

No. 32672

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

ULRIKA BROWNING, TIMOTHY HIGGINS, AND WENDY HIGGINS

Plaintiffs Below, Appellants,

v.

**JUDITH HALLE and
ANDREAS HALLE**

Defendants Below, Appellees.

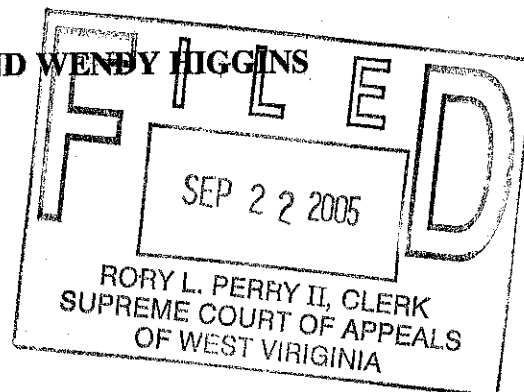
*From the Circuit Court of
Upshur County, West Virginia
Civil Action No. 02-C-104*

**APPELLANTS ULRIKA BROWNING, TIMOTHY HIGGINS
AND WENDY HIGGINS' REPLY TO BRIEF ON BEHALF OF
APPELLEES JUDITH HALLE AND ANDREAS HALLE**

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Counsel for Appellants

ORAL ARGUMENT IS REQUESTED



COME NOW the Appellants, Ulrika Browning, Timothy Higgins, and Wendy Higgins, by and through their counsel, William E. Ford III, pursuant to Rule 10(c) of the West Virginia Rules of Appellate Procedure, and files this Reply to Brief on Behalf of Judith Halle and Andreas Halle. In support of this Reply, Appellants state as follow:

**I. THE HALLES' PENDING LAWSUIT AGAINST
APPELLANT BROWNING HAS NO RELEVANCE TO THIS APPEAL**

As with the Halles' Motion For Summary Judgment filed below, and in their Response to the Petition for Appeal filed previously herein, they improperly continue to assert that the other nuisance law suit pending in the Court below against your Appellant Ulrika Browning, *Halle v. Browning*, Civil Action No. 02-C-63, is a matter relevant to this action. The Appellants acknowledge that they included in their Petition for Appeal herein and in Appellants' Brief the procedural history of *Halle v. Browning*. However, it was also part of that history that the lower Court ruled in its November 7, 2002 Order in *Halle v. Browning* that the Court considered the matters alleged in *Halle v. Browning* to have no relationship to the lawsuit that is the subject of this appeal. The lower Court consequently dismissed Appellant Browning's counterclaim alleging the matters of her riparian rights and nuisance claims relative to the riparian rights claims and dismissed the Higgins similar third party complaint.

Your Appellants then filed a Petition for Writ of Prohibition (#022483) in response to the lower Court's rulings of November 7, 20002 in *Halle v. Browning* seeking, among other things, to have the counterclaim and third party issues considered by this Court. This Court refused to consider said Petition for Writ of Prohibition, leaving your Appellants with no other alternative than to file a separate law suit ultimately leading to this appeal. Rather than directly attacking the

full substance of the causes of action alleged by your Appellants against the Halles regarding their riparian water rights and nuisance regarding the subject creek, the Halles continue to point to this unrelated matter as justification for the Circuit Court's improper grant of summary judgment in this action. It is of no consequence to this appeal as to when, or why, the Appellants filed this action in relation to the Halles' ongoing acts alleged to have occurred since 2000. The Circuit Court should not have considered such.

The Halles not only raise this issue, but mislead this Court in its description of witnesses' testimony stating in their brief that "Ms. Browning confirmed that the reason for filing her counter-claim was in retaliation for the Halles' institution of an action against her." None of the Appellants are attorneys. None of them have the education or knowledge as to what the civil procedure requirements are, other than what is explained to them by their counsel. A fair reading of Ms. Browning's deposition at pp. 73-75 show that she was not inclined to file a lawsuit, but that it was her desire to know that she could tell her side of the story. This lawsuit is her side of the story. A fair reading of Ms. Browning's deposition clearly shows the full picture of the actions of the Halles and the results thereof.

As to Mr. Higgins' deposition testimony regarding the reasons that he filed this lawsuit, the Halles clearly ignore his stated reasons given in his deposition (p. 69), being "the letter that we wrote". The Halles also failed to point out that this letter is attached to the deposition as Exhibit 7. The letter that the Higgins wrote to the Halles dated March 14, 2000 clearly advised the Halles of the nature and extent of the use of the stream, as well as the Higgins' appreciation of the stream and their specific requests that the Halles not do anything to harm the stream. It is also clear from Mr. Higgins' deposition testimony at pp. 67-69, that the Higgins' decision to

assert a counter-claim regarding their riparian water rights was made after consultation with their attorney. Ms. Higgins testified, at page 33, the following question:

17. "What prompted to join Ms. Browning in this law suit against the Halles?"

