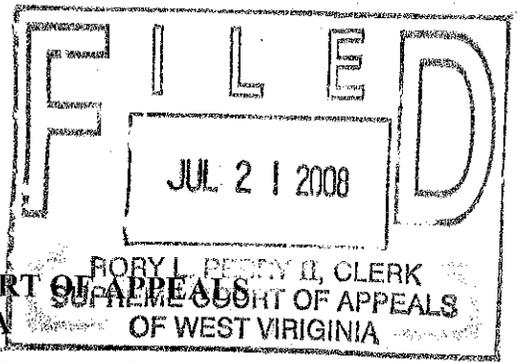


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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA

**RIVER RIDERS, INC. AND MATTHEW KNOTT,**

Petitioners/Defendants,

v.

**THE HONORABLE THOMAS W. STEPTOE, ALL PLAINTIFFS IN 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/Plaintiffs

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**MEMORANDUM OF LAW OF RESPONDENTS, MARSHA CHRISTOPHER, ET AL.,  
SHOWING CAUSE WHY A WRIT OF PROHIBITION SHOULD NOT BE AWARDED  
AGAINST THE HONORABLE THOMAS W. STEPTOE,  
AS PRAYED BY THE PETITIONERS**

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AGAINST THE HONORABLE THOMAS W. STEPTOE,  
AS PRAYED BY THE PETITIONERS**

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Respondents, Marsha Christopher, Samuel Christopher, Lara Crozier, M. Cristina Echegoyen, Alex Echegoyen, Betty Green, George Green, Katherine M. Hax, Ruchi Rastogi, Donald E. Spears, Karan Trehan, Darryl Wiley, Anita Wiley, Carrie Harris-Muller, Bradford Muller, Christina Renee Friddle, April Goss, Brian Payne and Victoria Payne (hereinafter referred to as the "Christopher Respondents" or "Christopher Plaintiffs"), by and through their undersigned attorneys, hereby file this Memorandum of Law, showing cause why a Writ of Prohibition should not be awarded against the Honorable Thomas W. Steptoe, as prayed by the Petitioners, River Riders, Inc. and Matthew Knott, in their Petition.

**I. SUMMARY OF ARGUMENT.**

Faced with the high likelihood that a jury would find River Riders, Inc. and its owner,

Matthew Knott, negligent for running a commercial river rafting trip on September 30, 2004, a day when the river was too high, too fast, and too violent for a group of inexperienced office workers on a team building exercise, River Riders has tried for the third time to delay the trial. This time, River Riders challenges three separate and independent Orders of January 30, 2008; April 15, 2008; and May 19, 2008.<sup>1</sup> Rather than proceeding to trial and preserving any perceived error for appeal, River Riders sought to further delay the litigation by asking this Court for extraordinary relief via a Writ of Prohibition. A Writ of Prohibition, however, is reserved for “extraordinary” circumstances that require immediate intervention by this Court because the error is so great that it cannot be adequately corrected on appeal. No such extraordinary circumstances exist in this case.

Similar to an appeal, Petitioners raise a host of issues. They challenge the trial court’s Orders that (1) exclude the anticipatory releases signed by the rafting participants, (2) preclude assumption of the risk as a defense, and (3) consolidate two cases arising out of the same rafting trip. Each Order concerned evidentiary and procedural matters that were within the complete discretion of the trial court. Each Order is fully supported by the law. Nevertheless, the Petition purports to present seven independent questions arising out of these Orders. On close review, Petitioners’ claims boil down to one central argument – the trial court improperly precluded assumption of the risk as a trial defense. Petitioners argue that the court applied the wrong law, that the court excluded relevant evidence, and that the court’s ruling will have far reaching effects on the whitewater industry. All of those arguments are aimed at the same goal of allowing Petitioners to argue assumption of the risk to the jury.

What is somewhat “extraordinary” is that the one question to which the Petitioners devote

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<sup>1</sup> Copies of the Orders were attached as Exhibits to the Petition.

the most energy – the application of maritime law to a commercial rafting trip on the Shenandoah River – was never challenged below by the Petitioners. Judge Steptoe issued the April 15, 2008 Order, precluding the admission of the anticipatory releases signed by the Christopher Respondents and prohibiting River Riders from asserting the defense of assumption of the risk, **without having received any opposition by River Riders.**<sup>2</sup> Although River Riders later moved Judge Steptoe to consider its untimely opposition, Petitioners denied him the opportunity to do so by filing the instant Petition. Petitioners have utterly failed to explain how they are entitled to prohibition relief on an Order that was not disputed below.

Even if this Court could consider the April 15, 2008 Order, it would see that as a matter of law the trial court properly excluded both the anticipatory releases and an assumption of the risk defense. Likewise, on January 30, 2008 and May 19, 2008, the lower court provided the proper factual and legal bases to exclude the anticipatory release of another passenger and to consolidate the two cases. Petitioners have simply failed to meet their burden of showing why they are entitled to extraordinary prohibition relief when each one of the court's Orders was supported by the evidence and based on sound law.

## **II. STATEMENT OF FACTS.**

On September 30, 2004, the Shenandoah River was not in its normal state. Just a few days earlier, Hurricane Jeane had swept through the area dumping several inches of rain water in just a short period of time. *See* Apx. at 8-10. As a result, the Shenandoah River, normally only about 2

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<sup>2</sup> The Christopher Respondents filed their Motion *in Limine* on March 14, 2008. By Court Order, River Riders had until April 10, 2008 to file a timely response. When the Court ruled on the Motion five days later on April 15, 2008, it still had not received an Opposition from River Riders. The Court, therefore, granted the Motion unopposed. Sometime thereafter, an Opposition by River Riders was docketed, but it was never considered by the Court.

feet high, had swelled to over 14 feet high. *See* Apx. at 8-10. Large trees were so engulfed by the river that they appeared only as bushes. Rocks that were normally exposed were totally covered by water. *See* Apx. at 1-7. The river was not only high that day, but it was also much more violent. Water gushed down the river bank with such force that in some places the river came out of its banks and flooded neighboring roads. *See* Apx. at 1-7. The blue/green water had turned murky brown from all of the churned up sediment. *See* Apx at 1-7. The normally docile and peaceful river had turned into an angry and raging beast.

In light of these water conditions, other whitewater outfitters operating commercial rafting tours on the Shenandoah River have testified that they did not and would not have taken customers out on the river that day. *See* Apx. at 13-17. In fact, the only other outfitter to have a scheduled tour on September 30, 2004, cancelled its trip because of the turbulent water. *See* Apx. at 13-17. First responders to the scene have stated that River Riders had no business taking inexperienced rafters onto the river that day. *See* Apx. at 21-28. The conditions were so bad that there was a flood warning in effect at the time the rafting trip began. *See* Apx. at 11-12.

Despite the high and turbulent water, River Riders Inc., a licensed commercial whitewater outfitter, took 27 customers, including Roger Freeman and 13 of the Christopher Respondents,<sup>3</sup> on a trip down the Shenandoah River in rafts it owned and operated. All but two of the Respondents were members of a group of management employees of Kaiser Permanente who had booked the rafting trip as part of a team building exercise set up by River Riders. The Respondents collectively had very little rafting experience and none of them had ever been rafting on the Shenandoah River.

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<sup>3</sup> The Respondents, Samuel Christopher, Alex Echegoyen, George Green, Anita Wiley, Bradford Muller, and Victoria Payne, are spouses asserting loss of consortium claims.

Prior to embarking on the trip, River Riders showed the Respondents a generic safety video on whitewater rafting. At no time before, during or after the video did River Riders inform the customers that the river was at or near flood stage. At no time before, during or after the video did River Riders inform the customers that the river was normally 2 feet and on this day the river was more than 6 times its normal level.

