

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 33710**

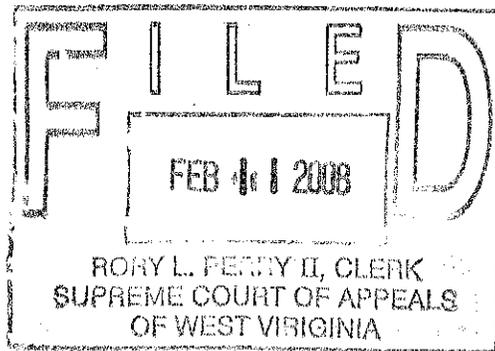
**IN RE: FLOOD LITIGATION**

**Raleigh County Civil Action No: 02-C-797**

**Honorable John A. Hutchison, Mass Litigation Panel**

**(Upper Guyandotte River Watershed Subwatershed 2a - Mullens)**

**REPLY BRIEF OF APPELLANTS**



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## REPLY BRIEF OF APPELLANTS

### I. INTRODUCTION

Appellants will endeavor to avoid a sentence-by-sentence refutation of the 170-page brief submitted by Appellees (hereinafter referred to as Western Pocahontas). That Appellants may not address a specific point represents a suggestion that the matter is fully joined and adequately briefed. In an effort not to burden the Court, Appellants will focus this Reply primarily on the cross-assignments of error raised by Western Pocahontas in its Brief. Appellants will highlight only a few areas with respect to the issues regarding the Order granting the Western Pocahontas motion for judgment as a matter of law and the award of a conditional grant of a new trial.

### II. STANDARD OF REVIEW FOR DETERMINING THAT THE TRIAL COURT ERRED IN GRANTING THE MOTION OF WESTERN POCAHONTAS FOR JUDGMENT AS A MATTER OF LAW

While recognizing that the standard of review under Rule 50 is, in general, de novo, Western Pocahontas proceeds to assert that because the trial court's decision was based largely on the exclusion of the expert witnesses, Dr. Bell and Dr. Morgan, an abuse of discretion standard applies. Western Pocahontas is wrong.

Without question, the appellate standard of review for granting a motion for judgment as a matter of law is de novo. Such a ruling will be sustained only when one reasonable conclusion as to the verdict can be reached. If reasonable minds differ, a circuit court's ruling granting judgment as a matter of law will be reversed. The standard is that the evidence must be considered in the light most favorable to the plaintiff. Specifically, this Court must (1) assume all conflicts were resolved in favor of the prevailing party; (2) assume as proved all facts which the prevailing party's evidence tends to prove; and (3) give to the prevailing party all favorable inferences. See, e.g., Arbogast, v.

Mid-Ohio Valley Medical Corp., 214 W.Va. 356, 589 S.E.2d 498 (2003); Syl. Pt. 3, Alkire v. First National Bank, 197 W.Va. 122, 475 S.E.2d 122 (1996); Syl. Pt. 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983).

Moreover, since Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995), our jurisprudence has recognized that when an expert's testimony is excluded based upon a determination as to whether or not it was "scientific," as was done here, or whether it was unreliable, then a question of law is raised which is reviewed de novo. *See, also*, San Francisco v. Wendy's Int'l., Inc., \_\_\_ W.Va., \_\_\_ S.E.2d \_\_\_, 2007 WL 4146834 at 5 (No. 33284, Nov. 21, 2007).

A de novo review compels the conclusion that the Order must be reversed and the jury verdict reinstated. However, even if an abuse of discretion standard is applied, the Order must be reversed as the trial court acted under misapprehension of both the law and the evidence.

**III. APPELLANTS PROVED AND PRESERVED TRIAL ISSUE TWO THAT THE WATER FROM THE WESTERN POCAHONTAS OPERATIONS MATERIALLY CAUSED OR CONTRIBUTED TO THE STREAM(S) INTO WHICH THEY DISCHARGED TO OVERFLOW THEIR BANKS**

Issue Two of the Phase One trial, as framed by the trial judge and the Flood Litigation Panel, required the jury to answer "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." Western Pocahontas raises two arguments regarding Issue Two. First, it is asserted, incorrectly, that Appellants did not raise or discuss Issue Two in their Petition for Appeal. Second, it is wrongly contended that there was no sufficient evidence to permit a verdict in favor of Appellants on Issue Two.

The bulk of the Order of March 15, 2007, which granted judgment as a matter of law in favor of Western Pocahontas and conditionally granted Western Pocahontas's motion for a new trial, constituted a complete rejection of the expert testimony of Mr. John Morgan and Dr. Bruce Bell. All aspects of the Order are largely based on the conclusion that the experts should have been excluded. Encompassed within that analysis was a summary rejection of all the testimony of and evidence elicited through Dr. Bell and Mr. Morgan. Testimony and evidence as to Issue Two regarding overflow of the streams was certainly part of the analysis and obviously was part of what was rejected by the trial court.

Appellants' Petition constituted a wholesale attack on the forty-six page Order which, among other things, stripped Appellants of their experts and therefore their proof as to all three trial issues. Appellants made plain that the Order was being appealed "in all respects." Appellants specifically sought in the Petition to have the Order "reversed and vacated in its entirety." (Petition, 9).

Western Pocahontas has attempted to craft cleverly a portion of the expert analysis into a discrete argument that it then contends Appellants did not address. However, Appellants' Petition was a refutation of the totality of the Order. Appellants indicated in the Petition the testimony of Mr. Morgan that directly refuted the proposition that there was no expert testimony regarding Issue Two. Specifically, Appellants cited to the testimony of Mr. Morgan regarding material contribution to the out-of-bank flow. (Petition, 20; Tr. Vol. VIII, 1878). Appellants also cited proof and testimony regarding how the capacity of the receiving streams was overwhelmed and the out-of-bank water and debris flow. (Petition, 26; Tr. Vol. VIII, 1953-1958). Thus, Western Pocahontas is just wrong when it asserts that the issue was not addressed.

Western Pocahontas is correct in that trial Issues One and Two address related, but very different, questions. Issue One required the jury to determine whether the use of the property materially increased the rate of surface-water runoff. Issue Two focused on whether the water materially caused or contributed to the stream or streams into which they discharged overflowing their banks. Both Dr. Bell and Mr. Morgan addressed these two issues. Appellants will focus on Mr. Morgan. As to Issue One regarding material increases in peak-flow runoffs, Mr. Morgan testified extensively and summarized his opinion that there was an increase based on three factors: (1) the large 45 percent of the watershed that was timbered; (2) the number of unreclaimed roads; and (3) the change in the forest floor by virtue of the timbering. (*Id.*, 1928). As to Issue Two, the testimony was explicit:

Q: With regards to the Mullens watershed, did Western Pocahontas's use of its property and the storm events of July the 8<sup>th</sup>, 2001 materially contribute to storm surface water runoff which caused or contributed to the streams in the Slab Fork subwatershed overflowing and flooding?

A. Yes.

(Tr. Vol. VIII., 1874).

Further, as to causing the streams to overflow, the testimony was as follows:

Q: . . . Do you have an opinion as to whether Western Pocahontas's use of its land in the Mullens watershed materially contributed storm runoff into the streams of the subwatershed, the Slab Fork subwatershed, as a result of the storm events of July the 8<sup>th</sup>, 2001, causing the streams in the Slab Fork subwatershed to overflow? Did it materially contribute or cause the streams in that subwatershed to overflow?

A.: It is –

Q: Do you hold such an opinion?

A: It is my opinion that the use of the Western Pocahontas properties in the Slab Fork subwatershed of the Mullens watershed did materially contribute to the flow and the flooding events in the Slab Fork watershed on July the 8<sup>th</sup>, 2001.

(Id., 1877-78).

The testimony as to Issue Two continued was as follows:

Q: . . . what's the effect of the increased peak flows -- you've testified to between 30 and 50 percent -- when they run across this land in the Slab Fork watershed and there's timbering debris left on the timbering sites?

A. As water rises out of the stream, any material in the stream will be mobilized the same way that you have a rainstorm at home and you've cut your grass, the grass cuttings will wash down the street or mud will wash down the street if you've got an undisturbed building site near your house.

So the same way, if you've got a large flow of water coming down the stream or on a log road, that will pick up any of the debris that is in the area and the timber will tend to float, so it will flow down with the stream.

(Tr. Vol. IX, 1950-51).

Mr. Morgan testified specifically as to the foreseeable consequences of a thirty-to-fifty percent increase in peak flow as a result of disturbing some 40 percent of the land. He also discussed exceeding the capacity of the streams:

Q: What are the foreseeable consequences of these 30 percent to 50 percent increase in peak flows as a result of a storm event like that?

A: Well, I'd say one thing is it's not just peak flows, it's total flow, there's two components, the peak flow, as I described yesterday, is just how quick the water comes out. The total flow is the overall amount.

Like if you're filling a bucket of water, the peak flow is how fast you've got the tap on, the quantity of water is the quantity of water you've got in the bucket. So does it take you one minute or one

hour to fill it? That's the difference between peak flow and total flow.

Q: All right.

A: The effect of those is to increase the amount of water which is going through a stream, and therefore you can overwhelm the capacity of a receiving stream be it a perennial stream or the receiving stream – river like Slab Fork itself.

And as you've then increased the flow, you've extended the capacity of some of the structures in that stream, such as culverts, bridge abutments, to past the flow, and therefore they will back up and end up being – impairing the flow further.

But it's the increase in flow above what that was designed for.

Q: And the foreseeable consequences of that will be what?

A: Flooding.

(*Id.*, 1954-55).

Further, upon being shown photographs<sup>1</sup> depicting flooding and debris in Mullens, Mr. Morgan testified that the photographs showed flooding indicative of increases in peak flow, increases in flood levels and velocity, out-of-bank flow and mobilization of trees, brush and other debris transported by increased and out-of-bank flows. (*Id.*, 1955-58).

