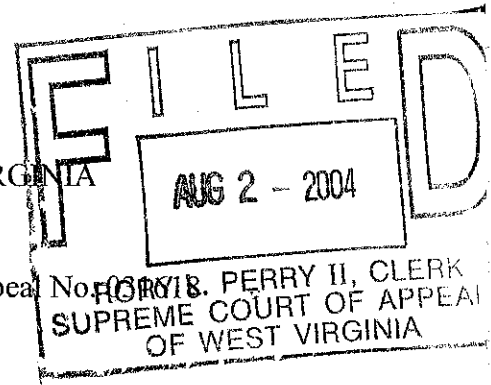


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN RE: FLOOD LITIGATION

Appeal No. 03-0018. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**APPELLEES' (DEFENDANTS BELOW) MASTER SUPPLEMENTAL BRIEF  
IN RESPONSE TO THE COURT'S REQUEST FOR  
ADDITIONAL BRIEFING FROM THE PARTIES**

The Appellees/Defendants below ("Defendants") submit this Master Supplemental Brief in Response to the Court's Request for Additional Briefing from the Parties ("Supplemental Brief") pursuant to the Order entered by this Court on June 10, 2004.

**I. INTRODUCTION**

The initial briefing and oral argument clearly show that the parties agree that the plaintiffs can pursue a cause of action for unreasonable use under Morris Associates v. Priddy, 181 W. Va. 588, 383 S.E.2d 770 (1989), and for negligence. These claims are all that are available to the plaintiffs in this litigation under West Virginia law. Because the plaintiffs have adequate redress in this litigation under these established legal theories, there is simply no reason for this Court to adopt the extraordinary revisions of West Virginia law suggested by the plaintiffs.

The plaintiffs advocate a sea-change in West Virginia law for the simple reason that they seek to lower the evidentiary burdens that established theories require them to meet. That is why plaintiffs, in an incomprehensible argument, contend that a claim for strict liability is subsumed by a "private nuisance" claim under Restatement (Second) of Torts § 822 in such a manner that the plaintiffs do not have to prove the generally-accepted elements of strict liability under §520, as adopted in Peneschi v. National Steel

Corp., 170 W. Va. 511, 295 S.E.2d 1 (1982). The Defendants agree with the three Mass Litigation Panel judges ("Panel Judges") that the plaintiffs *cannot* pursue a claim for strict liability under the assumed facts in this litigation. The plaintiffs' response is to attempt to convert virtually all their claims into a private nuisance cause of action so that the evidentiary burdens attendant to each of those other causes of action are avoided. This approach, however, is incorrect, illogical, and has not been adopted by a single jurisdiction in any recorded decision.

The Panel Judges' answers to Certified Questions 6 (preemption) and 7 (mitigation) are entirely consistent. The Defendants agree that federal law does not preempt the plaintiffs' claims for unreasonable use and negligence. Likewise, the Defendants agree with the Panel Judges that compliance with state laws, regulations, and permits "vitiates" or mitigates against a finding of unreasonable use or negligence. One addresses a question of law, and the other addresses a question of evidence.

Likewise, the Panel Judges' answers to Certified Questions 8 and 9 are correct and reflect fundamental fairness, logic, and an appropriate application of basic tenets of West Virginia law.

## II. ARGUMENT

### A. **Strict Liability.**

The law of strict liability in West Virginia is well-settled and follows the rationale of Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd Fletcher v. Rylands*, L.R. 1 Ex. 265 (1866), *aff'd Rylands v. Fletcher*, L.R. 3, 3 H.L. 330 (1868), as set forth in the Restatement (Second) of Torts. See Peneschi v. National Steel Corp., 170

W. Va. 511, 295 S.E.2d 1 (1982). As detailed in the Defendants' Master Brief in Response to Questions Certified from the Circuit Court of Raleigh County, West Virginia ("Master Brief") at pp. 8-12, the Panel Judges correctly found that the plaintiffs cannot state a cognizable cause of action for strict liability against the Defendants for allegedly increasing the peak surface flow of water during naturally-occurring floods.

**B. Private Nuisance.**

To avoid the established law of strict liability, and despite having a cognizable cause of action for unreasonable use under the principles of Morris Associates v. Priddy, 181 W. Va. 588, 383 S.E.2d 770 (1989), and for negligence, the plaintiffs seek to sweep negligence, reasonable use, strict liability, and a host of other torts under the label of "private nuisance" with the goal of convincing this court that "strict liability" means something other than the Rylands-type strict liability adopted in Peneschi v. National Steel Corp., 170 W. Va. 511, 295 S.E.2d 1 (1982). In fact, the plaintiffs go so far as to argue that the concept of "abnormally dangerous conduct" is magically transformed under "private nuisance" into something else: "[The] rule of reasonable use/intentional unreasonable nuisance is essentially identical to that of . . . abnormally dangerous conduct, . . . being a rule of strict liability." Plaintiffs' Petition at 12. This is absurd and runs directly counter to established law and to the Restatement.

**1. Restatement (Second) of Torts § 822.**

Restatement (Second) of Torts §822 contains the general rule of private nuisance as it applies to an invasion of interests in land other than by trespass:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

- (a) intentional and unreasonable, or
- (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

This Section contains two separate subparts, each of which supports a claim for private nuisance.

