

No. 32672

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**At Charleston**

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**ULRIKA BROWNING, TIMOTHY HIGGINS, AND WENDY HIGGINS**

*Plaintiffs Below, Appellants,*

v.

**JUDITH HALLE and  
ANDREAS HALLE**

*Defendants Below, Appellees.*

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*From the Circuit Court of  
Upshur County, West Virginia  
Civil Action No. 02-C-104*

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**APPELLANTS' BRIEF**

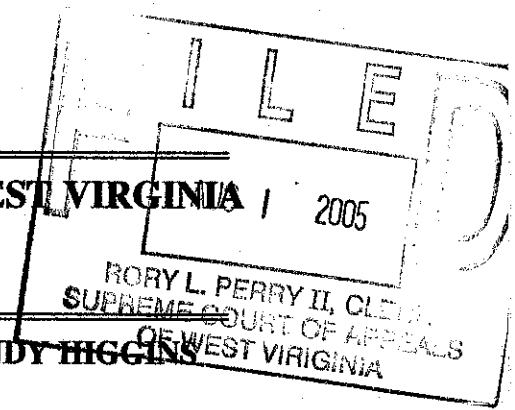
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**ORAL ARGUMENT IS REQUESTED**



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## **I. INTRODUCTION**

This Appeal stems from the October 6, 2004 Order of the Circuit Court of Upshur County, Judge Thomas A. Keadle, which granted Appellees/Defendants Summary Judgment as to all of Appellants/Plaintiffs' causes of action alleged in their Complaint. The parties are neighbors and all reside upon the waters of Laurel Run Creek in the rural Rock Cave area of Upshur County, West Virginia, an area known locally as Eden Hollow. The underlying Complaint filed by the Appellants against the Appellees alleges that the actions by the Appellees and their contractors upon their land have damaged and continue to damage Appellants riparian rights and have created a nuisance. The underlying Complaint requests injunctive relief and money damages. Following almost two years of discovery activity with jury trial scheduled one week later on September 21, 2004, on September 15, 2004, after a ten minute hearing, the Court from the bench granted Appellees Summary Judgment. Appellants assert that the Circuit Court of Upshur County exceeded its authority and abused its discretion in granting summary judgment in the face of numerous asserted facts establishing a prima facie case, supported by competent and credible opinion testimony from Appellants' biology expert and hydrology expert, which should have been allowed to be presented to a jury.

## **II. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW**

While this matter is an appeal of a an order granting Appellees summary judgment, the facts and causes of action asserted in Appellants' Complaint filed below in the Circuit Court of Upshur County, Civil Action No. 02-C-104, were originally asserted in response to a prior lawsuit filed by the Appellees herein, Judith N. Halle and Andreas Halle, against Appellant Ulrika

Browning, also in the Circuit Court of Upshur County, Civil Action No. 02-C-63. The Complaint filed by the Halles against Ulrika Browning sought temporary and permanent injunctive relief as well as money damages for nuisance and interfering with the Halle's quiet enjoyment of their real estate. On July 30, 2002 after hearing witness testimony, which included assertions by Appellant Browning of similar conduct by the Halles, and considering evidence on the Halles' Motion for Temporary Injunction, the Circuit Court entered an Order enjoining all parties from the following:

1. Playing loud music, television or similar devices or engaging in conduct that disrupts the other parties quiet enjoyment and use of their property.
2. From blocking the roadways or interfering with the other parties, guests, invitee's or otherwise.
- c. That the parties are required to keep dogs on their own property and parties are to inhibit the barking of their dogs so as to prevent the same from annoying neighbors.

Thereafter, Ms. Browning filed in response to the prior lawsuit an Amended Answer and Counterclaim alleging, with the Higgins joining as third party claimants, among other things, as follows:

- a. Activities of the Halles damaged the riparian water rights of each of your Petitioners;
- b. The acts and omissions of the Halles constitute a nuisance interfering with the quiet enjoyment of the respective property of Petitioners Browning and Higgins.

By Order of October 7, 2002, the Circuit Court dismissed the Counterclaims and third party claims, without prejudice to refile such claims as a separate action. On December 12, 2002,

your Appellants herein filed in this Court a Petition for Writ of Prohibition (No. 022483) which sought to prohibit the Circuit Court from subjecting Ms. Browning to a criminal contempt jury trial for alleged violations of the July 30, 2002 Temporary Injunction Order in disregard of her due process rights, and to prohibit the Circuit Court from dismissing the riparian and nuisance claims against the Halles and forcing your Petitioners to file a separate lawsuit to assert those claims. By Order of January 16, 2003, this Court refused the Petition for Writ of Prohibition.<sup>1</sup> Just prior to the entry of this Court's January 16, 2003 Order, the Circuit Court canceled the criminal contempt jury trial and referred the Petition for Contempt to the Upshur County Prosecuting Attorney for investigation, who later reported to the Circuit Court that he could not find probable cause to prosecute the Petition for Contempt.

On December 9, 2002 your Appellants filed their Complaint, subject of the instant Appeal, in the Circuit Court of Upshur County, Civil Action No. 02-C-104 against the Halles alleging that the Halles' actions and the acts of their contractors upon their land had damaged the Appellants' riparian rights and created a nuisance suffered by the Appellants (see *Complaint*).

On September 7, 2004, the Halles filed their *Motion for Summary Judgment* and *Memorandum of Law in Support* thereof ("*MSJ*") with attached exhibits. On September 13, 2004, Appellants filed their *Response in Opposition to Defendants' Motion for Summary Judgment* ("*Response to MSJ*") with attached exhibits. At a September 15, 2004 hearing, the Appellants filed their *Addendum to Response in Opposition to Defendants' Motion for Summary Judgment* and the Court heard argument. From the bench, and by written Order of October 6, 2004, the Circuit

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<sup>1</sup>The Complaint, transcript of July 30, 2002 hearing, the Temporary Injunction Order and other referenced documents can be found as part of the Petition for Writ of Prohibition previously filed with the Court.

Court granted the Halles' Motion for Summary Judgment as to all issues (see Transcript of Proceedings had 9/25/04<sup>2</sup>), in the face of extensive discovery conducted by the parties and eleven (11) depositions of the parties and fact and expert witnesses.

On October 14, 2004, your Appellants filed nine deposition transcripts, *Affidavit of Plaintiff Timothy Higgins* with three (3) VHS videotapes and *Plaintiffs' Responses to Defendants' First Set of Interrogatories* and their *Motion for Relief From Judgment or, In The Alternative, To Reconsider the Court's Order Granting Defendants' Motion for Summary Judgment*.

On November 19, 2004, the Halles filed their (1) *Memorandum of Authority in Opposition to Plaintiffs' Motion for Relief from Judgment and Motion to Reconsider the Court's Prior Order* and (2) *Motion to Strike Plaintiffs' Submission of Additional Discovery in Support of Motion for Relief From Judgment*.

Appellants' Petition for Appeal was filed with the Court February 3, 2005 and granted on May 9, 2005. This Court by its Order of May 9, 2005 "ordered that the above-captioned proceeding be heard, submitted and determined upon the original record, briefs of counsel and oral argument, if requested by the parties. " By letter dated May 18, 2005, the Appellants were advised that they had 20 days to designate such portions of the record deemed relevant to the issues presented on appeal. On May 25, 2005 Appellants mailed to the Circuit Clerk of Upshur County Plaintiffs' Notice of Adequate Record for Appeal advising that the Plaintiffs do not desire to supplement the record as previously prepared pursuant to Rule 4(c) of the West Virginia Rules of Appellate Procedure. On May 25, 2005 the Circuit of Upshur County entered an Order

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<sup>2</sup>The 9/25/04 date listed on the docket sheet should reflect the 9/15/04 date.

granting the Halles' *Motion to Strike* discovery filed in support of Appellant's *Motion for Relief From Judgment or, In The Alternative, To Reconsider the Court's Order Granting Defendants' Motion for Summary Judgment*, without ruling upon the Appellant's *Motion or Relief from Judgment*. By letter of June 27, 2005 the Circuit Clerk advised the parties the record for appeal was forwarded to the West Virginia Supreme Court of Appeals. The Clerk did not transmit the deposition transcripts, videotapes, documents and other items filed with the Notice of Filing on October 14, 2004, which was part of the record filed with Appellants' Petition for Appeal.<sup>3</sup>

### III. APPELLANTS' STATEMENT OF FACTS

In early 2000 the Halles, purchased approximately eighty (80) acres of Upshur County farmland that they found via the internet. This tract is at the top of a watershed for a tributary of Laurel Run Creek near Rock Cave, Upshur County, West Virginia, and is locally known as Eden Hollow. The contour of the Halles' tract is fairly steep, rugged and resembles a funnel. Their buildings are located close to the drain of this funnel. The Halles, both college professors, moved to Eden Hollow after living most of their lives in Whittier, California. They planned to start an Arabian horse boarding and breeding operation on the subject tract. Judith Halle has a Ph.D in nursing from UCLA concentrating in maternal fetal physiology and has served as an expert witness over 40 times. (see *Transcript of Deposition of Judith Halle*, pp.4-13).

