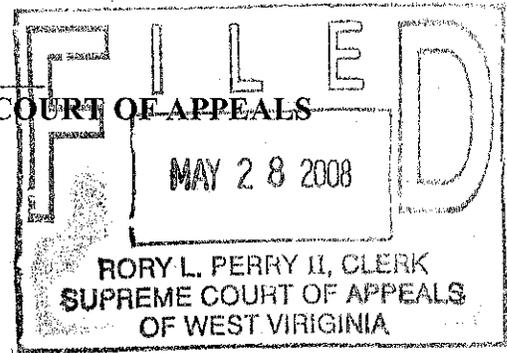


DOCKET NO. _____
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WV



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.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S VERIFIED PETITION FOR WRIT OF PROHIBITION SEEKING RELIEF FROM THREE ORDERS ISSUED BY THE HONORABLE THOMAS W. STEPTOE

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**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S VERIFIED PETITION
FOR WRIT OF PROHIBITION SEEKING RELIEF FROM THREE ORDERS ISSUED
BY THE HONORABLE THOMAS W. STEPTOE**

I. SUMMARY OF ARGUMENT

The Circuit Court of Jefferson County erred in entering three separate orders: "Order Denying Plaintiff's Motion for Judgment on the Pleadings and Granting Motion In Limine Regarding Release"; "Order Granting Plaintiff's Motion in Limine Regarding Release and Assumption of Risk" and; Order Consolidating the *Freeman* and *Christopher* litigation. The Circuit Court's rulings are incorrect for several reasons, including, but not limited to:

1) The Release document is admissible because it contains warnings of the inherent risks and hazards to the participants in the whitewater activity, and any arguably improper release / hold harmless language can be redacted therefrom;

2) Maritime Jurisdiction does not extend to this whitewater rafting case on the Shenandoah

River, as the West Virginia Whitewater Responsibility Act controls in this matter, and because the Shenandoah River is not a navigable waterway as it cannot be used for commercial shipping. Additionally, the Court failed to make any finding of fact regarding the navigability of the Shenandoah River;

3) Assumption of the Risk should be an available defense in this action pursuant to controlling West Virginia law;

4) The Orders, based upon the Court's incorrect ruling mandating the application of maritime law to this whitewater rafting accident, negate the West Virginia Whitewater Responsibility Act and deprive the Defendants of the defense of assumption of the risk and thus the effect thereof renders all Whitewater Outfitters uninsurable and cripples a vital State industry;; and

5) The Court's most recent ruling consolidating the *Freeman* case and the *Christopher* case for trial causes unfair prejudice and insures juror confusion as a result of the intertwining of unrelated legal, factual and damage issues due to one case being a wrongful death case and the others being personal injury cases.

As a result of the Circuit Court's ruling of April 28, 2008 consolidating the *Christopher* case and the *Freeman* case, the Order disallowing the defense of assumption of the risk and mandating the application of maritime law would now apply to both cases. Defendants seek this writ to vacate these Orders and thus avoid the resultant unfair prejudice and certainty of a disastrous result. In light of the immediate prejudice of continuing to litigate these cases under the incorrect application of maritime law and consolidated as the current orders require, your Petitioners request that the underlying litigation be stayed pending determination of all issues by this Court pursuant to West Virginia Code § 53-1-9.

II. STATEMENT OF CASE

The plaintiffs, on September 30, 2004, were participants in a whitewater rafting activity sponsored by the defendant, River Riders, Inc., a commercial whitewater outfitter located in Harpers Ferry, West Virginia and claim personal injuries from an incident that occurred on that date. Additionally, several of the plaintiffs are spouses of the participants and claim damages for loss of consortium based upon the alleged injuries that were allegedly suffered by their spouses.

The *Freeman* civil action was filed against River Riders, Inc. and its owner Matthew Knott by Kathy L. Freeman, as Personal Representative of the Estate of Roger Freeman in the Circuit Court of Jefferson County, West Virginia on September 28, 2006. The *Christopher* civil action was filed against River Riders, Inc. by Marsha Christopher, Samuel Christopher, Lara Crozier, M. Christina Echegoyen, Alex Echegoyen, Betty Green, George Green, Katherine M. Hax, Ruchi Rastogi, Donald E. Spears, Karan Trehan, Darryl Wiley, Carrie Harris-Muller, Christina Renee Friddle, Timothy Friddle¹, April Goss, Brian Payne and Victoria Payne in the Circuit Court of Jefferson County, West Virginia on September 29, 2006.

Most of the participant plaintiffs in this action were employees of Kaiser Permanente, a healthcare conglomerate located in the State of Maryland. Kaiser Permanente scheduled a team building activity with the Defendant, River Riders, Inc., that included a morning of land based activities and an afternoon of whitewater rafting. The two participants who were not employees of Kaiser Permanente and participated in the whitewater rafting trip that day were Karan Trehan and Donald Spears. Mr. Spears lives in Washington, DC and Mr. Trehan resides in New York City. Mr. Spears and Mr. Trehan were considered "walk ins" at River Riders.

¹ Mr. Friddle has since been dismissed from this action, voluntarily.

Prior to participating in the rafting activity, each of the participating plaintiffs executed a document entitled "Release, Assumption of Risk and Indemnity Agreement" ("the Release") (**Exhibit A**). This release served as a warning of the inherent risks of whitewater rafting.² Additionally, the release is an express acknowledgment of the written warnings and the participants' understanding of those warnings and assumption of the risks associated with whitewater rafting. Furthermore, the release contains the specific language of the West Virginia Whitewater Responsibility Act, Duties of a Participant (West Virginia Code §20-3B-5).

On March 14, 2008, the *Christopher* Plaintiffs filed a "Motion in Limine Regarding Release and Assumption of the Risk", seeking to preclude introduction of the entire release at trial and to preclude the Defendant from invoking assumption of the risk as a defense. The Plaintiffs based their argument regarding the release upon *Murphy v. North American River Runners, Inc.*, 412 S.E.2d 504, 186 W.Va. 310 (1991). This case holds: "Generally, in absence of an applicable statute, a plaintiff who expressly and, under the circumstances, clearly agrees to accept a risk of harm arising from defendant's negligent or reckless conduct may not recover for such harm, unless the agreement is invalid as contrary to public policy." It goes on to hold that peremptory releases of statutory duties are invalid as a matter of public policy.

Despite the invalidity of peremptory releases, the *Murphy* Court did not preclude assumption of the risk as a defense nor did it preclude a warnings defense. In fact the **legislature did not intend**

² These risks have been specifically recognized by the West Virginia Legislature in West Virginia Code §20-3B-1, which states: "The Legislature recognizes that there are inherent risks in the recreational activities provided by commercial whitewater outfitters and commercial whitewater guides which should be understood by each participant. It is essentially impossible for commercial whitewater outfitters and commercial whitewater guides to eliminate these risks."

that parties would not have contractual freedom to agree to assume risk of such conduct.

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

The *Christopher* Plaintiffs' Motion requested that the Circuit Court preclude the defense from arguing assumption of the risk. The Plaintiffs argued that this case is governed by general maritime law and that assumption of the risk is not an argument available under general maritime law. However, Maritime law is not the applicable law to this case as specific West Virginia statutory law has been enacted to govern whitewater rafting.

The West Virginia Legislature enacted the Whitewater Responsibility Act, which governs actions against whitewater rafting outfitters and guides for injuries received during the course of a whitewater rafting trip. West Virginia Code § 20-3B-1 states: "It is the purpose of this article 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."

West Virginia Code § 20-3B-3 places specific duties upon whitewater outfitters and whitewater guides. West Virginia Code § 20-3B-5 (a) states:

No licensed commercial whitewater outfitter or commercial whitewater guide acting in the course of his employment is liable to a participant for damages or injuries to such participant unless such damage or injury was directly caused by failure of the commercial whitewater outfitter or commercial whitewater guide to comply with duties placed on him by article two of this chapter, by the rules of the commercial whitewater advisory board, or by the duties placed on such commercial whitewater outfitter or commercial whitewater guide by the provisions of this article.

Accordingly, West Virginia whitewater rafting guides and outfitters may be found liable only if they breach the specific duties outlined in West Virginia Code § 20-3B-3. Under West Virginia

law, which clearly governs this case, a whitewater rafting outfitter may be held liable only under the West Virginia Whitewater Responsibility Act. West Virginia law does not permit recovery from whitewater rafting outfitters or guides under any other theory. Additionally, the injuries alleged must be “directly” caused by the whitewater outfitter or guides’ failure to meet the standard of care outlined by West Virginia Code § 20-3B-3.

However, despite the clear language and intent of this statute, on April 15, 2008, the Circuit Court entered its Order Granting the Plaintiff’s Motion in Limine regarding the Release and Assumption of the Risk in the *Christopher* case. (**Exhibit B**). That Order held that the Defendant is prohibited from introducing the release as evidence at the trial of this matter, making any reference to such releases or eliciting any evidence regarding it at trial.

The Circuit Court justified its ruling by stating:

Just as in *Murphy* and *Johnson*, this Court finds that the anticipatory releases allegedly signed by Plaintiffs in the instant case are unenforceable. The Whitewater Responsibility Act established the applicable standard of care and Defendants cannot attempt to usurp that standard through an anticipatory release. Therefore, because the releases have no legal effect, they are irrelevant and unfairly prejudicial under West Virginia Rules of Evidence 401, 402, 403, and 404.

The Circuit Court completely ignored the fact that the releases contained clear warnings of the inherent risks and hazards of whitewater rafting which are absolutely relevant in this case. Each participant signed a release and discussed the same among themselves and with family members.

Interestingly, after the Court explicitly found that this action was governed by the Whitewater Responsibility Act, it stated:

Second, this Court is of the opinion that assumption of the risk is not an available defense in this maritime action. Because the incident

occurred on the Shenandoah River, a navigable body of water, it is governed by general maritime law. *Yamaha Motor Corp. v Calhoun*, 516 U.S. 199, 206 (1996). Assumption of the risk is not a defense in admiralty or maritime law.

