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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

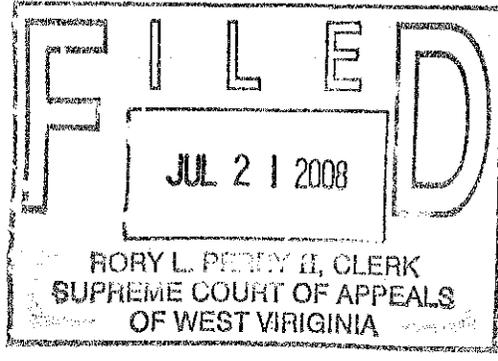
**RIVER RIDERS, INC. and
MATTHEW KNOTT,**

Petitioners/Defendants,

v.

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



**MEMORANDUM OF LAW OF RESPONDENT, KATHY FREEMAN, AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER FREEMAN,
SHOWING CAUSE WHY A WRIT OF PROHIBITION SHOULD NOT BE
AWARDED AGAINST THE HONORABLE THOMAS W. STEPTOE**

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Introductory Statement & Summary of Argument

Petitioners River Riders and its owner Matthew Knott¹ decided to take five rafts of corporate office workers on the Shenandoah River right after a hurricane swelled the river to more than twelve feet—ten feet higher than its normal level and volume. The Shenandoah at two feet is typically an easygoing river. Despite the fact that the river was too high, too fast, and too violent for commercial rafting, River Riders decided that it was safe to take the five-raft trip that day in violation of the West Virginia Whitewater Responsibility Act. Of the five rafts, four of them dumped their occupants into the river at the site of a hydraulic. Roger Freeman, Respondent Kathy Freeman's husband, drowned and thirteen other people were injured after they were dumped into the flooded river.

Two separate lawsuits were filed: *Freeman v. River Riders, Inc. et al.* and *Christopher, et al., v. River Riders, Inc.* The only critical difference between the two lawsuits is the extent of damages amongst the Plaintiffs. The *Freeman* lawsuit focuses on Roger Freeman and the *Christopher* lawsuit focuses on the thirteen people, primarily Roger Freeman's co-workers, who suffered various injuries as a result of the trip. The liability issues are *exactly* the same. In both cases, the Plaintiffs alleges that River Riders failed to meet the statutory standard of care expected of members of the profession in direct violation of the West Virginia Whitewater Responsibility Act, W.Va. Code §20-3B-3(b). Plaintiffs have several whitewater and water safety experts who confirm this.

Two months before the scheduled trial date, River Riders filed the Petition challenging three separate orders of the Trial Court. The first challenged Order granted the Respondent Freeman's Motion *in Limine* to exclude an anticipatory release/waiver because of the West Virginia Whitewater Responsibility Act and precedent. The Trial Court's ruling was based upon settled law and does

¹The Petitioners will be referred to collectively as "River Riders."

not stray from the precedent that anticipatory releases are invalid when they seek to void a duty owed by statute.

The second Order was in response to a nearly identical motion *in limine* filed in the *Christopher* case. In addition to the Whitewater Responsibility Act, this motion added arguments based upon maritime law. River Riders failed to file a timely response, and the Trial Court entered the Order provided by the *Christopher* plaintiffs. Because the substantive ruling is correct and because River Riders failed to respond to the motion, the Order is not appropriately before this Court. River Riders now asks this Court to rule on an argument never presented to the Trial Court.

Finally, River Riders seeks extraordinary relief from the Trial Court's Order consolidating the *Freeman* and *Christopher* cases for trial. That Order, in addition to the two before it, was supported by the evidence and based on sound law. The Trial Court carefully considered all of the proper factors for consolidation and exercised proper discretion in consolidating a case with nearly one hundred witnesses.

This case belongs back in the Trial Court where it can be tried. River Riders has not met its burden of demonstrating why it is entitled to extraordinary relief concerning any of the Court's rulings. In both procedure and substance, River Riders offers little to support why this Court should grant a writ. Accordingly, Respondent Kathy Freeman asks that the writ be denied in all aspects.

Statement of the Case

Although the water on the Shenandoah River is normally only around two feet high, on September 30, 2004, it was approximately thirteen feet high, just below flood stage.² The volume and speed of the river had risen to 35,000 cubic feet per second. *Id.* River Riders had agreed to lead

² Department of National Resources Conservation Officer Ken White's investigative report, Appendix at 3.

a team-building exercise and rafting trip for a group of suburban D.C. office workers that day, and was faced with a decision to cancel the trip and forfeit its fees, or go forward. Despite the level of the water, the inexperience of the guides at that level, and a National Weather Service flood warning in place, River Riders proceeded with the trip.³ The water was out of its banks and into the trees.

⁴ River Riders never told any of the participants that day that the river was at or near flood stage.

That day, River Riders' guides were unprepared for the volume and speed of the water, and as a result, four out of the five boats either flipped or dumped their customers into the same place in the raging flood waters of the Shenandoah. A hydraulic snatched Roger Freeman, one of the participants, when he was knocked out of a raft.⁵ He became trapped in the powerful water while his river guide was busy elsewhere. Roger Freeman was pronounced dead on the shore. He left behind his wife, Kathy, and two daughters, Gayla, then twelve years old, and Lynnae, then eight years old. Roger Freeman was 43.

Matthew Knott, the owner and one of the river guides, made the decision to take the group out that day despite the conditions. He expressed his attitude about high water:

³ See National Weather Service's flood warning, Appendix at 8-11 and Petitioners' Memorandum, p. 17.

⁴ Photographs taken on September 30, 2004, by the Department of Natural Resources and an eyewitness, attached hereto at Appendix p. 12-17. The Court may want to compare the water level in these pictures to the normal water level of the Shenandoah River, depicted in photographs attached to River Riders' Memorandum as Exhibit "D." The photograph of the overturned raft in the middle of the river was identified by Renee Friddle as the raft that both she and Roger Freeman were knocked out of. This photograph actually shows the scene of the incident. (See relevant portion of Renee Friddle's deposition, Appendix p. 19-23).

⁵ A hydraulic, according to DNR Officer White, is "created by an obstacle in the river. This obstacle could be represented by a low spot (hole) in the river bottom or an object that is big enough to cause the water to flow around it or climb up and over the obstacle without moving it. This creates a water flow pattern in front of the obstacle capable of throwing an object back into the hydraulic as the object is attempting to climb up and over the obstacle." Appendix at 3.