**a. Section 822(a).**

The plaintiffs latch onto the "intentional and unreasonable" language of §822(a) in arguing that the "rule of reasonable use/intentional unreasonable nuisance is essentially identical to that of . . . abnormally dangerous conduct, . . . being a rule of strict liability." Plaintiffs' Petition at 12. This is nonsensical. In fact, this statement contradicts the plaintiffs' own statement that "the test for reasonable use with regard to surface water under Morris and the test for intentional private nuisance under Hendricks and the *Restatement* [§822(a)] are the same . . . ." The Defendants agree that a private nuisance cause of action under §822(a) is simply another name for the "unreasonable use" cause of action under Morris. To contort this simple logic into a broad scale abandonment of tort law by calling everything "private nuisance" is, however, illogical, unwarranted, and unnecessary.

For example, Comment "c" to §822 states that "[a] person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case . . . ." This language parallels the rule of "reasonable use" under Morris, under which "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." Morris, 181 W. Va. at 592, 383 S.E.2d at 774. In both cases, the focus is on whether the conduct is "reasonable" under "all the circumstances" of the case.

Likewise, the Court in Hendricks also focused on the "reasonableness" of the conduct: "An interference is intentional when the actor knows or should know that the *conduct* is causing a substantial and *unreasonable* interference . . . ." Hendricks, 181 W. Va. at 35, 380 S.E.2d at 35 (emphasis added). The Court went further and stated that "[t]he unreasonableness of an intentional interference must be determined by a balancing of the landowners' interests. An interference is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm." Hendricks, 181 W. Va. at 35, 380 S.E.2d at 35. This, of course, mirrors the balancing required by the "reasonable use" test in Morris, under which the "reasonableness" of the steps taken by a landowner are determined "in light of all the circumstances of relative advantage to the actor and disadvantage to the adjoining landowners, as well as social utility." Morris, 181 W. Va. at 591, 383 S.E.2d at 773.

Whatever the moniker affixed to this cause of action, therefore, be it "unreasonable use", "nuisance", "private nuisance" or "intentional and unreasonable nuisance", the test is the same: the "reasonable use" standard articulated by this Court in Morris and affirmed in subsequent cases. See Graham v. Beverage, P.C., 211 W. Va. 466, 566 S.E.2d 603 (2002); Whorton v. Malone, 209 W. Va. 384, 549 S.E.2d 57 (2001); Elder v. Smith, 196 W. Va. 660, 474 S.E.2d 590 (1996); and Russell v. Island Creek Coal Co., 182 W. Va. 506, 389 S.E.2d 194 (1990).

In short, there is simply no need to recognize a "private nuisance" cause of action under the assumed facts of this litigation because the plaintiffs already have available to them a claim for unreasonable use. In addition, even if the Court does permit the plaintiffs to pursue a "private nuisance" cause of action, there is simply no reason to adopt a new and radical standard of liability under this theory when, clearly, the standard is simply the "reasonable use" standard in Morris.

**b. Section 822(b).**

An "unintentional" invasion of a person's interest in the private use and enjoyment of land leads to a private nuisance cause of action only if the conduct leading to the "unintentional" invasion is "negligent, reckless or abnormally dangerous." Restatement (Second) of Torts, §822, cmt. c. A private nuisance cause of action based on "unintentional" invasion, therefore, is simply another name for a negligence or strict liability claim. Clearly, therefore, a claim for "unintentional" private nuisance is redundant and adds nothing to the panoply of legal theories already available to the plaintiffs, which is why this Court has never adopted § 822(b).

There is absolutely *no* merit to the plaintiffs' argument that an action for private nuisance under §822(b) modifies or diminishes what a plaintiff must show to establish a strict liability claim under §520, as adopted in Peneschi v. National Steel Corp., 170 W. Va. 511, 295 S.E.2d 1 (1982). This argument completely misinterprets and inverts the Restatement's position on private nuisance.

Historically, a private nuisance claim focused on the property interest invaded rather than the conduct that led to the invasion; i.e., a private nuisance claim existed if the use and enjoyment of property was disturbed, regardless of how the conduct was

characterized. See §822, Cmt. b. Also, historically, the rule of strict liability prevailed in tort law; i.e., "[a]n actor was liable for harm caused by his acts whether that harm was done intentionally, negligently, or accidentally." §822, Cmt. b. Eventually, however, tort law changed to "take into consideration not only the harm inflicted but also the type of conduct that caused it, in determining liability." §822, Cmt. b. This change came later to private nuisance law, but now "an actor is no longer liable for accidental interferences with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct." §822, Cmt. b. Clearly, therefore, the plaintiffs must establish the traditional tort theories of negligent or reckless conduct or strict liability to recover for "unintentional" private nuisance.

As a result, "[l]iability for an invasion of interests in the use and enjoyment of land now depends upon the presence of some type of tortious conduct." §822, Cmt. c. Simply focusing on the interest invaded, or the "conditions" that lead to the invasion, is not enough. A court must also consider the "reasonableness" of the conduct (under §822(a)) or whether the conduct is negligent or subject to strict liability (under §822(b)).