The Court ultimately held: "Defendant is prohibited from asserting the defense of assumption of the risk or making any argument in support of this defense at trial."

Obviously, this contradictory Order regarding the governing law is problematic. In one instance, the Circuit Court has held that the Whitewater Responsibility Act applies to exclude the release and warnings document executed by each of the participating plaintiffs. However, in the second instance the Circuit Court held that the case is "governed by general maritime law" in order to preclude the Defendants from arguing assumption of risk, which is permitted under the Whitewater Responsibility Act and West Virginia law.

In the *Freeman* case the Circuit Court, on January 30, 2008, entered an "Order Denying the Plaintiff's Motion for Judgment on the Pleadings and Granting Motion in Limine Regarding Release". (**Exhibit C**). The effect of that Order, like the *Christopher* Order, precludes the Defendants from introducing the release executed by Mr. Freeman at trial. The Freeman Order states, "the Defendants are prohibited from introducing the release, making any reference to it, or eliciting any information regarding it at trial." As a result of the Circuit Court's ruling on April 28, 2008 consolidating the *Christopher* case and the *Freeman* case for discovery and trial, the Order precluding assumption of the risk defense and applying maritime law would apply to both cases.

It is imperative that this Court examine the issue of applicable law and the admissibility of the release. This case cannot proceed using dual, contradictory bodies of law without resultant manifest injustice to the Defendants. The rulings of the Circuit Court have unfairly prejudiced the

defense of these cases as evidence and arguments regarding assumption of the risk, warnings, inherent risks and effectively all of the Defendants' proper defenses have been precluded.

Importantly, in order for maritime or admiralty law to apply to these cases, the Plaintiffs must show, at a minimum, that the Shenandoah River is a "navigable" waterway. There has been no evidence proffered and no finding by the court or otherwise regarding the navigability of the Shenandoah River or why maritime law should apply.

Furthermore, the whitewater industry in West Virginia is dependent upon the just and uniform application and enforcement of the West Virginia Whitewater Responsibility Act. That Act is what business plans are based upon, how insurance rates are determined and ultimately the legal framework that permits the whitewater industry in West Virginia to legally exist. The Circuit Court has committed substantial and clear error as stated herein, and this writ is the only avenue of relief that these defendants can properly and fairly seek in order to correct these unjust and prejudicial rulings.

III. STANDARD OF REVIEW

A writ of prohibition is appropriate to correct "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." *State ex rel. Oak Cas. Ins. Co. v. Henning*, 505 S.E.2d 424 (W. Va. 1998), quoting *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). See also *McFoy v. Amerigas, Inc.*, 170 W.Va. 526, 532, 295 S.E.2d 16, 23 (1982), quoting *Hinkle*. See also, W. Va. Code § 53-1-1(2003) ("The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power . . ."); *State ex rel. Frazier & Oxley, L.C. v.*

Cummings, 214 W. Va. 802, 807, 91 S.E.2d 728,733 (2003).

The Defendants seek this Writ of Prohibition pursuant to West Virginia Code § 53-1-1, which states: "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."

Jurisdiction is in this Court based upon West Virginia Code § 53-1-2, which states: "Jurisdiction of writs of mandamus and prohibition (except cases whereof cognizance has been taken by the supreme court of appeals or a judge thereof in vacation), shall be in the circuit court of the county in which the record or proceeding is to which the writ relates. A rule to show cause as hereinafter provided for may be issued by a judge of a circuit court or of the supreme court of appeals in vacation. A writ peremptory may be awarded by a circuit court or a judge thereof in vacation, or by the supreme court of appeals in term."

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (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. 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.”Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

Defendants seeks this immediate writ as there is no other means for the defendants to obtain the desired relief as this matter is going to trial in late July, 2008, and the majority of discovery has been completed. Furthermore, it is defendants’ position that the Circuit Court’s Orders are clearly erroneous as they misapply and ignore applicable substantive law. Additionally, these Orders raise new and extremely important problems and issues of law of first impression due to the potential impact on the whitewater rafting industry in West Virginia. Therefore, defendants maintain that the factors of *Hoover* are clearly met, and the issuance of a writ is necessary to promote justice and fairness.

IV. ARGUMENT

A. IT IS IMPROPER TO APPLY “GENERAL MARITIME LAW” TO THIS WHITEWATER RAFTING CASE AS IT IMPROPERLY PREEMPTS WEST VIRGINIA LAW AND THE WEST VIRGINIA WHITEWATER ACT.

Although the trial court applied the West Virginia Whitewater Responsibility Act and used cases interpreting that Act in order to exclude introduction of the release and indemnity language, it applied “general maritime law” which precludes the defendants from arguing the defense of assumption of risk. The Circuit Court’s “Order Granting Plaintiffs’ Motion in Limine Regarding Release and Assumption of the Risk”, entered on April 15, 2008 in *Christopher* states as follows:

“Second, this Court is of the opinion that assumption of the risk is not an available defense in this maritime action. Because the incident occurred on the Shenandoah River, a navigable body of water, it is governed by general maritime law. *Yamaha Motor Corp. v Calhoun*, 516 U.S. 199, 206 (1996). Assumption of the risk is not a defense in admiralty or maritime law. *DeSole v. United States*, 947 F.2d1169,

1175 (4th Cir. 1991).”³

For the reasons stated herein-below, the Circuit Court has committed clear error and the defendants are left as their sole remedy of seeking relief through this writ, requesting that the Order be vacated.

The Circuit Court’s Order is clearly wrong as maritime law is not applicable in this case. The West Virginia Legislature enacted the Whitewater Responsibility Act, which governs actions against whitewater rafting outfitters and guides for injuries received during the course of a whitewater rafting trip. West Virginia Code §20-3B-1 states: “It is the purpose of this article 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.”

West Virginia Code §20-3B-3 places certain duties upon whitewater outfitters and whitewater guides⁴. West Virginia Code § 20-3B-5 (a) states: “No licensed commercial whitewater outfitter or commercial whitewater guide acting in the course of his employment is liable to a participant for damages or injuries to such participant unless such damage or injury was directly

³ By applying general maritime law to the case at bar, the Court has effectively precluded the language of the Whitewater Act and assumption of risk as a defense to this whitewater defendant. Said argument regarding assumption of risk is more thoroughly addressed later in this brief.

⁴ (a) All commercial whitewater outfitters and commercial whitewater guides offering professional services in this state shall provide facilities, equipment and services as advertised or as agreed to by the commercial whitewater outfitter, commercial whitewater guide and the participant. All services, facilities and equipment provided by commercial whitewater outfitters and commercial whitewater guides in this state shall conform to safety and other requirements set forth in article two of this chapter and in the rules promulgated by the commercial whitewater advisory board created by section twenty-three-a, article two of this chapter.
(b) In addition to the duties set forth in subsection (a) of this section, 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.

caused by failure of the commercial whitewater outfitter or commercial whitewater guide to comply with duties placed on him by article two of this chapter, by the rules of the commercial whitewater advisory board, or by the duties placed on such commercial whitewater outfitter or commercial whitewater guide by the provisions of this article.” Accordingly, West Virginia whitewater rafting guides and outfitters may be found liable **only** if they breach the duties outlined in West Virginia Code § 20-3B-3.

Additionally, the West Virginia Whitewater Responsibility Act places certain duties upon participants. West Virginia Code 20-3B-4 states: “Participants have a duty to act as would a reasonably prudent person when engaging in recreational activities offered by commercial whitewater outfitters and commercial whitewater guides in this state.” Additionally, the same section precludes participants from failing to advise of illness or disability, participating under the influence and the like. Accordingly, the Legislature has recognized and codified that participants must bear some responsibility for their actions.

Importantly, the regulation of whitewater rafting is within the police power of the states to oversee safety. Therefore, state law applies to this whitewater rafting case, which is exactly what the Legislature of this State intended. That is why the Whitewater Act was codified into law and why the Circuit Court should have applied this statute as being applicable to the cause of action, as opposed to allowing federal maritime law to control in order to preclude a defense of assumption of risk. Maritime law does not preempt State law in this matter.

In preemption cases, this Court has followed the United States Supreme Court's teaching that “[b]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all preemption cases, and

particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700, 715 (1996).

Additionally, this Court has held: "[o]ur law has a general bias against preemption." *General Motors Corp. v. Smith*, 216 W.Va. 78, 83, 602 S.E.2d 521, 526 (2004). "[B]oth this Court and the U.S. Supreme Court have explained that federal preemption of state court authority is generally the exception, and not the rule." *In re: West Virginia Asbestos Litigation*, 215 W.Va. 39, 42, 592 S.E.2d 818, 821 (2003). "Given the importance of federalism in our constitutional structure ... we entertain a strong presumption that federal statutes do not preempt state laws; particularly those laws directed at subjects-like health and safety-'traditionally governed' by the states." *Law v. General Motors Corp.*, 114 F.3d 908, 909-910 (9th Cir.1997), quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993). Therefore, "preemption is disfavored in the absence of convincing evidence warranting its application." *Hartley Marine Corp. v. Mierke*, 196 W.Va. 669, 673, 474 S.E.2d 599, 603 (1996). Said another way, "pre-emption will not lie unless it is 'the clear and manifest purpose of Congress.'" *Law*, 114 F.3d at 910, quoting *Easterwood, Id.* For these reasons, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *State ex rel. Orlofske v. City of Wheeling*, 212 W.Va. 538, 543, 575 S.E.2d 148, 153 (2002), quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576, 595 (1981).

