'model is a simplified version of reality. Models must be tested by calibration and validation to ensure that the simplifying assumptions made to develop a model do not distort reality. Absent such testing, a model can be manipulated to return any results the modeler wishes to show.'

A. Absolutely.

Q. You remember stating that.

A. Yes." (Tr. Vol. VII at pp. 1579-1580).

Dr. Bell readily admitted that there had been no calibration or validation of the modeling he did.

Mr. Morgan made similar, but somewhat different changes in assumptions in his pre-disturbance and post-disturbance modeling of a small 570 acre watershed.¹⁹ Unlike Dr. Bell, Mr. Morgan made no change in the Manning's n number at all. Why? Because he testified that Manning's n is changed only to reflect changes in channel flow or changes in stream elevation, and has nothing to do with changes in runoff:

"Q. You didn't use Manning's n at all, did you?

¹⁹ Significantly, neither Dr. Bell nor Mr. Morgan modeled any portion of the Slab Fork Subwatershed, the area which they contended was the significant area for purposes of the case against Western Pocahontas.

- A. I haven't given you any opinion at all in the work which we did about change in elevation of the flow in the watershed we analyzed. I was looking at runoff -- changes in runoff, not changes in stream elevation." (Tr. Vol. X at p. 2159).

When it was pointed out to Mr. Morgan that Dr. Bell had changed the Manning's n, he testified that he couldn't "remember specifics" about Dr. Bell's modeling, but that, in his view, Manning's n "wasn't applicable":

"Q. Okay. Well, are you aware that Dr. Bell, in his modeling, used Manning's n?

A. I can't remember specifics at the moment.

Q. Huh?

A. I can't remember the specifics at the moment.

Q. Okay. But you didn't [use Manning's n].

A. It wasn't applicable." (Tr. Vol. X at p. 2159).

Notwithstanding the fact that Mr. Morgan didn't change Manning's n, because it "wasn't applicable," his modeling produced a far greater percent increase in peak flow than even Dr. Bell's, i.e., a 275% increase (Tr. Vol. VIII at p. 1894), which, as a result of additional modeling, he later reduced to a 150% increase (Tr. Vol. IX at p. 2098), and then further reduced, without any additional modeling, and for no apparent reason other than his alleged decision to be "conservative"²⁰ to a 30%-50% increase (Tr. Vol. IX at pp. 2098-2100).²¹ Mr. Morgan generated these eye-popping results (without

²⁰ One court has noted that producing wide ranges of "possible" results and arbitrarily selecting a number within that range that can be characterized as "conservative," amounts to nothing more than "gameplaying" and is highly suspect: "Anyone can look at the same range and come up with a different figure. It also contributes to gaming. Note, for example, how quick 'Dr. Economist' in the sample testimony...is to exploit the method's malleability by suggesting that he could have picked a higher number (like \$ 5 million) and that by opting for the lower figure he is somehow rendering a 'conservative' opinion. Maybe so, but a conservative opinion in that sense does not equate to a scientific one. Someone who states on the basis of a dull pain in his right knee that he thinks it is going to rain less than .1 inch expresses a conservative, but surely an unscientific, opinion." *Ayers v. Robinson*, 887 F. Supp. 1049, 1060-1061 (D. Ill. 1995).

²¹ Compare Mr. Morgan's results with increases in the rate of runoff in the range of 0% to 5.9% modeled by the West Virginia Flood Advisory Technical Taskforce ("FATT Team") as reported in

changing the Manning's n number) in part by increasing the curve numbers from pre-disturbance to post-disturbance by an amount that was four times the spread used by the FATT Team and six times the spread used by Dr. Bell:

"Q. Okay. There are twelve curve numbers in that spread from 50 to 62, right?

A. Right.

Q. And that is -- that is four times the spread the FATT team used, going from 70 to 73. And is six times the spread Dr. Bell used and going from 70 to 71.9, right?

A. Right." (Tr. Vol. IX at p. 2101).

What justified his decision to use a significantly higher post-disturbance curve number than either Dr. Bell or the FATT Team, Mr. Morgan said, was his assumption that diameter limit timbering causes a very significant reduction in the depth of "humus" on the forest floor (leaves, needles, twigs, bark and other vegetative debris). Humus depth, he points out, is one of the principal factors used in determining curve numbers. (Tr. Vol. IX at pp. 2045-2046). The flaw in this argument is that Mr. Morgan, by his own admission, never bothered to examine or measure humus depth in the Slab Fork Subwatershed²² or any other timbered or untimbered watershed, and he has no education, experience or other basis for making any assumption as to whether BMP compliant diameter limit harvesting causes a reduction in humus.

the Flood Advisory Technical Taskforce's "Runoff Analyses of Seng, Scrabble, and Sycamore Creeks" dated June 14, 2002 ("FATT Report"). Importantly, Mr. Morgan admitted that the literature shows that the HEC-1 model used by FATT Team to produce increases in peak flow ranging from 0% to 5.9% actually overpredicts peak flow. (Tr. Vol. X at p. 2166). Dr. Bell admitted that even a 15% increase would have been an "acceptable increase," i.e., would not have materially contributed to flooding. (Tr. Vol. VII at p. 1623).

²² "I have not been in the watershed to measure the tim - the humus depths at any locations in the Slab Fork Watershed pre-harvest and post harvest." (Tr. Vol. IX at p. 2034).

Although Mr. Morgan did not use any change in the Manning's n number he, like Dr. Bell, did find a second way to produce a guaranteed massive increase in his post-disturbance results. He changed the SEDCAD "unit hydrograph" from slow to medium to fast, i.e., he assumed a radical change in surface conditions as a result of timbering activity. Importantly, the manual for the SEDCAD model he used described the conditions under which the fast hydrograph might reasonably be applicable, and it is quite clear that those conditions would not apply to a forested watershed that had been subjected to diameter limit cutting:

"Fast should be used for situations such as urban areas and areas where a rapid hydrologic response is anticipated or for conditions such as disturbed soils that have been subjected to compaction by heavy equipment." (Tr. Vol. IX at p. 2048).

Mr. Morgan admitted that by changing the unit hydrograph from slow to medium to fast he produced a clear "jump" in his post-disturbance runoff increase numbers:

"Q. That is what happens, right? It's because you're changing those hydrographs just from slow to medium to fast that you have that big -- you have two big jumps in those percentages of peak flow increase.

A. Yes.

Q. Okay.

A. And that's because, as we discussed earlier on page 38, the guidance with SEDCAD is, if you have high disturbance in a watershed and compaction, then you should use the fast response hydrograph. And if you get up to over 50% disturbance, then I believe the hydrograph type needs to change.

Q. Okay. And that is why this graph looks a whole lot like this one, isn't it? Because both of them represent that jump from slow to medium and medium to fast. They both have that jump built into them, don't they?

A. They both have the jump, but even if you didn't change the hydrograph response, you still would get a continuing increase in peak runoff as you increase the percentage harvested." (Tr. Vol. IX at p. 2105).

Although Mr. Morgan thus stated that "... if you get up to over 50% disturbance, then I believe the hydrograph type needs to change," he never offered any basis for this "belief." He did admit that his decision to shift hydrographs in mid-stream, so to speak, was simply "our idea" and not based on anything in either the SEDCAD manual or "any paper written by anyone":

"Q. Okay. Did you find anything at all about doing that, linking these up, low compaction, slow response, medium compaction, medium response, high and fast, did you find anything about doing that kind of linkage in the SEDCAD manual?

A. No.

Q. Did you find anything about that in any manual or any paper written by anyone?

A. No.

Q. Okay. This was your idea, right? Or Jack Burchett's.

A. It was our idea. What we're trying to do is look at the range of effect resulting from changes in the humus layer, so it's looking at the tools which you have as to how to adapt those to give a representation of what changes could occur." (Tr. Vol. IX at p. 2050).

Mr. Morgan also admitted that by shifting hydrographs, he was able to, and actually did greatly extend the range of possible effects of timbering disturbance, i.e., created percentages of increase in peak flow ranging up to 275%. (Tr. Vol. VII at p. 1894).

"Q. I understand. And is it true that by moving through a range of all three hydrographs, from slow to fast, you have greatly inflated the range of possibilities?

A. You've extended the range, yes." (Tr. Vol. IX at p. 2052).

Mr. Morgan, like Dr. Bell, had never been to the Slab Fork Subwatershed, had never witnessed diameter limit harvesting and had no idea what effect that activity may or may not have on the peak flow of stormwater runoff. Like Dr. Bell, Mr. Morgan admitted that "you have to go back and calibrate any model before you can use it" (Tr.

Vol. X at p. 2145), and he admitted that there was no way he could do a calibrated model of the Slab Fork Subwatershed:

"A. I didn't have a calibrated model because there was no data on Slab Fork prior to any disturbance in order to calibrate and work out exactly what those characteristics were, and also any runoff model which you conduct, you have to know all the other factors in that watershed, exactly where the roads are, exactly where the disturbances are, exactly where every single culvert is, exactly where every bridge is, all the restrictions to that watershed. Therefore, as it wasn't a calibrated watershed and there was none available prior to any disturbance of logging, there was no modeling prior to logging. To do it after the fact serves no purpose; that's why I focused on looking at the sensitivity analysis rather than model the Slab Fork." (Tr. Vol. X at pp. 2133-2134).

Based on all of the foregoing, it is clear that Judge Hutchison's decision to strike Dr. Bell and Mr. Morgan's testimony was clearly correct.

5. AS JUDGE HUTCHISON PROPERLY HELD, HE ERRED IN ALLOWING THE OPINIONS OF DR. BELL AND MR. MORGAN TO BE SUBMITTED TO THE JURY AFTER DR. WILLIAM MARTIN (UPON WHOM BOTH DR. BELL AND MR. MORGAN RELIED) WAS WITHDRAWN BY APPELLANTS.

As Judge Hutchison stated in the March 15, 2007 Order, Dr. Bell and Mr. Morgan both relied on the opinions of Dr. William Martin, who Appellants disclosed as a forestry expert but later withdrew.²³ As Judge Hutchison correctly concluded, "expert" testimony based on other expert opinions or reports not introduced in evidence is necessarily unreliable.²⁴

²³ "... both Dr. Bell and Mr. Morgan relied upon the opinions of Dr. William Martin, a forest ecologist who had been named or identified as an expert witness by the Plaintiffs but who did not testify and was later withdrawn." (March 15, 2007 Order at p. 19).

²⁴ "Expert testimony would not meet reliability standard and should be excluded where based on underlying studies that are not presented in evidence and whose methodology is not explained. Wilt v. Buracker, 191 W.Va. 39, 47, 443 S.E.2d 196, 205 (1993), certiorari denied, 511 US 1129." (March 15, 2007 Order at p. 19, footnote 27).

Recognizing, apparently, the inescapable logic of Judge Hutchison's conclusion, Appellants now seek to avoid the consequences of the decision to withdraw Dr. Martin by contending that their expert, John Morgan, did not rely on Dr. Martin's opinions. (Brief of Appellants at p. 46).²⁵ This argument is utterly astounding to those of us who sat through the trial, since it represents a 180-degree about-face for Appellants. During the trial, at the March 13, 2006 hearing regarding Western Pocahontas' motion to exclude the testimony of Mr. Morgan, because of its lack of foundation, Appellants' lead counsel, Scott Segal, candidly admitted that Mr. Morgan's testimony "standing alone, without Dr. Martin," might be inadmissible. Mr. Segal then rebuked Western Pocahontas' counsel for acting "like Dr. Martin doesn't exist and isn't going to testify as to forest ecology":

"Now, I agree, standing alone, without Dr. Martin, this might be an uphill battle for me. But it's as though Dr. Martin doesn't exist. The forest ecologist, and when you dovetail those two opinions together [i.e. Mr. Morgan and Dr. Martin], I'm sure the court will be satisfied that we've met our burden.

Mr. Bolen acts like Dr. Martin doesn't exist and isn't going to testify as to forest ecology, which subsumes forestry in its management and all that stuff, so I mean it's not like he's going to be testifying in a vacuum without Dr. Martin to testify.

For those -- if the court wants me to go into more detail, I'll be happy to do that, but I think that suffices for today's argument." (Tr. Vol. III at pp. 608-609).

In fact, both Dr. Bell and Mr. Morgan relied upon Dr. Martin to reach and support their opinions. As discussed above, neither Dr. Bell nor Mr. Morgan has any expertise relating to timbering or forestry, and the testimony they gave relating to the issues of the impact of timbering operations and the reasonableness of timbering

²⁵ Appellants do not dispute that Dr. Bell relied on Dr. Martin.

operations were necessarily based on the opinions and report of Dr. Martin, which were never introduced to the jury.

At trial, Dr. Bell specifically testified that his opinions, to the extent they concern timbering, were based upon opinions and conclusions of Dr. Martin. During direct examination, Dr. Bell stated that he was relying totally on the conclusions of Dr. Martin regarding BMPs; he had no opinion of his own regarding whether the actions of Defendants were in accordance with BMPs. (Tr. Vol. V, at pp. 1058-1059). Dr. Bell further testified that he had only a general understanding of how a timber operation is conducted, and that what understanding he did have was derived from Dr. Martin. (Tr. Vol. VI at p. 1306).

Dr. Bell also testified that he had no knowledge about the recovery period relating to timber disturbances, i.e., the period of time after which any impacts associated with disturbances would cease. (Tr. Vol. VII at pp. 1461-1463). Dr. Bell again relied on Dr. Martin's opinion as to this issue. When defense counsel attempted to cross-examine Dr. Bell about the issue of recovery period, Plaintiffs' counsel objected, stating that Dr. Bell was not called to testify regarding recovery periods for disturbances associated with timber operations. (Tr. Vol. V. at pp. 1461-1463).²⁶ At that time, of course, defense counsel was under the impression that Dr. Martin would be called to testify at trial, as promised, and there would be an adequate opportunity to cross-examine Dr. Martin regarding his opinions relating to recovery periods, as well as Dr. Martin's other opinions that were incorporated into Dr. Bell's and Mr. Morgan's testimony, modeling, exhibits and ultimate opinions. That opportunity for cross-examination was denied by

²⁶ This is a critical issue in regard to Dr. Bell and Mr. Morgan's arbitrary decision to consider all timber operations that were conducted in the ten-year period prior to July 8, 2001.

the Plaintiffs' decision to withdraw Dr. Martin -- a decision which also effectively stripped both Dr. Bell's and Mr. Morgan's testimony of any possible basis with respect to forestry activities.

To the extent that Appellants might seek to argue that even though they elected to withdraw Dr. Martin from the trial, Dr. Bell and Mr. Morgan could still rely on his report, such an argument must fail under the West Virginia Rules of Evidence. Certainly, it is true that expert witnesses may rely on facts or data outside of trial, provided that those facts or data are of the "type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." W.V.R.Evid. 703 (2006); 2 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, §7-3(B)(3)(4th Ed. 2000). Facts or data used by experts that are not in evidence, aside from being the type relied upon by "experts in the particular field" must also have a circumstantial guarantee of trustworthiness. *See, e.g., Riccardi v. Children's Hosp. Medical Ctr.*, 811 F.2d 18, 25-26 (1st Cir. 1981); *Brian v. John Bean Div. of FMC Corp.*, 566 F.2d 541, 545 (5th Cir. 1978).

The Fourth Circuit Court of Appeals, in applying Rule 703 of the Federal Rules of Evidence, ruled that "[a]lthough all of the facts and observations relied upon by an expert need not be independently admissible, there still must be an adequate basis for his testimony." *Horton v. W.T. Grant*, 537 F.2d 1215, 1218 (4th Cir. 1976). "An expert's opinion that is neither based upon facts within his own knowledge nor established by other evidence is speculative, possesses no evidential value, and therefore is not an adequate basis for expert testimony." *Gilbert v. Summers*, 393 S.E.2d 213, 215 (Va. 1990).

Courts have routinely held that "reports specifically prepared for the purposes of litigation are not by definition 'of a type reasonably relied upon by experts in the particular field'" because they are inherently unreliable. Brian, 566 F.2d at 545; United States v. Tran Trong Cuong, 18 F.3d 1132, 1143 (4th Cir. 1994). In In Re: Imperial Credit Industries, Inc. Securities Litigation, 252 F.Supp.2d 1005, 1012 (C.D.Cal.2003), the United States District Court for the Central District of California expounded upon the rationale behind excluding expert testimony based upon documents produced in anticipation of litigation by non-testifying expert witnesses:

"Federal Rules of Evidence 702 and 703 permit an expert to rely upon facts and data.' The rules do not permit an expert to rely upon excerpts from opinions developed by another expert for the purposes of litigation. The instant situation is distinguishable from a medical malpractice case, where a testifying expert relies upon medical records or a patient's chart, even when portions of those records or the patient's chart may obtain opinions or hearsay. The differences are that the records are the records and the chart, including the opinions contained therein, (1) were generated for purposes other than litigation, and (2) are properly relied upon and continue to be relied upon by experts and others in the performance of their ordinary professional duties outside of litigation. Such documents therefore bear independent indicia of reliability unlike opinion which is generated solely for the sole purposes of litigation."

The federal court further noted that the testifying witness, while an expert in his specific field, was not qualified to perform the type of analysis or test performed by the non-testifying expert²⁷, and that he would not be able to "validate" the facts, data, and opinions he relied upon. Id. According to the court, because the testifying witness could not "validate" the facts and opinions in his report and be subject to a meaningful cross-examination on the inferences and opinions from those facts, his testimony was deemed

²⁷ Dr. Bell testified that he had never "gotten any information about timbering until [he got involved in the instant case]." (Tr. Vol. V at p. 1057). Likewise, Mr. Morgan admitted that he had no education or experience in timbering other than hiring timberers to clear cut in advance of mine operations, which he admitted was entirely unrelated to diameter limited harvesting and the surface water runoff effects thereof.

inadmissible. Id. Likewise, this Court decided in Sisler v. Hawkins, 158 W.Va. 1034, 1040, 217 S.E.2d 60, 64 (W. Va. 1975) that:

"(R)eports and examinations of others upon which expert testimony is predicated, are subject to close scrutiny by the courts, and, if the reports or examinations are found to contain opinions, inferences, or conclusions, the expert testimony is generally excluded."

Although Sisler was decided before the West Virginia Rules of Evidence were adopted, it is in accord with many federal court rulings interpreting Rule 703 of the Federal Rules of Evidence.

It cannot be disputed that Dr. Martin's report and opinions were prepared for the express purpose of litigation. Therefore, the testimony of Dr. Bell and Mr. Morgan based upon Dr. Martin's report should have been excluded, as Judge Hutchison has now ruled.

6. THE ALLEGED "LITERATURE REVIEW" PERFORMED BY DR. BELL AND MR. MORGAN DOES NOT ENHANCE THEIR QUALIFICATIONS TO TESTIFY IN THIS MATTER, NOR DOES IT RENDER THEIR METHODS RELIABLE OR RELEVANT.

As Judge Hutchison properly recognized, the opinions of the Plaintiffs' experts, Dr. Bell and Mr. Morgan, were based almost exclusively on unreliable and irrelevant models. In the Appellants' brief, it is implied that Dr. Bell and Mr. Morgan also relied on scientific literature in the field of forest hydrology in support of their opinions. This assertion lends no support to Appellants' position.

First, Appellants admit without hesitation or qualification that neither Dr. Bell nor Mr. Morgan is an expert in the field of forest hydrology. As has been noted by the courts that have addressed this issue: "an individual's 'review of literature' in an area outside his field does 'not make him any more qualified to testify as an expert...than a lay person who read the same articles.'" Newton v. Roche Labs, Inc., 243 F. Supp. 2d

672, 678 (W.D.Tx. 2002)²⁸, quoting United States v. Paul, 175 F.3d 906, 912 (11th Cir. 1999). Dr. Bell and Mr. Morgan cannot qualify to testify regarding the effects of timbering on runoff, i.e. forest hydrology, merely by conducting a literature review in the field of forest hydrology.

Similarly, in Smith v. Rasmussen, 57 F. Supp. 2d 736, 766 (D. Iowa 1999) *rev'd on other grounds* 249 F.3d 755 (8th Cir. Iowa 2001), the district court determined that a witness's lack of qualification from training or experience in a relevant field is not removed by a literature review: "Such a literature review, however, is an insufficient basis or methodology on which to render a reliable expert opinion. Courts are suspicious of purported expertise premised solely or primarily on a literature review." The court noted significant precedent supportive of this conclusion:

"See, e.g., United States v. Paul, 175 F.3d 906, 912 (11th Cir. 1999) (the district court properly excluded 'expert' testimony on handwriting analysis, because the proffered expert had no skill, experience, training, or education in the field of handwriting analysis, and his law degree provided no such qualification, even though he had reviewed the literature in the field of questioned document examinations and then coauthored a law review article critical of forensic document examiners' ability to reach the correct conclusion in questioned document examinations); Burton v. Danek Med., Inc., F. Supp. 2d , , 1999 U.S. Dist. LEXIS 2619, 1999

²⁸ In Newton, the plaintiffs presented Dr. O'Donnell to testify that Accutane was pharmacologically capable of causing schizophrenia. The court noted of Dr. O'Donnell that "although he holds himself out as a 'doctor' and a pharmacologist, he has never earned an M.D. or Ph.D., or any degree in pharmacology." Newton, 243 F. Supp. 2d at 677. "In summary, O'Donnell has no relevant expertise regarding Accutane, Vitamin A, schizophrenia, or psychosis outside of that which he has gleaned from a scant literature review for the purpose of consulting and testifying in this case.... In fact, rather than fitting the mold of a pharmacologist who is scientific in his approach, he much more closely fits the profile of an 'expert for hire' whose opinions are more likely to be biased. As Daubert explains, the Court has a 'gatekeeping' responsibility that requires it to prevent such individuals from giving unqualified scientific opinions to juries. Here, the Court cannot in good conscience present James O'Donnell to a jury as an expert in the effects of Accutane on the human body. Quite frankly, the Court finds Plaintiff's attempts to present O'Donnell as an expert pharmacologist to be an extremely bold stretch." Newton, 243 F. Supp. 2d at 679.

WL 118020, *3-4 (E.D. Pa. Mar. 1, 1999) (a proffered expert, a board certified neurologist, was not qualified to testify as an expert as to spinal fusion surgery, because he had never performed surgery of any kind, had no training in, nor had he ever observed any, spinal fusion surgery, had never treated a patient who had spinal fusion surgery, was not familiar with the techniques of such surgery, had conducted no independent research regarding spinal fusion surgery, and had only reviewed the medical literature supplied by the hiring party's counsel); Mancuso v. Consolidated Edison Co. of N.Y., 967 F. Supp. 1437 (S.D.N.Y. 1997) (rejecting the qualifications of a proffered 'expert' concerning PCB exposure, although he was a medical doctor, because he had no experience with toxic torts and his 'self-education' in the effects of PCBs was either insufficient or belied by his lack of knowledge under cross-examination); Diaz v. Johnson Matthey, Inc., 893 F. Supp. 358, 372-73 (D.N.J. 1995) (disqualifying a pulmonologist from testifying that the plaintiff had a platinum allergy, because the witness was not an epidemiologist or a toxicologist, had 'no other qualifications other than his medical education and his years practicing as a pulmonologist,' had only casually studied the literature on platinum allergy, and had never previously treated a patient suffering from platinum allergy); Wade-Greaux v. Whitehall Labs., Inc., 874 F. Supp. 1441, 1476 (D. V.I.) (a witness educated as a pediatrician, pharmacologist, and toxicologist was not qualified to testify regarding the cause of birth defects, because he had merely reviewed selected literature on the subject for the purposes of litigation), aff'd without op., 46 F.3d 1120 (3d Cir. 1994)."

Smith, 57 F. Supp. 2d at 766-767. Because neither Dr. Bell nor Mr. Morgan is qualified to testify as an expert in the areas relevant to this case, the mere fact that they have reviewed some scientific papers on the issue cannot render them qualified.

However, even more important than the legal issue of whether performing a literature review can render qualified an otherwise unqualified expert is the factual issue of what "literature review" was actually conducted by Dr. Bell and Mr. Morgan. As the record shows, Dr. Bell and Mr. Morgan did nothing more than cherry-pick a few (very few) articles that they believed to be supportive of their position.²⁹

²⁹ However, as was shown on cross-examination, none of the articles did, in fact, support the testimony offered by Dr. Bell and Mr. Morgan.

For example, in the case of Dr. Bell, Appellants assert that Dr. Bell "conducted a literature review of forest responses to storms." (Brief of Appellants at p. 14). Appellants further claim that "Dr. Bell also considered actual data from the Coweeta Experimental Forest in North Carolina," and "Dr. Bell used the Coweeta data to look at peak stormwater runoff rates." (Brief of Appellants at p. 15). However, Dr. Bell's actual testimony regarding the extent of his "literature review" does nothing to enhance his qualifications or the reliability or relevancy of his methods:

"Q. Had you ever heard of Coweeta before you got involved in this case?

A. No.

Q. And you testified that the information that you gave to the jury relating to studies that had been done and measurements taken down at Coweeta came from an article that summarized, you thought, some previous articles; is that right?

A. Yes.

Q. One article.

A. Yes.

Q. Now, tell -- tell the jury what else you know about the Coweeta experimental forest.

A. Not much."

* * *

"Q. So you feel like, on the basis of this one article relating to this experimental forest that, by your testimony maybe, has been in existence for 40 years, feel like you've probably got a good understanding of what they do down there and how forest hydrology works?

A. No, I have -- I feel like I have a pretty good understanding of what happened in the experiments they reported in that particular paper, which is what I gave the jury." (Tr. Vol. VII at pp. 1464-1468).

As to a final tally of the number of articles comprising his "literature review," Dr. Bell places the count somewhere between one and three articles. (Tr. Vol. VII at pp. 1470-1471). Further, cross-examination revealed that the primary article upon which Dr. Bell relied was irrelevant. The article relied upon by Dr. Bell involved clear cutting, whereas the evidence is undisputed that no clear cutting occurred anywhere on Western Pocahontas' properties in the Slab Fork Subwatershed. (Tr. Vol. VII at pp. 1470-1471).

As to Mr. Morgan, Appellants merely claim that Mr. Morgan used data from the Fernow experimental forest for comparison purposes, without expounding regarding exactly what he relied on. (Brief of Appellants at p. 23). However, in the expert report he prepared in this matter, Mr. Morgan references only seven publications, including only two articles relating to forest hydrology.³⁰

Clearly, neither Dr. Bell nor Mr. Morgan did any level of research that could fairly be classified as a literature review. However, even if they had done so, a literature review conducted in the field of forest hydrology (a field in which neither Dr. Bell nor Mr. Morgan is or claims to be an expert) does not render either of them qualified as experts in this matter and does not make the opinions that they derived from unreliable and irrelevant models admissible.

7. **JUDGE HUTCHISON CORRECTLY APPLIED THE DAUBERT/WILT ANALYSIS IN CONCLUDING THAT NEITHER DR. BELL'S NOR MR. MORGAN'S TESTIMONY SHOULD HAVE BEEN PRESENTED TO THE JURY.**

³⁰ In addition to the FATT Report and the FATT responsive summary, the other literature referenced by Mr. Morgan in his expert report included: National Resource Conservation Service (1969), "National Engineering Handbook," Section 4; Maidment, David R. (1993), "The Handbook of Hydrology," McGraw-Hill, Inc.; Wang, McNeel, Kochenderfer, Woods (2003) "Fifty Years of Watershed Research on the Fernow Experimental Forest, WV: Effects of Forest Management and Air Pollution in Hardwood Forests"; and Silviculture Instructors Subgroup Silviculture Working Group, Society of American Foresters (1994), "Silviculture Terminology." (John Morgan Rep. dated December 20, 2005 at p. 70).

Judge Hutchison correctly determined that the trial testimony of Appellants' experts, Dr. Bell and Mr. Morgan, was "scientific" in nature. Appellants argue that the testimony of Mr. Morgan and Dr. Bell was merely "technical" and not "scientific." Appellants make this argument in an effort to avoid the trial judge's "gatekeeper" analysis with regard to scientific expert testimony. Presumably, Appellants believe that trial judges have no discretion in determining whether to admit or deny (or to allow a jury to rely upon) the testimony of a technical expert. Appellants' argument fails for two reasons: (1) the testimony of Mr. Morgan and Dr. Bell was "scientific" in nature and thus subject to a Daubert/Wilt analysis, and (2) even if the testimony of Mr. Morgan and Dr. Bell is considered "technical," the trial court still has discretion to consider the unreliability and irrelevancy of the experts' opinions in ruling upon the motion for judgment as a matter of law.

a. The testimony of both Mr. Morgan and Dr. Bell was "scientific" in nature.

"Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Overton v. Fields, Syl. Pt. 5, 145 W. Va. 797, 809, 117 S.E.2d 598, 607 (W. Va. 1960); Wilt v. Buracker, Syl. Pt. 3, 191 W. Va. 39, 46, 443 S.E.2d 196, 203 (W. Va. 1993), *cert. denied*, 511 U.S. 1129 (1994); Watson v. Inco Alloys Intern., Inc., Syl. Pt. 1, 209 W. Va. 234, 238, 545 S.E.2d 294, 298 (W. Va. 2001). With regard to "scientific" expert testimony, West Virginia has formally adopted the gatekeeping requirements first set forth by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993). Wilt, 43 S.E.2d at 203.

In Wilt, the Court adopted the Daubert standard for testing the reliability and relevancy of “scientific” expert testimony, then applied that analysis to the proffered testimony of an economist. In Gentry, this Court provided additional guidance on the procedure a trial court should follow when conducting a Daubert/Wilt analysis:

“When scientific evidence is proffered, the circuit court in its ‘gatekeeper’ role must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert’s testimony reflects ‘scientific knowledge,’ whether the findings are derived by ‘scientific method’ and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is ‘relevant to the task at hand.’” Gentry, 466 S.E. 2d at Syl. Pt. 4.³¹

As to the distinction between “scientific” and “technical” testimony, this Court explained as follows:

“At the outset, the trial court must decide whether the expert testimony is ‘scientific’: ‘Scientific’ implies a grounding in the methods and procedures of science while ‘knowledge’ connotes more than subjective belief or unsupported speculation. In order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. It is the circuit court’s responsibility initially to determine whether the expert’s proposed testimony amounts to ‘scientific knowledge’ and, in doing so, to analyze not what the experts say, but what basis they have for saying it.” Gentry, 466 S.E.2d at Syl. Pt. 6.

In this case, both Mr. Morgan and Dr. Bell used (or should have used) the methods and procedures of science (specifically the science of forest hydrology) in reaching their opinions. However, Appellants place great emphasis on the fact that Mr. Morgan and Dr. Bell are “engineers,”³² and that engineering testimony is generally

³¹ The trial court’s answers to the questions in the first part of the analysis are reviewed de novo, while the answer to the second question is reviewed under an abuse of discretion standard. Gentry, 466 S.E.2d at Syl. Pt. 3.

³² However, Mr. Morgan testified that he is not, in fact, a licensed engineer in West Virginia or any other state.

“technical” in nature.³³ Western Pocahontas agrees that Mr. Morgan has an undergraduate degree in mining engineering (but is not a licensed professional engineer) and that Dr. Bell is an environmental engineer. (Tr. Vol. V at p. 1043; Tr. Vol. VIII at p. 1849). But neither Mr. Morgan nor Dr. Bell is a forest hydrologist. (Tr. Vol. V at p. 1057; Tr. Vol. VIII at pp. 1836-1837, 1843-1844). And yet, both Mr. Morgan’s opinions and Dr. Bell’s opinions concerned the science of forest hydrology. Hydrology is defined as “[a] science dealing with the properties, distribution, and circulation of water on and below the earth’s surface and in the atmosphere.” (Merriam Webster’s Collegiate Dictionary 568 (10th Ed. 1999)) (emphasis added). This Court has stated that “[u]nless an engineer’s opinion is derived from the methods and procedures of science, his or her testimony is generally considered technical in nature, and not scientific.” Watson, 545 S.E.2d at Syl. Pt. 3 (emphasis added). This very important qualification clearly applies in the case of both Mr. Morgan and Dr. Bell.

Moreover, “scientific” testimony does not become unscientific just because the testimony is presented through an engineer. It is not the job title that controls; it is the subject matter of the testimony. In their criticism of Judge Hutchison’s Daubert/Wilt analysis, Appellants try to use their experts’ lack of qualification to their advantage, by using their training in the irrelevant field of engineering – and lack of qualification in the relevant field of forest hydrology – in an attempt to sidestep a Daubert/Wilt analysis.

³³ In Watson, 545 S.E.2d at 300, “technical” was defined as “pertaining to or connected with the mechanical or industrial arts and the applied sciences.” [citing Random House Dictionary of the English Language 1950 (2d ed.1987)]. Technical knowledge is the knowledge of these mechanical and industrial arts and the applied sciences.” The issues presented in this case clearly were not “technical” but, rather, were “scientific” in nature.

Once Judge Hutchison correctly determined that Mr. Morgan and Dr. Bell provided “scientific” testimony, he also correctly applied the Daubert/Wilt “gatekeeper” analysis. Judge Hutchison examined “whether the reasoning or methodology underlying the testimony [was] scientifically valid and whether that reasoning or methodology properly [could] be applied to the facts in issue.” Daubert, 509 U.S. at 592-593. These two inquiries are generally referred to as the “reliability” element and the “relevancy” element. Judge Hutchison correctly determined that Dr. Bell and Mr. Morgan did not pass muster on either count.

(i.) The “reliability” element.

The Daubert Court established the following non-exclusive list of factors which trial courts should generally review when determining whether a proposed expert’s testimony is sufficiently reliable:

- “(1) whether the expert’s technique or theory can be or has been tested;
- (2) whether the theory or technique has been subjected to peer review and publication;
- (3) the technique’s or theory’s known or potential rate of error;
- (4) the existence and maintenance of standards controlling the technique’s operation; and
- (5) whether the reasoning or methodology has received general acceptance.” Daubert, 509 U.S. at 593-94.

While these factors are not exclusive and are not required in every case, they are applicable in this case. Accordingly, each factor will be addressed in turn.

First, as Judge Hutchison noted in the March 15, 2007 Order, Appellants provided no basis for using computer runoff models for forensic purposes.³⁴ Dr. Bell testified that the models he used, HEC-1 and TR-55³⁵, are generally used for designing bridges, culverts, and the like to withstand anticipated storms. (Tr. Vol. V at pp. 1082-1084). Mr. Morgan used SEDCAD, and he also admitted that it is usually used for design purposes to ensure the structure being designed will be of sufficient size and strength to withstand anticipated storms. (Tr. Vol. X at pp. 2168-2169, 2171). These models were not designed to model historical events based upon hypothetical changes in land cover. (Tr. Vol. VI at pp. 1417-1418).

Second, the only peer review information presented throughout these proceedings stems from the FATT Report. The FATT Team used the BOSS version of HEC-1, which is generally similar to the models utilized by Dr. Bell and Mr. Morgan. Two independent reviewers, Dr. Rhett Jackson³⁶ and Dr. Wayne Swank³⁷, analyzed the use of the curve number method selected by the FATT Team. In reviewing the conclusions of the FATT Report, Dr. Jackson stated, in part, as follows:

³⁴ As with all computer models, the well-known term “garbage in, garbage out” applies. See *generally Coffey v. Dowley Manufacturing, Inc.*, 187 F.Supp.2d 958, 974 (M.D.Tenn. 2002) (stating that if the modeler “assumed certain parameters for his computerized finite element analysis, and those parameters were later proven to be incorrect, then the conclusion reached by the computer model would also be incorrect”).

³⁵ The TR-55 model utilized by Dr. Bell labels itself as “Urban Hydrology for Small Watersheds.” (Tr. Vol. VI at p. 1405). The Mullens subwatershed, which consists of approximately 83,990 acres, is neither small nor urban.

³⁶ Dr. Rhett Jackson is Assistant Professor of Hydrology at the Warnell School of Forest Resources at the University of Georgia.

³⁷ Dr. Wayne Swank is Scientist Emeritus at the Coweeta Hydrologic Laboratory and is an adjunct professor at the University of Georgia and Clemson University.

"Throughout the [FATT] report there are comments that the BOSS modeling system provides accurate and precise results. Actually the SCS [curve number] method that is the basis for HEC-1 and BOSS modeling is inherently inaccurate. There is a very good reason that the textbooks and guidance documents for the SCS method do not show the original scatter plots from which the curve numbers were derived - such plots would erode the user's confidence in the results of the model. While the curve number for a mature forest on a certain type of soil may be 70, the actual runoff behavior of such a land/cover combination is actually quite variable due to differences in soil depth, bedrock conditions, topography, landscape position, and landscape history. For these reasons, uncalibrated hydrologic models, including the SCS model and others, are notoriously inaccurate." (FATT Report at p. 99).

Dr. Swank also had concerns:

"A critical question arises: is CN 70 an appropriate index for predicting peak discharge for 'pristine' forests? Probably the best approach in addressing this question is to apply the NRCS procedure to experimental forested watersheds with long-term discharge records and compare predicted values with observed values. I am not aware of any citable reference where this is documented. However, Hewlett et al. (1977) developed simple nonlinear equations (R-Index Method) for predicting storm flow and peak flow for small-forested basin based on data from 11 watersheds from New Hampshire to South Carolina. Tested against the SCS runoff curve method used at that time (SCS-TP-149) on four independent bases, the R-index method was judged considerably more accurate. The runoff curve method gave quite wild predictions and largely over predicted storm flow volumes and peak discharge." (FATT Report at p. 108).

While the methodologies used by the FATT Team, Dr. Bell, and Mr. Morgan have been peer reviewed, those reviews have only called their methodologies further into question.³⁸

Third, neither Dr. Bell nor Mr. Morgan could provide an error rate for their models. (Tr. Vol VI at pp. 1417-1418; Tr. Vol. X at p. 2140). None of Dr. Bell's or Mr. Morgan's models were calibrated. (Tr. Vol. VII at pp. 1580-1581, 1630; Tr. Vol. IX at pp.

³⁸ See section III.D.1 for additional discussion regarding the FATT Report.

1946-1947; Tr. Vol. X at pp. 2133-2143, 2157-2158).³⁹ Dr. Bell testified that he could not even guess what the error rates for his models might be. (Tr. Vol. VII at p. 1584). In fact, he could not even state whether his model was accurate within 250%. (Tr. Vol. VII at p. 1585).

Likewise, Mr. Morgan's model did not have an error rate because it was merely a "sensitivity study," according to Mr. Morgan. (Tr. Vol. X at pp. 2133-2135, 2140). It allegedly showed the range of "potential" runoff, anywhere between a pristine forest and a completely paved mountainside. (Tr. Vol. IX at pp. 2046-2047). He did not provide an opinion regarding the actual increase in runoff, if any, on any specific piece of property. (Tr. Vol. X at pp. 2135, 2143-2144, 2149-2150). Thus, he simply provided a gross range of possibilities within which the jury could speculate.

Fourth, because the models utilized by Dr. Bell and Mr. Morgan are not designed to show discharge from historical storms based on hypothetical changes to inputs, standards controlling the modeling operation in such a setting do not exist. Instead, the inputs entered into the model are left to the whim of the modeler. There are many obvious problems with the experts' free hand in entering information into their models. For instance, the gap between the curve numbers chosen by Dr. Bell and Mr. Morgan is alarming. (Tr. Vol. IX at p. 2101). These numbers were chosen even though neither expert ever set foot within the Mullens subwatershed. (Tr. Vol. VI at p. 1303; Tr. Vol. IX at pp. 1952-53, 2018).

Furthermore, both Dr. Bell and Mr. Morgan generically and arbitrarily assumed that all timbering that occurred within ten years prior to July 8, 2001 should be

³⁹ As noted above, Dr. Bell testified that, absent calibration "a model can be manipulated to return any results the modeler wishes to show." (Tr. Vol. VII at p. 1580).

presumed to have the same impact. (Tr. Vol. X at p. 2195; Tr. Vol. VII at pp. 1461-1463).⁴⁰ This assumption was contrary to the “clear evidence” that “any negative effect of that disturbance would be abated in a four-year period.” (March 15, 2007 Order at p. 34). Appellants concede that “[Dr. Bell] explained that the data from the measured Coweeta watersheds showed that the rates were increased during timbering operations [sic] and for four years subsequent to such operations.” (Brief of Appellants at p. 15, citing Tr. Vol. V at p. 1155) (emphasis added).⁴¹ Dr. Bell also testified that he had no knowledge regarding the recovery period relating to timber disturbances, i.e. the period of time after the impacts, if any, associated with a timber operation would cease. (Tr. Vol. VII at p. 1461-1463). The following testimony further highlights the lack of foundation for considering all operations in the ten-year period prior to July 8, 2001:

“A. And my understanding from the State folks [FATT Team], they used five years back, and I – from Dr. Martin, who said at least five years, so I would think – we’re talking about roads now.

* * *

Q. So you would rely upon Doctor Martin and these other resources again?

A. I’d certainly – you know, I relied upon the State folks and the FATT report; I relied upon what Doctor Martin told me.

Q. And that was that five years—

A. Five years or more. State used five.

⁴⁰ Judge Hutchison permitted discovery within the ten year timeframe prior to July 8, 2001. However, no foundation was presented to establish that the same time period was relevant in considering the issues outlined for the Phase I Trial.

⁴¹ Of course, this data involved clear cutting, which is a much more drastic disturbance to the land than the diameter limit cutting that was done on Western Pocahontas’ property.

Q. But if Best Management Practices were being followed on a site that was being timbered, then the recovery period would be fewer than five years. Agree with that?

A. I don't know whether I would agree with that or not. I mean, the State used five years throughout their study. I assume the State thought that Best Management Practices were being used. If they didn't, I assume they would have been upset.

* * *

Q. Well, would you agree – have you read Doctor Martin's deposition?

A. No, I haven't.

Q. You've talked to him?

A. I talked to him.

Q. And Doctor Martin is the forest ecologist upon whom you relied for that kind of information?

A. Again, along with the State.

Q. All right. And would you agree with Doctor Martin that if BMPs are, in fact, followed that it could reduce the time to as little as three to four years?

A. I – if Doctor Martin said that, I don't know it.

Mr. Emch: Well, I have the – I have the clip, your Honor, if there's no objection, we can show him from the deposition of Doctor Martin that testimony.

The Court: Objection?

Mr. Calwell: Well, yes, your Honor. I mean, I think he's bordering on arguing with the witness. He already said he doesn't know and he wasn't called to testify –

The Court: Sustained.

Q. Well, in the event – we can get that from Doctor Martin when he's here. But Doctor Bell, if you assume that Doctor Martin acknowledges that if Best Management Practices are followed, that the recovery period is as low as three to four years – for a timbered site – you have no reason to disagree with that do you?

A. I have no reason to agree or disagree.

Q. Because that's not your area?

A. That's right.

Q. And you relied on Doctor Martin?

A. And the State." (Tr. Vol. VII at p. 1461-1463).

Thus, although Dr. Bell chose to attribute increased runoff to all operations that occurred within ten years prior to July 8, 2001, he admitted that he had no knowledge or foundation to support this decision, that the Coweeta study he relied upon indicated that there would be no impacts after four years, that Dr. Martin told him five years would be appropriate, and that the FATT Team used five years. Of course, as discussed above, the Plaintiffs withdrew Dr. Martin as an expert witness, and he never testified at the Phase I Trial.⁴²

Finally, the fifth Daubert element is not met with regard to the modeling by Dr. Bell or Mr. Morgan. The reasoning or methodology utilized by Dr. Bell and Mr. Morgan has not received general acceptance. There is no doubt that computer models are routinely used by engineers in designing certain structures in particular settings, but not for forensic investigation of the effect of timbering operations on runoff in forested

⁴² Dr. Martin, the forestry expert disclosed by the Plaintiffs and withdrawn during the trial, testified in his deposition as follows:

Q. And if you have a skid road or a haul road where the job is closed down, water bars are put in at the appropriate spots and it's reseeded pursuant to the BMPs, would it be reasonable to believe that the impact is not going to be 5 to 10 years, but maybe 3 years or 4 years?

A. That's the intent of the BMPs is to reduce the amount of time that there is recovery, and depending on how well that is done and how successful that is going to, it could, it could reduce the time from 5 years, yes, could. I

watersheds. Further, the models are not applicable for recreating historical situations based upon hypothetical timber operations, with hypothetical acreages, hypothetical slopes and grades, hypothetical harvest amounts, hypothetical harvest types, hypothetical time periods, hypothetical rainfall amounts and intensity, and hypothetical roads and landings.

Based upon the five factors outlined in Daubert and adopted in Wilt, Judge Hutchison correctly ruled that the testimony of Appellants' experts was unreliable and properly struck such testimony from the record.

(ii.) The "relevancy" element.

In addition to determining the reliability of the evidence, a trial court must also evaluate the relevancy of the evidence, i.e., whether the evidence will "assist the trier of fact to understand the evidence or to determine a fact in issue." The United States Supreme Court equated the relevancy of scientific evidence to the question of whether the expert testimony "fits" with the facts in the case. Daubert, 509 U.S. at 591. Judge Hutchison correctly analyzed this issue on page 24 of the March 15, 2007 Order.

As has been noted, nothing that was modeled by Dr. Bell and Mr. Morgan was even purported to be an accurate representation of what occurred at any specific location in the Mullens subwatershed. As Judge Hutchison properly concluded: "the assumptions, to which Dr. Bell and Mr. Morgan testified and that were used in the model programs, used no data taken from the real estate in the Slab Fork Creek Subwatershed. There was no independent measuring of humus coverage or depth. There was no investigation with regard to the use of BMP's during the timbering process.

would expect it to, I'll put it that way." (Dr. William Martin Depo. Tr. of January 27, 2006 at pp. 427-428).

Plainly put, the assumptions used in the hypotheticals, upon which Mr. Morgan and Dr. Bell based their opinions, do not fit the facts of this case.” (March 15, 2007 Order at p. 24).

In Thomas v. FAG Bearings Corp., 846 F.Supp. 1382 (W.D.Mo. 1994), the court addressed a similar situation. The court stated that “[t]he task confronting the Court is to determine whether the hydrologist’s opinions are such that they would be admissible at trial and whether they would allow a reasonable jury to find causation.” Thomas, 846 F.Supp. at 1393. The court applied a Daubert analysis to the proffered testimony of the hydrologist. The court stated that “testimony about ‘scientific knowledge,’ in turn, must be based on ‘verifiable propositions of fact.’” Thomas, 846 F.Supp. at 1393 (citations omitted)(emphasis added). The court went on to state that “[s]uch evidentiary reliability is not present when the ‘scientific’ opinion is premised on fundamentally unsound bases or a fatally deficient amount of data.” Id. (emphasis added). The court then stated as follows:

“The Court does not mean to imply that Overton is not an able hydrologist. Rather, the Court’s comments are directed to Overton’s investigation into and knowledge of this particular site. It is abundantly clear that, for whatever reason, Overton was not given the opportunity to make the type of personal investigation that would have allowed him to reach actual conclusions, rather than speculations.”

Thomas, 846 F.Supp. at 1394, n. 7. The Appellants’ experts in this case premise their opinions on the same type of speculations that were deemed insufficient in Thomas. Dr. Bell’s and Mr. Morgan’s “hypothetical” models did not provide relevant information for the jury to use in answering Issue One.

- b. Even if the testimony of Dr. Bell or Mr. Morgan is considered technical, rather than scientific, Judge Hutchison properly exercised his discretion to consider the reliability and relevancy of the “technical” opinions in**

granting Western Pocahontas' motion for judgment as a matter of law.

Rule 50(b) of the West Virginia Rules of Civil Procedure allows a judge to submit the case to the jury "subject to the court's later deciding the legal questions raised by the motion [for judgment as a matter of law]." (W.Va.R.Civ.P. 50(b)). The legal question that remained before the trial court, even after it submitted the case to the jury, was whether there existed a legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiffs on any of the three issues. (W.Va.R.Civ.P. 50(a)). It was against this background that Judge Hutchison evaluated the reliability and the relevancy of Dr. Bell's and Mr. Morgan's opinions. Once Judge Hutchison correctly determined that Mr. Morgan and Dr. Bell provided "scientific" testimony, he correctly applied the Daubert/Wilt "gatekeeper" analysis and struck their testimony.

However, even if the testimony of Mr. Morgan and Dr. Bell is considered technical, rather than scientific, in nature, it is clear that Judge Hutchison had discretion to weigh (1) the qualifications of the experts and (2) the legal sufficiency of their expert testimony. In weighing the legal sufficiency of their testimony, the trial court may consider both reliability and relevancy. Dr. Bell's and Mr. Morgan's utter lack of relevant education, training or experience has been discussed in detail throughout this brief. The law in West Virginia is clear: "a jury will not be permitted to base its findings of fact upon conjecture or speculation." Oates v. Continental Ins. Co., Syl. Pt. 1, 137 W. Va. 501, 72 S.E.2d 886 (W. Va. 1952); Lacy v. CSX Transp. Inc., 205 W. Va. 630, 520 S.E.2d 418 (W. Va. 1999); Crane & Equipment Rental Co., Inc. v. Park Corp., Syl. Pt. 4, 177 W. Va. 65, 350 S.E.2d 692 (W. Va. 1986); Queen v. Sawyers, 148 W. Va. 130, 133

S.E.2d 257 (W. Va. 1963); Payne v. Ace House Movers, Inc., 145 W. Va. 86, 112 S.E.2d 449 (W. Va. 1960).

The testimony of the Plaintiffs' experts did not provide a legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiffs on any of the three issues that were before it. For the reasons discussed above, the unreliable and irrelevant models and opinions of Mr. Morgan and Dr. Bell provided only speculation and conjecture for the jurors to rely upon in coming to their verdict. Accordingly, Judge Hutchison correctly considered the inadequacies of the Plaintiffs' experts' testimony in granting Western Pocahontas judgment as a matter of law.

D. EVEN IF DR. BELL AND MR. MORGAN HAD BEEN QUALIFIED AND THEIR TESTIMONY HAD BEEN RELIABLE AND RELEVANT, JUDGE HUTCHISON CORRECTLY RULED THAT, AS TO ISSUE THREE, THE TIMBER OPERATIONS ON WESTERN POCAHONTAS' PROPERTIES CANNOT BE DEEMED UNREASONABLE, AS A MATTER OF LAW.

The third separate and independent basis upon which Judge Hutchison granted judgment in favor of Western Pocahontas was that: "Based upon all the evidence in this case, regardless of whether there is a subsequent finding that there was a material increase in peak flow and material increase in the overflow of the streams, the use by Western Pocahontas of its land and resources in the Slab Fork Creek Subwatershed, as a matter of law, cannot be deemed unreasonable." (March 15, 2007 Order at p. 36).

Appellants concede in their brief, and Mr. Morgan testified, that there was nothing unreasonable or improper about any specific timber operation on Western Pocahontas' properties in the Slab Fork Subwatershed. (Tr. Vol. X at p. 2209). Appellants' position is that (1) Western Pocahontas took a "head-in-the-sand" approach and did nothing to control stormwater runoff from its property (Brief of Appellants at p.

3) and (2) that Western Pocahontas allowed too much timber harvesting to occur on the property. Both of these arguments are wholly without merit, as Judge Hutchison properly concluded.

1. THE EVIDENCE WAS UNDISPUTED THAT BMPs FUNCTION AS STORMWATER RUNOFF CONTROLS AND THAT BMPs WERE REQUIRED TO BE FOLLOWED ON EVERY TIMBER OPERATION ON WESTERN POCAHONTAS' PROPERTIES IN THE SLAB FORK SUBWATERSHED.

Throughout the Appellants' brief, it is implied that Western Pocahontas had some burden to affirmatively prove it properly "controlled" stormwater runoff from its properties. This is clearly wrong. Nonetheless, Western Pocahontas did prove, and the evidence is undisputed, that (1) BMPs function as stormwater runoff controls and (2) all operations on Western Pocahontas' properties were required to be BMP compliant.

One misrepresentation that is repeated throughout the Appellants' brief is that BMPs are irrelevant to an analysis of stormwater runoff from timbering operations. Appellants insist that: "The BMPs have nothing to do with regulating surface water for the prevention of water absorption and increases in peak flow." (Brief of Appellants at p. 48-49). "BMPs were not intended to prevent increases in peak flow rates, water volume and flooding." (Brief of Appellants at p. 52). Appellants incorrectly state that BMPs "have no relevance to the issues of rate and manner of water flow." (Brief of Appellants at p. 48). Of course, Appellants do not provide citation to any testimony to support these incorrect statements. Instead, Appellants urge that: "this Court need go no further than the jury instructions of the trial court...." (Brief of Appellants at p. 49). Perhaps the reason that Appellants provide no citation for their (inaccurate) statements and urge the

Court to “look no further” than the jury instruction quoted in the brief⁴³ is because the record in this matter completely contradicts Appellants’ assertions.

To begin, Mr. Morgan, Appellants’ expert witness, admitted on cross-examination that BMPs do, in fact, help control stormwater runoff:

“Q. ...You testified that the BMPs only are designed, or at least their preamble says they’re designed for control of sedimentation.

A. Yes.

Q.: And although BMPs are designed for sediment control, they also have the effect of controlling water runoff, don’t they?

A.: Some of them can, yes. (Tr. Vol. X at pp. 2189-2192) (emphasis added).⁴⁴

Thus, as Appellants’ own expert, Mr. Morgan, clearly testified, BMPs can act as stormwater runoff controls.

⁴³ Appellants emphasized that: “Sediment’ means solid particulate matter, usually soil or minute rock fragments, moved by wind, rainfall or snow melt into the streams of the State.” (Brief of Appellants at p. 50). Thus, contrary to Appellants’ argument, the BMPs, by their very terms, are to prevent excessive rainfall runoff from carrying sediment into streams.

⁴⁴ This is consistent with Mr. Morgan’s deposition testimony wherein he testified as follows:

“A. ...If you look at the preamble to the best management practices, their objective is to decrease sedimentation, not to decrease peak flows.

Q. But they can have that effect even if that’s not their purpose.

A.: If some of the best—those practices as identified in the West Virginia best management practices are adopted, they can help in attenuating peak flows.

Q. So to the extent that they’re [BMPs are] followed, they do have an effect on runoff and peak flows.

A. Yes.” (John Morgan Dep. Tr. of January 20, 2006 at pp. 366-367) (emphasis added).

However, Appellants ignore the testimony of their own witness and insist that BMPs are irrelevant. Appellants then extend this error by further arguing that: "The jury did not hear anything about what is done in timbering and harvesting to consider and adjust for water movement changes resulting from land disturbances in the forest." (Brief of Appellants at p. 2). The undisputed evidence was that Western Pocahontas did, in fact, require the use of stormwater controls on every timbering operation; Western Pocahontas required that BMPs be followed, employed forestry professionals to inspect and ensure that BMPs were being followed, and contracted with independent forestry professionals to serve as a check on the forestry employees (Tr. Vol. XII at pp. 2424-2425).

Dr. Nutter, a forest hydrologist called by Western Pocahontas, testified that: "I realize that BMPs are designed as a water quality protection, but you have to stop the water from flowing in order to protect water quality, because the sediment is carried by that flowing water. If you get water to flow into the soil, infiltrate into the soil, there's not an issue of sediment being moved into the stream channel, and that's our objective under the BMPs under forest management." (Tr. Vol. XVII at p. 3692-3693).⁴⁵

⁴⁵ Dr. Nutter also testified that:

"A. The BMPs that are put in place and practiced, as I observed, on the Western Pocahontas Properties, those BMPs are really hydrologic based, meaning that – BMPs are to protect water quality. But in order to protect water quality, you have to stop water from running off the site and carrying sediment and other contaminants to the stream. And those are the type of activities that are practiced here and on Western Pocahontas' Properties, those practices and implementation of BMPs, are sufficient and it is not necessary to model or to provide any other stormwater control features or practices. ... The BMPs are designed to retain water to direct it off disturbed areas back into the forest to infiltrate, and those are stormwater control measures. That's what they're designed for and, in my opinion, they are effective." (Tr. Vol. XVIII at pp. 3800-3802).

On cross examination from Appellants' counsel, Dr. Nutter, testified that it is "absolutely" true that the BMPs are sufficient to address storm flows. (Tr. Vol. XVIII at pp. 3800-3802) (emphasis added).

Of course, while the undisputed evidence showed that BMPs act as stormwater runoff controls and further showed that Western Pocahontas required BMPs to be used at every single timber operation, neither Dr. Bell nor Mr. Morgan included BMP compliance in their models, as Judge Hutchison noted in ruling that Dr. Bell's and Mr. Morgan's testimony and models do not "fit the facts of this case."