Q Does the level of risk increase with the level of the river?

A No, it just changes.

Q So, it's just as safe to go on the river when it's at twelve and a half feet as it is when it's at four feet?

A. Yes.⁶

...

Q So are you saying that although the risks of being in the river at those two different levels are different, the risk of death is the same?

A Yes.⁷

Other whitewater outfitters in the area have testified that they would not, and did not, take customers out on the Shenandoah River that day.⁸ The only other outfitter who had scheduled a trip that day canceled it because of river conditions.⁹ The first responders on the scene, as well as the Division of Natural Resource officers, flatly stated that River Riders had no business taking unskilled customers out onto the flooded river that day.¹⁰ The primary violations of the West Virginia Whitewater Responsibility Act focus on the choice to go on the river that day. Shane Safford, one of the guides, echoed the attitude of Matthew Knott regarding the flood water:

Q ...Does the volume of water when the river is at 12 feet increase any of the risks of being on the river?

A I don't think so.¹¹

⁶Mathew Knott Deposition, 2/20/2008, excerpt Appendix at 24.

⁷Matthew Knott Deposition, 2/20/2008, p. 100, Appendix at 25.

⁸ See relevant portions of depositions of local outfitters, Appendix at 26-27.

⁹ See Walter Lee Bahley's deposition, Appendix at 29-30.

¹⁰ See relevant portions of depositions, Appendix at 31-42.

¹¹Shane Safford Deposition at Page 16, Appendix at 43.

Three separate whitewater experts agree that River Riders violated the West Virginia Whitewater Responsibility Act in the decision to take the rafts out that day.¹² River Riders' own expert, Mike Mather, acknowledged that there is more potential for a boat to flip over on the Shenandoah when it is at or near flood level.¹³

Two separate law suits were filed: *Freeman v. River Riders, Inc. et al.* and *Christopher, et al., v. River Riders, Inc.* The only critical difference between the two lawsuits is the extent of damages amongst the Plaintiffs. The *Freeman* lawsuit focuses on Roger Freeman while the *Christopher* lawsuit focuses on 13 people, primarily Roger Freeman's co-workers, who were also thrown into the river at the same spot. The liability issues are *exactly* the same. In both cases, the Plaintiffs allege that River Riders failed to meet the statutory standard of care expected of members of the profession in direct violation of the West Virginia Whitewater Responsibility Act, W.Va. Code §20-3B-3(b) which requires River Riders to "conform to the standard of care expected of members of their profession."

In preparation for trial, Kathy Freeman filed a motion *in limine* to exclude a release/waiver, citing the West Virginia Whitewater Responsibility Act and the precedent of other cases. There was no mention of maritime law. The Trial Court granted the motion,¹⁴ precluding it from its use at trial.¹⁵

The second motion *in limine* at issue was filed by the *Christopher* Plaintiffs. This was a

¹²Dr. Robert Kauffman, Eric Leaper, and Gerald Dworkin.

¹³Mike Mather deposition, Page 43, line 22 through page 44, line 5, Appendix at 44-45.

¹⁴Prior to the rafting trip, Roger Freeman and the *Christopher* Plaintiffs signed a release which purported to release River Riders from all liability for negligence, gross negligence, and even intentional torts. (See Exhibit "A" to River Riders' Memorandum.)

¹⁵ Order is Exhibit "C" to River Riders' Memorandum, Appendix at 46-49.

nearly identical motion, except that it included maritime law as an issue. The motion was accompanied by a proposed order. When River Riders did not file a timely response to the motion, the Trial Court granted the motion and entered the *Christopher* Plaintiffs' proposed order which precluded the introduction of any release at the trial of that matter.¹⁶ Judge Steptoe noted on the order that the Court had not received any opposition to the motion.

Lastly, the Trial Court granted the *Christopher* Plaintiffs' Motion to Consolidate its case with the *Freeman* case.¹⁷ It is from these three rulings that River Riders now seek extraordinary relief.

Standard of Review

The standard for issuance of a writ of prohibition is set forth in West Virginia Code § 53-1-1 which states “[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” This Court has noted that “the right to prohibition must be clearly shown before a petitioner is entitled to this extraordinary remedy.” *State ex rel. West Virginia Secondary Schools Activity Comm’n v. Hrko*, 213 W.Va. 219, 220, 579 S.E.2d 560, 561 (2003)(citing *Norfolk S. Ry. Co. v. Maynard*, 190 W.Va. 113, 120, 437 S.E.2d 277, 284(1993)).

River Riders has not challenged the Trial Court’s jurisdiction over the matter, but instead has asserted that the Trial Court exceeded its legitimate powers. This Court has held that in determining whether to entertain and issue a writ of prohibition on such grounds, it will consider five factors:

¹⁶ See Exhibit “B” to River Riders’ Memorandum.

¹⁷ See May 19, 2008 Order, Appendix at 50-55.

- (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 any 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 . . .

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996). This Court noted that “the third factor, the existence of clear error as a matter of law, should be given substantial weight.” *Id.* However, “a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” Syl. Pt. 4, *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 518, 575 S.E.2d 124, 128 (2002). Moreover, “the writ does not lie to correct ‘mere errors’ and . . . it cannot serve as a substitute for appeal, writ of error or certiorari.” *State ex rel. Williams v. Narick*, 164 W.Va. 632, 635, 264 S.E. 2d 851, 854 (1980).

In determining whether a petitioner has shown cause for the issuance of a writ, this Court must “review each case on its own 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 power is so flagrant and violative of petitioner’s rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.” Syl. Pt. 2, *Woodall v. Laurita*, 156 W.Va. 707, 195 S.E.2d 717 (1973) (emphasis added). The standard is high because “[t]raditionally, the writ of prohibition speaks purely to jurisdictional matters. It was not designed to correct errors which are correctable upon appeal.” *Narick*, 164 W.Va. at 635, 264 S.E.2d at 854.

On each of the issues before this Court, River Riders does not, and cannot, meet the high threshold for extraordinary relief.

Argument

I. The Trial Court Has Not Exceeded its Legitimate Powers

River Riders' assignments of error are based upon the Trial Court's entry of three Orders concerning pre-trial matters which were within the Trial Court's discretion. River Riders failed to preserve any alleged error with respect to the April 15, 2008 Order, which granted the *Christopher* Plaintiffs' Motion *in Limine* excluding the anticipatory release signed by the *Christopher* Plaintiffs. This particular Order also raises the issue of the application of maritime law.