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<sup>3</sup>Appellants further address this issue herein below. In order to distinguish between references to facts in the record as transmitted with Appellants Petition for Appeal and the record as most recently transmitted by the Circuit Clerk to this Court, references herein to any stricken discovery items are highlighted in bold text.

Appellant Browning and her two teenage daughters live on her property separated from the Halles' land by the gravel road. Petitioner Browning is the daughter of the locally known wood sculptor Wolfgang Flor, who built by hand the houses situate on the Halles' property. Appellant Browning in fact grew up on the Halles' property. Appellant Higgins is owner of an auto repair and parts business specializing in Volvo products and lives just downstream from Ms. Browning and the Halles. The subject stream runs from the Halles' land across land of Ms. Browning and joins the main stem of Laurel Run Creek which then runs across the land of Appellants Higgins. Approximately 200 yards distance separates the Higgins from the Halles.

The Appellants alleged in their Complaint that the Halles created a nuisance and have otherwise damaged Appellants' riparian rights by the actions and inactions of Halles that has resulted in pollution of the subject stream with sedimentation and animal excrement, as well as an increased frequency of flooding (see *Complaint and Response in Opposition to Defendants' Motion for Summary Judgment* ).

The waters of Laurel Run is the primary source of water that has been used, and which use continued, by each of your Appellants for drinking, domestic (i.e., washing clothes), agricultural (gardening and watering animals) and other purposes for as long as they have owned their respective real estate (the Higgins since 1972 and Ms. Browning since 1982), until mid-2000 when the Halles began the activities subject of this appeal. Ms. Browning has drunk and otherwise used the waters of Laurel Run her whole life.

Within a few months of their purchase of their property, the Halles began clear-cutting timbering, construction and other activities which have adversely affected the color, drinking purity, quality, quantity and flood mitigation qualities of the water flowing through Laurel

Run and upon the real estate of your Appellants. Consequently, these activities have adversely affected the quality of life of Appellants that existed prior to the commencement of the activities by the Halles. The stream at the Higgins' property has flooded since then with a frequency not ever seen, even with the heavy rainfalls of the mid-1980's.

Prior to the commencement of the timbering, construction and other activities by the Halles, the Higgins advised the Halles in writing of the sensitive ecology of Laurel Run and requested that they conduct the planned clear cut timbering operations so as not to adversely impact the Higgins and other people living downstream from the Halles' property. There is no dispute that Dr. Halle received this letter. (see *Transcript of Deposition of Timothy Higgins*, pp. 106-108 and Exhibit 7, *Transcript of Deposition of Judith Halle*, pp. 78-82, *Transcript of Deposition of Wendy Higgins*, pp. 39-40).

On June 9, 2003 Appellants' biology expert Dr. Benjamin Stout III and hydrology expert Richard Eades conducted an inspection of the Halles' land pursuant to Rule 36 of the W. Va. R. Civ. Proc. During this inspection, Appellants discovered the Halles had, among other things:

- a) recently built a barn located within 25 feet of the subject creek with visible effluent flowing from the adjacent feeding and exercise area directly into the creek;
- b) had paved a driveway and area adjacent to the barn and over the creek;
- c) had apparently installed a drain pipe from the floor of the barn directly into the creek<sup>4</sup>;

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<sup>4</sup>It was later learned in discovery that the floor drain was installed into the home waste treatment unit, which according to Randy Reger, the installer, compromises the proper operation of the unit. (see below)

- d) had built a large animal manure pile on the bank of the creek; and,
- e) installed other drain pipes emptying apparently from the residence structure into the creek.

(See, *Response to MSJ*, Exhibit 2 Site Assessment Report 5/16/04, by Richard T. Eades and Exhibit 3, Deposition of Richard Talmadge Eades, pp. 104-107, Exhibit 4, Dr. Benjamin Stout Report 9/19/03 and Stout Report May 19, 2004, Exhibit 5, Deposition of Dr. Benjamin Stout, pp. 11-46 *Affidavit of Timothy Higgins*, VHS videotape marked "Rick Eades".)

As a result of the discovery of the matters outlined above, Appellants requested, and were granted, with some delay, the opportunity to withdraw water samples from the subject creek upon the Halles' property for fecal coliform testing. The water samples were taken by Dr. Stout on September 2, 2003. Dr. Stout also took water samples from various points further downstream and delivered all of the water samples to Reliance Laboratories in Bridgeport, West Virginia for testing for fecal coliform analysis (see *Plaintiffs' Motion for Preliminary Injunction* and Exhibits attached thereto). The fecal coliform analysis results reflected a bacteria count in the water emanating from the Halles' subject real estate grossly in excess of limits allowed by state and federal regulations for public water plants and grossly in excess of limits for safe human and/or animal consumption or other recreational, household and/or agricultural use. (See *Plaintiffs' Motion for Preliminary Injunction*, Exhibit A, Dr. Stout's Report and Reliance Laboratory test results). The Appellants forwarded Dr. Stout's report to the W.Va. Department of Environmental Protection as a complaint. (see, *Motion for Summary Judgment and Memorandum of Law in Support*, Exhibit 3).

Another source point of fecal coliform contamination and possible intentional wrongful act of the Halles was revealed through discovery. Dr. Judith Halle testified in deposition that she had the drain to the concrete floor of their \$50,000 barn plumbed into the their Mighty Mac home aeration human waste treatment unit. (See, *Response to MSJ*, Exhibit 6, *Transcript of Deposition of Judith Halle* pp.108-109) This unit treats human waste and discharges treated effluent into the subject stream and requires a water pollution permit from the DEP. Randy Reger, the manufacturer and installer of the unit, and disclosed by Respondents as one of their experts, testified that to run animal wastes through the Mighty Mac unit would compromise its operation and discharge effluent that would degrade the quality of the water in the stream. (See, *Response to MSJ*, Exhibit7, *Transcript of Deposition of Randy Reger*, pp.50-57).

The grounds for Appellants' theories of liability and claims for damage to the subject stream are twofold: 1) soil erosion and sedimentation, caused by the logging and other farming/construction activities by the Halles, and, 2) fecal coliform contamination due to several source points created by the Halles. Appellants are unable to use the stream for drinking, domestic and farming purposes in the same way as they have used the subject stream prior to the arrival of the Respondents. The subject stream continues to turn muddy after any rainfall event of approximately 1/4 inch or greater preventing Appellants from using the water from the stream for washing clothes, their vehicles or anything else for several days.

Appellants' expert opinions establish that, at a minimum, after any rainfall event of approximately 1/4 inch or greater that the subject stream is contaminated with unsafe levels of fecal coliform for a period of several days thereafter, likewise preventing Appellants from using the stream safely for the several day period. Appellants cannot ever use the water with

any confidence of its purity given the uncertainty of the proper operation of the Halles' Mighty Mac waste treatment unit. Meanwhile, the Appellants have been forced to incur extreme aggravation and additional expense to maintain their households in the usual manner because of the Halles' activities. [see *Transcript of Deposition of Timothy Higgins*, pp.17-23 (damage to Higgins' property and money damages from Halles activities), pp.36-36 , 41-49 (evidence of nuisance/flooding from Halle activities), pp.51-53 (sedimentation and erosion), pp. 73-75 (emotional distress), pp.76-77 (need for alternative water sources), pp.89-94, (describes photos depicting sedimentation problems), pp. 100-103 (loss of fish life in stream), pp. 115-121 (evidence of nuisance/effect of sedimentation on day to day activities); see *Transcript of Deposition of Wendy Higgins*, pp. 6-13 (detrimental effects of Halles' activities on Higgins); pp. 14-16 (history of drinking water from creek/Culligan man says water is pure), pp. 19-30 (adverse effect of Halles activities on Higgins), pp. 36-38 (changes to stream since Halles' activities commenced), pp.46-48 (effect of drought on water consumption without availability of stream); *Transcript of Deposition of Ulrika Browning*, pp.12-19 (effect of sedimentation on lifestyle; aggravation of obtaining water from alternative sources), pp.30-35 (change in water quality/flooding after Halles' activities commenced), pp.58-59 (effects of not having reliable water source in winter), pp.77-78 (expenses/damages incurred from being unable to use water from stream), pp. 81-83 (inability of Forestry division to resolve problems), pp.91-109 (identification of photographs evidencing sedimentation and erosion coming from Halle property), pp.115-123 (explanation of Ms. Browning's belief that water from stream could be used safely for drinking purposes); see *Response to MSJ*, Exhibit 2 Site Assessment Report 5/16/04, by Richard T. Eades and Exhibit 3, Deposition of Richard Talmadge Eades, pp. 104-