In this case, the West Virginia Legislature has governed whitewater rafting safety since 1987

with the enactment of the Whitewater Responsibility Act, West Virginia Code 20-3B-1 et seq. A search of the entire United States Code reveals no legislation regarding whitewater rafting safety. Accordingly, regulation of whitewater activities and legislation affecting whitewater safety and responsibility is within the historic police powers of each state. It is very important to note that there is not a single reported case in the nation that has applied "general maritime law" to whitewater rafting incidents.⁵ Consequently, the general principles of maritime law are not applicable to this

⁵ *Forman v. Brown*, 944 P.2d 559 (Colo. App. 1996) (Plaintiff participated in rafting trip conducted by defendants. Maritime law was not applied, and Plaintiff was not entitled to recovery due to signed exculpatory agreement which could only be broken by willful and wanton conduct by the defendant.); *Ferrari v. Grand Canyon Dories, et al.*, 32 Cal. App. 4th 248 (Cal. App. 3 Dist. 1995) (Plaintiff sued operator of white water rafting trip to recover for personal injuries. General maritime law not applied, and held assumption of risk is complete bar to recovery where operator only owned duty not to increase inherent risks); *Sanders v. Laurel Highlands River Tours, Inc.* 966 F.2d 1444 (4th Cir. 1992) (Plaintiff sued defendant white water rafting company for injuries sustained on rafting trip. General maritime law not applied, and held warnings given to Plaintiff were adequate and he assumed the risk of undertaking the white-water rafting trip.); *Goldstein v. D.D.B. Needham Worldwide, Inc., et al.*, 740 F.Supp. 461 (S.D. Ohio 1990) (Heirs of participant in white water rafting trip brought wrongful death action against trip sponsors. General maritime law not applied, and held issue of material fact existed as to whether participant assumed risks associated with white water rafting); *Saenz v. Whitewater Voyages, Inc.*, 226 Cal.App.3d 758 (Cal. App. 1 Dist. 1990) (Heir of decedent who drown after falling out of raft during white water rafting trip brought wrongful death action against rafting company. General maritime law not applied, and held express assumption of risks attendant to white water rafting is a complete bar to recovery in a negligence action.); *Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730 (Tenn.Ct. App. 2005) (General maritime law not applied and white water rafting operator granted summary judgment on basis of release signed by participant.); *Lahey v. Covington*, 964 F.Supp. 1440 (D.Colo. 1996) (Plaintiff sued white water rafting company for injuries sustained during rafting trip. General maritime law not applied, and held exculpatory portion of release agreement barred rafter's claims to the extent they were based on rafting company's alleged negligence.); *Madsen v. Wyoming River Trips, Inc.*, 31 F.Supp.2d 1321 (D.Wyo. 1999) (Plaintiff sued rafting company for injuries sustained on white water rafting trip. General maritime law not applied, and held genuine issue as to injury was caused by "inherent risk" of white water rafting.); *Livingston v. High Country Adventure, Inc.*, 156 F.3d 1230 (6th Cir. 1998) (Plaintiff sued white water rafting company for injuries sustained during rafting trip. General maritime law not applied, and held that statutory law prohibited liability for simple negligence in white water rafting and waiver agreements signed by Plaintiff prevented claims for simple negligence.) *King v. US Forest Service*, 647 F.Supp. 20 (N.D.Cal. 1986) (Rafters

whitewater rafting case. The states have the authority to regulate whitewater rafting and it is properly within the states' police power to regulate the safety of participants in this important West Virginia industry. Therefore, the Circuit Court has committed clear error in ruling that general maritime law applies to this lawsuit.

Additionally, the Circuit 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. Accordingly, the Circuit Court has failed to indicate the necessary factual predicate and findings to rule that general maritime law applies, as there have been no evidence proffered in this matter that the Shenandoah River is navigable.

A threshold question that must be answered before applying maritime law is whether the accident occurred on a navigable body of water. If the waterway was not "navigable" then it is not appropriate to apply "general maritime law." The Circuit Court completely neglected any analysis as to whether the Shenandoah is a navigable body of water and/or whether whitewater rafting falls under this guise.

The Circuit Court's order conclusively determined that maritime law applies in this matter

drowned while on rafting company operating under permit issued by the US Forest Service. General maritime law not applied, and held that discretionary function exception under the Federal Tort Claims Act precluded claim based on Forest Service's failure to warn of danger of rafting when waters were at unusually high level.); *Spath v. Dillon Enterprises*, 97 F.Supp.2d 1215 (D.Mont. 1999) (Estate of customer of white water rafting outfitter brought wrongful death action. General maritime law not applied, and contractual exculpation of statutory or common law legal duties are not allowed.); *Council of Unit Owners Hawaiian Village Condominiums, Inc., et al.*, 983 F.Supp. 640 (D.Md. 1997).

despite no factual determination for a finding that the Shenandoah is navigable⁶. The West Virginia Supreme Court⁷ has addressed the three types of navigable streams based upon federal case law. The Court held:

In the United States there are three classes of navigable streams: (1) Tidal streams, that are held navigable in law, whether navigable in fact or not; (2) those that, although non-tidal, are yet navigable in fact for 'boats or lighters,' and susceptible of valuable use for commercial purposes; (3) those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests and tillage of the country they traverse to mills or markets.

Campbell Brown & Co. v. Elkins, 141 W.Va. 801, 93 S.E.2d 248 (1956), citing *Gaston v. Mace*, 33 W.Va. 14, 10 S.E. 60, 62. The Court went on to state:

With reference to the second of these classes of navigable streams it will be observed from its definition, that, whether fresh water streams be or be not navigable, is a **question of fact, and as such those, who claim such non-tidal streams to be navigable have on them the burden of proving that such streams are in fact navigable for boats or lighters, and susceptible of valuable use for commercial purposes in their natural state, unaided by artificial means or devices.**

Id. (Emphasis Added).

Given the West Virginia Supreme Court rulings on the issue of navigability, it is clear that navigability is a question of fact and that the party asserting that a body of water is navigable has the burden of so proving. Therefore, at the very least the Court has invaded the province of the jury in

⁶ Regardless of the issue of navigability, the defendants maintain that maritime law does not apply as the West Virginia Whitewater Act pertains to this lawsuit.

⁷ Cases discussing navigability, boats and lighters, all were decided before whitewater rafting likely became a licensed activity and business, in addition to being regulated by West Virginia statutory law. Therefore, it is the defendants' position that the present day Court would likely address the matter differently, cognizant of the fact that whitewater rafting has evolved on West Virginia streams and rivers.

finding that maritime law is applicable without any findings of fact.

The evidence in this matter indicates that the Shenandoah River ordinarily flows at or below two feet.⁸ Accordingly, it cannot be navigated by boats or 'lighters' in its natural state. The Shenandoah may be navigated only in canoe, raft or inner tube when the water is at certain levels. Even the use of these water crafts require certain skill and knowledge in order to negotiate rocks, rapids, and other natural obstacles. Such characteristics do not permit a finding of navigability as contemplated by maritime law and that the Circuit Court erred in its findings.

Federal cases have also dealt with the navigable water issue with respect to maritime law.

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

The Daniel Ball, 77 US (10 Wall.) 557, 563, 19 L.Ed. 999 (1870). This definition has been used consistently and uniformly by federal courts in ascertaining whether admiralty jurisdiction exists. See, e.g., *Lynch v. McFarland*, 808 F. Supp. 559, 561, 1994 AMC 2407 (W.D. Ky. 1992); *Wilder v. Placid Oil Co.*, 611 F. Supp. 841, 845-46 (W.D. La. 1985). Furthermore, the test that has been developed for purposes of admiralty jurisdiction turns on contemporary navigability in fact. See,

⁸ For the Court's benefit, defendant is attaching photographs of the Shenandoah River at normal levels. (See Exhibit D)

e.g., *LeBlanc v. Cleveland*, 198 F. 3d 353, 358, 2000 AMC 609 (2d Cir. 1999); *Alford v. Appalachian Power Co.*, 951 F.2d 30, 33, 1992 AMC 1123 (4th Cir. 1991); *Adams v. Montana Power Co.*, 528 F.2d 437, 1978 AMC 680 (9th Cir. 1975). Under this standard, historical navigability of a body of water is of little relevance, contrary to its importance in cases involving ownership of submerged lands or regulation pursuant to the Commerce Clause. *Alford, supra*, 951 F.2d at 33. Instead, the focus is upon the current ability of the waterway to permit commerce in the customary modes of trade and travel on water. This analysis was never performed in this case by the Circuit Court of the Shenandoah River as this river is presently not used to conduct any type of activity on it other than rafting, kayaking, tubing, and swimming.

Furthermore, the Circuit Court failed to determine how the term "commerce" should be defined for purposes of admiralty jurisdiction, and to determine what is meant by the phrase "customary modes of trade and travel on water". Neither of these aspects of the definition of "navigability" have been specifically addressed in the context of admiralty or maritime cases. However other types of cases have addressed these issues under similar contexts.

As the definition of navigable waters from the *The Daniel Ball* makes clear, in order to be considered navigable for maritime jurisdiction purposes, a river must be a highway of commerce over which trade and travel are or may be conducted "in the customary modes of trade and travel on water". The piloting by licensed commercial guides and skilled operators on specialized types of rafts for recreational purposes and thrill seekers does not constitute a "customary mode" of trade and travel on water. The types of travel on the Shenandoah involves recreational and sport activity. In order to travel the portion of the Shenandoah River where River Riders operates and into Virginia, one must navigate several rapids which are rated as high as Class III. In general, other jurisdictions

have found that navigability requires more than restricted or specialized use, and the fact that a stream may be navigated by a specialized craft operated by a skilled pilot does not render it navigable. *Leovy v. US*, 177 US 621, 633, 20 S.Ct. 797, 44 L.Ed. 914 (1900). The Shenandoah River clearly requires the use of specialized watercraft being piloted by qualified and skilled river guides in order to travel on it. Under normal conditions, the Shenandoah River has only 2-3 feet of water, incapable of permitting navigation by normal water craft for commercial purposes.