In regard to BMPs, it should be noted that the Plaintiffs did not present evidence of a single violation or a single complaint lodged with the West Virginia Division of Forestry for any operation on Western Pocahontas' properties in the Mullens subwatershed or the Slab Fork Subwatershed in the ten years prior to July 8, 2001.

2. ABSENT A FOUNDATION FOR INCLUDING ALL TIMBER OPERATIONS THAT OCCURRED IN THE TEN-YEAR PERIOD PRIOR TO JULY 8, 2001, MR. MORGAN'S "CUMULATIVE HYDROLOGIC IMPACT" ANALYSIS CANNOT BE SUPPORTED.

Appellants do not claim, and clearly could not support a claim, that any particular operation on Western Pocahontas' property was unreasonable or materially contributed to the flooding that occurred in Mullens, West Virginia (and other parts of eight counties in southern West Virginia) on July 8, 2001. In other words, every individual operation on Western Pocahontas' property was proper, lawful, reasonable, and did not materially cause or contribute to flooding. Appellants' case rests solely on the assertion that these separate operations, all reasonable and harmless in and of themselves, combined to create an unreasonable "cumulative hydrologic impact." (Tr. Vol. X at p. 2209).

In addition to the unreliable and irrelevant modeling that was done by Appellants' unqualified experts, and in addition to the fact that absolutely no proof was offered regarding Issue Two, Appellants' assertion that Western Pocahontas unreasonably allowed too much timbering to be done is unsupportable because of the fundamental error in including timber operations in the "cumulative" calculation that were conducted so far in the past that they could not have had any effect on increased runoff or peak flow. Early in the course of discovery, Judge Hutchison determined that Appellants would be permitted to engage in discovery of all operations that occurred at any time in the ten years prior to July 8, 2001. Because no timbering occurred on any of Western Pocahontas' properties in the Mullens subwatershed between 1991 and 1993, Mr. Morgan included in his analysis all timber operations that occurred from 1994 through July 8, 2001 (a seven and one-half year period). (Brief of Appellants at p. 5)

However, as Judge Hutchison pointed out in his March 15, 2007 Order, "the undisputed evidence produced by the defense, forestry experts and forest hydrologists was that, if a timbering operation follows BMPs and industry standards, and is 'closed out' or reclaimed in conformity with these standards, then that particular timber operation will return to its pre-disturbance condition within four years." (March 15, 2007 Order at p. 11).⁴⁶

⁴⁶ "The Plaintiffs' contention is that the disturbance by the Defendants of 40 percent of its real estate in the Mullens Subwatershed, and specifically, 40 percent of the acreage in the Slab Fork Creek Subwatershed over a 10-year period was unreasonable because, in the opinion of Plaintiffs' experts, that disturbance materially increased the peak flow off the property and materially increased the overflow of the receiving streams. However, the clear evidence in this case is that despite the disturbance created by the Defendants on their real estate, any negative effect of that disturbance would be abated in a four-year period. This is because Western Pocahontas utilized Best Management Practices and adhered to industry standards. Thus, the evidence is equally clear that if Western Pocahontas appropriately conducted their timbering operations, the only operations which could reasonably be inferred to have potentially created conditions resulting in damage to the Plaintiffs, would be 16 percent of the timbered area,

As Judge Hutchison correctly determined, there was zero evidence at trial to support the inclusion of operations that occurred as far back as 1994. Neither Dr. Bell nor Mr. Morgan had any idea what recovery period is generally applicable for timbering operations.

3. WESTERN POCAHONTAS ENSURED THAT BOTH THE MANNER AND THE AMOUNT OF TIMBER HARVESTING ON ITS PROPERTIES WERE REASONABLE, LAWFUL, AND NOT ONLY MET, BUT EXCEEDED, INDUSTRY STANDARDS.

Appellants' argument is, essentially, that Western Pocahontas allowed too much timber harvesting on its property in the Slab Fork Subwatershed. However, the evidence was undisputed that Western Pocahontas' commendable efforts to limit the amount of timber harvested on its properties resulted in an increase of more than 65% in the volume of timber growing on the property at issue from the time the properties were acquired in 1987 through 2005.

Joe Newlon is a certified, professional forester, and is employed by Western Pocahontas as the manager of forestry resources. (Tr. Vol. XXI at pp. 4414-4415). Mr. Newlon has worked for Western Pocahontas since it acquired the properties at issue in 1987. (Tr. Vol. XXI at p. 4415). Between 1974 and 1987, Mr. Newlon worked for the predecessor in title of the properties at issue. (Tr. Vol. XXI at p. 4415). Thus, Mr. Newlon has managed the properties at issue for over thirty years.

Mr. Newlon testified that when Western Pocahontas acquired the properties at issue in 1987, an inventory was performed by an independent company, which revealed that the standing, growing timber on the property equaled 61 million board feet. (Tr.

equaling approximately 1,440 acres in the Slab Fork Creek Subwatershed." (March 15, 2007 Order at p. 34).

Vol. XXI at pp. 4427-4428). A second inventory was performed in 1997; this inventory showed that in ten years, Western Pocahontas increased the board feet of timber growing on the property from 61 million to 90 million. (Tr. Vol. XXI at p. 4428). A third inventory in 2005, which was also conducted by an independent company, showed the amount of timber had again increased to 101 million board feet. (Tr. Vol. XXII at p. 4489-4490).

While Appellants' experts did not even attempt to accurately quantify the alleged "potential" increase that they presumed resulted from Western Pocahontas' disturbance of the land and "excessive" harvesting, Western Pocahontas could and did quantify the increase in the amount of timber on the property. Under Joe Newlon's care and guidance, the forest on Western Pocahontas' properties grew more than 65% from 61 million board feet to 101 million board feet between 1987 and 2005.

Mr. Newlon testified that, as a result of its efforts, Western Pocahontas has been recognized in its industry for proper forest management: "The American Forest Institute recognizes proper forest management activities through certification in a tree farm program. Our entire ownership that we have in the state is a certified tree farm. This property is one of the parcels that we own and manage for sustained yield forestry." (Tr. Vol. XXI at p. 4431).

The 65% increase in the amount of timber on the property resulted from at least four measures taken by Western Pocahontas: (1) Western Pocahontas employed professional, certified foresters to manage the properties; (2) Western Pocahontas' professional, certified foresters implemented annual forest management plans to ensure that timber operations are conducted properly and reasonably; (3) Western Pocahontas

imposed diameter limit cutting restrictions on all timber companies that operate on its property, i.e. only large and mature trees are permitted to be cut; and (4) Western Pocahontas operated on a twenty-five year cutting cycle, i.e. on average, approximately 4% of the properties in the Slab Fork Subwatershed were designated as cutting units each year.

As part of his management of the properties, Mr. Newlon completes annual forestry operating plans. (Tr. Vol. XXI at p. 4416). In conjunction therewith, Mr. Newlon inspects the various stands of timber to determine which ones are ready to be harvested. After this is determined, Mr. Newlon enters into Timber Harvesting Agreements with timber companies. (Tr. Vol. XXI at p. 4420).

The timber operations in the Slab Fork Subwatershed were done by Columbia West Virginia Corporation, the Jim C. Hamer Company, and White Oak Lumber Company. (Tr. Vol. XXI at pp. 4418-4420). Because of the diameter limit restrictions that were imposed, only approximately 15% of the basal area in the Slab Fork Watershed was removed between 1994 and July 8, 2001 (approximately 2% per year). (Tr. Vol. XVIII at pp. 3771-3773). Of course, even with this limited, conservative amount of harvesting, there was still a 65% net increase in the amount of timber on Western Pocahontas' properties.

Finally, Western Pocahontas restricted the areas included as cutting units to less than 4% of its property each year. (Tr. Vol. XII at p. 2558). In other words, every year, Western Pocahontas left at least 96% of its properties in the Slab Fork Watershed undisturbed. On the 4% that was disturbed, far less than half of the timber was

removed.⁴⁷ Furthermore, on the 4% of the properties where diameter limit cutting occurred, Western Pocahontas required that BMPs be followed to prevent increased water runoff. Western Pocahontas also required that all operations be closed out in accordance with BMPs. (Tr. Vol. XII at p. 2462). As Mr. Newlon testified, he required BMPs to be followed and operations to be closed out in accordance with BMPs to ensure that there was no increase in the quantity of water leaving Western Pocahontas' properties. (Tr. Vol. XII at p. 2452-53).

It is difficult to conceive of how a land company could more reasonably manage forestry resources than Western Pocahontas did in this case. What more must a land company do? What more could a land company do? As Judge Hutchison properly found, Appellants did not attempt to answer either of these questions as they were required to do under the applicable legal standard established by this Court in In Re: Flood Litigation.

4. **JUDGE HUTCHISON PROPERLY APPLIED THIS COURT'S HOLDING IN IN RE: FLOOD LITIGATION TO CONCLUDE THAT APPELLANTS HAD THE BURDEN TO PROVE THAT WESTERN POCAHONTAS KNEW OR SHOULD HAVE KNOWN OF SOME RISK THAT COULD HAVE BEEN PREVENTED BY ADDITIONAL MEASURES OTHER THAN THE BMPS.**

Appellants mischaracterize Judge Hutchison's ruling regarding Issue Three and claim that Judge Hutchison ignored the holding of In Re: Flood Litigation, and "concluded that following irrelevant sediment-related BMP's equates to a defense verdict." (Brief of Appellants at p. 48).

⁴⁷ "Based upon that admissible evidence, disturbance of 4 percent per annum over a 10-year period of the real estate in the Slab Fork Subwatershed, the removal of 2 percent of the trees on land in the Slab Fork Creek Subwatershed, and the consistent adherence to state regulation, best

Judge Hutchison's decision to grant judgment as a matter of law in favor of Western Pocahontas was not based solely on Western Pocahontas' BMP compliance. Instead, Judge Hutchison's ruling was as follows: "this Court believes that, a) when a defense is raised by the Defendants tending to show that its operations met regulatory standards, best management practices and industry standards, b) the Defendants' operations involved only a small part of their actual holdings in the subwatershed, and c) the Defendants had developed, maintained and amended a forest management plan resulting in a net increase in the amount of available timber on the real estate owned by the Defendants over a 10-year period, it then becomes incumbent upon the Plaintiffs to show what reasonable and additional protections or conduct, if any, would have provided an increased and material protection to adjoining landowners or downstream landowners in the event of a major rain event under these circumstances." (March 15, 2007 Order at pp. 35-36) (emphasis added).

This finding is consistent with the holding of In Re: Flood Litigation, wherein this Court reformulated certified question 6 as follows:

"Is compliance of a landowner in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations competent evidence in any cause of action against the landowner for negligence or unreasonable use of the landowner's land if the injury complained of was the sort the regulations were intended to prevent?" In Re: Flood Litigation, 607 S.E.2d at 877 (emphasis added).

This Court answered question 6, as reformulated, in the affirmative. "[W]e hold that compliance of a landowner in the extraction or removal of natural resources on his or her property with the appropriate state and federal regulations may be evidence in any cause of action against the landowner for negligence or unreasonable use...." In Re:

management practices and industry standards cannot support a finding of unreasonable use."

Flood Litigation, 607 S.E.2d at 877. Clearly, Western Pocahontas' compliance with BMPs is competent evidence that it acted reasonably.

Appellants assert that Judge Hutchison disregarded the provision that: "Such compliance, however, does not give rise to a presumption that the landowner acted reasonably or without liability to others in his or her extraction and removal activities." However, it is Appellants, not Judge Hutchison, who ignored the remainder of the discussion of this Court regarding certified question 6. This Court explained the rationale for its holding as follows:

"Our holding is based on the rationale that, If the defendants knew or should have known of some risk that would be prevented by reasonable measures not required by the regulation, they were negligent if they did not take such measures. It is settled law that a statute or regulation merely sets a floor of due care. Restatement (Second) of Torts, § 288C (1965); Prosser and Keaton on Torts, 233 (5th ed. 1984). Circumstances may require greater care, if a defendant knows or should know of other risks not contemplated by the regulation. *Id.*, 182 W.Va. at 562, 390 S.E.2d at 209. We find that the above-stated rule and its underlying rationale are applicable in this case." In Re: Flood Litigation, 607 S.E.2d at 877.

In Miller v. Warren, 182 W. Va. 560, 562, 390 S.E.2d 207, 209 (W. Va. 1990), which this Court relied on in In Re: Flood Litigation and extended to apply to "any cause of action against the landowner for negligence or unreasonable use," this Court explained that "If the plaintiff is unable to show prima facie negligence by failure to comply with a statute, he must prove negligence in some other particular."⁴⁸

In this case, Appellants were unable to show prima facie "unreasonableness" because Western Pocahontas complied with all regulations and industry standards.

(March 15, 2007 Order at p. 36).

⁴⁸ Though this quote relates to a "negligence" action, in In re Flood Litigation, this Court applied the holding in Miller to "any cause of action against the landowner for negligence or unreasonable use of the landowner's land." In re Flood Litigation, 607 S.E.2d at 877.

Appellants were therefore required to prove unreasonableness “in some other particular.” They did not do so.

Based on In Re: Flood Litigation, because Appellants did not prove prima facie unreasonableness, they were required to show that (1) Western Pocahontas “knew or should have known of some risk,” (2) “that would be prevented by reasonable measures not required by the regulation.” Appellants presented no evidence that Western Pocahontas knew or should have known of a risk that the BMP-compliant operations on its property would materially increase flooding. Some of the operations under attack occurred seven and one-half years before the floods of July 8, 2001. Yet, there was no evidence of any complaints from any property owners regarding increased runoff from Western Pocahontas’ properties in that time. Likewise, there was no evidence of any complaints or violations from the Division of Forestry regarding any operations on Western Pocahontas’ properties in that time. For seven and one-half years, these operations apparently caused no problems at all—certainly none that Western Pocahontas was put on notice regarding.

In addition to the fact that there was no evidence that Western Pocahontas knew or should have known of any risk of flooding from its BMP-compliant timber operations, there was no evidence of what additional or different measures should have been taken. Of course, it is clear that neither Dr. Bell nor Mr. Morgan would be able to suggest alternative measures for conducting a timbering operation since neither of them is qualified to opine regarding how timber operations should be conducted. Accordingly, Judge Hutchison’s ruling regarding Issue Three is consistent with the answer to certified question six in In Re: Flood Litigation.

For all of the foregoing reasons, this Court should affirm Judge Hutchison's grant of judgment as a matter of law in favor of Western Pocahontas.

III. ARGUMENT IN SUPPORT OF THE TRIAL COURT'S CONDITIONAL GRANT OF A NEW TRIAL

In the March 15, 2007 Order, Judge Hutchison held that if the grant of judgment as a matter of law is reversed by this Court, Western Pocahontas would nonetheless be entitled to a new trial on all issues. See March 15, 2007 Order at p. 46. Though it is clear that the judgment as a matter of law in favor of Western Pocahontas should be affirmed, in the event that this Court determines otherwise, Western Pocahontas should be granted a new trial on all issues.

A. JUDGE HUTCHISON'S RULING TO GRANT A NEW TRIAL SHOULD BE REVIEWED UNDER AN ABUSE OF DISCRETION STANDARD.

Judge Hutchison's decision to grant a new trial should be reviewed under an abuse of discretion standard. "A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.' Syl. pt. 3, In re State Public Bldg. Asbestos Litigation, 193 W. Va. 119, 454 S.E.2d 413 (1994), cert. denied, ____ U.S.

_____, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995).” Summers v. Martin, Syl. Pt. 2, 199 W. Va. 565, 486 S.E.2d 305 (W. Va. 1997).

“An appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial.’ Syl. pt. 4, Young v. Duffield, 152 W. Va. 283, 162 S.E.2d 285 (1968). Syl. pt. 2, In re State Public Bldg. Asbestos Litigation, 193 W. Va. 119, 454 S.E.2d 413 (1994), cert. denied, ____ U.S. ____, 115 S. Ct. 2614, 132 L. Ed. 2d 857 (1995). ‘The role of the appellate court in reviewing a trial judge’s determination that a new trial should be granted is very limited.’ *Id.*, 193 W. Va. at 126, 454 S.E.2d at 420.” Summers, 486 S.E.2d at 307.

B. PLAINTIFFS’ EXPERTS, DR. BELL AND MR. MORGAN, WERE NOT QUALIFIED TO TESTIFY UNDER RULE 702.

As discussed at length above, Dr. Bell and Mr. Morgan were not qualified to testify under Rule 702 of the West Virginia Rules of Evidence. Even if they were qualified to testify, Judge Hutchison was clearly within the appropriate bounds of his discretion in determining that the testimony of Dr. Bell and Mr. Morgan was not credible and that the verdict rendered by the jury was against the clear weight of the evidence.

C. WESTERN POCAHONTAS WAS PREJUDICED BY IRRELEVANT EVIDENCE RELATING TO DISMISSED DEFENDANTS.

As Judge Hutchison points out in the March 31, 2007 Order, at the beginning of the Phase I Trial, there were approximately 31 Defendants. Several weeks later when this matter was submitted to the jury, there was a single Defendant, Western Pocahontas.

Appellants argue that "If this decision is permitted to stand, then in all instances where there are partial settlements during trial, the trial judge will be compelled to declare a mistrial and start all over." (Brief of Appellants at pp. 64-65). This argument is a hollow one. Each case must be considered based on its unique circumstances, and while in some cases, the dismissal or settlement of co-defendants in a trial may not result in any prejudice, in certain cases, the resulting prejudice may very well constitute the type of miscarriage of justice that warrants a new trial; this is one of those cases.

This case did not involve the dismissal and release of only one co-defendant or even five co-defendants; it involved the dismissal or settlement of approximately twenty-nine co-defendants. Likewise, this is not a case where only one or two exhibits became completely irrelevant as a result of the dismissals or settlement, but rather literally dozens of exhibits and portions of exhibits were entered that related to the twenty-nine dismissed co-defendants and not to Western Pocahontas. At the beginning of the trial, which spanned approximately eight (8) weeks, jurors were to consider two sub-watersheds and the mining and timbering activities of dozens of defendants. At the conclusion of the trial, the issues had been narrowed to a single defendant and a single subwatershed and timbering activities only.

D. JUDGE HUTCHISON CORRECTLY RULED THAT WESTERN POCAHONTAS' PROFFERED PHOTOGRAPHS OF FLOODING ON JULY 8, 2001 AT TWIN FALLS STATE PARK SHOULD HAVE BEEN ADMITTED.

During the Phase I Trial, Western Pocahontas proffered photographs of flooding that occurred at Twin Falls State Park. Judge Hutchison refused to admit the Twin Falls photographs. Judge Hutchison has now correctly ruled that the Twin Falls photographs were relevant and admissible.

Appellants argue that Western Pocahontas did not “vouch” the record, and cite Horton v. Horton, 164 W. Va. 358, 264 S.E.2d 160 (W. Va. 1980) for the proposition that “[i]f a party offers evidence to which an objection is sustained, that party, in order to preserve the rejection of the evidence as error on appeal, must place the rejected evidence on the record or disclose what the evidence would have shown.” (Brief of Appellants at p. 65).

Contrary to Appellants’ (incorrect) statement that Western Pocahontas did not fulfill the mandate of Horton, Western Pocahontas did, in fact, disclose exactly what the evidence would have shown. At the Phase I Trial, counsel for Western Pocahontas argued that:

”Your Honor, we believe they are relevant, and I might show the photographs to the Court so you can see what we’re proposing to – to offer. [Photographs handed to Court].

The Twin Falls State Park is immediately adjacent to Western Pocahontas Properties on the west, and it – that state park includes not only a golf course; it includes all the surrounding wooded hills. Mr. Morgan’s testimony was that these watersheds don’t – are not naturally prone to flooding, that it’s only when you go up and cut trees and so forth that they flood.

Well, the reality is quite different than that. The reality is that a lot of flooding takes place even in a state park. And as I say, it is immediately adjacent to – to our property. ...

This is an area where there wasn’t any timbering and there wasn’t any coal mining, and there was a lot of flooding.” (Tr. Vol. XXI at pp. 4230-4231).

”Your Honor, that golf course is right on the valley floor. The flooding didn’t come from the golf course. The golf course got flooded from water that came out of the hills, and it came out of hills that had not been timbered, and had not been mined, and the superintendent, who has been subpoenaed, is prepared to testify – and also happens to be the individual who took the photographs – says that he’s been there 30-some years, it’s never done that before, and it hasn’t done that since.

It’s clear evidence of the extreme nature of the storm event. It’s property that is located immediately adjacent to Western Pocahontas

Properties, and we think it is relevant to show that this flood would have happened anyway, without any timbering and without any coal mining.” (Tr. Vol. XXIII at p. 4572).

Thus, it is clear that Appellants are mistaken, and Western Pocahontas did, in fact “disclose what the evidence would have shown.” Appellants concluded in their petition that: “How photographs outside the watershed at issue are relevant is puzzling.” (Petition at p. 65). What is more puzzling is why photographs should be deemed irrelevant for being outside the watershed at issue, while numerous models of hypothetical conditions in watersheds much further outside the Mullens subwatershed formed almost the entire basis of Appellants’ case. The FATT Report, which Appellants characterize as a “critical piece of evidence” involved three subwatersheds outside of the subwatersheds at issue in this case; both of Dr. Bell’s models were of hypothetical conditions in subwatersheds other than the ones at issue in this case. Apparently, in Appellants’ view, this “outside the watershed” rule should only be applied to Western Pocahontas’ proffered evidence and not that of the Plaintiffs. Unlike the models of Dr. Bell, Mr. Morgan, and the FATT Team, which analyzed watersheds several miles from the Slab Fork Subwatershed, the Twin Falls State Park is just over the ridgeline and directly adjacent to Western Pocahontas’ property in the Slab Fork Subwatershed. Twin Falls has been a state park for over 60 years and has not been timbered or mined—and yet it flooded on July 8, 2001. The Twin Falls evidence proved that what Mr. Morgan said on the witness stand is incorrect – floods happen in forested watersheds without timbering and without mining.

E. JUDGE HUTCHISON CORRECTLY RULED THAT A NEW TRIAL WAS WARRANTED BASED ON PLAINTIFFS’ COUNSELS’ REPEATED PRESENTATION OF PREJUDICIAL AND INADMISSIBLE EVIDENCE.

In the March 15, 2007 Order, Judge Hutchison concluded that the jury was encouraged “to resort to passion and sympathy in making their decision,” as a result of the repeated prejudicial and inadmissible comments made throughout the trial by Plaintiffs’ counsel. The prejudicial comments ran the gamut from inadmissible anecdotal hearsay that had been excluded *in limine*, unfounded references to deaths that purportedly resulted from the alleged flooding events, and inappropriate nonverbal communications with jurors. As Judge Hutchison properly ruled, the conduct of Plaintiffs’ counsel essentially denied Western Pocahontas a fair trial.

1. PLAINTIFFS’ COUNSEL’S USE OF ANECDOTAL COMMENTS FROM PUBLIC MEETINGS, QUOTED IN THE FATT REPORT, TAINTED THE PROOF AND RESULTED IN THE DENIAL OF A FAIR TRIAL.

On April 6, 2006, Plaintiffs’ Counsel, Stuart Calwell, while cross-examining defense expert, Wade Nutter, Ph. D., about his criticism of the Flood Advisory Technical Taskforce Report (the “FATT Report”), began quoting anecdotal comments included in the FATT Report from unnamed attendees at a public meeting held on November 26, 2001, in Mullens, regarding the flood event. The comments quoted to the jury during Dr. Nutter’s cross-examination included one resident’s description of an unidentified timbered area as looking “like a bomb went off”, and another resident allegedly described something that “looked like a tidal wave”, an alleged thirty foot wall of water that supposedly resulted from the flooding. (Tr. Vol. XVIII at pp. 3879-3881). Counsel for Western Pocahontas promptly objected, suggesting that Mr. Calwell was attempting to force a mistrial with his abusive antics. (Tr. Vol. XVIII at pp. 3883-3884). After a brief discussion out of the hearing of the jury, Judge Hutchison sustained Western Pocahontas’ objection and ordered Mr. Calwell not to further quote anecdotal comments

from the FATT Report. However, substantial damage had already been done as a result of the reading of these anecdotal comments in open court, despite the fact that the Court ruled in advance of trial that anecdotal evidence of the flooding events would not be permitted.

On April 24, 2006, Western Pocahontas moved to prohibit such anecdotal comments from the FATT Report from being introduced into evidence or given to the jury at all; this motion was granted after considerable discussion. (Tr. Vol. XXIII at pp. 4578-4598). Judge Hutchison recognized that the anecdotal comments taken from this report were objectionable, not only in that they were hearsay within hearsay, but in that the comments, for the most part, were not relevant to Phase I at all, since most of the comments went to damages, if anything legitimate. Further, Judge Hutchison recognized the implicitly inflammatory nature of such comments, especially when delivered in such a combative manner, in granting the motion and sustaining the objection.

Although the trial court prohibited Mr. Calwell from reading further anecdotes from the FATT Report on April 6, 2006, Mr. Calwell continued to question Dr. Nutter as to whether Dr. Nutter believed that citizen comments, such as those previously (and improperly) quoted, should be disregarded by the jury and if Dr. Nutter was calling the unidentified individuals that made those comments "liars."

The prejudice created by Mr. Calwell's comments could not be undone by anything short of a new trial. Mr. Calwell attacked Dr. Nutter with anecdotal, unverified comments, and was able, despite objection, to discuss the reliability of such witness statements afterwards. By improperly introducing verbal images of a bombed-out timber graveyard and a gargantuan ocean wave engulfing Mullens, Mr. Calwell tainted

the proof required to establish unreasonableness. Instead of utilizing expert testimony and other admissible evidence, the Plaintiffs attempted to paint – and, to a great extent, succeeded in painting – a grossly false image of out of control storm runoff and timber demolition, caused by what could only have been unreasonable land use. These inappropriate comments necessarily tainted the jury, resulted in a miscarriage of justice and justify Judge Hutchison’s order granting a new trial.

2. PLAINTIFFS’ COUNSELS’ REPEATED REFERENCES TO DEATHS ALLEGEDLY RESULTING FROM THE JULY 8, 2001 FLOOD VIOLATED THE TRIAL PLAN AND CONSTITUTED PREJUDICIAL ERROR.

During his opening statement, Plaintiffs’ Counsel, Randolph McGraw, announced that “some of our citizens lost their lives on that date [July 8, 2001] due to this – to this matter [the flood].” (Tr. Vol. IV at p. 794). This comment was made despite the fact that Defendants were not permitted any discovery of Plaintiffs’ alleged damages prior to trial, and damages were expressly reserved for Phase II. To this day, Western Pocahontas has not been permitted to engage in any discovery to determine what alleged deaths were being referred to.

Later, while cross-examining Dr. Nutter (immediately after Mr. Calwell’s combative and improper cross-examination, discussed *supra*), Mr. McGraw chastised Dr. Nutter and stated, without support, that “[t]wo people died in this flood.” (Tr. Vol. XVIII at p. 3919). Shortly thereafter, Western Pocahontas moved that Plaintiffs be prohibited from mentioning deaths in connection with the flooding, since such an issue relates to damages and is therefore confined by the Trial Plan to Phase II. (Tr. Vol. XX at pp. 4015-4018). Judge Hutchison sustained the objection and cautioned counsel not to mention such deaths again.

As a general rule, comments from counsel that could excite or inflame the minds of the jury against a litigant, or that are designed to appeal to the passion or prejudice of the jury, are not to be tolerated; if the trial court does not take proper curative steps to erase the possibility of such an improper appeal to the jury, then a new trial should be granted. Crum v. Ward, 146 W. Va. 421, 122 S.E.2d 18 (W. Va. 1961); *see also* State v. Bennett, 179 W. Va. 464, 370 S.E.2d 120 (W. Va. 1988); State v. Stephens, 206 W. Va. 420, 525 S.E.2d 301 (W. Va. 1999)(where jury instruction to disregard improper argument is ineffective, mistrial is appropriate).

One notable case, Hamer v. School Board of Chesapeake, 240 Va. 66, 393 S.E.2d 623 (Va. 1990), involved an eminent domain proceeding in which several landowners challenged the findings of a court-appointed commission to determine just compensation for their land, as well as challenging the school board's taking in the first place. The school board's counsel repeatedly, and in spite of the admonition of the trial court, appealed to the commissioners' private pecuniary interests in valuing the landowners' property⁴⁹. The Supreme Court of Virginia found that such an appeal by counsel was "highly improper" and that, while the trial court had sustained the objection to the first such remark, the court overruled the objection on the second remark and gave no cautionary instruction to the factfinders. Hamer, 393 S.E.2d at 628. The Supreme Court of Virginia cited precedent for the proposition that "where prejudicial effect is so overwhelming [from improper comments by counsel] that it cannot be removed by the court's instruction, the injured party ... is entitled to a new trial." Id. (citing Maxey v. Hubble, 238 Va. 607, 611, 385 S.E.2d 593, 597 (Va. 1989)).