107, Exhibit 4, Dr. Benjamin Stout Report 9/19/03 and Stout Report May 19, 2004, Exhibit 5, Deposition of Dr. Benjamin Stout, pp. 11-46;][see also the following which were filed in support of *Plaintiffs Motion for Relief From Judgment*, (1) *Affidavit of Timothy Higgins* with : a. VHS videotape marked “Rick Eades”, b. VHS videotape marked “Creek at Higgins March 93 to March 04 (about 40 minutes)” ; c. VHS videotape marked “Logging - Perrines at Halles 2/15/04 Higgins Creek and tributary into it April 26- 04 May 2-04 (about 30 minutes)” ; (2) *Plaintiff Ulrika Browning’s Responses to Defendants’ First Interrogatories; Plaintiffs Timothy Higgins and Wendy Higgins’ Responses to Defendants’ First Interrogatories.*]

On September 7, 2004, with discovery and preparation nearly completed and trial scheduled for September 21, 2004, the Halles filed their Motion for Summary Judgment claiming 1) Petitioners’ claims were factually unsupported by the record in the case, that the Halles have not acted unreasonably in the use of their land, that the Halles’ use of their land has not proximately caused any significant interference with Appellants’ riparian rights, that the Halles’ timbering and agricultural uses conformed to best management practices, and that the instant action was brought solely in retaliation for the Halles having sued Appellant Browning in *Halle v. Browning*, Civil Action No. 02-C-63, filed in the Circuit Court of Upshur County, West Virginia, and subject of the Petition for Writ of Prohibition referenced above. By Order of October 6, 2004, the Circuit Court granted the Halles’ Summary Judgment as to all claims.

#### IV. ASSIGNMENT OF ERROR

- A. The Appellants assign error in that the Circuit Court, in granting the Halles' Motion for Summary Judgment, held that there are no genuine issues of material fact and the Halles were entitled to summary judgment as a matter of law. (October 6, 2004 Order, Conclusion of Law 1)
- B. The Appellants assign error in that the Circuit Court, in granting the Halles' Motion for Summary Judgment, failed to construe the facts in the light most favorable to the Appellants.
- C. The Appellants assign error in that the Circuit Court, in granting the Halles' Motion for Summary Judgment, found that use of raw stream water from Laurel Run for drinking and other domestic uses is inherently unsafe because of the presence of naturally occurring animal fecal material and other organisms in stream water, and is not a use recognized under the State Water Quality Regulations. (October 6, 2004 Order, Finding of Fact 23)
- D. The Appellants assign error in that the Circuit Court, in granting the Halles' Motion for Summary Judgment, found that Appellants failed to produce any competent evidence to rebut the findings of the Division of Forestry, The WV Department of Environmental Protection, or the Defendant's expert, Dr. McCoy, with regard to the defendants' adherence to BMP's in the timbering activities on their land, their method of domestic waste water treatment, and the complete lack of a causal connection between those activities and the Appellants' use of the raw stream water from Laurel Run for drinking and other domestic purposes. (October 6, 2004 Order, Finding of Fact 24)
- E. The Appellants assign error in that the Circuit Court, in granting the Halles' Motion for Summary Judgment, held that the land use activities of the Halles did not constitute a private or public nuisance. (October 6, 2004 Order, Conclusion of Law 2)

F. The Appellants assign error in that the Circuit Court, in granting the Halles' Motion for Summary Judgment, held that the Halles acted reasonably in the use of their land and their land use activities have not proximately caused any interference with or damage to the Appellants' riparian rights to use the stream water from Laurel Run. (October 6, 2004 Order, Conclusion of Law 3)

G. The Appellants assign error in that the Circuit Court, in granting the Halles' Motion for Summary Judgment, held as a matter of law that the Appellants' use of the raw stream water from Laurel Run for drinking and other domestic purposes is unsafe and unreasonable and is not a use recognized under the State Requirements Governing Water Quality Standards (46 CSR 1, et seq.). (October 6, 2004 Order, Conclusion of Law 4).

H. The Appellants assign error in that the Circuit Court granted the Halles' Motion for Summary Judgment as to Appellants' claims that the Halles' negligence caused damage to Appellants.

I. The Appellants assign error in that the Circuit Court granted the Halles' *Motion to Strike Plaintiffs' Submission of Additional Discovery in Support of Motion for Relief From Judgment* without ruling upon the Appellants' *Motion for Relief From Judgment or, In The Alternative, To Reconsider the Court's Order Granting Defendants' Motion for Summary Judgment*.

J. The Appellants assign error in that the Circuit Court abused its discretion by failing to grant Appellants' *Motion for Relief From Judgment or, In The Alternative, To Reconsider the Court's Order Granting Defendants' Motion for Summary Judgment*.

## V. POINTS AND AUTHORITIES RELIED UPON

- A. Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); Syl. Pt. 1, *Taylor v. Culloden Public Service District*, 214 W.Va. 639, 591 S.E.2d 197 (2003).
- B. A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.’” Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963); Syl. Pt. 2, *Taylor v. Culloden Public Service District*, supra.
- C. As a general rule, a fair test as to whether a particular use of the property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property in relation to the particular locality involved, and ordinarily such a test to determine the existence of a nuisance raises a question of fact. *Sticklen v. Kittle*, 168 W.Va. 147, 287 S.E.2d 148 (1981); Syl. Pt. 1, *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 334 S.E.2d 616, 621 (W.Va. 1985).
- D. A nuisance is anything which annoys or disturbs the free use of one’s property, or which renders its ordinary use or physical occupation uncomfortable....A nuisance is anything which interferes with the rights of a citizen, either in person, property, in the enjoyment of his property, or his comfort...A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby. *Martin v. Williams*, 141 W.Va. 595, 610-611, 93 S.E.2d 835,844 (1956); *Sharon Steel Corp. v. City of Fairmont*, supra.
- E. Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact. *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E. 2d 770 (1989); *In Re: Flood Litigation*, No. 31688, (Filed December 9, 2004).
- F. The riparian owner’s right is to have the water pass his land in its natural course. Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits. The obstruction or diversion of the natural watercourse or the introduction into it of

sediment, sludge, refuse or other materials which corrupt the quality of the water by upper riparian owners or users constitutes an infringement of the lower riparian owner's property right, which may be enjoined or give rise to a cause of action for damages. *Snyder v. Callaghan*, 284 S.E.2d 241 (W.Va. 1981); *In Re: Flood Litigation*, supra.

## VI. ARGUMENT/DISCUSSION OF LAW

### A. The Standard of Review

Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Williams v.*

*Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995)

"A motion for summary judgment should be granted only when it is clear that there is no issue of genuine fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.", *Mountain Lodge Ass'n v. Crum & Forster Indem. Co.*, 210 W.Va. 536, 558 S.E.2d 336, Syl. Pt. 7 (2001); *Corder v. William W. Smith Excavating Co.*, 210 W.Va. 110, 556 S.E.2d 77; Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

This Court reviews a Circuit Court's grant of summary judgment *de novo*. *Armor v. Lantz*, 207 W.Va. 672, 535 S.E.2d 737 (2000). This Court is to apply the same test that the Circuit Court should have applied initially in determining whether a grant of summary judgment was appropriate. *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996). In determining the propriety of a grant of summary judgment, this Court will also resolve all reasonable doubts in favor of the non-moving party. *Id.*; see also *Alpine Prop. Owners Ass'n*,

*Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 365 S.E.2d 57 (1987). This Court will reverse summary judgment if it finds, after reviewing the entire record, a genuine issue of material fact exists or if the moving party is not entitled to judgment as a matter of law. *Williams v. Precision Coil, Inc.*, supra at p. 59/ p. 336. “ If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must (1) either rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.” *Williams v. Precision Coil, Inc.*, supra.