Without question, as addressed in the Petition and fully set forth in the Brief, Appellants, through Mr. Morgan, fully and competently addressed trial Issue Two.<sup>2</sup>

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<sup>1</sup>These photographs, whose admission was stipulated by the parties, are discussed more fully in Section X, infra.

<sup>2</sup>The Court should take note of the fact that Western Pocahontas substantially relied upon the deposition testimony of Mr. Morgan. The arguments based on the deposition testimony which was not before the jury should not be considered. Moreover, the arguments are selective, out-of-context and glaring for what they omit.

**IV. APPELLANTS' EXPERT WITNESSES WERE QUALIFIED, THEIR TESTIMONY DERIVED FROM TECHNICAL OR OTHER SPECIALIZED KNOWLEDGE- SPECIFICALLY UNIVERSALLY ACCEPTED ENGINEERING PRINCIPLES AND MODELS USED TO ANALYZE WATER VOLUME, RATE AND FLOW ON, IN, AND OFF THE SURFACE OF LAND – AND THEIR TESTIMONY WAS RELEVANT AND RELIABLE**

In addition to the Issue Two argument, some fifty-six more pages of the Western Pocahontas brief address the expert qualifications and testimony. Appellants represent that these issues are fully joined and before the Court based upon the record and complete trial transcript, the Order and the briefs of the parties. This Court is burdened by a massive amount of briefing. Appellants will not rehash the same arguments made in the Petition and the Brief regarding the experts. However, some additional points must be made and/or emphasized.

It has long been established that Rule 702 of the West Virginia Rules of Evidence represents an attempt to liberalize the rules governing the admissibility of expert testimony. Indeed, the Rule is one promoting admissibility, not inadmissibility. *See, e.g., Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). That is, expert testimony is presumptively admissible.

Recent case law from the West Virginia Supreme Court reaffirms that Rule 702 shall be liberally construed and that trial courts are to err on the side of admissibility. *See, e.g., State ex rel. Jones v. Recht*, \_\_\_ W.Va. \_\_\_, 655 S.E.2d 126 (2007) (granting a writ of prohibition as to the trial court's exclusion of expert testimony and holding that a neurosurgeon's testimony that a rear-end collision could not have caused the victim's problems was improperly excluded in its entirety); *Walker v. Sharma*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2007 WL 3317415 (No. 33308, Nov. 8, 2007) (reversing the trial court's Rule 50 granting of a motion for judgment as a matter of law which had

been based on discrediting and rejecting an expert physician's standard of care and causation testimony); San Francisco v. Wendy's Int'l., Inc., *supra*, (reversing and remanding the trial court's grant of a motion in limine to exclude plaintiff's experts and companion grant of summary judgment).

Western Pocahontas valiantly, but unsuccessfully, attempts to sidestep Watson v. Inco Alloys Int'l., Inc., 209 W.Va. 234, 545 S.E.2d 294 (2001), which held that the testimony of an engineer is generally considered as not scientific within the reasoning of Rule 702. In so holding, the Court determined that the "gatekeeping" analysis of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1994), does not apply to technical knowledge. The Court did not adopt the United States Supreme Court's extension of the Daubert scientific knowledge analysis to technical knowledge that was made in Kumho Tire Co., v. Carmichael, 526 U.S. 137 (1999).

Contrary to West Virginia law, the trial court improperly engaged in a rigid, stringent and preclusive Daubert/Kumho analysis. In so doing, the liberal thrust of West Virginia Rule 702, which was directed at relaxing barriers to opinion testimony, was disregarded. Applying the facts and circumstances here to West Virginia case law instructs that Dr. Bell and Dr. Morgan were qualified experts with relevant and reliable technical or specialized knowledge.

Boiled down, Western Pocahontas' position is that Dr. Bell and Dr. Morgan are not qualified because they are not "forest hydrologists."<sup>3</sup> Western Pocahontas wants the Court to place blinders

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<sup>3</sup>Appellants in their Brief documented that Mr. Morgan did not rely on William Martin for any purpose. (Brief at 47). Western Pocahontas referenced a remark by Mr. Segal made on March 13, 2006, prior to Mr. Morgan's deposition of March 18, 2006. At that deposition, it was crystallized for Appellants that Western Pocahontas was going to embark on a trial defense strategy that solely relied on (1) Best Management Practices which do not address water flow

on itself and narrowly consider this as a forestry/timber industry case, thereby requiring a timber or forestry expert. The flaw in that approach is that this case is about land disturbance – how much land can be disturbed before it affects the rate of water run-off, increases peak flow, overwhelms the capacities of receiving streams and at what point does such land disturbance become unreasonable. These issues do not necessarily call for a forestry or timber expert. Rather, what is required is a consideration of water movement and management in connection with land disturbances. This mandates an approach using engineering principles as afforded by both Dr. Bell and Mr. Morgan.

The movement of water in response to land disturbance involves application of the same engineering principles whether one is considering a parking lot, a shopping center, housing development, industrial development, recreational development, mining or timbering. The engineering hydrologic models employed by Dr. Bell and Mr. Morgan are used by the U.S. Army Corp. of Engineers, the U.S. Department of Agriculture, Natural Resources Conservation Service, the U.S. Environmental Protection Agency, and the U.S. Geological Survey. They are nationally accepted engineering tools for analyzing peak discharge water flow, runoff and flooding.

While Western Pocahontas references Jones v. Patterson Contracting, Inc., 206 W.Va. 399, 524 S.E.2d 915 (1997) (per curiam), it fails to set forth the salient points of the opinion that support the Appellants. In Jones, an employee who sustained serious injuries while attempting to dislodge clogged dirt from a rock crusher chute brought, in part, a product liability action against the manufacturer of the crusher. The primary evidence of defective design was introduced at trial

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rates or water infiltration; and (2) that the rain event itself was simply overwhelming in nature. Thus, Appellants knew there was no reason to have William Martin testify.

through the expert testimony of a licensed engineer and certified safety professional whose professional experience was primarily in the field of aeronautics. The expert testified that he was familiar with chutes, conveyors, material handling and had viewed photographs and videotapes of the rock crusher.

The trial court granted a motion to strike the expert's testimony due to his lack of familiarity with the mining industry, mining standards, mining regulations and the equipment at issue, indicating that the plaintiff needed a mining engineer.

This Court engaged in a de novo review and reversed the decision of the trial court. That analysis applies here. The Court noted that the expert had knowledge of safety mechanisms and safety issues in general. The lack of distinctive knowledge of the workings of the mining industry did not prohibit his expert testimony. The issues were not deemed to be exclusively mining issues.

The Jones analysis, considered in connection with Gentry and the liberal thrust of the West Virginia rules and the case law directed toward reducing barriers to expert testimony, instructs that both Dr. Bell and Mr. Morgan are qualified experts with relevant and reliable testimony. Like the Jones case could not be pigeonholed as merely a "mining" case, Appellants' actions cannot be pigeonholed as merely a "timbering" case. While timbering is the industry conducting the land-disturbing activities, the principles for evaluating and determining the result of such land-disturbing activities on water flow apply across all disciplines and activities that disturb the surface of the land.

It is Appellants' contention that even if this Court determined to apply a Daubert/Kumho/Wilt analysis, a review of the testimony at issue dictates that it is relevant, reliable and therefore admissible. Western Pocahontas refers to the Daubert/Kumho/Wilt analysis as requiring consideration of "elements." In fact, what is to be considered in assessing reliability are

various factors that do not constitute a definitive, exclusive checklist. As this Court has indicated, regardless of what factors are considered, an expert's opinion is reliable and admissible if the expert explains how the conclusions were reached and points to an objective source to show that the conclusions are based on methodology used by others – even if a minority – in the field. See, San Francisco, supra, 2007 WL 4146834 at 6. As summarized in the Brief, that explanation was done by both Mr. Morgan and Dr. Bell. Mr. Morgan explained in detail what he did and why, and the methodology used is the only methodology used to assess the effect of land disturbance on water flow - all of which was subject to cross-examination by Western Pocahontas.

The Court has repeatedly cautioned that the role of the trial court is not to decide whether the expert testimony is right, but rather whether it is valid enough to be reliable. “Put simply, a trial court acting as a gatekeeper should take care not to invade the province of the jury, whose job it is to decide issues of credibility and persuasiveness, and to determine the weight that should be given to the expert's opinion.” Id., at 6, Gentry, 195 W.Va. at 522-23. We do well to recall that in Gentry, the Court indicated that challenges to scientific evidence should be rare. Id. The issues that Western Pocahontas raises and that led the trial judge astray post-trial are more properly issues of credibility, persuasiveness and weight which can be effectively dealt with in cross-examination, good counter-expert testimony and argument<sup>4</sup>.

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<sup>4</sup>It is worthy of note that toward the conclusion of the trial, the trial judge “knocked out” another group of plaintiffs’ claims against two defendants based on the expertise and testimony, not of any defense witness, but, rather, the judge’s stated reliance upon Mr. Morgan’s expert testimony. (Tr. Vol. XXVI 5196-98, 5209-10). The irony is that Mr. Morgan’s analysis is qualified, relevant, reliable and valid enough to support dismissal of defendants, but is not when offered in support of Appellants’ claims.

## **V. STANDARD OF REVIEW OF THE CONDITIONAL GRANT OF A NEW TRIAL**

Western Pocahontas correctly states that 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, that decision generally should be subject to review under an abuse of discretion standard. However, Appellants respectfully submit that the standard of review here should be de novo inasmuch as the judge's reasoning and analysis was rooted in and, as he acknowledged in the Order, flowed from the Rule 50 determinations and the determinations regarding the Appellants' expert witnesses which require a de novo review. However, under either standard, Appellants prevail.