⁴⁹ The commissioners served as factfinders in the lower court proceedings, but the Supreme Court treated that body as a jury for appeals purposes.

In the present litigation, the comments about people dying as a result of the July 8, 2001 floods, whether accurate or not, were clearly offered for a single purpose – to excite the passions and prejudice of the jury against Western Pocahontas. The only relevance that deaths can have in this proceeding is to inflame the jury; as in Hamer, the effect is so prejudicial as to overwhelm the legitimacy of the proceedings. Since these errors were not cured or curable, Judge Hutchison properly found that Western Pocahontas was entitled to a new trial.

3. PLAINTIFFS' COUNSELS' REPEATED SUGGESTION REGARDING THE LIMITED ROLE OF THE PHASE I JURY CREATED THE FALSE IMPRESSION THAT THE PHASE I JURY DID NOT NEED TO TAKE ITS RESPONSIBILITIES SERIOUSLY, SINCE ANOTHER JURY WOULD ULTIMATELY DETERMINE LIABILITY AND DAMAGES, IF ANY.

Both during the trial and especially in their closing arguments to the jury, Plaintiffs' counsel made repeated statements to the effect that the Phase I jury did not have ultimate responsibility for determining liability, causation, or damages, and therefore could essentially pass the burden of the tough questions on to the Phase II jury, by finding for the Plaintiffs in Phase I. On April 25, 2006, during cross-examination of Mark Weaver, Mr. McGraw attempted to steer the testimony in the direction that the Plaintiffs' closing arguments eventually would go, by asking Mr. Weaver a "hypothetical" designed to elicit a response about which of three different juries hearing a multi-phase trial would be responsible for compensating the Plaintiffs for their loss. (Tr. Vol. XXIV at p. 4867). Quick objections by defense counsel caused Mr. McGraw to pursue another line of testimony.

During Mr. Calwell's closing argument, he reduced the task of the Phase I jury to a simple cause and effect: by answering the three operative Phase I questions in the

affirmative, the jury would “open the courthouse door for them and give them the right to come in and **then** prove their cases. **That’s all we’re asking you to do.** Answer ‘Yes’ to all three, and the door will open, and then people can come in and press their legitimate claims to see whether or not they deserve compensation.” (Tr. Vol. XXVII at pp. 5355-5356) (emphasis added). Mr. Calwell repeated his request that the jury “open the courthouse door” at the end of his argument as well. (Tr. Vol. XXVII at p. 5358).

Mr. McGraw then added his version of this impermissible characterization of the jury’s role in his closing argument. He got to the point quickly, telling the jury that “this is the last stop for you all as a jury. This is the only decision that you’ll make in this trial, are the three issues that have been talked about ...the train stops here for you ... These are the only three things you decide.” (Tr. Vol. XXVII at p. 5363). Mr. McGraw then drove the point home: “Other juries and other events will decide the other issues involved.” *Id.* Plaintiffs’ Counsel specifically mentioned causation and damages as issues that are reserved to future juries.

Finally, Mr. Segal wrapped up the closing arguments for the Plaintiffs, taking pains to thank the jury “on behalf of all the people that I hope who get to come back to this courtroom in front of another jury, who you weren’t allowed to meet, because your part of the case doesn’t involve meeting them, on behalf of all those people, though, please know that your service makes this engine run, and keeping the courthouse doors open is a mighty, mighty, mighty power that you have.” (Tr. Vol. XXVII at pp. 5502-5503).

The thrust of the Plaintiffs’ strategy was clear, and it is not a new tactic among attorneys, although it is most often seen in the criminal law context: making a jury feel more comfortable in returning an otherwise difficult and, in reality, significant verdict

for a party, by creating the impression that it is someone other than this jury who will ultimately decide the questions of liability and damages (or guilt/innocence and punishment, in the criminal context). In the criminal context, this deceptive device is usually quickly recognized and summarily rejected by the courts; beginning with the landmark decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), courts have allowed criminal defendants to request resentencing where the prosecutor and/or trial judge make impermissible comments regarding the jury's role and the effect of its decisions, that likely diminish the sentencing jury's sense of responsibility with respect to its role in the sentencing process. *See, e.g.*, Tamme v. Commonwealth, 759 S.W.2d 51 (Ky. 1988) (prosecutor's suggestion that jury would only "recommend" sentencing, not impose it, held objectionable since it implied that the jury could pass the burden of sentencing on to another party and reduced the importance and seriousness of the jury's role); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(error for prosecutor to suggest that jury's role was to render "advisory" opinion on sentencing and that burden of imposing sentence was not on jurors' shoulders), *partially overruled on other grounds by* Davis v. Singletary, 119 F.3d 1471 (11th Cir, 1997).

Although rarer, there are civil cases in which counsels' comments to the jury on its role have been deemed inappropriate. In Lacy v. CSX Transportation, Inc., 205 W. Va. 630, 520 S.E.2d 418 (W. Va. 1999) this Court discussed the impropriety of commenting to the jury on certain matters, including the effects of joint and several liability. The Court admonished that counsel's comments to the jury about potential post-judgment effects of issues to be decided by the jury could only be based on speculation, and explicitly held that "in a civil trial it is generally an abuse of discretion for the trial court to instruct the jury or permit argument by counsel regarding the

operation of the doctrine of joint and several liability, where the purpose thereof is to communicate to the jury the potential post-judgment effect of their assignment of fault.” Id. at 431 (emphasis added).

Of course, all of these cases are distinguishable in one way or another from the subject case. However, the underlying purpose of Plaintiffs’ Counsels’ comments, and the likely effects thereof, are the same motivations and possible outcomes that led the courts in the cited cases to find reversible prejudicial error. In the present case, the challenged comments of Mr. Calwell, Mr. McGraw and Mr. Segal essentially ask the jury to abandon its role or at least treat it more lightly. By focusing the jury’s attention on the “potential post-judgment effect” of its verdict, considered in light of the duties of the Phase II jury, the Plaintiffs have asked the jury to speculate about the Phase II proceedings and have requested the jury to simply pass the burden of ultimate decision on these issues to that jury (since it will have to consider some of the same issues anyway, a problem addressed in Western Pocahontas’ cross assignments of error).

The prejudice is the same here as in Lacy; counsels’ comments have caused the jury to impermissibly speculate about post-verdict events in an inappropriate manner. Asking the jury to “keep the courthouse doors open” to the Plaintiffs by checking “Yes”, “Yes”, and “Yes” on the verdict form and blindly passing the burden to another jury, though different in kind from informing the jury about joint and several liability, is no different in effect or motivation, and the prejudice to Western Pocahontas is just as great, if not greater, than the prejudice suffered in Lacy. (Tr. Vol. XXVII at pp. 5358, 5374).

The parallels to the criminal cases are even greater; the prosecutors in cases leading to Caldwell challenges invariably attempt to get the jury to pass the burden of

sentencing on to another party, i.e., the judge, an appeals court, etc. The prosecutors are clearly attempting to relieve any anxiety in the minds of jurors regarding the seriousness of imposing a sentence, particularly a death sentence. Plaintiffs' counsel in the present case have done exactly the same thing for the same reason; of course, there is no criminal trial or death penalty at stake here, but the rationale behind the Caldwell line of cases should nevertheless apply, regardless of the severity of the liability at stake. These decisions rest upon the constitutional right to a fair trial by an impartial jury, and civil litigants have the same entitlement as criminal defendants in this respect. Plaintiffs' counsels' attempts to convince the jury in this case that it can pass the burden of judgment on to another jury, since that jury will impose liability, is no different beneath the surface than a prosecutor's sideways attempt to secure a strong sentence from a squeamish jury by telling them that they are not really ultimately responsible for judgment or sentence. It is prejudicial to criminal defendants, and it was prejudicial in the present litigation as well.

4. PLAINTIFFS' COUNSEL ENGAGED IN PROHIBITED AND INAPPROPRIATE NONVERBAL CONTACT WITH JURORS IN OPEN COURT DURING THE TRIAL, EVEN AFTER ADMONISHMENT FROM THE TRIAL COURT TO CEASE ANY SUCH CONTACT, AND SUCH CONDUCT HAD A CLEAR PREJUDICIAL EFFECT ON WESTERN POCAHONTAS.

On March 24, 2006, at the end of that day's hearing, Judge Hutchison admonished counsel that it had received several complaints "with regard to nonverbal communication [by counsel] with jurors during the proceedings, smiling, giggling, eye contact. One person used the word 'flirting.'" (Tr. Vol. XI at p. 2362). Judge Hutchison severely cautioned against such conduct, although this discussion was had outside the presence of the jury. No lawyer in particular was identified at that time.

Subsequently, on April 6, 2006, Mr. Jernigan, counsel for one of the then co-defendants, raised the issue of inappropriate contact between jurors and counsel again by informing the trial court, in the absence of the jury once again, that during the course of the trial, “there’s been interplay with the jury, and during the last witness – and I know Stuart [Calwell] doesn’t do it intentionally, but when I said I wasn’t questioning, he objected and chuckled with the jury. I don’t think that type of interplay is appropriate.” (Tr. Vol. XVIII at p. 3194). Judge Hutchison responded by alluding to its admonitions of March 24, 2006, and further stated, out of the hearing of the jury, that “I will indicate that it must stop.” *Id.*

On April 10, 2006, Judge Hutchison vouched the record and stated in pertinent part as follows:

“You have been warned to make- and to make the record perfectly clear, my caution several days ago regarding nonverbal communication with the jury was directed at you. At the time, I had no desire to embarrass anyone or make a record. You have now required that I make a record and make it clear. **I have and have all others in this courtroom, seen you making facial expressions and flirting with members of the jury.** You, Mr. Calwell, are a very talented attorney and **clearly you know how to communicate without making a record.**”

(Tr. Vol. XX at pp. 4026-29) (emphasis added). Obviously, a trial transcript cannot portray Mr. Calwell’s repeated, flagrant and inappropriate nonverbal communication with the jury. However, such communications were observed and acknowledged by the trial court and others.

This is precisely the sort of prejudice that Rule 59 was designed to counter. There is simply no adequate remedy for such an ongoing, willful violation of the rights of all parties to a fair trial by an impartial jury. Jurors are only human; though presumed to follow the law, jurors often are influenced by their feelings toward counsel in a case.

The extent and nature of inappropriate contact between counsel and the jury in this case tainted the jury and deprived Western Pocahontas of a fair trial. As Judge Hutchison appropriately ruled, a new trial was the only appropriate remedy for this miscarriage of justice.

There are sporadic cases dealing with attorney conduct of this type and the necessity of a mistrial or new trial to correct actual prejudice or the appearance thereof in an attempt to preserve the sanctity of the trial by jury process. In Colosimo v. Penn. Electric Co., 337 Pa. Super. 363, 486 A.2d 1378 (Penn. Super. Ct. 1984), a juror had met with one of the attorneys in the case out of court to discuss a business situation; this was done in direct defiance of the court's order not to have any such contact. The court noted the "general rule that a trial court should grant a new trial if an attorney communicates with a juror during the course of trial and the harmlessness of such contact is not shown." 486 A.2d at 1380 (citing Printed Terry Finishing v. City of Lebanon, 372 A.2d 460, 471 (1977); Mattox v. United States, 146 U.S. 140 (1892)). In ordinary cases, the court had held that "before granting a new trial, the trial court must assess the prejudicial impact of the contact between the attorney and the sitting jury, and determine whether such contact influenced the verdict." Id. Although the court had "recognized the fundamental impropriety of lawyer-juror communications during the course of trial", it noted that accidental or unavoidable casual contacts were not the problem at issue. Id. at 1381. The court went on to observe that there "are certain attorney-juror contacts which happen during trial, 'which if permitted to stand would shake the confidence of laymen in the fairness of judicial proceedings.'" Baker v. Ohio Ferro-Alloys Corp., 261 N.E.2d 157, 164 (Ohio Ct. App. 1970); Omaha Bank, Etc. v. Siouxland Cattle Co-Op., 305 N.W.2d 458 (Iowa 1981)". Id. In other words, in

circumstances where the conduct of counsel shows “such gross impropriety” that even without prejudice a new trial must be granted, the court’s “concern is not with the contact’s potential influence on a discrete verdict; rather we seek to protect against the ‘confidence shaking effect upon future cases, which would result from appellate disregard of such events.’ Baker, 261 N.E.2d at 164.” Id. The court found that it was “imperative that we promote public confidence in our judicial system by vigilantly protecting the integrity of our jury system. Trial by jury presupposes that the jury works in a controlled environment, untouched by any influence other than that properly permitted by the trial judge. To safeguard zealously this controlled environment, we must see to it that each juror enters a case impartial, and throughout trial remains uncontaminated by outside pressures.” Id. (internal citations omitted).

Of particular relevance in both Colosimo and the present case, the objectionable contacts were brought to the trial court’s attention and the court admonished the offending parties to cease such conduct; in Colosimo and the present litigation, the parties nonetheless continued to engage in such conduct in defiance of the trial court’s orders. In Hamer, the court held that the “injured party’s right to a new trial is especially strong where his opponent has persisted in an objectionable course of conduct after the trial judge has expressed disapproval of it, sustained an objection to it, or instructed the jury to disregard it. In that situation, an appellate court will presume that the prejudicial effect of the improper conduct was too strong to be removed by further admonitions or jury instructions.” 393 S.E.2d at 628. *See also* Baker v. Ohio Ferro-Alloys Corp., 261 N.E.2d 157, 164 (Ohio Ct. App. 1970) (automatic reversal where counsel and some jurors discussed counsel’s client’s operations off record).

The conduct by Plaintiffs' Counsel in the case at bar was an obvious and prohibited attempt to curry favor with the jury in an inappropriate manner, and falls within the scope and rationale of the cited cases. Even in the absence of prejudice, however, there is significant authority that the trial court's grant of a new trial was necessary to preserve the appearance of integrity in the trial process and to avoid a grave miscarriage of justice. Plaintiffs' counsel repeatedly engaged in prohibited conduct, despite Judge Hutchison's order not to engage in such conduct, and, as a result, a new trial was properly granted.

F. JUDGE HUTCHISON CORRECTLY RULED THAT IT WAS ERROR TO ADMIT THE FATT REPORT INTO EVIDENCE.

The FATT Report was commissioned by former Governor Bob Wise "to focus specifically on the impacts of the mining and timbering industry on the July 8th flooding."⁵⁰ (FATT Report at p. 1). In their brief, Appellants make various assertions about the content of the FATT Report and the conclusions of the FATT Team. (Brief of Appellants at p. 10). Appellants also state in footnote 3 of their brief that the FATT Report was a "critical piece of evidence considered by the jury." (Brief of Appellants at p. 10). Appellants claim that it was error for Judge Hutchison to conditionally grant a new trial on the basis that the FATT Report should not have been admitted. (Brief of Appellants at pp. 66-67).

Appellants' reliance on the FATT Report is misplaced because: (1) the content of the FATT report does not support the conclusion that timbering necessarily increases surface water runoff; (2) the FATT report is not applicable to Western Pocahontas'

⁵⁰ Importantly, the purpose of the FATT Report, to focus solely on potential mining and timbering impacts to the exclusion of all other possible contributing factors such as commercial development, residential development, highway projects, etc., reveals an inherent bias.

operations in the Slab Fork Subwatershed; and (3) the FATT report is unreliable and was incomplete at the time of its admission into evidence.

1. THE CONTENT OF THE FATT REPORT DOES NOT SUPPORT THE CONCLUSION THAT LOGGING INCREASED SURFACE WATER RUNOFF IN ANY MATERIAL RESPECT.

Appellants assert that “[t]he FATT study concluded, based on the use of engineering and hydrology models, addressed by Appellants’ experts Dr. Bell and Mr. Morgan, that mining and logging did influence the degree of runoff in the subject watersheds by increasing surface water runoff and the resulting stream flows.” (Brief of Appellants at p. 10). However, this statement cannot be reconciled with the actual content of the FATT Report.

Contrary to Appellants’ conclusory statement, the FATT Report demonstrates that, in some areas, timbering operations were found to have *no* effect and did not increase runoff. The FATT Team selected three watersheds to model: (1) Seng Creek, where logging had occurred within the previous 1-5 years and mining was ongoing; (2) Scrabble Creek, where both current and recent logging occurred and mining was in some form of reclamation; and (3) Sycamore Creek, which, for modeling purposes, was assumed to be undisturbed.

In the Seng Creek watershed, the FATT Team’s model showed impacts from timbering operations on peak runoff in the range of 3.9% to 5.9%. As noted above, Dr. Bell admitted that increases up to 15% would not have been material. (Tr. Vol. VII at p. 1623). In the Scrabble Creek watershed, the FATT Team’s modeling showed impacts ranging from 0% to 4% at the various points of measurement. Therefore, the Scrabble Creek model indicated that in the watershed where both current and recent logging

operations were modeled, at some points of measurement, there was absolutely no increase in runoff from the timber operations.⁵¹

2. **THE FATT REPORT CONTAINS CONCLUSIONS REACHED FROM MODELS OF THREE WATERSHEDS (SENG CREEK, SCRABBLE CREEK, AND SYCAMORE CREEK) THAT WERE NOT AT ISSUE IN THIS CASE.**

As Appellants assert in their brief: “It must be noted that this case is not about whether timbering and its attendant land disturbances is reasonable per se.” (Brief of Appellants at p. 3). Yet, Appellants urge that the results of the FATT Report, derived from different operations in different watersheds, may be extrapolated to impose liability upon Western Pocahontas: “The FATT report concluded that the results are applicable to most steep slope topographic regions associated with southern West Virginia.” (Brief of Appellants at p. 10). This case involves timbering on Western Pocahontas’ property in the Slab Fork Subwatershed only. However, the FATT Team did not model Western Pocahontas’ operations in the Slab Fork Watershed or anything else in the Mullens Subwatershed. In arguing that the results of the FATT Report should be applied to all timber operations in the “steep slope topographic regions of southern West Virginia,” Appellants do, in fact, seek to make this a case about the reasonableness

⁵¹ Dr. Bell testified as follows:

“Q. The Seng Creek modeling done by the FATT team showed timbering operation’s impact between 3.9% and 5.9%, right?”

A. Yes.

Q.: All right. And the Scrabble Creek modeling showed timbering operation’s impact – depending on the measuring point – of between **zero percent** and 4 percent. Correct?

A.: Yes.” (Tr. Vol. VII at p. 1473) (emphasis added).

of timbering “per se” throughout southern West Virginia. Such a proposition must be rejected.

However, perhaps the more important issue is that even if the FATT Report were somehow deemed relevant to the issues in this case, i.e. timbering operations on Western Pocahontas’s properties in the Slab Fork Subwatershed, the FATT Team concluded that timbering resulted in increases in peak flow at some points in the modeled watersheds of up to a maximum of 5.9% and resulted in absolutely no increase at other points in the modeled watershed. Therefore, the only thing that the FATT Team concluded is that some timbering in some locations can have some effect on peak flow – according to Dr. Bell, an immaterial effect – or it can have absolutely zero effect on peak flow. Therefore, even if the FATT Report is “applied” in this case, it does nothing to advance Appellants’ position.

3. THE FATT REPORT IS ONLY ONE PART OF A CONTINUING INVESTIGATION BY THE STATE. AS ADDITIONAL PEER REVIEWS AND REPORTS HAVE EMERGED, THE INHERENT UNRELIABILITY OF THE FATT REPORT, PARTICULARLY AS TO THE FORESTRY ISSUES CONSIDERED, HAS BEEN CONFIRMED.

Regardless of the conclusions reached in the FATT Report, the report should never have been admitted because it is incomplete and unreliable. The FATT Report is only one part of a continuing effort by the State to determine whether timbering and mining activities contributed to widespread flooding that occurred throughout southern West Virginia in 2001. Even before the FATT Report was admitted into evidence, the criticism surrounding the FATT Report was sufficiently significant so as to warrant its exclusion.

First, the conclusions of the FATT Team as to the effects of timbering are particularly suspect since no forestry professionals were on the FATT Team. As Appellants point out in their brief, the FATT Team was comprised of professionals within the West Virginia Department of Environmental Protection (“DEP”) Division of Mining and Reclamation (“DMR”). No professionals from the Division of Forestry or any other forestry professional served on the FATT Team. (Tr. Vol. XVIII at pp. 3708-3709). As in the case of Mr. Morgan, a mining consultant, the mining professionals on the FATT Team simply were not qualified to reliably study or opine regarding the effects of forestry practices on water runoff. For this reason, the Flood Advisory Committee recommended that the FATT Report be evaluated by impartial forestry experts. (FATT Report at p. 96).⁵²

Since the trial, the FATT Report and, more specifically, the curve number method that was utilized in that report (and was also used by Dr. Bell and Mr. Morgan), have continued to be subject to criticism by experts in the field of forest hydrology. On October 25, 2006, a report was issued by Steven C. McCutcheon, Ph.D., a renowned, independent expert, along with a committee of others with unique expertise, under contract to the West Virginia Division of Forestry.⁵³ (Rainfall-Runoff Relationships for Selected Eastern U.S. Forested Mountain Watersheds: Testing of the Curve Number

⁵² See, *supra*, regarding Dr. Jackson and Dr. Swank’s criticism of the methods used in the FATT Report.

⁵³ The primary author of the McCutcheon Report is Steven C. McCutcheon, Ph.D., D.WRE, P.E., a researcher at the University of Georgia Warnell School of Forest Resources. McCutcheon is a renowned expert in ecological engineering, hydrology, hydrodynamics and related subjects. The Report was prepared in conjunction with an expert panel including: Mary Beth Adams, Ph.D., U.S Forest Service Timber and Watershed Laboratory, Fernow Experimental Forest; Wayne Swank, Ph.D., retired from the U.S. Forest Service Coweeta Hydrologic Laboratory; John L. Campbell, Ph.D., Hubbard Brook Experimental Forest; Richard H. Hawkins, Ph.D., P.E., P.H., of the University of Tucson; and Charles R. Dye, West Virginia State Forester.

Method for Flood Analysis dated October 25, 2006 ("McCutcheon Report"). After careful investigation, Dr. McCutcheon and the committee confirmed that forestry practices (like Western Pocahontas' operations) "do not have an overall effect on major flooding."⁵⁴ (McCutcheon Report at p. 35) (emphasis added).

Dr. McCutcheon and the committee extensively analyzed the literature relating to forestry practices and flooding, data and articles from three experimental forests (Fernow in West Virginia, Coweeta in North Carolina, and Hubbard Brook in New Hampshire), the FATT report, the scientific validity of the curve number method, and other issues.

On October 25, 2006, Dr. McCutcheon and the committee completed the McCutcheon Report and concluded (1) that customary forestry practices do not cause flooding and (2) that the curve number method is not an appropriate method for analyzing the impacts of forestry practices on flooding. The McCutcheon Report concludes that the curve number "method cannot be used to hindcast or analyze a specific storm as originally designed. The current NRCS leadership states that the method cannot be used in the formulation of policy and regulations. This precludes the use of the method defined in NCRS (1998, 2001) as the primary decision-making tool to hindcast flooding effects like that which occurred in Southern West Virginia in 2001." (McCutcheon Report at p. 255). "This study proves that different concepts are necessary to provide more precise forest runoff forecasts, especially to support major policy decisions like those contemplated by the State of West Virginia and others. Regulatory

⁵⁴ On November 15, 2006, Western Pocahontas filed a Supplemental Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial on the basis of the McCutcheon Report, which constitutes newly discovered evidence. In the March 15, 2007 Order, Judge Hutchison stated that "The Court, for purposes of this order, does not consider the supplemental motion at this

management, policy making, and legal proceedings involving forestry require more advanced modeling techniques tailored to forestry hydrology and management practices....” (McCutcheon Report at p. 4).

In response to the FATT Report, the McCutcheon Report notes that “The West Virginia Flood Advisory Technical Taskforce (FATT 2002) overlooked that forest management practices have not been proven to affect major floods in river basins.” (McCutcheon Report at p. 34) (emphasis added). Based on the extensive literature review that was conducted and the analysis of data from experimental forests, Dr. McCutcheon and the committee concluded that “[t]his investigation establishes that hydrologically dominant forestry practices like clear cutting and especially the subtle impacts of selective tree cutting do not consistently and significantly change curve numbers [runoff] for the eight watersheds investigated in the Appalachian Highland Province.” (McCutcheon Report at p. 257) (brackets added for clarification). Thus, the McCutcheon Report directly refutes Appellants’ contention that forestry operations on Western Pocahontas’ property materially increased runoff.

The McCutcheon Report also highlights the fact that, contrary to Appellants’ mantra that the models used by Dr. Bell and Mr. Morgan are “universally accepted,” the curve number method cannot be applied to determine the effects of forestry practices, as Judge Hutchison properly considered in his Daubert/Wilt analysis. For example, the curve number method “has not been formally adopted in a handbook or guidance manual to rainfall-runoff analysis in watersheds with forests as the dominant land cover.” (McCutcheon Report at p. 31). “[T]he curve number method has not been

time and defers ruling on Western Pocahontas’ Supplemental Motion for Judgment as a Matter of Law or New Trial.” See March 15, 2007 Order at p. 6.

adapted to account for forest practices.” (McCutcheon Report at p. 48). The curve number method “has not been formally adopted in the NRCS (2001) National Engineering Handbook for use on forested watersheds or wild lands.” (McCutcheon Report at p. 65).

“Most troubling is the lack of specific procedures for adapting curve-number-based forecasts of runoff to standard silvicultural practices such as the use of riparian buffers, special access road constructions, diameter-limit cutting, selective cutting, and clear cutting.” (McCutcheon Report at p. 65). “Another major flaw of the curve number estimates for forested watersheds is that the method has never been formally updated to take into account important forest management practices like road and landing construction and clear cutting or deforestation, not to mention more subtle effects like diameter limit cutting and thinning.” (McCutcheon Report at p. 257). “The broad general and specific uncertainty in watershed curve numbers leaves very little if any resolution to define curve numbers for different land uses, covers and treatment, and soils, much less being able to define more subtle effects of different forestry practices such as road and landing construction, clear cutting, and thinning.” (McCutcheon Report at p. 253). The McCutcheon Report concludes that “[T]here is no clear evidence that the curve number method has been validated for forested watersheds for use in the simulation of extreme floods like those that occurred in West Virginia in 2001 and at other times.” (McCutcheon Report at p. 65) (emphasis added).

Certainly the most relevant finding regarding the curve number method is that it is not appropriate for use in analyzing forested watersheds or the effects of forestry practices, as was done by Appellants’ experts and the FATT Team. In addition, the McCutcheon Report calls into question the use of the curve number method in general

for any analysis of an individual storm event. “The lack of a significant correlation between curve numbers derived from rainfall-runoff data and watershed characteristics implies that the fundamental structure and basis of the curve number method remains in question.” (McCutcheon Report at p. 50) (emphasis added). The McCutcheon Report specifies several fundamental problems with the curve number method, including: lack of scientific basis; bias and uncertainty of tabulated curve numbers; inconsistent data; and fundamental and procedural weaknesses. (McCutcheon Report at pp. 53-59).

Though Judge Hutchison did not rely upon the McCutcheon Report in reaching the rulings that are the subject of this appeal, it is clear that he did not abuse his discretion in finding that the models from which Dr. Bell and Mr. Morgan derived their opinions were unreliable or in ruling that the FATT Report should not have been admitted into evidence. Judge Hutchison’s ruling is in accord with the handbooks and manuals for the models and the relevant scientific literature, all of which is confirmed by the McCutcheon Report.