The purposes of federal maritime and admiralty jurisdiction is the protection and promotion of the maritime shipping industry through the development and application, by neutral federal courts, of a uniform and specialized body of federal law. *Adams*, 528 F.2d at 439; *Sisson v. Ruby*, 497 US 358, 364 (1990). The federal government's interest in fostering commercial maritime activity has been found to outweigh the interest of any state in providing a forum and applying its law to regulate conduct within its borders. *Adams*, 528 F.2d at 439. However, as the Ninth Circuit has stated, "In the absence of [interstate] commercial activity, present or potential, there is no ascertainable federal interest justifying the frustration of legitimate state interests." *Id.*

The Court in *Adams* held that admiralty jurisdiction did not exist over a tort claim arising from the capsizing of a small pleasure boat on a stretch of river completely obstructed by dams at both ends. *Id.* at 440. The Court found that because the damming of the waterway had the practical effect of eliminating commercial maritime activity, no purpose would be served by application of a uniform body of federal law, and "only the burdening of federal courts and the frustrating of the purposes of state tort law would be thereby served." *Id.* at 440-41. The Shenandoah's make up in and of itself, consisting of 2-3 feet of water normally, rocks, rapids, hydraulic holes, and other natural obstacles does eliminate commercial maritime activity, other than whitewater rafting and

kayaking. Importantly, the Ninth Circuit has held that "the regulation of commercial white-water rafting activities is not an area that inherently requires national uniformity." *Grand Canyon Dories, Inc. v. Idaho Outfitters and Guides Bd.*, 709 F.2d 1250, 1254 (9th Cir. 1983); see also *Lynch v. McFarland*, 808 F.Supp. 559, 563 (dismissing case for lack of admiralty jurisdiction and finding that river traffic limited to canoes and rafts did not require uniform "rules of the road" supplied by federal maritime law).

Furthermore, the Circuit Court's reliance upon *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206 (1996) in order to apply general maritime law to this litigation is misplaced. The *Yamaha* decision dealt with the application of state wrongful death acts to deaths that occur in territorial waters. This case was one of application of state law to maritime cases in federal court because of the lack of a mechanism for recovery for wrongful death.

Defendant seeks relief from the Circuit Court's Order, via this writ, as clear error has been committed, inapplicable law has been applied, and unfair prejudice upon defendants has occurred. By applying general maritime law to this matter, the Circuit Court has ignored West Virginia statutory law that was enacted solely and for the specific purpose of covering lawsuits arising out of whitewater rafting activities in West Virginia. Furthermore, the Order creates a manifestation of injustice and unfair prejudice on the defendants, as it prevents said defendants from applying West Virginia law and assumption of risk defenses. Therefore, defendants request that this Court vacate said Order, and an ruling prescribing that West Virginia case law and statutory law apply.

B. PRECLUDING ASSUMPTION OF RISK DEFENSE IS IMPROPER AND CLEAR ERROR

The Circuit Court's "Order Granting Plaintiffs' Motion in Limine Regarding Release and

Assumption of the Risk”, entered on April 15, 2008 in Christopher⁹, also prohibits defendants from arguing and/or presenting evidence regarding plaintiffs’ assuming the risk of going whitewater rafting on the Shenandoah River on September 30, 2004. This Order relies upon principles of maritime law in deciding that maritime law applies and therefore there can be no assumption of risk. As discussed herein-above, it is defendants’ contention that maritime law does not apply, but that state law applies, specifically the West Virginia Whitewater Act. These defendants seek the West Virginia Supreme Court’s intervention on this issue and a ruling reversing the Circuit Court’s Order, permitting the defense of assumption of risk to be allowed in this matter.

Assumption of risk is similar to contributory negligence but certainly not identical. “The essence of the former is venturousness while the latter characterizes a state of carelessness. The doctrine of assumption of risk rests on two premises: First, that the nature and extent of the risk are fully appreciated; and second, that it is voluntarily incurred.” See *Cross v. Noland*, 156 W.Va. 1, 5, 190 SE2d 18, 22 (1972); *Hunn v. Windsor Hotel Company*, 119 W.Va. 215, 193 S.E. 57, 58 (1937). “Assumption of risk is available as a defense only where one places himself in a posture of known danger with an appreciation of such danger.” *Cross*, 156 W.Va. at 7, 190 SE2d at 18; *Syl Pt. 2, Korzun v. Shahan*, 151 W.Va. 243 (1966). The defense of assumption of risk presupposes that there was a known danger of which the plaintiff had knowledge and that he voluntarily exposed himself to such danger; also the essence of assumption of risk is venturousness. *Cross*, 156 W.Va. at 7, 190 SE2d at 18; 57 *Am. Jur. 2nd*, Negligence, Section 274. The essence of contributory

⁹ Because of the Circuit Court’s recent ruling on April 28, 2008 consolidating the Christopher case with the Freeman case, the Order concerning assumption of risk and maritime law would apply to both.

negligence is carelessness; of assumption of risk, venturousness. Knowledge and appreciation of the danger are necessary elements of assumption of risk. Failure to use due care under the circumstances constitutes the element of contributory negligence. Syl. Pt 5, *Spurlin v. Nardo*, 145 W.Va. 408, 114 S.E.2d 913 (W.Va. 1960). A plaintiff is not barred from recovery by the doctrine of assumption of risk unless his degree of fault arising therefrom equals or exceeds the combined fault or negligence of the other parties to the accident. Syl. Pt. 2, *King v. Kayak Manufacturing Corp.*, 182 W.Va. 276, 387 SE2d 511 (1989).

In this case, there are voluminous undisputed facts and evidence to support an assumption of the risk defense. First, 'whitewater rafting', in and of itself, contains the terms whitewater¹⁰ and rafting. These terms un-mistakably give an adult some sort of information that the activity will involve rafting on water with rapids. Additionally, some plaintiffs were aware of the risks involved prior to the date in question. Plaintiff Echegoyen testified that obviously there is a risk factor in this kind of sport. (**Exhibit E, Deposition of Christina Echegoyen, p. 64**). Plaintiff Payne was aware that your boat could flip and that you could fall out in the river. (**Exhibit F, Deposition of Brian Payne, p. 138**). There is also evidence indicating that River Riders provided via email to Katherine Hax, the individual arranging this whitewater rafting trip for the majority of the plaintiffs, alternative activities such as biking and/or tubing. It appears that Ms. Hax determined the nature of the activity (whitewater rafting), without passing the alternatives to her co-employees. (**Exhibit G, Deposition of Carrie Harris-Muller, p. 16-18; Exhibit H, Deposition of Katherine Hax, pp. 18-19¹¹**).

¹⁰ Merriam-Webster's online dictionary terms white water as "frothy water" (as in breakers, rapids, or falls)

¹¹ Hax testified that she did offer the alternatives, but those who were interested in the alternative land based activities decided not to worry about it and they had decided to go

Additionally, the participants were well aware prior to going on the trip that they would be on the Shenandoah River, a river controlled by mother nature, not a controlled water ride at an amusement park. Also, a day prior to going on the trip, River Riders advised Ms. Hax, that the water level was high and that guides would be in each boat. **(Exhibit G, Deposition of Carrie Harris-Muller, p. 30; Exhibit H, Deposition of Katherine Hax, pp. 29-30)**. With respect to Roger Freeman, there is ample evidence indicating his trepidation and flat-out not wanting to go rafting, and his inability to swim, which he communicated in detail to Katherine Hax. **(Exhibit H, Deposition of Katherine Hax, pp. 21-24)**. Moreover, said participants all received and read the River Riders document which contained numerous warnings and discussions of 'substantial risks', potential injury or death, and traveling on rivers or streams. (See above argument section for this testimony).

Furthermore, several plaintiffs discussed amongst themselves or relatives prior to the trip their individual trepidation and fears with respect to doing water activities on a river as they could not swim or were not good swimmers. **(Exhibit I, Deposition of Betty Green, pp. 22-23, 33-35, 41; Exhibit E, Deposition of Christina Echegoyen, p. 31-32; Exhibit J, Deposition of Ruchi Rastogi, pp. 11; Exhibit F, Deposition of Brian Payne, pp. 44-45; Exhibit H, Deposition of Katherine Hax, p. 24)**. Additionally, several plaintiffs, while traveling to the River Riders facility on the morning of the trip, observed the conditions of the river, discussed said conditions, and were cognizant of the high water conditions, all prior to deciding to whitewater raft. **(Exhibit K, Deposition of Darryl Wiley, pp. 18, 20; Exhibit E, Deposition of Christina Echegoyen, p. 20-21; Exhibit J, Deposition of Ruchi Rastogi, pp. 24-25; Exhibit F, Deposition of Brian Payne, pp. 35-36, 48; Exhibit L, Deposition of Donald Spears, pp. 6, 8-9; Exhibit G, Deposition of Carrie**

forward with the whitewater rafting **(p. 28 of Hax deposition)**.

Harris-Muller, p. 47-49). Mr. Wiley admitted that he knew the water level was abnormally high as did plaintiff Rastogi. **(Exhibit K, Deposition of Darryl Wiley, pp. 74; Exhibit J, Deposition of Ruchi Rastogi, p. 19).** Plaintiff Spears admitted to his knowledge of the river appearing rough, and that the guides told the group that the river was higher than usual and that it was very swift. **(Exhibit L, Deposition of Donald Spears, pp. 6, 30).**

The undisputed evidence also indicates that prior to rafting, all plaintiffs watched a safety/instructional video on whitewater rafting at the River Riders facility. This video contains verbal warnings and instruction about the hazards of whitewater rafting. Also, the video shows actual footage of rafts overturning in rough rapids with the rafting participants being knocked in the river rapids. The video further explains what to do in several scenarios if you fall into the river, along with warnings of foot entrapments, how to float, and what to do if you are caught in a whitewater phenomenon called a 'hydraulic'. Plaintiffs have testified as to watching the video and certain plaintiffs obviously were forewarned of the risks of whitewater rafting. **(Exhibit E, Deposition of Christina Echegoyen, p. 32; Exhibit J, Deposition of Ruchi Rastogi, p. 27; Exhibit F, Deposition of Brian Payne, pp. 135-138; Exhibit L, Deposition of Donald Spears, p. 12.; Exhibit G, Deposition of Carrie Harris-Muller, pp. 58-59).** Importantly, Plaintiff Green testified that the video was unsettling, the water in the film had quite a bit of force and it wasn't very comforting, and the video made her tell her co-employees that she did not want to do this, that this is not her thing. **(Exhibit I, Deposition of Betty Green, pp. 42-43).**

The evidence further establishes that River Riders guides provided warnings and information to the plaintiffs prior to the decision to go rafting on the Shenandoah. Guide Tim Main testified that he gave the plaintiffs three options following the video presentation on the day in question including

a flat water stretch where they could just float down the river in the rafts, the Needles section of the Potomac, or the Shenandoah normal run. He also responded to their questions of safety by explaining to them that there are inherent risks in any outdoor activity and that the water level was high. **(Exhibit M, Deposition of Tim Main, pp. 81-84)**. Plaintiff Rastogi confirms this statement from Mr. Main in her testimony. **(Exhibit J, Deposition of Ruchi Rastogi, p. 28)**. Mr. Main also testified that after presenting the group with the options and answering their questions, the group essentially took a vote and decided to go whitewater rafting and were yelling “yeah, we’re ready to go”. **(Exhibit M, Deposition of Tim Main, p. 85)**. Ms. Hax testified that at some point prior to rafting, those who had concerns about whitewater rafting and river activities had decided not to worry about it and go forward with whitewater rafting, and therefore, she had no reason to discuss or search for alternative activities for these individuals. **(Exhibit H, Deposition of Katherine Hax, p. 28)**. Therefore, Ms. Hax essentially testifies that Freeman, despite his inability to swim, fear of going on the river, and earlier decision to state ‘no rafting’, changed his mind and decided to go whitewater rafting that day.