The net result is that, to recover for an "intentional and unreasonable" private nuisance cause of action under §822(a), the plaintiffs must use the "reasonable use" standard of liability in Morris.<sup>1</sup> To recover for an "unintentional" private nuisance cause of action under §822(b), the plaintiffs must still prove the traditional elements of negligence or strict liability -- and the Panel Judges correctly found that, under the

---

<sup>1</sup> For this reason, it is unnecessary for this Court to address, much less adopt, Restatement (Second) of Torts 826 and 829 as Morris provides what factors, under West Virginia law, are relevant to the "reasonable use" standard of liability. See Defendants' Master Brief at pp. 16-17.

assumed facts in this litigation, the plaintiffs cannot pursue a claim for strict liability. For these reasons, permitting the plaintiffs to pursue a "private nuisance" cause of action is redundant and unnecessary.

No recorded case, including from the surrounding jurisdictions, has adopted the radical and wholesale changes to the law espoused by the plaintiffs in this case. That is because the notion that private parties can be made accountable for all damages caused by a natural disaster is so outrageous and ludicrous that only an entirely new approach could possibly support it. The Defendants ask that this Court reject the radical changes suggested by the plaintiffs and simply confirm the application of the existing West Virginia law of reasonable use and negligence to the plaintiffs' claims in this litigation.

**C. Question 6 (Preemption) and Question 7 (Mitigation) were answered consistently.**

Question 6 and Question 7 are entirely consistent. The questions do *not* mirror each other, and address different concepts.

Question 6 addresses the legal question of whether federal law preempts the plaintiffs' state law claims:

In the event that a landowner conducts the extraction and removal of natural resources on its property in conformity with federal law and with permits issued by appropriate federal agencies, is any state court action preempted for damages caused by surface waters accumulating and migrating on residential property?

The Panel Judges correctly answered this question "No" because federal law does *not* preempt the plaintiffs' claims for unreasonable use or negligence in this litigation.

Question 7 addresses the evidentiary question of whether evidence that a defendant conforms with state laws and state permits mitigates against a finding of

negligence or unreasonable use:

In the event that a landowner conducts the extraction and removal of natural resources on its property in conformity with state law and with permits issued by appropriate state agencies, does this vitiate any cause of action for negligence, nuisance or unreasonableness?

Again, the Panel Judges correctly answered "Yes" to this question because evidence of conformity with state laws and permits *does* "vitate" against a finding of negligence or unreasonableness though such evidence does not *mandate* a finding of no liability. This assumes that the Panel Judges intended the common use of the word "vitate", which is "to reduce or impair the quality of." See Merriam-Webster's Collegiate Dictionary 10th Ed. ("impair; . . . to make ineffective."); see also Black's Law Dictionary 5th Ed. ("to impair; to make void or voidable; to cause to fail or force or effect.").

Together, the answers to Question 6 and Question 7 simply, and correctly, stand for the proposition that a defendant's compliance with all federal and state law, regulations, and permits does not require, as a matter of law, dismissal of a particular plaintiff's claims for negligence or unreasonable use. On the other hand, evidence of such compliance certainly impairs the ability of a plaintiff to show that the complying defendant acted unreasonably or negligently.

**D. Causation and Damages.**

The Panel Judges' answers to Certified Questions 8 and 9 are correct and reflect fundamental fairness, logic, and an appropriate application of basic tenets of West Virginia law. These questions, and the Panel Judges' answers, are as follows:

Question Number 8. Whether the causation shall be limited to those matters proximately caused by the increase in peak

flow (the increase in the flow of water that was caused by the extraction and removal of natural resources over the flow that would have normally occurred during the rain event) by the defendants' use of this land.

Answer: Yes.

Question Number 9. Whether the measure of damages should be limited to those damages proximately cause [sic] by the increase in peak flow (the increase in the flow of water that was caused by the extraction and removal of natural resources over the flow that would have normally occurred during the rain event) due to defendants' activities on the land.

Answer: Yes.

#### **1. The Origin and Assumptions of Questions 8 and 9.**

The Defendants note that Questions 8 and 9 were independently formulated by the Panel Judges; they were not suggested by any of the parties. In addition, the Panel Judges formulated and answered these questions on the basis of numerous, unsubstantiated factual and legal assumptions. While disagreeing that any evidence or law exists to support those underlying assumptions, the Defendants simply take the questions as they are and submit that, as stated and incorporating numerous unproven assumptions, the answers given by the Panel Judges to those questions are correct.