The standard of review under which a grant of summary judgment is reviewed as to nuisance and harm to riparian rights is the same. This Court in *Taylor v. Culloden Public Service District*, 214 W.Va. 639, 591 S.E.2d 197 (2003), Syl. Pt. 1, citing Syl. Pt. 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), stated that [s]ummary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. This Court stated further in *Taylor* that “[i]t is axiomatic that ‘[a] party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.’” Syl. Pt. 6, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, supra. This Court further stated in *Taylor* “[a]s we recognized in *Harris v. Jones*, 209 W.Va. 557, 550 S.E.2d 93 (2001), “[t]he standard for summary

judgment is high.’ *id.*, at p. 561 and p. 97. And, ‘even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom,’ summary judgment should still be denied. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995)(quoting *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4<sup>th</sup> Cir. 1951)). This is because the ‘drawing of legitimate inferences from the facts are jury functions, not those of a judge.’ *Williams*, 194 W.Va. at 59, 459 S.E.2d 329 at 336 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).” *Taylor v. Culloden Public Service District*, 214 W.Va. 639, 591 S.E.2d 197 (2003).

This Court “has often observed that negligence cases are not typically well-suited for disposition by summary judgment.” *Moore v. Wood County Bd. of Educ.*, 200 W.Va. 247, 489 S.E.2d 1 (1997). Therein, this Court reiterated that “[q]uestions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.” *Id.* (quoting *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236, Syl. Pt. 5 (1964)).

The bases of this action are 1) nuisance and 2) negligent and intentional damage to the riparian water rights of Appellants caused by the action and inaction of the Halles that has led to a pollution of the subject stream with sedimentation and animal wastes. The grounds for Appellants’ theories of liability and claims for damage to the subject stream are twofold: 1) soil erosion, sedimentation and increased flooding, caused by the logging and other farming/ construction activities by the Halles, and, 2) fecal coliform contamination recurring after average or worse rains that are a result of actions by Halles.

**B. The Halles' Actions Constitute a Nuisance Under West Virginia Common Law**

The West Virginia Supreme Court of Appeals in *Sharon Steel Corp. v. City of Fairmont*, 175 W.Va. 479, 334 S.E.2d 616 (W.Va. 1985), has generally described what may constitute a nuisance:

“A nuisance is anything which annoys or disturbs the free use of one/s property, or which renders its ordinary use or physical occupation uncomfortable....A nuisance is anything which interferes with the rights of a citizen, either in person, property, in the enjoyment of his property, or his comfort...A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby...”

*Id.* at p. 621, citing *Martin v. Williams*, 141 W.Va. 595, 610-611, 93 S.E.2d 835,844 (1956).

A “private nuisance” is one that affects a limited number of persons as opposed to a nuisance that affects the general public. *Taylor v. Culloden Public Service District*, 214 W.Va. 639, 591 S.E.2d 197 (2003). A private nuisance is a substantial and unreasonable interference with the private use and enjoyment of another’s land. The definition of private nuisance includes conduct that is intentional, and unreasonable, negligent or reckless, or that results in an abnormally dangerous conditions or activities in an inappropriate place. *Hendricks v. Stalnaker*, 181 W.Va. 31, 380 S.E.2d 198 (W.Va. 1989). “As a general rule, a fair test as to whether a particular use of the property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property in relation to the particular locality involved, and ordinarily such a test to determine the existence of a nuisance raises a question of fact.” *Sharon Steel Corp. v. City of Fairmont*, supra at Syl. Pt. 1, citing *Sticklen v. Kittle*, 168 W.Va. 147, 287 S.E.2d 148 (1981).

This Court recently considered and discussed the limits and applicability of a nuisance cause of action in the context of diversion of surface water in *In Re: Flood Litigation*, No. 31688, (Filed December 9, 2004). Therein this Court first held that under the balancing test set forth in *Morris Associates, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E. 2d 770 (1989), both adjacent and non-adjacent landowners may have a cognizable cause of action based on allegations of unreasonable land use by the defendant on the defendant's land. In so holding, this Court reiterated the rule derived in *Morris*:

“Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact.”

*In Re: Flood Litigation*, supra, citing *Morris Associates, Inc. v. Priddy*, supra.

This Court went on to explain that the standards defining a private nuisance as enunciated in *Hendricks*, supra, were not limited only to cases involving interference with land use for reasons other than surface water diversion, and stated:

“As a general rule, a fair test as to whether a business or particular use of a property in connection with the operation of a business constitutes a nuisance, is the reasonableness or unreasonableness of the operation or use in relation to the particular locality and under all the existing circumstances.”

*In Re: Flood Litigation*, supra.

The record is replete with proof of Appellants' assertions of nuisance at the hands of the Halles. For years the Appellants have used the water from the creek for drinking, animal watering, and other domestic and agricultural purposes. Since the Halles commenced their timbering operations, the creek becomes visibly muddy for one-two days after every

significant rainfall, which never occurred before. Since the discovery of the fecal coliform contamination, without any remediation of the point sources of the contamination, the Appellants are unable to risk use of the creek even when it is not visibly muddy or murky. Likewise, the fecal coliform contamination is, according to Dr. Stout, likely to recur with every significant rain event. A jury view of the respective properties will reflect that the watershed is a tight valley with steep slopes not unlike a funnel with the Halles' house, barns and other buildings situate at the drain of the funnel close to where the stream leaves the Halles' property and flows onto the Appellants' property. Applying the balancing test of *Morris Associates, Inc. v. Priddy*, supra, there is more than enough evidence in the record to submit to a jury as to the issue of whether the Halles have created a nuisance suffered by the Appellants. Either the intermittent sedimentation problem or the intermittent fecal coliform contamination standing alone could be considered a nuisance suffered by the Appellants. Combination of both sedimentation and fecal coliform contamination should pass anyone's smell test of nuisance with flying colors.

The allegations in Appellants' Complaint were verified under oath by each Appellants and allege each element necessary to establish a prima facie case under nuisance and damage to riparian rights theories. The Complaint alleges the ownership of real estate by the Appellants across which Laurel Run and the subject tributary run. It alleges nature of the use of the waters by the Appellants and how the actions of the Halles have damaged Appellants' rights in the subject stream. It alleges the nature and scope of the damage suffered by the Appellants as a result of the Halles' actions. The Complaint alleges that the acts of the Halles were negligent and intentional. The Complaint sufficiently alleges that the result of the acts of the Halles

constitute a nuisance.

The verified allegations of the Complaint alone are enough to establish a prima facie case. In addition, and standing alone, the deposition testimony from the Appellants more than amply supplies the basis of a prima facie case. Their testimony describes with great particularity the recurring sedimentation that occurs with each normal rainfall, how the sedimentation can be traced to the stream coming from the Halles' property, and how the sedimentation in the creek has adversely affected their significant and historic use of the subject stream. The report and deposition testimony of Appellants' hydrology expert Richard Eades establishes how the sedimentation occurred due to the timbering practices of the Halles. The reports and deposition testimony of biology expert Dr. Benjamin Stout establish how the sedimentation affects the plant, insect and fish life in the stream. The Appellants have testified as to how the water quality, quantity and availability is essential to their appreciation of the pristine nature of the stream and surroundings.

The reports and deposition testimony of Dr. Stout and Richard Eades are direct evidence of the contamination of the creek by the Halles from the various waste point sources of fecal coliform discharge into the stream. Dr. Stout's and Mr. Eades' reports and testimony, and the VHS videotape of the June 9, 2003 inspection provide direct evidence of the Halles' large manure pile almost on top of the creek, located just downstream of the Halles' house and barns and upstream of the Appellants' property. Dr. Stout's and Mr. Eades' reports and testimony, and the VHS videotape of the June 9, 2003 inspection establish the causation link between the harm suffered by the Appellants and the acts of the Halles, and establish that the harmful conditions will recur at every moderate or greater rainfall if no remedial actions are

taken. Appellants have not found, nor have the Halles offered proof of any remedial actions.

Moreover, the inspection of the Halles' property revealed facts and circumstances that indicate an intent to harm Appellants. Not only did Appellants discover the large manure pile sitting almost in the creek, but other point sources of possible fecal coliform contamination as well, all of which were constructed after the Halles purchased their property, and after Appellants tried to protect their interests by sending the Halles the March 14, 2000 letter.

The Halles' *Motion for Summary Judgment* and supporting exhibits did not contradict the rights of the Appellants, the facts of the Halles' acts, or the harm suffered by the Appellants. The parties can disagree as to the degree of the nuisance created by the conditions and the nature and amount of damage suffered by Appellants, and these are issues to be determined by a jury. Once the Appellants establish a prima facie case, the Halles must fully rebut that case in order to prevail. The Halles' *Motion for Summary Judgment* failed to rebut the essential elements of Appellants' claims. Taking the allegations in the light most favorable to the non-moving party, at best the Halles have created issues of fact that must be considered by a jury.

