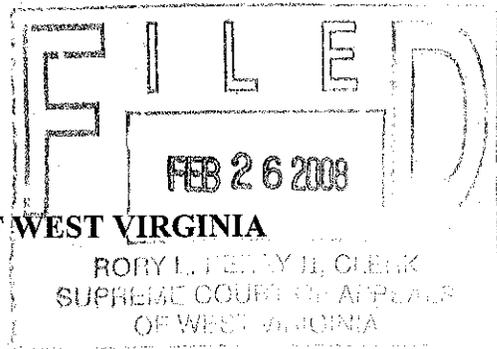


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 33711



IN RE: FLOOD LITIGATION

Civil Action No. 02-C-797
Honorable John A. Hutchison
Upper Guyandotte Watershed 2a

APPELLANTS' RESPONSE TO APPELLEES' CROSS ASSIGNMENTS OF ERROR

I. INTRODUCTION

Appellees, Western Pocahontas Properties Limited Partnership and Western Pocahontas Corporation (hereafter, collectively, WP) have made cross assignments of error. In short, WP is pleased that the trial court set aside the verdict, but in the event of a new trial, WP wants this Court to find that the trial plan adopted by the Panel Judges was unconstitutional. The reasons advanced by WP in support of this argument are wrong.

II. WP HAS CONFUSED "HARM" WITH INDIVIDUAL DAMAGE CLAIMS.

The nub of WP's argument is under *Morris v. Priddy*, *In Re Flood Litigation*, and negligence theories, proof of liability requires a jury to consider the balancing tests of *Morris* and *In Re Flood* and "prudent man reasonableness" in the case of negligence. WP contends that unless the jury considered the individual damage claims of the flood victims, proof of the requisite "harm" was missing from the balancing test equation. WP has simply missed the point and confused the notion of individual damage claims with the theory of "harm" embodied in the trial evidence and put to the jury in the form of the three questions forming the basis of the Phase I trial.

A plain reading of the trial issues leads to only one interpretation: the jury found WP legally responsible for causing or contributing to the July 8, 2001, flood. The flood *was the harm*. The jury was asked and found that WP's conduct materially increased the peak rate of discharge of surface water from its operations. The jury was asked and found WP's conduct in increasing the peak rate of discharge was a material cause of the discharge waters leaving the banks of creeks, streams, and rivers (read "flood" for what else could it be?). Finally, the jury was asked and found that WP's conduct in this regard (causing or contributing to the flood) was unreasonable. Plainly, the jury balanced the activity of WP against the harm it caused -- the flood -- and found WP's activity to be *unreasonable*. It is a simple calculus: conduct causing a material increase in peak rates of surface water discharge + material overflows of creeks and streams + watershed wide flooding = *unreasonable conduct*.

There can be no evidentiary issue as to whether the value of WP's activities is so great that the residents of the Mullens watershed should be required, on balance, to endure flooding. The harm in this case is the *flood*. The overarching issue of "harm" is whether a community should be required to endure catastrophic flooding caused by a neighbor's use of land. Surely there is no triable issue as to whether catastrophic flooding is a harm one should reasonably be expected to endure.

No issue of material fact exists as to the location of the flood and the location of Plaintiffs' individual properties in relation to the flood. The only issue remaining is the dollar amount of individual property damage.

III. APPELLANTS CONTEND THEY HAD A LIABILITY VERDICT BEFORE THE TRIAL JUDGE TOOK IT AWAY.

Appellants, plaintiffs below, initially objected to the Mass Tort Panel's trial plan if it was not to result in a liability verdict. The trial judge's statements suggesting that a "liability phase" would be the next trial is contrary, as shown above, to the trial and verdict which is the subject of this appeal. The jury has already considered the issue of reasonableness in the full context of the harm caused (the flood) by the conduct of WP. The trial judge's musings to the contrary are clearly erroneous and contrary to any fair and impartial reading of the Mass Panel's trial plan and the jury verdict below.

Respectfully Submitted,
Appellants, By Counsel



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MOTION TO ACCEPT BRIEF OF APPELLANTS' OUT OF TIME

The Appellants, plaintiffs below, by J. David Cecil, James F. Humphreys & Associates; Stuart Calwell, The Calwell Practice, PLLC; and, W. Randolph McGraw, II, McGraw Law Office, their attorneys (hereinafter, "The Calwell Group, McGraw Group, and Humphreys Group"), respectfully move this Honorable Court for an order, for good cause shown, accepting the accompanying Appellants' Response to Appellees' Cross Assignments of Error, which is submitted more than 30 days after receipt of the Brief of the Appellees and Appellees' Motion to Adopt Supplemental Appendix, which was filed on January 18, 2008.



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CERTIFICATE OF SERVICE

I, J. David Cecil, counsel for the Appellants, do hereby certify that I have served the **Appellants' Response to Appellees' Cross Assignments of Error and Motion to Accept Brief of Appellants' Out of Time** in the above-styled matter upon all counsel of record, via first-class U.S. Mail, this 26th day of February, 2008.



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