Questions 8 and 9 contain critical assumptions made by the Panel Judges that the Defendants vigorously contest. In discussing Questions 8 and 9, the Defendants do not want to create the perception that they acquiesce in the correctness of those assumptions, and so they will point out and briefly discuss the major -- and highly contested -- assumptions incorporated by the Panel Judges into Questions 8 and 9:

- **That Defendants engaged in tortious or other conduct that will support a finding of liability against them under West Virginia law for all or part of Plaintiffs' damages.** Defendants categorically deny that the plaintiffs can prove liability against any of them under any theory of law.
- **That Defendants' use of the land actually caused an increase in peak flow.** The Defendants disagree with this assumption. In fact, the Referral from Court to the Panel Judges states as a fact that mining operations (and presumably any other land-disturbing activity) can either increase or decrease the peak flow in a rainstorm event, so this assumption is obviously a fact that will have to be proven in each instance as to each Plaintiff. More importantly, not only do the questions assume that peak flow is increased, they also assume that the assumed increase would actually matter in a legally cognizable way under circumstances involving huge amounts of concentrated rainfall and widespread flooding such as occurred on July 8, 2001. Defendants submit that this second assumption is also incorrect, and even if it is assumed that peak flow was increased, such increase would be so minuscule as to be inconsequential.
- **That Defendants' conduct was the factual cause of all or part of Plaintiffs' damages.** Questions 8 and 9 *assume* that, in the absence of the Defendants' conduct, the plaintiffs would not have been injured. This is the "but for" test of cause-in-fact. Defendants are confident that the "but for" test cannot be satisfied with respect to their conduct and that these cases will fail at that level. Nevertheless, the questions assume that the "but for" test can be met.
- **That Defendants' conduct was a proximate cause of Plaintiffs' damages.** Proximate cause is, of course, a policy-driven analysis of the appropriate scope of the Defendants' liability for their assumed tortious acts. The plaintiffs take the position in this litigation that any person or entity who added even a minuscule amount to the instrumentality (in this case the water) that made up a natural disaster is liable for *all* of the damages resulting from that natural disaster. From a proximate cause perspective, such a proposition is preposterous, and accepting it would produce enormous and far-reaching consequences for everyone in West Virginia who actually uses the land, which obviously includes just about everybody. The Defendants believe that the plaintiffs will lose these cases on the proximate cause issue. Nevertheless, the

questions assume proximate cause is present.

- **That damages assumed to have been sustained by Plaintiffs are separable; in other words, that the damages can be allocated between those that were caused by Mother Nature and those that were caused by the conduct of man.** This assumption really appears to get to the core of the rationale for posing Questions 8 and 9. They are really about apportionment of damages and essentially ask: “If you can (and the questions assume so) separate damages between those caused by Mother Nature and those caused by man, should that be done, and should man then only be held legally responsible for those damages that he actually causes?” In that context, Defendants respectfully submit that the Panel Judges’ answer, “yes,” is correct.

The Defendants also point out that these questions fail to focus on the key element in the causal chain involved in this case. Here, unlike every other flooding case decided in West Virginia involving the so-called Act of God defense, the acts of man (the Defendants) had absolutely no impact upon *whether* the *event* (flooding) occurred. It is analytically unsound to pass over this critical point.

**2. The Panel Judges’ Answers to Questions Numbers 8 and 9 Do Not Implicate Changes to Longstanding Principles of West Virginia Law.**

The truly unique aspect of these cases is the fact that the plaintiffs are attempting to foist liability for all of the damages resulting from a natural disaster upon the Defendants, whose acts, by the plaintiffs’ own admission, allegedly contributed only minuscule amounts to peak flows. While plaintiffs’ counsel repeatedly recites the mantra “God cannot be a tortfeasor” and argues that this invalidates the answers given by the Panel Judges to Questions 8 and 9 (see Plaintiffs’ Brief at 22-24), and suggests that these questions and their answers, if accepted, somehow stand traditional tort principles on their heads, logical analysis quickly shows that to be untrue.

It is axiomatic that God or Mother Nature cannot be a tortfeasor. This is not

because they are bankrupt, or outside the jurisdiction of the court, or without insurance, or otherwise judgment proof -- it is because they are legally and morally incapable of fault. That distinguishes them from all other categories of people or entities that may not in certain instances be held accountable as tortfeasors, but undeniably *can be* tortfeasors.

It is also axiomatic that the concepts of joint and several liability, comparative fault, and comparative contribution operate *only* between and among tortfeasors.

Therefore, by definition, these concepts cannot and do not have any applicability whatsoever to God or Mother Nature.

Natural forces can be, however, and invariably are, the factual and proximate cause of events and the sometimes (as here) enormous damages flowing from them, and the law in all respects recognizes this. Separating the damages caused by non-tortfeasor Mother Nature from those damages caused by tortfeasor man does no harm whatsoever to concepts that apply only to tortfeasor man. Doing so merely recognizes what would appear to be a fundamentally logical and fair concept: That tortfeasors should only be held responsible for the damage their tortious conduct causes.

The cases discussed in the briefs before this Court involving instances where Mother Nature and man have interacted in a flooding situation are distinguishable in many important ways from this litigation and are not analytically inconsistent with the Panel Judges' answers to Questions 8 and 9. The first and most important distinction is that all of those cases involved situations where Mother Nature simply provided the instrumentality (water) and the acts of man controlled and directed that instrumentality so as to cause damage to the plaintiff. See Timber Defendants' Brief, pp. 5-7, discussing Frederick v. Union Carbide Corporation, 168 F.2d 808 (N.D. W. Va. 1959) (where debris