Also prior to rafting, the participants were told that certain rafts would take or provide a more exhilarating/exciting ride and that some plaintiffs chose the more exciting ride purposefully. **(Exhibit K, Deposition of Darryl Wiley, p. 25;)**. Importantly, Ms. Hax testified that in the Kaiser Group were some “adrenaline junkies” who were looking forward to a fast experience. **(Exhibit H, Deposition of Katherine Hax, p. 37)**. Thus the testimony of plaintiffs and guide Tim Main explicitly indicates facts and evidence to support an assumption of risk defense and to exclude such evidence would be clear error as a matter of law.

Importantly, West Virginia statutory law governing whitewater activities indicates that there

are inherent 'risks' involved in whitewater rafting that cannot be eliminated. "The Legislature recognizes that there are inherent risks in the recreational activities provided by commercial whitewater outfitters and commercial whitewater guides which should be understood by each participant. It is essentially impossible for commercial whitewater outfitters and commercial whitewater guides to eliminate these risks." WVC §20-3B-1. Furthermore, WVC §20-3B-5 states, "It is recognized that some recreational activities conducted by commercial whitewater outfitters and commercial whitewater guides are hazardous to participants regardless of all feasible safety measures which can be taken." Thus the very description and statutory law pertaining to whitewater rafting incorporates the fact that there are risks and hazards associated with the activity. Therefore, the Circuit Court's ruling which states "Accordingly, Defendant is prohibited from asserting the defense of assumption of the risk or making any argument in support of this defense at trial" is patently wrong, is in contradiction with West Virginia law, and is clearly in direct conflict with the West Virginia Whitewater Act. Additionally, whitewater rafting cases in other jurisdictions have allowed the defense of assumption of risk.¹²

¹² *Ferrari v. Grand Canyon Dories, et al.*, 32 Cal. App. 4th 248 (Cal. App. 3 Dist. 1995) (assumption of risk is complete bar to recovery where operator only owed duty not to increase inherent risks); *Sanders v. Laurel Highlands River Tours, Inc.* 966 F.2d 1444 (4th Cir. 1992) (warnings given to Plaintiff were adequate and he assumed the risk of undertaking the white-water rafting trip.); *Goldstein v. D.D.B. Needham Worldwide, Inc., et al.*, 740 F.Supp. 461 (S.D. Ohio 1990) (Issue of material fact existed as to whether participant assumed risks associated with white water rafting); *Saenz v. Whitewater Voyages, Inc.*, 226 Cal.App.3d 758 (Cal. App. 1 Dist. 1990) (Express assumption of risks attendant to white water rafting is a complete bar to recovery in a negligence action.); *Madsen v. Wyoming River Trips, Inc.*, 31 F.Supp.2d 1321 (D.Wyo. 1999) (Genuine issues as to whether injury was caused by "inherent risk" of white water rafting.); *King v. US Forest Service*, 647 F.Supp. 20 (N.D.Cal. 1986) (Discretionary function exception under the Federal Tort Claims Act precluded claim based on Forest Service's failure to warn of danger of rafting when waters were at unusually high level.); *Spath v. Dillon Enterprises*, 97 F.Supp.2d 1215 (D.Mont. 1999) (Contractual exculpation of statutory or common law legal duties are not allowed.)

Plaintiffs' lawsuits surrounds facts which indicate rafts overturning or occupants in the rafts falling into the Shenandoah River while participating in a whitewater rafting trip. The Complaints allege negligence and wrongdoing against defendants, and recent testimony from plaintiffs' expert witnesses allege breaches of the standard of care. As part of the defense of said negligence lawsuits, defendants should be entitled to argue and present evidence of assumption of the risk, as an abundance of facts and testimony exists to demonstrate such a defense, in addition to the fact that statutory law pertaining to whitewater rafting activities discusses inherent risks and hazards. The Circuit Court committed clear error in its ruling which requires immediate correction via this writ. Therefore, defendants request reversal of the Circuit Court's Order which precludes the defense of assumption of risk.

C. THE ACTION OF THE CIRCUIT COURT, EFFECTIVELY STRIKING THE WHITEWATER RESPONSIBILITY ACT, IS AN UNCONSTITUTIONAL USURPATION OF THE DUTIES AND RESPONSIBILITIES OF THE LEGISLATURE

The Circuit Court, in applying maritime law to this whitewater rafting case, has usurped the legislative authority that the West Virginia Constitution has granted the Legislature, in violation of the West Virginia Constitution, Article 5, section 1, which states:

“The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.”

“Judicial power” is power conferred on courts to administer law, authority exercised by department of government charged with declaration of what law is and construction of written law, or power to construe and expound law, as distinguished from legislative and executive functions.

State ex rel. Richardson v. County Court of Kanawha County, 78 S.E.2d 569, 138 W.Va. 885 (1953).

Judicial process is concerned with the interpretation and application of legislative intent, not with usurpation of the lawmaking function. *Cart v. General Elec. Co.*, 506 S.E.2d 96, 203 W.Va. 59 (1998).

The Court, in applying the West Virginia Whitewater Responsibility Act to preclude the Defense from utilizing the warnings contained within the release document and then applying principles of “general maritime law” to this case results in a great deal of confusion. Moreover, it results in a total invalidation of the statutory standards of liability defined by the Legislature in the Whitewater Responsibility Act. For instance, the Whitewater Responsibility Act sets the standards for which commercial whitewater outfitters or guides may be held liable. However, the Court, in applying maritime law to this case, has stripped the Defendants of their rights under the Act. Maritime law results in strict liability which is not the standard enacted by the West Virginia Legislature. Additionally, it strips the Defendants from utilizing assumption of risk as a defense, a defense which West Virginia recognizes. “Unless statutes enacted by the legislature invade constitutional rights, determination of the legislature in enacting such statutes is conclusive.” *Vest v. Cobb*, 76 S.E.2d 885, 138 W.Va. 660 (1953).

“Executive, legislative, and judicial Departments are independent of each other, and courts generally refuse to invade province of legislative bodies.” *City of Wheeling v. John F. Casey Co.*, 85 F.2d 922 (1936). “When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.” *State v. Inscore*, 634 S.E.2d 389, 219 W.Va. 443 (2006). “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will

not be interpreted by the courts but will be given full force and effect.” Syllabus point 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951).” Syl. pt. 1, *Sowa v. Huffman*, 191 W.Va. 105, 443 S.E.2d 262 (1994). “It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten.” *Taylor-Hurley v. Mingo County Bd. of Educ.*, 551 S.E.2d 702, 209 W.Va. 780 (2001).

The Actions of the Circuit Court in usurping legislative authority ignores the fact that it does not have the authority to strike the Whitewater Responsibility Act. Judicial process is concerned with the interpretation and application of legislative intent, not with usurpation of the lawmaking function. *Cart v. General Elec. Co.*, 506 S.E.2d 96, 203 W.Va. 59 (1998). Moreover, the Circuit Court does not have authority to alter the standard of care from the duties outlined in the Whitewater Responsibility Act to the strict liability standard on maritime law. “Once Legislature has enacted statute, any subsequent policy changes must come from Legislature itself and, in absence of constitutional authority to the contrary, Supreme Court of Appeals has no blanket power to recast statute to meet its fancy.” *State ex rel. Riffle v. Ranson*, 464 S.E.2d 763, 195 W.Va. 121 (1995).

The Circuit Court has usurped the Legislatures authority by striking the provision of the Whitewater Responsibility Act, which was legislatively enacted, in favor of maritime law. Such an alteration of the statute must be done by the Legislature and cannot be done by judicial fiat. Accordingly, the Court’s actions are plain error.

D. THE CIRCUIT COURT’S RULING WOULD HAVE A FAR-REACHING AND EXTREMELY NEGATIVE IMPACT ON THE WHITEWATER RAFTING INDUSTRY IN WEST VIRGINIA

The Circuit Court’s Order, in ruling that maritime law applies to this whitewater rafting case and that assumption of risk is precluded as a defense, essentially could impact this State’s whitewater

rafting industry in such a way that it would cripple it or completely end it. This erroneous interpretation and misapplication of law to the facts of this case should permit the Supreme Court of Appeals to immediately rescind and correct the Circuit Court's Order, so that the whitewater rafting industry in West Virginia may continue.