It is clear from the Circuit Court's ruling from the bench at the September 15, 2004 hearing that it gave no consideration to any of the facts and circumstances alleged in the Appellants' Complaint or submitted into the record by the Halles and Appellants. It appears that the Circuit Court *sua sponte* disregarded the reports of Appellants' experts Dr. Stout and Mr. Eades. The Court totally disregarded, among other things, the Appellants' long history of use of the water for domestic and drinking purposes, the March 14, 2000 letter advising the Halles of the Appellants' use of the subject stream and warning of the harm to the subject

stream by the clearcut logging operation planned by the Halles, and the subsequent apparent intentional contamination of the stream by the Halles in the location of their manure pile and the illegal tie-in of the barn floor drain to their home sewage treatment unit. Each of these are fact matters that go to the heart of the issue of reasonableness of the Halles' acts and the reasonableness of the Appellants' expectations under all the circumstances. These are questions for the jury. The Circuit Court in this instance stepped into the shoes of the fact finder contrary to West Virginia law.

**C. The Halles' Timbering and Other Activities Have Interfered With Appellants' Riparian Rights Under West Virginia Common Law**

Riparian water rights are a property interest in the flow of a natural watercourse through or adjacent to one's property, damage to which can support a common law cause of action. *Snyder v. Callaghan*, 284 S.E.2d 241 (W.Va. 1981). An upstream user "may make use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits. *Snyder v. Callaghan*, supra at p. 246; *Gaston v. Mace*, 33 W.Va. 14, 23, 10 S.E. 60, 63 (1889). This Court long ago recognized that "[t]he right of a riparian proprietor to have the water of a stream pass his land in its natural flow is a right annexed to the soil and exists as a parcel of the land." Syl. Pt. 2, *Roberts v. Martin*, 72 W.Va. 92, 77 S.E. 535 (1913), and that "[a] diversion of a natural water course, though without actual damage to a lower riparian owner, is an infringement of a legal right and imports damage." Syl. Pt. 1, *id.* "The right of a riparian owner to the natural flow of the stream is not dependent upon its value to him or the use which he makes of it." Syl. Pt. 3, *id.*;

also cited in *In Re: Flood Litigation*, supra

This Court in *In Re: Flood Litigation*, supra, also reiterated long standing common law regarding the rights of riparian owners:

“The riparian owner’s right is to have the water pass his land in its natural course. Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality or detain it so as to deprive other proprietors or the public of a fair and reasonable participation in its benefits. The obstruction or diversion of the natural watercourse or the introduction into it of sediment, sludge, refuse or other materials which corrupt the quality of the water by upper riparian owners or users constitutes an infringement of the lower riparian owner’s property right, which may be enjoined or give rise to a cause of action for damages.”

*In Re: Flood Litigation*, supra, citing *Snyder v. Callaghan*, supra at p. 271-272 and p. 246.

Relying on this long standing common law, this Court in *In Re: Flood Litigation*, supra, held that the riparian owners therein had a cognizable cause of action for interference with riparian rights based on an increase in a stream’s natural flow by a flood due to acts of the Defendants, even where the flooding was only partly attributable to such acts.

In the absence of a valid waiver or other contractual arrangement, altering the natural flow or drainage of surface water upon one’s land such that the water causes damage to another party is not “reasonable” merely because the person altering the flow of water sought to protect his or her own property and did not intend to harm any other party. Syl. pt. 7, *Whorton v. Malone*, 209 W.Va. 384, 549 S.E.2d 57 (W.Va. 2001); *Graham v. Beverage*, 211 W.Va. 466566 S.E.2d 603 (W.Va. 2002).

In the instant action, the report and deposition testimony of hydrology expert Richard Eades establishes how the quantity of the flow and turbidity of the subject stream has been

altered by the Halles' timbering activities and their recurring use of skid paths and haul roads. The reports and deposition testimony of Dr. Stout are direct evidence of the contamination of the creek by the Halles from the various point sources of fecal coliform discharge, and how such will recur after every moderate or greater (1/4") rain event. Again, the Appellants' deposition testimony is replete with evidence of how they are unable to use the stream as they had before the arrival of the Halles. In the context of the Halles' Motion for Summary Judgment there is more than enough evidence to constitute jury questions as to whether and how much the Appellants' riparian rights have been damaged. The level of harm suffered by your Appellants is a question of fact for the jury, not the Circuit Court.

**D. The Circuit Court Erred in Finding that Appellants' Historic Use Of The Raw Waters Of The Subject Stream For Drinking And Domestic Purposes Was Unreasonable**

The Halles asserted below, and the Circuit Court erred in concluding at law, that Appellants' use of the raw stream water from Laurel Run for drinking and other domestic purposes is unsafe and unreasonable and is not a use recognized under the State Requirements Governing Water Quality Standards (46 CSR 1, et seq.). The Halles treat this issue as a threshold issue which would foreclose any further analysis of Petitioners' claims. For the following reasons, such a conclusion of law is unnecessary and irrelevant to the analysis of your Appellants' rights under the common law of West Virginia regarding nuisance and riparian rights.

The Circuit Court erred in making such a conclusion of law. Appellants do not take issue that the regulatory scheme of West Virginia's Water Pollution Control Act, W.Va. Code

§22-11-1, et seq., and the rules promulgated thereunder, 46 CSR 1, et seq., fail to specifically designate the use of raw stream water for drinking purposes as a recognized use.

However, the Act and the Rules contemplate that citizens have the right to the historical use of the streams of this State: citizens like the Brownings, the Higgins and all West Virginians.

The declaration clause of the West Virginia Water Pollution Control Act, W.Va. Code § 22-11-2, reads as follows:

**§§22-11-2. Declaration of policy.**

(a) It is declared to be the public policy of the state of West Virginia to maintain reasonable standards of purity and quality of the water of the state consistent with (1) public health and public enjoyment thereof; (2) the propagation and protection of animal, bird, fish, aquatic and plant life; and (3) the expansion of employment opportunities, maintenance and expansion of agriculture and the provision of a permanent foundation for healthy industrial development.

(b) It is also the public policy of the state of West Virginia that the water resources of this state with respect to the quantity thereof be available for reasonable use by all of the citizens of this state.

Rule § 46-1-4, promulgated under the Water Pollution Control Act, is known by its title as West Virginia's "Antidegradation Policy". It reads, in part, as follows:

"4.1 It is the policy of the State of West Virginia that the waters of the state shall be maintained and protected as follows:

4.1.a. Tier 1 Protection. Existing water uses and the level of water quality necessary to protect existing uses shall be maintained and protected. Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included as designated uses within these water quality standards."

It is undisputed that your Appellants were using the raw waters of the subject stream for drinking, domestic and agricultural purposes continuously since 1972 and before, all without any apparent harm, and long before the Halles moved to Eden Hollow. Your Appellants are not contending that the water quality of the subject stream has to be maintained

to drinking quality standards as set forth by current health department standards. Your Appellants contend that the subject stream should be not subjected to the degradation that has been inflicted by the Halles, and that this degradation is causing a nuisance to the Appellants and interfering with their riparian rights. From a plain reading of Rule § 46-1-4, it the Appellants are entitled to at least the level of water quality existing just prior to the Halles' timbering and construction activities, and the Appellants certainly are entitled to no subsequent degradation.

Furthermore, as directed by the West Virginia Legislature, the Water Pollution Control Act and rules promulgated thereunder have no bearing on the instant cause:

**“§§22-11-27. Existing rights and remedies preserved; article for benefit of state only.** It is the purpose of this article to provide additional and cumulative remedies to abate the pollution of the waters of the state and nothing herein contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provisions in this article, or any act done by virtue of this article, be construed as estopping the state, municipalities, public health officers, or persons as riparian owners or otherwise, in the exercise of their rights to suppress nuisances or to abate any pollution now or hereafter existing, or to recover damages.

The provisions of this article inure solely to and are for the benefit of the people generally of the state of West Virginia, and this article is not intended to in any way create new, or enlarge existing rights of riparian owners or others. An order of the director or of the board, the effect of which is to find that pollution exists, or that any person is causing pollution, or any other order, or any violation of any of the provisions of this article shall give rise to no presumptions of law or findings of fact inuring to or for the benefit of persons other than the state of West Virginia.”

This is not the forum to argue whether the Environmental Quality Board, which sets water quality standards, has or has not done its job. The Appellants have used and enjoyed the subject stream for many years with no harmful effects. The Halles' *Motion for Summary Judgment* failed to fully rebut the reasonableness of the Appellants' asserted use of the subject

stream. The reasonableness of the Appellants' use of the stream for drinking and other purposes under all the circumstances is a question of fact for a jury, not the Circuit Court in ruling on the Halles' *Motion for Summary Judgment*.