The trip began at a put-in site in Millville, West Virginia at approximately 1:15 p.m. During the trip down the river, and while the rafts were attempting to navigate through high waves and around the obstacles in the Lower Staircase, the rafts carrying the Christopher Respondents were upset, throwing each passenger into the rough and dangerous waters. As a result, each Respondent-passenger sustained serious injuries and Roger Freeman drowned.

### **III. STATEMENT OF CASE.**

On September 28, 2006, Kathy L. Freeman, as personal representative of the Estate of Roger Freeman, filed a wrongful death action against River Riders, Inc. and its owner Matthew Knott (hereinafter referred to as the "Freeman Litigation") based on violations of the West Virginia Whitewater Responsibility Act. The next day, on September 29, 2006, a separate lawsuit was filed by 13 of the other paying passengers and their spouses claiming personal injury and loss of consortium (hereinafter referred to as the "Christopher Litigation") based on violations of general maritime law and the West Virginia Whitewater Responsibility Act.

The Plaintiffs in both the Freeman Litigation and the Christopher Litigation contend that running a raft trip on September 30, 2004, simply was not reasonable under the circumstances. Plaintiffs argue that River Riders was negligent and careless and failed to conform to the standard

of care expected of members of the whitewater rafting profession by failing to call off or postpone the trip until conditions were safe to go out on the river; failing to recognize that the operating capabilities of its rafts with the inexperienced customers would be unsafe and hazardous in high, swift and rough water conditions; and by wrongfully electing to navigate the Shenandoah River and in particular the Shenandoah Staircase.<sup>4</sup>

The Freeman Litigation was initially set to go to trial in February 2008. In December 2007, Mrs. Freeman moved *in limine* to exclude from evidence at trial an anticipatory release that was allegedly signed by Roger Freeman.<sup>5</sup> On January 30, 2008, the trial court entered an Order granting the Motion *in Limine* on the basis that the release had no legal effect under West Virginia statutory and case law and was unenforceable.

Similarly, the Plaintiffs in the Christopher Litigation moved *in limine* on March 14, 2008 to have the anticipatory releases allegedly signed by the 13 Christopher Plaintiffs excluded from their May 2008 trial. In that same Motion, Plaintiffs also requested that Defendant River Riders be precluded from asserting the defense of assumption of the risk because it is not an available defense under maritime law. River Riders did not timely oppose this motion, and, therefore, the trial court granted Plaintiffs' unopposed Motion on April 15, 2008. After the trial court issued its Order, River Riders filed an Opposition. Because the trial court had already ruled on the matter, River Riders presumably filed a Motion for Relief from Order Granting Plaintiffs' Motion *in Limine* Regarding

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<sup>4</sup> Under the Whitewater Responsibility Act, "all commercial whitewater guides providing services for whitewater expeditions in this state shall, while providing such services, conform to the standard of care expected of members of their profession." See W.Va. Code §20-3B-3(b) (1987).

<sup>5</sup> A copy of an unexecuted release is attached to Defendants' Petition as Exhibit A.

Release and Assumption of Risk.<sup>6</sup> In light of the present Petition, the trial court never ruled on Defendants' request for reconsideration.

Although much of the discovery was conducted jointly, the Freeman and Christopher cases technically proceeded independently until May 19, 2008, when they were, upon motion, consolidated by the trial court pursuant to W.Va.R.Civ.P. 42(a). The court found that both cases arose from the same whitewater rafting trip, and that a consolidated trial would (1) reduce the burden on the parties and the witnesses in having to appear and to testify at two separate trials, (2) reduce the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit, and (3) result in a significant savings of judicial resources. The trial court set a firm trial date to begin on July 29, 2008.

#### IV. STANDARD OF REVIEW.

A writ of prohibition remedy, "being extraordinary in nature, [is] generally 'reserved for really extraordinary causes.'" *State ex rel. Brooks v. Zakaib*, 214 W.Va. 253, 259, 588 S.E.2d 418, 424 (2003) (quoting *State ex rel. Suriano v. Gaughan*, 198 W.Va. 339, 345, 480 S.E.2d 548, 554 (1996)). Stated otherwise, "writs of prohibition . . . provide a drastic remedy to be invoked only in extraordinary situations." *State ex rel. Thrasher Engineering, Inc. v. Fox*, 218 W.Va. 134, 138, 624 S.E.2d 481, 485 (2005) (quoting *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 36, 454 S.E.2d 77, 81 (1994)). The "extraordinary" bases for a Writ of Prohibition are found in W.Va. Code §.53-1-1 (1987), which provides:

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<sup>6</sup> The trial court requested that all open motions be argued on June 25, 2008. Petitioners filed their Petition in this Court before that date. As a result, the trial court never ruled on the Motion for Relief from Order Granting Plaintiffs' Motion *in Limine* Regarding Release and Assumption of Risk.

The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

Nowhere in its 48 page submission do Petitioners contend that the trial court lacks jurisdiction of the present subject matter. Instead, Petitioners only contend that the trial court exceeded its powers in granting two Motions *in Limine* and one Motion to Consolidate.

Of the Orders that may be subject to a Writ, Petitioners have the burden to show why they are entitled to the extraordinary relief afford by a Writ of Prohibition. *Norfolk Southern Ry. Co v. Maynard*, 190 W.Va. 113,120 n.6, 437 S.E.2d 277, 284 n.6 (1993). The five factors the Court examines to determine whether a Writ of Prohibition is warranted are:

- (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief;
- (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- (3) whether the lower tribunal's order is clearly erroneous as a matter of law;
- (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
- (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 21, 483 S.E.2d 12, 21 (1996) (hereinafter referred to as "*Hoover*"). "These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id.*

Prohibition relief, however, is not available to correct a simple abuse of discretion. *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 518, 575 S.E.2d 124, 128 (2002). In fact, this Court has explained, “[i]n the absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. These matters are best saved for appeal and, as a general rule, do not present a proper case for issuance of the writ.” *Id.* (citing *State ex rel. Williams v. Narick*, 164 W.Va. 632, 636, 264 S.E.2d 851, 854 (1980)). See also *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994) (“Mere doubt as to the correctness of a trial court’s ruling on a motion *in limine* regarding an evidentiary issue is an insufficient basis to invoke this Court’s writ power.”)

In considering Petitioners request for prohibition relief, this Court “will review each case on its particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is **so flagrant and violative of the petitioner’s rights as to make a remedy by appeal inadequate**, will a writ of prohibition issue.” Syllabus Point 2, *Woodall v. Laurita*, 156 W.Va. 707, 707, 195 S.E.2d 717, 717 (1973) (emphasis added). No such flagrant and violative abuse is presented in this case. The trial court issued discretionary rulings after full opportunity to be heard and set forth the full factual and legal bases for its decisions in each one of the three Orders. If indeed any of these rulings are improper, it is correctable on appeal on a full record.

## V. ARGUMENT.

### A. THE WEST VIRGINIA WHITEWATER RESPONSIBILITY ACT AND FEDERAL MARITIME LAW – WHAT LAW APPLIES AND WHEN?

All of Petitioners’ arguments come back to one main theme – they are entitled to present an

assumption of risk defense to the jury. Petitioners argue that the anticipatory releases, which are evidence of assumption of the risk, were improperly excluded. Petitioners argue that the West Virginia Whitewater Responsibility Act was improperly applied, and if applied correctly, would allow them an assumption of the risk defense. Petitioners argue that the trial court wrongly applied federal maritime law, which precludes the defense of assumption of the risk. Petitioners argue that if assumption of the risk is not a permissible defense, the rafting industry as we know it will crumble. As a result of these alleged errors by the trial court, Petitioners claim that they are entitled to a Writ of Prohibition reversing these trial court rulings so that the anticipatory releases are admissible as evidence, and so that they may argue their defense of assumption of the risk to the jury.