## **VI. THE TRIAL COURT ERRED IN CONDITIONALLY GRANTING A NEW TRIAL**

The trial court, with very little discussion, limited its inquiry for purposes of Western Pocahontas' Motion for a New Trial to the issues of (1) the qualifications of the experts; (2) cumulative evidence (the jury's "mental database"); (3) refusal of evidence as to the photographs of the Twin Falls State Park golf course; (4) tainted anecdotal evidence from another Appellants' group; and (5) the admission of the FATT report. Order at 40-45. The new trial analysis of the trial court was grounded in the decisions as to the expert testimony. Appellants have adequately briefed these five issues and will not reargue them. Western Pocahontas has raised several points that Appellants did not previously address which now require a response.

Western Pocahontas argues that counsel for one group of plaintiffs, Mr. McGraw, improperly made "repeated" references to deaths which constituted prejudicial error. There were two "repeated" references. One occurred during Mr. McGraw's opening statement and the other occurred during the cross-examination of a defense expert.

Subsequent to the isolated cross-examination remark, Western Pocahontas moved that Plaintiffs be prohibited from mentioning deaths, since damages were to be confined to Phase Two of the trial and there had been no discovery regarding deaths and damages. The objection was sustained and counsel was cautioned. It did not occur again. Western Pocahontas did not request that a curative instruction be given to the jury and therefore has waived any claim of prejudice. Cf. Rowe v. Sisters of Pallottine Missionary Soc., 211 W.Va. 738, 568 S.E.2d 45 (2002) (party waived review of closing argument where no curative instruction requested).

Appellants submit that two brief remarks during the course of the lengthy and protracted trial process could not have overwhelmingly and prejudicially inflamed the passions of the jury against Western Pocahontas. The purported “notable” Virginia case cited by Western Pocahontas is not on point as it involved special court- appointed commission proceedings in an eminent domain action to determine compensation. Counsel there repeatedly, and despite admonition, improperly appealed to the commissioner’s private pecuniary interests imploring that it was “your money” at issue, be fair to yourselves and pleading “is that what you are going to pay your money for.” Hamer v. School Bd. of Chesapeake, 240 Va. 66, 393 S.E.2d 623 (Va. 1990). No such thing occurred here.

There is no merit to Western Pocahontas’s argument that Plaintiffs “repeatedly” suggested that the Phase One trial was not important and created the false impression that the jury did not need to take its responsibilities seriously. Appellants emphatically state that they did not engage in any “deceptive device” in order to seek to have the jury abandon its function or treat it more lightly.

There is nothing improper about directing the attention of the jury to the three very specific and tailored questions framed by the trial judge and the litigation panel. Indeed, that is precisely what the jury was required to focus on. Answering the three questions was the role of the jury.

Appellants are entitled to thank the jury and to briefly (as was done) explain that we do represent real people who were not involved in Phase One by virtue of the trial plan. That is all that these Appellants did. It is entirely proper and there is no parallel whatsoever to the criminal law context or improperly arguing post-judgment effects of joint and several liability and assignment of fault. Appellants did not ask the jury to speculate about Phase Two. Rather, the jury was asked to do its job – focus on the three questions placed before it.

The Court should disregard all argument based on a post-trial report issued by Steven C. McCutcheon, PhD. The trial court properly stated in its Order that it did not consider the McCutcheon post-trial material submitted by Western Pocahontas some six months after the conclusion of the trial. Like the trial court, this Court should not consider it.

Further, the report of Dr. McCutcheon does not stand for the propositions asserted by Western Pocahontas. Most significantly, Dr. McCutcheon was deposed as a witness in this action on February 18, 2006, a few weeks before the trial commenced. Western Pocahontas did not call Dr. McCutcheon as a witness. Nor did any other defendant. We respectfully suggest that the reason for that strategic decision was that Dr. McCutcheon testified that he would expect that experts could use the various engineering hydrologic models and “be able to make reasonable interpretations whether they use the curve number method or watershed calculation or other forms of hydrologic analysis.” (McCutcheon Dep. at 169-70). If, for some reason, this Court decides to consider the post-trial McCutcheon material, it should do so only in companion with his deposition testimony.

**VII. THE WESTERN POCAHONTAS CROSS-ASSIGNMENT OF ERROR THAT THE TRIAL PLAN WAS UNCONSTITUTIONAL AND PREJUDICIAL IS FUNDAMENTALLY FLAWED AND MUST BE REJECTED FOR THE FAILURE TO ACKNOWLEDGE, ADDRESS OR DISCUSS THE CONTROLLING TRIAL COURT RULE 26.01 REGARDING MASS LITIGATION AND THE CONTROLLING CASE LAW GOVERNING MASS LITIGATION**

The attack by Western Pocahontas on the Trial Plan is astounding for its failure to acknowledge long-settled West Virginia rules and law regarding mass litigation. In that regard, it is a classic example of setting up a strawman argument for the purpose of defeating it. The approach is either disingenuous or a stealth attempt to overturn the rules and case law governing mass litigation. This Honorable Court must not be led astray by the calculated effort to confuse and confound the issues.

In State ex rel. Appalachian Power Co. v. MacQueen, 198 W.Va. 1, 479 S.E.2d 300 (1996)<sup>5</sup>, the Court dealt with facility-owner defendants who sought a writ of prohibition to prevent the trial court from implementing a plan for consolidation of all pending asbestos premises liability cases against the facility owners. The opinion was issued prior to the enactment of Trial Court Rule (TCR) 26.01, which defined “mass litigation” and established the Mass Litigation Panel and related procedural rules.

In Appalachian Power, the Court approved a bifurcated trial plan. Specifically, the Court approved a trial plan that included a first phase which, like here, was not plaintiff-specific. Rather, it was premises-specific in determining whether the premises owners failed to maintain a reasonably safe workplace and, if not, determining during what period of time the premises were not reasonably safe. Phase one, as approved by the Court, was to determine common negligence issues. The goal

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<sup>5</sup>Judge Recht who authored the opinion is one of the Flood Litigation Panel judges.

was to efficiently, with judicial economy and dispatch, eliminate defendants with prejudice so that only those defendants who failed to maintain their premises in a reasonably safe condition would continue to phase two. Phase two was intended to be plaintiff-specific, concentrating on issues relating to proximate cause, damages and comparative fault.

In approving the trial plan and rejecting the defendants' claims of prejudice, denial of due process and chaos, the Court commented as follows:

The Plan presents a novel method of fact resolution which, while possibly atypical in the traditional litigation process, is indispensable in handling mass litigation cases, such as damage claims for asbestos exposure.

The trial court is in the best position to determine the immediate wisdom of consolidating cases for purposes of resolving common issues of law and fact, and we refuse to second guess the experience and talent of the trial judge. . . .

We find nothing in the Plan that would prejudice any of the defendants. To be sure, there is much in the Plan to recommend it to all parties because it represents an effective and efficient manner to bring closure to these cases without depleting valuable resources in the event that they are needed to satisfy a monetary award.

Id., 198 W.Va. at 6, 479 S.E.2d at 305.

Furthermore, the Court in Syllabus Point 3 established the foundational jurisprudential philosophy that was subsequently embodied in TCR 26.01 and the case law governing mass litigation:

A creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties.

Id., Syl. Pt. 3, 198 W.Va. at 2, 479 S.E.2d at 301.

In State ex rel. Mobil Corp. v. Gaughan, 211 W.Va. 106, 563 S.E.2d 419 (2002) (per curiam), the Court again addressed a trial plan and defendants' claims of due process and equal protection

violations, lack of commonality of issues, and the potential use of a damages matrix. Again, the Court refused to provide requested relief to the defendants.

The Mobil opinion is important as it was a post-TCR 26.01 decision. TCR 26.01 went into effect on July 1, 1999. The Court remarked at length on the goals and purposes of TCR 26.01 and the need to so address mass litigation. After discussing the procedural history of asbestos cases, the earlier application of Rule 42 of the West Virginia Rules of Civil Procedure to consolidate asbestos cases, the petition of Judges Recht and MacQueen to the Court to group asbestos cases under TCR 26.01, and the Court Order granting the petition, the Court commented:

Through the experience of those earlier cases, various constructs emerged regarding how to balance the rights of the parties to have access to the judicial system in a reasonably prompt fashion without simultaneously grinding the court system to a halt to the detriment of all other matters. . . . Perhaps the most important lesson that was learned from these earlier mass asbestos cases is that the management of these cases cannot be accomplished without granting the trial courts assigned to these matters significant flexibility and leeway with regard to their handling of these cases. . . . A critical component of that required flexibility is the opportunity for the trial court to continually reassess and evaluate what is required to advance the needs and rights of the parties within the constraints of the judicial system. Out of this need to deal with "mass litigation" cases in non-traditional and often innovative ways, TCR 26.01 was drafted and adopted.

While we do not suggest that TCR 26.01 perfectly addresses the entirety of the issues that arise in conjunction with the handling of mass litigation claims<sup>6</sup>, we conclude that this rule, as well as the implementing efforts of the trial courts and this Court, represent the judicial system's best efforts to address the unique challenges of managing this voluminous litigation, while at the same time trying to afford substantial justice to all the parties involved in a timely

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<sup>6</sup>Indeed, the Court has now approved a new staff position to deal solely with mass litigation and work directly with the Mass Litigation Panel members while being supervised by the Supreme Court Clerk.

manner. We further observe that TCR 26.01, by sanctioning mass litigation, seeks to meet the constitutional mandate of administering justice without delay.

Id., 211 W.Va. at 111-112, 563 S.E.2d at

Critically, Mobil and its predecessor, State ex rel. Allman v. MacQueen, 209 W.Va. 726, 551 S.E.2d 369 (2001) (per curiam), specifically rejected the argument that Rule 42 and case law construing such rule were controlling following enactment of TCR 26.01.