G. THE VERDICT WAS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE

In addition to all of the specific issues outlined above (the lack of qualification of Plaintiffs’ expert witnesses, the exclusion of relevant evidence, the admission of the FATT report, the inappropriate and prejudicial comments and arguments of Plaintiffs’ counsel, and the utter lack of evidence to support a verdict in Plaintiffs’ favor as to the three issues), Judge Hutchison determined that the jury’s verdict was against the clear weight of the evidence:

“In this case, based upon this Court’s ruling, with regard to the expert witnesses proffered by the Plaintiffs herein, and further based upon the weight of the evidence supplied by the Defendants herein, the Court **FINDS** that the Defendants’ evidence in opposition to Plaintiffs’ position

should have carried greater weight and should have created in the minds of fair and reasonable jurors a belief that the position proffered by the Defendants was in fact the better evidence presented in this case with regard to what happened on July the 8th, 2001. This Court has ruled that the testimony of Dr. Bruce Bell and Mr. John Morgan was not reliable and scientific. But in the event the appellate court disagrees with this Judge's conclusions, it is clear that the method and mode of presentation of the evidence by the Plaintiffs does not substantially support their obligation to prove by a preponderance of the evidence that the Defendants use of its property materially increased the peak flow of water from that property and that this material increase in peak flow materially caused the receiving streams to overflow their banks. Additionally, there is no relevant evidence that this Court can find that supports the conclusion that the use by the Defendants of their real estate was unreasonable under the criteria as set forth in In Re: Flood and also as instructed by this Court to the jury.

This Court in no way intends to impugn the integrity of the jurors who sat for nearly three months in this case, who nobly and diligently considered all the testimony and exhibits that were presented to them and, and based upon the evidence they had, attempted to make a decision that was correct in their minds. The problem is that the jury was exposed to irrelevant, improper and salacious evidence, which they should not have heard, which this Court firmly believes affected their ability to make an informed decision. The Plaintiffs' entire case was designed to inflame this jury and to imply that this jury's function during Phase One was less serious and less important than the roles of jurors in the phases to come.

In this Judge's mind, this jury was not adequately protected from what this Court has now found to be unreliable scientific evidence, inappropriate cumulative, objectionable evidence, improper anecdotal evidence, the admission of improper and unfounded documents (specifically the FATT report) and the refusal to admit what, upon review, appears to have been relevant evidence in the form of the Twin Falls Watershed evidence. This Court also believes that the net effect was that the jurors found it impossible to separate the wheat from the chaff and were required to improperly speculate as to their findings with regard to the three priority questions." (March 15 2007 Order at pp. 44-45).

Because the task of trying the first case in the novel and complex mass flood litigation fell upon Judge Hutchison, he is quite probably more intimately familiar with the history of these proceedings and the issues under consideration than any other judicial officer in this State. Judge Hutchison's decision that judgment Western Pocahontas was entitled to judgment as a matter of law and that, in the alternative, Western Pocahontas was entitled to at least a new trial was surely not a decision that

was made lightly. The decision to grant a new trial is clearly not an abuse of discretion and deference should be given to Judge Hutchison's ruling.

IV. ARGUMENT IN SUPPORT OF CROSS ASSIGNMENTS OF ERROR AS TO ADDITIONAL GROUNDS WARRANTING THE GRANT OF A NEW TRIAL

In the event that this Court determines that all of the findings and conclusions underlying Judge Hutchison's grant of a new trial should be reversed, Western Pocahontas submits that there are additional grounds warranting a new trial, which were properly preserved, though not relied upon by Judge Hutchison in his March 15, 2007 Order. Those grounds include the following:

- The trial court committed error in adopting an unconstitutional and prejudicial Trial Plan.
- The trial court erred by admitting Plaintiffs' photographs of alleged flood damage without a proper foundation to establish whether the source of the water and debris depicted originated from Western Pocahontas' property.
- Western Pocahontas was prejudiced by the trial court's determination that the Appellants could attack operations of Defendants that were voluntarily dismissed with prejudice.
- The trial court committed error by allowing the jury to consider the actions of White Oak Lumber Company in determining whether Western Pocahontas reasonably used the properties at issue.
- The charge given to the jury contained errors that materially prejudiced Western Pocahontas.

- The jury verdict form utilized by the trial court unfairly prejudiced Western Pocahontas because it failed to follow the Trial Plan Requirement that operations be assessed individually.
- Western Pocahontas is entitled to a new trial because Juror 20 should have been disqualified for reasons that were not discovered by Western Pocahontas until after the verdict was rendered, despite the exercise of ordinary diligence.

Each of these grounds is addressed below.

A. THIS COURT MAY AFFIRM THE JUDGMENT OF THE TRIAL COURT WHERE IT IS CORRECT ON ANY LEGAL GROUND, REGARDLESS OF THE GROUND, REASON OR THEORY ASSIGNED BY THE TRIAL COURT FOR ITS JUDGMENT.

Rule 10(f) of the West Virginia Rules of Appellate Procedure states that “Appellee, if he is of the opinion that there is error in the record to his prejudice, may assign such error in a separate portion of his brief and set out authority and argument in support thereof.” Although Judge Hutchison conditionally granted Western Pocahontas a new trial on the grounds discussed above, additional grounds for relief under Rule 59 were raised in Western Pocahontas’ post-trial motion.

It is well-settled that this Court “may affirm the judgment of the trial court where it is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the trial court for its judgment.” Barnett v. Wolfolk, Syl. Pt. 3, 149 W. Va. 246, 140 S.E.2d 466 (W. Va. 1965). Accordingly, Western Pocahontas submits that each of the issues addressed below require that this Court affirm the portion of the ruling granting a new trial in favor of Western Pocahontas.

B. THE TRIAL COURT COMMITTED ERROR IN ADOPTING AN UNCONSTITUTIONAL AND PREJUDICIAL TRIAL PLAN.

Prior to the trial court's entry of the Trial Plan, Defendants repeatedly raised concerns about and objections to the bifurcated trial plan adopted by the trial court. Judge Hutchison preserved all of the Defendants' objections to the Trial Plan.⁵⁵ Defendants moved the trial court to adopt an alternate case management order that would allow complete liability trials or complete trials of discrete groups of Plaintiffs and Defendants located in common, manageable geographic locations. *See Defendants' "Motion for Adoption of Upper Guyandotte Watershed Case Management Order No. 1,"* hereinafter referred to as "Defendants' Proposed Trial Plan."

As support for Defendants' Proposed Trial Plan, Defendants argued that the consolidation of all claims being asserted by all Plaintiffs against all Defendants in a particular watershed would not be practicable due to the topographic and geographic dispersal of Plaintiffs and of Defendants' properties and the sheer number of Plaintiffs and Defendants involved in each watershed. *See Defendants' Proposed Trial Plan at p. 2.* Furthermore, Defendants pointed out that the trial court is bound by the answers to certified questions provided by this Court, which answers made clear that the resolution of Plaintiffs' claims would require individualized inquiries into the manner in which

⁵⁵ The Court noted that: "This trial Plan is adopted over the OBJECTIONS of the defendants as to (a) the propriety of a phased Trial Plan that relieves the plaintiffs of the burden of proof required to establish a claim for unreasonable land use, negligence or private nuisance; (b) the consolidation of claims of geographically dispersed plaintiffs with claims that require individualized proof against disparate defendants; (c) the failure of the Trial Plan to make allowance for the discovery and introduction of evidence relative to actions of third-parties in the diversion of surface waters, which diversion may have caused or contributed to the harms alleged by individual plaintiffs; and (d) the continued stay of discovery into the harm or damages allegedly incurred by individual plaintiffs, all of which the defendants claim infringe on their right to a fair trial and otherwise constitute a denial of due process." *See Trial Plan at pp. 6-7.*

each Defendant developed its property in light of all the relevant circumstances, including the nature of the harm suffered by particular Plaintiffs, if any. For these reasons, Defendants argued that a so-called “common issues” trial would not be appropriate or practicable. See Defendants’ Proposed Trial Plan at p. 2. The trial court rejected Defendants’ Proposed Trial Plan and instead adopted the Trial Plan.

The Trial Plan is flawed on its face because it violates the mandates of Article III, § 13 of the West Virginia Constitution and does not meet the requirements of Rule 42(c) of the West Virginia Rules of Civil Procedure. The inherent flaws in the Trial Plan resulted in a trial that was likewise fraught with prejudicial error, most notably: incessant, improper, and unproven arguments and comments from Plaintiffs’ counsel and their witnesses regarding the harm allegedly caused by Defendants’ conduct; inconsistent and confusing jury instructions; and improper speculation by the jury.

1. IN WEST VIRGINIA JURISPRUDENCE, THERE IS A STRONG PRESUMPTION IN FAVOR OF UNITARY TRIALS OF ALL LEGAL ISSUES AND AGAINST BIFURCATION.

This Court historically has expressed a preference for unitary trials of all legal issues. In Bowman v. Barnes, 168 W. Va. 111, 117, 282 S.E.2d 613, 617 (W. Va. 1981), the Court stated that there is a presumption in favor of a single trial of all issues. In Bryan v. Big Two Mile Gas Co., 213 W. Va. 110, 116, 577 S.E.2d 258, 264 (W. Va. 2001), the Court again stressed the preference for unitary trials of all issues: “West Virginia jurisprudence favors the consideration, in a unitary trial, of all claims regarding liability and damages arising out of the same transaction, occurrence or nucleus of operative facts...”. The Court noted that while there are exceptions to this general rule, there is a point where bifurcation of issues affects more than convenience- “It makes a substantial change in

the nature of the jury trial itself.” Bryan v. Big Two Mile Gas Co., 213 W. Va. 110, 116, 577 S.E.2d 258, 264 (W. Va. 2001), *quoting*, State ex rel. Cavender v. McCarty, 198 W. Va. 226, 231, 479 S.E.2d 887, 892 (W. Va. 1996) (J. Cleckley, concurring) (emphasis added). “It is for this reason that the bifurcation decision goes beyond the pale of mere trial management.... We believe as a matter of public policy that... separation of this kind should be sparingly used.” *Id.* (ellipses in original)(emphasis added). *See also State ex rel. Crafton*, 207 W. Va. 74, 79, 528 S.E.2d 768, 773 (W. Va. 2000) (“Our historic preference for unitary trials is clear in our jurisprudence” ... “separate trials should not be ordered unless such a disposition is clearly necessary””) (emphasis added); State ex rel. Cavender v. McCarty, 198 W. Va. 226, 231, 479 S.E.2d 887, 892 (W. Va. 1996) (“It is the policy of the law to limit the number of trials as far as possible, and separate trials are granted only in exceptional cases.”) (emphasis added).

Because there is a strong presumption in favor of unitary trials of all issues of liability and damages in West Virginia, and because it has been recognized that bifurcation is not merely a method of trial management, but is instead an event that substantively impacts the nature of the litigation, the burden on the trial court in justifying a decision to bifurcate legal issues for separate trials is a high one.

2. IT IS WELL-SETTLED THAT ORDERING A SEPARATE TRIAL OF AN ISSUE THAT IS NOT ENTIRELY SEPARATE AND DISTINCT VIOLATES THE CONSTITUTION.

Even if a court determines that there might be some justification for overcoming West Virginia’s strong preference for unitary trials of all issues, under no circumstances can issues be separated in a manner that violates the guarantees of Article III, § 13 of the West Virginia Constitution, which mandates that:

“In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.”

W. Va. Const. Art. III, § 13.⁵⁶

Two essential guarantees provided by this constitutional provision are (1) that parties are entitled to a fair trial by jury and (2) that once facts are tried by a jury, they will not be reexamined by another jury (often referred to as the “reexamination clause”). Courts have routinely found that when a trial plan orders a separate trial of an issue that is not entirely separate and distinct from the remaining issues, it necessarily violates both the right to a fair trial by jury and the reexamination clause. Because the Trial Plan erroneously bifurcated the question of reasonableness for a Phase I trial, separate and apart from the remaining, interwoven components of the causes of action for (1) unreasonable use of land, (2) negligence, (3) nuisance and (4) interference with riparian rights, the Trial Plan violated the West Virginia Constitution and was fundamentally flawed.

There is a long line of authority that clearly establishes that separating issues for trial that are not separate and distinct leads to confusion, uncertainty and prejudice and constitutes a denial of the right to a fair trial. A partial trial may not be ordered “unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.” Gasoline Prods. Co. v. Champlin

⁵⁶ This provision of the West Virginia Constitution is substantially similar to the Seventh Amendment of the United States Constitution, which states that: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” Accordingly, cases construing the

Ref. Co., 283 U.S. 494 (1931). In denying a partial trial, the United States Supreme Court in Gasoline Products reasoned that “the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.” Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 500 (1931) (emphasis added).

This Court has likewise cautioned that an important limitation on ordering separate trials is that the issues to be determined in one trial must be “entirely distinct and separable from the matters involved in the other issues.” Munden v. Johnson, Syl. Pt. 1, 102 W. Va. 436, 135 S.E. 832 (1926). This is consistent with the general rule that “only if the issues are distinct is bifurcation proper.” 88 C.J.S. *Trials* § 20 (2001), *citing*, Malta Public School Dist. A and 14 v. Montana Seventeenth Judicial Dist. Court, Phillips County, 283 Mont. 46, 938 P. 2d 1335 (1997).

In Dunlap v. Graves, 2004 ML 4067, 8 (Mont. Dist. 2004), the court found that “It is not appropriate to bifurcate issues when the issues are so intertwined that if they are separated it will create confusion and uncertainty...”. (Emphasis added).

Laitram Corporation v. Hewlett-Packard Company, 791 F. Supp. 113, 115 (E.D. La. 1992) likewise cautions that courts should bear in mind before ordering separate trials that the issue to be tried separately must be so distinct and separable from the others that a trial of it alone may be had without injustice. In Carlson v. Carlson, 836 P.2d 297 (Wyo. 1992), the court stated that “When the issues to be tried are not clearly separate and distinct, they do not lend themselves to bifurcation. In the absence of clearly

Seventh Amendment of the United States Constitution are instructive in the interpretation of Article III, § 13 of the West Virginia Constitution.

separate and distinct issues, bifurcation may result in prejudice to one or more of the parties....A fair trial is often thwarted when interwoven issues are tried separately." (Emphasis added).

In Swofford v. B & W Inc., 336 F.2d 406, 415 (5th Cir. 1964), the Court of Appeals for the Fifth Circuit noted that "There is an important limitation on ordering a separate trial of the issues under Rule 42(b): the issue to be tried must be so distinct and separable from the others that a trial of it alone may be had without injustice." Id., citing, Gasoline Prod. Co. v. Champlin Ref. Co., 283 U.S. 494, 499-500 (1931) (emphasis added).

Based on Constitutional concerns, in In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323 (D.N.Y. 2002), the Court refused to certify a class for a separate trial on issues of "general liability" with later trials determining issues of specific liability:

"Plaintiffs propose that litigation be divided between generic and specific liability in a way that violates the Seventh Amendment's prohibition on reexamination of a jury verdict. See U.S. Const. amend. VII. **While a court may instruct a jury to try only certain issues**, see Simon, 200 F.R.D. at 32-35 (defending liberal use of Rule 23(c)(4) to aid judicial efficiency), **it is constitutionally limited by concerns over juror confusion and uncertainty**, see id. at 36-39 (discussing Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 500, 75 L. Ed. 1188, 51 S. Ct. 513 (1931)). Here, juries in follow-on suits would be charged with the impermissible task of sorting out the following issues: (1) whether defendants were liable to a particular individual given the first jury's finding of general liability; (2) whether a particular release of gasoline was foreseeable in light of the first jury's determination of general foreseeability; and (3) whether a particular UST owner received a warning in light of a jury finding that no warnings were given in general. See Rhone-Poulenc, 51 F.3d at 1303-04 (explaining juror confusion that would result from attempting to decide comparative negligence and proximate causation in follow-on trials where "negligence" had already been determined); n54 accord In re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (rejecting proposal that "general causation" issue be tried because "commonality among class members on issues of causation and

damages can be achieved only by lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury."); In re Agent Orange, 818 F.2d at 164-65 (stating that "generic causation" is not a proper issue that may be tried in a class action); Hamilton, 935 F. Supp. at 1331-32 (denying certification of class with respect to issues of "duty and breach only").

n54 It is well-settled that bifurcation of trial is authorized in federal court, but such division must "carve at the joint" between liability and damages. Rhone-Poulenc, 51 F.3d at 1302.

In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 209 F.R.D. 323, 352 (D.N.Y. 2002)
(emphasis added).

In addition to the fact that ordering a separate trial of an issue that is not separate and distinct creates uncertainty and confusion that constitutes a denial of the right to a fair trial, courts have also recognized that care must be exercised to ensure that bifurcation of issues does not run afoul of the reexamination clause. When interwoven issues are separated for trial, it is inevitable that different juries will examine the same facts, which violates the reexamination clause of Article III, § 13. For example, after stating that great care must be exercised in determining whether and how to separate issues for different trials, one district court explained that:

"If the issues were not truly separable, the result would be that different juries would have considered the same issue, in violation of the Seventh Amendment. See Wright, supra at 512 (p. 110, 1999 Pocket Part), citing Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir.), cert. denied, 516 U.S. 867, 116 S. Ct. 184, 133 L. Ed. 2d 122 (1995); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). Consequently, the issues must be truly separable before separate trials can be ordered without the risk of untoward consequences."

F & G Scrolling Mouse L.L.C. v. IBM Corp., 190 F.R.D. 385, 387-388 (D.N.C. 1999)

(emphasis added).

Similarly, in Benner v. Becton Dickinson & Co., 214 F.R.D. 157 (S. Dist. N.Y. 2003), the court ordered that negligence and comparative negligence were not separate and distinct issues and could not be tried separately, explaining that “At bottom, issues may be divided and tried separately, but a given issue may not be tried by different, successive juries.” (Emphasis added). The court in Benner concluded that bifurcating inter-related issues violates the Seventh Amendment and Rule 42(b) of the Federal Rules of Civil Procedure. Id.

In Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir.), cert. denied, 516 U.S. 867, 116 S. Ct. 184, 133 L. Ed. 2d 122 (1995), the Court of Appeals for the Seventh Circuit found that the district judge had exceeded his authority under Rule 42(b) of the Federal Rules of Civil Procedure because his trial plan proposed a separate trial of the negligence of the defendants, reserving comparative negligence, proximate causation and other issues of liability to later trials and other juries. The Court noted that courts are authorized to conduct separate trials under Rule 42(b) of the Federal Rules of Civil Procedure, but noted that “**as we have been at pains to stress recently, the district judge must carve at the joint. Of particular relevance here, the judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries.**” In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (emphasis added).

The court further expounded that the plan of the district judge in the Rhone case (a separate trial relating only to the negligence of the defendants) “is inconsistent with the principle that the findings of one jury are not to be reexamined by a second, or third, or nth jury.” Id. The court found that issues of comparative negligence and proximate

causation were overlapping with the issue of the defendants' negligence and could not be bifurcated:

“Comparative negligence entails, as the name implies, a comparison of the degree of negligence of plaintiff and defendant. See, e.g., Alaska Stat. § 09.17.080; ILCS 735 5/2-1116; N.J. Stat. § 2A:15-5.1; Ohio Rev. Code § 2315.19; Utah Code § 78'38. Proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, uninterruptedly, and with reasonable probability from the negligent act of the defendant. It overlaps the issue of the defendants' negligence even when the state's law does not (as many states do) make the foreseeability of the risk to which the defendant subjected the plaintiff an explicit ingredient of negligence. See, e.g., Powell v. Drumheller, 653 A.2d 619, 1995 Pa. LEXIS 65, *7- *8 (Pa. Jan. 23, 1995); Whittaker v. Saraceno, 418 Mass. 196, 635 N.E.2d 1185 (Mass. 1994); Vincent v. Fairbanks Memorial Hospital, 862 P.2d 847, 851-52 (Alaska 1993); Flight Line, Inc. v. Tanksley, supra, 608 So. 2d at 1158-59; Wasfi v. Chaddha, 218 Conn. 200, 588 A.2d 204 (Conn. 1991). ...How the resulting inconsistency between juries could be prevented escapes us.”

In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995).

Prior to adopting the Trial Plan in the case at bar, the trial court acknowledged the problems that would arise from deferring issues of comparative fault, contributory fault of third parties and affirmative defenses to a later phase:

[The Defendants are] “entitled to not be required to try these basic issues, these key issues, twice. And that's what's going to happen if I don't open it up and allow them to do some sort of investigation with regard to were there some sort of alterations made to the property, that could have, or that you made to the property, that could have, how do we say it, created additional problems, other than what naturally existed. ...Well, and we've got two issues.... We've got active conduct by the plaintiffs that may have contributed to the problem. That's the first one. But then you've got the other side, which is—which related to the defenses of the defendant, assumption of the risk, all those types of issues, act of God--...--proximate cause, all that sort of thing. Those are two different things, and to put us in a position, as a group, where we're going to have to try all the defendants and keep out any potential counterclaims or claims for contribution against the plaintiffs, is going to require that we go through this with the defendants that have been named by the plaintiff. And, then, depending on who is left, have them go back in and try it again with regard to the reasonable use by the plaintiffs of their own property, and I think that causes me a little bit of a problem.”

See December 19, 2005 Hearing Transcript at p. 49 lines 15-22 and p. 50 line 16 to page 51 line 11.

A trial plan that violates the Constitutional requirements of Article III, §13 of the West Virginia Constitution necessarily violates Rule 42(c) of the West Virginia Rules of Civil Procedure, as well. Rule 42(c) of the West Virginia Rules of Civil Procedure states that:

“The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any **separate** issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, **always preserving inviolate the right of trial by jury as declared by Article III, Section 13 of the West Virginia Constitution or as given by a statute of this State.**”⁵⁷

(Emphasis added).

Rule 42(c) contains the threshold requirement that an issue cannot be tried separately unless it is, in fact, a **separate** issue. Rule 42(c) also states that issues may not be tried separately unless the guarantees of Article III, § 13 are preserved. This Court further requires that any order separating issues for trial must contain a sufficient justification for the bifurcation:

“Parties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting sua sponte, **must provide sufficient justification to establish for review** that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, **the overriding concern being the provision of a fair and impartial trial to all litigants.**” Syl. pt. 6, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988).”

⁵⁷ Rule 42(c) of the West Virginia Rules of Civil Procedure is substantially similar to Rule 42(b) of the Federal Rules of Civil Procedure. Accordingly, cases construing Rule 42(b) of the Federal Rules of Civil Procedure are instructive in interpreting Rule 42(c) of the West Virginia Rules of Civil Procedure.

State ex rel. Cavender v. McCarty, Syl. Pt. 2, 198 W. Va. 226, 479 S.E.2d 887 (W. Va. 1996) (emphasis added).

Thus, even if a court determines that the issues separated for trial are, in fact, separate and distinct, and that a trial of those issues can be had without violating Article III, § 13 of the West Virginia Constitution, the court must further provide sufficient justification to establish that the separation of certain issues for a separate trial promotes judicial economy, serves the convenience of the parties and does not prejudice any party. However, findings on these issues were not made, and there is no sufficient justification for the Trial Plan.

The Court recently noted that:

“In determining whether to bifurcate a trial, circuit courts should be mindful of the danger that evidence relevant to both issues may be offered at only one-half of the trial. This hazard necessitates the determination that the issues of liability and damages be **totally independent** of each other prior to permitting bifurcation.... Piecemeal litigation is not to be encouraged. Particularly is this so in the field of personal injury litigation, where the issues of liability and damages are generally **interwoven** and **the evidence bearing upon the respective issues is commingled and overlapping.**’ Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 42(c), at 797 (2000).”

Sydenstricker v. Mohan, 217 W. Va. 552, 562, 618 S.E.2d 561, 571 (W. Va. 2005) (emphasis added).

3. THE TRIAL PLAN WAS UNCONSTITUTIONAL AND PREJUDICIAL BECAUSE IT BIFURCATED THE ISSUE OF REASONABLENESS FROM THE REMAINING, INTERWOVEN ISSUES OF LIABILITY.

The Trial Plan was unconstitutional and prejudicial because: (1) the issue of reasonableness is not separate and distinct from the remaining issues of liability; (2) submitting the issue of reasonableness to the jury separate and apart from interwoven

issues necessarily results in uncertainty and confusion, which amounts to the denial of a fair trial; (3) the Trial Plan violates the reexamination clause because the Phase II jury will have to try facts that relate to the interwoven issue of reasonableness; (4) the trial court did not provide sufficient justification to establish that informed discretion was exercised to determine that the Trial Plan promoted judicial economy and convenience to the parties and avoided prejudice to the parties; and (5) the Trial Plan did not, in fact, promote judicial economy and convenience to the parties, and most importantly, did prejudice Western Pocahontas and infringe upon its Constitutional rights.

The third issue outlined in the Trial Plan was:

“...was the use by the Defendants of the property in question unreasonable under the circumstances set forth by the Supreme Court of Appeals in the case of In Re: Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004).”

Though the trial court ordered that the issue of reasonableness be tried separately from the remaining issues of liability, appellate courts have recognized that “reasonableness” cannot be “determined in a vacuum” and that “reasonableness” has no meaning outside of the legal and factual framework in which it is to be considered.

“Whether a particular risk of harm is reasonable cannot be determined in a vacuum. The phrase ‘unreasonably dangerous’...has no discernable content of its own and...must acquire its meaning solely from the environment attendant on each of the variety of disputes in which it is put to use.” Celestine v. Union Oil Co., 636 So. 2d 1138, 1142 (La. Ct. App. 1994), quoting, Ladue v. Chevron, U.S.A., Inc., 920 F.2d 272, 277-278 (5th Cir. 1991). (Emphasis added). In Celestine, the Louisiana Court of Appeals further explained that assessing a risk “under all of the circumstances of a particular case” requires “determining the reasonableness of a given risk vis-à-vis the plaintiff, or more

accurately, vis-à-vis the plaintiff and those similarly situated.” Id. That court also explained that it is not proper to examine the issue of reasonableness “with respect to the world at large.” Id.

The impossibility of determining reasonableness in a vacuum is greatly exacerbated where, as here, the reasonableness concept is being employed as part of several discrete legal theories, each of which uses the word “reasonable” in a different sense and defines it in relation to different facts. In In Re: Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (W. Va. 2004), this Court held that Plaintiffs have cognizable causes of action based on: (1) unreasonable use of land under the balancing test set forth in Morris v. Priddy, 181 W. Va. 588, 383 S.E.2d 770 (W. Va. 1989); (2) negligence; and (3) interference with riparian rights. The Court also answered that there were not enough stipulated facts on record to make a determination as to whether Plaintiffs have a fourth cause of action based on private nuisance, and that the Panel and trial courts should make that determination as the evidence develops. In Re: Flood Litigation, 216 W. Va. 534, 543, 607 S.E.2d 863, 872 (W. Va. 2004).

While “reasonableness” is a component of each of these causes of action, the legal standard of reasonableness varies. In fact, “reasonableness” factors into the four causes of action identified by this Court in entirely different ways: (1) as to a Morris v. Priddy action, the question is “unreasonable use of land”; (2) as to negligence it’s the familiar “reasonable person” inquiry; (3) in a riparian rights action, the issue is “unreasonable use of water”; and (4) in a nuisance action the focus is “unreasonable interference” with someone else’s land. No serious argument can be made (1) that the deceptively simple Issue Three in the Trial Plan adequately addresses the four different concepts of reasonableness at issue in this action, or (2) that the Phase II jury will not have to re-

examine reasonableness in order to properly determine liability under the four theories at issue. To the contrary, it is patently obvious that the Phase II jury will have to re-examine reasonableness (for many different reasons discussed below) and in doing so will violate the Constitution.

Based on the answers to the certified questions provided by this Court in In Re: Flood Litigation, Defendants, long prior to the Phase I trial, repeatedly objected to any trial plan in which the issue of reasonableness would be bifurcated for separate consideration by the jury “in a vacuum” or in isolation from other issues of liability such as harm caused, proximate causation, comparative negligence, assumption of risk, contributory causes, etc.

“In determining what is reasonable use, if you have a gas well in the middle of Charleston, that may be an unreasonable use, because of its surroundings. If you have a gas well in a remote portion of the Oceana subwatershed, that may be perfectly reasonable. You have to judge reasonable use in relationship to specific plaintiffs, and not in the abstract. In this case, the jury will have to determine... Is that a reasonable use? You have to look at the harm caused to specific plaintiffs, if any, as a result of those operations.... But you have to look at the totality of the circumstances, and I believe that’s language that comes from the Supreme Court’s decision, all of the circumstances, including the location of the plaintiffs. Thus, you have to begin with discrete areas, and that’s why we believe that discrete areas are necessary.”

See September 30, 2005 Hearing Transcript at p. 48 line 7 to p. 49 line 2 (emphasis added).

“...As you recall, under our proposal we suggest that the plaintiffs, first of all, select two of the non-drainage watersheds, which apparently they have done independently of that. We then suggested, and I want to focus on this for just a moment, that within that area...they then look to the clusters of plaintiffs that they have and identify the defendants they say caused the damage.