With respect to the two other Orders at issue, River Riders' complaints do not provide a sufficient basis for the issuance of a rule to show cause. As noted above, this Court must determine (1) whether the petitioners have no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the Petitioners will be damaged or prejudiced in any way that is not correctable on appeal; (3) whether the lower tribunal's order was clearly erroneous as a matter of law; (4) whether the lower tribunal's order was an oft-repeated error or manifested persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raised new and important problems or issues of law of first impression. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

In each of the five categories, River Riders fails to make a persuasive case. Importantly, its memorandum fails to address each *Berger* point.

A. The Petitioners Did Not Timely Assert and Preserve Their Objections to the *Christopher* Plaintiffs' Motion *in Limine* and the Trial Court's Application of

Maritime Law Was Not in Error

The Trial Court entered an Order in the *Christopher* matter ruling that assumption of risk was not an available defense and excluding the anticipatory release from the evidence in the *Christopher* matter. This Order mirrored the Trial Court's earlier ruling in its January 30, 2008 Order in the *Freeman* case, which also excluded the anticipatory release, in every respect except one: the *Christopher* Order noted that maritime law also applied to the case. River Riders challenges the Trial Court's ruling that maritime law applies to this action.

First, and most importantly, River Riders failed to respond to the motion *in limine* in a timely manner, something left unsaid in River Riders' petition and memorandum. River Riders chose not to respond to a very specific deadline set by the Trial Court.¹⁸ The Trial Court noted on the Order that it did not receive an objection from River Riders to the *Christopher* Plaintiffs' Motion *in Limine*.¹⁹

Despite its failure to challenge the motion below, River Riders wants to litigate the issue for the first time in the West Virginia Supreme Court. This Court's general rule is that "[w]here objections were not shown to have been made in the Trial Court, and the matters concerned were not jurisdictional in character, such objections will not be considered upon appeal." Syl. Pt. 7, *Wheeling Dollar Savings and Trust v. Leedy*, 158 W.Va. 926, 216 S.E.2d 560 (1975).

More importantly, with respect to extraordinary writs, this Court has held, that a party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a Trial Court, *must request the trial court*

¹⁸ Trial Court Rule 22 Scheduling Order, Appendix at 56-57.

¹⁹ Exhibit "B" to River Riders' Memorandum, Appendix at 46-49.

set forth in its order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.

Syl. Pt. 6, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998)(emphasis added).

Although River Riders asserts that the Order finding that maritime law applied to this case failed to contain sufficient findings of fact,²⁰ River Riders *did not* request the Trial Court to make specific findings of fact as required by *Gaughan, supra*. It would be inappropriate for this Court to second-guess the Trial Court's conclusions when the Trial Court was not asked to set forth its findings under *Gaughan, supra*. It was River Riders' obligation to preserve any alleged error for interlocutory review, and River Riders failed to do so.

Furthermore, River Riders' assertion that the Trial Court's application of maritime law was error because it "preempts" the West Virginia Whitewater Responsibility Act is incorrect. There has never been an Order which indicates that maritime law "preempts" the West Virginia Whitewater Responsibility Act. Indeed, the law states, "[t]he exercise of admiralty jurisdiction . . . does not result in the automatic displacement of state law." *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199, 206, 116 S.Ct. 619, 623 (1996)(citing *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476

²⁰River Riders complains that "[t]he Trial Court did not examine any factual issues regarding its decision to apply general maritime law and the navigability of the Shenandoah River. The Order is completely silent as to why the Court determined maritime law applies and why a whitewater excursion on the Shenandoah River is governed by such law." (p. 15 River Riders' Memorandum)

U.S. 858, 864, 106 S.Ct. 2295, 2298-2299 (1986)(emphasis added).²¹ A court sitting in admiralty jurisdiction “may-and should-resort to state law when no federal rule covers a particular situation.” See *Greenly v. Mariner Mgmt. Group, Inc.*, 192 F.3d 22, 25-26 (1st Cir.1999) (citing *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21, 75 S.Ct. 368, 99 L.Ed. 337 (1955)).²² There is “a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction.” *Just v. Chambers*, 312 U.S. 383, 391, 61 S.Ct. 687, 85 L.Ed. 903 (1941). See also, *American Dredging Co. v. Miller*, 510 U.S. 443, 446, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994)(noting that “[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence”).²³

Thus, maritime law and the Whitewater Responsibility Act can be applied together. Furthermore, it should be noted that the *Christopher* Plaintiffs’ Motion *in Limine* was a preliminary ruling on the applicable law of the case.²⁴ The issue concerning what law will govern will be further briefed and addressed in the context of the parties’ submission of jury instructions, at which time

²¹Claimants may bring federal maritime cases in state court under the “savings to suitors” clause in 28 U.S.C. § 1333(1). *Terre Aux Boeufs Land Co., Inc. v. J.R. Gray Barge Co.*, 803 So.2d 86, 90 (La.App. 4 Cir. 2001).

²²Indeed, River Riders themselves assert that their search of the U.S. Code revealed no federal legislation regulating whitewater rafting safety (p. 14 Memorandum).

²³River Riders argue in Part C of their petition that the Trial Court somehow usurped the West Virginia legislature’s power by “striking” the Whitewater Responsibility Act in its finding that maritime law also applied to this case. (River Riders’ Memorandum, p. 27). However, both state and federal courts may have concurrent jurisdiction. See, *Terre Aux Boeufs Land Co., Inc. v. J.R. Gray Barge Co.*, 803 So.2d at 91 (noting that substantive state laws may be applied along with substantive federal maritime law if they are not inconsistent).

²⁴As noted previously, River Riders currently has a motion before Judge Steptoe on this very matter which is currently stayed pending this resolution of the petition for a writ of prohibition.

River Riders may make their objections to the Trial Court concerning the application of both maritime law and the West Virginia Whitewater Responsibility Act. At that time, the Trial Court will determine what the law of the case will be. At that same time, River Riders may properly preserve its objections for appeal if the Trial Court disagrees. Until that time, the Court's pre-trial rulings are subject to change, and, as this Court noted in Syllabus Point 4 of *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995), "[a] trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified." See also, *Holcomb v. Sadler*, 222 W.Va. 32, 658 S.E.2d 562 (2008) (finding that a writ of prohibition was not applicable on the basis of prejudice when events could still change in the case which would eliminate concerns of prejudice).

