

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

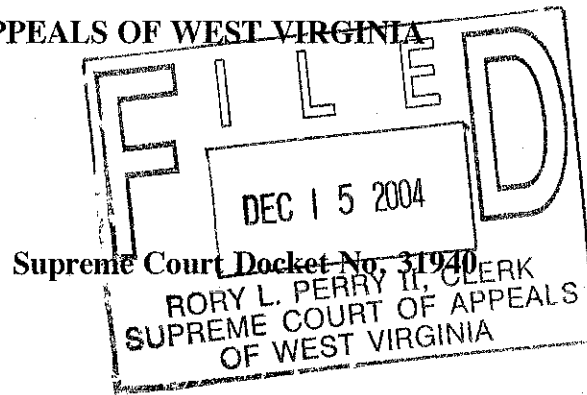
ROBERT D. FORTNER, II,

Plaintiff/Respondent,

v.

KANAWHA STONE COMPANY, INC.,  
a corporation,

Defendant/Petitioner.



**PETITIONER'S REPLY BRIEF**

Respectfully submitted,

Mary H. Sanders, WWSB 3084  
Brian J. Headley, WWSB 9667  
**HUDDLESTON BOLEN LLP**  
One Bridge Place, 4<sup>th</sup> Floor  
10 Hale Street  
P. O. Box 3786  
Charleston, WV 25337-3786  
*Counsel for Petitioner Kanawha Stone  
Company, Inc.*

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Upon review of the Respondent's Reply Brief (the "Response"), it appears that the parties are in agreement as to many matters regarding this appeal. The Petitioner, Kanawha Stone Company, Inc. ("Kanawha Stone"), therefore, writes in reply to the Response for two reasons: 1) to correct factual misstatements, and 2) to emphasize and clarify its legal contentions.

### I. STATEMENT OF FACTS

Throughout the Response, Fortner made many factual allegations with absolutely no citation to any record evidence. Upon review of the record, Kanawha Stone can find little or no support for many of Fortner's contentions. Therefore, Kanawha Stone will correct the significant misstatements.<sup>1</sup>

In the Response, Fortner attempts to portray Kanawha Stone as a malicious defendant that knowingly trespassed over his property in order to more easily and more cheaply reach its worksite. See, e.g., Response at 6. The record, however, indicates otherwise. Upon entering the contract with the Department of Transportation, Kanawha Stone's president, Art King, entered into an agreement with Morris Mullett, the owner of a welding service, to pass over his property in performance of the state contract. Deposition of Art King at 18 (attached hereto as "Exhibit 1"). After doing so, Kanawha Stone simply used the same roads that were used each day by Mullett's business. Id. This usage may be the source of the litigation underlying this appeal, as Fortner himself conceded that "occasionally Mullett's might use" his parking lot. Deposition of Robert Fortner II at 13 (attached hereto as "Exhibit 2"). Thus, to Art King's knowledge, they were not trespassing on anyone's property, as Kanawha Stone's trucks "would have traversed the same ground that the welding service trucks do on a daily basis." Deposition of Art King at 18-19. Accordingly, Kanawha Stone cannot credibly be portrayed as a willful tortfeasor.

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<sup>1</sup> Notably, the Certification Order itself vastly limits the degree to which this Court should consider Fortner's factual allegations, as the first and second certified questions expressly provide that this is "an action for trespass over a corner of an unmarked parking lot." See Certification Order. The third question, however, queries whether "intermittent, non-exclusive crossing of an unmarked parking lot" constitutes a continuing trespass. Id.

Fortner also alleges that "employees of Kanawha Stone entered into a discussion with the father of the Respondent to the effect that they would make it right with the Respondent." Response at 2. The only record evidence relating to an agreement between Kanawha Stone and the father of the Respondent indicates that a Kanawha Stone employee stated that it would correct the dust problems occasioned by trucks traveling on the dirt road near the home of Fortner's father. Deposition of Robert Fortner at 29 (attached hereto as "Exhibit 3"). The record does not, therefore, support Fortner's implication that Kanawha Stone has reneged on its agreement.