Both Mobil and Allman plainly provide that when TCR 26.01 controls (as it does here), the cases interpreting various Rules of Civil Procedure, – including Rules 20, 23, and/or 42 addressing issues of joinder, class action and consolidation -- do not apply.

It is utterly remarkable that Western Pocahontas argues that the Trial Plan is unconstitutional and prejudicial without so much as mentioning TCR 26.01, Appalachian Power, Mobile Corp., or Allman. (Brief of Appellees at 104-116). It is astonishing that while ignoring the controlling rules and case law, Western Pocahontas has chosen to rely instead on Rule 42 of both the federal and state Rules of Civil Procedure and case law interpreting Rule 42 and general bifurcation doctrine. This choice places Western Pocahontas in the untenable position of disregarding the established rules and precedents without even acknowledging them. Thus, it is respectfully suggested that all the Western Pocahontas arguments regarding the Trial Plan sit on a foundation which does not constitute good faith, lacks candor in failing to disclose adverse legal authority, and lacks fairness. *See, e.g.*, W.Va. Rules of Professional Conduct 3.1, 3.3 and 3.4. Accordingly, the entire line of argument should be summarily disregarded and certainly must be rejected because it is inapplicable and wrong<sup>7</sup>.

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<sup>7</sup>While not controlling, it must be noted that the Court has successfully defended a due process attack on TCR 26.01 and the interpretive case law. *See, e.g., Norfolk Southern Ry. Co. v. McGraw*, 71 Fed. Appx. 967 (4<sup>th</sup> Cir. 2003) (unpublished).

**VIII. THE TRIAL PLAN PROPERLY ADDRESSED REASONABLENESS IN PHASE ONE**

With sleight of hand, what Western Pocahontas is actually arguing in all sections of the cross-appeal addressing reasonableness is that liability was not determined in Phase One. The cross-appeal obfuscates the proceedings and the facts, thereby requiring a somewhat detailed response.

On February 25, 2005, the Panel Judges announced that there would be a division of trials based upon watershed and that Phase One would be as to liability.

But what we have decided is that we're going to try these cases by watershed, and the first one that will be tried will be the upper Guyandotte watershed, which would include most of Wyoming and Raleigh County. And the reason we picked that watershed was because that's where most of the plaintiff's reside. When you look at the map of the plaintiffs, it seems to be that that's where most have occurred.

And Judge Hutchison has graciously agreed to try the first watershed trial, and that's going to be set on March the 6<sup>th</sup> of 2006. And the pretrial on that will be on February the 20<sup>th</sup> at 9:00 a.m. We will try liability only, and we're going to try it in the – the Circuit Court of Raleigh County.

....

Now, as I said, we're going to try liability only. We have not yet made a final decision about the damage trials, but when the liability trials are concluded, we – we are going to try to proceed as quickly as possible to damage trials, and we may parcel those out to the various counties, depending on – you know, and to the circuit judges in those counties. We have talked about that, but we have not made a final decision on that.

....

But that's – that's the way we're going to – We're going to determine the liability in each watershed and then have separate damage trials for the plaintiffs, and we have not yet decided how we're going to parcel those out.

(Hrg. Tr. 2-25-05 at 30, 31, 32). (Emphasis added).

At a hearing on September 15, 2005, the trial judge set forth what the Appellants had to prove. “[E]ssentially, they’ve got to prove (a) that it was an unreasonable use of the premises wherever that premises may be and (b) that it somehow – that unreasonable use somehow caused an injury which exceeds anything that might be considered to be Mother Nature.” (Tr. 9-15-05, 39-40).

The irony in all of this at this stage is that these Appellants requested a separate trial and fully detailed why the circumstances called for it. Nevertheless, Appellants were forced to trial in a distant county where they prevailed despite a Trial Plan that consisted of hurdles designed to make prevailing difficult, at best. As counsel for Appellants explained in arguing for a timber-only trial, the topography at issue was a bowl which drained into Mullens. There was not much coal mining disturbance in the area upon which these Appellants were focused. Rather, there was substantial timbering disturbance. Thus, Appellants proposed a discrete timbering-only case for the watershed. (Hrg. Tr. 9-30-05, 21). These Appellants argued that the ownership of the vast majority of the watershed was vested in Western Pocahontas. Moreover, almost fifty percent of the disturbance was coming from the Slab Fork area which is owned, almost in its entirety, by Western Pocahontas. (*Id.*, 22). Appellants contended early on that the disturbance would increase the runoff volume and the surface flow by almost 150 to 200 percent. (*Id.*, 23). In other words, the Appellants argued that at the end of the day, the Mullens watershed would be a one defendant (Western Pocahontas) trial. (*Id.*, 24). (*See also, Id.*, 50-54). Appellants asserted that this would be easier and promote judicial economy. Of course, the defendants at that time, including Western Pocahontas, wanted none of it. That is why these Appellants were hauled into these proceedings late, without participation in In re: Flood Litigation, over objection, and over subsequent attempts to be severed and sent back to Wyoming County for trial with sixty-some plaintiffs and one defendant.

The trial court then made abundantly clear what the Phase One trial would be: “I think I am bound by the Panel decision that these are going to be liability cases to begin with.”(Id., 60). (Emphasis added).

The trial judge asked the defendants if they disagreed with the identification of the subwatershed as being Mullens and Oceana. (Id.). There was no objection. In fact, liaison counsel agreed with the outlines of Mullens and Oceana. (Id., 61).

The trial judge then continued to note that Phase One was a liability trial. (Id., 63).

Mr. Segal: It’s a liability trial.

The Court: Yeah, it’s a liability trial.

(Id., 97).

The trial judge explained liability for purposes of Phase One in more detail:

The Court: . . . They are not liability trials – this is not a liability trial as to liability as to a particular plaintiff. The issue of foreseeability as to a particular plaintiff, I think is still open, if they build their house – if it was flooded out in 1998, and they built it back and put it in the same place, that’s a defense. If they altered their own property in some manner that potentially caused their own property damage, that’s a defense. Other floods, that’s a defense, you know, the occurrence rate and that sort of stuff. So that goes to causation and liability with regards to those issues.

(Id., 100). (Emphasis added).

The trial judge enunciated what the plaintiffs had to prove by a preponderance of the evidence as “that the particular operation undertaken was unreasonably accomplished and was unreasonable because of where it was located and the foreseeability of damages to the folks downstream.” (Id., 105). That, as the trial court properly noted, did not require getting into issues as to individual plaintiffs. (Id.). “Causation as to a particular plaintiff is not an issue in this trial.”

(Id., 110).

In further explaining that Phase One was a liability trial, the trial judge indicated that causation as to a particular plaintiff would not be an issue. However, Phase One was a liability trial according to the trial court "because this is the liability of the defendants as to the operation of their property, not their liability as to any particular plaintiff." (Id., 110). Further, in Phase Two, the plaintiffs were to be required to prove causation as to his or her particular property. (Id.). Issues of remoteness, comparative negligence and the like are open to Western Pocahontas in Phase Two. (Id.). Obviously, whether Western Pocahontas is ultimately liable to any particular plaintiff was reserved to Phase Two. (Id., 112). While we as plaintiffs did not approve of the approach, we understood it as being in accord with the mass litigation rule and case law (with the exception of not being conducted in Wyoming County). There is nothing unique about this Trial Plan approach.

Nevertheless, despite the clarity of the trial court, some of the original defendants attempted to revisit the issue of liability determination in Phase One. In response to the attempt of defendants to move reasonable use to phase two, the trial judge made it a Phase One issue. (Hrg. Tr. 12-19-05, at 57). Otherwise, what is the point of a Phase One trial? Phase One was plainly described as: (1) whether there was an increase in surface water runoff rate; (2) whether the banks overflowed and (3) whether the use of the property was unreasonable. (Id., 59, 107-08, 121, 123, 130). Damages were reserved to Phase Two. (Id., 65). "The theory of phase one is if a jury finds that regardless of what has taken place on the property, that the use of the land was reasonable, then as to that defendant, the inquiry is over." (Id., 86). Proximate cause and damages were properly preserved for Phase Two. (Id., 87).

It should be very clear that defendants, including Western Pocahontas, by and through liaison counsel, approved of the Trial Plan:

In Phase One, we've got the Trial Plan Order ready, with a couple of little issues, and this is one of them. I mean, this is a major issue that we've got to figure out what we're doing.

But the trial plan is, Phase One, (reading): . . . (a) whether as to each defendant's operation, the defendant's use of its property materially increased the rate of surface water runoff that left the operation as a result of the storm events on 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, whether the water from the individual defendant's operations materially caused or contributed to the stream or streams into which they discharged to overflow their banks; and (c) regardless of the findings in (a) and (b) above, whether the use by the defendants of the property in question was unreasonable under the circumstances, as set forth in the findings by the Court In Re: Flood. So those are the three questions that we're going to be answering in Phase One.

In all due deference to Mr. Jernigan and your argument about the reshuffling of the deck, and in deference to the argument that if all you're going to do is bring them back in under some other guise, that it shouldn't be done, in getting through Phase One, there is a possibility, and I don't know if I accept your representations, there is a fair chance that some of the property owners are going to be out, which would, likewise, take out any claims, cross-claims or third-party claims that they may have against the people who worked on their facilities.

Am I missing something here? Am I stepping – I have to take baby steps, guys, you know, (a), (b), (c). Am I right?  
(Hrg. Tr. 1-24-06 at 29-30).

At this point liaison counsel for the defendants, Mr. Emch, stated "I like the way you're talking so far, Judge." Id. (Emphasis added). Thus, three questions were framed for trial, including question three regarding "reasonability."

Even the trial court recognized that substantial hurdles were being place for the plaintiffs:

The Court: Well, then, if what I'm trying to do, and that's exactly – you're right, I'm trying to narrow the issues here, and I'm trying to narrow the focus to a point that's manageable.