obstructed flow at defendant's floodgate, erected for the specific purpose of altering water flow, causing water to rise and damage plaintiff's property); Adkins v. City of Hinton, 149 W. Va. 613, 142 S.E.2d 889 (1965) (where negligently maintained refuse disposal facility released a huge mound of debris into the hollow during a heavy rain, demolishing plaintiffs' properties); and Riddle v. Baltimore & Ohio R. Co., 137 W. Va. 733, 73 S.E.2d 793 (1953) (where inadequately sized culvert obstructed a natural watercourse, producing an injurious result). See also Thrasher v. Amere Gas Util. Co., 138 W. Va. 166, 75 S.E.2d 376 (1953) (where improperly located pipe caused obstruction to flow of water resulting in damage to plaintiff's property); Mitchell v. Virginian Railway Co., 116 W. Va. 739, 183 S.E. 35 (1935) (affirming judgment for plaintiffs and jury instructions that permitted jury to find that because defendant should have anticipated insufficient clearance of railroad bridge above creek and did not, unprecedented rainfall could not have been considered the sole cause of the injury). In all of these cases, causation and damages could not practically be apportioned, and it was analytically sound to conclude that the roles of Mother Nature and man could not be separated.

Each of those cases, however, is fundamentally different from this litigation, which is predicated upon and seeks recovery from private parties for a huge natural disaster. In this litigation, it is not alleged that man controlled the instrumentality (water) but rather that he "increased the peak flow" or *added* (in a very small amount, if at all) to that instrumentality. Regarding Defendants' assumed addition to Mother Nature's instrumentality, Questions 8 and 9 assume that causation and damages can be separated and apportioned. If causation and damages can be apportioned between cannot-be-a-

tortfeasor Mother Nature and alleged-to-be-tortfeasor man, then they should be apportioned, and man should only be accountable for what he caused.

For example, the District Court for the Northern District of Georgia found that a power company whose newly built dam caused flood water upstream on plaintiffs' land to rise higher and stay elevated longer was liable only for the increased damage the floods caused due to the construction and operation of the dam and not for the entirety of the damages. Clemones v. Alabama Power Company, 250 F.Supp. 433, 438-39 (N.D. Ga. 1966). Relying on the Restatement (Second) Torts § 433A, the court recognized that an apportionment should be made where there is a reasonable basis for determining the contribution of each cause to a single harm. Clemones, 250 F.Supp. at 439 (citing Norfolk & W. Ry. Co. v. McCoy, 257 Ky. 32, 36, 77 S.W.2d 392, 393 (1934) (holding that railway company could be found liable only for the increased damages, if any, to the land which directly and solely resulted from the railroad fill increasing the diversion of water onto plaintiff's land)). Such a situation is different, said the court, from those cases "where it is impossible to distinguish the injury from each cause." Clemones, 250 F.Supp. at 439 (citing Frederick v. Union Carbide Corp., relied on by plaintiffs and discussed *infra*); *cf.* Lang v. Wonnemberg, 455 N.W.2d 832, 838 (N.D. 1990) (finding that defendant might have introduced evidence providing the trial court a reasonable basis to apportion damages among various causes, including unusually high rainfall producing extremely wet conditions).

Once the apportionment is made, then the legal concepts that customarily act between and among tortfeasors have their usual effect, unimpeded and without any change whatsoever from their current formulations in West Virginia law.

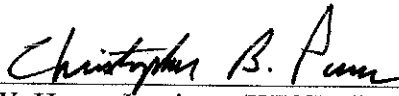
If in fact these cases get to that point -- a very big assumption from the Defendants' perspective -- then such an apportionment of causation/damages is both entirely fair and fully consistent with current law. This kind of analysis is performed every day in West Virginia courts by juries and judges. The principles of comparative fault and comparative contribution both rely upon the same analytical process and normally produce the same result contemplated by Questions 8 and 9 -- an apportionment of damages. A plaintiff in West Virginia cannot recover for damages caused by their own fault, as expressed by the jury in the percentage of fault assigned to the plaintiff. Even joint and several liability works: As to the damages for which the Defendants are jointly responsible, any one of them may be required to pay it all (and will have a right of contribution against other joint tortfeasors). All of these deeply embedded legal concepts in West Virginia law rest upon the bedrock principle that apportionment is appropriate and fair. It is also appropriate and fair in this case, as expressed in Questions 8 and 9, and this Court should affirm the Panel Judges' answers to those questions.

Fundamental fairness, logic, and an appropriate application of basic tenets of West Virginia law dictate that the answers to Certified Questions Numbers 8 and 9, as posed and incorporating all of the myriad assumptions that underlie them, must be "yes." The Defendants do not, however, for even a moment suggest that by taking this position they agree in the slightest degree that the predicate assumptions built into those questions can actually be established. To the contrary, the Defendants are confident that the plaintiffs cannot establish liability, factual cause, or proximate cause against any Defendant, and that these cases will inevitably fail on those grounds without reaching the issues addressed in Questions 8 and 9.

#### IV. CONCLUSION.

As noted in the Defendants initial Master Brief, this Court must understand one thing clearly: the plaintiffs ask this Court to impose liability for natural disasters on the general public (landowners, homeowners, business owners, farmers, loggers, miners, etc.) for any "disturbances of the land". Not for dams that break; not for impoundments that fail; not for ponds that persistently overflow under normal conditions because of lack of maintenance; not for the deliberate diversion of normal runoff from one's property onto that of an adjoining landowner. They want to impose liability on the Defendants for *all* the damage done by floods that struck a large area of our State following extraordinarily heavy rainfall events. This has never been attempted before, much less accomplished, in the recorded jurisprudence of this country. Plaintiffs cannot do it under any of the myriad theories and remedies available under existing law, so they are asking that the law be changed, stretched, and deformed so they can prevail in these cases. The Defendants ask this Court to decline to do so.