A. "For the first time since the problems began with the water and my fear of flooding began, I began to have hope that we could possibly get them to stop the logging and stop the damage."

These misrepresentations may appear minor, but they are emblematic of the representations made to the Court by the Halles in their Motion for Summary Judgment which the lower Court apparently considered in its ruling.

The Halles make reference in footnote 2 of their Brief that there is nothing in the Circuit Court's file that reflects that the Prosecuting Attorney informed the Court that he declined to prosecute Ms. Browning for criminal contempt, as stated in the appellant's brief, page 3. The Halles apparently failed to look in the right file because by Order dated April 1, 2005, a copy of which is attached hereto as Exhibit 1, in paragraph 5 the lower Court states "that the Plaintiff's Petition For Contempt shall be dismissed in future proceedings in contempt as it applies to issues that have been referred to the Upshur County Prosecuting attorney's shall be barred. However, the Plaintiffs may re-file their Petition For Contempt and assert grounds that have not been previously submitted to the Upshur County Prosecuting Attorney's office." To date, no further Petition For Contempt against Ms. Browning in the *Halle v. Browning* action has been asserted or filed.

II. APPELLANTS REBUTTED THE HALLES' MOTION FOR SUMMARY JUDGEMENT AS TO THE HALLES' TIMBERING ACTIVITIES

While the Halles have strenuously objected to the introduction of deposition testimony and other evidence subsequent to the September 14, 2004 hearing on the Motion Summary Judgment (see Section D of their Response Brief), the Halles continue to reference testimony of James "Jim" Mitchell, the former forestry agent for Upshur County, West Virginia. Although Mr. Mitchell's deposition testimony is one of the items that the Halles had stricken from the record¹, it is evidence the Halles insist be considered herein. It is also one of the reasons supporting the Appellants' assertion that the lower Court abused its discretion by not considering Appellants' Motion for Relief From Judgment or, in the Alternative, to Reconsider the Court's Order granting the Halles' Motion for Summary Judgment (see below). The portions of Mr. Mitchell's deposition testimony which rebut the Halles' contentions, cited at pp. 34-35 of Appellants brief are again as follows:

"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

¹ By Order dated May 25, 2005 , the Circuit Court ordered Mr. Mitchell's deposition transcript and other items stricken from the record after the record was reviewed by this Court in consideration of the Petition for Appeal and the record was returned by the Clerk of this Court and returned to the Office of the Circuit Clerk of Upshur County. see Section IV hereinafter.

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 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)."

Again, the Halles minimize the reports and depositions of your Appellants' expert, Benjamin M. Stout, III, Ph. D. A full and fair reading of his testimony and his report sets out all of his opinions as a result of his investigation and testing. The Halles failed to point out the obvious that Dr. Stout was not called upon to test the subject creek prior to the Halles moving onto their property on the tributary of Laurel Run. Dr. Stout was obviously not called upon to investigate or test the subject creek until after this lawsuit was proceeding through discovery.

Halles failed to include the following question and answer which immediately followed the question and answer cited by the Halles in their Response Brief at p. 5:

"Q. What were you asked to do when you were retained in this case?

A. Well, I was asked-- oh, when was I retained in this case. That has been awhile. I was asked to come up and-- well, let me think about that for a minute, now that I-- that's been a while, but I was asked to come up and look at the water quality. I was made aware of what the situation was or perceived situation. I was asked to make comments about the effect of timbering primarily on sediment flow in the watershed. And that was the gist of the first field kind of survey we did.

Pardon me.

Q. Are you going to offer any opinions on the affect of the timbering on the Halle property on the watershed?

A. Yeah, I will.

Q. What will your opinions be?

A. Well, I think -- I haven't been up there in the last -- since we did -- since September. But when I was there, both in June and in September, I mean, the timbering operations didn't seem to be currently impacting sediment flow on the property; but they did seem to have had, what I would think would be a significant impact in the past. And there is pretty good evidence of that.

And I really don't think they followed best management practices, not all the time. In some places, they did; in other places, they just didn't, and that's probably going to be my opinion."

(Deposition of Benjamin M. Stout III, Ph.D. at pp 87-88)

After the question and answer quoted in the Halles' Response Brief page 5, Mr. Stout's deposition continues as follows:

"Q. Are there any remedial measures that, in your opinion, need to be put into place by the Halles, based on the past timbering of their property?