If, in doing this, as we are putting it together, and I'm forcing the plaintiffs to prove as to the property that they alleged caused them damage that (a) it materially increased the off-flow; materially increased the volume in the creeks and whatever, which caused them to overflow their banks; and it was unreasonable, then I don't need everybody in here as a defendant yet. That's the first thing.

The second thing is, they've got a heck of a hurdle to overcome to get to that point.  
(Hrg. Tr. 1-24-06 at 30-31).

The point, according to the trial judge, was to get rid of defendants so that they would not be back for Phase Two. (*Id.*). This is a markedly defendant-oriented trial plan. Indeed, the plan itself as ultimately adopted was drafted and submitted by defendants' liaison counsel.

As the trial court repeatedly indicated, the focus was on unreasonability: "I'm trying to keep my eye on the ball, and the ball is, was it unreasonable, did it materially increase the flow, and did their operations increase that flow over what would normally have been expected." (*Id.*, 32). The trial court was clear that while Phase One was not a liability trial as to determining direct liability with respect to any single plaintiff, it certainly was determinative of reasonableness. (*Id.*, 107-08). The issues that are not to be relitigated in Phase Two are excess flow, material increase of overflow of streams and reasonable use. (*Id.*, 36).

#### **IX. THE TRIAL PLAN IS IN ACCORD WITH IN RE: FLOOD LITIGATION**

Western Pocahontas fails to address the reality of the trial and the jury instructions. The case was submitted to the jury squarely within the reasonable-use paradigm as commanded by the opinion of the Court in In re: Flood Litigation 216 W.Va. 534, 607 S.E.2d 863 (2004), and Morris

Associates, Inc., v. Priddy, 181 W.Va. 588, 383 S.E.2d 770 (1989). Whether reasonableness is also a component of a nuisance claim, a negligence claim and/or a riparian rights claim, and whether there are subtle distinctions regarding reasonableness amongst these claims, is of no consequence for the purposes of this appeal or cross-appeal in light of what was tried, what the jury was instructed and what it determined. The trial judge refused all the Appellants' instructions with respect to nuisance, negligence and riparian rights claims.

Specifically, the jury determined liability in favor of the Appellants under the reasonable use doctrine of In re: Flood Litigation and Morris v. Priddy. There is no need for Western Pocahontas to infuse this appellate process with speculation regarding what "Plaintiffs will undoubtedly argue" in Phase Two. Accordingly, the Western Pocahontas argument set forth in pages 116 through 128 of its Brief regarding reasonableness should be disregarded, as well as portions of the brief from 128 through 133.

The Court in In re: Flood Litigation concluded that the Appellants had a cause of action under Morris v. Priddy. The Phase One jury, at a minimum, has now determined that Appellants proved the Morris v. Priddy reasonable-use cause of action.

In Morris v. Priddy the Court clarified the law with regard to a landowner's liability for altering the surface of his land to change the course or amount of surface water that flows off the land. Surface water was defined as early as 1899. "Surface water is water of casual, vagrant character, oozing through the soil, or diffusing and squandering over or under the surface, which, though usually and naturally flowing in known direction, has no banks or channel cut in the soil; coming from rain and snow, and occasional outbursts in time of freshet, descending from mountains or hills, and inundating the country; and the moisture of wet, spongy, spring, or boggy land." Neal

v. Ohio R.R. Co., 47 W.Va 316, 34 S.E. 914 (1899). That definition of surface water was used in both Morris v. Priddy and In re: Flood Litigation.

Morris v. Priddy adopted the rule of reasonable use in dealing with surface water. In Syllabus Point 2, the Court held as follows:

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

Id., Syl. Pt.2 W.Va at, 383 S.E.2d at 770.

In In re: Flood Litigation, the Court, in addition to holding that Appellants have a Morris v. Priddy cause of action, rejected Defendant's assertions that Morris v. Priddy applied only to claims for diversion of surface waters onto an adjoining landowner's property. The Court did so to avoid unfairly preventing recovery in instances where the harm to non-adjacent landowners caused by the defendant was foreseeable due to the specific topography of the land. This Court should recall that the topography at issue here is that of a steep, bowl-like sub-watershed that drains directly to the community of Mullens.

The Court in In re: Flood Litigation declined "to delineate with specificity all of the factors to be considered when determining the issue of reasonableness" Id., 216 W.Va. at 542, 607 S.E.2d at 872. Instead, the Court held that in determining reasonable use as set forth in Morris v. Priddy, "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. Id., Syl. Pt. 2, 216 W.Va. at 538, 607 S.E.2d at 867.

The trial judge took firm control of the instructions, taking the position that all instructions from both Appellants and Western Pocahontas were refused. According to the trial judge, he crafted a general charge that "may or may not contain portions of the instructions that the counsel have provided." It was noted that the trial judge believed the instructions provided by counsel were duplicative or did not accurately state the law. Counsel were then invited to state objections. The only stated objection to the trial judge's charge by Western Pocahontas was to the use of the term "debris" without definition in an instruction setting forth that it is the duty of the landowner who conducts or permits removal of timber from his property to confine any debris on his own property and 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. (Tr., Vol. XXVII 5296-97, 5300-01).

The Appellants stated an objection to substantive instructions encompassing some five pages of transcript, and which recited statutory findings and declarations regarding the timber industry. (Id., 5299).

Having been invited by the trial judge to state objections to instructions, and in doing so only as to one word within the instructions, Western Pocahontas should not now be permitted to complain about instructions. As will be shown below, the instructions were basically those submitted by Western Pocahontas.

The instructions viewed in their totality were wholly favorable to Western Pocahontas and created high hurdles for the Plaintiffs to leap in order to prevail. As to questions number one and

two, the jury was instructed not once, but twice. (Id., 5313-14). The instructions on issue three correctly and precisely tracked Morris v. Priddy and In re: Flood Litigation. Moreover, the jury was repeatedly instructed that it was not being asked to determine whether timbering per se is reasonable or unreasonable, and that just because land is used for timbering does not make the landowner liable. The jury was instructed regarding social utility and that public policy promotes the continued development and expansion of the forest products industry as vital to the economic well-being of the State, increasing employment, raising revenue and boosting the economy.

Specifically, the jury was instructed in accordance with In re: Flood Litigation and/or Western Pocahontas's instructions as follows:

Further, even if the plaintiffs are able to meet the burden of proof as to these questions, the plaintiffs must still prove by a preponderance of the evidence that the defendants' use of the property in question was unreasonable under the circumstances. [*From Western Pocahontas instruction number 1 and in accord with In re: Flood*].

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: The amount of the potential harm involved;

The character of the potential harm involved;

The foreseeability of potential harm on the part of the landowner making alteration to the topography and flow of surface waters, if any;

The purpose or motive with which the landowner acted;

And the social utility that the law attaches to the type of use or enjoyment invaded;

And finally, the burden on those persons who might be harmed. [In accord with In re: Flood].

The Court instructs you that you must consider whether each individual operation and activity of the defendants materially increased the rate of surface water runoff and, if so, whether this increased rate of runoff materially contributed to streams overflowing. [*From Western Pocahontas instruction number 6*].

The word "material" refers to something that is significant and relevant and describes an ability to alter an outcome significantly. For example, to significantly increase the rate of runoff and to significantly contribute to flooding. [From *Western Pocahontas instruction number 6*].

In other words, something that is not material – something is not material if it is slight, unimportant or so minor as to deserve to be disregarded. [From *Western Pocahontas instruction number 6*].

During this phase of the trial, in order to establish the plaintiffs' claim, it is not necessarily – necessary to show that the defendant was negligent or violated some rule or regulation imposed by State or Federal government, because compliance with regulations or industry standards is not determinative as to whether or not the defendant acted reasonably in the use of its land. [In accord with In re: Flood].

Even if you believe that the defendant was conforming to industry standards in his operations or activities, this would not prevent you from returning a verdict for the plaintiffs if the plaintiffs have proved by a preponderance of the evidence each of the three elements that this Court has asked you to determine. [In accord with In re: Flood].

You, as a jury, are not being asked to make a determination as to whether or not timbering, per se, is reasonable or unreasonable.

.....

It is the duty of the 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 place it in such a 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 term "debris" was objected to by *Western Pocahontas*].

You are instructed that compliance with regulations or industry standards is not determinative as to whether or not a defendant acted reasonably in the use of his land. [In accord with In re: Flood].