...To take the entire [sub]watershed, as at least I understand their proposal, would involve plaintiffs that have, obviously, no claim against operations that are remote to theirs and would, in essence, become a hodge-podge, and it would be extremely difficult to relate the operations of any given plaintiff to the alleged harm that was caused by those

operations. And you will recall from the Supreme Court's decision, they said that harm – not damages, but the harm – the foreseeability of the harm that was caused was relevant. So you have to look at the harm that was caused to these plaintiffs, the foreseeability of it, the relative advantages and disadvantages of whatever group of plaintiffs you take to those operations.”

See September 30, 2005 Hearing Transcript at p. 39 lines 11-15 and p. 40 lines 6-19

(emphasis added).

“One cannot weigh interests and balance concerns by only looking at one side of the equation. One does have to look at the other side of the equation, which is the plaintiffs in this instance.”

See September 30, 2005 Hearing Transcript at p. 49 lines 18-21 (emphasis added).

The trial court improperly rejected Defendants' motions and objections and proceeded with a trial plan that violated the Constitution and was contrary to the guidance provided in In Re: Flood Litigation, 216 W. Va. 534, 543, 607 S.E.2d 863, 872 (W. Va. 2004).

- a. **"Reasonable use of land" under the Morris v. Priddy balancing test is based on several factors, some of which the Trial Plan erroneously bifurcated for Phase II consideration.**

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

Connecticut's "reasonable use" rule, which requires a balancing of all the circumstances which are of relative advantage to the landowner against all circumstances which are disadvantageous to the downstream landowners:

"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 as well as social utility" (quoting from 182 Conn. at 488-89, 438 A.2d at 741) 383 S.E.2d 770, 773.

Later, in In Re: Flood Litigation, this Court held that the relevant circumstances of disadvantage to downstream property owners includes, most obviously, "amount of harm caused" and foreseeability of that harm:

"[A]fter surveying the tests for reasonableness utilized in other jurisdictions, we hold that in determining whether a landowner has acted reasonably in dealing with surface water pursuant to the "reasonable use" rule set forth in Syllabus Point 2 of Morris Associates, Inc. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989), the jury generally should consider **all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on part of landowner making alteration in the flow of surface waters**, the purpose or motive with which the landowner acted, etc. See, e.g., Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (Minn. 1958); Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529, 50 Cal.Rptr. 273 (1966); and Rick v. Worden, 369 N.W.2d 15 (Minn.Ct.App. 1985).

In Re: Flood Litigation, 216 W. Va. 534, 542 607 S.E.2d 863, 871 (W. Va. 2004)
(emphasis added).

Under the Trial Plan, the Phase I jury was not able to consider the amount of harm caused, because the amount of harm suffered by particular Plaintiffs, if any, was reserved for Phase II, and the issue of proximate causation was reserved for Phase II. The Phase I jury was not able to consider the foreseeability of the harm caused for the same reasons. Likewise, the Phase I jury was not able to consider all of the other relevant circumstances under a trial plan that focused solely on the conduct of the Defendants.

It is also clear that Plaintiffs have a duty to take reasonable precautions to avoid or reduce any actual harm. In Keys v. Romley, 64 Cal. 2d 396, 409, 412 P.2d 529, 537 (Cal. 1966), also cited by the Court in In Re: Flood Litigation, the California Court stated that:

"It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of

surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury."

(Emphasis added). Accordingly, in order to make a determination regarding the issue of reasonable use, a jury, at the same time that it considers the circumstances of advantage to the landowner and of disadvantage to those downstream, including harm, foreseeability and proximate causation, must also consider the interrelated issues of comparative negligence and assumption of the risk, among other things. The Trial Plan failed to allow for such contemporaneous consideration of any of these factors and thus violated the requirements of In Re: Flood Litigation.

- b. Reasonableness is also a component of a nuisance claim ("unreasonable interference" with the private use and enjoyment of another's land), which was erroneously bifurcated for Phase II consideration under the Trial Plan.**

As to the cause of action for nuisance⁵⁸, this Court instructed in In Re: Flood Litigation that "A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another's land." In Re: Flood Litigation, 216 W. Va. 534, 543, 607 S.E.2d 863, 872 (W. Va. 2004).

Because nuisance focuses on unreasonable interference with the rights of others, rather than unreasonable use of one's own property, the critical components of "actual harm" and foreseeability of that harm are even more indispensable to a proper consideration of a nuisance action than a Morris v. Priddy action.

⁵⁸ The Court did not decide whether the Plaintiffs have a cognizable cause of action sounding in nuisance but, rather, reserved that issue for future determination by the Panel and trial courts upon a fuller development of the evidence. In re Flood Litigation, 216 W. Va. 534, 543, 607 S.E.2d 863, 872 (W. Va. 2004).

In Hendricks v. Stalnaker, 181 W. Va. 31, 380 S.E.2d 198 (W. Va. 1989), which is relied upon in In Re: Flood Litigation as the leading case on the issue of nuisance, the Court made clear that the issue of reasonableness **cannot** be examined by focusing solely on the conduct of the Defendant. “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.**” Hendricks v. Stalnaker, 181 W. Va. 31, 34, 380 S.E.2d 198, 201 (W. Va. 1989) (emphasis added). “At the heart of nuisance is the notion that the lawful use of one 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 the circumstances.” Id. (emphasis added). Balancing interests, determining the effects or harm caused, examining all the relevant circumstances and finally determining whether unreasonable interference occurred - these things cannot be accomplished in a trial that is unconstitutionally bifurcated in the manner set forth in the Trial Plan.

In Hendricks v. Stalnaker, the Court listed some, though not all, of the circumstances that must be considered to determine the issue of reasonableness as used in an action for nuisance: the extent of the harm involved; the character of the harm involved; the burden on the person of avoiding the harm; the impracticability of preventing or avoiding the invasion, etc.

Under the Trial Plan, the extent of the harm caused, if any, was deferred until Phase II. The character of the harm involved, if any, was deferred until Phase II.⁵⁹

⁵⁹ The character of the harm caused, if any, in this case remains unknown, five years after the event at issue occurred. The character of the event that took place on July 8, 2001 is known-flooding. However, the allegations are not that Defendants caused the floods, but rather that

Whether the Plaintiffs took any measures to avoid the harm caused, if any, was deferred until Phase II. The extent of the alleged invasion, if any, was deferred until Phase II. The impracticability of avoiding the alleged harm, if any, was deferred until Phase II. The Phase I jury could not properly and fairly determine the issue of reasonableness when the evidence regarding the factors that must be weighed to determine reasonableness were deferred until Phase II.

It is also important to note that the jury, in examining all relevant circumstances and in balancing the interests of the parties must examine the actual harm caused, if any.⁶⁰ This was impossible for the Phase I jury to do under the Trial Plan because relevant circumstances and issues, particularly harm suffered, if any, and proximate causation, were deferred until Phase II.

- c. A negligence claim also contains a reasonableness component, in that negligence requires an analysis of what a reasonable, prudent person would do and that too was erroneously bifurcated for Phase II consideration under the Trial Plan.**

each Defendant somehow changed the floods or added to the floods in some unknown and unspecified degree.

⁶⁰ Plaintiffs have, in the past, taken the position that it is not necessary to look at the actual harm caused, but instead, a jury can weigh the potential harm. This theory is clearly contradicted by the controlling authorities. In In re Flood Litigation, the Court specified clearly that the jury must consider the “harm caused,” not the potential harm. In re Flood Litigation, 216 W. Va. 534, 542, 607 S.E.2d 863 (W. Va. 2004) (“...The jury generally should consider all relevant circumstances, including such factors as amount of **harm caused**.”) (emphasis added). Likewise, in Hendricks v. Stalnaker, the Court made it clear that the balancing of interests requires a balancing of the **actual harm caused**, if any. “Unreasonableness is determined by balancing the competing landholders’ interests.” Hendricks v. Stalnaker, 118 W. Va. 31, 380 S.E.2d 198 (W. Va. 1989). The Court cites § 822 of the Restatement Second of Torts which specifically rejects the notion that theoretical or potential harm may be considered instead of the actual harm caused in making a determination of reasonableness. This section notes that one may be liable for nuisance if his conduct is the legal cause of an invasion that is either (1) intentional *and* unreasonable, or (2) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities. Restatement Second of Torts, § 822 (1979). To determine reasonableness, “it is necessary to look only at the gravity, or extent, of the **harm actually suffered**.” Restatement Second of Torts, § 822, comment k. (1979). (Emphasis added).

In order to establish negligence, there must be, among other things, a breach of a legal duty. The Court has described duty as a “question of whether the defendant is under any obligation for the benefit of the *particular plaintiff*; and in negligence cases, the duty is always the same, to conform to the legal standard of *reasonable conduct* in light of the apparent risk.” *Strahin v. Cleavenger*, 216 W. Va. 175, 183, 603 S.E.2d 197, 205 (W. Va. 2004), quoting, *Robertson v. LeMaster*, 171 W. Va. 607, 611, 301 S.E.2d 563, 567 (W. Va. 1983), quoting, W. Prosser, *The Law of Torts*, §53 (4th ed. 1971) (emphasis added). “Whether a person acts negligently is always determined by assessing whether or not the alleged negligent actor exercised reasonable care under the facts and circumstances of the case, with reasonable care being the level of care a person of ordinary prudence would take in like circumstances.” *Strahin v. Cleavenger*, 216 W. Va. 175, 183, 603 S.E.2d 197, 205 (W. Va. 2004).

Yet again, under the law of negligence, the issue of reasonableness is only one inseparable component that must be considered in light of all the relevant facts and circumstances, making bifurcation of the issue of reasonableness a logical impossibility and an infringement on the constitutional mandate that issues may not be separated for trial when they are interwoven with other issues such that they cannot be fairly considered in isolation.

d. Interference with riparian rights also contains a reasonableness component, i.e., reasonable use of water, an issue erroneously bifurcated for Phase II consideration under the Trial Plan.

Interference with riparian rights requires an inquiry into whether a defendant made reasonable use of water as it ran through the defendant’s property before reaching the plaintiff’s property. “The right of a lower riparian owner to the natural flow of the

stream is subject only to a reasonable use of the water by the upper riparian owners as it runs through their lands before reaching his [or hers]." In Re: Flood Litigation, 216 W. Va. 534, 542, 607 S.E.2d 863, 871 (W. Va. 2004), quoting, Roberts v. Martin, Syl. Pt. 4, 72 W. Va. 92, 77 S.E. 535 (W. Va. 1913) (emphasis added). Under the Trial Plan, the Phase I jury was asked whether each Defendant made reasonable use of its land, *not* whether each Defendant made reasonable use of the water flowing through its land, but the Phase II jury looking at reasonable use of water will be bound, Plaintiffs will argue, by the Phase I finding of unreasonable use of land -- without, however, having any clue as to just what acts or omissions the Phase I jury considered to be "unreasonable." Thus, the Phase II jury will have no choice but to entirely reconsider the issue of negligence as it relates to the use of water, but such reconsideration is constitutionally prohibited.

Of course, the fundamental problem remains that the Phase I jury could not fairly determine whether Western Pocahontas' use of land was reasonable (or whether a defendant's use of the water flowing through its land was reasonable) without considering all of the relevant circumstances, including the amount and nature of the harm suffered by Plaintiffs, if any, and proximate causation.

- e. **The Trial Plan requires the Phase II jury to re-examine the same facts and factors as to reasonableness as were adjudicated by the Phase I jury.**

Although Article III, § 13 of the West Virginia Constitution *prohibits* reexamination of facts that have been tried by a jury, the Trial Plan both explicitly and implicitly *requires* the Phase II jury to reexamine the same facts considered by the Phase I jury.

The issue of reasonableness, which was erroneously separated for the Phase I trial, simply was not separate and distinct from the remaining issues of liability. This is indisputable even on the face of the Trial Plan. The third question outlined for the jury in the Trial Plan is: "...was the use by the Defendants of the property in question unreasonable under the circumstances set forth by the Supreme Court of Appeals in the case of In Re: Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004)." See Trial Plan at p. 3. The Trial Plan then stated that: "If the jury in Phase II should determine that the operations of an individual defendant were performed negligently and/or created a private nuisance, and further that the negligence and/or nuisance was the proximate cause of an individual plaintiffs' loss, the jury shall determine what damages, if any, the individual plaintiff suffered as a result of that defendants' negligence and/or nuisance. **These determinations will take into consideration all of the factors identified by the Supreme Court of Appeals in response to the certified questions in the case of In Re: Flood Litigation.**" See Trial Plan at p. 4 (emphasis added).

Thus, the Trial Plan requires that the Phase II jury reexamine facts that have been tried by the Phase I jury based on the very same factors, the essential difference being that the Phase II jury presumably would have the requisite legal and factual framework within which to make a determination regarding reasonableness, while the Phase I jury did not. In addition, the parties would be permitted in Phase II to first discover and then present all the facts and circumstances that must be fairly considered to analyze the factors outlined, critical aspects of a fair trial that were denied in the Phase I trial under the Trial Plan. Because the Trial Plan requires that different juries consider the same facts in relation to the same factors, it is indisputable that the issues

separated for the Phase I trial in the Trial Plan were *not* separate and distinct from the remaining issues that must be examined by a different jury.

Of course, in Phase II, Plaintiffs will undoubtedly argue that unreasonableness has now been determined for all purposes and that such determination is binding on the Phase II jury. If the Court adopts that position, the Phase II jury will then have to determine whether defendants are liable under four different theories, each of which employs reasonableness in different ways -- without, however, knowing what acts or omissions the Phase I jury considered to be unreasonable. Absent that knowledge, there is simply no way the Phase II jury can avoid re-examining reasonableness.

Thus, the Trial Plan was erroneous, prejudicial and unconstitutional on its face, and Western Pocahontas should, at minimum, be granted a new trial to be conducted in a manner such that a jury may properly, fully and fairly consider the issues outlined by this Court in In Re: Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (W. Va. 2004).

C. BECAUSE THE TRIAL COURT ADOPTED A TRIAL PLAN THAT WAS INHERENTLY FLAWED, THE TRIAL WAS LIKEWISE INHERENTLY FLAWED AND PREJUDICIAL TO WESTERN POCAHONTAS.

In addition to being overwhelmingly supported by the case law, the soundness of Defendants' objections to the Trial Plan is apparent from the events that transpired at the Phase I Trial. Defendants' concerns about being subjected to a trial regarding the issue of reasonableness in isolation from other interwoven issues of liability manifested themselves in the gross prejudice and clear error that abounded in the Phase I trial. Most notably, the jury was permitted (in fact, essentially *required*) to speculate regarding issues that Western Pocahontas was not permitted to defend or even discover in Phase I. In addition, Western Pocahontas was prejudiced by the repeated, improper

and unfounded insinuations from Plaintiffs' counsel regarding the harm that was "caused" to Plaintiffs, which misled the jury.

1. **ABSENT DISCOVERY OF AND EVIDENCE AS TO "HARM CAUSED", THE JURY WAS REQUIRED TO REACH ITS VERDICT BASED ON SPECULATION, CONJECTURE OR THEIR OWN PREJUDICES.**

In the absence of evidence of "harm caused", the Phase I jury could not determine the issues that were put before them without either engaging in improper speculation or falling back on their own prejudices. The Phase I jury was asked to determine the issue of reasonableness, which could only be based on all the relevant circumstances, but was not permitted to receive evidence of all the relevant circumstances because of the trial court's erroneous bifurcation.

It is clear under West Virginia law that a court may not permit a jury to base its verdict on mere speculation or conjecture. Oates v. Continental Insurance Company, Syl. Pt. 1, 137 W. Va. 501, 72 S.E.2d 886 (W. Va. 1952), Adams v. Sparacio, Syl. Pt. 3, 156 W. Va. 678, 196 S.E.2d 647 (W. Va. 1973), Crane & Equip. Rental Co. v. Park Corp., 177 W. Va. 65, 68, 350 S.E.2d 692, 695 (W. Va. 1986)(A jury will not be permitted to base its findings of fact upon conjecture or speculation.) Yet, the Trial Plan essentially *required* the Phase I jury to speculate, or draw on their own prejudices, by asking the jury to make a decision on the issue of reasonableness while prohibiting Defendants from discovering and presenting to the jury interwoven and inseparable issues and circumstances that must be considered when analyzing the issue of reasonableness.

In portions of the jury charge, consistent with the rulings in In Re: Flood Litigation and other controlling authorities, the jury was instructed to "balance the relative advantages, if any to the Defendant of the specific land uses at issue against the

disadvantages, if any, to the Plaintiffs.⁶¹ See General Jury Charge at p. 12 (emphasis added). The jury was instructed that it should consider such factors as “the **amount of harm**, if any, **caused** by the Defendant’s use of its land.” See General Jury Charge at p. 12 (emphasis added). However, Plaintiffs were improperly relieved of the burden of proving causation (though they were erroneously permitted to argue, without evidence, without rebuttal and without discovery that certain harm was “caused” by Western Pocahontas). Worse yet, Western Pocahontas was (and still is) precluded from engaging in discovery to investigate what harm, if any, was suffered by Plaintiffs and whether such harm, if any, was proximately caused by Western Pocahontas.

The jury was also instructed to consider “the foreseeability of the harm,” again, without Plaintiffs bearing the burden to prove that any harm was, in fact, proximately caused by Western Pocahontas. See General Jury Charge at p. 12. As to foreseeability, the jury was instructed to consider such factors as “whether the harm **proximately flowed** from Defendant’s conduct,” further demonstrating that proximate causation is too interwoven with the issue of reasonableness in this case to be separated. See General Jury Charge at p. 13 (emphasis added).

The jury was also instructed to consider “whether the **resulting harm** was unavoidable,” despite the fact that Plaintiffs were not required to prove that any harm resulted from Defendant’s conduct and Western Pocahontas were not permitted to engage in discovery of the Plaintiffs to investigate the harm allegedly caused, if any. See General Jury Charge at p. 13 (emphasis added). The Phase I jury could do nothing more than speculate regarding the amount of harm, the nature of the harm and the cause or

⁶¹ Although other portions of the jury charge inconsistently and erroneously instructed the jury to consider “potential” harm.

causes of the harm allegedly suffered by Plaintiffs, which speculation was further encouraged by inappropriate comments and insinuations from Plaintiffs' counsel regarding issues of proximate causation, harm to Plaintiffs, etc., as discussed below.

2. THE JURY WAS IMPROPERLY MISLED AND CONFUSED BY UNFOUNDED COMMENTS AND IMPROPER ARGUMENTS FROM PLAINTIFFS' COUNSEL AND THEIR WITNESSES THAT CERTAIN HARM WAS CAUSED BY THE CONDUCT OF WESTERN POCAHONTAS.

In the Trial Plan, Judge Hutchison expressly ordered that proximate causation and the damages suffered by Plaintiffs, if any, would be deferred until Phase II. *See* Trial Plan at p. 4. The trial court also ordered that the stay of all discovery regarding “the alleged harm or damages suffered by an individual plaintiff as a consequence of the alleged acts of the defendants” would remain in place. (emphasis added). Nonetheless, Plaintiffs' counsel repeatedly made comments and arguments and elicited testimony that was intended to and did, in fact, insinuate to the jury that certain harm was proximately caused to Plaintiffs by the conduct of Western Pocahontas.

For example, Plaintiffs' counsel and their experts repeatedly argued that it was unreasonable not to conduct analysis regarding the stormwater impact that would be “caused” to downstream residents or build retention structures to prevent stormwater impacts to downstream residents, despite the fact that Plaintiffs were not required to prove that any impact to downstream residents even occurred in the first place. A jury must determine the issue of proximate causation, and it is improper for “harm caused” to simply be taken as a foregone conclusion, which was the inevitable consequence of the trial court's bifurcation of the issue of reasonableness from the remaining issues of liability.

Furthermore, during his opening statement, Mr. McGraw asserted that "some of our citizens lost their lives on that date [July 8, 2001] due to this - to this matter [the flood]." (Tr. Vol. IV at p. 794). Then, when cross-examining Dr. Nutter, Mr. McGraw again stated that "[t]wo people died in this flood." (Tr. Vol. XVIII at p. 3919). It cannot seriously be disputed that these alleged deaths must have weighed on the minds of jurors -- particularly after the trial court instructed them to consider the harm caused in determining reasonableness, but effectively prohibited any discovery or evidence of such harm. Western Pocahontas has not had the benefit of any discovery as to harm caused to the Plaintiffs, and, to this day, has no idea what Mr. McGraw was talking about. Plaintiffs certainly did not submit any evidence to support Mr. McGraw's comment, and they did not have to since they were relieved of the burden of proving harm to Plaintiffs or proximate causation in the Phase I trial. The jury was impermissibly misled to believe that deaths occurred in the subwatershed under consideration and that those deaths were caused by the conduct of Western Pocahontas. In the absence of evidence of any other harm caused and under instructions to consider harm caused, the jury had no choice but to seize on Mr. McGraw's comments. In other words, in striking the Morris v. Priddy balance, the jury necessarily balanced the social utility of timbering against multiple deaths -- to the great prejudice of Western Pocahontas.

In another instance, Plaintiffs' counsel argued to the jury that when timbering is conducted, "this" (presenting a picture of massive flooding in downtown Mullens) is what happens and concluded with "A picture says a thousand words." (Tr. Vol. XXVII at p. 5339).

Despite the trial court's order bifurcating the issue of reasonableness from issues of harm and proximate causation, the jury in this case was permitted to be improperly

misled to believe that Western Pocahontas “caused” an unspecified amount of harm to unidentified Plaintiffs and was then required to weigh that hypothetical, speculative harm which was supposedly “caused” and balance it against social utility. Just as Plaintiffs’ counsel repeatedly argued to the jury that massive flooding and the destruction of homes and lives were the “inevitable” result of Defendants’ conduct, unfounded arguments and insinuations of that very nature were the inevitable result of the trial court’s improper bifurcation of the issue of reasonableness, which is clearly *not* separate and distinct from remaining issues of liability.

The Trial Plan violated Western Pocahontas’ right to a fair trial in that it required the Phase I jury to make a decision regarding the issue of reasonableness, yet precluded Western Pocahontas from proffering evidence, or even discovering evidence, that is essential for a jury to fairly reach a decision regarding the issue of reasonableness. The issue of reasonableness is inextricably related to other issues of liability, and allowing a jury to decide the issue of reasonableness in a vacuum, or in isolation from other issues concerning liability, violated Western Pocahontas’ right to a fair trial.

To make a proper decision regarding the issue of reasonableness, the jury was required to weigh *all* relevant factors, including a balancing of the advantages to the Defendants compared to the disadvantages to Plaintiffs. However, because the Phase I trial focused solely on the conduct of the Defendants and precluded discovery regarding the harm suffered by Plaintiffs and other relevant issues, Plaintiffs were improperly relieved of their burden to show any actual harm proximately caused by the alleged conduct of the Defendants and the jury was permitted to be confused and misled, causing great prejudice to Western Pocahontas.

D. THE TRIAL COURT ERRED BY ADMITTING PLAINTIFFS' PHOTOGRAPHS OF ALLEGED FLOOD DAMAGE WITHOUT A PROPER FOUNDATION TO ESTABLISH WHETHER THE SOURCE OF THE WATER AND DEBRIS DEPICTED ORIGINATED FROM APPELLEE'S PROPERTY.

Plaintiffs' Exhibits 65 and 66 consist of photographs of a log, rocks and debris at a residence of a plaintiff or third party; and Plaintiffs' Exhibits 67, 68, 69, and 70 depict photographs of flood waters at unidentified locations alleged to be somewhere in the Mullens subwatershed. The trial court erroneously admitted Plaintiffs' Exhibits 65, 66, 67, 68, 69, and 70 into evidence over Western Pocahontas' objections and denied Western Pocahontas' request to inquire into the foundation for the proffer of such photographs.

In admitting Plaintiffs' Exhibits 67, 68, 69, and 70, the trial court erroneously treated the stipulation of the parties regarding the authentication of the photographs as a substitute for an appropriate foundation regarding the origin of the water and debris depicted, which was necessary to establish the relevancy required by Rule 402 of the West Virginia Rules of Evidence.

The portion of Western Pocahontas' property at issue in this trial was essentially confined to the Slab Fork sub-subwatershed, which was one of several sub-subwatersheds that allegedly generated floodwaters that had their confluence at the lower end of Mullens. No foundation was laid to identify which of these sub-subwatersheds was being depicted in Plaintiff's Exhibits 67, 68, 69, and 70.

Plaintiffs' own witness, John Morgan, could not specify the source of the water depicted and could not identify whether the photographs represented water from Slab Fork, on which Western Pocahontas owned timber lands, or from the Guyandotte River,

on which Western Pocahontas owned only limited acreage that was not contended to be material:

“Q. Okay. So if we’re looking at one of those photographs of flooding in Mullens, can you tell whether the flood water you’re looking at is flood water coming from the Guyandotte or coming down Slab Fork? Can you tell that?”

A. As I said when I looked at those photographs, I did not know exactly where they were taken or what they represented. They represented a flooding event, so I don’t know which one represented Slab Fork; I don’t know which of those photographs represented the Guyandotte.”

(Tr. Vol. IX at p. 1991).

Upon the settlement of claims against various defendants, the trial court recognized that Western Pocahontas was entitled, in accordance with Rule 105 of the West Virginia Rules of Evidence, to exclude from the evidence to be considered by the jury and taken into the jury room, those documents which pertained to other defendants or geographical locations having no relationship to Western Pocahontas’ property. But the flood photos, in spite of the lack of a location foundation were given to the jury, which greatly prejudiced Western Pocahontas by allowing the jury to presume that Western Pocahontas was responsible for the conditions depicted. This conjecture is clearly insufficient to support the jury’s verdict.

The lack of foundation was particularly prejudicial to Western Pocahontas with regard to Plaintiffs’ Exhibits 65 and 66. Plaintiffs’ counsel repeatedly implied that such photographs depicted debris from timber operations on Western Pocahontas’ property. However, there was no foundation to establish that the debris depicted in Exhibit 65 and 66 originated from a location on Western Pocahontas’ property, and there was even

expert testimony disputing the contention that such a log would likely have originated from a commercial logging operation. (Tr. Vol. XXV at pp. 3940–3941).

Such anecdotal depictions of flood damage were not appropriately a subject for consideration during the Phase I trial; and to be relevant at all during such proceeding, the origin of the water or debris would have had to have been tied by a proper foundation to the specific operations of the defendant against whom the claim was asserted. Contradicting the admission of the photos of flooding proffered against Western Pocahontas, the trial court refused to allow Plaintiffs to admit similar evidence in relation to one of the mining related co-defendants that was subsequently dismissed from the case:

THE COURT: . . . “The question then becomes, you know, ‘Where did the debris and the sediment come from that ended up in Ms. Kiser’s yard?’

Ms. Kiser can’t say that it came from the -- the Pioneer permitted areas. She just knows it came from upstream. She is not -- cannot be qualified as an expert regarding sediment or the movement of sediment. All she can say is there are big rocks and mud and other things in my yard that look like, according to Mr. McGraw’s representation, that look like what they were hauling around up there on top of the hill.

I don’t think that that’s appropriate rebuttal.”

(Tr. Vol. XXV at p. 5047).

The refusal of the trial court to allow Western Pocahontas to inquire into the foundation for the proffered exhibits, and their admission into evidence, erroneously allowed such photographs to become an important component of Plaintiffs’ argument, to the prejudice of Western Pocahontas.

E. WESTERN POCAHONTAS WAS PREJUDICED BY THE TRIAL COURT’S DETERMINATION THAT THE APPELLANTS COULD ATTACK OPERATIONS OF DEFENDANTS THAT WERE VOLUNTARILY DISMISSED WITH PREJUDICE.

On March 21, 2006, the trial court denied Jim C. Hamer Company's Motion to Preclude Evidence. That motion sought to preclude the introduction of any evidence or argument critical of operations conducted by Jim C. Hamer Company, since Jim C. Hamer Company was dismissed with prejudice under West Virginia Rule of Civil Procedure 41(a) on February 6, 2006. This ruling constitutes clear error, is contrary to established West Virginia case law, and warrants a new trial.