**APPELLEES/DEFENDANTS BELOW**  
**By Counsel**  
(For Supplemental Master Brief Only)

  
\_\_\_\_\_  
W. Henry Jernigan (WVSB #1884)  
Mychal S. Schulz (WVSB #6092)  
Christopher B. Power (WVSB# 4286)  
DINSMORE & SHOHL LLP  
Huntington Square, Suite 600  
900 Lee Street  
Charleston, West Virginia 25301  
(304) 357-0906  
*Counsel for Appellees/Defendants Below (For Supplemental Master Brief Only)*

*Christy B. Penn*

---

Lee Davis Thames, Esquire

Butler, Snow, O'Mara, Stevens & Cannada, PLLC

P.O. Box 22567

AmSouth Plaza, 17th Floor

210 East Capitol Street

Jackson, MS 39225-2567

*Counsel for Appellees/Defendants Below (For Supplemental Master Brief Only)*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: FLOOD LITIGATION

Appeal No. 031618

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **Appellees' (Defendants Below) Master Supplemental Brief in Response to the Court's Request for Additional Briefing From the Parties** was served to counsel of record listed below, this 2nd day of August, 2004.

W. Stuart Calwell, Jr., Esq.  
Thomas N. White, Esq.  
The Calwell Practice, PLLC  
Law and Arts Center West  
500 Randolph Street, 25302  
Post Office Box 113  
Charleston, WV 25321  
*Liaison Counsel for Plaintiffs*

Edward G. Atkins, Esq.  
Douglas V. Atkins, Esq.  
Atkins & Atkins  
1335 Virginia Street, East  
Charleston, WV 25301  
*Counsel for Plaintiffs*

G. David Brumfield, Esq.  
Brumfield and Watson  
Attorneys at Law  
First National Bank Building  
Post Office Box P  
Welch, WV 24801-3035  
*Counsel for Plaintiffs*

Edward Shuff Cook, Esq.  
Provost Umphrey Law Firm, LLP  
The Mayfair Royal, Suite 425  
181 14th Street, N.E.  
Atlanta, GA 30309  
*Counsel for Plaintiffs*

Greg A. Hewitt, Esq.  
Hamilton, Burgess, Young & Pollard, PLLC  
Post Office Box 959  
Fayetteville, WV 25840  
*Counsel for Plaintiffs*

Cindy J. Kiblinger, Esq.  
David B. Richardson, Esq.  
James F. Humphreys & Associates, L.C.  
United Center, Suite 800  
500 Virginia Street, East  
Charleston, WV 25301  
*Liaison Counsel for Plaintiffs*

W. Kendrick King, Esq.  
Post Office Box 428  
Welch, WV 24801  
*Counsel for Plaintiffs*

Pamela A. Lambert, Esq.  
Stephen P. New, Esq.  
Lambert & New  
Post Office Drawer 926  
Gilbert, WV 25621  
*Counsel for Plaintiffs*

W. Randolph McGraw, II, Esq.  
McGraw Law Offices  
Post Office Box 279  
Prosperity, WV 25909  
*Liaison Counsel for Plaintiffs*

Belinda S. Morton, Esq.  
Post Office Box 600  
Fayetteville, WV 25840  
*Counsel for Plaintiffs*

Amy L. Sanderson, Esq.  
David P. Wilson, Esq.  
Provost Umphrey Law Firm, LLP  
490 Park Street  
Post Office Box 4905  
Beaumont, TX 77704  
*Counsel for Plaintiffs*

John Sutter, Esq.  
The Sutter Law Firm, PLLC  
1598 Kanawha Boulevard, East  
Charleston, WV 25311  
*Counsel for Plaintiffs*

Vincent M. Trivelli, Esq.  
The Law Offices of Stuart Calwell, PLLC  
178 Chancery Row  
Morgantown, WV 26505  
*Counsel for Plaintiffs*

Edgar A. Poe, Jr., Esq.  
Stephen M. Fowler, Esq.  
Johnnie E. Brown, Esq.  
Pullin, Fowler & Flanagan, PLLC  
1000 Bank One Center  
707 Virginia Street, East, Suite 1000  
Charleston, WV 25301

*Counsel for AEI Resources, Inc.; Cannelton Industries, Inc.;  
Cannelton Land Company; CC Coal Company; Horizon Natural Resources;  
Mega Minerals, Inc.; Mid-Vol Leasing, Inc.; Princess Beverly Coal Company  
and Princess Beverly Coal Holding Company, Inc.*

Richard J. Bolen, Esq.  
Huddleston, Bolen, Beatty, Porter & Copen, LLP  
611 Third Avenue  
P.O. Box 2185  
Huntington, WV 25722-2185  
*Counsel for Alawest, Inc.; Imperial Colliery Company; Ohley Land Company;  
Western Pocahontas Corporation and  
Western Pocahontas Properties Limited Partnership*