Generally under the rule of reasonable use, a landowner, in dealing with surface water, is entitled to take such steps as are reasonable in light of all circumstances of relative advantage to the landowner and disadvantage to the adjoining and nonadjoining landowners as well as social utility. *[From Western Pocahontas instruction number 2 and in accord with In re: Flood].*

The development of land for timbering, commercial, industrial and residential use may require alteration of the property. If such development is to continue, owners must be able to take reasonable steps to develop their – and use their property without being subject to suit. *[From Western Pocahontas instruction number 2 and in accord with In re: Flood].*

In considering whether a defendant's use of his land was reasonable, you must balance the relative advantages, if any, to the defendants 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 communities and the State's interest in timbering and mining industries. *[In accord with In re: Flood].*

In weighing these factors, you should consider the amount of harm, if any, caused by the defendant's use of its land, the foreseeability of the harm by the defendant, the defendant's purpose, the social utility of the defendant's use of its land, and any other relevant circumstances. *[In accord with In re: Flood].*

No one factor is controlling, and all factors should be considered in determining whether a defendant's actions were reasonable. *[In accord with In re: Flood].*

In determining whether the defendant could have foreseen the harm, you should keep in mind that a person is not liable for damages which result from an event which was not expected and could not reasonably have been anticipated by an ordinary and prudent person. *[From Western Pocahontas instruction number 7 and in accord with In re: Flood].*

In other words, would an ordinary person in the defendant's position, knowing what the defendants knew or should reasonably have known, anticipate that harm of the general nature suffered by the plaintiffs was likely to result specifically from its operations? *[From*

*Western Pocahontas instruction number 7 and in accord with In re: Flood.*

If the defendant could not have reasonably foreseen the harm caused, then its land use was not unreasonable. *[From Western Pocahontas instruction number 7 and in accord with In re: Flood].*

“Foreseeability of harm” refers to whether the actor had reason to believe that his actions would result in significant harm to adjoining or nonadjoining landowners. *[From Western Pocahontas instruction number 8 and in accord with In re: Flood].*

Some factors to be considered in determining whether the harm was foreseeable include, but are not limited to: Whether the harm proximately flowed from the defendants noncompliance with a regulation or statute intended to prevent that harm; *[From Western Pocahontas instruction number 8 and in accord with In re: Flood].*

2. Whether the defendant knew or should have known of some risk that would be prevented by a reasonable measure, not required by a regulation or statute; *[From Western Pocahontas instruction number 8 and in accord with In re: Flood].*

3. Whether the defendant knew or by reasonable investigation should have known that an alteration he made to the land could cause flooding; *[From Western Pocahontas instruction number 8 and in accord with In re: Flood].*

4. Whether measures were taken by the defendant to minimize downstream impact; *[From Western Pocahontas instruction number 8 and in accord with In re: Flood].*

5. Whether the resulting harm was unavoidable; *[From Western Pocahontas instruction number 8 and in accord with In re: Flood].*

6. Whether the costs of dealing with downstream impact was too great, considering the minimal amount of foreseeable harm. *[From Western Pocahontas instruction number 8 and in accord with In re: Flood].*

Motive is a relevant factor in a reasonable use inquiry. Motive refers to the defendant’s motivation, his main or predominant

objective in acting or failing to act. *[From Western Pocahontas instruction number 9 and in accord with In re: Flood].*

Social utility is a relevant consideration in a reasonable use inquiry. Social utility refers to the meritoriousness of the conduct creating the alteration of land. Social utility is determined by examining factors, which could include: *[From Western Pocahontas instruction number 10 and in accord with In re: Flood].*

1. The social value of the law attaches to the primary purpose of the conduct; *[From Western Pocahontas instruction number 10 and in accord with In re: Flood].*

2. The suitability of the conduct to the character of the locality; and *[From Western Pocahontas instruction number 10 and in accord with In re: Flood].*

3. The impracticability of preventing or avoiding the invasion. *[From Western Pocahontas instruction number 10 and in accord with In re: Flood].*

You should not find that a landowner used its property unreasonably simply because the landowner utilized its land for timbering operations. Just because a landowner uses its land for timbering does not make him liable to the plaintiffs.

The West Virginia legislature has declared that as a matter of public policy, and in accordance with state law, West Virginia has extensive forest resources, and their continued development and expansion is vital to the economic well-being of the State and its people. *[From Western Pocahontas instruction number 11].*

The production potential of the State's forest resources remains far greater than its present demand. *[From Western Pocahontas instruction number 11].*

The promotion of existing forest product industries and the promotion of new forest product industries would benefit the State in terms of employment and additional revenue to the State. *[From Western Pocahontas instruction number 11].*

To increase employment and boost the State's economy, the limits to the development of the potential of West Virginia forest

resources must be reduced through an intensive campaign at making new contracts, developing new and existing markets, and increasing public awareness of the advantages of the forest resources in West Virginia. *[From Western Pocahontas instruction number 11].*

*[The remainder of the statutory section was placed in by the trial judge. The Plaintiffs had objected to using the statutory language requested by Western Pocahontas but requested that in the event the judge used that portion offered by Western Pocahontas, then the entirety of the statutory provision should be included].*

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

It is the policy of the State to strengthen and extend the present sediment control activities of this state by implementing operator licensing, logger certification and logging operations notification programs through the Division of Forestry.

Best practice management – “Best Management Practices” means sediment control measures, structural or nonstructural, used singly or in combination, to reduce soil runoff from land disturbances associated with commercial timber – timber harvesting.

The “Chief” means the Chief of the Office of Water Resources, the Division of Environmental Protection, or his or her designee.

The “Director” means the Director of the Division of Forestry of the Department of Commerce, Labor and Environmental Resources, or his or her designee.

An “Operator” means any person who conducts timbering operations.

“Timbering operations” means activities directly relating to the severing or removal of standing trees from the forest as a raw material for commercial processes or purposes.

For the purposes of this article, timbering operations do not include the severing of evergreens grown for and severed for the

traditional Christmas holiday season or the severing of trees incidental to ground disturbing construction activities, including well sites, access roads and gathering lines for oil and natural gas operations, or the severing of trees for maintaining existing or, during construction of, right-of-way for public highways or public utilities or any company – or any company subject to the jurisdiction of the Federal Energy Regulation Commission, unless the trees so severed are being sold or provided as raw material for commercial wood product purposes or the severing of trees by individual – by an individual on an individual's own property for his or her individual use, provided that the individual does not have the severing done by a person whose business is the severing or removal of trees.

And "Sediment" means solid particulate matter, usually soil or minute rock fragments, moved by wind, rainfall or snow melt into the streams of the State.

Compliance or noncompliance with Best Management Practices by a defendant to whom they apply may be considered by you as one of the factors in determining whether the defendant's use of the particular property involved was reasonable at the time. *[From Western Pocahontas instruction number 13 and in accord with In re: Flood].*

However, it is not determinative of that question. Compliance of a defendant in the extraction and removal of natural resources on his or her property with the appropriate state and federal regulations may be considered by you as evidence that the landowner's use of the land was reasonable. *[From Western Pocahontas instruction number 13 and 14, and in accord with In re: Flood].*

It is not conclusive evidence that the land use was reasonable, but is a factor that should be considered by you, along with all of the circumstances and evidence presented. *[From Western Pocahontas instruction number 14 and in accord with In re: Flood].*

(Tr. Vol. XXVII, 5315-5326).

Plainly, Phase One was not tried in a vacuum. The jury through trial Issues One and Two addressed harm. The concept of harm was inherent in those questions.

Western Pocahontas will have a full and fair opportunity to address the issues it complains of in Phase Two, which will address causation and damages. Further, the jury was not required to engage in speculation.

To the extent that Western Pocahontas complains that it could not fully weigh or balance issues, that is a result of the manner in, and strategy by, which Western Pocahontas chose to try the case. They chose a strategy that focused solely on best management practices and the notion that the flood event itself was just too enormous and too unlikely that it was not reasonable to suggest that Western Pocahontas should have accounted for it in its land use. In essence, while cloaking it slightly differently, Western Pocahontas chose to defend with what amounted to an "act of God" defense.

**X. THE TRIAL COURT PROPERLY ADMITTED STIPULATED-TO PHOTOGRAPHS OF FLOOD DAMAGED AREAS IN THE MULLENS SUBWATERSHED**

Western Pocahontas wrongly argues that Plaintiffs' Exhibits 65, 66, 67, 68, 69, and 70, which are photographs stipulated to by Western Pocahontas and which depict flood waters and debris of the July 8, 2001 flood event in the Mullens area, were admitted in error without authentication for foundational purposes. Western Pocahontas has misled this Court by failing to inform it that the photographs were stipulated to by Western Pocahontas as depicting the Mullens flood.

Western Pocahontas stipulated to the photographs and Mr. Segal accordingly used them in opening statement. Mr. Segal then used them in the direct examination of Mr. Morgan. Mr. Morgan testified that the pictures depict the foreseeable consequences of increases in peak flow with respect to overwhelming the receiving streams or rivers, exceeding the capacity of the receiving structures

in the stream, such as culverts, bridge abutments, causing back-up and impairment of flow and mobilization of trees, brush and other debris. (Tr. Vol. VIII, 1953-1954).

Western Pocahontas was not pleased with the use of the photographs for foreseeability purposes. Western Pocahontas objected. The following accurately sets forth the issue:

Mr. Segal: Your Honor, I thought we stipulated that the photographs that we were showing the jury in opening were in Mullens.

The Court: That's my understanding. That's what he said – he identified these as being pictures from Mullens in his opening and then he said he didn't know exactly where in Mullens they were located.

Mr. Bolen: Your Honor, I said I didn't object to him using them in his opening. Didn't, don't, but that was subject to Mr. Segal's representation that he had the people to authenticate those photos.

Well, you know, I – I want to hear the authentication on those photos, particularly about that log. You know, that log is a saleable log. That's a nice-looking log. That's not debris. That's not debris.

I don't know where that came from, don't know how it got there, but I know what impression it's making on the jury.

The Court: What's your position?

Mr. Segal: My position is he stipulated that these photographs were in Mullens and that I could use them and I didn't have to bring those witnesses.

The Court: I agree. Admitted over objection. (Id., 1959-60). (Emphasis added).

Mr. Morgan testified, as stipulated to, that the photographs were taken of flooding in Mullens. Mr. Morgan did not know specifically where they were taken. Western Pocahontas cross-examined Mr. Morgan to make that point, as well as the point that in looking at the photographs one

could not tell whether it was coming from the Slate Fork or the Guyandotte. There was then elicited on cross-examination the analysis and conclusion that the rainfall in Slab Fork was more significant than the rest of the watershed and it happened first, which would lead the timing of the storm to be such that Slab Fork water came first. (Id., 1991-95).

The relevance of the stipulated photographs went squarely to trial Issue Two and to foreseeability. Western Pocahontas was able to fully cross-examine Mr. Morgan in accord with its trial themes, the jury was not misled, and there is no undue prejudice to Western Pocahontas.