In denying a writ of prohibition in *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 519, 575 S.E.2d 124, 129 (2002), this Court noted that it "cannot assume that the trial court will rule incorrectly on [the] matter if it is properly presented to it during trial." This Court explained that

there is a significant practical reason for not allowing challenges, by use of the writ of prohibition, to every pre-trial discretionary evidentiary ruling made by trial courts. Such use of the writ would effectively delay trials interminably while parties rushed to this Court for relief every time they disagree with a pre-trial ruling. The fact remains that the piecemeal challenge of discretionary rulings through writs of prohibition does not facilitate the orderly administration of justice. Said another way, writs of prohibition should not be issued nor used for the purpose of appealing cases upon the installment plan.

Id. River Riders complains in its memorandum that a writ of prohibition is its "sole remedy."²⁵ This is simply not true.

River Riders had many choices, including the choice to file a timely response, the choice to

²⁵ River Riders' Memorandum, p. 11.

request findings of fact and conclusions of law, and the choice to ask the Trial Court to fully consider and rule upon River Riders motion to reconsider. But River Riders chose none of these options, instead preferring to bring this case to Charleston from Charles Town to hear objections for the first time.

This Court has recognized “the correctness of discretionary rulings should ordinarily be challenged at a time when the entire record is available to an appellate court.” *Woodall v. Laurita*, 156 W.Va. 707, 713, 195 S.E.2d 717, 720-721 (1973). This Court has also noted that “[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. Williams v. Narick*, 164 W.Va. 632, 264 S.E.2d 851 (1980).

Nevertheless, River Riders failed to properly preserve their objection to the *Christopher* Plaintiffs’ Motion. However, to the extent that River Riders at a later time might properly raise objections to the law of the case, a remedy by appeal will be both available and adequate. Thus, because “a writ of prohibition may not be used as a substitute for appeal,” *Shelton*, 212 W.Va. at 518, 575 S.E.2d at 129, this Court should deny the writ requested by River Riders.

River Riders provocatively claims that “[t]he Trial Court has usurped the Legislature’s authority by striking the provision of the Whitewater Responsibility Act,”²⁶ but it is unable to explain where the Trial Court has actually done that. They go on: “[t]he problem is that this ruling creates is enormous as it essentially finds any whitewater rafting incident/lawsuit falls under the realm of

²⁶ River Riders’ Memorandum, p. 30.

general maritime law...”²⁷ Nowhere in the Order is there any indication that the Trial Court was making any ruling to that effect. The statement that “the Trial Court has placed the future of the whitewater rafting industry in serious jeopardy”²⁸ lacks a factual or legal argument to back it up. River Riders tactically uses hyperbole to cover up that it was River Riders who did not oppose the very motion that resulted in the Court’s ruling.

The application of the five *Berger* factors lead to a conclusion that a writ is inappropriate, both procedurally and substantively, for this *Christopher* motion *in limine* Order. First, River Riders had adequate means to obtain the desired relief by, at the least: (a) timely responding to the Motion; (b) asking the Trial Court to rule on its motion to reconsider; (c) raising the issue at a pre-trial conference; and (d) raising the issue at the jury-instruction conference. It should be noted that although River Riders believes this to be an issue of national importance, it never called this to the attention of the Trial Court by asking for an expedited hearing. During the same time period, River Riders had no problem faxing an “emergency” motion over the location of a deposition and had no problem getting Judge Steptoe to hear it the same day that it was faxed.²⁹ Second, River Riders will not be damaged in any way that is not correctable on appeal. River Riders does not even argue that it will be.

River Riders fails to meet the third *Berger* factor, whether the Order is clearly. River Riders fails to set forth a cogent argument why the Order was actually in error. To be sure, River Riders does not like the Order, but its arguments—including preemption, are not grounded in the law.

²⁷ River Riders’ Memorandum, p. 30.

²⁸ River Riders’ Memorandum, p. 31.

²⁹ See Attached docket sheet excerpt, item 311, Appendix at 58.

Moreover, a litigant waives its right to complain of any error if it does not object. Here, River Riders not only did not object, but it did not participate.

The fourth *Berger* factor, whether the Trial Court's order is an oft-repeated error or manifests persistent disregard for either procedural or substantive law is self-evident. Judge Steptoe's ruling was not an oft-repeated error nor is it manifestly unjust. And finally, the fifth *Berger* factor, whether the Order raises new and important problems or issues of law of first impression, favors the Respondent's position. Since there is little to no difference between negligence under maritime law and the settled law under the West Virginia Whitewater Responsibility Act, the issues are not novel. Under both bodies of law, assumption of risk is not a defense. Most of the issues raised have already been dealt with in the *Murphy* decision, *discussed infra*.

B. Assumption of Risk is not a Defense under the West Virginia Whitewater Responsibility Act

Nearly four months after the Trial Court entered an Order in the *Freeman* case finding that the defense of assumption of risk was unavailable under the West Virginia Whitewater Responsibility Act,³⁰ the Trial Court entered an Order in the *Christopher* case finding the same and, in addition, that assumption of risk also was unavailable under maritime law.³¹ It is from these two Orders that River Riders now seeks relief on the basis that it should be permitted to assert the defense of assumption of risk.³²

³⁰Exhibit "C" to River Riders' Memorandum, Appendix at 59-62.

³¹Exhibit "B" to River Riders' Memorandum, Appendix at 46-49.

³²To the extent that River Riders seeks redress from the April 15, 2008 Order in the *Christopher* matter, it is still the Respondent's position that River Riders failed to timely object or preserve any alleged error with respect to this ruling.