**E. The Circuit Court Erred In Granting the Halles Summary Judgment As the Appellants Established a Prima Facie Case For The Jury And the Halles Failed To Rebut the Appellants' Prima Facie Case**

The allegations of Appellants' Complaint were verified by oath by the Appellants and standing alone these allegations establish a prima facie cause of action for nuisance, negligent and intentional damage to Appellants' riparian rights<sup>5</sup>, as well as simple negligence. The Halles' *Motion for Summary Judgment* and supporting exhibits do not disprove the allegations of the Complaint as to any of these cause of actions. At most, the deposition testimony and exhibits cited by the Halles in support of their *Motion for Summary Judgment* create more issues of fact for the jury.

The Halles' *Motion for Summary Judgment* and attached exhibits make no attempt to rebut or contradict any of the assertions of Appellants' Complaint or their deposition testimony. Each of the Appellants testified in deposition eloquently and specifically as to their observations of the quality and flow of the waters of Laurel Run, how that quality and flow had changed after the Halles had moved into Eden Hollow and commenced their timbering and construction activities, and how these changes had adversely affected their lives and pocketbooks.

It is clear from the reading of the transcript of the September 15, 2004 hearing on the

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<sup>5</sup>As a review of the facts in the record will reveal, it is a jury question as to whether some of the acts of the Halles were committed intentionally or the result of negligence.

Halles' *Motion for Summary Judgment* that, at a minimum, the Circuit Court issued its ruling from the bench without reading or considering Appellants' *Addendum to Response in Opposition to Defendants' Motion for Summary Judgment* and the full deposition transcripts given by each of your Appellants.

The Halles' *Motion for Summary Judgment* and exhibits attached thereto are a selective parsing of words that support the Halles' assertions surgically excised from many pages of deposition transcript and expert reports, without regard to all the other facts contained therein and those facts asserted by Appellants' Complaint, documents, exhibits and reports filed herein. The Halles also improperly attempt to make relevant the prior nuisance action that they filed against Appellant Ulrika Browning. The Circuit Court previously ruled that this action had no relevance to the nuisance action brought by the Halles against Appellant Browning. (see Petition for Writ of Prohibition No. 022483, Exhibit A).

There is no legal or factual basis supporting a grant of the Halles' *Motion for Summary Judgment*. The Halles' *Motion for Summary Judgment* should have been denied by the Circuit Court, and the issues and evidence presented to a jury at trial.<sup>6</sup> There can be no just result here, or viable conclusion to this dispute without a jury trial.

While the Circuit Court's Order granting the Halles' *Motion for Summary Judgment* does not reference it, the Halles assert that the Appellants' Complaint was filed in retaliation for the previous lawsuit filed by the Halles against Appellant Browning. Such an assertion is

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<sup>6</sup>The Court adopted the Defendants' proposed Order *in toto*. The transcript of the September 15, 2004 hearing on Respondents' Motion for Summary Judgment reflects that the Circuit Court, while granting summary judgment, made no specific findings of fact from the bench. (see Record, Transcript of 9/15/04 Hearing, pp. 18-19)

again a strained selective parsing of a few works from the many statements contained in the depositions of the Appellants. It is clear from the record in the Petition for Writ of Prohibition (No. 022483) in the other lawsuit, the verified Complaint and the Appellants' sworn deposition testimony that there were many events that precipitated the filing of the Appellants' action against the Halles. While your Appellants vehemently deny such assertions, such has no relevancy to the issues of summary judgment and should be disregarded by the Court.

The Halles' *Motion for Summary Judgment* and exhibits attached thereto, and the Court's Order granting Summary Judgment, primarily rely on the assumption that since neither the Division of Forestry nor the Department of Environmental Protection found no violations of the law, that Appellants cannot make a prima facie case. The Halles assert the opinions of their expert, Dr. Eli McCoy, (1) that he found no violations of the logging Best Management Practices ("BMP") guidelines promulgated by the West Virginia Division of Forestry and (2) that the water sampling test results taken by both sides failed to establish a violation West Virginia's water quality regulations, as the last word on the Appellants' causes of action. The Halles' *Motion for Summary Judgment* makes no attempt to rebut the numerous findings and statements to the contrary by Appellants' experts, Dr. Benjamin Stout and Richard Eades in both their reports and deposition testimony. (See, *Response to MSJ*, Exhibit 2 Site Assessment Report 5/16/04, by Richard T. Eades and Exhibit 3, Deposition of Richard Talmadge Eades, pp. 104-107, Exhibit 4, Dr. Benjamin Stout Report 9/19/03 and Stout Report May 19, 2004, Exhibit 5, Deposition of Dr. Benjamin Stout, pp. 11-46)

The report of Richard Eades, a hydrology expert retained by the Appellants, establishes that there is substantial soil erosion and sedimentation emanating from the Halles' past logging

activities and recurring use of the haul roads and skid paths on their property. (see *Response to MSJ Exhibit 2, Site Assessment Report 5/16/04*). His deposition testimony clearly attributes the soil erosion and sedimentation problems to the Halles' activities on their property. (see *Response to MSJ, Exhibit 3, Deposition of Richard Talmadge Eades, pp. 104-107*). Mr. Eades' report and deposition refers to specific instances of various conditions created by the Halles that caused sedimentation and soil erosion into the subject stream and that the Halles failed (or their loggers or other contractors failed) to observe best management practice guidelines during their timbering operations (see *Response to MSJ, Exhibit 3, Deposition of Richard Talmadge Eades, pp. 104-107; Transcript of Deposition of Richard Talmadge Eades 172-180, 190*).

Dr. Benjamin M. Stout III, a biologist and professor at Wheeling Jesuit College retained by Appellants, issued detailed reports and testified in deposition providing evidence about the fecal coliform contamination he found in the stream. Dr. Stout's findings and testimony, *especially when* coupled with the test results of samples taken by Dr. McCoy and the DEP, actually show a pattern of contamination emanating from the same source points identified by Dr. Stout after rain events. This contamination and damage to Appellants' riparian rights will continue to occur without appropriate remedial action. (see *Response to MSJ Exhibit 4, Stout Report 9/19/03 and Stout Report May 19, 2004; Exhibit 5, Stout Deposition pp. 11-46*).

One of the source points of contamination was the large manure pile built by the Respondents virtually on top of the stream and the improperly installed home waste treatment unit ("Mighty Mac"). The fecal coliform contamination was not discovered until the first

inspection of the Halles' premises on June 9, 2003 by Richard Eades, Dr. Stout and the Petitioners. (see *Response to MSJ Exhibit 2, Site Assessment Report 5/16/04 pp.2, 14-16, Photos 8,9*). The Halles made no attempt to rebut or mention any of this in their *Motion for Summary Judgment*. The Circuit Court ignored Appellants' *Response to the Motion for Summary Judgment* in this regard.

Mr. Eades' findings are supported by his observations of specific violations of BMPs with measurements. The deposition of Laidley Eli McCoy, Ph.D. reflects that he did not walk over any of the skid roads or haul roads on the Halle property and, that he took no measurements to establish the degree of slope to any of the haul roads or skid paths in use on the Halle property nor did he measure or count the water breaks on the roads. (see *Transcript of Deposition of Laidley Eli McCoy, pp. 79-82*). Dr. McCoy further admitted that he observed erosion, that he has not been on the property while it was raining, and that where the Halles placed their barn and the paving activities would increase the intensity of the rain runoff (see *Transcript of Deposition of Laidley Eli McCoy, pp.93-99*). He also testified that he would avoid using the subject stream during higher flow events given the fecal coliform test results derived by Dr. Benjamin Stout tests (see *Transcript of Deposition of Laidley Eli McCoy, pp.131-135*). The Circuit Court disregarded Dr. McCoy's testimony in this regard.

The deposition of Bradley Swiger, an investigator with the West Virginia Department of Environmental Protection, reflects that only one of the water samples taken by him during his investigation were during or immediately after a rainfall event, which was not a downpour (see *Transcript of Deposition of Bradley Swiger, pp. 69-71*), that (1) there were potential sources of fecal coliform contamination, i.e. at the garage where horses had been feeding and

watering, (2) that during a storm there could be a possibility of fecal coliform contamination, and that (3) the water/feeding area, the manure pile, the Mighty Mac Unit, and the ponds were all points of concern to him (see *Transcript of Deposition of Bradley Swiger*, pp.81-87). Mr. Swiger's report notes that WVDEP recommends that the horse feeding and watering area be relocated away from the drainage structure or modified to prevent migration of animal wastes into the drainage structure (see *Motion for Summary Judgment and Memorandum of Law in Support*, Exhibit 3). The Circuit Court disregarded Mr. Swiger's report and testimony in this regard.