But, there is even more to the story of the stipulation! Subsequent to Mr. Morgan's testimony and the admission of the photographs as exhibits, counsel for Western Pocahontas continued to remark about the foundation and admissibility of the photographs. Thus, Plaintiffs determined, out of an abundance of caution and to protect the record for purposes of appeal, to extend the trial by bringing in the witnesses for purposes of explaining the date the photographs were taken and the precise location where they were taken. Yet, again, we had another stipulation as to where and when the photographs were taken! Moreover, Plaintiffs' counsel, by virtue of stipulation, was permitted to use an exhibit of the Mullens area (Plaintiffs' Exhibit No. 54), and show the jury on a map of the watershed exactly where each photograph was taken.

What follows is the record of the stipulation and what the jury was told by stipulation:

....

Mr. Segal: Your Honor, there is a stipulation which was arrived at. We had called some plaintiffs to testify. It's my understanding that Mr. Hrko has worked out a stipulation with Mr. Bolen where the photographs which you have admitted into evidence of the flooding and the debris, that Mr. Hrko will be allowed to take the Plaintiffs' Exhibit No. 54 and show the jury where each of those photographs were specifically taken in the watershed.

Other than that stipulation, the plaintiffs rest, and the plaintiffs don't believe that we need to delay our resting. We just need an opportunity to do that when you bring the jury back.

The Court: I understand. Mr. Bolen, regarding the stipulation?

Mr. Bolen: We did stipulate to that effect.

The Court: Okay.

Mr. Bolen: Location of the photos.

....

Mr. Hrko: Your Honor, what we anticipated doing was showing the five – I think it's five photographs, me standing in front of the jury telling them where they were taken, what day they were taken.

The Court: Okay.

Mr. Hrko: That's it.

The Court: Okay. That's not – and I think Mr. Bolen indicated that that – that he had stipulated to that. Am I correct?

Mr. Segal: Yes, your Honor.

Mr. Goddard: Yes, your Honor. (Co-counsel with Mr. Bolen).

....

Mr. Segal: Your Honor, if Mr. Hrko may present a stipulation with regards to Exhibit 54.

The Court: Mr. Hrko?

Mr. Hrko: Thank you, your Honor.

Good afternoon, ladies and gentlemen. My purpose for standing before you this afternoon is to talk about a stipulation we

have reached with the defendants in this case, specifically Western Pocahontas Properties.

With respect to this photograph, Plaintiffs' Exhibit No. 65, and Plaintiffs' Exhibit No. 66, the parties in this case stipulate that those two photographs were taken shortly after the July 8, 2001 event, in an area in the City of Mullens, which I will point to as being right here, and that's the area that's the Slab Fork Creek, and that's Terry's Branch coming off of that mountain.

The residence you see in that photograph was taken right in that area.

With respect to Plaintiffs' Exhibit 67, which is this photograph, and with respect to Plaintiffs' Exhibit 68, and with respect to Plaintiffs' Exhibit 69, these three photographs were taken on July 8, 2001 in the City of Mullens in the area where Slab Fork Creek and Tommy – or Terry Branch – Terry's Branch, comes off of that mountain right there. Those were taken in that general vicinity. They were taken on the day of July 8, 2001.

With respect to Plaintiffs' Exhibit No. 70, this photograph was taken on July 8, 2001, and it was taken in this area right here, which is in downtown Mullens. And downtown Mullens, the Slab Fork and Guyandotte Rivers meet right there. It was taken on July 8, 2001. Thank you.

Mr. Segal: Your Honor, with that stipulation having been made of record, the plaintiffs represented by The Segal Law Firm hereby rest their case.

(Tr. Vol. XV., 3035, 3105, 3108-09). (Emphasis added).

To paraphrase Paul Harvey: "And that is the rest of the story."

**XI. WESTERN POCAHONTAS COULD NOT BE PREJUDICED BY ATTACKS ON OPERATIONS OF DEFENDANTS THAT WERE VOLUNTARILY DISMISSED WITH PREJUDICE BECAUSE THERE WERE NO SUCH ATTACKS**

Western Pocahontas argues that it was prejudiced by the trial court's determination that Appellants could attack operations of defendants that were voluntarily dismissed with prejudice under Rule 41(a) of the West Virginia Rules of Civil Procedure. Western Pocahontas points to the

operations of Jim C. Hamer Company and several others who these Appellants did not sue. There is no citation to the record as to where or how any Appellants attacked operations of others.

Appellants are at a loss to understand this assignment of error because a review of the record dictates the conclusion that there was no evidence or argument critical of these defendants' operations. Thus, there was no attack. Therefore, there was no prejudice.

The Western Pocahontas argument fails to appreciate that Appellants' approach in the litigation was directed at the vast land disturbance in the subwatershed; not at the specifics of individual company timbering practices.

## **XII. WESTERN POCAHONTAS HAS NOT BEEN PREJUDICED BY ANY ISSUE REGARDING WHITE OAK LUMBER COMPANY**

Western Pocahontas argues that it 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, which was sued by other Appellants. The argument is illusory.

In dismissing the direct claims of the other Appellants against White Oak Lumber, the trial court again referred to the three trial issues and indicated that White Oak Lumber's disturbance of land was too statistically insignificant with respect to causing material increase in peak flow or banks to overflow. (Tr. Vol. XXVI, 5209-10). The trial judge also noted that any contractual claims, non-contractual claims, contribution or indemnity claims between Western Pocahontas and White Oak were not affected by his ruling. (*Id.*, 5210-12).

As the trial court correctly noted:

The nature of this case, or this phase of the case, is the use of the property by the landowners, WPPLP, and White – Western Pocahontas Corporation are the landowners in this case.

The evidence is quite clear and unrefuted in this case that WPPLP managed actively its land holdings in the Subwatershed 2A.

The Court has taken the position – and while perhaps I’ve not been clear enough in – in my prior rulings or in my prior statements to indicate where we’re coming from, it’s clear that WPPLP managed 22,000-plus acres in the Mullens subwatershed actively and controlled the conduct on their property.

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., the 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.

To that extent, Western Pocahontas Properties cannot disclaim the operations that took place on their properties. They can’t say, or cannot – for purposes of this phase of the trial – immunize themselves by using the – the argument that, “Yeah, it was our land but somebody else did the damage.”

That’s their – they either buy it all or they don’t buy it all, because quite clearly, in the event that there was a – there is a finding that there was an increase in peak flow, there was a material increase in the overflowing of the streams and that what was done on their real estate was unreasonable, they still have their cross and counterclaims which the Court has preserved and has not dismissed.

But on the flip side, if those questions are answered “No,” then they, and their contractors, are out. That’s how it is. (Tr. Vol. XXVII, at 5285-87).

Like other arguments set up by Western Pocahontas, Appellants are puzzled by the claims of prejudice by Western Pocahontas. Any issue they have as to White Oak Lumber can be addressed in Phase Two. There was no instruction to the jury that any liability of White Oak Lumber could be attributed to Western Pocahontas. The jury was simply instructed that it made decisions with regard to certain issues, and White Oak Lumber was no longer a party to the case. The jury was instructed that the only decisions left for them were as to Western Pocahontas and that they were not to “consider,” “worry about” or “conjecture” about decisions made regarding keeping a party in or letting a party out of the case. (Tr. Vol. XXII, 5329). The jury was told that the only defendants remaining were Western Pocahontas and that the only issues as to Western Pocahontas were as to the Mullens (2A) subwatershed. (*Id.*, 5330). Moreover, there was no closing argument made by any lawyer for any of the Appellants’ groups to the effect that Western Pocahontas was vicariously responsible for bad timbering practices of White Oak Lumber. Again, Western Pocahontas misapprehends that this case is about the cumulative disturbance over the subwatershed and not individual timbering or cutting practices.

### **XIII. THE VERDICT FORM WAS PROPER**

Western Pocahontas argues that the jury verdict form unfairly prejudiced it because it failed to follow the Trial Plan that operations be assessed individually. Western Pocahontas basically argues that each of the three Phase One questions needed to be set forth not solely as to Western Pocahontas as the landowner and defendant, but needed to be broken down as to individual tracts

or cutting units. Western Pocahontas is once again attempting to distort the nature of the Phase One trial.

Western Pocahontas simply refuses to accept that the thrust of the claims against them and the Phase One trial issues went to ownership, management and disturbance of the land over a vast proportion of a subwatershed that drained directly to the community of Mullens. The case was not about isolated acts on discrete parcels or about practices as to individual cutting units or operators.

The verdict form was entirely proper, consistent with the Trial Plan and in accord with In re: Flood Litigation.

**XIV. WESTERN POCAHONTAS IS NOT ENTITLED TO  
A NEW TRIAL UPON REMAND BASED UPON ALLEGED  
MISCONDUCT BY JUROR 20**

Western Pocahontas argues in its cross-appeal that it is entitled to a new trial based upon alleged misconduct on the part of Juror 20,<sup>8</sup> who is claimed to have falsely answered questions on a jury questionnaire completed prior to *voir dire*. Specifically, Western Pocahontas asserts that such juror was untruthful by failing to disclose that her husband's employer was a plaintiff in a separate action against one of Western Pocahontas' co-defendants, White Oak Land Company ("White Oak"), where it was alleged that the husband's employer's business was damaged as a result of water drainage problems caused, in part, by White Oak's negligence in failing to properly design and construct roadways on a tract of urban land it had developed. That action involved multiple defendants, including the current owner of the adjacent property – First Community Bank, NA – the first named and apparently target – defendant.

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<sup>8</sup>This brief will refer to this juror as "Juror 20" rather than by her actual name, so as to preserve her privacy.

