

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

RIVER RIDERS, INC., AND MATTHEW KNOTT

Petitioners/Defendants,

v.

THE HONORABLE THOMAS W. STEPTOE, ALL PLAINTIFFS ON ~~CHRISTOPHER,~~
ET AL, v. RIVER RIDERS, INC., CIVIL ACTION NO. 06-C-328, AND ALL PLAINTIFFS
IN *FREEMAN* v. RIVER RIDERS, INC., AND MATTHEW KNOTT, CIVIL ACTION NO.
06-C-325,

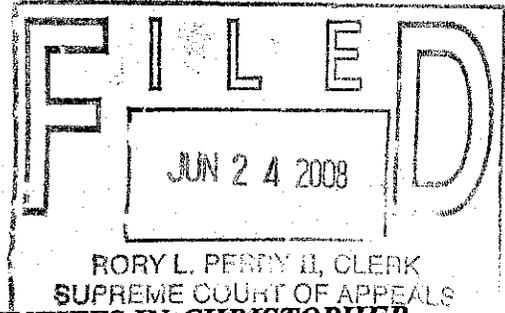
Respondents.

**AMICUS BRIEF OF THE WEST VIRGINIA PROFESSIONAL RIVER
OUTFITTERS IN SUPPORT OF THE PETITIONERS**

COMES NOW the West Virginia Professional River Outfitters Association ("WVPRO"), by counsel, Schuda & Associates, *pllc*, and Daniel R. Schuda, and submits this brief as *amicus curiae* in support of the relief sought by the Petitioner, River Riders, Inc., and states as follows:

ABOUT WEST VIRGINIA PROFESSIONAL RIVER OUTFITTERS

The West Virginia Professional River Outfitters is an industry group of whitewater outfitters in West Virginia. WVPRO member outfitters include Ace Adventure Center; Adventures Mountain River; Alpine Ministries; Appalachian Wildwaters; Class VI River Runners; Extreme Expeditions; New & Gauley River Adventures; North American River Runners; Rivermen Whitewater; Rock 'n' Roll Rafting; Songer Whitewater; and West Virginia Adventures, some of the premiere rafting outfitters in the State.



WVPRO serves as the voice of the commercial whitewater industry and coordinates marketing and public relations efforts with the Division of Tourism and serves as a central contact and source of communication, maintaining a close relationship with the West Virginia Division of Natural Resources, Whitewater Commission, the National Park Service, U. S. Army Corp of Engineers, the West Virginia Hospitality and Travel Association, West Virginia Convention and Visitors Bureaus, State and Local Chambers of Commerce and America Outdoors.

In addition to marketing, WVPRO works for the improvement of the whitewater industry and serves as an organized body that provides a voice for issues affecting it.

WVPRO has studied the issues presented in the Petition for Writ of Prohibition and is gravely concerned about the effects the ruling of the lower Court will have on the whitewater rafting industry in the State of West Virginia. Creating total confusion as to the applicable law, the ruling has the potential, by that fact alone, to make the outfitters uninsurable in any reasonable sense and unable to continue in business.

- 1. THE LOWER COURT'S RULING WILL INJURE THE WHITEWATER RAFTING INDUSTRY IN WEST VIRGINIA, AFFECTING THOUSANDS OF JOBS AND MILLIONS OF DOLLARS IN REVENUE.**

The Courts, the whitewater industry, the regulatory bodies and the participants have relied upon the standards and requirements of the West Virginia Whitewater Responsibility Act since its passage in 1987 and should not be so simply altered.

The impact of this ruling could devastate this recreational industry in this State and must, therefore, not be allowed to stand without having been given the full attention of this Court. WVPRO thus joins in with the Petitioners in the Writ of Prohibition in order to protect the

interests of West Virginia businesses, of the thousands of West Virginians who rely upon the rafting industry as a source of income and livelihood, and the millions of dollars generated each and every year in tourism revenue for this State.

There can be no dispute that the rafting industry itself has a substantial and positive effect on West Virginia's economy, producing thousands of jobs for West Virginians as well as generating millions of dollars in revenue for this State. WVPRO members currently employ over twelve hundred West Virginia residents and taxpayers with a payroll of \$8 million to \$10 million.

Additionally, the whitewater industry is extremely important to the tourism revenue of this State. The attached West Virginia Department of Natural Resources Report shows that since 1995 approximately 200,000 people each year participate in water activities on five separate West Virginia rivers (Gauley, New River, Cheat, Shenandoah, and Tygart) with the 32 different licensed West Virginia whitewater outfitters. (Exhibit 1). Even the little Shenandoah River had 17,694 whitewater participants in 2007. (Exhibit 2).

These whitewater companies offer other recreational activities off the river, including biking, hiking, mountain climbing, and camping/lodging so that although river activities and whitewater rafting are the main source of business and income for these companies, additional revenue from participants and tourists is derived from these land based activities and the numbers of individuals seeking recreation and adventure with these companies will be more than the reported figures for just river activity.