Under the doctrine of *res judicata*, the trial of this case should not have included any evidence, argument, or implication that: (1) the operations of Jim C. Hamer Company were conducted negligently, (2) the operations of Jim C. Hamer Company constituted a nuisance; (3) the operations of Jim C. Hamer Company materially increased the rate of surface water runoff that left its operations as a result of the storm events on or about July 8, 2001, compared to the rate of surface water runoff that would have left that operation but for the defendants' use of that property; (4) the operations of Jim C. Hamer Company materially caused or contributed to the stream or streams into which they discharged to overflow their banks; or (5) the operations of Jim C. Hamer Company constituted an unreasonable use under the circumstances set forth by the Supreme Court of Appeals in the case of In Re: Flood Litigation, 216 W.Va. 534, 607 S.E. 2d 863 (2004). Each of these claims were brought against Jim C. Hamer Company and they were all adjudicated on the merits by the Rule 41(a) voluntary dismissal with prejudice entered on February 6, 2006.⁶²

⁶² These arguments apply with equal force to any evidence, argument or implication regarding Columbia West Virginia Corporation, Cranberry Hardwoods, Inc., Cranberry Lumber Company, and Jewell's Logging Company. For simplicity's sake, only Jim C. Hamer Company is listed during this argument, but each of the arguments apply equally for the other dismissed entities listed above.

In syllabus point 4, Blake v. Charleston Area Med. Ctr., Inc., 201 W.Va. 469, 498

S.E.2d 41 (W. Va. 1997), this Court set forth three elements for *res judicata* to apply:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

All three of these elements apply in this action.

First, it is irrefutable that a dismissal with prejudice under Rule 41(a) is an adjudication on the merits. See State ex rel. Division of Human Services by Mary C.M. v. Benjamin P.B., 183 W.Va. 220, 222, 395 S.E. 2d 220, 222 n.3 (W. Va. 1990)(stating that “[c]ourts have recognized that a dismissal “with prejudice” under Rule 41(a) is an adjudication on the merits”)(citations omitted); Litten v. Peer, Syl. Pt. 1, 156 W.Va. 791, 197 S.E.2d 322 (W. Va. 1973)(holding that “[a]n order of a United States District Court entered in a civil action under Rule 41(b) of Federal Rules of Civil Procedure dismissing the action with prejudice for failure of the plaintiff to prosecute his claim is an adjudication on the merits and bars a subsequent civil action instituted on the same claim in a state court”); *see also*, Black’s Law Dictionary, 6th Ed. (a “dismissal with prejudice” means “an adjudication on the merits, and final disposition, barring right to bring or maintain an action on same claim or cause”).

Second, the two actions not only involve “the same parties or persons in privity with those same parties,” the two actions are actually the same. Plaintiffs, Jim C. Hamer Company, and Western Pocahontas were all parties to this action. Plaintiffs’ claims against Jim C. Hamer Company were all fully and finally adjudicated on the merits.

Many of Plaintiffs' claims against Western Pocahontas are dependent upon the exact same facts which were alleged (and dismissed with prejudice) against Jim C. Hamer Company. It has been adjudicated that Hamer's operations: (1) were not negligent; (2) did not constitute a nuisance; (3) did not materially increase the rate of surface water runoff that left its operations; (4) did not materially cause or contribute to the stream(s) into which they discharged overflowing their banks; and (5) did not constitute an unreasonable use. Allowing the introduction of any evidence, argument, or implication that Jim C. Hamer Company's operations on Western Pocahontas' properties did any of these things was unfairly prejudicial to Western Pocahontas in this case.

Third, the cause of action that proceeded to trial against Western Pocahontas was "identical to the cause of action determined in the prior action or [was] such that it could have been resolved, had it been presented, in the prior action." Blake, at Syl. Pt. 4. Clearly, the claims against Western Pocahontas⁶³ were identical to the claims against Jim C. Hamer Company, or were such that they could have been resolved had they been presented in the action against Jim C. Hamer Company.

In discussing this issue, this Court has stated as follows:

"An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits."

⁶³ (1) that its operations materially increased the rate of surface water runoff that left its operations as a result of the storm events on or about July 8, 2001, compared to the rate of surface water runoff that would have left that operation but for Western Pocahontas' use of that property; (2) that its operations materially caused or contributed to the stream or streams into which they discharged to overflow their banks; and (3) that its operations constituted an "unreasonable use" as set forth in In re: Flood Litigation.

Sattler v. Bailey, 184 W.Va. 212, 400 S.E.2d 220 (W. Va. 1990), *quoting*, Sayre's Adm'r v. Harpold, Syl. Pt. 1, 33 W.Va. 553, 11 S.E. 16 (W. Va. 1890).

The Plaintiffs, through the Rule 41(a) dismissal with prejudice, stipulated, in effect, that Jim C. Hamer Company acted appropriately in harvesting timber on Western Pocahontas' lands in subwatershed 2a (Mullens). Thus, allowing the Plaintiffs to re-litigate these issues during the trial of this lawsuit unfairly prejudiced Western Pocahontas by allowing the presentation of alleged wrongdoing on properties where Jim C. Hamer Company owned the right to harvest timber. The trial court's erroneous decision to allow presentation of evidence, argument, and implication that wrong-doing occurred on Jim C. Hamer's operations or the operations of Columbia or Cranberry in subwatershed 2a warrants a new trial.

F. WESTERN POCAHONTAS WAS WRONGFULLY DENIED A TRIAL BY JURY OF THE ISSUE OF WHETHER IT WAS VICARIOUSLY LIABLE FOR THE TIMBER HARVESTING PRACTICES OF WHITE OAK LUMBER COMPANY.

The trial court erred in ruling as a matter of law that White Oak Lumber was Western Pocahontas' "employee," rather than an "independent contractor," and that Western Pocahontas was vicariously liable for all actions of White Oak Lumber:

"THE COURT: . . . To that extent, and for these proceedings, for the purposes of this -- these proceedings only, the Court believes that the conduct of White Oak Lumber Company was that of an employee, as opposed to a subcontractor and independent contractor.

It's quite clear there is a body of case law out there that talks about how you determine whether someone is a -- an independent sub or an employee, and for purposes of what we're doing here, I take the position that White Oak Lumber was an employee because Western Pocahontas property managed the entire operations on its property, decided what was going to be cut, when it was going to be cut, what the diameter limits were and other limitations on the folks that were cutting.

They also dictated the methods, i.e., they demanded use of BMPs and other limits placed upon its employees.

They are the ones that essentially managed the operation of their properties; therefore, Western Pocahontas Properties is the -- is the employer and the landowner in this case.”

(Tr. Vol. XXVI at pp. 5286–5287).

Syllabus Points 3 and 4 of Shaffer v. Acme Limestone Co., 206 W. Va. 333, 524 S.E.2d 688 (W.Va. 1999) make clear that the factors considered by the trial court do not necessarily convert an independent contractor relationship into an employee relationship. Further, where more than one inference can be drawn from the evidence, the determination whether an employee or independent contractor relationship exists is for jury determination:

“3. An owner who engages an independent contractor to perform a job for him or her may retain broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the contract--including the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work--without changing the relationship from that of owner and independent contractor, or changing the duties arising from that relationship.

4. 'One who would defend against tort liability by contending that the injuries were inflicted by an independent contractor has the burden of establishing that he neither controlled nor had the right to control the work, and if there is a conflict in the evidence and there is sufficient evidence to support a finding of the jury, the determination of whether an independent contractor relationship existed is a question for jury determination.' Syllabus point 1, Sanders v. Georgia-Pacific Corp., 159 W. Va. 621, 225 S.E.2d 218 (1976).” Syllabus point 5, Pasquale v. Ohio Power Co., 187 W. Va. 292, 418 S.E.2d 738 (1992).” (Emphasis added).

Even Plaintiffs’ counsel recognized and argued strenuously that the evidence was such that the jury could find that White Oak Lumber was liable, but that Western Pocahontas acted reasonably and was not liable:

MR. MCGRAW: “Judge, I’d just like to add, on behalf of our plaintiffs, and all the other plaintiffs as well, that I agree with the Court that we’re only entitled to one recovery, but I could easily envision a scenario where the jury could come back – and I certainly hope that they don’t – but they could come back and say “Western did everything that they could, and they even had a contract spelling out that White Oak and Mr. Fowler’s client was supposed to do everything absolutely right, and they stayed on top of them, and therefore we believe Western’s not obligated; but White Oak indeed did something wrong, and we’re going to hold them responsible.”

(Tr. Vol. XXVI at pp. 5203–5204) (emphasis added).

MR. McLAUGHLIN: “And there would absolutely be nothing inconsistent if the jury comes back with a finding against White Oak but not Western Pocahontas. I can’t imagine that that would be an inconsistent jury verdict, given the evidence that’s been -- been put out there, and certainly given the manner in which it was produced to the jury.” (Tr. Vol. XXVI at pp. 5194–5195) (emphasis added).

The trial court should have left the status of White Oak in relation to Western Pocahontas to the jury. Instead, the trial court dismissed White Oak Lumber, finding that any liability of White Oak Lumber could be attributed by the jury to Western Pocahontas. Because Western Pocahontas was wrongfully denied a trial by jury of the issue of whether it was vicariously liable for the timber harvesting practices of White Oak Lumber Company, a new trial is warranted.

G. THE CHARGE GIVEN TO THE JURY CONTAINED ERRORS THAT MATERIALLY PREJUDICED WESTERN POCAHONTAS.

The jury was repeatedly instructed on erroneous law, particularly as to sediment and debris control and as to actual and potential harm. These errors of law resulted in a miscarriage of justice and warrant a new trial pursuant to Rules 50 and 59 of the West Virginia Rules of Civil Procedure

1. THE JURY INSTRUCTIONS REGARDING SEDIMENT AND DEBRIS CONTROL ALLOWED THE JURY TO CONSIDER IRRELEVANT FACTORS IN ANSWERING THE QUESTIONS PRESENTED TO THEM.

The General Jury Charge materially deviated from the three issues contained in the Trial Plan, i.e., water runoff, stream overflow and reasonableness:

“It is the duty of a landowner who conducts or permits extraction of minerals and/or removal of timber from his property to confine any debris on his own property and to place it in such manner that it could not reasonably be expected to escape from his property, under normal conditions, and roll or slide or be washed into the property of others.

...The Legislature has further found that some activities associated with the commercial harvesting of timber results in the exposure of soil and that, if uncontrolled, such exposed soil can erode resulting in gullying, soil slippages and sediment deposition in streams.

... (f) ‘Sediment’ means solid particulate matter, usually soil or minute rock fragments, moved by wind, rainfall or snowmelt into the streams of the state.

General Jury Charge, p. 11, ¶ 2; p. 14, ¶ 3; p. 16, ¶ 1.

Those three instructions incorrectly instruct the jury to consider debris and sediment in their determination of the issues presented. Debris and sediment do not go to the issue of whether Western Pocahontas’ use of their property materially increased the rate of surface water runoff or whether the water materially caused or contributed to streams overflowing their banks, which are the first two issues presented for the jury’s determination. Moreover, debris and sediment do not relate to whether Western Pocahontas’ property use was reasonable, because debris and sediment relate to damages, which was relegated to Phase II by the Trial Plan. As the three questions were presented, the issue of “reasonableness” was necessarily limited to whether a Defendant’s land use was reasonable as it pertained to water runoff and water increase in streams, and not sediment or debris. In any event, the jury wasn't given sufficient

evidence to consider whether Western Pocahontas' conduct regarding sediment and debris was reasonable. Such a determination would require information about the harms suffered by the Plaintiffs, if any. As discussed above, this information has never been presented, other than through the prejudicial and anecdotal comments of Plaintiffs' counsel, discussed *supra*, and the erroneous and prejudicial introduction of the "log" photograph, discussed *supra*.

Moreover, the Trial Plan directly tied reasonableness to "the circumstances set forth by the Supreme Court of Appeals in the case of In Re: Flood Litigation, 216 W.Va. 534, 607 S.E.2d 863 (2004)," wherein the Court only discussed the issue of debris and sediment once; it was in a discussion of riparian rights, not increased water runoff, contribution to flooding, or a general discussion of reasonableness. 607 S.E.2d at 875.

The trial court, in error, adopted debris and sediment instructions over Western Pocahontas' objections. (Tr. Vol. XXVI at p. 5238). As this Court has stated, "[i]t is reversible error to give an instruction which tends to mislead and confuse the jury." Preston County Coke Co. v. Preston County Light & Power Co., Syl. Pt. 13, 146 W. Va. 231, 119 S.E.2d 420 (W. Va. 1961). In this case, the instructions on debris and sediment permitted the jury to hold Western Pocahontas liable based on irrelevant evidence as to which no discovery had been permitted. The instructions were inappropriate, misleading, confusing, and resulted in a miscarriage of justice.

2. **THE TRIAL COURT ERRONEOUSLY GAVE INCONSISTENT INSTRUCTIONS AS TO WHETHER THE JURY SHOULD CONSIDER "POTENTIAL HARM" RATHER THAN ACTUAL "HARM CAUSED" IN DETERMINING "REASONABLE USE," AND THESE INSTRUCTIONS WERE PARTICULARLY PREJUDICIAL SINCE NO DISCOVERY WAS ALLOWED AS TO ACTUAL HARM.**

It has long been the law in West Virginia that inconsistent instructions to the jury – even if one of the instructions accurately states the law – constitutes reversible error:

"It is error to give inconsistent instructions, even if one of them states the law correctly, inasmuch as the jury, in such circumstances, is confronted with the task of determining which principle of law to follow, and inasmuch as it is impossible for a court later to determine upon what legal principle the verdict is founded.' (citations omitted)." John D. Stump & Associates, Inc. v. Cunningham Memorial Park, Inc. Syl. Pt. 8, 187 W.Va. 438, 419 S.E.2d 699 (W. Va. 1992).

In its General Jury Charge in this case, the trial court instructed the jury as follows:

"In determining whether a landowner or possessor of land acted reasonably in altering the topography or the drainage upon his land, you should consider all relevant circumstances, including such factors as:

- (a) The amount of **potential** harm involved;
- (b) The character of **potential** harm involved;
- (c) The foreseeability of **potential** harm on the part of the landowner making alteration to the topography and flow of surface waters, if any;
- (d) The purpose or motive with which the landowner acted;
- (e) The social utility that the law attaches to the type of use or enjoyment invaded; and
- (f) The burden on those persons who might be harmed."

(Tr. Vol. XXVII at p. 5315) (emphasis added). Then later in the charge, the trial court further instructed the jury:

"In considering whether a Defendant's use of his land was reasonable, you must balance the relative advantages, if any, to the Defendant of the specific land uses at issue against the disadvantages, if any, to the plaintiffs, and you must carefully consider the social utility of such land use (for example, the community's and state's interest in the timber and mining industries). In weighing these factors, you should consider:

- (1) **The amount of harm, if any, caused** by the Defendant's use of its land,
- (2) The **foreseeability of the harm** by the Defendant,

- (3) The Defendant's purpose,
- (4) The social utility of the Defendant's use of its land, and
- (5) Any other relevant circumstances."

No one factor is controlling, and all of the factors should be considered in determining whether a Defendant's actions were reasonable."

(Tr. Vol. XXVII at pp. 5318-5319) (emphasis added).

Obviously, these two sets of instructions closely parallel one another. Both address the factors to be considered by the jury in determining whether a landowner has acted reasonably in using its land, but the two lists of specific factors to be considered are materially different. The first list tells the jury that they must consider "potential" harm, the character of "potential" harm, and the foreseeability of "potential" harm, whereas, the second list tells the jury to consider "harm...caused" and the foreseeability of such harm.

The second list is the one that, more or less, accurately reflects West Virginia law. In Re: Flood Litigation requires that juries, in determining reasonable use, must consider all the relevant circumstances, including the "amount of harm caused," i.e., **actual** harm caused and not "potential" harm:

"In determining whether a landowner has acted reasonably in dealing with surface water pursuant to the 'reasonable use' rule set forth in Syllabus Point 2 of Morris Associates, Inc. v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989), the jury generally should consider all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on part of landowner making alteration in the flow of surface waters, the purpose or motive with which the landowner acted, etc." See, e.g., Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (Minn. 1958) (other citations omitted)." 607 S.E.2d 863, 871.

It goes without saying that there is a vast difference between "potential" harm that might be caused by a particular activity and "actual" harm caused by that activity.⁶⁴

⁶⁴ See, for example, Garnes v. Fleming Landfill, 186 W.Va. 656, 413 S.E.2d 897 (1991), in which this Court addressed punitive damages and the circumstances under which they may be

By improperly instructing the jury that they could consider "potential" harm and balance "potential" harm against social utility, the trial court not only encouraged the jury to speculate⁶⁵ but also allowed the jury to balance what they might imagine to be a "tremendous" potential for harm⁶⁶, regardless of actual harm, against social utility, thus, encouraging the jury to strike the balance in favor of "potential" harm rather than social utility.

If the trial court's only instructions to the jury had been that they must balance social utility against *evidence* of *actual* "harm caused," if any, then, presumably, the jury would have been far more likely to find that Western Pocahontas' activities were not

awarded. As part of that discussion, the Court pointed out that "punitive damages should bear a reasonable relationship to the potential of harm caused by the defendant's actions...." 413 S.E.2d 897, 908, and that "... generally means that punitive damages must bear a reasonable relationship to actual damages, because compensatory damages provide a reasonable measure of likely harm." 413 S.E.2d 897, 908. However, the Court went on to point out that there are situations where actual harm is quite minimal, but potential harm is "tremendous" and, in those cases, it is appropriate for a jury to fix punitive damages based on the "tremendous" potential for harm. 413 S.E.2d 897, 908.

⁶⁵ As the Supreme Court of Appeals has acknowledged, whenever a jury is asked to consider "potential" harm, they are, in effect, being asked to speculate. *See, for example, Snyder v. Scheerer*, 190 W.Va. 64, 436 S.E.2d, 299 (1993):

"We also explained in *Rowsey v. Rowsey*, 174 W.Va. 692, 695, 329 S.E.2d 57, 61 (1985), that "(a) change of custody based on a speculative notion of potential harm is an impermissible exercise of discretion." 436 S.E.2d 299, 307.

⁶⁶ The trial court further exacerbated the problem by allowing the plaintiffs to introduce improper suggestions of "tremendous," harm without ever offering any proof. For example, Mr. McGraw repeatedly told the jury about people who had allegedly died as a result of the flooding of July 8, 2001. Where these people died, if they died, under what circumstances they died, and whether their deaths had any relationship at all to Western Pocahontas' land in the Mullens subwatershed is still unknown, but the jury was allowed to assume that there was such a relationship. Likewise, the photograph of a log under a carport, which was admitted into evidence over objection, together with the Plaintiffs' repeated references to the "fact" that the log had been cut, suggested, but did not prove, the "tremendous" potential for harm caused. The owner of the carport was never called, and no one ever testified as to where the log came from, but the jury was left to speculate as to this "potential" harm that might possibly have been caused by activities on Western Pocahontas Properties' land.

unreasonable, i.e., find that since there was no evidence of any actual harm caused by the Western Pocahontas' activities, they must strike the balance in favor of the social utility – and reasonableness of Western Pocahontas' activities.

In short, the trial court's "potential" harm instructions were both materially erroneous and highly prejudicial and for this reason alone a new trial should be granted.

H. THE JURY VERDICT FORM UTILIZED BY THE TRIAL COURT UNFAIRLY PREJUDICED WESTERN POCAHONTAS BECAUSE IT FAILED TO FOLLOW THE TRIAL PLAN REQUIREMENT THAT OPERATIONS BE ASSESSED INDIVIDUALLY.

The jury verdict form presented to the jury in this matter was erroneous because it did not reach the level of specificity outlined in the Trial Plan Order. As discussed repeatedly herein, in the Trial Plan, the trial court ruled that Phase I of the trial would ask the jury to answer three distinct questions:

- (A) Whether, as to each Defendant's **individual operation(s)**, the Defendant's use of its property materially increased the rate of surface water runoff that left that operation as a result of the storm events on or about July 8, 2001, compared to the rate of surface water runoff that would have left the operation but for the Defendant's use of that property;
- (B) Whether the water from the **individual Defendants' operation(s)** materially caused or contributed to the stream or streams into which they discharged to overflow their banks; and
- (C) Regardless of the findings made in A and B above, was the use by the Defendants **of the property in question** unreasonable under the circumstances set forth by the Supreme Court of Appeals in the case of In Re: Flood Litigation, 216 W. Va. 534, 607 S.E.2d 683 (2004).

See Trial Plan at p. 3 (emphasis added).⁶⁷

⁶⁷ The requirement of specific proof with regard to individual operations has been clear since at least September 30, 2005, when the Court clearly stated in its "Order Amending Case Management Order June 8, 2005 With Respect to The Upper Guyandotte Watershed Only" the following:

The jury verdict form did not ask the jurors to consider “individual operations” on Western Pocahontas’ properties. In fact, the jury verdict form did not allow the jury to differentiate between individual operations based upon the sufficiency (or insufficiency) of Plaintiffs’ evidence of wrongdoing on each specific operation on Western Pocahontas’ properties. Instead, the jury verdict form asked the jury to answer the three questions set forth in the Trial Plan for Western Pocahontas’ operations as a whole – not with regard to individual tracts, cutting units, or TONFs.

In the Mullens subwatershed, multiple individual operations were conducted on Western Pocahontas’ properties in the ten years preceding July 8, 2001. These operations were conducted through three different timber agreements with three different timber operators: White Oak Lumber Company; Jim C. Hamer Company; and Columbia West Virginia Corporation. In turn, these three timber companies contracted with approximately nine different loggers to harvest timber on Western Pocahontas’ properties: R&R Logging; Ranson Trucking; Hedra Wheatley Logging; Lane Trucking; Kenneth Hardy, Butternut One; Lane Trucking; Big Oak Construction; and Jewell Logging. In sum, over a period of approximately eight years, three different timber

On or before October 31, 2005, each Plaintiff located in the Upper Guyandotte watershed will identify, to the best of his/her ability, each defendant against whom he/she is asserting a claim, and each particular active holding and/or operation of such defendant, as of July 8, 2001, that he/she contends caused him/her damage as a result of the July 8, 2001 flood event.

See 9/30/05 Order at p. 4 (emphasis added). The Court’s mandate that specific defendants **and** specific holdings and/or operations be disclosed evidences the specific level of proof Plaintiffs would be required to present at trial. See also 12/19/05 Order at p. 5 (reiterating that Plaintiffs must disclose “each particular active holding and/or operation of such defendant”) (emphasis in original); 1/11/06 Order (yet again requiring specific disclosures of individual operations).

owners contracted with nine different loggers to harvest timber on Western Pocahontas' properties.

These operations consisted of approximately 12,500 acres over approximately eight years, with different physical characteristics, different slopes, different harvest amounts, different proximities to populated areas, different tendencies of individual loggers and timber owners, and countless other property-specific characteristics for each individual property. Yet, the jury verdict form forced the jury to group each of the individual operations together for purposes of its verdict.

The problem this creates is clear – individual operations that may have been blameless were grouped in with individual properties that may not have been. This would have a profound effect on Western Pocahontas (and the cross-claim defendant timber operators and loggers) in Phase II. Western Pocahontas presumably will not be able to re-litigate its culpability for any of the individual properties, even though sufficient evidence was not provided with regard to any of the individual properties in the Mullens subwatershed. Instead, the Plaintiffs will be relieved of their burden to produce sufficient proof of “unreasonable use” as to any of these individual properties. Every individual operation of the landowner, timber owner, and logger in the Mullens subwatershed will be grouped together - all operations will be deemed “unreasonable uses”, based on the collective evidence presented for all of the properties.

The case of Blyden v. Mancusi, 186 F.3d 252 (2nd Cir. 1999) expressly dealt with the problems of a similarly inadequate verdict form utilized in the liability phase of a two phase trial. That case stemmed from allegations of cruel and inhumane treatment of inmates at Attica prison in 1971 after police retook control of the prison following prisoner riots. A class action lawsuit was filed on behalf of inmates asserting that

correctional officers engaged in reprisals against prisoners constituting cruel and inhuman treatment. The trial proceeded in two phases: liability, then damages. The appellate court held that the jury verdict form utilized in the liability portion of the trial “did not require findings sufficient to support class-wide liability or even liability to particular, identifiable plaintiffs.”

“In the typical case where a single plaintiff sues over acts arising out of a single incident, there is rarely any question about what the jury found. Not so here. While there is substantial evidence from which a reasonable jury might have concluded that Pfeil’s behavior was a proximate cause of all the unconstitutional acts that occurred, the assumption that this is what the liability jury found is entirely conjectural. Indeed, the verdict sheet invited the jury to find deliberate indifference to one ‘reprisal’ and to end its inquiry without ever considering the hundreds or thousands of other acts of violence. Moreover, the verdict sheet’s failure to establish class-wide causation could not have been harmless.”

Id. at 266, 267.

The same problems exist with regard to the verdict form utilized in this case. The verdict did not establish anything with regard to any specific operations upon Western Pocahontas’ property. Since individual Plaintiff’s claims are directly tied to individual operations located in different areas of the Mullens subwatershed, no Plaintiff has yet established any necessary element of liability against Western Pocahontas. Indeed, the only issue that could have been resolved in Phase I using the verdict form presented to the jury was whether Western Pocahontas was potentially liable to some Plaintiffs in the Mullens subwatershed. *See Blyden*, 186 F.3d at 266, n. 7 (noting that “all that could have been established with finality by a verdict was the non-liability of particular defendants to all members of the class”). Unless the Phase I jury verdict is without any practical meaning – and would allow Western Pocahontas to re-litigate each of the issues resolved in Phase I with regard to each of its specific operations during Phase II –

then the use of the jury verdict form submitted to the Phase I jury constituted clear error and a new trial is mandated.

I. WESTERN POCAHONTAS IS ENTITLED TO A NEW TRIAL BECAUSE JUROR 20 SHOULD HAVE BEEN DISQUALIFIED FOR REASONS THAT WERE NOT DISCOVERED BY WESTERN POCAHONTAS UNTIL AFTER THE VERDICT WAS RENDERED, DESPITE THE EXERCISE OF ORDINARY DILIGENCE.

After the jury reached its verdict in this case, Western Pocahontas' counsel was informed, for the first time, of facts that establish that Juror 20, Sherry McGraw, should have been disqualified. Mrs. McGraw's husband, Ernie McGraw, was at the time of the Phase I Trial, involved in a lawsuit⁶⁸ (the "Mountaineer Hyundai case") in which flooding damage was alleged to have been caused by White Oak Land Company, a co-defendant in the Phase I Trial. Specifically, in the Mountaineer Hyundai case, it is alleged that the defendants, including White Oak Land Company, caused surface water runoff to improperly flow onto the plaintiffs' property as a result of land alteration and associated building of roads. It is incontrovertible that such claims are of the very same nature as those alleged against Western Pocahontas in the Phase I Trial.

Obviously, if a potential juror's spouse is involved in a case of the same nature against one of the same defendants, such a relationship should be grounds for disqualification. It is difficult to imagine that the trial court would not have granted a motion to strike Mrs. McGraw for cause if these circumstances had been revealed prior to trial. Of course, Western Pocahontas never made such a motion because, despite the

⁶⁸ DKM Limited Liability Company, a West Virginia limited liability company, and Mountaineer Hyundai, Inc., a West Virginia corporation v. First Community Bank and White Oak Land Company, Civil Action Number: 04-C-625 (Judge Burnside). A copy of the complaint in the Mountaineer Hyundai case is attached to the "Notice of Filing Supplemental Exhibit to Defendants' Memorandum of Law in Support of Renewed Motion for Judgment as a Matter of Law or a New Trial," which is included in Western Pocahontas' appendix.

exercise of ordinary diligence, Western Pocahontas never learned of these circumstances until after the jury, including Mrs. McGraw, conferred and rendered their verdict.

Western Pocahontas diligently attempted to discover disqualifying information of this nature before the jury was empanelled. In the jury questionnaire⁶⁹, each juror was asked in question number 16: "Has any business where you or a member of your family works ever been flooded?" Mrs. McGraw answered "no," despite the fact that the family business where her husband acts as general manager had already instituted a lawsuit against one of the defendants in this case, alleging frequent and severe runoff and flooding damage resulting from land alteration and associated building of roads.

The jury questionnaire also asked at question 69: "Do you know any person who has filed a lawsuit as a result of experiencing a flood?" Mrs. McGraw again answered "no." However, her husband and his family business had, in fact, filed a lawsuit as a result of allegedly experiencing flooding, and her husband was significantly involved in both the lawsuit and the events underlying the lawsuit. Similarly, question 67 asked: "Do you know any person who is a defendant in this litigation?" Mrs. McGraw answered "no." However, it appears that her husband allegedly spent weeks attempting to negotiate a resolution with a co-defendant in this case regarding alleged flood damage, and was unable to do so, resulting in the filing of the Mountaineer Hyundai case.