A. Yeah. Yeah. There's a couple of things, I think. One is that one road that goes up into the west part of the property there is still eroding. I mean, you know, and maybe it's not a gully that's a huge torrent of silt right now, but it obviously was. And that road needs to be put to sleep and taken out of existence. There's no reason for it, and it's detrimental to downstream communities.

Q. How would that be taken out?

A. Get rid of that culvert and vegetate the lower portion along the stream there.

Q. Okay. Anything else?

A. You know, it's pretty hard to undo past stuff. Yeah, don't use those haul roads that exceed the slope of best management practices. Sorry.

Q. Did there appear to be active use of haul roads?

A. I don't know about active. It's hard to tell because I was only there twice, but I don't think they were actively being used. Most of the stuff that I saw that I thought had been detrimental had been detrimental in the past.

Q. Not currently?

A. Not from what I saw.

Q. So, the one road on the west part of the property needs to be taken out of use and the

culvert removed?

A. Yeah. I mean-- yeah. That's a compromise because you already have a brand new culvert with pavement over it by the house, which I'm not real happy about that either. But there's two culverts down below that that needs to be taken out. They are not needed anymore, so-- and they are detrimental. So, yeah. If it was my farm, I would take them out.

Q. Is it a violation of best management practices not to do that?

A. Well, you don't really violate best management practices, they are voluntary.

Q. Right.

A. Oh, yeah, you put roads to sleep, absolutely, unused roads, haul roads, put them to sleep. And a water bar. If you take a culvert out, put a water bar uphill of it, well away from the stream and get some vegetation growing on that old roadbed. You might need to spread a little soil out to do that. You could eliminate that as being an impact.

Q. Just to conclude this area of your opinions, it's your testimony and your opinion that the past timbering and logging practices on the Halle property is not presently having any detrimental effect on the sediment flow in Laurel Run at this time?

A. No, I didn't say that.

Q. Okay. Say it the way you want to say it.

A. I think most of the damage, and there obviously was some, has been in the past. And I think that's really, you know, lessened over the years with natural revegetation. But there are some things that could be done better. There's still sediment flow coming from the Halle tributary into the Laurel Run."

(Deposition of Benjamin M. Stout III, Ph.D. at pp 88-91).

Clearly ignored by the Halles, and apparently the Circuit Court in its rulings, was the information about fecal coliform testing and the probable sources. Just as this Court is asked to do by Appellants, all the Circuit Court had to do was make a fair reading of Dr. Stout's deposition and the Halles' contentions would have been rebutted in their entirety.

While Dr. Stout was hired by the Appellants to look at "water quality" issues, he was not the expert hired to provide the necessary opinions on the effect of the Halles' logging activities as was Richard Eades. The Halles cite only one question and answer from the deposition of Richard Eades regarding investigation of sources of sedimentation to support their contentions and to rebut his 23-page report (exclusive of photographs) that is in the record. The Halles fail to explain Dr. Eli McCoy's admission that he did not view the whole property. It is obvious from reading his report with photographs and his deposition testimony that Mr. Eades, unlike Dr. McCoy, walked all over the Halle property, took photographs, prepared a diagram of his view of the property and the clearly concluded the cause and effect of damage to the stream to have been caused by the Halles' activities. The Halles did nothing to rebut Mr. Eades's testimony from his deposition at pages 103 through 108. All of this testimony and evidence was filed with the Circuit Court in response to the Halles' Motion for Summary Judgment. Obviously, the Circuit Court ignored this credible and extensive expert testimony in favor of a few statements by Dr. McCoy, who did not bother to walk the Halle property or take one photograph.

III. APPELLANTS REBUTTED THE HALLES' MOTION FOR SUMMARY JUDGEMENT AS TO THE FECAL COLIFORM CONTAMINATION

The Court below gave no consideration whatsoever to the evidence regarding drainage of

the barn and adjacent area, the horse manure pile almost in the creek, or the improper installation of the Halle's Mighty Mac home aeration waste treatment unit, the improper installation of which would compromise the water quality of the stream. (See, *Response to MSJ*, Exhibit 7, *Transcript of Deposition of Randy Reger*, pp.50-57)

As in their Motion for Summary Judgment, the Halles rely on the fact that no State of West Virginia enforcement agency cited the Halles for improper timbering practices or violations of State's water quality standards set forth by the Environmental Quality Board which at the time set water quality standards. This lawsuit is about damage to the Appellants' rights to reasonably use the water and damage that their up-stream neighbors have caused them. As stated in the Appellants Brief, this is another case that "amply 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 interest 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." *Taylor v. Culloden Public Service District*, 214 W.Va. 639, 591 S.E.2d at p.206 (2003).