Defendant River Riders is a commercial whitewater rafting outfitter governed by the West Virginia Whitewater Responsibility Act, WVC §20-3B-1 et seq. There are numerous other whitewater rafting companies throughout the state of West Virginia, providing rafting activities on rivers such as the Shenandoah, Potomac, Greenbrier, Gauley, Cheat, Tygart, and New rivers. Several other commercial whitewater companies also operate on the Shenandoah River. These West Virginia companies provide an obvious and necessary economic benefit to large areas of the State of West Virginia as thousands of people from surrounding states venture into West Virginia to experience and enjoy this outdoor recreational activity and adventure sport on a yearly basis. These thousands of out of state residents spend millions of dollars in this State. Rafting companies in these areas generate business for not only themselves, but also for other local businesses. It cannot be disputed that whitewater rafting makes West Virginia a premier tourist destination for the entire eastern portion of the United States during the typical whitewater rafting months from April through October.

However, all of this could come to a grinding halt due to the Circuit Court's recent Order ruling that general maritime law applies to this action, not West Virginia law or the West Virginia Whitewater Responsibility Act. The problem that this ruling creates is enormous as it essentially finds any whitewater rafting incident/lawsuit falls under the realm of general maritime law, and therefore, the litigation will proceed under a strict liability standard. Under general maritime law,

there is no assumption of the risk defense, despite the fact that the activity is one where a participant seeks out adventure. It would be impossible to defend any claim in any type of rafting incident as the only evidence would be what happened on the river and damages. A Defendant could not put on evidence relating to assumption of risk, warnings, hazards, etc.¹³, which would be unfair and which is not what the West Virginia legislature had in mind when drafting the West Virginia Whitewater Act.

If this Order is allowed to stand, there will be an influx of claims made by every individual who has fallen from a commercial outfitter's raft on any whitewater river in West Virginia. As a result, whitewater rafting companies would become un-insurable forcing them to close.

There is no question that whitewater rafting companies in West Virginia look to and rely upon the West Virginia Whitewater Responsibility Act to govern their conduct and actions, and it was the clear design of the legislature for the Act to govern these rafting companies. There can be no question that neither the State or the local rafting companies anticipated general maritime law applying to their activities.

By ruling that general maritime law applies to this action and therefore assumption of risk is not a defense, the Circuit Court has placed the future of the whitewater rafting industry in serious jeopardy. Defendant River Rivers requests relief from the Circuit Court's Order as clear error was committed, West Virginia Statutory law ignored, and immediate reversal is warranted to correct this error by issuance of a writ.

¹³

Said ruling would essentially eliminate from the trial any evidence regarding written warnings of inherent hazards, the whitewater rafting warning/instructional video shown to participants prior to rafting, and/or any verbal discussions of the hazards by the guides

E. THE COMPLETE EXCLUSION OF THE “RELEASE, ASSUMPTION OF RISK AND INDEMNITY AGREEMENT” DOCUMENT IS IMPROPER AND CONTRARY TO WEST VIRGINIA LAW

The Circuit Court’s “Order Denying Plaintiff’s Motion for Judgment on the Pleadings and Granting Motion In Limine Regarding Release”, entered on January 30, 2008 in Freeman, and its “Order Granting Plaintiffs’ Motion in Limine Regarding Release and Assumption of the Risk”, entered on April 15, 2008 in Christopher, is in direct conflict with clear West Virginia law, as it completely incapacitates the defendant River Riders’s ability to argue assumption of risk and proper warnings as a defense in this matter. **(Exhibits B and C)**. The Circuit Court’s Orders concludes that the ‘anticipatory release’ signed by all plaintiffs in this action shall have no legal effect and is unenforceable, and therefore shall not be admitted into evidence or discussed at trial. However, the Circuit Court erred in this determination as West Virginia law allows said ‘document’ into evidence as part of a warnings and/or assumption of risk defense. Therefore, defendants seek the West Virginia Supreme Court’s intervention on this issue and a ruling to allow said release document to be admitted into evidence and utilized at the trial of this matter for purposes of a warnings argument and an assumption of risk argument, not as a complete bar to plaintiffs’ claims.

The document in question is a form “Release, Assumption of Risk and Indemnity Agreement” prepared by River Riders, Inc., and provided to all participants of a whitewater rafting trip. **(Exhibit A)**. The document was read and signed by all plaintiffs (all adults) in this matter, including Roger Freeman, and contains language and sections regarding activities, understandings, warnings, representations of health and physical condition, assumption of risk, release language, and

indemnity and hold harmless language¹⁴. (**Exhibits N and O**). The document also contains language reciting the exact language of the “West Virginia Whitewater Responsibility Act Duties of a Participant” (West Virginia Code §20-3B-5).

The defendants agree with the Circuit Court’s portion of the ruling that this document does not act as a bar to plaintiffs case against it, nor are the provisions regarding release of liability and indemnity and hold harmless enforceable in this particular case, pursuant to *Murphy v. North American River Runners, Inc.*, 186 W.Va. 310, 412 S.E.2d 504, 511-512 (W.Va. 1991). The defendants have made the Circuit Court aware that it is willing to redact language consistent with the *Murphy* opinion and not introduce said language or arguments at the trial of this matter¹⁵. However, the Circuit Court was incorrect in its decision to exclude the entirety of the document as the portions not containing language or referring to release of liability and/or indemnity and hold harmless are proper for a jury to hear, are relevant to the case at hand, and are allowed by West Virginia law. River Riders is not seeking the plaintiff to expressly “assume the risk of a defendant’s violation of a safety statute” per *Murphy, Id.* at 315, 509. River Riders seeks to utilize certain language in the document to satisfy that it conformed to the applicable standard of care by providing appropriate warnings of the risks and hazards associated with whitewater rafting.

River Riders requests relief from the Circuit Court’s clearly erroneous Orders so that it may introduce the document for warnings purposes, standard of care issues, and assumption of risk

¹⁴ For purposes of brevity, the defendants are only attaching the documents signed by Marsha Christopher and Roger Freeman. However, all rafting plaintiffs executed the document and fact is undisputed.

¹⁵ See **Exhibit P**, “Defendant’s Memorandum of Law in Opposition to Plaintiffs’ Motion in Limine Regarding the Release and Assumption of the Risk”

defenses, minus the proper redactions. River Riders attaches hereto a document that it would seek to introduce as evidence that is consistent with West Virginia law. **(Exhibit Q)**. Said language River Riders seeks to utilize is as follows:

RIVER RIDERS, INC.: ASSUMPTION OF RISK

I acknowledge that, directly or indirectly, I have requested that I be allowed to participate in whitewater rafting, kayaking, canoeing, tubing, biking, camping or other activities provided by River Riders, Inc. (which includes any commonly owned, related, parent, or subsidiary corporations and entities, their owners, officers, directors, agents, and employees).

I understand that these activities and services pose substantial risks of injury or death and damage or loss of personal property as the result of exposure; travel on or being in whitewater rivers and streams; travel on roads or rough terrain by foot, conveyances, or other means while participating in activities or using services; the negligence, gross negligence, or bad judgment by me, or other participants; the risks that injuries may occur in remote areas without adequate medical or other services; and other known or foreseeable risks of these activities and services. I represent that I am in good physical condition and health and am able to safely participate in these activities.

In consideration of and as partial payment for being allowed to participate in activities and use services provided by River Riders, Inc., **I ASSUME**, to the greatest extent permitted by law, all of the risks, whether or not specifically identified herein, of all the activities in which I participate and services I use;

I consent to the use by River Riders Inc., of photographs and video recordings made of me while participating in activities or using services without further compensation and agree that all such materials, including negatives, are the sole property of River Riders, Inc.,

I agree that the exclusive venue of any suit against River Riders, Inc., for any reason shall be the Circuit Court of Jefferson County, West Virginia; consent to the jurisdiction of that Court as to any action against me to enforce this Agreement; agree that this Agreement is to be interpreted under the laws of the State of West Virginia and/or Maryland which gives it that broadest interpretation and application; and agree that if any part of this Agreement is found to be invalid that all other portions shall be fully enforced.

West Virginia Whitewater Responsibility Act Duties of a Participant(West Virginia Code §20-3B-5)

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

(2) No participant may:

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

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

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

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

(5) Fail to inform or notify the trip guide or trip leader of any incident or accident involving personal injury or illness experienced during the course of any commercial whitewater expedition. If such injury or illness occurs, the participant shall leave personal identification, including name and address, with the commercial whitewater outfitter's agent or employee.

Pursuant to West Virginia law, introduction of the document with this language is proper in this matter, as 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. River Riders intends to utilize this language and testimony of plaintiffs surrounding their reading and understanding of said language, to argue that it met the standard of care of a commercial white water outfitter in providing adequate warnings to the plaintiffs regarding the inherent risks of white water rafting, that plaintiffs understood the warnings, and voluntarily assumed the risks. To hold otherwise

would clearly be a manifestation of injustice, highly unfair and prejudicial, and contrary to West Virginia law.

Plaintiffs' and the Circuit Court's reliance on the *Murphy* decision is correct with respect to excluding evidence and language regarding release of liability and indemnity/hold harmless provisions. However, the *Murphy* case clearly does not hold that assumption of risk and/or warnings are excluded in whitewater rafting cases. *Murphy* involved a paying white water rafting plaintiff who was injured when the raft she was in engaged in a rescue operation of another raft operated by the defendant North American River Runners on the New River. In attempting to dislodge the other raft by intentionally bumping it, the plaintiff was forcefully ejected from her raft, which caused her injuries. *Id.* at 314, 508. The plaintiff successfully appealed the decision of the Circuit Court of Fayette County which granted summary judgment on behalf of the defendant on the ground that the anticipatory release signed by the plaintiff was a complete bar to any action. The *Murphy* decision ruled that the anticipatory release did not bar plaintiff's claim. However, the *Murphy* decision did not exclude the anticipatory release language from evidence, and it certainly did not exclude language regarding warnings or assumption of risk. The defendants agree with the application of *Murphy* in that anticipatory releases are unenforceable pursuant to certain factual situations. However, the Circuit Court's decision to completely and broadly wipe out the entirety of the River Rider's document based upon the *Murphy* decision is improper as a matter of law and should be reversed.