Ironically, what Petitioners did not do is object below to the trial court's application of the West Virginia Whitewater Responsibility Act and Federal maritime law to preclude the defense of assumption of the risk. The first time Petitioners challenge the interplay of these two bodies of law is in their present Petition. Even worse, although Petitioners assert error about the application of both the West Virginia Whitewater Responsibility Act and Federal maritime law, they do not so much as explain the basics of the two bodies of law. Because this Court cannot thoroughly review the trial court's Orders of January 30, 2008; April 15, 2008; and May 19, 2008 without an understanding of the applicable law and the interplay of Federal maritime law and state law, a brief explanation follows.

i. The West Virginia Whitewater Responsibility Act.

The West Virginia Whitewater Responsibility Act (hereinafter sometimes referred to as the "Act") was enacted in 1987 in response to the Legislature's recognition that there are "inherent risks" associated with whitewater rafting that should be understood by those engaging in the recreation.

W. Va. Code § 20-3B-1 (1987). Those inherent risks are part of the recreation and fun of whitewater rafting, and are “essentially impossible” to eliminate. *Id.* Therefore, according to the Act, a commercial whitewater outfitter and commercial whitewater guide cannot be found negligent if an inherent risk results in an injury. *Id.* The Legislature adopted the Act, however, to “define those areas of responsibility and affirmative acts for which commercial whitewater outfitters and commercial whitewater guides are liable for loss, damage or injury.” *Id.* Accordingly, commercial whitewater outfitters and commercial whitewater guides are required to “conform to the standard of care expected of members of their profession.” W. Va. Code § 20-3B-3 (1987). In interpreting this Act, this Court has explained, “[t]his statute establishes such standard of care as a **statutory safety standard for the protection of participants in whitewater rafting expeditions.**” *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 318, 412 S.E.2d 504, 512 (W.Va. 1991) (emphasis added). As such, commercial whitewater outfitters and commercial whitewater guides are liable to rafting passengers for violating or breaching the statutory standards provided in the Act.

ii. Federal Maritime Law.

Admiralty jurisdiction is bestowed on cases involving a tort committed on navigable water when the tort has a nexus to traditional maritime activity. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 256, 93 S.Ct. 493, 498 (1972). The purpose of maritime law is the “important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation.” *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677, 102 S.Ct. 2654, 2658 (1982). “Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.” *Wells v. Liddy*, 186 F.3d 505, 524 (4th Cir. 1999) (citing *East River Steamship Corp. v. Transamerica*

*Delaval, Inc.* 476 U.S. 858, 864-65, 106 S.Ct. 2295 (1986)). A maritime action may be “brought under federal admiralty jurisdiction, in state court under the saving-to-suitors clause, or in federal court under diversity jurisdiction.” *Id.* (quoting *Byrd v. Byrd*, 657 F.2d 615, 617 (4th Cir. 1981)). When a case filed in state court falls under maritime jurisdiction, as the present case does, **the state court must apply federal substantive admiralty law.** *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206, 116 S.Ct. 619, 624 (1996).

- a. *Maritime Law Applies Because The Tort Complained Of By The Christopher Plaintiffs Has A Nexus To Traditional Maritime Activity.*

As required by *Executive Jet Aviation v. City of Cleveland*, the wrong alleged by Respondents bears, as it must, “a significant relationship to traditional maritime activity.” *Executive Jet Aviation*, 409 U.S. at 268, 93 S.Ct. at 504; *see also Foremost Ins. Co.*, 457 U.S. at 674, 102 S.Ct. at 2658. To fulfill this “nexus” requirement, it is not necessary to demonstrate that the maritime activity is an exclusively commercial one. *Foremost Ins. Co.*, 457 U.S. at 674, 102 S.Ct. at 2658. In *Foremost*, a decision concerning the collision of two pleasure vessels, the United States Supreme Court upheld admiralty jurisdiction, notwithstanding that the vessels were not engaged in commercial shipping, noting that, “[b]ecause the wrong here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction.” *Id.* This jurisdictional inquiry does not turn on the actual effects, but rather on the potential impact of the tort on maritime commerce. *Id.* at 674-75, 102 S.Ct. at 2658; *Sisson v. Ruby*, 497 U.S. 358, 363, 110 S.Ct. 2892, 2896 (1990).

Respondents have alleged and can prove that running a raft trip on September 30, 2004, simply was not reasonable under the circumstances in light of the high and rough waters.

Respondents contend that the rafts simply should not have been on the water that day. Admiralty law has long been concerned with the question of seaworthiness. Thus, Respondents' allegations go to the very core of admiralty jurisdiction. *See Foremost Ins. Co.*, 457 U.S. at 674-75, 102 S.Ct. at 2658.

b. *Maritime Law Applies Because The Shenandoah River Is A Navigable Waterway.*

Petitioners claim that maritime law is inapplicable because the Shenandoah River is not a navigable waterway. The basic test to determine the navigability of waters was established in *The Daniel Ball*, 77 U.S. (10 Wall) 557 (1871):

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are 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 of the United States within the meaning of the acts of Congress, in contradistinction from 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.

To sustain admiralty jurisdiction, Respondents need not establish that the Shenandoah River itself constituted an interstate highway of commerce; it is sufficient that the body of water unites or joins with other waters which together create a "continued highway over which commerce is or may be carried." *Id.* Additionally, despite Petitioners' assertion to the contrary, Respondents need not demonstrate that the Shenandoah River currently carries interstate commerce so long as it, in conjunction with adjacent waterways, is susceptible of sustaining such commerce. *Id.* The Shenandoah River meets the Potomac River which in turn meets the Chesapeake Bay. Both the adjoining Potomac River and the Chesapeake Bay are not only susceptible of sustaining such

commerce, but in fact do sustain such commerce. *See also Mullenix v. United States of America*, 1993 AMC 1766, 1770 (4<sup>th</sup> Cir. 1993) (“The Potomac River . . . [is] a navigable waterway for purposes of determining admiralty jurisdiction.”)

Petitioners’ contention that the trial court failed to decide that the Shenandoah River is a navigable waterway is a red herring. As previously explained, Petitioners failed to oppose the Motion *in Limine* filed in the Christopher Litigation. In that Motion, Respondents identified the Shenandoah River as a navigable waterway. That assertion was unopposed, and, therefore, the Court was permitted to accept its truth.<sup>7</sup>

iii. When Maritime Law Looks To The West Virginia Whitewater Responsibility Act.

The Christopher Respondents pled in their Complaint the application of both Federal maritime law and the West Virginia Whitewater Responsibility Act. At first blush, this appears contradictory. But the Christopher Respondents are not asking and the trial court did not apply two different and opposing bodies of law. Instead, the trial court followed the long recognized principle of maritime jurisdiction, that substantive maritime law applies unless there is no well developed body of admiralty law on the matter.<sup>8</sup> *Wilburn Boat Co. v. Fireman’s Fund Ins.*, 348 U.S. 310, 321,

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<sup>7</sup> This is particularly true in light of Petitioners’ statement that the Shenandoah River is a navigable waterway. *See* Apx. at 29 -31, October 12, 2004 Transcript of Interview of Matthew Knott, (Statement of Matthew Knott in response to the question about whether the city line extended over the river: “They’re attempting to make it such, but evidently at some point in time they said that when they built that new bridge there at the Shenandoah, they had to pay the town because the town owns the river bed there or something. I’ve talked to several people since who didn’t seem to feel that the town would have jurisdiction, **it’s interstate commerce, and it’s a navigable waterway.**”) (emphasis added).

