IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION

JAMES SURRATT and ROSE SURRATT, et al.

Plaintiffs,

v. Civil Action No. 5:15-cv-15444

(Consolidated Nos. 5:15-cv-15444,

5:15-cv-15527, 5:15-cv-15534, 5:15-cv-

15525, 5:15-cv-15533, 5:15-cv-15532,

5:15-cv-15530, 5:15-cv-15529, 5:15-cv-

15528, and 5:15-cv-15526)

PINNACLE MINING COMPANY, LLC;

A Delaware corporation,

Defendant.

# PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE, TESTIMONY OR REFERENCE BY DEFENDANT THAT IT IS THE LARGEST EMPLOYER

**IN WYOMING COUNTY, WEST VIRGINIA, THAT IT EMPLOYS APPROXIMATELY 500 HUNDRED PEOPLE IN WYOMING COUNTY, THAT THE MINERS**

**IT EMPLOYS ARE UNION MINERS, THAT THIS ACTION WILL CAUSE DEFENDANT'S MINE TO CEASE OPERATIONS,**

**AND THAT THESE COAL MINERS WILL LOSE THEIR JOBS**

Plaintiffs, by counsel, respectfully move the Court for an order *in limine* excluding any evidence, testimony, or reference by Defendant in this matter that it is the largest employer in Wyoming County West Virginia, that it employs approximately 500 hundred people in Wyoming County, that the miners it employs are union miners, that this action will cause Defendant's mine to cease operations, and that these coal miners will lose their jobs. Upon information and belief, Defendant intends to present such evidence at the trail of this case. This belief is bolstered by the fact that Defendant has already referenced these matters in testimony before the West Virginia Surface Mine Board. (Exhibit A, Pages 24, 103, 125.) There are no allegations in this case for which the status of this Defendant as the largest employer is Wyoming

County, the number of employees it employs, the number of employees that are union members, or that this action might "stop 500 union men from working," or any like evidence, is related. Accordingly, any evidence referring to these matters mine has no relevance to the issues here and any reference to these matters would be unfairly prejudicial. The subject evidence is not relevant to any of the allegations here and discussion of these matters has no probative value in determining if Defendant is liable for the actions and omissions as alleged by the Plaintiffs.

# Evidence of Defendant's status as the largest employer in Wyoming County, the number of employees it employs, the number of employees that are union members, or that this action might stop 500 union men from working, is not relevant in this case.

The Federal Rules of Evidence are clear that only relevant evidence may be presented at trial. FED. R. EVID. 402. Relevant evidence is defined as that which has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID*. 401*, *see also Young v. State Farm Mut. Auto Ins. Co.*, 169 F.R.D. 72, 77 (S.D. W. Va. 1996).

Plaintiffs have alleged that Defendant was negligent/grossly negligent in its mining operations which caused subsidence and damages to Plaintiffs' properties. Plaintiffs have alleged that Defendants' have trespassed upon Plaintiffs' properties and that Defendant's mining activities have created a nuisance which interferes with Plaintiffs' use and enjoyment of their properties. Plaintiffs have also alleged that Defendant violated West Virginia Code § 22-3-1, *et seq.* Additionally, Plaintiffs alleged entitlement to punitive damages and an injunction.

All of Plaintiffs' claims relate to subsidence and damages to their properties caused by the Defendant. With regard to negligence,

The elements of a negligence claim are well established: 1) Defendant must owe Plaintiff a legal duty; 2) the duty must have been breached; 3) Plaintiffs must have been injured; and 4) the injury must have been proximately caused by Defendant's negligence. *Rowe v. Sisters of Pallottine Missionary Soc'y,* 211 W.Va. 16, 23, 560 S.E.2d 491, 498 (2001).