This issue is a matter of settled law. In *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 412 S.E.2d 504 (1991), this Court recognized that with the enactment of the West Virginia Whitewater Responsibility Act, the legislature abrogated common law negligence claims and put in its place a statutory standard of conduct. In *Murphy*, the Plaintiff sued a whitewater outfitter for negligence as well as intentional and reckless conduct. The Trial Court and the *Murphy* Court interpreted the Plaintiff's negligence claim as arising *solely* under the West Virginia Whitewater Responsibility Act, *not* under common law. *Id.*

This Court recognized that the Whitewater Responsibility Act implicitly *replaced* common law claims concerning the rights and liabilities arising out of whitewater rafting. The Court noted that the Whitewater Responsibility Act is similar to the West Virginia Skiing Responsibility Act, W.Va. Code § 20-3A-1 *et seq.*, which the Court upheld as constitutional in *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 695, 408 S.E.2d 634, 645 (1991). In *Lewis*, the Plaintiff challenged the safety statute's constitutionality on the basis of the equal protection and the "certain remedy" provisions of the constitution. The *Lewis* Plaintiff objected because the Act eliminated the Plaintiff's negligence claims against the ski operator who was immune under the Act from tort liability for the inherent risks of skiing. *Id.* In denying the Plaintiff's constitutional challenge, this Court recognized that the enactment of safety statutes, such as the West Virginia Skiing Responsibility Act and the West Virginia Whitewater Responsibility Act, *abrogated and replaced* common law negligence claims. *Lewis*, 185 W.Va. at 694, fn 15, 408 S.E.2d at 644, fn 15 (noting that Art. II § 17 of the West Virginia Constitution sets forth that West Virginia common law is only effective "*until altered or repealed by the legislature.*" (emphasis in the original)).

Claims for common law negligence and claims for violations of a safety statute cannot co-exist in West Virginia under the Act. Otherwise, outfitters would also be held liable under the less-stringent standard of simple negligence which would render safety statutes useless. Just as a claim for common law negligence is abrogated by the enactment of a safety statute, so too is the common law defense of assumption of risk.

In *Murphy*, this Court held that an anticipatory release is invalid to the extent that it seeks to absolve a rafting company from its breach of the whitewater industry's safety standards. *Murphy*, 186 W.Va. at 318, 412 S.E. 2d at 512. This Court explained that "the safety obligation created by the statute for [the purpose of protecting the public] 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 (citation omitted). Thus, "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." *Murphy*, 186 W.Va. at 318, 412 S.E. 2d at 512.

River Riders relies on *Spulin v. Nardo*, 145 W.Va. 408, 114 S.E.2d 913 (1960) and *King v. Kayak Manufacturing Corp.*, 182 W.Va. 276, 387 S.E.2d 511 (1989), which are cases that pre-date *Murphy* and have nothing to do with a statutory scheme like the West Virginia Whitewater Responsibility Act. River Riders' reliance upon extra-territorial cases, which do not address a statutory safety standard like the West Virginia Whitewater Responsibility Act, should also be disregarded.

The *Murphy* case was decided in 1991 and, over the past seventeen years since the decision, West Virginia's Whitewater industry has not only continued, but it has grown. Since Judge

Chambers' decision in the *Johnson vs. New River Scenic Whitewater Tours, Inc.*, 313 F. Supp. 2d 621 (S.D. W. Va. 2004), when he granted a motion *in limine* to exclude anticipatory releases on the basis of this Court's ruling in *Murphy*, the whitewater rafting industry has not been impacted as River Riders suggests. River Riders' assertion is without a legal or factual basis.

River Riders asserts that the Trial Court's finding that assumption of risk was unavailable as a defense will "cripple" or "essentially end" the whitewater rafting industry.³³ This is simply not true. These assertions are hysterical, inflammatory, and inaccurate. Most importantly, they are not *legally* relevant. What River Riders and the whitewater industry really want is *absolute immunity* for their operations-no matter how bad their judgment was or how reckless their employees were. They want both the Act's statutory immunity for inherent risks as well as the right to assert an assumption of risk defense for claims for which they are not immunized. This would give River Riders and the industry liberty to make decisions fueled solely by their economic self-interest, regardless of whether their decisions increase the danger of whitewater rafting and result in injury and death. However, that was not what the legislature intended when it granted outfitters *limited* immunity, and that was not what this Court held when it decided *Murphy*.

River Riders suggests that in *Murphy*, this Court ruled that, although an anticipatory release waiving a claim for violation of a safety statute is invalid, a whitewater outfitter *is* entitled to assert assumption of risk as a defense. If true, it would eviscerate the holding in *Murphy* as well as the limited protections afforded to participants under the West Virginia Whitewater Responsibility Act. Waiver and assumption of risk are two sides of the same coin, and River Riders' argument presents

³³ See p. 30, River Riders' Memorandum.

a distinction without a difference. If an outfitter could require all participants to sign a document purporting to assume the risk that the outfitter would violate the safety statute (since by statute, participants already assume inherent risks which cannot be eliminated), an outfitter could run his business with absolute impunity. In essence, the outfitter would be able to *repeal* the protection afforded by the Act, class member by class member. That is not what the legislature intended when it enacted the West Virginia Whitewater Responsibility Act, nor was it the letter or spirit of this Court's ruling in *Murphy*.

It is not just the substance of the argument where River Riders' Petition is thin, but its failure to demonstrate why this Court should issue a writ under *Berger, supra*, is conspicuous. River Riders' Petition does not meet the *Berger* standards for a writ. First, River Riders had the means and opportunity to deal with this issue with Judge Steptoe and seek clarification, yet it chose to short-circuit the process and petition for a writ. Second, this issue is absolutely correctable on appeal. There is no prejudice here that cannot be corrected after trial. Third, the Trial Court's Order is not clearly erroneous. As demonstrated above, the Trial Court's order is a clear descendant of the *Murphy* decision. Fourth, this is not an oft-repeated error, nor does it disregard the law. Finally, this Order does not raise a new issue about assumption of risk. The assumption of risk issue had been decided by the Trial Court in the *Freeman* case several months before. The issue was resolved by this Court before in *Murphy*. River Riders has failed to meet its burden under *Berger* in demonstrating why the Trial Court did not usurp its authority.