<sup>8</sup> Respondents’ position is strikingly similar to the explanation of the interplay between the West Virginia Whitewater Responsibility Act and Federal maritime law given by the Amicus, America Outdoors. *See* Amicus at p. 5-6, 8-10. Interestingly, both of these explanations are in stark

75 S.Ct. 368, 374 (1955); *Wells*, 186 F.3d at 525. When there is no applicable maritime law, a court should look to state law – in this case the West Virginia Whitewater Responsibility Act – for guidance. *Id.* Indeed, “[s]tate law may supplement maritime law when maritime law is silent or where a local matter is at issue, but state law may not be applied where it would conflict with maritime law.” *Floyd v. Lykes Bros. Steamship Co., Inc.*, 844 F.2d 1044, 1047 (3d Cir. 1988) (citing *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5<sup>th</sup> Cir. 1986)). “State law is said to conflict with general maritime law when it negatively impacts upon admiralty’s foremost goal – uniformity.” *Wells*, 186 at 525 (citing *Maryland Dep’t of Natural Resources v. Kellum*, 51 F.3d 1220, 1227 (4th Cir. 1995); *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983)). “It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.”<sup>9</sup> *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S.Ct. 468 (1959).

In the present case, there is no federal statute or regulation regarding whitewater rafting safety. To the contrary, the West Virginia legislature has expressed a particular interest in whitewater safety and the regulation of that industry on inland waters through the West Virginia Whitewater Responsibility Act. Because maritime law is silent about the regulation of whitewater

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contrast to the Petitioners’ claim that the West Virginia Whitewater Responsibility Act preempts Federal maritime law. *See* Petition at p. 10-13.

<sup>9</sup> As exemplified above, Petitioners’ claim that maritime law is inapplicable because the West Virginia Whitewater Responsibility Act preempts Federal law is misplaced. Plain and simple – state law does not preempt Federal maritime law. The United States Supreme Court has made plain that when a case is determined to be a maritime action, the substantive Federal admiralty law applies. *Yamaha Motor Corp.*, 516 U.S. at 206, 116 S.Ct. at 624. State law may supplement Federal maritime law, but it does not preempt Federal maritime law. *See id.* The West Virginia Legislature simply does not have the authority to preempt Federal maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S.Ct. 468 (1959).

rafting, the trial court properly looked to the Act for guidance.

In fact, a trial court sitting in maritime jurisdiction has heretofore applied a state's water safety statute when federal maritime law was silent on the matter. For example, just last year in *Tassinari v. Key West Water Tours, L.C.*, 2007 WL 1879172 (S.D. Fla. 2007), the United States District Court for the Southern District of Florida applied a similar Florida safety statute regarding the negligent operation of a personal watercraft when there was no applicable uniform maritime law. *See* Apx. at 32-36. In that case, the plaintiffs had rented jet skis from the defendants. During their tour, another paying customer collided with the plaintiffs, causing them serious injury.

Maritime law applied because the negligence involved a tort on navigable waters. Being that there was no federal statute on point, the plaintiffs argued that the defendants were negligent per se because of violations of a Florida safety statute enacted to protect the safety of personal watercraft renters. Citing *Wilburn Boat*, the United States District Court stated, “[i]n the field of maritime contracts, as in that of maritime torts, the National Government has left much regulatory power in the states.” *Tassinari*, at \*2 (citing *Wilburn Boat*, 348 U.S. at 313). Because the “Florida statutes at issue were not designed to circumvent federal maritime law or substitute a stricter standard of care in negligence cases; rather they were designed to help regulate recreational boating safety,” the Court applied the Florida safety statute. *See also Smith v. Haggerty*, 169 F. Supp.2d 376 (E.D. Pa. 2001) (applying Pennsylvania law to a negligence claim arising from a boating accident) (vacated on other grounds); *Coastal Fuels Marketing Inc. v. Florida Exp. Shipping Co., Inc.*, 207 F.3d 1247, 1251 (11th Cir. 2000) (the state law will be applied if it does not “frustrat[e] national interests in having uniformity in admiralty law.”). Hence, even though this is a case governed by maritime law, when that body is silent on an issue, the trial court properly looked to the West Virginia Whitewater

Responsibility Act for guidance.

iv. Negligence Under Maritime Law Is The Same As Negligence Under West Virginia Whitewater Responsibility Act.

Negligence under maritime law is the same as West Virginia negligence law.<sup>10</sup> Under maritime law, negligence is simply the failure to use reasonable care under the circumstances. A maritime plaintiff must establish a duty, a breach of the duty by the defendant, and an injury that proximately results from that breach. *See Moore v. Matthews*, 445 F.Supp.2d 516, 522 (D.Md. 2006); *Schumacher v. Cooper*, 850 F.Supp. 438, 447 (D.S.C. 1994). Because there is no federal statute stating otherwise, the duty under maritime law is the same duty established under West Virginia's Whitewater Responsibility Act – that commercial whitewater outfitters and commercial whitewater guides “conform to the standard of care expected of members of their profession.” W.Va. Code § 20-3B-3 (1987). In short, both maritime law and the Act require rafting outfitters and rafting guides to act reasonably under the circumstances.

**B. A WRIT OF PROHIBITION IS NOT WARRANTED BECAUSE THE TRIAL COURT UNDER ITS DISCRETION PROPERLY EXCLUDED THE ANTICIPATORY RELEASES.**

On two separate occasions, on January 30, 2008 and again on April 15, 2008, the trial court excluded the anticipatory releases allegedly signed by Roger Freeman and the 13 Christopher Respondent passengers pursuant to the West Virginia Whitewater Responsibility Act. It is beyond elementary that a trial court has the complete discretion to admit or exclude evidence. *McKenzie v.*

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<sup>10</sup> Despite Petitioners' assertions to the contrary, maritime law does not embody strict liability, nor have the Christopher Respondents ever made a claim of strict liability. *See Syllabus Point 3, Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979) (stating in strict liability cases, the question is not whether defendant had a duty or breached that duty but whether a product was not reasonably safe for its intended use); *Evans v. Mutual Min.*, 199 W.Va. 526, 485 S.E.2d 695 (1997) (stating that when a party chooses to have an abnormally dangerous instrument, he is strictly liable for any injury, without a showing of negligence).

*Carroll Intern. Corp.*, 216 W.Va. 686, 690, 610 S.E.2d 341, 348 (2004). As a matter of law, these rulings were proper and fully within the trial court's discretion. The West Virginia Whitewater Responsibility Act and those cases interpreting it unequivocally establish that anticipatory releases purporting to absolve commercial whitewater outfitters and commercial whitewater guides of the liability imposed under the Act are unenforceable as a matter of law. Because the anticipatory releases in question purport to do just that, the trial court properly excluded them as evidence.

Petitioners, however, challenge the trial court's ruling on the basis that the releases are admissible to show conformity with the standard of care because (1) Petitioners gave adequate warnings of the inherent risks associated with whitewater rafting, and (2) Respondents understood the warnings and voluntarily assumed the risks. By arguing that an unenforceable document has any application, Petitioners are giving it more weight than it is entitled to under West Virginia statutory and case law. Furthermore, Petitioners have not met their burden under *Hoover* of showing why they are entitled to prohibition relief on a trial court's discretionary ruling. In light of Petitioners' failure, this Court should be guided by its general rule that "[p]rohibition is ordinarily inappropriate in matters involving a trial court's pretrial ruling on . . . the admissibility of evidence." *State ex rel. Shelton*, 212 W.Va. at 518, 575 S.E.2d at 128 (citing *Policarpio v. Kaufman*, 183 W.Va. 258, 261, 395 S.E.2d 502, 505 (1990)).

i. The Trial Court's January 30, 2008 And April 15, 2008 Orders Properly Excluded The Anticipatory Releases As Unenforceable As A Matter Of Law.

Anticipatory releases purporting to exempt commercial whitewater outfitters and commercial whitewater guides of liability under the West Virginia Whitewater Responsibility Act are unenforceable as a matter of law. This Court first had the opportunity to consider the enforceability

of anticipatory releases in *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 412 S.E.2d 504 (1991).