## II. LAW AND ARGUMENT

In response to the well-defined measure of damages set forth in Jarrett v. E.L. Harper & Son, Inc., 235 S.E.2d 362, 365 (W. Va. 1977), Fortner boldly asserts that this measure of damages "would clearly not adequately and equitably compensate the Respondent." Though it may be clear to Fortner, Kanawha Stone fails to comprehend how this matter could justify altering 27-year-old precedent in order to further compensate for the unremarkable injuries that Fortner has allegedly suffered.<sup>2</sup>

Kanawha Stone recognizes that Fortner has attempted to portray it as a morally culpable defendant who acted in bad faith and intentionally disregarded Fortner's ownership rights. Kanawha Stone emphatically disagrees with this characterization and submits that any trespass was inadvertent. Nevertheless, even if Kanawha Stone willfully trespassed over Fortner's land, he is still precluded from recovering wheelage or mesne profits and the doctrines of unjust enrichment and continuing trespass remain inapplicable. The West Virginia

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Therefore, Kanawha Stone corrects the factual misstatements only to clarify any ambiguity contained within this final question.

<sup>2</sup> Indeed, the facts of Jarrett are far more disconcerting than those presented by Fortner. In Jarrett, the defendants destroyed a water-well on the plaintiffs' property, leaving the plaintiffs without water for five weeks until the plaintiffs could construct a new well. Jarrett, 235 S.E.2d at 363. The plaintiffs then brought suit for the cost of the new well, the expenses involved in carrying water from a neighbor's home, and other damages represented by the inconvenience, hardship, annoyance, and discomfort occasioned by these circumstances. Id. When faced with these rather harsh facts, the Court concluded that the plaintiffs could recover the cost of rebuilding the well and any related expenses, as well as damages for annoyance and inconvenience. Id. at 365-66. Here, Fortner has not been greatly inconvenienced by these circumstances, as he rarely used the parking lot and has not been sufficiently troubled by the damage to justify its repair.

legislature has specifically addressed willful trespassers and provides that "any person who performs or causes damage to property in the course of a willful trespass shall be liable to the property owner in the amount of twice the amount of such damage." W. Va. Code § 61-3B-3(d). Therefore, Kanawha Stone requests that the Court hold true to the well-established measures of damages provided by Jarrett and the West Virginia legislature.

- 1. In an action for trespass over a corner of an unmarked parking lot by trucks hauling coal and other material for a highway construction contractor for the State of West Virginia, the owner of real estate is not entitled to damages in the form of wheelage.**

Wheelage is the duty or toll paid for vehicles passing over certain ground. Black's Law Dictionary 1595 (6th ed. 1990). Fortner flatly states that wheelage "would clearly have been the method of compensating the Respondent" for use of his land. Fortner has submitted nothing that would support this contention, as he can point to no wheelage agreement between Kanawha Stone and any other party. Furthermore, as a practical matter, Fortner's proposed recovery is illogical. Again, the trespass at issue involved trucks intermittently and non-exclusively crossing the corner of an unmarked parking lot. It is not difficult to imagine that the recovery of wheelage could be worth well more than the ownership value of the corner of the parking lot, if not the entire lot.

The parties agree that Kentucky expressly forbids recovery of wheelage in a trespass to realty action. See Kentucky Mountain Coal Co. v. Hacker, 412 S.W.2d 581 (Ky. 1967) (refusing recovery of wheelage where coal company hauled coal across plaintiff's land, though it had no legal right to do so, and overruling contrary decisions). Nevertheless, Fortner contends that the earlier decisions permitting wheelage "made as much or more legal sense that [sic] the ones denying wheelage." Response at 3. Obviously, the Supreme Court of Kentucky disagrees, and Fortner can offer no other authority that supports his contention.

Fortner also attempts to distinguish Kincaid v. Morgan, 425 S.E.2d 128, 134 (W. Va. 1992), as a "simple trespass between two adjoining land owners where one had trespassed across the boundary when the boundary line was disputed," stating that "it was not intended to

restrict an award for damages in a case not similar to that one.” Response at 3. In Kincaid, however, this Court explained that the defendants “acknowledge that their building was constructed so as to encroach upon [the plaintiffs’] property, even if the placement of the boundary is where they contend.” Kincaid, 425 S.E.2d at 133. Thus, although the boundary was disputed, the defendants were still knowingly trespassing by constructing their restaurant as they did. Nevertheless, the Court limited the plaintiffs’ recovery to the diminished value of the property occasioned by the trespass, even though the defendants had permanently trespassed in order to earn a profit. Id. at 134 (citing the “longstanding rule” expressed in Rowe v. Shenandoah Pulp Co., 26 S.E. 320 (W. Va. 1896)). Here, Kanawha Stone’s alleged trespass was inadvertent, non-exclusive, and temporary. This Court should not, therefore, expand the damages recoverable in a trespass to realty action to include wheelage.