Plaintiffs and the Circuit Court also rely upon *Johnson v. New River Scenic Whitewater Tours, Inc.*, 313 F.Supp.2d 621 (2004) to exclude the entirety of the River Riders document in question. The Johnson case involved the white-water drowning death of a 14 year-old girl who was

a part of a church group trip. The Church's chaperone, John Peters, executed documents on behalf of the participants that basically asserted that Mr. Peters agreed to release the defendant of liability and indemnify it. District Judge Chambers granted summary judgment holding that because the applicable documents are construed either as releases of liability or parental indemnity agreements, they are precluded to be introduced at trial. *Id.* at 634. The Circuit Court's and plaintiffs' reliance on the *Johnson* case is also incorrect in the context of the present case. In *Johnson* the issues were the enforcement of standard boilerplate releases and a parental indemnity agreement both executed by a church chaperone, not by the actual participant, who was a 14 year-old minor. Furthermore, there were no discussions or rulings in Judge Chambers's opinion regarding issues of appropriate warnings and/or assumption of risk, which are the matters at bar and which defendants seek to utilize. Essentially, *Johnson* reaffirmed the *Murphy* ruling by holding that said releases of liability and indemnity and hold harmless provisions are unenforceable. Defendants agree with the *Johnson* decision under the facts presented, however it disagrees with the broad ranging scope as to how the Circuit Court applied the *Johnson* decision in this case.

First and foremost, the *Murphy* decision did not exclude the use of the North American River Runners' Release, which contained similar language to the River Riders document.¹⁶ The decision clearly did not hold that North American River Runners could not argue or put forth evidence of assumption of risk and/or warnings. Additionally, the *Johnson* decision did not rule that the defendant whitewater rafting company, New River Scenic, could not go forward with evidence of warnings and/or comparative fault.

¹⁶ The North American River Runners' Release included language on risks and dangers existing or that may occur, including hazards of traveling on rubber rafts in rough river conditions, assumption of risk, hold harmless, and release and waiver language.

Moreover, there is a case involving white-water rafting allowed said language of warnings and assumption of risk into evidence. In *Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163 (1989), the entirety of the document signed by the plaintiff prior to rafting which was allowed into evidence. Said document, entitled "Raft Trip Release and Assumption of Risk" contained language of warnings, risks, and assumption of risk. *Id.* at 165. In the matter at bar, defendants are willing to redact the language concerning release of liability and indemnification to conform to the *Murphy* decision. However, to exclude the entire document is clear error and these defendants seeks a reversal of said Circuit Court's rulings.

Additionally, the West Virginia Whitewater Act specifically includes language in the Act allowing for the whitewater rafting company to defend on the basis of warnings and assumption of risk. West Virginia Code §20-3B-1 states:

Every year, in rapidly increasing numbers, the inhabitants of the state of West Virginia and nonresidents are enjoying the recreational value of West Virginia rivers and streams. The tourist trade is of vital importance to the state of West Virginia and the services offered by commercial whitewater outfitters and commercial whitewater guides significantly contribute to the economy of the state of West Virginia. **The Legislature recognizes that there are inherent risks in the recreational activities provided by commercial whitewater outfitters and commercial whitewater guides which should be understood by each participant. It is essentially impossible for commercial whitewater outfitters and commercial whitewater guides to eliminate these risks.** It is the purpose of this article 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.

The Legislature of this State has decided that each participant of a whitewater trip should understand that there are inherent risks in said activity and that it is essentially impossible for River Riders to

eliminate these risks.¹⁷ This language additionally makes it clear that assumption of risk is a defense for whitewater rafting companies. Therefore, the document and language River Riders is seeking to rely upon, which has been read and executed by all plaintiffs, simply reasserts this Code section and provides for another warning of the substantial and inherent risks of whitewater rafting. The Circuit Court's ruling essentially negates the clear and plain language of the Whitewater statute allowing defenses of assumption of risk and warnings and unfairly prejudices the defendants' ability to properly defend its case.

Furthermore, the Whitewater Responsibility Act in WVC §20-3B-3 contains language regarding the standard of care that must be abided by whitewater rafting outfitters:

(a) All commercial whitewater outfitters and commercial whitewater guides offering professional services in this state shall provide facilities, equipment and services as advertised or as agreed to by the commercial whitewater outfitter, commercial whitewater guide and the participant. All services, facilities and equipment provided by commercial whitewater outfitters and commercial whitewater guides in this state **shall conform to safety and other requirements** set forth in article two of this chapter and in the rules promulgated by the commercial whitewater advisory board created by section twenty-three-a, article two of this chapter.

(b) In addition to the duties set forth in subsection (a) of this section, 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.

Additionally, the initial portion of WVC §20-3B-5 states:

It is recognized that some recreational activities conducted by

¹⁷ Additionally, the first portion of WVC §20-3B-5 states, "It is recognized that some recreational activities conducted by commercial whitewater outfitters and commercial whitewater guides are hazardous to participants regardless of all feasible safety measures which can be taken."

commercial whitewater outfitters and commercial whitewater guides are hazardous to participants regardless of all feasible safety measures which can be taken.

(a) No licensed commercial whitewater outfitter or commercial whitewater guide acting in the course of his employment is liable to a participant for damages or injuries to such participant unless such damage or injury was directly caused by failure of the commercial whitewater outfitter or commercial whitewater guide to comply **with duties placed on him by article two of this chapter, by the rules of the commercial whitewater advisory board, or by the duties placed on such commercial whitewater outfitter or commercial whitewater guide** by the provisions of this article.

It has been plaintiffs' apparent position in this case that they were not properly forewarned of any inherent risks involving whitewater rafting or any risks period, depending on the plaintiff. A likely defense strategy in this matter will be to utilize factual evidence and expert testimony to establish that River Riders provided the plaintiffs adequate and proper warnings of the risks and hazards associated with whitewater rafting, and that one element of said warnings will be the document read and signed by each adult plaintiff which contains the following relevant warning and assumption of risk language:

I understand that these activities and services pose substantial risks of injury or death and damage or loss of personal property as the result of exposure; travel on or being in whitewater rivers and streams; travel on roads or rough terrain by foot, conveyances, or other means while participating in activities or using services; the negligence, gross negligence, or bad judgment by me, or other participants; the risks that injuries may occur in remote areas without adequate medical or other services; and other known or foreseeable risks of these activities and services. I represent that I am in good physical condition and health and am able to safely participate in these activities.

In consideration of and as partial payment for being allowed to participate in activities and use services provided by River Riders, Inc., **I ASSUME**, to the greatest extent permitted by law, all of the risks, whether or not specifically identified herein, of all the activities in which I participate and services I use; . . .

This language, the receipt and understanding of said language by plaintiffs, and reliance on said language, goes to the heart of said defenses recognized and allowed by West Virginia law and the Whitewater Responsibility Act¹⁸. This language is akin to having a large sign posted on River Riders's property warning of the hazards and dangers associated with the activities. Evidence of such a sign would be admissible, and evidence of an actual document provided, read by, and signed by the rafting plaintiffs is admissible for purposes sought by the defendants. The Circuit Court's ruling is in direct conflict with the statutory language and West Virginia case law and said ruling prevents the defendants from fairly defending this case.

The warnings provided in the River Riders document are as relevant as any piece of evidence in this case, as all plaintiffs¹⁹, adults capable of making decisions on their own, read and relied upon said document. Trip organizer for the Kaiser Permanent plaintiffs, Katherine Hax testified that she sent the document via email to all of her group. **(Exhibit H, Deposition of Katherine Hax, p. 27)**. Plaintiff Betty Green has testified that she received the document around a week before going on the trip. Summarizing her testimony, Plaintiff Green admitted that she read it the day before; discussed it with fellow plaintiffs Roger Freeman and Brian Payne; became apprehensive about the warnings provided because neither she nor Roger Freeman could swim; talked with her husband about the statement "I understand that these activities and services pose substantial risks of injury or death"; admitted that she read first part of the release about substantial risk as a result of exposure, travel on

¹⁸ The bottom portion of the River Riders document contains the exact language from the Whitewater statute regarding duties of the participants. Without thoroughly briefing this issue, it is River Riders contention that this language is appropriate, relevant, and informative to rafting participants and should be allowed into evidence.

¹⁹ Not all plaintiffs are being cited or referenced due to size restraints and brevity reasons.

or being in white water rivers in streams; testified that this statement worried her; claimed that it made something go off in her head to say hey, I might be doing some type of activity that could either get me hurt or killed; stated that according to the release, the activity could have been risky; testified that her husband's response was, 'what are you going to do if you get out there in the middle of that water and you get sick or you have an asthma attack'; contended that during the conversation with her husband, she knew that there was a possibility that she could end up in the water, and admitted that she agreed that she was worried about falling in the river prior to going rafting because she made the complaints that she couldn't swim. **(Exhibit I, Deposition of Betty Green, pp. 21-26, 103-105, 107)**. Her husband, in summarizing his testimony, also admitted that she was upset about the release and he told her that if you get out there and you don't want to go on the trip, don't sign it; and that he read the 1st part of the release and agreed that he had an understanding of what the dangers were when somebody goes whitewater rafting, but he left the decision up to her. **(Exhibit R, Deposition of George Green, pp. 10, 18)**.

Plaintiff Christina Echegoyen testified to reading, understanding, and signing the document prior to rafting. **(Exhibit E, Deposition of Christina Echegoyen, pp. 13-14)**. Plaintiff Darryl Wiley has testified to the following: that he received and signed the document; he read the underlined portion in the second paragraph and that it meant we were accepting responsibility based on us participating in the trip; he understood that something serious could happen, even somebody being killed; and that he may have discussed the document with other plaintiffs prior to rafting. **(Exhibit K, Deposition of Darryl Wiley, pp. 11-12)**. Plaintiff April Goss received, read, and signed the document, including reading the sentence starting "I understand that these activities and services pose substantial risks of injury or death", although she indicated that this phrase did not

mean anything to her. (**Exhibit S, Deposition of April Goss, pp. 66-67**). Plaintiff Marsha Christopher admitted to receiving, reading, and signing her document and admitted reading the phrase "I understand that these activities and services pose substantial risks of injury or death", which she testified meant to her that there could be a risk on the trip, that those risks could be serious harm or death, and that she understood the terminology contained in the document. (**Exhibit T, Deposition of Marsha Christopher, pp. 81-82**). Plaintiff Donald Spears testified that he also read and signed the document, and understood every word of it. (**Exhibit L, Deposition of Donald Spears, p. 11**). This evidence clearly establishes that said warning language and assumption of risk language was relied upon and understood by the plaintiffs in this case, and evidence of the same should be allowed in the trial of this matter, as it goes to the heart of defendants' defenses and standard of care arguments. It is also important to note that other jurisdictions have held that 'releases' are allowed into evidence in whitewater rafting cases²⁰.