In *Murphy*, the plaintiff, Kathleen Murphy, signed an anticipatory release prior to participating in a whitewater rafting trip down the New River in Fayette County. The release purported to hold the defendant harmless for any injury or damage that may result during the rafting trip. The defendant commercial whitewater outfitter, North American River Runners, Inc., filed for summary judgment on the grounds that the anticipatory release absolved it from liability. This Court concluded, “when a statute imposes a standard of care, **a clause in an agreement purporting to exempt a party from tort liability to a member of the protected class for failure to conform to that statutory standard is unenforceable.**” *Id.* (emphasis added). *Murphy* establishes that, because West Virginia has a very clear and defined statutory standard of care for commercial whitewater outfitters and commercial whitewater guides, that duty cannot be waived by a rafting participant through an anticipatory release. *See* W.Va Code §§ 20-3B-1 to 20-3B-5 (1987); *Murphy*, 186 W.Va. at 315, 412 S.E.2d at 509. Indeed, as the Court stated, “a plaintiff’s express agreement to assume the risk of a defendant’s violation of a safety statute enacted for the purpose of protecting the public will not be enforced; **the safety obligation created by the statute for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waive.**” *Murphy*, 186 W.Va. at 315, 412 S.E.2d at 509 (emphasis added).

More than ten years later and relying on *Murphy*, the United States District Court for the District of West Virginia in *Johnson v. New River Scenic Whitewater Tours, Inc.*, 313 F. Supp. 2d 621, 627 (D. WVa. 2004), reaffirmed that anticipatory releases purporting to preclude liability on behalf of a whitewater rafting outfitters are unenforceable. There, a church leader signed an

anticipatory release on behalf of a 14-year-old girl participating in a church sponsored whitewater rafting trip. The young girl drowned during the trip, and the whitewater rafting outfitter asserted the release as a means to avoid liability. The Court rejected that argument, citing *Murphy's* explanation that releases of this sort are "contrary to public policy and unenforceable." *Id.* at 628 (citing *Murphy*, 186 W.Va. at 314, 412 S.E.2d at 508). More important to this case, the Court in *Johnson* held that because the anticipatory release was unenforceable, **the defendant was precluded from referencing or relying on it at trial.** *Id.* at 634 (emphasis added). Specifically, that Court, just as the trial court here, granted plaintiff's Motion *in Limine* to have the release precluded as evidence at trial.

Relying on the West Virginia Whitewater Responsibility Act and the cases interpreting it, Mrs. Freeman moved *in limine* in December 2007 to exclude from evidence at trial the anticipatory release that was allegedly signed by her deceased husband, Roger Freeman. After consideration of an Opposition filed by Petitioners, the Court granted the Motion, finding that the anticipatory release was unenforceable as a matter of law. Almost three months later, the Respondents in the Christopher Litigation filed a substantially similar motion requesting that the anticipatory releases allegedly signed by the 13 Christopher Respondents be excluded as evidence from their trial. In their Motion, the Christopher Respondents also relied on the West Virginia Whitewater Responsibility Act.<sup>11</sup> Petitioner River Riders **did not timely oppose this motion,** and, therefore, the trial court granted

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<sup>11</sup> The Christopher Respondents' reliance on the West Virginia Whitewater Responsibility Act is in accord with their assertion that maritime law generally applies to the case. As previously explained in Section A(iii), under maritime jurisdiction, substantive maritime law applies unless there is no well developed body of admiralty law on the matter. *Wells v. Liddy*, 186 F.3d 505, 525 (4th Cir. 1999). Petitioners have not cited any uniform federal maritime case law regarding the enforceability of anticipatory releases. When there is no applicable maritime law, a court should look to state law and in this case the West Virginia Whitewater Responsibility Act for guidance. *Id.*

the Christopher Respondents' unopposed Motion on April 15, 2008. The Christopher Respondents maintain that Petitioners' failure to oppose their Motion *in Limine* precludes them from challenging that Motion through a Writ of Prohibition. Even if this Court could peek at the trial court's April 15, 2008 Order, it would see that the basis of the trial court's ruling was exactly the same as its January 30, 2008 Order; namely, that West Virginia's Whitewater Responsibility Act rendered the releases unenforceable as a matter of law.

Just as in *Murphy* and *Johnson*, the anticipatory releases allegedly signed by Roger Freeman and the 13 Christopher Respondents are unenforceable. The West Virginia Whitewater Responsibility Act establishes the applicable standard of care and Petitioners cannot attempt to usurp that standard through an anticipatory release. In light of West Virginia's statutory and case law with regard to anticipatory releases, the trial court did not err in excluding them as unenforceable and therefore irrelevant documents.

Nor does this exclusion allow for prohibition relief, because questioning a court's ruling on the admissibility of evidence is not a sufficient grounds for a Writ of Prohibition. As this Court has stated before, "[m]ere doubt as to the correctness of a trial court's ruling on a motion *in limine* regarding an evidentiary issue is an **insufficient basis to invoke this Court's writ power.**" *State ex rel. Allen*, 193 W.Va. at 37, 454 S.E.2d at 82 (emphasis added). Stated another way,

The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, ruling on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.

*State ex rel. Shelton*, 212 W.Va. at 518, 575 S.E.2d at 128.

As further explained in *State ex rel. Shelton v. Burnside*, the trial court's ruling, even if

wrong, only amounts to a simple abuse of discretion, “which is not correctable by a writ of prohibition,” but rather, which is a more appropriate issue for appeal when the entire record is available to the appellate court. 212 W.Va. at 518, 575 S.E.2d at 128. Under *State ex rel. Shelton*, the use of a Writ of Prohibition for pretrial evidentiary rulings would only delay trials and “not facilitate the orderly administration of justice.” *Id.* (citing *Woodall v. Laurita*, 156 W.Va. 707, 713, 195 S.E.2d 717, 721 (1973)).

ii. The Anticipatory Releases Are Not Admissible For Any Reason.

Despite the clear West Virginia statutory and case law authority, Petitioners still contend that the anticipatory releases are relevant. Although Petitioners’ argument is verbose and difficult to understand, they appear to argue that the releases are relevant to show they met the standard of care because (1) Petitioners gave “adequate warnings” of the “inherent risks” associated with whitewater rafting and (2) Respondents understood those warnings and “voluntarily assumed the risks.” *See* Petition at p. 35. Neither of these reasons is meritorious or provides justification to admit the releases as evidence.

By advancing the claim that the releases are evidence that Petitioners warned Respondents of the inherent risks of whitewater rafting, Petitioners reveal their complete misunderstanding of the West Virginia Whitewater Responsibility Act. Under the Act, a commercial whitewater outfitter and a commercial whitewater guide can never be held responsible or negligent for the inherent risks associated with whitewater rafting because those risks are “essentially impossible” to eliminate. W. Va. Code § 20-3B-1 (1987). Rather, the Act establishes for what acts/omissions **other than inherent risks** a commercial whitewater outfitter and a commercial whitewater guide can be held liable.

More important, Respondents have not made any allegations of improper warnings of inherent risks. Instead, both the Freeman and Christopher Respondents contend that the whitewater rafts should not have been taken out on the river on September 30, 2004 because of the especially high and rough waters from hurricane runoff. Respondents argue that in light of the Petitioners' superior knowledge about the river conditions and the general recklessness of rafting when the river is at or just below flood stage, Petitioners never should have embarked on the trip on September 30, 2004.

Contained within the anticipatory release is no warning about the risks associated with taking rafts out on unusually high, flood stage waters.<sup>12</sup> See Release attached as Exhibit A to Petitioner's Petition. Nor is there even an explanation of what constitutes high waters. The anticipatory releases only outline general risks that may accompany whitewater rafting on an average day when the water is approximately two feet and not ten feet. Quite simply, the releases are not proper evidence of a warning in this case because they do not contain a warning about the danger that was present and for which Respondents complain.