2. **In an action for trespass over a corner of an unmarked parking lot by trucks hauling coal and other material for a highway construction contractor for the State of West Virginia, the owner of the unmarked parking lot is not entitled to damages for unjust enrichment or mesne profits.**

#### A. Unjust Enrichment

An action for unjust enrichment may lie where “benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefore.” Realmark Developments, Inc. v. Ranson (“Realmark I”), 542 S.E.2d 880, 884-85 (W. Va. 2000). Furthermore, “the measure of damages in an unjust enrichment claim is the greater of the enhanced market value of the property or the cost of the improvements to the property.” Syl. Pt. 2, Realmark Developments, Inc. v. Ranson (“Realmark II”), 588 S.E.2d 150 (W. Va. 2003). As was explained in Kanawha Stone’s Opening Brief, the language of Realmark II indicates that unjust enrichment is inapplicable to these circumstances. Fortner, however, advises that “the enhanced market value of the property” referred to in Realmark II “clearly means that the enhanced market value of the use of the Respondent’s property.” Although Fortner’s contention is unclear, any interpretation illustrates that Fortner should be precluded from

recovery for unjust enrichment. Certainly, Fortner is not asserting that Kanawha Stone's use of the corner of his parking lot enhanced the value of the parking lot, as this would be a curious basis on which to bring suit.

If, however, Fortner is asserting that Kanawha Stone's use of his property has enhanced the value of Kanawha Stone's own property, then Fortner misunderstands the Realmark decisions. In Realmark I, a tenant improved his landlord's property with the understanding that his lease payments could subsequently be credited toward the outright purchase of the property. See Realmark I, 542 S.E.2d at 884-85. At the conclusion of the lease, however, the landlord refused to assist in financing the purchase, and the tenant brought suit for unjust enrichment to recover the amounts expended on the improvements during his tenancy. This Court reviewed the scenario and determined that an action for unjust enrichment was appropriate. Id. Thus, the plaintiff could bring suit for the sums expended by the plaintiff to improve the defendant's property. Here, the Plaintiff seeks to recover the increased value of the Defendant's property allegedly occasioned by the *Defendant's* inadvertent use of the *Plaintiff's* property. As this analysis reveals, the Realmark decisions do not support recovery on a theory of unjust enrichment where the Kanawha Stone allegedly increased the value of its own property through the use of Fortner's property.

Much of the Response regarding the unjust enrichment claim focuses on the facts of the case. For example, Fortner explains that "it does not take a genius to know that" Kanawha Stone lessened its transportation expenses through the use of his property. Response at 4. Although it may not take a genius to understand this principle, it is likewise not a great intellectual feat to understand that the certified question itself limits this Court's consideration of the facts to "an action for trespass over a corner of an unmarked parking lot." Therefore, Kanawha Stone must again question whether any benefit was conferred upon it by its inadvertent crossing of a corner of an unmarked parking lot at the intersection of two roads.

Finally, Fortner again submits Edwards v. Lee's Adm'r, 96 S.W.2d 1028 (Ky. 1936), as supportive of his position. As explained in Kanawha Stone's Opening Brief, the facts in

Edwards are peculiar and are inapplicable to the present circumstances. Moreover, subsequent opinions have characterized Edwards as a resource conversion decision and have limited it to its facts. Kanawha Stone submits that Fortner's reliance on a nearly 70-year-old, out-of-state decision with extremely unusual facts demonstrates the frailty of his position. Therefore, given the lack of support for unjust enrichment damages, both legally and equitably, Kanawha Stone again requests that this Court affirm the trial court and deny Fortner's recovery on the basis of unjust enrichment.

### B. Mesne Profits

Mesne profits are "intermediate profits: that is profits which have been accruing between two given periods," and they most often constitute the "value of the use or occupation of the land during the time it was held by one in wrongful possession." Dumas v. Ropp, 558 P.2d 632, 633 (Idaho 1977) (citing Black's Law Dictionary). Fortner ignores the obvious distinction between this appeal and Dumas, see Opening Brief at 8-9, and he directs this Court to 87 C.J.S. Trespass § 153, which provides that "the worth of the use of the property while a trespass is continued is the measure of mesne profits, which may be shown by the reasonable rental value." Fortner contends that mesne profits are recoverable here in the form of wheelage; however, "an action for mesne profits springs from a trespass and a tortious holding." 87 C.J.S. Trespass § 153. Even if this Court adopts the language of Dumas or the Corpus Juris Secundum, it must likewise conclude that traveling "over a corner of an unmarked parking lot by trucks" constitutes "occupancy" or "a tortious holding" to allow Fortner's recovery of mesne profits. Because Kanawha Stone's inadvertent acts do not rise to the level of an occupancy or a tortious holding, Kanawha Stone again requests that this Court deny recovery of mesne profits in the form of wheelage.