C. The Court's Ruling Which Precluded the Introduction of the Release at Trial Was Proper and Within the Court's Discretion

The Trial Court found in the *Freeman* case that the anticipatory release should be excluded

under the West Virginia Whitewater Responsibility Act because it was unenforceable and thus, unfairly prejudicial under W.Va.R.Evid. 403.³⁴ The Trial Court followed this ruling four months later with a similar Order in the *Christopher* case also excluding the anticipatory release.³⁵ It is from these two Orders that River Riders now seeks relief on the basis that they should be permitted to introduce the anticipatory release into evidence.³⁶

Anticipatory releases, such as those in the instant case, are not effective under the West Virginia Whitewater Responsibility Act. Judge Chambers, of the United States District Court for the Southern District of West Virginia, applied the *Murphy* decision and refused to allow two releases to be admitted into evidence in *Johnson v. New River Scenic Whitewater Tours, Inc.* 313 F.Supp.2d 621, 627 (S.D.W.Va. 2004). Judge Chambers reasoned that,

[t]o the extent that either document purports to be a “release of liability,” this Court’s analysis is governed by the West Virginia Supreme Court’s decision in *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 412 S.E.2d 504 (1991). In *Murphy*, the court examined a West Virginia statute that imposes a standard of care upon commercial whitewater guides. *Id.* at 511; *see also* W. Va. Code § 20-3B-3(b). The court held that an anticipatory release of liability . . . that “purports to exempt the defendant from tort liability to the plaintiff for the failure of the defendant’s guide to conform to the standard of care expected of members of his occupation . . . is unenforceable.”

Id. In applying this Court’s decision in *Murphy*, Judge Chambers found the releases to be unenforceable; he granted a motion *in limine* excluding them from evidence. River Riders asserts that in *Murphy*, this Court did not exclude the releases. However, in *Murphy*, this Court was

³⁴ See Exhibit “C” to River Riders’ Memorandum, Appendix at 59-62.

³⁵ See Exhibit “B” to River Riders’ Memorandum, Appendix at 46-49.

³⁶ To the extent that River Riders seeks redress from the April 15, 2008 Order in the *Christopher* matter, it is still the Respondent’s position that River Riders failed to timely object and preserve any alleged error with respect to this ruling.

considering an entirely separate issue, a motion for summary judgment--a motion that procedurally would have occurred prior to *motions in limine*. In *Murphy*, this Court was not asked to consider a motion *in limine*, such as the one that Judge Chambers considered in *Johnson*.

Nevertheless, River Riders asserts that the release should be introduced to show that warnings of the inherent risks of whitewater rafting were given by River Riders to both Roger Freeman and the *Christopher* Plaintiffs. However, under the West Virginia Whitewater Responsibility Act, an outfitter cannot be held liable for the inherent risks of whitewater rafting *regardless of whether warnings were provided*. W.Va. Code § 20-3A-1 *et seq.* Warnings of the inherent risks in whitewater rafting are not at issue in this case; River Riders' violation of W.Va. Code § 20-3A-1 *et seq.* is. Whether "inherent risks" were communicated to Mr. Freeman or the *Christopher* Plaintiffs is irrelevant.

Moreover, River Riders' argument that portions of the release are proper for a jury to hear, relevant to the case, and allowed by West Virginia law is not followed by a critical analysis showing why their statements are correct. River Riders' argument that "a defendant in a white-water rafting case and/or any other recreational activity/adventure sport, may utilize the defenses of appropriate warnings and assumption of risk"³⁷ lacks a citation to any West Virginia case. River Riders wants the best of both worlds: it wants the immunity granted to it by the Whitewater Responsibility Act *and* all of the common law defenses that were abrogated by the same statute.

River Riders' argument that the release should be admissible for proof of "warnings" is an attempt to inject assumption of risk into the litigation through the back door. Claiming that the

³⁷ River Riders' Memorandum, page 35.

participants were warned is just another way of proving assumption of risk. River Riders cites the *Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163, 166 (4th Cir.1989 WV) for the proposition that warnings and assumption of risk should be allowed into evidence. River Riders does not mention that it was *this* Court who distinguished *Krazek* in *Murphy*. The most important point about *Krazek* is that it construes West Virginia law *prior* to the enactment of the Whitewater Responsibility Act. The prime issue in *Krazek* was waiver of common law negligence claims, whereas here, the prime issue is dealing with violations of the Whitewater Responsibility Act which automatically eliminates all common law negligence claims and defenses. River Riders actually reveals its misunderstanding as to the applicable law in that seventeen years after *Murphy*, it still advocates: “to argue West Virginia negligence law (assumption of risk defenses)...”³⁸

Because the alleged “warnings” were placed in the midst of “assumption of risk” language which this Court previously found in *Murphy* to conflict with West Virginia public policy, the release would cause unfair prejudice to the Respondents, confuse issues in the case, and mislead the jury.³⁹ Because any relevance would be far outweighed by the danger of the release’s admission, pursuant to West Virginia Rule of Evidence 403, the Trial Court was correct to exclude it from evidence in this case.⁴⁰

³⁸River Riders’ Memorandum, page 44.

³⁹ River Riders assert that the release could somehow be redacted to eliminate the language that this Court previously found violative of West Virginia public policy in *Murphy*. However, a redacted release is obviously still a release. Any juror would know what it was and therefore, the release would improperly inject the defense of “assumption of risk” into the litigation in violation of *Murphy*, the West Virginia Whitewater Responsibility Act, and West Virginia public policy. (River Riders’ Memorandum, p. 33).

⁴⁰River Riders’ real reason for wanting the release admitted is clear in light of the fact that their defense is almost entirely predicated on blaming the victim, as opposed to showing how River Riders met the standard of care. (See pp. 22-25 River Riders’ Memorandum).

Most importantly, an objection as to the admissibility of evidence is not an acceptable predicate for a writ of prohibition. This Court's "general rule provides that prohibition is ordinarily *inappropriate* in matters involving a Trial Court's pretrial ruling on the admissibility of evidence." *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 518, 575 S.E.2d 124, 128 (2002)(citation omitted, emphasis added). This Court has held that "[t]he West Virginia Rules of Evidence ... allocate significant discretion to the Trial Court in making evidentiary ... rulings. Thus, rulings on the admissibility of evidence ... are committed to the discretion of the Trial Court. . . ." Syl. Pt. 6, *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 518, 575 S.E.2d 124, 128 (2002). Most relevant, "a writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court." Syl. Pt. 4, *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 518, 575 S.E.2d 124, 128 (2002). Furthermore, "the correctness of discretionary rulings should ordinarily be challenged at a time when the entire record is available to an appellate court. The piecemeal challenge of discretionary rulings through writs of prohibition does not facilitate the orderly administration of justice." *Woodall v. Laurita*, 156 W.Va. 707, 713, 195 S.E.2d 717, 720-21 (1973).