The deposition of Nathan Kennedy reflects that the skid road across the pasture area was not sufficiently seeded with grass and such was in violation of Best Management Practices guidelines. He also testified that the skid road was a potential source of soil erosion into the subject stream and that the activities of the Respondents' last logging contractor, Dave Perrine, had added to the potential of sedimentation reaching the creek and had potential to impact the stream. (see *Motion for Summary Judgment and Memorandum of Law in Support*, Exhibit 7 *Transcript of Deposition of Nathan Kennedy*, pp. 33- 39). Forester Kennedy also suspended Mr. Perrine from logging the Halles' property for violation of the Forestry regulations (see *Transcript of Deposition of Nathan Kennedy*, pp. 48-50). The Circuit Court disregarded Mr. Kennedy's testimony in this regard.

The Halles in their *Motion For Summary Judgment* make reference to numerous statements made by West Virginia Division of Forestry Forester James W. Mitchell (retired) in deposition taken August 26, 2004. Petitioners were unable to secure the transcript of Mr. Mitchell's deposition prior to the hearing on the Halles' *Motion for Summary Judgment* and

thus unable to provide the same to the Court for its consideration prior to the September 15, 2004 hearing.<sup>7</sup> As set forth below, Mr. Mitchell made statements that rebut many of the Halles' contentions.

The deposition of Mr. Mitchell reflects that during the 30 plus years that he was the Forester for Upshur County, the WV Division of Forestry never issued a citation that resulted in a fine being collected (see *Transcript of Deposition of James W. Mitchell*, pp. 29-32). Mr. Mitchell's testimony actually contradicts the Court's finding that "BMP's were followed during the reclamation stage of each phase of the logging operations that he inspected" and the Circuit Court's conclusion of law that the Defendants' "land use activities have not proximately caused any interference with or damage to the plaintiffs' riparian rights to use the stream water from Laurel Run". Mr Mitchell witnessed sedimentation coming off the logging job and entering the creek thus causing the creek to become muddy and admitted that it could still be a problem today. (see *Transcript of Deposition of James W. Mitchell*, pp. 73-78). Mr. Mitchell testified that he suspended the logging operation at one point in January 2002 because of possible sedimentation problems. (see *Transcript of Deposition of James W. Mitchell*, pp. 85-93). Mr. Mitchell reviewed photographs taken during the inspection of the Halles' property in June 2003 by the Appellants and their experts and he identified numerous point sources of soil erosion and sedimentation (see *Transcript of Deposition of James W. Mitchell*, pp. 95-109 and Composite Exhibit 3). Finally, Mr. Mitchell testified that Best Management Practices guidelines do not contemplate that his enforcement duties require him to

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<sup>7</sup> This is one of the grounds asserted by Appellants in their *Motion for Relief From Judgment* filed under Rule 60(b) of the West Virginia Rules of Civil Procedure, which Motion the Circuit Court has yet to rule upon.

look at supposed reclamation once the logging job is complete and that he has no concern about any resulting nuisance or problem thereafter (see *Transcript of Deposition of James W. Mitchell*, pp. 103-105).

Mr. Mitchell also testified that he was aware of the Appellants' use of the stream for domestic and drinking purposes, he was aware of the Higgins' concern about their water supply for "10 or 15 years", and that he never told them not to drink the water. (see *Transcript of Deposition of James W. Mitchell*, pp.50-52). The Circuit Court disregarded Mr. Mitchell's testimony in this regard. Such goes to the reasonableness of Appellants' use of the subject stream. He also testified that he never called a Division of Forestry Water Resource officer to assist in inspection of the Halle logging job. (see *Transcript of Deposition of James W. Mitchell*, pp. 53-54).

That the Halles' *Motion for Summary Judgment* places great stock in the fact that the WV DEP did not explicitly cite the Halles for violations of the Water Quality Rules and the Division of Forestry did not cite the Halles or their logging contractors for violation of Forestry BMP guidelines. However, this is, at best, peripheral and certainly not determinative of the Appellants' causes of action. Moreover, Appellants' action is not grounded in violations of statutes or WV DEP rules and such is irrelevant to this action. The core issues for summary judgment are whether the Appellants can establish, *at trial*, that the Halles created a nuisance situation and whether Appellants have degraded the quality of the subject stream to an extent to have damaged Appellants. The Complaint makes no mention of statutory or regulatory violations. Under West Virginia common law, none is necessary

The Halles' assertions of no violations of law or regulation has particular significance

as to whether an issue of fact triable by a jury exists in this type of case in light of the recent West Virginia Supreme Court of Appeals opinion in *Taylor v. Culloden Public Service District*, 214 W.Va. 639, 591 S.E.2d 197 (2003). In *Taylor*, the Balls lived downstream and adjacent to a waste water treatment plant and had attempted to intervene in a civil enforcement action filed by the WV DEP against the Culloden Public Service District (CPSD) which operated the plant. The Circuit Court of Cabell County granted the CPSD summary judgment finding that the Balls had failed to demonstrate actions grounded in trespass or private nuisance. The *Taylor* Court held that whether the Balls had suffered a nuisance, or whether the Balls had suffered annoyance or discomfort as a result of the actions of the CPSD were clearly jury questions. The *Taylor* Court further stated:

“In this Court’s opinion, this case aptly demonstrates the need for common law remedies in addition to the (Water Pollution Control) Act, especially where it is arguable that the government agency charged with protecting the public’s interests may not be acting with sufficient alacrity to eradicate the alleged nuisance which may be presenting serious health concerns or posing a potential environmental hazard.” *Id.*, at p. 206.

Former Forester James Mitchell’s testimony that he had never issued a citation that resulted in a fine being collected should support and reinforce this Court’s concern. As with the Balls in *Taylor*, your Appellants have no recourse left to but to present to a jury the facts of the actions of the Halles and the resultant harm suffered.

While Appellants maintain that no violations of law or regulations are necessary to establish at common law a nuisance action or action grounded in damage to riparian rights, it is also true that some of the observations set forth in the deposition testimony of the Halles’ experts Dr. McCoy, Bradley Swiger and Nathan Kennedy actually support Appellants’ claims

of damage from the Halles' activities. While the Halles' expert Dr. McCoy says generally that he found no violations of the BMP guidelines, the specific opinions of Appellants' hydrology expert, Mr. Eades, that BMPs were not followed, were uncontradicted. Mr. Eades' report and deposition testimony reflects that he actually walked all over the Halles' property and making observations in a scientific manner, unlike Dr. McCoy, Mr. Mitchell, and Mr. Kennedy. Likewise uncontradicted is the opinion of Appellants' biology expert, Dr. Benjamin Stout, that during and shortly after significant rain events the subject stream was contaminated with fecal coliform from the identified source points. It is also clear that the water samples taken for testing by the DEP and Dr. McCoy were not done around significant rain events, the type that cause a flushing effect in the small watershed that is the Halles' property.

The Halles properly assert the doctrine of "reasonable use" as a possible defense to Appellants' allegations. However, the Halles failed to properly define the standard:

"Generally, under the rule of reasonable use, the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable, in light of all the circumstances of relative disadvantage to the adjoining landowners, as well as social utility. Ordinarily, the determination of such reasonableness is regarded as involving factual issues to be determined by the trier of fact." Syl.pt.2, *Morris Assoc., Inc. v. Priddy*, 181 W.Va.588, 383 S.E.2d 770 (1989); *Whorton v. Malone*, 549 S.E.2d 57 (W.Va. 2001).

This Court recently expounded on the holdings of *Morris Assoc., Inc. v. Priddy*, supra, in *In Re: Flood Litigation*, No. 31688, (Filed December 9, 2004). Therein this Court held:

"In determining whether a landowner acted reasonably in dealing with surface water pursuant to the "reasonable Use" rule set forth in Syllabus Point 2 of *Morris Associated, Inc. v. Priddy*, 181 W.Va. 588, 383 S.E.2d 770 (1989), a jury generally should consider all relevant circumstances, including such factors as amount of harm caused, foreseeability of harm on the part of the landowner making alteration in the flow of surface waters, the purpose or motive with which the landowner acted, etc." Syl. Pt. 2, *In Re: Flood Litigation*, No. 31688, (Filed December 9, 2004).

It is a question for the jury as to the reasonableness of persons who have drank the water out of the stream flowing across their land for over 25 years without a problem. It is a question for the jury to as to the reasonableness of the Halles' actions against having been told by the Appellants how they used the stream before the Halles embarked upon their injurious actions. It is a question for the jury as to the reasonableness of a professor of nursing who built a large horse manure heap close enough to the stream to ensure leeching of fecal coliform therein with every rainfall. It is a question for the jury as to the reasonableness of a professor of nursing who would try to dispose of animal waste through a private waste treatment unit not intended for such purpose knowing that her neighbors use the same water in which the mistreated sewage will flow.