### 3. Under West Virginia law, the intermittent, non-exclusive crossing of an unmarked parking lot by trucks for a highway construction project does not fall within the purview of a continuing trespass.

A continuing trespass has been defined as "a trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property." Black's Law

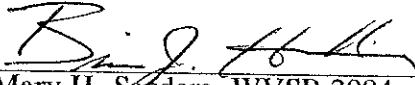
Dictionary 1220 (7th ed. 2000). It has also been described as “an appropriation or an attempt to appropriate the land itself or its use to the use of the trespasser.” 87 C.J.S. Trespass § 152. Here, Kanawha Stone did not permanently invade Fortner’s ownership rights, and it has not attempted to appropriate Fortner’s land to its exclusive use. Therefore, even if this Court determines that West Virginia recognizes a cause of action for a “continuing trespass,” Fortner should realize no such recovery.

However, even assuming that a continuing trespass did occur, Fortner’s recovery should be limited as provided by the West Virginia legislature. According to the *Corpus Juris Secundum*, where a defendant has committed a continuing trespass, the proper recovery is the cost of repair or the worth of the use of the property. *Id.* In West Virginia, however, the damages for a willful trespass to realty have been set at “twice the amount of such damage” occasioned by the trespass. W. Va. Code § 61-3B-3(d). Thus, the “worth of the use of the property” is irrelevant, and Fortner’s recovery should be limited accordingly.

Because Kanawha Stone’s actions do not rise to the level of a continuing trespass, Fortner should be denied recovery on this theory. However, even if a continuing trespass did occur, Fortner’s recovery should be limited to the cost of repair, as this is the equitable solution in the case of an inadvertent trespass. If, however, this Court concludes that sufficient evidence exists to proceed on a willful trespass theory, Fortner’s potential recovery should be limited as provided by West Virginia Code § 61-3B-3(d).

### III. CONCLUSION

Fortner has proposed four novel theories in seeking recovery of damages in excess of the costs to repair the corner of his parking lot. Any recovery, however, should be limited to well-defined measure of damages previously expounded by this Court and the legislature. Any additional recovery would be vastly inequitable and would only encourage the future pursuit of financial windfalls by plaintiffs with nominal injuries. **WHEREFORE**, the Petitioner Kanawha Stone Company, Inc., by counsel, respectfully requests that this Court **AFFIRM** the decisions reached by the Circuit Court of Logan County.

  
Mary H. Sanders, WWSB 3084  
Brian J. Headley, WWSB 9667  
*Counsel for Petitioner Kanawha Stone  
Company, Inc.*

**HUDDLESTON BOLEN LLP**  
Post Office Box 3786  
Charleston, West Virginia 25337  
(304) 344-9869  
OF COUNSEL

# **EXHIBIT 1**

02

in this case to cross their property?

A. I have no knowledge of that.

Q. Were they informed that they would have to get such permission by your company?

A. No.

Q. They were sub-contracting for your company. Is that correct?

A. Yes.

Q. Do you deny that coal was transported and your trucks and other machinery did travel over the property of the son, Robert Fortner?

A. As I stated earlier. We had a written agreement with the welding/machine company to use the same roads that they used on a daily basis and that is exactly what we used.

So, no, I don't have any knowledge we traveled on someone else's property.

Q. Do you know who owned all of the roads that you went over?

A. No. I did not research to find out who owned the roads. As I stated earlier, no one complained or made any issue of this until after the project was complete to

**Larry K. Coffindaffer**

CERTIFIED REPORTER  
SEVENTH JUDICIAL CIRCUIT OF WEST VIRGINIA  
LOGAN, WEST VIRGINIA 25601

my knowledge.

Q. Was it ever necessary to leave any of the roads and go on any other property in order to get there?

A. We followed the roads that were established by the welding service or the machine shop.

Q. Let me put it this way. Isn't there a point where bib trucks had to cut the corner instead of staying on the road and went across a paved parking lot area?

A. There was a corner that you had to come around at the Fortner house. Whether the trucks had to leave the roadway in order to do that or not I honestly don't know.