Moreover, none of the *Berger* factors show the Trial Court usurped its authority. First, River Riders had the means to deal with this issue through clarification with Judge Steptoe, yet it chose to petition for a writ instead. River Riders also had the opportunity to raise the issue at the pre-trial and at the jury instruction conference. Second, this issue is absolutely correctable on appeal. There is no prejudice here that cannot be corrected after trial. Third, the Trial Court's Order is not clearly erroneous. As demonstrated above, the Trial Court's order is a clear descendant of the *Murphy* decision. Fourth, this is not a oft-repeated error, nor does it disregard the law. Finally, the waiver

issue raised in the Order does not raise a new issue about waivers or evidence. The issue has been addressed by this Court before in *Murphy*. The *Berger* factors do not support River Riders' request for a writ.

D. The Court's Consolidation of the Two Civil Actions Which Arose Out of the Same Rafting Incident Was Proper and Within the Court's Discretion

The Trial Court entered an Order consolidating the *Christopher* case and the *Freeman* case for trial.⁴¹ Rule 42(a) of the West Virginia Rules of Civil Procedure sets forth, in pertinent part, that,

[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the 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.

W.Va.R.Civ.P. 42(a). In Syllabus Point 1 of *Holland v. Joyce*, 155 W.Va. 535, 185 S.E.2d 505 (1971), the West Virginia Supreme Court of Appeals held that

[a] trial court, pursuant to the provisions of R.C.P. 42, has a wide discretionary power to consolidate civil actions for joint hearing or trial and the action of a trial court in consolidating civil actions for a joint hearing or trial will not be reversed in the absence of a clear showing of abuse of such discretion and in the absence of a clear showing of prejudice to any one or more of the parties to the civil actions which have been so consolidated.

River Riders was, and still is, unable to articulate a clear showing of prejudice that will result from the consolidation of the two cases. It should be noted that, although all of the *Christopher* Plaintiffs suffered different levels of injury from one another, River Riders has never objected to the consolidation of *these* different claims in a single action. The primary argument advanced by River Riders is that the *Christopher* Plaintiffs cannot recover for claims of negligent infliction of emotional distress. However, the *Christopher* Plaintiffs *have not asserted such a claim*, nor are they attempting

⁴¹ Order Consolidating cases, May 19, 2008, See Appendix at 50-55.

to recover such damages.

Beyond that, any alleged prejudice can be cured through proper jury instructions, limiting instructions, and special interrogatories. In River Riders' Memorandum, they argue that "[w]hile the death of Mr. Freeman may have impacted these plaintiffs, recovery [of such] damages is barred under West Virginia law." However, an instruction to that effect would clarify this issue for a jury. See *State ex rel. State Farm Auto. Ins. Co. v. Canady*, 197 W. Va. 107, 114, 475 S.E.2d 107, 114 (1996)(finding that, despite the prohibition against referencing insurance in W.Va. R. Evid 411, insurance could be mentioned because "the potential for prejudice [could] be rectified with sound trial management precautions, including a limiting instruction"). In addition, the preparation of an appropriate verdict form would obviate any alleged prejudice, as a jury clearly cannot award damages for claims that are not listed on the verdict form.

The consolidation of the two civil actions will have the salutary effect of both promoting judicial economy and decreasing the burden on witnesses. In the *Freeman* case, there are over 100 witnesses, including River Riders' guides and employees, emergency personnel, DNR investigators, Sheriff's Office personnel, and thirteen of the Plaintiffs in the *Christopher* matter. The *Christopher* Plaintiffs separately identified almost *all* of the same witnesses. Therefore, if both trials proceed separately, this would take an enormous amount of time with duplication of effort, emotional burden, and expense, as well as the possibility of inconsistent liability determinations.

What River Riders' Memorandum also fails to acknowledge is that Judge Steptoe considered in his decision the fact that practically every necessary witness in both lawsuits lives over 1 ½ hours away in Maryland. Neither River Riders, nor the respective Plaintiffs, would be able to subpoena the

necessary witnesses under Rule 45 of the West Virginia Rules of Civil Procedure to require them to attend trial in the companion action. Thus, the only way for the Trial Court to promote the presence of all essential witnesses on all claims was to consolidate the cases for trial, as the majority of witnesses were also parties in the respective suits.

In addition, it is incorrect for the Petitioner to assert that the burden and costs imposed by two trials, as opposed to a single consolidated trial, would only be borne by River Riders. The Trial Court will incur savings by having a single jury trial, as the length of the trial would likely be reduced commensurate with the likelihood of shared witnesses, which number at least 100.

Furthermore, as is shown in the Order, Judge Steptoe considered the financial costs of all the witnesses traveling to Charles Town, West Virginia, to and from the D.C. Metro area every day for two separate trials (assuming that they would even agree to voluntarily attend). Judge Steptoe recognized that this would be a real and appreciable burden upon the witnesses. Lastly, the Trial Court noted that the *Christopher* Plaintiffs are integral witnesses in the *Freeman* case, not only with respect to liability, but also as to damages. Because the issues of liability and damages were so intertwined and could not be reasonably separated, the claims once consolidated could not be bifurcated.⁴²

While the Trial Court could cure any perceived prejudice to River Riders with respect to the consolidation by offering limiting instructions and requiring appropriate special interrogatories, the only way to promote that all of the necessary witnesses attended trial was to consolidate the cases.

⁴²To lessen any burden on River Riders, the Trial Court extended both the discovery deadline and the trial date in the matter and, per their request, gave River Riders additional time to file a dispositive motion. Appendix at 50-55. However, instead of availing themselves of the additional time to prepare a dispositive motion, they instead filed the instant Petition seeking extraordinary relief from this Court.

Consolidation of the cases had the beneficial effect of both promoting judicial economy and efficiency. Thus, the Court, in its discretion, balanced these factors and, in exercising its legitimate powers, properly consolidated the cases.

And once again, the issue of consolidation does not meet the *Bergen* standards for a writ. First, River Riders had the means to deal with this issue by asking for reconsideration with Judge Steptoe, yet it chose to petition for a writ. Second, this issue is absolutely correctable on appeal. There is no prejudice here that cannot be corrected after trial. Third, the Trial Court's order is not clearly erroneous. As shown above, the Court considered the relevant law, made findings of fact and law, and made a reasoned decision. Fourth, this is not a oft-repeated error nor does it disregard the law. Finally, the consolidation Order does not raise a new issue about consolidation. The *Berger* factors does not favor River Riders petition.