*Willier, Inc. v. Hurt*, No. CIV.A. 5:06-CV-00547, 2007 WL 4613033, at \*8 (S.D.W. Va. Dec. 31,

2007). "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." *Martin v. Williams*, 141 W. Va. 595, 610, 93 S.E.2d 835, 844 (1956). "A trespass generally refers to an unauthorized intrusion onto the land of another." *See Whiteman v. Chesapeake Appalachia, L.L.C.,* 729 F.3d 381, 386 (4th Cir.2013). West Virginia Code § 22-3-1 *et seq.,* is an act that protects property owners and their property from surface impacts incident to an underground coal mine. Neither Defendant's status as the largest employer in Wyoming County, nor the number of employees it employs, the number of employees that are union members, or that this action might stop 500 union men from working, make it more or less likely that Defendant is liable to Plaintiffs for the causes of action alleged here.

Given that these matters are wholly unrelated to the allegations against the Defendant, presenting evidence about these matters would serve only to prejudice the jury. The court should not permit the Defendant to introduce evidence wholly unrelated to the allegations here in order to unfairly sway or prejudice the jury. Instead, irrelevant testimony, evidence, and references to Defendant's status as the largest employer in Wyoming County, the number of employees it employs, the number of employees that are union members, or that this action might stop 500 union men from working, should be excluded under Rules 401 and 402.

# Evidence concerning Defendant's status as the largest employer in Wyoming County, the number of employees it employs, the number of employees that are union members, or that this action might stop 500 union men from working, even if relevant, should be excluded under the Rule 403 balancing test.

Courts have discretion to exclude even relevant evidence when it “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . [.]” FED. R. EVID.403; *United States v. Gibson*, 84 F. Supp. 2d 784, 789-90 (S. D.

W. Va. 2000). As a leading treatise has recognized, Rule 403 exists to ensure a fair trial based on the elements of the cause of action and not unrelated appeals to the passions and prejudices of jurors. 75A Am.Jur.2d *Trial* § 545 (footnote omitted). Accordingly,

[a]rgument is improper when it is designed to appeal to prejudice, contempt, hatred, or resentment toward the opposing party, or to arouse sympathy for a party to the extent that a verdict is secured upon considerations outside the record, thereby drawing the minds of the jury away from the matter in dispute and subjecting them to influences entirely foreign to the case. Although the fullest freedom of speech can be accorded in argument, it is license, not freedom of speech, for counsel to base his or her argument on appeals to prejudices irrelevant to the case and outside the proof.

*Id.* (footnotes omitted)

Applying the Rule 403 balancing test to the facts of this case, the subject evidence must be excluded. First, as discussed above, the subject evidence has no probative value with regard to the allegations in this case. No information or detail regarding the subject evidence makes it any more or less likely that the Defendant is liable to the Plaintiffs for the actions alleged.

On the other side of the scale, the danger of unfair prejudice in introducing this evidence is high. Allowing jurors to consider testimony, evidence, and references to Defendant's status as the largest employer in Wyoming County, the number of employees it employs, the number of employees that are union members, or that this action might stop 500 union men from working, is an invitation for jurors to find for the Defendant based upon job loss, harm to their community or economy, or other factors totally foreign to Defendant's liability for Plaintiff's damages. If jurors are allowed to hear the subject evidence, their human response may be to find in favor of the Defendant, even if the evidence does not support such a finding. Because the potential for unfair prejudice far outweighs any probative value of the subject evidence, the evidence must be excluded from the trial of this matter.

Wherefore, Plaintiffs respectfully request that the Court grant their motion and enter an order in limine excluding all evidence regarding Defendant's status as the largest employer in Wyoming County, the number of employees it employs, the number of employees that are union members, or that this action might stop 500 union men, or any others, from working.

JAMES SURRATT and ROSE SURRATT, et al.

By Counsel

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**PINNACLE MINING COMPANY, LLC;**

**A Delaware corporation,**

**Defendant.**

**CERTIFICATE OF SERVICE**

I, Roger A. Decanio, counsel for plaintiffs, do hereby certify that on the 17th day of April, 2017, I electronically filed “Plaintiffs' Motion In Limine To Exclude Evidence, Testimony Or Reference By Defendant That It Is The Largest Employer In Wyoming County, West Virginia, That It Employs Approximately 500 Hundred People In Wyoming County, That The Miners It Employs Are Union Miners, That This Action Will Cause Defendant's Mine To Cease Operations, And That These Coal Miners Will Lose Their Jobs” and a Certificate reflecting service of same with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following CM/ECF participant:

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