I know that tractor trailers come in and out of the welding service, the machine shop, on a daily basis.

Our trucks or our subs trucks would have traversed the same ground that the welding service trucks do on a daily basis.

Q. Did your company or anyone at your direction research what property the welding shop or machine shop had a right to give you permission to travel over?

A. Not to my knowledge, we didn't know.

Q. You just entered into a contract with them and did not research to see that they owned what they were

**Larry K. Coffindaffer**

CERTIFIED REPORTER  
SEVENTH JUDICIAL CIRCUIT OF WEST VIRGINIA  
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# **EXHIBIT 2**

Q Oh, he did? But that was one little piece of property that was separate from --

A Yes.

Q -- his other property? And when you bought it, it was -- was it just raw land or dirt, gravel?

A Dirt.

Q Dirt?

A Garden spot.

Q Oh, he used it as a garden?

A No.

Q What did he use it for?

A Nothing.

Q Just a --

A Investment.

Q What's the --

A I assume. I mean I shouldn't --

Q What's the size of that lot?

A About 40 by 80.

Q Tell me what you've done with it since you've owned it?

A Paved it, reclaimed it. I mean from being a garden spot, upgraded it, improved it.

Q When did you pave it?

A Not too long after I bought it, so

approximately ten years or so.

Q Have you ever repaved it or just once?

A Well, the company repaved it due to the damages that they had done to it back years ago.

Q You mean by driving on it, parking on it?

A Uh-huh, (yes). They had repaved it, so it was in good shape before all this other stuff.

Q So Robco Mine Service did it or Mullett's?

A Robco would have done it, and the State did some because they built a bridge there and they damaged it.

Q The bridge that's on out the road where your parents are?

A Uh-huh, (yes).

Q When did the State repair it?

A Right after they finished their bridge project, which I -- it's been four or five years ago.

Q So it's been patched or repaved totally?

A I'd say they repaved 50 percent of it.

Q The State did?

A Uh-huh, (yes).

Q And then Robco, did they repave it or just patch it?

A Well, really it's kind of confusing. I don't

1 know if Robco or the State did it, to be truthful with  
2 you. It's just one of those things that it got done.

3 Q But it was a patchwork, not a whole total --

4 A Well, no, it was total as far as the half.

5 Q Half of it?

6 A Yeah, because that's what really gets bothered  
7 or damaged.

8 Q That's the half that's closer to the --

9 A Road.

10 Q -- the creek, Dingess Rum?

11 A Well, you've got two roads there, parallel  
12 road to the creek and a perpendicular road to the creek.

13 Q But it's on that lot -- the end of the lot  
14 that's closer to the creek is where --

15 A Well, obviously.

16 Q -- where they did the paving?

17 A They wouldn't go onto the far corner.

18 Q All right. And you own -- that lot goes all  
19 the way over to that metal building where Robco was?

20 A Yes, ma'am.

21 Q Do you get any rent for allowing anybody to  
22 park there now from the new place that owns Mullett's or  
23 whoever is there now?

24 A No, no. They do me favors, I do them favors.

1 Q So that piece of land doesn't produce any  
2 income?

3 A No. But they don't park on it either. They  
4 don't use it.

5 Q Basically you just allow your -- it's a parking  
6 lot for your family?

7 A Yeah, personal. Occasionally Mullett's might  
8 use it, but they let me dump my garbage or my parents dump  
9 their garbage in their dumpster.

10 Q Since you've owned the property, how much money  
11 have you had to put into the property for repair of that  
12 lot?

13 A For repairing the lot?

14 Q Repairing it or paving it or whatever you --

15 A When I originally paved it, seemed to me like  
16 that cost almost \$10,000.

17 Q Who did it for you?

18 A Company, I don't remember their name. They  
19 had me in court too.

20 Q What for?

21 A Over BS.

22 Q What for?

23 A Well, the partners -- it was partners and

24 the partnership fell apart and I had to go to testify how

# **EXHIBIT 3**

1 Q Did he tell you anything he could do about it  
2 or do for you?  
3 A Yes, ma'am, he did. He'd call them and he'd  
4 make them come down and wet the road down, and one time  
5 they brought down what they call a dribbler and the dirt  
6 just -- because it had no pressure, it just turned to  
7 mud, so he got them to bring in a truck with pressure  
8 on it where it would wash the mud off.  
9 Q And how many times did they do that?  
10 A I don't remember.  
11 Q But they did it more than once?  
12 A Yes, ma'am.  
13 Q Did that take care of the dust problem?  
14 A No, ma'am. For about an hour.  
15 Q And then when it dries, you've got the dust  
16 again?  
17 A (Witness nods head yes)  
18 Q Yeah, okay.  
19 A Yes, ma'am.  
20 Q Anybody else from the State that you recall  
21 talking to about your problem?  
22 A No, ma'am.  
23 Q How about with Kanawha Stone, you talked to  
24 George and then you say you talked to Art King too?