III. Even Assuming *Arguendo* That Any of the Trial Court's Rulings Were Erroneous, a Remedy by Appeal Is Both Available and Adequate

Writs of prohibition provide a drastic remedy to be invoked only in extraordinary situations. The United States Supreme Court has noted that "only in exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305, 309 (1967) (citation omitted). To justify the Court's granting of this extraordinary remedy, River Riders must show that the Trial Court's "usurpation of power" was not only clear and egregious, but that a writ of prohibition is the only available and adequate remedy. *See, Woodall v. Laurita*, 156 W.Va. 707, 712, 195 S.E.2d 717, 720 (1973)(finding that "[p]rohibition cannot be substituted for a writ of error and appeal unless it appears under all the facts and circumstances of the case that a writ of error and

appeal is an inadequate remedy.”) Moreover, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” Syl. Pt. 1, *State ex rel. Shepherd v. Holland*, 219 W.Va. 310, 633 S.E.2d 255 (2006). Thus, if this Court finds that River Riders’ asserted errors are, at most, an abuse of discretion or, if more, still correctable by appeal, then this Court must find that River Riders has failed to meet its burden of demonstrating why this Court should issue a writ of prohibition.

In the instant case, the Trial Court’s rulings were correct. Both maritime law and the West Virginia Whitewater Responsibility Act apply to this case. *See, Terre Aux Boeufs Land Co., Inc. v. J.R. Gray Barge Co.*, 803 So.2d at 91 (noting that both state and federal courts may have concurrent jurisdiction). However, even assuming for argument’s sake that the Trial Court was incorrect, River Riders failed to preserve their error for the purposes of interlocutory relief pursuant to Syl. Pt. 6, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998). River Riders cannot complain of error when River Riders failed to oppose the *Christopher* Plaintiffs’ Motion *in Limine*, or request the Trial Court to enter an Order containing sufficient findings of fact and conclusions of law.

More importantly, as noted above, the Trial Court correctly applied the controlling case in this matter, *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 412 S.E.2d 504 (1991), and found that assumption of risk was not available as a defense to a violation of the West Virginia Whitewater Responsibility Act. Regardless of whether the Court also applies maritime law in this case, the fact remains that under West Virginia law, the defense of assumption of risk is not available. However, even if the Trial Court somehow misapplied *Murphy*, this is still an issue that

can be adequately preserved for appeal.

Also, the Trial Court correctly ruled that the release is not admissible. The Trial Court followed Judge Chambers in *Johnson v. New River Scenic Whitewater Tours, Inc.* 313 F.Supp.2d 621, 627 (S.D.W.Va. 2004), and found that because the release was not enforceable, it should be excluded from evidence at the trial. However, even assuming for argument's sake that the Trial Court's ruling was incorrect, a pre-trial evidentiary ruling is not a sufficient basis for the issuance of an extraordinary writ. *State ex rel. Shelton v. Burnside*, 212 W.Va. 514, 519, 575 S.E.2d 124, 129 (2002)(noting that even "if the Trial Court's [pre-trial ruling excluding evidence]. . .is wrong, it amounts to a simple abuse of discretion which is not correctable by a writ of prohibition). This is another matter that can be adequately cured, if necessary, on appeal.

Lastly, the Trial Court exercised proper discretion in balancing the interests of the parties, and determining that the two cases arising out of the same rafting incident should be consolidated. A Trial Court, under W.Va.R.Civ.P. 42, has wide discretion to consolidate matters for trial. Syl. Pt. 1, *Holland v. Joyce*, 155 W.Va. 535, 185 S.E.2d 505 (1971). The Trial Court determined that it would benefit the parties to promote that all available witnesses appear for trial, and the way to promote this would be to consolidate the cases. The Court further determined that any concern for prejudice as a result of the consolidation could be remedied with appropriate limiting instructions and special interrogatories. In balancing the parties' interests, along with the Trial Court's goal of promoting judicial efficiency and economy, the Court elected to consolidate the cases and, at the sole request of River Riders, continued the trial to lessen the burden of consolidation upon River Riders.

The Trial Court did not abuse its discretion in its rulings but, even if it had, any errors were

at most an abuse of discretion and correctable upon appeal. As such, River Riders' complaints of error do not justify this Court's granting of a writ of prohibition.

Conclusion

This Court has advised that "the right to prohibition must be clearly shown before a petitioner is entitled to this extraordinary remedy." *State ex rel. West Virginia Secondary Schools Activity Comm'n v. Hrko*, 213 W.Va. 219, 220, 579 S.E.2d 560, 561 (2003)⁴³. At every turn, however, River Riders has failed to meet its burden to justify why this Court should grant a writ of prohibition. The Trial Court's rulings were well-reasoned, sound, and fair. River Riders failed to assert and preserve many of their objections. This Court has noted that "the correctness of discretionary rulings should ordinarily be challenged at a time when the entire record is available to an appellate court." *Woodall v. Laurita*, 156 W.Va. 707, 713, 195 S.E.2d 717, 720-721 (1973). All of the matters raised in River Riders' Memorandum are appropriate for appeal, and an appeal would be an adequate remedy.

⁴³ citing *Norfolk S. Ry. Co. v. Maynard*, 190 W.Va. 113, 120, 437 S.E.2d 277, 284(1993)

Wherefore, the Respondent respectfully requests this Court to deny River Riders' application for a writ of prohibition and award her the costs of responding to the Petition.

Respectfully submitted,

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Personal Representative of the Estate
of Roger Freeman, Deceased

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DOCKET NO. 081205
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RIVER RIDERS, INC. and
MATTHEW KNOTT,

River Riders/Defendants,

v.

THE HONORABLE THOMAS W. STEPTOE,
ALL PLAINTIFFS IN THE 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.

CERTIFICATE OF SERVICE

Stephen G. Skinner, of SKINNER LAW FIRM, does hereby certify that I have served a true copy of the foregoing Respondent Kathy Freeman's Memorandum of Law Showing Cause why a Writ of Prohibition Should not be Awarded Against the Honorable Thomas W. Steptoe by mailing to the following parties the same, by U.S. Mail, Postage Prepaid, this 21st day of July 2008:

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