It is ironic that the Halles would maintain that using the water for drinking purposes or other domestic purposes is unreasonable while they contending that the manner of their use is reasonable. The only way that whose use is reasonable and whose is not can be determined is with a jury. Concomitant with that process is a view of the respective properties by the jury in light of all the circumstances. One such circumstance being the Higgins' warning to the Halles in writing of their use of the stream, advising the Halles that the watershed was ecologically sensitive and requesting the Halles not to do anything that would harm the watershed.

The Appellants' deposition testimony is still competent evidence of the damage that they suffered from the acts of the Halles. The Appellants' allegations are clearly supported by the deposition testimony and written reports with exhibits introduced into the record. Appellants' assertions of past and possible future damage, as well as the appellants' assertions as to the harm and damage caused to them by the Halles' activities and/or the activities of their contractors is supported by the record. Whether the harm occurs daily or intermittently is not an element of Appellants' causes of action against the Halles. The extent of harm can only be determined by a jury after all evidence is presented.

Regarding the Mighty Mac unit, the Halles also state at footnote 12 on page 13 of their Response Brief that "the *treated* affluent from the unit is discharged onto the ground and not into Laurel Run." However, Dr. McCoy's report at page 4 references photograph 4 as "sample from Mighty Mac HAU which discharges into Laurel Run up stream of LR-3, 4" green PVC pipe." A review of this photograph clearly shows affluent coming out of the green PVC pipe and going into the stream. The Circuit Court chose to ignore these facts as well.

The Halles also tried to conjure up a difference between degrading surface water run off versus degradation of water flowing across property. The appellants have been harmed by both surface water run off causing sedimentation problems, as well as degradation of the water flowing across their property caused by the Halles' activities. The issue at stake is whether the Halles caused harm to the appellants by materially diminishing the quantity, corrupting the quality, or detaining the water to deprive the appellants a fair and reasonable participation in the benefits of the stream. *In Re: Flood Litigation*, No. 31688, (Filed December 9, 2004); *Snyder v. Callaghan*, 284 S.E.2d 241(1981).

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION BY FAILING TO GRANT APPELLANTS MOTION FOR RELIEF FROM JUDGMENT

The Halles also take issue with the appellants failure "to advise this Court that at no time did they request a trial court to hear or otherwise rule on their motion." To the contrary, the Circuit Court was asked by letter by the Appellants to rule on the motion without a hearing or to set a hearing. (See letter dated October 14, 2004 attached hereto as Exhibit 2). The Halles assert that Appellants' Motion for Relief From Judgment or, in the Alternative, to Reconsider the Court's Order granting the Halles' Motion for Summary Judgment was the manner and method chosen to bring to the attention of the Court below other evidence and deposition testimony, including Mr. Mitchell's deposition transcript as well as the other evidence and deposition testimony that did not seem to be pertinent to the issues raised in the Halles' Motion for Summary Judgment.

As a reading of the transcript of the September 15, 2004 hearing will reflect, the Circuit Court Judge issued his ruling from the bench without providing any reasons or justification from the bench. Appellants had no real opportunity to ask him to consider other evidence prior to his granting of the summary judgment motion. A post summary judgment ruling motion was the only way available to Appellants to attempt to offer other evidence in the record on this matter and to seek the lower Court to reconsider its ruling from the bench. Given the lack of any reasons from the bench for its ruling, this attorney chose to make these matters known through a subsequent written motion. In any event, the Circuit Court made no ruling and did not strike any evidence until it filed its Order of May 25, 2005, after this Court granted the Appellants' Petition for Appeal. Afterwards, the Circuit Court Clerk of Upshur County, disregarding this Court's

standard Order to produce the original record returned the "original record" without the items filed by Appellants on October 14, 2004 with the Circuit Clerk .

Appellants filed with this Court a Motion to Proceed on the Original Record. The Court's Clerk advised the undersigned by telephone that such a Motion should not be necessary. In light of the Circuit Court Clerk's failure to transmit back to this Court the full record which the Court had while considering the Petition for Appeal, Appellants make reference to the Motion to Proceed on the Original Record, should this Court choose to consider it.

In any event, there was sufficient evidence in the record at the September 15, 2004 hearing on the Halles' Motion for Summary Judgment to fully rebut the Halles' contentions set forth therein. The Appellants are entitled to a jury trial in this cause. This Court should grant the Appellants the relief requested and remand this case to the Circuit Court for a trial on all issues.