1 really sticks out in my mind is he told me he felt like  
2 the State ought to compensate me, and I told him that the  
3 State wasn't the one that was doing me the damage, it was  
4 Kanawha Stone.  
5 Q And the damage you're talking about was the  
6 dust?  
7 A Yes, ma'am, the dust and busting up the parking  
8 lot.  
9 Q When you say busting up, do you mean cracks in  
10 the asphalt?  
11 A Yes, ma'am.  
12 Q Since the work was done up there by Kanawha  
13 Stone, have you had any -- done any patching or  
14 resurfacing?  
15 A No, ma'am.  
16 Q Now, after you talked to Lance, Rick Lance,  
17 you talked to Art King?  
18 A Yes, ma'am.  
19 Q And where did you talk to him? Where was he  
20 when you talked to him?  
21 A In his trailer.  
22 Q Over there near your place?  
23 A Yes, ma'am, on that lot that they have leased.  
24 Q And tell me about the conversation you had

1 A Yes, ma'am, and I also talked to Rick Lance.  
2 Q Rick Lance?  
3 A Yes, ma'am. I talked to him before I did Art  
4 King.  
5 Q Was Rick Lance there in the trailer?  
6 A No, ma'am. He come in my living room and  
7 he told me he felt like the State ought to compensate me  
8 instead of them.  
9 Q And when he came to your house, had you called  
10 to ask somebody to come over or did he just happen to  
11 stop by?  
12 A No, he come by because I had blocked the road  
13 and I told them the only way that I would move my truck  
14 for them to get them trucks out is if they would give me  
15 a telephone number to get ahold of them in Charleston,  
16 and so the mechanic and the truck driver give me the  
17 telephone number. I told them I would not move my truck  
18 unless somebody come over and talked to me. That's the  
19 way I had to do to get them to even talk to me.  
20 Q So then that's when Rick Lance came over and  
21 talked to you?  
22 A Yes, ma'am.  
23 Q And tell me about that conversation.  
24 A Well, the only part of it I remember that

1 with Art?  
2 A Well, Don Wandling was with me and Don really  
3 done most of the talking about getting some kind of  
4 settlement on the dust, and Rick Lance said, yeah, said,  
5 we don't deny we caused problems with dust, said, you  
6 cannot do construction work without dust, and he says,  
7 we will take care of it, get an estimate on it. So when  
8 they got done with the biggest part of the dust, I got an  
9 -- Don did --  
10 Q You what?  
11 A When they got done with the biggest part of  
12 their dust work, Don sent someone up there to give an  
13 estimate on cleaning the house and the carport and the  
14 barbecue grill, and I never heard no more about it.  
15 Q You never had it cleaned?  
16 A No. My wife cleaned part of it. We had to.  
17 We couldn't sit on the porch. The dust was a half-inch  
18 thick on everything I own.  
19 Q But do you know what happened to the estimate  
20 that --  
21 A I have no idea. You'll have to ask Don about  
22 that.  
23 Q Did you ever have any more conversations with  
24 anybody at Kanawha Stone after that?

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ROBERT D. FORTNER, II,

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v.

Supreme Court Docket No. 31940

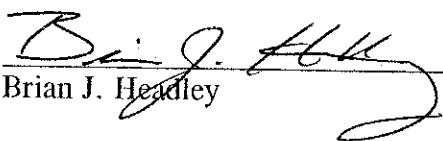
KANAWHA STONE COMPANY, INC.,  
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Defendant/Petitioner.

CERTIFICATE OF SERVICE

I, Brian J. Headley, counsel for Kanawha Stone Company, Inc., hereby certifies that service of the foregoing *Petitioner's Reply Brief* was made upon counsel of record this the 15<sup>th</sup> day of December, 2004, by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

Bernard L. Spaulding, Esq.  
P.O. Box 957  
Logan, WV 25601  
*Counsel for Plaintiff/Respondent*

  
\_\_\_\_\_  
Brian J. Headley