Gregory S. Matney, Esq.  
Campbell & Matney  
996 Ben Bolt Avenue  
Tazewell, VA 24651  
*Counsel for Alawest, Inc.*

William J. Hanna, Esq.  
Robert P. Lorea, Esq.  
Michelle L. Marinacci, Esq.  
Flaherty, Sensabaugh & Bonasso, PLLC  
200 Capitol Street  
Charleston, WV 25301  
P.O. Box 2843  
Charleston, WV 25338-3843

*Counsel for Albatross Mining Corporation; Baystar Coal Company, Inc.;  
Bluestone Coal Corporation; Impact Resources, LLC; Keystone Services Industries, Inc.;  
Mountain Empire Leasing, Inc.; Pocahontas Land Corporation;  
San-West Coal Co., Inc.; and Westwood Mining Company, Inc.*

Marc E. Williams, Esq.  
Angela W. Konrad, Esq.  
Huddleston, Bolen, Beatty, Porter & Copen, LLP  
611 Third Avenue  
P.O. Box 2185  
Huntington, WV 25722-2185

*Counsel for Ashland Oil; Norfolk Southern Railway Company;  
Pocahontas Land Corporation and White Oak Company*

Andrew P. Arbogast, Esq.  
Spilman, Thomas & Battle, PLLC  
Spilman Center  
300 Kanawha Blvd., E  
P.O. Box 273  
Charleston, WV 25321-0273  
*Counsel for Berwind Land Company*

John R. Fowler, Esq.  
Karen E. Klein, Esq.  
Law Offices of John R. Fowler  
500 Virginia Street, East, Suite 1270  
Charleston, WV 25301  
*Counsel for Butternut Two, LTD; Butternut Three Ltd.; Cranberry Hardwoods, Inc;  
Cranberry Lumber Company; Eagle Land Company; McCreery Coal Land Company;  
Piney Land Company and White Oak Land Company*

William R. Slicer, Esq.  
Mark W. Browning, Esq.  
Shuman, McCusky & Slicer, PLLC  
P.O. Box 3953  
Charleston, WV 25339  
*Counsel for Baylor Mining, Inc.; Creekside Energy Development Company;*

*Pardee Resources Group, Inc.; Rowland Land Company, Ltd.;  
Limited Partnership and Tioga Lumber Company*

Larry W. George, Esq.  
Attorney-at-Law  
Northgate Business Park  
200 Association Drive  
Charleston, WV 25311

*Counsel for Beaver Coal Company, Ltd.; Dickinson Company LLC;  
Southern Land Company and Southern Land Company Limited Partnership*

Charles E. Hurt, Esq.  
P.O. Box 833  
Charleston, WV 25323  
*Counsel for Bennett Logging Company, Inc.*

Mark A. Bramble, Esq.  
Kesner, Kesner & Bramble, PLLC  
112 Capitol Street  
Charleston, WV 25301  
*Counsel for Black Wolf Mining Company; Flame Coal Corporation;  
Southern Minerals, Inc. and VICA Coal Company, Inc.*

Michael M. Fisher, Esq.  
Scott L. Summers, Esq.  
Offutt, Fisher & Nord  
812 Quarrier Street, Suite 600  
P.O. Box 2833  
Charleston, WV 25330-2833  
*Counsel for Bluefield Timber, LLC; Callisto Coal Company, Inc;  
Left Fork Processing, LLC; Mystic Energy Inc.; Spencer Resources, Inc.;  
Wagner Forest Management, Ltd. (Inc.) and White Mountain Mining Co., LLC*

Lawrence E. Morhous, Esq.  
Hudson McClanahan, Esq.  
Brewster, Morhous & Cameron  
P.O. Box 529  
Bluefield, WV 24801  
*Counsel for Bluestone Coal Corporation; Cedar Coal Company;  
Central Appalachian Mines; Keystone Services Industries, Inc.  
and Second Sterling Corp.*

Edgar E. Bibb, III, Esq.  
Lynch, Mann & Bibb  
P.O. Box 5453  
Beckley, WV 25801-7506  
*Counsel for CDX Gas, L.L.C.*

James M. Brown, Esq.  
Jane E. Harkins, Esq.  
Brown & Levicoff, PLLC  
201 N. Kanawha St.  
Suite 100  
P.O. Box 5039  
Beckley, WV 25801-5039  
*Counsel for Coastal Lumber Company*

Dwayne E. Cyrus, Esq.  
Shuman, McCuskey & Slicer, PLLC  
P.O. Box 3953  
Charleston, WV 25339  
*Counsel for Coastal Lumber Company*

Robert D. Pollitt, Esq.  
Steven P. McGowan, Esq.  
Steptoe & Johnson PLLC  
Bank One Center, Seventh Floor  
P.O. Box 1588  
Charleston, WV 25326-1588  
*Counsel for Consol, Inc.; Consolidation Coal Company and  
Laurel Run Mining Company*

Lee Davis Thames, Esq.  
Butler, Snow, O'Mara, Stevens & Canada, PLLC  
AmSouth Plaza  
17th Floor  
210 East Capitol Street  
P.O. Box 22567  
Jackson, Mississippi 39225  
*Counsel for Colony Bay Coal Company; Eastern Associated Coal Corp.  
and Peabody Coal Company*