As an initial matter, Western Pocahontas waived any challenge to Juror 20 by failing to raise the issue of her purported misconduct at trial. Before a complaining party may attempt to show that it was prejudiced by alleged juror misconduct, such party must be diligent in investigating such misconduct, and must request a hearing as soon as the misconduct is discovered or as soon thereafter as practicable. See McGlone v. Superior Trucking Co., Inc., 178 W. Va. 659, 668, 363 S.E.2d 736, 745 (1987); see also West Virginia Human Rights Comm'n v. Tenpin Lounge, Inc., 158 W. Va. 349, 357, 211 S.E.2d 349, 354 (1975); State v. Banjoman, 178 W. Va. 311, 317 & n.9, 359 S.E.2d 331, 338 & n.9 (1987). In this case, counsel for Western Pocahontas has effectively conceded that at trial he was made aware of the fact that Juror 20's husband's employer had a pending action against White Oak. Western Pocahontas therefore clearly has no basis to complain regarding Juror 20's answer to Question No. 67 of the questionnaire, which asked, "Do you know any person who is a defendant in this litigation?"

Moreover, the fact that counsel for Western Pocahontas was aware of such alleged discrepancy involving Juror 20's response to Question No. 67 should have alerted him so as to undertake further investigation. Obviously, by failing to disclose that she was familiar with White Oak and the litigation brought against it by her husband's employer, Juror 20 was either being untruthful in her responses or, as is far more likely, had no knowledge or understanding of the pending litigation. In either case, counsel should have, at the very least, inquired of Mr. Fowler or his client's representative as to the general nature of the pending lawsuit. The failure to take such minimal action to investigate this matter clearly requires a conclusion that Western Pocahontas waived its current assignment of error.

Indeed, a close review of Juror 20's answers on her questionnaire demonstrates why Western Pocahontas and its co-defendants chose not to question her capacity to render a fair and impartial judgment in this case. For example, Juror 20 stated in response to Question No. 57 that she had not heard or seen anything about lawsuits against mining and timbering companies for flooding in southern West Virginia. She also stated in response to Question No. 73 that she believed that coal mining and timbering were essential to her community's economic success. Furthermore, in answering Question No. 82, which asked "would you have any hesitation in giving a fair trial to a company that engages in mining, timbering or land management?," Juror 20 stated that she would not have any hesitation in giving a fair trial to these types of businesses. Appellants respectfully suggest that the reason that this matter became a post-trial issue is that a strategic decision was made to keep Juror 20, whose questionnaire responses demonstrated a favorable view of the mining and timbering industries.

In her responses to Question No. 47, Juror 20 also agreed that the environment is every bit as important to large corporations as making profits, and likewise agreed that timber harvesting can be conducted in such a way as to minimize the effects on water runoff. Juror 20 disagreed that logging should be stopped in southern West Virginia, and disagreed that land companies that sold rights to timber companies should be punished for putting people at risk. Juror 20 was undecided regarding whether individuals who live in flood plains should bear the risk of flooding. Juror 20 further strongly agreed that the media typically rushes to judgment in reporting the activities of mining or timbering companies. In answering Question Nos. 40 and 42, Juror 20 voiced the general opinion that timber operations in West Virginia and companies that lease land to mining and timbering companies in West Virginia probably do more good than harm. Moreover, in her responses to

Question Nos. 58-62, Juror 20 indicated that she (1) remembered nothing about the July 8, 2001 flood events, (2) did not recall reading anything about it, and does not remember discussing it with anybody, (3) took no drive to and did not visit any flooded area, and (4) saw no documentaries or television programs discussing mining, timbering and flooding in southern West Virginia.

In order to be granted a new trial, the challenging party must show, in addition to a voir dire question being answered falsely, that a correct response by the prospective juror would have provided a valid basis to challenge that juror for cause. See McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984).<sup>9</sup> The Court in McDonough noted that “motives for concealing information may vary, but only those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial.” McDonough, 464 U.S. at 556; see also State v. Dennis, 216 W. Va. 331, 349, 607 S.E.2d 437, 455 (2004).

In McGlone, the Court stated that a new trial will be awarded based upon a juror’s willful or inadvertent failure to disclose relevant information only where it “suggests actual or probable prejudice, not merely because the complaining party has been, in effect, denied a preemptory strike of a particular prospective juror.” 178 W. Va. at 669, 363 S.E.2d at 746 (citation omitted). More recently, in State v. Dennis, supra, the Court affirmed a criminal conviction notwithstanding the fact that a juror had failed to disclose that her mother had previously worked in the prosecutor’s office and currently worked in the circuit clerk’s office. The Court concluded that the record “did not

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<sup>9</sup>Western Pocahontas’ reliance on Proudfoot v. Dan’s Marine Service, Inc., 210 W. Va. 498, 558 S.E.2d 298 (2001), is misplaced. Proudfoot dealt with a statutory qualification to serve on a jury. The juror in Proudfoot concealed a prior felony conviction which rendered her service void *ab initio* under the statutory requirements. Consequently, this Court concluded that a showing of bias on the part of the juror was not required, since the statutory qualifications were not met in the first instance. In this case, there is no allegation that Juror 20 misrepresented her statutory qualifications to sit on the jury. Put simply, Proudfoot is not on point.

reveal any intent on the part of the juror to withhold information regarding her mother's employment; the record demonstrates that the juror simply misunderstood the voir dire question. . . . Appellant's counsel did not demonstrate how a correct response by the juror would have provided a valid basis to sustain a challenge for cause or show that the juror was actually biased." 216 W. Va. at 349, 607 S.E.2d at 455.

Even assuming that the responses provided by Juror 20 to the defendants' ambiguous questions were incorrect, such disclosures regarding her husband's employer would not have been sufficient to challenge her for cause. In State v. Mills, 211 W. Va. 532, 566 S.E.2d 891 (2002), the Court held that "a prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a *per se* disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case." 211 W. Va. at 538, 566 S.E.2d at 897 (citing Syl. Pt. 6, State v. Beckett, 172 W. Va. 817, 310 S.E.2d 883 (1983)); *see also* State v. Parsons, 214 W. Va. 342, 589 S.E.2d 226 (2003) (holding that trial court had not abused its discretion in refusing to strike a juror for cause whose brother was a police officer and who was an employee of the same school system as the defendant); State v. Hutchinson, 215 W. Va. 313, 599 S.E.2d 736 (2004) (holding that a juror's work relationship with the State's witness was not an automatic disqualification). There is no assertion that Juror 20's husband had any involvement in the current case and, consequently, under Mills there is no basis for West Pocahontas' claim that Juror 20 was presumptively biased against it based simply upon the fact that her husband's employer had brought an action involving water runoff.

Importantly, counsel for Western Pocahontas tacitly concedes that the mere fact Juror 20's husband's employer was suing one of its co-defendants is not a sufficient ground for challenging the

juror's impartiality, since counsel was apparently made aware of such fact during trial and took no action.<sup>10</sup> Consequently, the sole basis for the current challenge must be confined to the juror's purported knowledge concerning the nature of the claims asserted in the litigation involving her husband's employer.

While Western Pocahontas characterizes the case brought by her husband's employer as a "flood lawsuit" akin to the current action, the only similarity between the two as evidenced by the documentation submitted is that both involve water. As evidenced by the complaint filed in the case brought by Juror 20's husband's employer, such case involved claims that White Oak was negligent in its design and construction of road and storm drain improvements in an urban area, which negligence resulted in the Beckley-area car dealership having frequent intrusions of water run-off. Nothing in the papers submitted by Western Pocahontas suggests that the claims brought by the husband's employer involved mining or timbering, or that it resulted in the type of catastrophic rising of creeks and rivers at issue in the present case. In short, Western Pocahontas argument mixes apples with oranges. No doubt had Juror 20's home been damaged as a result flooding caused by the timber- and mining-related activities of one of its co-defendants, Western Pocahontas would likely have a good argument that she should be deemed presumptively biased against it. But in this case, the similarities between the two juxtaposed cases are far too attenuated to support a finding that Juror 20 would have been the proper subject of a challenge for cause. Consequently, even upon the scant record before it, this Court can conclude that Western Pocahontas' cross-appeal on this issue is without merit.

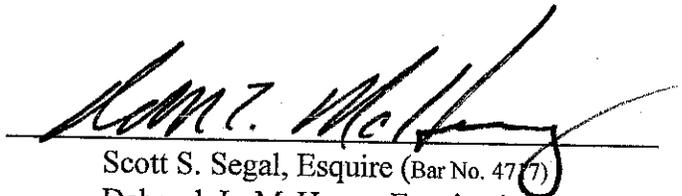
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<sup>10</sup>Juror 20 had also clearly identified her husband's employer in response to Question 8 of the jury questionnaire.

**XV. CONCLUSION AND PRAYER FOR RELIEF**

Appellants respectfully request, based upon the record and the Briefs, that this Honorable Court reverse and vacate the "Order Granting in Part and Denying in Part Defendant's Motion for Judgment as a Matter of Law or for New Trial" in all respects, reject the cross-assignments of error, Order that the jury verdict be reinstated and Order that this matter proceed to Phase Two of trial in Wyoming County, West Virginia.

Respectfully submitted,  
Appellants, by counsel,



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*Counsel for Appellants*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33710

IN RE: FLOOD LITIGATION

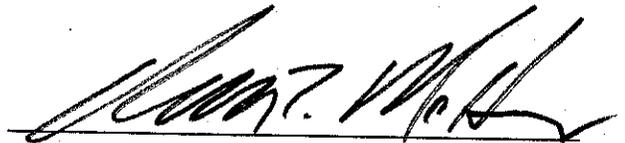
Raleigh County Civil Action No: 02-C-797

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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)**

**CERTIFICATE OF SERVICE**

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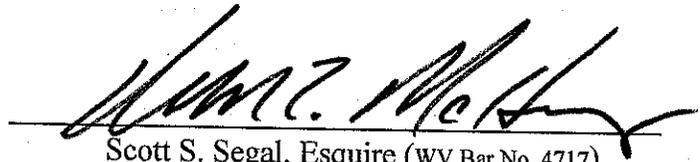
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