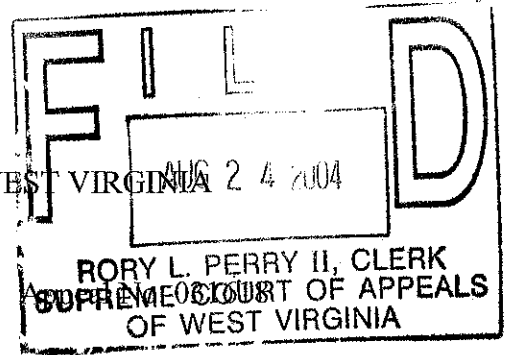


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



IN RE: FLOOD LITIGATION

**APPELLEES' (DEFENDANTS BELOW) MOTION TO STRIKE
PORTIONS OF PLAINTIFFS' SUPPLEMENTAL BRIEF
IN RESPONSE TO THE COURT'S REQUEST FOR
ADDITIONAL BRIEFING FROM THE PARTIES**

The Appellees/Defendants below ("Defendants") submit this Motion to Strike Portions of Plaintiffs' Supplemental Brief in Response to the Court's Request for Additional Briefing from the Parties ("Supplemental Brief"). In support of this Motion, the Defendants state as follows:

1. The matter is before the Court on certified questions and answers submitted by the three Mass Litigation Panel judges ("Panel Judges") pursuant to W. Va. Code §58-5-2.
2. The Supreme Court of Appeals has no jurisdiction to determine questions of fact on certified questions, see Consolidation Coal Co. v. Mineral Coal Co., 147 W. Va. 130, 126 S.E.2d 194 (1962); State v. Stout, 142 W. Va. 182, 95. S.E.2d 639 (1956); however, the majority of the Plaintiffs' Supplemental Brief argues for this Court's adoption of "facts" that are seriously and vehemently disputed by the Defendants. See Plaintiffs' Supplemental Brief at pages 2-9, footnotes 1-8, and Appendices 1-3.
3. For example, the Plaintiffs claim that "[G]overnment studies have concluded that disturbances of the topography by the defendants, in the areas studied, caused an increase in the rate of storm water discharge by as much as 59%." See Plaintiffs' Supplemental Brief at 2. In fact, the West Virginia Department of Environmental Protection's "Flood Advisory Technical Taskforce Runoff Analyses of Seng, Scrabble and Sycamore Creeks" ("FATT Report" dated June 14, 2002) did not evaluate surface water elevations (i.e. the level of flood waters) resulting from mining or timbering. That report did conclude, however, that any contributions to

increased flows from those activities at the mouths of the study watersheds were "relatively small" and that *all areas studied would have experienced flooding whether or not mining and timbering had been undertaken* in the area. FATT Report at 60, 70 (emphasis added). In addition, the WVDEP found in its FATT Report that "regulated surface mining and logging operations likely *minimized* some sedimentation impacts in the watershed by virtue of compliance with the rules and regulations enforced by that specific regulatory agency." FATT Report at 22 (emphasis added). Such findings stand in stark contrast to the Plaintiffs' rhetorical characterization of the 2001 floods as "...an 'unnatural' broth of death and destruction." Plaintiffs' Supplemental Brief at 2. This represents but one of myriad "facts" cited by the Plaintiffs that are strenuously contested by the Defendants.

4. Because these hotly contested "facts" cannot be considered by the Court in resolving the issues of law presented by the certified questions, they should be stricken from the Plaintiffs' Supplemental Brief.

5. The Panel Judges specifically stated that they were "certifying these questions as if they were a Rule 12(c) motion for judgment on the pleadings" See Petition to Court for Answer to Certified Questions at 4. In fact, the Plaintiffs acknowledge this: "This is a Rule 12(c) proceeding" Plaintiffs' Supplemental Brief at 3, 9 n. 8 ("Again, this case is before the Court on a Rule 12(c) Judgment on the Pleadings proceeding *with no facts in evidence.*") [emphasis added].

6. When this Court referred this litigation to the Mass Litigation Panel, it adopted the *only* Findings of Fact that were properly a part of the record before it at the time. See Administrative Order dated May 16, 2002. The Findings of Fact contained in this Administrative Order remain the only facts that are properly before the Court in its consideration of the Certified Questions. In fact, even if the Panel Judges had not considered the questions in

the context of Rule 12(c), the facts in the Administrative Order would still be the only facts before this Court in this appeal.

7. "The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the supreme court of appeals [sic]." W. Va. Code §58-5-2. W. Va. R. App. P. 13(c) and (d) sets forth the criteria for the designation of the record on a petition for review of certified questions. The Plaintiffs have followed none of those provisions. Instead, they have sought to circumvent or ignore those provisions by the submission of their Supplemental Brief and have this Court consider facts *not* in the record.

8. The Memorandum from the Clerk's Office dated May 8, 2002 does not help Plaintiffs in this instance. That Memorandum addresses problems of storage space in the Clerk's Office in connection with the appeal of "final orders in mass litigation cases" and provides a procedure to remedy that storage problem during an appeal of a *final order*. That does not help Plaintiffs in this instance both because the appeal of certified questions is not an appeal of a final order and because Plaintiffs have not followed the provisions of that Memorandum in their effort to insert facts into the record at a stage in the proceedings when they admit such action is not consistent with a Rule 12(c) proceeding.

9. The hyperbole and accusations being made by the Plaintiffs, whether in Footnote 8 of their Supplemental Brief, or their newspaper campaign to avoid the force of a resolution of legal issues based solely on the law, or their other extra-judicial efforts to inject disputed facts into this case at this time, cannot be considered in the determination of the strictly legal issues now before this Court.

10. The Plaintiffs posit that their presentation of "facts" for the Court's consideration stems from their belief that "the Court's questioning in June indicates the Court's interest in facts" Plaintiffs' Supplemental Brief at 4. Even if this Court has such an interest, the

Defendants are confident that this Court can and will decide the legal issues before it based only on the record properly before it. It is for that reason that this Motion to Strike should be sustained.

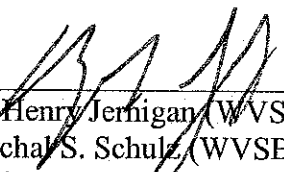
11. The Defendants have respected the appropriate rule of procedure and this Court by restricting their arguments to a legal analysis of legal issues. If the Plaintiffs are allowed to inject disputed facts into this proceeding, which requires only a legal analysis of legal issues, then the Defendants' due process rights will be violated and the Defendants will suffer irreparable harm.

WHEREFORE, the Defendants ask that the Court enter an Order that strikes Pages 2-9, Footnotes 1 - 8, and Appendices 1 - 3 from the Plaintiffs' Supplemental Brief.

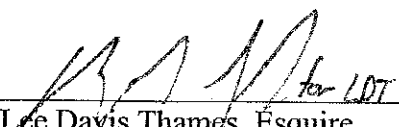
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: FLOOD LITIGATION

Appeal No. 031618

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Appellees' (Defendants Below) Motion to Strike Portions of Plaintiffs' Supplemental Brief in Response to the Court's Request for Additional Briefing from the Parties** was served to counsel of record listed below, this 24th day of August, 2004.

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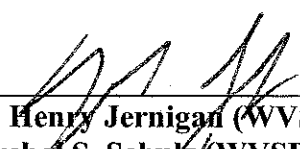
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