In summary, West Virginia case law, national case law, the West Virginia Whitewater Responsibility Act, and basic tenets of fairness, all demonstrate that River Riders should have the ability to introduce as evidence of proper warnings, assumption of risk, standard of care, and

²⁰ *Forman v. Brown*, 944 P.2d 559 (Colo. App. 1996) (Plaintiff was not entitled to recovery due to signed exculpatory agreement which could only be broken by willful and wanton conduct by the defendant.); *Saenz v. Whitewater Voyages, Inc.*, 226 Cal.App.3d 758 (Cal. App. 1 Dist. 1990) (Express assumption of risks attendant to white water rafting is a complete bar to recovery in a negligence action.); *Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730 (Tenn.Ct. App. 2005) (White water rafting operator granted summary judgment on basis of release signed by participant.); *Lahey v. Covington*, 964 F.Supp. 1440 (D.Colo. 1996) (Exculpatory portion of release agreement barred rafter's claims to the extent they were based on rafting company's alleged negligence.); *Livingston v. High Country Adventure, Inc.*, 156 F.3d 1230 (6th Cir. 1998) (statutory law prohibited liability for simple negligence in white water rafting and waiver agreements signed by Plaintiff prevented claims for simple negligence.)

compliance with West Virginia statutory law, the language contained in the release as quoted herein-above. The Circuit Court's Orders of January 30, 2008 and April 15, 2008 wrongfully handcuffs defendants' ability to properly defend this case as it excludes relevant and important evidence from the jury and does not allow these defendants to argue West Virginia negligence law (assumption of risk defenses) and clear language contained in the Whitewater Responsibility Act. These defendants therefore request by writ the overturning or correcting of the Circuit Court's rulings and ordering that the River Rider's document not be excluded from evidence, pursuant to proper redactions of certain language, and that questions and testimony be allowed regarding the document.

F. CONSOLIDATION OF THE SEPARATE AND DISTINCT CASES FOR TRIAL WAS CLEAR ERROR AS IT WOULD RESULT IN UNFAIR PREJUDICE TO THE DEFENDANTS

Consolidation in this case is improper because it would result in incurable prejudice to this Defendant. Rule 42(a) of the West Virginia Rules of Civil Procedure states: "When 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. 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."

The West Virginia Supreme Court of Appeals held: "The trial court, when exercising its discretion in deciding consolidation issues under West Virginia Rules of Civil Procedure 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. When the trial court concludes in the exercise of its discretion whether to grant or deny consolidation, it should set forth in its order granting or denying consolidation sufficient grounds to establish for review why consolidation would or would not promote judicial economy and convenience of the parties, and avoid prejudice and confusion.” Syllabus Point 2, *State ex rel. Appalachian Power Co. v. Ranson*, 190 W. Va. 429, 438 S.E.2d 609 (1993); *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W. Va. 1, 479 S.E.2d 300 (1996).

The Plaintiffs in the *Christopher* case seek recovery for mental and emotional problems which they allege flow from the rafting incident in question. However, the *Christopher* Plaintiffs are precluded from recovering damages, if any, flowing from Mr. Freeman’s death. While the death of Mr. Freeman may have impacted these plaintiffs, recovery for those damages is barred under West Virginia law.

“A defendant may be held liable for negligently causing a plaintiff to experience serious emotional distress, after the plaintiff witnesses a person closely related to the plaintiff suffer critical injury or death as a result of the defendant’s negligent conduct, even though such distress did not result in physical injury, if the serious emotional distress was reasonably foreseeable.” Syllabus Point 1, *Hildreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992).

“A plaintiff’s right to recover for the negligent infliction of emotional distress, after witnessing a person closely related to the plaintiff suffer critical injury or death as a result of defendant’s negligent conduct, is premised upon the traditional negligence test of foreseeability. A plaintiff is required to prove under this test that his or her serious emotional distress was reasonably

foreseeable, that the defendant's negligent conduct caused the victim to suffer critical injury or death, and that the plaintiff suffered serious emotional distress as a direct result of witnessing the victim's critical injury or death. In determining whether the serious emotional injury suffered by a plaintiff in a negligent infliction of emotional distress action was reasonably foreseeable to the defendant, the following factors must be evaluated: (1) whether the plaintiff was closely related to the injury victim; (2) whether the plaintiff was located at the scene of the accident and is aware that it is causing injury to the victim; (3) whether the victim is critically injured or killed; and (4) whether the plaintiff suffers serious emotional distress." *Supra.* (Emphasis added). The *Christopher* Plaintiffs are not related to Mr. Freeman and, therefore, cannot recover for any emotional distress stemming from his death.

However, in a wrongful death suit "[t]he verdict of the jury shall include, but may not be limited to, damages for the following: (A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses." West Virginia Code § 55-7-6.

While Mrs. Freeman and her children may recover damages for mental anguish and the loss of Mr. Freeman if she establishes liability, the Plaintiffs in the *Christopher* litigation cannot. Given that clear discrepancy, the trial of the cases together would be confusing to the jury, lead the jury to award damages for Mr. Freeman's death to the *Christopher* plaintiffs and will undeniably result in prejudice to this Defendant.

These cases progressed without having been consolidated from filing until April 28, 2008. Moreover, the Circuit Court did not *sua sponte* consolidate these actions. Accordingly all of the parties have been diligently working to prepare their cases for trial based upon the fact that these two cases were separate and distinct actions. Moreover the prejudice that will result to this Defendant if the jury hearing this case also hears testimony about Mrs. Freeman's damages merits continuing these cases as two separate and distinct actions.

The Circuit Court had initially scheduled the trials in both of these actions. During the April 28, 2008 hearing, the Circuit Court consolidated the cases and set trial for July 29, 2008 in both cases. However, the issues presented are different in each action. The time saved by consolidating these trials certainly will not alleviate the prejudice imputed to this Defendant if the trials are consolidated.

The only way to consolidate these trials into one and avoid some of the prejudice is to consolidate the liability phases of these trials under rule 42(a), but to bifurcate the damages issues under Rule 42(c), in order to avoid the problems with jury confusion regarding damages. If the plaintiffs prevail at trial, this would result in having to hold at least three (3) trials to resolve these issues as opposed to two in order to assure a fair trial regarding these issues.

If these cases are consolidated, then the Plaintiffs in both cases will have had the opportunity to depose many of our witnesses multiple times. Accordingly, if these cases are consolidated they will have had the benefits of separate trials for the preparation but none of the drawbacks of having separate trials.

Rule 42(c) of the West Virginia Rules of Civil Procedure states: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and

economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by Article III, Section 13 of the West Virginia Constitution or as given by statute of this State.”

Though the burden of persuasion is on the party seeking bifurcation. *Barlow v. Hester Indus., Inc.*, 198 W. Va. 118, 479 S.E.2d 628 (1996), the prejudice that would result regarding damages would merit bifurcation of liability and damages issues.

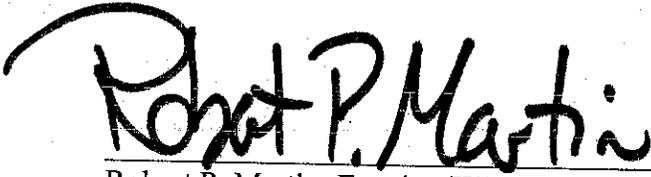
V. CONCLUSION

For all of the foregoing reasons, Petitioners, River Riders, Inc., and Matthew Knott, have no available remedy from the January 30, 2008 “Order Denying Plaintiff’s Motion for Judgment on the Pleadings and Granting Motion in Limine Regarding the Release”, the April 15, 2008 “Order Granting Plaintiffs’ Motion in Limine Regarding the Release and Assumption of Risk”, nor the “Order Consolidating the *Freeman* and *Christopher* cases” ruled upon during the hearing held on April 28, 2008, other than seeking relief through the instant extraordinary Writ. Accordingly, Petitioners respectfully request that this Court grant this Writ of Prohibition, and that it undertake an immediate review to correct the Circuit Court’s substantial, clear, and prejudicial errors. Additionally, in light of the immediate prejudice of continuing to litigate these cases under the incorrect choice of law and consolidated as the current orders require, your Petitioners request that the underlying litigation be stayed, pursuant to West Virginia Code § 53-1-9.

Respectfully submitted,

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

By counsel

A handwritten signature in black ink that reads "Robert P. Martin". The signature is written in a cursive style with a large, looping initial "R".

Robert P. Martin, Esquire (WV Bar No. 4516)

Justin C. Taylor, Esquire (WV Bar No. 8014)

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DOCKET NO. _____
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WV

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

CERTIFICATE OF SERVICE

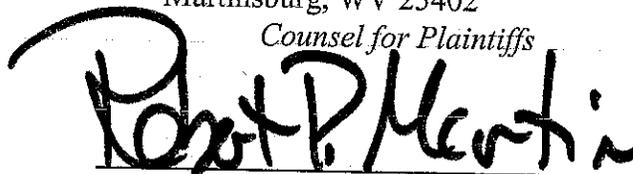
I, Robert P. Martin, do hereby certify that on this 28th day of May, 2008, I served the "MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S VERIFIED PETITION FOR WRIT OF PROHIBITION SEEKING RELIEF FROM THREE ORDERS ISSUED BY THE HONORABLE THOMAS W. STEPTOE" upon counsel by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

The Honorable Thomas W. Steptoe
Judge, 23rd Jud. Cir.
Jefferson County Courthouse
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EXHIBITS

ON

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