Given these reported numbers of participants in water activities, the vast majority of which would be whitewater rafting trips, the economic impact of this industry is substantial to

this State, and more importantly, to the locales where these outfitters are located. In 1995, conservative estimates of the total direct expenditures by commercial boaters on only three rivers – the Cheat, New and Gauley – were \$49.4 million. **(Exhibit 3)**. Of this, approximately \$43.1 million was spent in West Virginia and \$41.3 million spend locally in the counties surrounding the rivers.

This spending is not limited to paying commercial outfitters. These visitors are spending large amounts of money at local gas stations, gift shops, grocery stores, restaurants, hotels, nightclubs, and other retail stores, accounting for 35% to 41% of the total direct spending by these rafters. **(Exhibit 3)**.

The vast majority of the commercial whitewater participants are from out of state. According to the study cited above, West Virginians made up only 2.5% of the rafters on the Cheat River, 7.5% on the New River, and 2.8% on the Gauley River, for an overall total of only 5%. **(Exhibit 3)**. The travel and expenditures of these commercial rafters indicate substantial statewide impact. The 1995 data indicates that the whitewater rafting industry created \$59.3 million in total output, \$22.9 million in personal income, \$16.6 million in employee compensation, and \$3.6 million in taxes. The data also show approximately 1,416 full and part time jobs were created. **(Exhibit 3; and Exhibit 4)**.

The data and studies clearly indicate the substantial and appreciable impact the whitewater rafting business provides to the local towns and counties where rafting is prevalent. This industry and the jobs and employment opportunities it creates is essentially the backbone of such towns like Hico, Fayetteville, and Oak Hill. More importantly, the jobs associated with the

whitewater rafting industry are supporting West Virginia families and allow West Virginians to remain in-state.

WVPRO is convinced that the Circuit Court of Jefferson County committed grave error in applying maritime law to the case on Shenandoah River. This ruling would have a profoundly negative impact on the whitewater industry in West Virginia and the reversal of the Circuit Court's order is necessary.

2. THE APPLICATION OF GENERAL MARITIME LAW TO A WHITEWATER RAFTING CASE IS LEGALLY INCORRECT AND WILL HAVE A DETRIMENTAL EFFECT ON THE WHITEWATER INDUSTRY IN WEST VIRGINIA.

The West Virginia Legislature enacted the West Virginia Whitewater Responsibility Act in 1987 recognizing that "[t]he tourist trade is of vital importance to the State of West Virginia and the services offered by commercial whitewater outfitters and commercial whitewater guides significantly contribute to the economy of the State of West Virginia." West Virginia Code § 20-3B-1. The Legislature also noted that commercial whitewater rafting is an inherently dangerous activity involving unstable river conditions, water levels, weather and nature that cannot be eliminated by a commercial whitewater outfitter or commercial whitewater guide. Accordingly, the Legislature defined the responsibilities and affirmative acts for which commercial whitewater outfitters and commercial whitewater guides are liable.

West Virginia Code § 20-3B-5 states:

It is recognized that some recreational activities conducted by commercial whitewater outfitters and commercial whitewater guides are hazardous to participants regardless of all feasible safety measures which can be taken.

(a) No licensed commercial whitewater outfitter or commercial whitewater guide acting in the course of his employment is liable

to a participant for damages or injuries to such participant unless such damage or injury was directly caused by failure of the commercial whitewater outfitter or commercial whitewater guide to comply with duties placed on him by article two of this chapter, by the rules of the commercial whitewater advisory board, or by the duties placed on such commercial whitewater outfitter or commercial whitewater guide by the provisions of this article.

The Legislature also recognized that the participants had duties also as identified in West Virginia Code § 20-3B-4:

(a) Participants have a duty to act as would a reasonably prudent person when engaging in recreational activities offered by commercial whitewater outfitters and commercial whitewater guides in this state.

(b) No participant may:

(1) Board upon or embark upon any commercial whitewater expedition when intoxicated or under the influence of nonintoxicating beer, intoxicating beverages or controlled substances; or

(2) Fail to advise the trip leader or the trip guide of any known health problems or medical disability and any prescribed medication that may be used in the treatment of such health problems during the course of the commercial whitewater expedition; or

(3) Engage in harmful conduct or willfully or negligently engage in any type of conduct which contributes to or causes injury to any person or personal property; or

(4) Perform any act which interferes with the safe running and operation of the expedition, including failure to use safety equipment provided by the commercial whitewater outfitter or failure to follow the instructions of the trip leader or trip guide in regard to the safety measures and conduct requested of the participants; or

(5) Fail to inform or notify the trip guide or trip leader of any incident or accident involving personal injury or illness

experienced during the course of any commercial whitewater expedition. If such injury or illness occurs, the participant shall leave personal identification, including name and address, with the commercial whitewater outfitter's agent or employee.

Maritime law, essentially federal common law of the sea with numerous federal statutes and regulations added, has never been applied to a West Virginia whitewater rafting case. Such a holding never made by any federal court in this State although able to do so in the various whitewater cases they have decided and has never even been hinted at by this Court or by any other circuit court of this State in the various whitewater cases which they have considered. All courts have uniformly applied the West Virginia Whitewater Responsibility Act. Applying maritime law is legally unjustified and incorrect.

First must be considered the essential question of why admiralty law should apply.