Appellants have met their burden and can establish at trial a prima facie case of nuisance and damage to their riparian rights. The Circuit Court should have denied the Halles' *Motion for Summary Judgment* and allow Appellants to proceed to trial.

**F. The Circuit Court Erred In Granting the Halles Summary Judgment As Appellants Established a Prima Facie Negligence Cause of Action Which the Halles Failed to Rebut**

If nothing else, your Appellants have established a simple negligence cause of action.

As this Court stated recently in *In Re: Flood Litigation*, supra:

“[t]he ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised, The test is, would the ordinary man [or woman] in the defendant's position, knowing what he [or she] knew or should have know, anticipate that harm of the general nature of that suffered was likely result?”  
It was confirmed by Dr. Judith Halle that she received the March 14, 2000 letter from

Appellants Higgins warning her of the Higgins' concerns of the grave damage that a clearcut

timbering operation would have upon the ecology of the small watershed that is their home. (see *Transcript of Deposition of Timothy Higgins*, pp. 106-108 and Exhibit 7, *Transcript of Deposition of Judith Halle*, pp. 78-82, *Transcript of Deposition of Wendy Higgins*, pp. 39-40). It is clear that Dr. Halle should foresee the adverse impact on her neighbors from sedimentation or other residual effects of her timbering operations. It is clear that Dr. Halle should foresee the adverse impact on her neighbors from fecal coliform contamination caused by locating her horse manure where it could leech into the creek every time it rains and by her improperly installing a home waste treatment unit that drains contaminating effluent into the stream. If a jury does not deem her acts to have been intentional, a jury could find her negligent.

The Halles failed to address the Appellants' prima facie negligence cause of action. Appellants' claims for simple negligence, if nothing else, should have been allowed to go to a jury.

**G. The Circuit Court Abused Its Discretion by Failing To Rule Upon or Otherwise Consider Matters Asserted in Appellants' Motion for Relief From Judgment and by Striking From the Appellate Record Deposition Transcripts, Videotapes, Documents and Other Items Filed With the Notice of Filing on October 14, 2004**

After this appeal was granted, upon the Halles' *Motion to Strike Plaintiffs' Submission of Additional Discovery in Support of Motion for Relief From Judgment*, the Circuit Court issued its Order of May 25, 2005 striking from the record, the same record reviewed by this Court in consideration of Appellants' Petition for Appeal, nine deposition transcripts, *Affidavit of Plaintiff Timothy Higgins* with three (3) VHS videotapes and *Plaintiffs' Responses*

*to Defendants' First Set of Interrogatories*, all of which were filed in support of Appellants' *Motion for Relief From Judgment or, In The Alternative, To Reconsider the Court's Order Granting Defendants' Motion for Summary Judgment*. The Circuit Court has never ruled upon Appellant's *Motion for Relief From Judgment*.

The Halles' *Motion for Summary Judgment* was very limited in scope. Its primary assertion was that your Appellant's claims failed because the West Virginia Division of Forestry, the Department of Environmental Protection and the Halles' expert, Dr. Eli McCoy, failed to find violations of West Virginia law relative to timbering and water pollution. Its secondary assertion was that the Halles' use of their land was reasonable and that your Appellants' use of their riparian rights was not reasonable. As set forth above, the Appellants' *Response to the Halles' Motion for Summary Judgment*, and exhibits, reports and deposition transcripts (and/or excerpts) sufficiently rebut the issues raised in the Halles' Motion to raise issues of material fact.

However, the Circuit Court went outside of the pleadings and materials filed when it considered representations by the Halles' of the deposition testimony of Jim Mitchell, the transcript of which had not at the time been furnished by court reporter. The Circuit Court also went outside of the pleadings when it dismissed the negligence allegations of the Appellants' Complaint, an issue not even raised in the Halles' *Motion for Summary Judgment*.

As the Circuit Court went outside of the pleadings and materials filed, the Appellants' *Motion for Relief From Judgment or, In The Alternative, To Reconsider the Court's Order Granting Defendants' Motion for Summary Judgment* was an attempt to bring to the Circuit Court's attention and consideration the full transcript of Jim Mitchell's deposition. The

Appellants also wanted the Circuit Court to consider the full deposition transcripts of all the other witnesses and totality of evidence derived through discovery which support Appellants' claims beyond rebuttal of the matters asserted by the Halles in their *Motion for Summary Judgment*.

Relief granted to a party under Rule 60(b) of the West Virginia Rules of Civil Procedure is essentially discretionary with the trial court and the court's ruling on such a motion will not be disturbed unless there is a showing of an abuse of such discretion. *Vanscoy v. Anger*, 203 W.Va. 624, 510 S.E. 2d 283 (1998).

Rule 60(b) in pertinent part reads as follows:

*"(b) Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. - On motion and upon such terms that are just, the court may relieve a party or a party's representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."*

Appellants were unable to secure the transcript of Mr. Mitchell's deposition prior to the hearing on Defendant's Motion for Summary Judgment and thus unable to provide the same to the Court for its consideration. Such is unavoidable cause to justify the relief requested herein under Rule 60(b) of the West Virginia Rules of Civil Procedure. Nonetheless, the Halles themselves cite statements from the deposition without filing the deposition transcripts or excerpts therefrom. The representations of the statements made were taken out of context and

as set forth above, Mr. Mitchell made many statements that clearly rebut some of Defendants' contentions. At a minimum, the Circuit Court abused its discretion by relying upon such statements in granting summary judgment while at the same time failing to consider Appellants' *Motion for Relief From Judgment* and then later striking the transcript of Mr. Mitchell's deposition from the record submitted in support of Appellants' Petition for Appeal. Striking from the record the other discovery items filed in support of Appellant's *Motion for Relief From Judgment* compounds further the Circuit Court's abuse of discretion in this regard.

Reading the full deposition transcript of Jim Mitchell paints a different picture from the representations made by the Halles in their *Motion for Summary Judgment*. Appellants were unable to rebut these assertions until his transcript was obtained. The Circuit Court's refusal to consider the Mr. Mitchell's full deposition transcript under these circumstances is an abuse of discretion.

The Circuit Court's refusal to considering the totality of evidence from the other full deposition transcripts, videotapes and other matters it struck from the record further compounds its abuse of discretion. Appellants understand their responsibility to rebut evidence presented in support of the Halles' *Motion for Summary Judgment*. However, this was not a summary judgment process wherein Appellants failed to introduce any evidence to rebut the Halles' assertions. The evidence submitted into the record by Appellants in response to the Halles' *Motion for Summary Judgment* was calculated to address the specific issues raised by Defendants therein. Appellants should not have to introduce into the Court record the full array of evidence intended for trial in order to rebut issues not raised by Defendant in their *Motion for Summary Judgment*. It is obvious that the Circuit Court rushed to judgment in

dismissing Appellants' Complaint. The Circuit Court's failure to consider and grant Appellants' *Motion for Relief From Judgment* also adds to the overall abuse of discretion by the Circuit Court in the way it apparently ignored in a wholesale manner the full depositions of each of your Appellants and in the way the Circuit Court went outside the issues raised by the Halles' *Motion for Summary Judgment* in dismissing Appellants negligence claims.

For the reasons cited herein this Court should order the Circuit Clerk of Upshur County to forward those discovery items stricken by the Circuit Court from the record submitted in conjunction with Appellant's Petition for Appeal.

#### **V. CONCLUSION/PRAAYER FOR RELIEF**

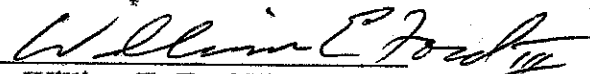
The commonality of each assignment of error noted above is that the Circuit Court drew factual inferences and made factual determinations which are the province of the jury. The record well supports the contentions of the Appellants. The Halles failed to fully rebut any of the elements established by the Appellants' prima facie case that would support an outright dismissal of Appellants' Complaint. The Halles may have created issues of fact, but such is for a jury to determine.

**WHEREFORE**, for the foregoing reasons, your Appellants, Ulrika Browning, Timothy Higgins, and Wendy Higgins respectfully requests that this Honorable Court reverse the Order of the Circuit Court of Upshur County granting the Halles Summary Judgment and the Order of the Circuit Court of Upshur County granting the Halles' *Motion to Strike Plaintiffs' Submission of*

*Additional Discovery in Support of Motion for Relief From Judgment.*

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, William E. Ford III, Counsel for Appellants Ulrika Browning, Timothy Higgins and Wendy Higgins hereby certify that I served a true and correct copy of the foregoing **APPELLANTS' BRIEF** upon the following counsel of record, by placing the same in the U.S. Mail, postage prepaid, on this the 1st day of August, 2005.

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