Petitioners also argue, in part by relying on out of state authority,<sup>13</sup> that the anticipatory

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<sup>12</sup> Anticipatory releases are, by their very nature, form releases aimed at generic circumstances. Releases are not catered to specific risks, such as the risk of high and fast waters after hurricane runoff, as in this case.

<sup>13</sup> In light of clear West Virginia authority on the matter, Petitioners' reliance on out of state authority is misguided. Moreover, Petitioners wrongly represent to this Court that they have offered to redact portions of the anticipatory release. Petitioners did not timely oppose the Christopher Respondents' Motion *in Limine* and therefore the arguments contained in an untimely filed Opposition was properly never considered by the trial court. Likewise, Petitioners' reliance on deposition testimony by the Christopher Respondents is also inappropriate. Such testimony is not part of the record in this case. In addition, full copies of the transcripts were not provided to the court; instead, Petitioners isolated certain excerpts without providing the Court with a copy of the statements in context.

releases are relevant to show that the Respondents understood the warnings and voluntarily assumed the risks of whitewater rafting. As *Murphy* makes clear, however, “**a plaintiff’s express agreement to assume the risk of a defendant’s violation of a safety statute enacted for the purpose of protecting the public will not be enforced[.]**” *Murphy*, 186 W.Va. at 315, 412 S.E.2d at 509 (emphasis added). Plain and simple, Petitioners cannot try to prove assumption of the risk through an anticipatory release.<sup>14</sup>

**C. BECAUSE THE TRIAL COURT’S RULING THAT ASSUMPTION OF THE RISK IS NOT AN AVAILABLE DEFENSE IS CORRECT REGARDLESS OF WHAT LAW APPLIES, PETITIONERS ARE NOT ENTITLED TO THE EXTRAORDINARY RELIEF OF A WRIT.**

Although the Petitioners attempt to create a disaster scenario if they are not permitted to put on an assumption of the risk defense, the bottom line is that Petitioners did not preserve the right to challenge this ruling. Only the April 15, 2008 trial court Order states that federal maritime law precludes an assumption of the risk defense, and Petitioners did not oppose that Motion. Because the Motion was unopposed, the trial court granted it and stamped on its Order “NOTE TO COUNSEL THE COURT HAS RECEIVED NO PLEADINGS IN OPPOSITION TO THIS MOTION DURING THE TIME PERIOD CONTEMPLATED BY TRIAL COURT RULE 22 ORDER.” This Court has made plain that Petitioners cannot now request extraordinary prohibition relief when they did not preserve the issue below. See *Lyons v. Steele*, 113 W.Va. 652, 652, 169 S.E. 481, 483 (1933) (emphasis added) (“[W]hile prohibition is classed as a legal remedy, its issuance is largely influenced by equitable principles. Equity would not lend an ear to a technical right founded on deceit. Neither should prohibition serve deception. We hold, accordingly, that courts

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<sup>14</sup> See Section C for a further explanation as to why an assumption of the risk defense is not available in this case.

in West Virginia are not bound to allow the writ . . . merely because the applicant shows a clear technical right to prohibition; **but they should deny the writ . . . whenever he comes not with clean hands**, as in the instant case.”)

In light of no Opposition, the trial court granted the Christopher Respondents’ request that Petitioners be precluded from asserting the defense of assumption of the risk at trial because it is not a recognized defense under maritime law. Even if this Court could review the April 15, 2008 Order, it would see that the ruling by the trial court is merely a preliminary decision about the applicable law with regard to assumption of the risk only. The question about what law will govern these cases will be decided **after** the parties present and argue jury instructions. The trial court will then formally decide the application of maritime law, the West Virginia Whitewater Responsibility Act, or any other law presented by the parties. If the Petitioners disagree with the trial court rulings at that time, they can object to properly preserve the issue(s) for appeal. As this Court in *State ex rel. Shelton* explained, pretrial discretionary rulings are not proper fodder for a Writ of Prohibition because the highest court “cannot assume that the trial court will rule incorrectly on [the] matter if it is properly presented to it during trial.” *State ex rel. Shelton*, 212 W.Va. at 519, 575 S.E.2d at 129.

Even if Petitioners’ complaint about the April 15, 2008 Order was properly preserved and even if it was more than a preliminary decision about the applicable law with regard to assumption of the risk, the trial court properly determined as a matter of law that assumption of the risk is not an available defense in this case because (1) maritime law, which is applicable to this case, does not permit an assumption of the risk defense, and (2) the West Virginia Whitewater Responsibility Act does not permit an assumption of the risk defense.

i. What Is Assumption Of The Risk?

In West Virginia, the defense of assumption of the risk is “based upon the existence of a factual situation in which the act of the defendant alone creates the danger and causes the injury and the plaintiff voluntarily exposes himself to the danger with full knowledge and appreciation of its existence.” *Hollen v. Linger*, 151 W.Va. 255, 263, 151 S.E.2d 330, 335 (1966). Although the doctrine is similar to contributory negligence, “[t]he essence of contributory negligence is carelessness; of assumption of risk, venturousness. **Knowledge and appreciation of the danger are necessary elements of assumption of the risk.**” *King v. Kayak Manufacturing Corporation*, 182 W.Va. 276, 280, 387 S.E.2d 511, 516 (1989) (emphasis added).<sup>15</sup>

Petitioners’ insistence that assumption of the risk is an appropriate defense is nonsensical in light of the factual presentation of this case. The primary negligence alleged by the Respondents in both the Freeman Litigation and in the Christopher Litigation is that Petitioner River Riders never should have taken the rafts out onto the flooding waters on September 30, 2004. Respondents contend that the Petitioners had superior knowledge about the water conditions on that day and how, if at all, those conditions would affect rafting. In this instance, assumption of the risk could only be a proper defense if there was evidence that the Respondents knew that, because of the highly elevated water levels due to hurricane runoff, the river was a place of danger for whitewater rafts and nevertheless decided to go rafting down the Shenandoah. Petitioners do not even attempt to show in their papers that any Respondent had special knowledge of the dangers presented by the high

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<sup>15</sup> In their papers, Petitioners do not even identify the danger to which they claim Respondents voluntarily exposed themselves. The Christopher Respondents will proceed as if the Petitioners asserted the very danger for which the Respondents complain – the high and rough waters on September 30, 2004.

water levels or river conditions.<sup>16</sup> Not surprisingly, Respondents relied on Petitioners, the rafting experts, for such guidance.

Petitioners do no more than point to isolated snippets of deposition testimony to contend that Respondents were aware of the general risks associated with whitewater rafting. Respondents are also aware of the general risks associated with getting up each morning or driving a car, but that is not sufficient knowledge to employ the defense of assumption of the risk. For assumption of the risk to apply, Respondents must have appreciated the specific danger complained of and voluntarily exposed themselves to that danger. *Hollen*, 151 W.Va. at 263, 151 S.E.2d at 335. Petitioners have no evidence that Respondents had knowledge of the dangerously high waters and nevertheless decided to go whitewater rafting. Assumption of the risk is simply not available under these circumstances.

ii. Assumption Of The Risk Is Not An Available Defense Under Maritime Law.

Not only is assumption of the risk not applicable to the facts of this case, it is not a proper defense under maritime law.<sup>17</sup> Assumption of the risk is not a defense in admiralty or maritime law. *De Sole v. United States*, 947 F.2d 1169, 1175 (4th Cir. 1991). In fact, “[t]he tenets of admiralty law, which are expressly designed to promote uniformity, do not permit assumption of risk in cases

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<sup>16</sup> Petitioners cite to (1) snippets of Respondents’ deposition testimony and (2) Petitioners’ generic safety video to try to prove this particularized knowledge by Respondents. These citations only show that Respondents were aware of the inherent risks associated with whitewater rafting. They do not, however, show that Respondents were aware of and understood the risk of the high and forceful water on September 30, 2004.