The seminal case regarding maritime jurisdiction held:

Those [waters] must be regarded as public navigable [waters] in law which are navigable in fact. And they are navigable in fact when they are used, or susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters in the United States within the meanings of the Acts of Congress, and contradistinction of the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 77 US (10 Wall.) 557, 563, 19 L.Ed. 999 (1870).

The use of streams carrying people not as passengers from one location to another but as participants seeking adventure by paddling a rubber raft in rapidly moving whitewater (and the clear and essential distinction between mere transportation of people and people participating in a

dangerous activity for excitement and thrills must be acknowledged), is not a "customary mode of travel or transportation" with which maritime law has ever been concerned. Neither is the stream involved in this matter, which judicial notice will allow this Court to find to be suitable to little more than specialized boating activities like rafting and canoeing and the character of which the lower court gave far too little attention, a "navigable" water suitable for the common carriage of goods or people.

These same distinctions remain applicable today. See, e.g., *Alford v. Appalachian Power Co.*, 951 F.2d 30 (C.A.4. 1991).

The lower Court's Order, holding that maritime law has even a limited application to a whitewater rafting case, must ultimately result in the displacement of the West Virginia Whitewater Responsibility Act, West Virginia Code § 20-3B-1 et seq. as "superior" federal statutes and regulations always supercede state law and regulations. Maritime law will certainly alter the responsibilities and duties of the participants just as it will certainly alter the applicable standard of care owed by commercial whitewater guides and outfitters and their potential liability. It is an unfortunate truth that the effect of applying maritime law, contained in the books, treatises, encyclopedias and case reports filling bookshelves of space, cannot be meaningfully discussed at this time or even forecast. For instance, as illustrated in the *Exxon Valdez* case now pending before the United States Supreme Court, *Exxon Shipping Co. v. Baker*, 07-219, argued February 27, 2008, is a commercial whitewater raft a "vessel?" Is a commercial whitewater trip guide the "captain" of the vessel and if not, what is the status of that guide? Does maritime law exclude liability of the owner for punitive damages? Are the participants passengers, who are only being transported, or seaman, because they play a role in the handling

of the raft? If the latter, will the principle of maintenance and cure, the doctrine of unseaworthiness, and the Jones Act apply?

3. ASSUMPTION OF THE RISK IS A DEFENSE IN THIS CASE.

WVPRO adopts the arguments of River Runners as to the use of the assumption of risk defense as allowed by this Court in *Murphy v. North American River Runners*, 186 W.Va. 310, 412 S.E.2d 504 (1991), and will not repeat arguments made elsewhere in support. But it must be noted that, despite the ruling of the trial court, should federal maritime law supercede the Whitewater Responsibility Act, maritime law does allow assumption of risk and other defenses to be raised. See, e.g., *Waggoner v. Nags Head Water Sports, Inc.*, 141 F.3d 1162 (C.A.4. 1998) (unpublished opinion).

CONCLUSION

For the foregoing reasons, WVPRO requests that this Court grant the hearing requested in the Petition for Writ of Prohibition so as to allow deliberate and measured consideration be given to the potentially devastating effects the ruling of the Circuit Court might have on the whitewater industry and the law of this State. WVPRO takes no position regarding the consolidation of the two (2) underlying actions, but does believe that the lower court's decisions as to the application of maritime law, of the use of the assumption of risk defense and the absolute bar to the admission of the release documents must be reversed.

WHEREFORE, WVPRO requests that the Court issue a Rule to Show Cause as to the January 30, 2008, *Order Denying Plaintiff's Motion for Judgment on the Pleadings and Granting*

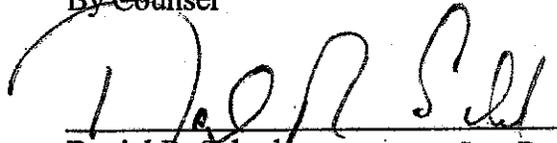
Motion in Limine Regarding the Release and the April 15, 2008, Order Granting Plaintiffs'

Motion in Limine Regarding the Release and Assumption of Risk.

Dated: June 24, 2008.

WEST VIRGINIA PROFESSIONAL RIVER
OUTFITTERS

By Counsel



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CERTIFICATE OF SERVICE

I, Daniel R. Schuda, do hereby certify that on the 24th day of June 2008 I served the foregoing "MOTION TO FILE *AMICUS CURIAE* BRIEF AND STATEMENT OF INTEREST OF THE WEST VIRGINIA PROFESSIONAL RIVER OUTFITTERS" and accompanying "*AMICUS BRIEF OF THE WEST VIRGINIA PROFESSIONAL RIVER OUTFITTERS IN SUPPORT OF THE PETITIONERS*" upon counsel of record by depositing a true copy in the United States Mail, postage prepaid, addressed as follows:

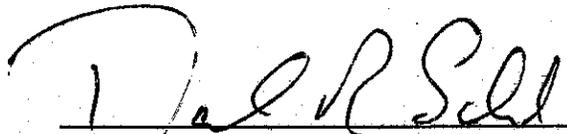
The Honorable Thomas W. Steptoe
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EXHIBITS

ON

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