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 reverse 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*, and for all


other relief this Court deems appropriate.

Respectfully submitted,

**ULRIKA BROWNING,
TIMOTHY HIGGINS and WENDY HIGGINS**

By Counsel

BY:



William E. Ford III
(WV State Bar No.1246)

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IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

JUDITH HALLE and
ANDREAS HALLE, husband and wife,

Plaintiff,

v.

CIVIL ACTION NO. 02-C-63

ULRIKA BROWNING

Defendant

ORDER

On this day the Court upon review of the file in this matter and the Plaintiff's Motion to Amend their Complaint and the Defendant's response thereto and further upon review of the Plaintiff's Petition for Contempt and the Defendant's Motion to Dismiss the same does Order as follows

- 1 That the Plaintiffs are permitted to amend their Complaint
- 2 That the trial heretofore scheduled in this matter on May 17, 2005 shall be continued until the Court's civil trial docket for September, 2005
- 3 It is further Ordered that a scheduling conference in this matter shall be held on the ^{16th} 9th day of May, 2005 at 11:00 o'clock A m at the Judges Chambers in the Upshur County Courthouse
- 4 That the Defendants objections and exceptions to the Amended Complaint are noted and the Defendant's right to move to dismiss individual allegations shall be preserved and may be brought before the Court at a later date
- 5 That the Plaintiff's Petition for Contempt shall be dismissed and future proceedings in

EXHIBIT 1

Contempt as it applies to issues that have been referred to the Upshur County Prosecuting Attorney's office shall be barred. However, the Plaintiff's may re-file their Petition for Contempt and assert grounds that have not been previously submitted to the Upshur County Prosecuting Attorney's office.

6 That the Clerk of this Court shall provide a certified copy of this Order to Steven B Nanners, Attorney at Law, 45 West Main Street, Buckhannon, West Virginia 26201 and William E Ford, III, Attorney at Law, 217 East Main Street, Clarksburg, WV 26301-2125

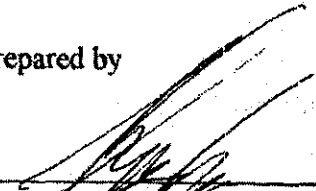
Entry April 1, 2005

cc 4/1/05
S. Nanners
W. Ford



Judge

Prepared by



Steven B. Nanners, #6358
Law Offices of Nanners & Willett, L.C.
45 West Main Street
Buckhannon, West Virginia 26201
304-472-2048

ENTERED 4/1/05
Civil BOOK 47
PAGE 224-225

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand 9/19/05
TERESA C. BEER, CLERK

By 
Deputy Clerk

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William E. Ford III
Admitted in West Virginia and Florida

October 14, 2004

Judge Thomas H. Keadle
Circuit Court of Upshur County
40 W. Main St. 2nd Floor
Buckhannon, West Virginia 26201

RE: *Browning, et al. v. Halle;*
Civil Action No. 02-C-104

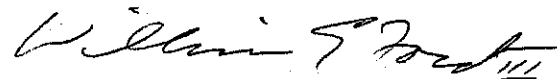
Dear Judge Keadle:

Enclosed please find a courtesy copy of **Plaintiffs' Motion for Relief From Judgment Or, In The Alternative, To Reconsider the Court's Order Granting Defendants' Motion for Summary Judgment** in the above referenced action, a copy of which has been served upon opposing counsel.

Please be advised that the Plaintiffs have no objection to the Court ruling on this Motion without a hearing. Should you wish to set a hearing, or have any questions, please do not hesitate to contact me at the above telephone number.

Thank you for your consideration in this matter.

Very truly yours,


William E. Ford III

cc: Steven B. Nanners, Esq.
Curtis G. Power, III, Esq.

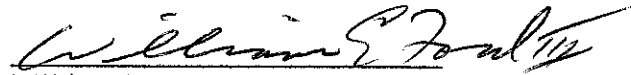
EXHIBIT 2

CERTIFICATE OF SERVICE

I, William E. Ford III, Counsel for Appellants Ulrika Browning and Timothy Higgins and Wendy Higgins, hereby certify that I served a true copy of **APPELLANTS ULRIKA BROWNING, TIMOTHY HIGGINS AND WENDY HIGGINS' REPLY TO BRIEF ON BEHALF OF APPELLEES JUDITH HALLE AND ANDREAS HALLE** upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 21st day of September, 2005.

Steven B. Nanners, Esq.
Nanners & Willets, PLLC
45 West Main St.
Buckhannon, WV 26201
Counsel for Appellees

Curtis G. Power, III
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Counsel for Appellees


William E. Ford III