<sup>17</sup> Petitioners cannot claim to be surprised by Respondents’ assertion of maritime law. The Christopher Respondents made allegations of violations of general maritime law in their Complaint filed in September 2006, and then counsel reiterated the application of maritime law in multiple correspondence to defense counsel in December 2007. *See* Apx. at 37- 66.

of personal injury whether in a commercial or recreational situation.” *Id.* The foundation of this principle has been recognized for more than 70 years. In *The Arizona v. Anelich*, Justice Harlan F. Stone stated in support of his position that assumption of the risk was not a proper defense in cases of unseaworthiness, “[n]o American case appears to have recognized assumption of risk as a defense by such a suit.” 298 U.S. 110, 122, 56 S.Ct. 707, 711 (1936). In light of this bright line rule in admiralty jurisdiction, the trial court properly precluded assumption of the risk as a defense.

Because the trial court’s ruling was correct as a matter of law, Petitioners attempt to challenge this ruling through their Petition for a Writ of Prohibition is unavailing. Under the third, and most important *Hoover* factor, a Petition seeking a Writ of Prohibition is appropriate when there is a clear error of law, not when the trial court properly follows and applies the law. *State ex rel. Hoover*, 199 W.Va. at 21, 483 S.E.2d at 21 (1996). When a Writ of Prohibition is sought to restrict a lower court’s “abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of the petitioner’s rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.” Syllabus Point 2, *Woodall*, 156 W.Va. at 707, 195 S.E.2d at 717 (emphasis added). No such flagrant and violative abuse is presented in this case. The trial court issued a ruling after full opportunity to be heard (even though Petitioners chose not to submit a timely Opposition) and set forth the full factual and legal bases for its decision which is fully supported by the law.

iii. Assumption Of The Risk Is Not An Available Defense Under The West Virginia Whitewater Responsibility Act.

As shown above in Section A(iii), the West Virginia Whitewater Responsibility Act applies to this maritime case. That Act, however does not somehow import assumption of the risk as a defense. As previously explained, the purpose of the Act is to recognize that rafting passengers assume the “inherent risks” associated with whitewater rafting. W. Va. Code § 20-3B-1 (1987). The Act specifically provides that commercial whitewater outfitters and commercial whitewater guides are not liable for such inherent risks. *Id.* The Act continues to explain, however, that commercial whitewater outfitters and commercial whitewater guides, however, are liable for their negligent actions that are not considered inherent risks of the recreational activity. W. Va. Code § 20-3B-3 (1987). As such, the Defendants are statutorily obligated to conform to that standard; any breach thereunder is negligence. The Court in *Murphy* explained that because the Act imposes a standard of conduct on whitewater rafting outfitters, a rafting passenger cannot through express agreement assume the risk of a defendant’s violation of the safety statute. *Murphy*, 186 W.Va. at 315, 412 S.E.2d at 509. *Murphy* continued, “the safety obligation created by the statute for such purpose is an obligation owed to the public at large and is not within the power of any private individual to waive.” *Id.* As such, *Murphy* makes clear that even though whitewater rafting passengers assume the inherent risks of rafting, assumption of the risk is not an available defense under the Whitewater Responsibility Act. *Id.* The Act outlines the specific standard of care that must be followed by whitewater outfitters and guides; those duties cannot be waived, nor can a rafting participant assume the risk that those statutory duties will be violated.<sup>18</sup> *Id.*

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<sup>18</sup> Similar to its Whitewater Responsibility Act, West Virginia also has a Skiing Responsibility Act. The purpose, just as with the Whitewater Responsibility Act, is to “define those

Because assumption of the risk is not an available defense under either maritime law or the West Virginia Whitewater Responsibility Act, the trial court's decision to preclude it as a defense does not provide grounds for a Writ of Prohibition. As the Court in *Hoover* explained, the extraordinary relief of a writ is available only when there is clear error that is not correctable on appeal. *State ex rel. Hoover*, 199 W.Va. at 21, 483 S.E.2d at 2. The trial court's preclusion of an assumption of the risk defense was not error, but based on sound legal principles.

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areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury[.]” W Va. Code § 20-3A-1 (1984). Again, just as with the Whitewater Responsibility Act, the Skiing Responsibility Act protects ski operators for inherent risks that are impossible to eliminate, but the Act does not “immunize ski area operators from liability for negligence where it involves a violation of an operator’s duty to maintain the ski areas in a reasonably safe condition.” *Hardin v. Ski Venture, Inc.*, 848 F. Supp. 58, 61 (N.D. W.Va. 1994); see also *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 693, 408 S.E.2d 634, 643 (1991). In *Hardin*, the Court was asked whether assumption of the risk is an available defense under the Skiing Responsibility Act. The Court explained that the Skiing Responsibility Act by its very language and purpose provides that skiers assume the inherent risks associated with skiing. *Hardin*, 848 F. Supp. at 61. Just because a skier assumes the inherent risks associated with skiing, however, does not mean that a skier assumes the risk of other negligence by a ski operator. That Court explained,

Although the Skiing Responsibility Act may modify the common law doctrine of assumption of the risk by statutorily creating a complete bar to recovery under certain circumstances, those circumstances cannot be assumed in this case at this juncture as a matter of law. While plaintiff’s injuries ultimately resulted from a collision with a tree, plaintiff alleges that the collision and resultant injuries were caused by negligent snow-making operations.

*Hardin*, 848 F. Supp. at 61. See also *Pack v. Van Meter*, 177 W.Va. 485, 354 S.E.2d 581 (1986) (stating that when the plaintiff argues a violation of an employee safety statute, the defense of assumption of the risk cannot be applied to prevent the plaintiff from recovering damages). West Virginia has made clear through both its Whitewater Responsibility Act and through its Skiing Responsibility Act that the recreation providers (either ski operators or commercial rafting outfitters and guides) have statutory duties and a participant cannot assume the risk associated with a breach of those duties.

iv. There Is No Evidence To Support Petitioners' Contention That West Virginia's Whitewater Rafting Industry Will Be Affected By The Trial Court's Rulings.

Petitioners make much ado about the impact the trial court's ruling to preclude assumption of the risk will allegedly have on the whitewater rafting industry as a whole, going as far as to surmise that these rulings, if not immediately reversed, will "cripple" the entire industry. First, this argument was not raised with the trial court in a motion *in limine*, dispositive motion, or responsive motion. The first time Petitioners ever made such a disaster scenario is in their Petition. More important, absolutely no evidence has been offered to support their contention. Petitioners' speculation concerning the potential impact of the rulings on the whitewater rafting industry is simply not sufficient to warrant the "extraordinary" relief afforded by a Writ, particularly when an appeal is available to examine the claimed errors on a full and complete record.

As direct proof to the contrary, the Christopher Respondents point this Court to the current thriving whitewater rafting industry in West Virginia. This industry follows both the *Murphy* and the *Johnson* decisions in which similar anticipatory releases were excluded and the assumption of risk defense was not permitted. In the more than 15 years that have followed since those decisions were rendered, the industry has not so much as felt a blip. For Petitioners to argue otherwise is simply an attempt to sensationalize and create an argument that does not exist.

**D. THE TRIAL COURT PROPERLY CONSOLIDATED THE FREEMAN LITIGATION AND THE CHRISTOPHER LITIGATION.**

The final order complained of by Petitioners is the May 19, 2008 Order in which the trial court consolidated the Freeman Litigation with the Christopher Litigation. Consolidation is wholly within the trial court's discretion. Syllabus Point 1, *Holland v. Joyce*, 155 W.Va. 535, 185 S.E.2d

505 (1971). Because the facts of these cases warranted consolidation, this Order does not give rise to prohibition relief.