Richard W. Walters, Esq.  
Miller, Snyder, Weiler & Walters  
2 Hale Street  
Charleston, WV 25301  
*Counsel for Deep Green West Virginia, Inc.*

Timothy M. Miller, Esq.  
David L. Yaussy, Esq.  
Robinson & McElwee, PLLC  
P.O. Box 1791  
Charleston, WV 25326-1791

*Counsel for Equitable Gas Company; Georgia-Pacific Corporation;  
North American Timber Corporation; Penn Virginia Oil & Gas Corporation;  
Penn Virginia Operating Co., LLC; Penn Resource Partners, L.P.  
and The Timber Company*

Joseph M. Farrell, Esq.  
Robert L. Hogan, Esq.  
Farrell, Farrell & Farrell  
P.O. Box 6457  
Huntington, WV 25772-6457  
*Counsel for Grist Lumber Inc.*

Gary E. Pullin, Esq.  
Angela J. Ball, Esq.  
Pullin, Fowler & Flanagan, PLLC  
1000 Bank One Center  
707 Virginia Street, East, Suite 1000  
Charleston, WV 25301  
*Counsel for Bragg Wood Products, Inc.; D&S Trucking; Intensified X5, Inc.;  
Jewells Logging Company; Mullican Lumber Company; N&L Contracting;  
Mike Lambert, Individually, d/b/a N&L Contracting;  
R&R Logging and Ransom Trucking, Inc.*

Daniel C. Cooper, Esq.  
Robert E. Gifford, Esq.  
J. Greg Goodykoontz, Esq.  
Steptoe & Johnson PLLC  
Bank One Center, Sixth Floor  
P.O. Box 2190  
Charleston, WV 26302-2190  
*Counsel for Jim C. Hamer Company*

Daniel T. Yon, Esq.  
Thomas L. Craig, Esq.  
Bailes, Craig & Yon  
Suite 500, The St. James  
401 Tenth Street  
P.O. Box 1926  
Huntington, WV 25720-1926  
*Counsel for Jim C. Hamer Company*

William W. Booker, Esq.  
John R. Hoblitzell, Esq.  
Kay, Casto & Chaney PLLC  
P.O. Box 2031  
Charleston, WV 25327  
*Counsel for Key Centurion Bancshares, Inc.*

E.M. Payne, III, Esq.  
130 Main Street  
Beckley, WV 25801  
*Counsel for McCreery Coal Land Co. and Piney Land Co.*

Harry G. "Chip" Shaffer, Esq.  
Jerome Sparks, Esq.  
Shaffer & Shaffer  
303 State Street  
P.O. Box 38  
Madison, WV 25130  
*Counsel for Oglebay-Norton Company*

Arden J. Cogar, Jr., Esq.  
Thomas S. Sweeney, Esq.  
MacCorkle, Lavender & Casey, PLLC  
300 Summers St., Suite 800  
P.O. Box 3283  
Charleston, WV 25332-3283  
*Counsel for Alpine Development Company; Dayton Resources Company;  
Herndon Processing Company; Peachtree Ridge Mining Company, Inc.;  
Pen Coal Corporation d/b/a Fork Creek Mining Company; Pinnacle Rock Coal Corp.;  
Riverside Energy, Inc.; Virginia Energy Company;  
and Wyoming Pocahontas Land Company*

R. Ford Francis, Esq.  
Brian Morrison, Esq.  
Schumacher, Francis & Nelson  
P.O. Box 3029  
Charleston, WV 25331  
*Counsel for Priddy, Inc.*

John McCuskey, Esq.  
Shuman, McCuskey & Slicer, PLLC  
P.O. Box 3953  
Charleston, WV 25339  
*Counsel for Shonk Land Company, LLC*

A.L. Emch, Esq.  
Jill M. Obenchain, Esq.  
Jackson Kelly, PLLC  
P.O. Box 553

Charleston, WV 25322-0553

*Liaison Counsel for Defendants and Counsel for Appalachian Mining, Inc.; Arch Coal, Inc.; Ark Land Company; Big Bear Mining Company; Black King Minie Development Company; Catenary Coal Company; Coal-Mac, Inc.; Drummond Company, Inc.; Eastern Coal Corporation; Elk Run Coal Company, Inc.; Elkay Mining Company; Federal Coal Company, Inc.; Gilbert Imported Hardwoods, Inc.; Gilbert Lumber Company, Inc.; Marfork Coal Company, Inc.; Massey Coal Services, Inc.; Performance Coal Company; Pittston Coal Company; Ranger Fuel Corporation; Shannon Pocahontas Mining Company and Vandalia Resources, Inc.*



**W. Henry Jernigan (WVSB #1884)**

**Mychal S. Schulz (WVSB #6092)**

**Christopher B. Power (WVSB# 4286)**

**DINSMORE & SHOHL LLP**

Huntington Square, Suite 600

900 Lee Street

Charleston, West Virginia 25301

(304) 357-0906

*Counsel for Appellees/Defendants Below  
(For Master Supplemental Brief Only)*