Western Pocahontas' counsel was advised, after the jury verdict, by John Fowler, counsel for White Oak Land Company in this action, that Mr. Fowler informed the trial court's law clerk of the foregoing facts during the trial, but no other action was taken.

⁶⁹ Mrs. McGraw's completed jury questionnaire is attached as Exhibit B to "Defendants' Memorandum of Law in Support of Renewed Motion for Judgment as a Matter of Law or a New Trial," included in Western Pocahontas' appendix.

This information was not communicated to Western Pocahontas' counsel until after the jury rendered its verdict.

Upon learning that Juror Sherry McGraw's husband was involved in a flood lawsuit against a co-defendant (a co-defendant that incidentally was one of the timber operators on Western Pocahontas' property in the Mullens subwatershed), Western Pocahontas' promptly moved for a new trial. In the following weeks, Western Pocahontas' counsel obtained copies of the complaint, discovery responses, and deposition transcripts, which further confirmed that Mrs. McGraw was disqualified to serve on the jury in this matter.

1. THE DISCOVERY RESPONSES IN THE MOUNTAINEER HYUNDAI CASE INDICATED THAT MRS. MCGRAW'S HUSBAND WAS CENTRALLY INVOLVED IN THE UNDERLYING EVENTS AND THE PROSECUTION OF THE CASE.

According to discovery responses that were filed in the Mountaineer Hyundai case, Mr. McGraw was a potential fact witness in that case and was centrally involved in the matters leading up to the filing of the suit, as well as the prosecution of the suit. For example, in Plaintiffs' Responses to Defendant First Community Bank's First Set of Interrogatories and Requests for Production of Documents in the Mountaineer Hyundai case⁷⁰, the plaintiffs identified Mr. McGraw as one of the individuals that assisted in preparing the discovery responses. In response to interrogatory number 2, Mr. McGraw is identified as an individual having personal knowledge of the facts surrounding the flood damage claim. In response to interrogatory number 10, the plaintiffs assert that

⁷⁰ A copy of which was attached as Exhibit B to "Defendants' Memorandum of Law in Support of Motion for Hearing to Question Juror Sherry McGraw, Ernie McGraw and Other Witnesses," and is included in Western Pocahontas' appendix.

Mr. McGraw was engaged in discussions for several weeks with the defendants before the filing of the lawsuit in an attempt to resolve the alleged runoff and flooding problems.

It is also alleged in Plaintiffs' discovery responses in the Mountaineer Hyundai case (which responses Mr. McGraw allegedly assisted in preparing) that the alleged runoff and flooding problems permeated practically every aspect of the business. It is alleged that the following losses were among those incurred by the plaintiffs:

- "Health concerns for customers and personnel. Plaintiffs believe the mold growing as a result of the water posed a risk to their employees and customers."

Since the employees of Mountaineer Hyundai have alleged that mold exposure had posed health risks, presumably, Mr. McGraw, as general manager of Mountaineer Hyundai, would have likely shared those serious health concerns with his spouse.

- "Morale of employees has suffered. Employees enjoyed working in the best facility in the community. For example, technicians could occupy two bays at once, which allowed them to do more work and, for those on flat rates or commissions, they were able to earn more money. As a result, Plaintiffs had to change their compensation structure."

- "Loss of jobs, Plaintiffs had to reduce the number of technicians and detail personnel because of the lack of space for them to work."

Again, it is difficult to imagine that Mr. McGraw would not have shared with his wife the fact that he, as general manager, was being forced to fire employees, that his compensation was being altered, and other circumstances alleged by the plaintiffs in the Mountaineer Hyundai case.

- "The sheer amount of time Plaintiffs' **management** has spent on this issue."

The plaintiffs alleged that management (and, again, Mr. McGraw is the general manager) spent an excessive amount of time dealing with the alleged runoff and

flooding problems. It is clear that Mr. McGraw was heavily involved in every aspect of the runoff and flood damage dispute.

2. THE DEPOSITION TRANSCRIPTS OF ERNIE McGRAW AND DIANA McGRAW IN THE MOUNTAINEER HYUNDAI CASE FURTHER ESTABLISH THAT SHERRY MCGRAW WAS DISQUALIFIED TO SERVE AS A JUROR IN THIS ACTION.

After filing its post-trial motion, Western Pocahontas obtained copies of the transcripts of the depositions of Ernie McGraw and Diana McGraw relative to the Mountaineer Hyundai case.⁷¹ Ernie McGraw is Juror Sherry McGraw's husband, and Diana McGraw is his daughter-in-law.

These transcripts clarified several important issues. First, it is clear from Ernie McGraw's deposition that the theory of liability alleged against White Oak in the Mountaineer Hyundai case was substantially the same as the theory of recovery that Plaintiffs sought to prove in the case at bar. Second, Mountaineer Hyundai is not merely Ernie McGraw's employer; it is a family business that involves others in the McGraw family. Third, the transcripts confirmed that Ernie McGraw had extensive involvement regarding Mountaineer Hyundai's alleged runoff and flooding problems and was centrally involved in prosecuting the case. Fourth, both Ernie McGraw and Diana McGraw recounted a conversation involving Mike Jarrell of White Oak and Greg McGraw (son of Ernie McGraw) of Mountaineer Hyundai, which indicated a likely bias or prejudice by the McGraws against White Oak. This bias against White Oak would, in turn, indicate a likely bias or prejudice against those who, like Western Pocahontas,

⁷¹ Ernie McGraw was deposed on August 15, 2006, and Western Pocahontas obtained a copy of the transcript on or around September 11, 2006. Diana McGraw was deposed on August 29, 2006, and Western Pocahontas obtained a copy of the transcript on September 15, 2006.

contract for work to be performed by White Oak and/or lease property to White Oak. All of these facts, lead to the unavoidable conclusion that Juror Sherry McGraw was disqualified to serve as a juror in the case at bar and that her jury questionnaire contained inaccurate responses to clear and material questions, all of which prejudiced Western Pocahontas.

- a. **In both the Mountaineer Hyundai case and the case at bar, the plaintiffs allege that land disturbances, particularly roads, caused increased runoff and flooding.**

When asked at his deposition what Mountaineer Hyundai believes White Oak did wrong to cause the alleged runoff and flooding problems to Mountaineer Hyundai, Ernie McGraw summarized that “according to their [White Oak’s] own drawings, they put the road in the wrong place, elevated wrong, put a ditch down through there, a ditch to nowhere; it didn’t even connect to the inlet.”⁷² In other words, as expressed throughout his deposition, Ernie McGraw and Mountaineer Hyundai are seeking to prove that an improperly constructed road caused increased runoff and flooding to Mountaineer Hyundai. This is also the theory that was alleged by Plaintiffs in the case at bar. As the record in this matter reflects, one of the primary arguments set forth by Plaintiffs was that construction of roads can cause increased runoff and flooding. In their closing arguments, Plaintiffs’ counsel repeatedly argued the theory that roads are the primary contributor to increased runoff and flooding. For example, Plaintiffs argued in closing that “It’s supported by Doctor Bell, who you will remember said that the roads were one

⁷² See Deposition Transcript of Ernie McGraw at p. 145, lines 1-4, excerpts attached as Exhibit A to “Supplemental Memorandum in Support of Defendants’ Motion for Hearing to Question Juror Sherry McGraw, Ernie McGraw, and Other Witnesses,” which is included in Western Pocahontas’ appendix.

of the key problems and one of the things you really had to watch.” (Tr. Vol. XXVII at p. 5369) (emphasis added). And “If you disturb the land and make roads, water probably runs off faster.” (Tr. Vol. XXVII at p. 5351) (emphasis added).

Sherry McGraw was, presumably, preconditioned to accept and believe this argument. This was the same argument her husband, stepson and stepdaughter-in-law were simultaneously making in the Mountaineer Hyundai case.

Significantly, Mountaineer Hyundai was not merely Ernie McGraw’s employer; it was the family business. Diana McGraw testified that she started Mountaineer Hyundai in 2000 with her husband, Greg McGraw, and her father, Andy Earehart.⁷³ Likewise, Ernie McGraw testified that Greg and Diana McGraw were the original owners of Mountaineer Hyundai in 2000. Greg McGraw is Ernie McGraw’s son and, presumably, Juror Sherry McGraw’s stepson.

Initially, Andy Earehart’s role was to give advice and guidance to Diana and Greg McGraw. Then, in 2001, Mr. Earehart sold Raleigh Auto Mall and started officially working at Mountaineer Hyundai where he later became President and owner. In 2002, Ernie McGraw (Greg McGraw’s father and Juror Sherry McGraw’s husband) became general manager of Mountaineer Hyundai. So, as of 2002, it appears that Mountaineer Hyundai was owned by Greg and Diana McGraw (Juror Sherry McGraw’s stepson and stepdaughter-in-law) and was operated by Juror Sherry McGraw’s husband, Ernie McGraw, as General Manager, and Diana McGraw’s father, Andy Earehart. In addition, Ernie McGraw testified that DKM Limited Liability Company, a co-plaintiff in the

⁷³ See, Deposition Transcript of Diana McGraw at p. 11, line 23 to p. 12, line 7, excerpts attached as Exhibit B to “Supplemental Memorandum in Support of Defendants’ Motion for Hearing to Question Juror Sherry McGraw, Ernie McGraw, and Other Witnesses,” which is included in Western Pocahontas’ appendix.

Mountaineer Hyundai case, is comprised of Diana McGraw and her sisters, Kim and Missy.

Diana McGraw sold Mountaineer Hyundai to her father, Andy Earehart in early 2004. Diana McGraw explained that there was simply too much family involvement, in her view, among her, her father, her husband and her father-in law. After Diana McGraw sold the business to her father, her father-in-law, Ernie McGraw, remained as General Manager. Greg McGraw presumably got another job at that point and left the family business. Diana McGraw remains an officer and continues her involvement as Vice President of Mountaineer Hyundai, but now is able to spend more time with her and Greg McGraw's children.

Since Mountaineer Hyundai is a family business, it is likely that the members of the McGraw family, including Juror Sherry McGraw, have knowledge of business affairs, such as the pending flood lawsuit. In her deposition, Diana McGraw stated that most business decisions and situations regarding Mountaineer Hyundai are discussed in informal family settings:

“Q: Have you been involved in any discussion with your owner, or with your father, or anyone else, representatives of the dealership, about growth, opening up another franchise or moving?”

A: Yes. We have a lot of family discussions.

Q: Okay. It might be difficult to distinguish between an informal family discussion at the dinner table and/or a formal – formal ownership meeting, but has there been any actual concrete discussions and/or debate about moving facilities, purchasing another property, changing locations, opening another franchise, those types of things?

A: Most of our discussions are informal. That's just the way we tend to do business....”

In summary, Mr. McGraw has assisted in preparing discovery responses that describe the runoff and flooding issues of Mountaineer Hyundai as a persistent and serious problem that has plagued the business for years, decreasing profitability, affecting the pay structure, causing employees to be fired, creating potential health problems from mold exposure, etc. Both Ernie McGraw and Diana McGraw then gave depositions that confirmed and clarified the nature of their allegations. Diana McGraw further testified that the family discusses these issues informally when they are together. Yet, Juror Sherry McGraw's questionnaire states in response to question 17 that no business where she or a spouse works has ever been flooded. It is an undeniable fact that the response to question 17 is *wrong*. According to Ernie and Diana McGraw, Mountaineer Hyundai has been flooded and has filed a lawsuit because of the flooding. And in that lawsuit, Mountaineer Hyundai, and Ernie McGraw in particular, are seeking to prove the same theory of liability that Plaintiffs seek to prove in the case at bar. The prejudice to Defendants in this situation is clear. Obviously, a juror in Sherry McGraw's position would be more receptive to the Plaintiffs' theory in this case, since her husband was primarily responsible for attempting to prove that same theory in the Mountaineer Hyundai case.

Also of note, since Mountaineer Hyundai is a family business, its success is vital to the livelihood of Juror Sherry McGraw and her husband Ernie McGraw; Ernie McGraw's son (Greg McGraw), daughter-in law (Diana McGraw) and grandchildren; and Greg McGraw's in-laws, including his father-in-law (Andy Earehart) and his sisters-in-law (Kim and Missy). In the Mountaineer Hyundai case, it is alleged that land disturbances by White Oak, particularly the roadway that was constructed near Mountaineer Hyundai, caused excessive runoff and flooding, jeopardizing the success of

Mountaineer Hyundai. A verdict in favor of Plaintiffs in the case at bar serves the interests of Mountaineer Hyundai and the McGraw family by validating the theory of liability that Mountaineer Hyundai, and Ernie McGraw in particular, are pursuing against defendants, including White Oak, in the Mountaineer Hyundai case. Thus, Juror Sherry McGraw had a clear interest in the outcome of the case at bar and was disqualified to serve as a juror.

3. MEMBERS OF JUROR SHERRY MCGRAW'S FAMILY (AND PERHAPS JUROR SHERRY MCGRAW) WERE PRIVY TO ALLEGED NEGOTIATIONS AND DISCUSSIONS WITH WHITE OAK THAT LIKELY RESULTED IN A BIAS AGAINST WHITE OAK AND, BY EXTENSION, AGAINST WESTERN POCAHONTAS.

Prior to the filing of the Mountaineer Hyundai case, Greg McGraw, Ernie McGraw's son, approached Mike Jarrell of White Oak to attempt to negotiate a resolution of Mountaineer Hyundai's alleged runoff and flooding problems. At least two members of the McGraw family, Ernie McGraw and Diana McGraw, had both been informed of the details of these discussions. It is only logical that Sherry McGraw was likely privy to this information as well. Diana McGraw testified that:

"I'm aware that my husband spoke to Mike Jarrell at the beginning of all this and we went at the angle, yes, maybe we're young and naïve and we thought we could all work this out with a handshake and get this cleared up. But he went up there because we this water issue and, of course, we've always had a road issue, space issue, and he went under the pretense of asking if there was any way we could purchase the road from him, or assume liability of the road, to see what our options were. And if we – if he could do some work, which I don't know exactly what that work would be, since it's not my expertise, in the drainage area, at our expense, to fix the water problem. And, basically, in Mr. Jarrell's words to my husband, were what's in it for me. And so that's how that meeting was left." (emphasis added).

Greg McGraw told not only his wife about this conversation, but his father (Juror Sherry McGraw's husband) as well. Ernie McGraw testified as follows:

“Q: Are you privy to what discussions were held with Mr. Jarrell?

A: Just that my son told me he discussed it with him, Mr. Jarrell. And the fact that the water was running in and he needed to see what they could do to divert the water.

Q: And do you know if Mr. Jarrell made any indications as to whether anything could be done, or is that knowledge you don't have?

A: The comment was made to me by my son as Mr. Jarrell said “What's in it for me?” (emphasis added).

One of the questions posed to the jury in the case at bar was whether Defendants acted reasonably under all the circumstances. The jury was able to assess the conduct of Western Pocahontas based on the conduct of the timber companies that were permitted to operate on Western Pocahontas' property, including White Oak. Juror Sherry McGraw's husband, Ernie McGraw, and his son and daughter-in-law, Greg and Diana McGraw, have alleged that White Oak was unreasonable in its conduct toward Mountaineer Hyundai, and that White Oak and Mike Jarrell's bottom line was “What's in it for me?”.⁷⁴ Mike Jarrell was present in the courtroom during much of the trial as a representative of both White Oak Land Company and White Oak Lumber Company. A juror who was privy to Greg McGraw's one-sided account of his negotiations and discussions with Mike Jarrell on behalf of White Oak would clearly be inclined to think that White Oak is “unreasonable” in dealing with runoff and flooding issues. Since much of the evidence presented against Western Pocahontas related to operations conducted by or at the direction of White Oak, this bias against White Oak also prejudiced Western Pocahontas.

⁷⁴ Western Pocahontas obviously takes no position on the truth or accuracy of any of the allegations made against White Oak by Mountaineer Hyundai representatives, including Ernie McGraw, Diana McGraw or Greg McGraw. Western Pocahontas relies on the same only to the

4. BECAUSE JUROR SHERRY MCGRAW WAS DISQUALIFIED TO SERVE AS A JUROR IN THIS ACTION, WESTERN POCAHONTAS IS ENTITLED TO A NEW TRIAL.

In Proudfoot v. Dan's Marine Serv., 210 W. Va. 498, 558 S.E.2d 298 (W. Va. 2001), this Court reversed the trial court and ordered that a new trial was required because one of the jurors voting on the verdict was disqualified, and the disqualification was undiscoverable by the exercise of ordinary diligence. In Proudfoot, appellant, who did not discover the basis for the juror's disqualification until after the jury's verdict was reached, argued on appeal:

"[F]irst, that our system of jurisprudence vests so much trust and confidence in the jury that any substantial irregularity in the impaneling of the jury must require setting aside the verdict. Two, because of the constraints on investigating the deliberative process of juries, it is doubtful that a specific showing of prejudice could ever be made. Three, the guarantee of a trial by jury in Article III, Section 13 of the West Virginia Constitution presumably means six *qualified* jurors. Finally, cases in other jurisdictions clearly hold that when a disqualified juror lies to conceal the disqualification and subscribes to the verdict, a new trial is required."

Proudfoot v. Dan's Marine Serv., 210 W. Va. 498, 502, 558 S.E.2d 298, 302 (W. Va. 2001). In ordering a new trial, this Court noted that it had traditionally required a showing of prejudice or harm prior to setting aside a verdict due to alleged juror disqualification, citing Syllabus Point 1 of Flesher v. Hale, 22 W. Va. 44 (1883).

Proudfoot v. Dan's Marine Serv., 210 W. Va. 498, 502 (W. Va. 2001). However, the Court ultimately concluded that a showing of prejudice or harm was *not* required under the circumstances and held that "[t]o the extent that Flesher v. Hale, 22 W. Va. 44

extent that such allegations reveal the bias or prejudice exhibited by Juror Sherry McGraw's family.

(1883), and its progeny are inconsistent, they are expressly overruled.” Proudfoot v. Dan’s Marine Serv., Syl. Pt., 3, 210 W. Va. 498, 558 S.E.2d 298 (W. Va. 2001).

Like the appellants in Proudfoot, Western Pocahontas is entitled to a new trial even without a specific showing of harm or prejudice. However, Western Pocahontas clearly was prejudiced by the presence of a disqualified individual as a juror. Western Pocahontas was entitled to a trial by six qualified jurors, which has been denied by the presence and participation of a disqualified juror. More importantly, there is no doubt that Mrs. McGraw voted in favor of answering the three questions in favor of the Plaintiffs, since unanimous consent was required, and all jurors stated in open court that they had consented to the verdict. Mrs. McGraw’s husband works at a business that has alleged that land disturbances by White Oak caused or exacerbated flooding. Mrs. McGraw’s husband was centrally involved in the Mountaineer Hyundai case, having given statements about the alleged flooding and having been identified as one of two persons who provided Mountaineer Hyundai’s discovery responses. In this case, Plaintiffs alleged that Western Pocahontas unreasonably allowed its land to be used for timbering by White Oak Lumber Company, among others, and that the associated land disturbances caused increased runoff and contributed to streams leaving their banks. It is clear that, given the similarity of the claims being pursued by her husband and the family business and the claims being pursued by Plaintiffs against Western Pocahontas, Mrs. McGraw should have been disqualified and would have been disqualified if the pertinent information had been divulged in response to the relevant questions on the jury questionnaire. By helping the Plaintiffs achieve a favorable verdict in this action, Mrs. McGraw, whether intentionally or unintentionally, likely increased both the settlement value and the probability of a favorable verdict in the Mountaineer Hyundai

case. Moreover, it seems highly likely that Ms. McGraw's decision as to the validity of the Plaintiffs' theory of recovery -- flooding caused by land disturbance -- was influenced by her husband's efforts to establish the validity of that same theory in the Mountaineer Hyundai action.

In response to Western Pocahontas' motion, Plaintiffs argued that this issue was waived. Though difficult to discern the precise basis for Plaintiffs' position, they appeared to rely primarily on the fact that counsel for other defendants became aware of the disqualifying circumstances during trial and declined to challenge the qualification of Mrs. McGraw. This clearly did not constitute a waiver of the issue by Western Pocahontas. There is absolutely no basis upon which to impute the actions of a co-defendant to Western Pocahontas.

There also seemed to be an implicit accusation in Plaintiffs' response that Western Pocahontas' counsel lied about when the disqualifying information was discovered. Plaintiffs stated that "even if the court believes defendants', WPPLP and WPC's, representations in their motion for judgment, that they did not discover Juror Sherry McGraw's husband's employer's relationship to the other lawsuit involving White Oak Land Company until after the verdict was returned, their argument fails." Further, Plaintiffs suggested that the undersigned and other witnesses, including John Fowler and Mike Jarrell, should be compelled to testify regarding when Western Pocahontas discovered the grounds for disqualification.

In reply, Western Pocahontas' counsel stated that they did not need to be "compelled" to testify as they would willingly do so. As stated in signed pleadings filed with the trial court, the undersigned did not become aware, until long after the jury returned its verdict, (1) of Mr. McGraw's active involvement in an action against White

Oak, (2) that Mr. McGraw and his employer, Mountaineer Hyundai, were alleging that land disturbances had caused or increased runoff, flooding and resulting damages, and (3) that Mrs. McGraw's sworn responses to the jury questionnaire were materially inaccurate. These facts were learned for the first time by the undersigned from telephone calls to John Fowler and, at his suggestion, to Mike Jarrell, just prior to filing Western Pocahontas' post-trial motions.

After filing and serving those post-trial motions, the undersigned received a call from White Oak's in-house counsel, Eric Cornett, who informed the undersigned that he and Mr. Jarrell subsequently recalled a brief conversation during the trial in which they mentioned to the undersigned (Richard Bolen) during a break that the employer of the husband of one of the jurors had a pending case against White Oak. No further details were provided during that conversation. The undersigned had no recollection of that conversation prior to the call from Mr. Cornett.

During the course of the long trial, the undersigned had literally dozens of conversations with lawyers and other persons in the courtroom, including both Mike Jarrell and White Oak's in-house counsel, Eric Cornett. These conversations touched on many aspects of the trial and other matters. Most of the details of most of these conversations were not noteworthy and have long since been forgotten. There was nothing particularly memorable or noteworthy said during the conversation with Mr. Jarrell and Mr. Cornett concerning a juror's husband and White Oak, i.e., nothing that raised any particular concerns for the undersigned. No mention was made during that conversation of the fact that the lawsuit filed by Mountaineer Hyundai against White Oak was filed on exactly the same theory as the theory advanced by the Plaintiffs in the case at bar, i.e., that land disturbance causes or exacerbates flooding. Most importantly

of all, nothing was said during that conversation that in any way contradicted any of the sworn answers given by Mrs. McGraw to the jury questionnaire, and, thus, there was no reason to further pursue the matter. Neither Mr. Jarrell nor Mr. Cornett indicated during that conversation that Mrs. McGraw had misrepresented the facts in answering the jury questionnaire.

Simply learning that a juror's husband's employer had pending litigation against White Oak in no way would have or should have prompted any further inquiry or action by the undersigned. Mrs. McGraw had already verified under oath that no business where any member of her family worked had ever been flooded and that she didn't know any person who had filed a lawsuit as a result of experiencing a flood. The undersigned were entitled to rely and did rely on the accuracy of these sworn responses and no further inquiry was necessary or appropriate. However, as the undersigned found out long after the trial was concluded, Mrs. McGraw's sworn responses to the questionnaire were simply not accurate in material respects. If the undersigned had learned that these responses were not true during the course of the trial, that certainly would have prompted additional inquiry and action by the undersigned. That never occurred.

It's important to note that, even though the undersigned did not recall the brief conversation with Mr. Jarrell and Mr. Cornett which took place during the trial until being reminded of the conversation by Mr. Cornett after the initial motion and memorandum were filed, nothing said in any of Western Pocahontas' prior filings was inaccurate or needed to be corrected. In the memorandum in support of defendants' renewed motion for judgment as a matter of law and/or a new trial, we stated that we "were not informed of the disqualifying circumstances until after the jury verdict was rendered...." The "disqualifying circumstances" are the fact that Mrs. McGraw's

husband, the General Manager of Mountaineer Hyundai, was actively involved in attempting to settle Mountaineer Hyundai's flood damage claim against White Oak and has been carrying the laboring oar in pursuing that action, and that he has a substantial personal investment of time and effort in proving Mountaineer Hyundai's theory that White Oak's land disturbance caused or exacerbated flooding resulting in damages to Mountaineer Hyundai. The "disqualifying circumstances" also include the fact that Sherry McGraw's sworn voir dire responses were materially inaccurate. None of these "disqualifying circumstances" were known until long after the trial had concluded. The only thing that the undersigned learned as a result of his conversation with Mr. Jarrell and Mr. Cornett during the trial was that a juror's husband's employer had a pending lawsuit against White Oak. That, standing alone, clearly did not constitute a "disqualifying circumstance", as far as the undersigned was concerned, particularly, in view of the fact that there was no suggestion that the juror had misrepresented any facts in her sworn answers to the jury questionnaire. Thus, there was clearly no waiver of this issue.

Though the circumstances clearly support a new trial in any event, Western Pocahontas joined in Plaintiffs' request for the taking of testimony to investigate this issue and requested that the trial court conduct a post-trial hearing to take the testimony of Mrs. McGraw and others.⁷⁵ This Court has instructed that when such a post-trial hearing is requested, it should be permitted:

⁷⁵ This request was supported by Rule 606(b) of the West Virginia Rules of Evidence, which states that "Upon an inquiry into the validity of a verdict... a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

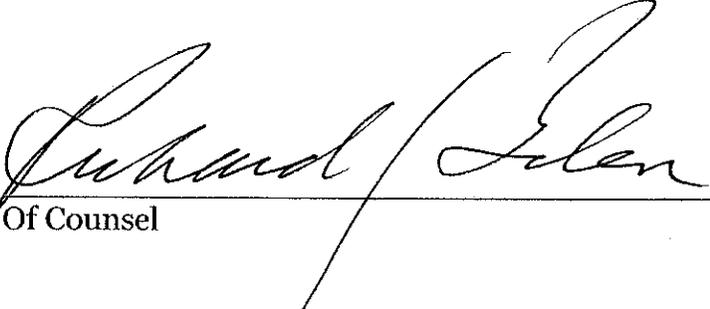
“Just as the trial court has discretion over voir dire examination, so should it have discretion on the question of whether a new trial should be granted because of false answers given by a prospective juror on such examination. In the exercise of its discretion in the latter instance a trial court should, when requested, permit interrogation of the prospective juror to determine the truth or falsity of such answers and the relevancy thereof to the case under consideration.”

State v. Dennis, 216 W. Va. 331, 349, 607 S.E.2d 437, 455 (W. Va. 2004) (emphasis added). The trial court, in error, denied Western Pocahontas’ request for a post-trial hearing. Because a disqualified juror participated in the verdict in this case, Western Pocahontas is entitled to a new trial.

VIII. CONCLUSION

For all of the foregoing reasons, Western Pocahontas respectfully requests that this Court deny the appeal and affirm Judge Hutchison’s grant of judgment as a matter of law in favor of Western Pocahontas. In the alternative, Western Pocahontas respectfully requests that this Court affirm Judge Hutchison’s grant of a new trial on all issues for the reasons set forth in Judge Hutchison’s order, or in the alternative, for the reasons outlined in Western Pocahontas’ cross assignments of error.

WESTERN POCAHONTAS PROPERTIES LIMITED
PARTNERSHIP and WESTERN POCAHONTAS
CORPORATION

By: 
Of Counsel

Richard J. Bolen-WV State Bar ID No. 392
Cindy D. McCarty-WV State Bar ID No. 9456
HUDDLESTON BOLEN LLP
611 Third Avenue
P. O. Box 2185
Huntington, WV 25722-2185
Phone: (304) 529-6181
Facsimile: (304) 522-4312
*Counsel for Defendants Western Pocahontas
Properties Limited Partnership and Western
Pocahontas Corporation*

and

David E. Goddard-WV State Bar ID No. 8090
John Greg Goodykoontz-WV State Bar ID No. 1437
STEPTOE & JOHNSON PLLC
P. O. Box 2190
Clarksburg, WV 26302-2190
Phone: (304) 624-8139
Facsimile: (304) 624-8183
*Co-counsel for Defendant Western Pocahontas
Corporation*