W. Va. R. Civ.P. 42(a) governs consolidation of cases and provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial or any or all matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. An action is pending before the court within the meaning of this subdivision if it is pending before the court on appeal from a magistrate.

This Court in Syllabus Point 1, *State ex rel. Appalachian Power Co. v. McQueen*, 198 W.Va. 1, 5, 479 S.E.2d 300, 304 (1996) stated that a trial court in the exercise of its discretion when deciding issues of consolidation under W.Va.R.Civ.P. 42(a), should consider the following factors:

- (1) whether the risks of prejudice and possible confusion outweigh the considerations of judicial dispatch and economy;
- (2) what the burden would be on the parties, witnesses, and available judicial resources posed by multiple lawsuits;
- (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and
- (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.

The trial court, in considering consolidation in this case, examined each of these four factors and in its discretion after a full hearing, determined that consolidation was appropriate. As such, the lower court's ruling was proper.

First, the trial court concluded that the risks of prejudice and possible confusion due to the difference in damages alleged by the party in the Freeman Litigation and by the parties in the Christopher Litigation was small. The court, in its discretion, determined that consolidation was

proper because, regardless of consolidation, the evidence at both trials would have been that as a result of this rafting accident more than a dozen people were injured and one person died. Petitioners contend, however, that a jury will be confused by the different damages available to the Respondent in the Freeman Litigation versus those damages available to the Christopher Respondents. The prejudice about which the Petitioners complain arises whenever more than one person is injured by the alleged negligent conduct of another in the same incident and the injuries that are sustained are different. Moreover, the court found that any potential for confusion and prejudice could be adequately controlled through the rules of evidence, the court's instructions to the jury, and a verdict sheet.

Under the second factor, the trial court found that because both cases arise out of the same white water trip, the same witnesses are likely to testify in each case. The Christopher Respondents alone have named over 125 witnesses for trial. Many of those same witnesses were identified by the Respondent in the Freeman Litigation. The ability to consolidate approximately 250 witnesses into 125 alone gives rise for consolidation. In addition, if the cases were not consolidated, it is unlikely that the parties could secure all 125 witnesses on two separate occasions. Many of the witnesses, including all of the Respondents, are out of state residents who live 1½ hours away and outside of the Court's Rule 45 subpoena power. The likelihood that on two separate occasions dozens of witnesses would voluntarily travel the 1½ hours from Maryland, Virginia, and the District of Columbia to West Virginia for a two week trial is low.

Third, the court considered the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit. Each case, if tried separately, was expected to last **at least two weeks** for a total of at least four weeks of trial time. Consolidation will

halve that, resulting in an enormous savings of judicial resources, including time spent in trial as well as time by judicial personnel.

Finally, the trial court considered the relative expense of the single-trial and multiple-trial alternatives. The court found that a single trial will reduce the number of experts needed, reduce the cost associated with dozens of witnesses traveling from Maryland, Virginia, and the District of Columbia to West Virginia for two trials, and eliminate the need to engage in multiple depositions of the same witness to the extent that each party has not deposed a particular witness.

Petitioners' claim that consolidation was an abuse of the trial court's authority is not properly before this Court in the form of a Petition for a Writ of Prohibition. In fact, this Court has explained, "[i]n the absence of jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. These matters are best saved for appeal and, as a general rule, do not present a proper case for issuance of the writ." *State ex rel. Shelton*, 212 W.Va. at 518, 575 S.E.2d at 128 (citing *State ex rel. Williams v. Narick*, 164 W.Va. 632, 636, 264 S.E.2d 851, 854 (1980)). The use of a Writ of Prohibition for discretionary trial court rulings would only delay trials and "not facilitate the orderly administration of justice." *Id.* (citing *Woodall v. Laurita*, 156 W.Va. 707, 713, 195 S.E.2d 717, 721 (1973)). Because Defendants may raise this as an issue on appeal, it is not properly before this Court in the form of a Writ of Prohibition.

## VI. CONCLUSION.

Petitioners have failed to show why they are entitled to the relief requested in their Petition. As made abundantly clear, Petitioners did not even have the right to note a Petition from the April 15, 2008 Order, which they did not oppose. More important, the trial court Orders of January 30, 2008; April 15, 2008; and April 28, 2008 were all discretionary, supported by the evidence, and

based on sound law. Not one of these rulings provides justification for the “extraordinary” relief provided by a Writ of Prohibition.

To that end, Defendants have not met their burden in proving any one of the five *Hoover* factors for the three Orders in question. *State ex rel. Hoover*, 199 W.Va. at 21, 483 S.E.2d at 21. For example, under the third and most important factor, the trial court never made a decision in clear violation of the law. All of the court’s rulings were discretionary and supported by the facts. The trial court properly excluded the anticipatory releases under the West Virginia Whitewater Responsibility Act. The trial court properly precluded an assumption of the risk defense under maritime law. And the trial court properly consolidated two cases arising out of the same rafting trip. Petitioners cannot point to error for any one of these rulings.

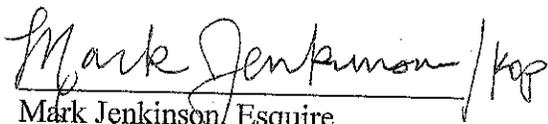
Under the first and second *Hoover* factors, these discretionary rulings do not give rise to prohibition relief because each one could be corrected on appeal with a new trial. This routine remedy affords Petitioners the full opportunity to seek the exact relief requested based on a full and complete record. Petitioners cannot deny that the right of appeal after trial is an available and adequate remedy, and that they failed to rebut this Court’s preference for appealing matters after a final judgment instead of attempting piecemeal appeals through a Writ of Prohibition. *See Woodall*, 156 W.Va. at 712, 195 S.E.2d at 720 (citing *Cosner v. See*, 129 W.Va. 722, 42 S.E.2d 31 (1947)) (stating “[p]rohibition cannot be substituted for a writ of error and appeal unless it appears under all of the facts and circumstances of case that writ of error and appeal is inadequate remedy.”).

Finally, under the fourth and fifth *Hoover* factors, there has been no argument by Petitioners that the errors complained of are oft repeated errors. In addition, Petitioners did not preserve their claim that the trial court improperly applied maritime law because they did not challenge that

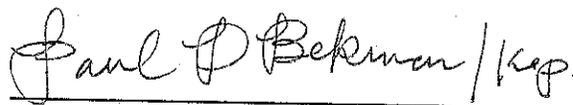
decision below.

Therefore, the Christopher Plaintiffs, Marsha Christopher, Samuel Christopher, Lara Crozier, M. Cristina Echegoyen, Alex Echegoyen, Betty Green, George Green, Katherine M. Hax, Ruchi Rastogi, Donald E. Spears, Karan Trehan, Darryl Wiley, Anita Wiley, Carrie Harris-Muller, Bradford Muller, Christina Renee Friddle, April Goss, Brian Payne and Victoria Payne, respectfully request that this Court deny Defendants' request for a Writ of Prohibition, lift the stay on the trial court proceedings, and order that the litigation proceed to trial.

Respectfully submitted,



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DOCKET NO. 34206

**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 IN 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/Plaintiffs

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**CERTIFICATE OF SERVICE**

I, Paul D. Bekman, do hereby certify that on this 18th day of July, 2008, I served the Memorandum of Law of Respondents, Marsha Christopher, et al., Showing Cause Why a Writ of Prohibition Should Not Be Awarded Against the Honorable Thomas W. Steptoe, As Prayed by the Petitioners by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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The Honorable Thomas W. Steptoe  
Judge, 23<sup>rd</sup> Jud. Cir.  
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