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

BECKLEY DIVISION

JAMES SURRATT and ROSE SURRATT, et al.

Plaintiffs,

1. 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 TO CURRENT WATER WELL STANDARDS AND REGULATIONS

Plaintiffs James and Rose Surratt, by counsel, respectfully move this Court for an order *in limine* excluding any evidence, testimony, or reference to current water well standards and regulations. Upon information and belief, Defendant intends to introduce cumulative evidence relating to current water well standards and regulations in an attempt to show that the water well located on James Surratt’s property, which exploded as a result of a methane build-up, was not properly constructed. This belief is further bolstered by testimony from Defendant’s witnesses before the West Virginia Surface Mine Board on October 11, 2016. (Exhibit A, Pages 107-108, 114-115, 128-129, 191-196, 230).

The undisputed facts of record here show that the well on the Surratt property was constructed approximately 60 years ago.

* 1. As far as I know, as long as the house was there.

Q. When was the house built?

A. In the early ‘50’s.

Q. Can you tell me that for sure, that the well was there when the house was built?

A. Yes.

See Exhibit B (James Surratt Transcript 3/7/17 at pp. 121--122)

Inasmuch as these standards were not in effect at the time this well was constructed, these standards are unrelated and irrelevant to the construction of the Surratt well, and, even if determined to be relevant, the introduction of them would be unfairly prejudicial, confusing and misleading, especially in light of cumulative testimony on the matter.

# Evidence of Current Water Well Standards and Regulations is Not Relevant Here.

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).

Defendants introduced testimony the testimony of Mike Isabell (Environmental Manager for Pinnacle Mining Company) before the Surface Mine Board that, based on current water well standards, that a concrete pad was required to secure the casing of the well, that the casing is supposed to stick up out of the ground at least twelve inches, that the well is supposed to be vented, that the is supposed to go down 20 feet, that the casing is supposed to be capped, among other testimony. (Exhibit A, Pages 107-108). Plaintiffs believe Defendant will seek to argue that the Surratt well, based upon current regulations, has “substantial deficiencies” in how it was constructed. (Id. at 114, 115).

When asked, before the Surface Mine Board, whether he was familiar with what the standards were for well constructions, “say 50 years ago,” Mr. Isabell responded: “No, sir. No.

sir, I’m not—I wasn’t doing much 50 years ago, so… Mom was thinking about me.” (Id. at 128). Mr. Isabell then admitted that the standards he discussed are current standards for well construction, “since the 80’s.” (Id. at 128-129).

Defendant also introduced the testimony of Gary Hartsog, an engineer with Alpha Engineering Services. Mr. Hartsog testified: “as far back as ’82, the regulations in the state required that wells be ventilated, that they have vents and recommend that wells be directly ventilated to the outside, they not be placed in buildings unless they were ventilated.” (Id. at 191). He also utilized a slide to show a concrete pad around the wellbore, adequate water casing, casing extending 12 inches above grade—all relating to the proper sealing of the well according to the regulations. (Id. at 191-192). While he testified the practices go back at least into the 60’s “in different places,” he acknowledged the first regulations were in the 1982 or 1983 time period. (Id. at 192). Significantly, he was asked: “You’re not aware of any regulation that would grandfather a person in so that they could maintain an unsafe well, do you?” (Id. at 192). He went on to add that there is a requirement that a well be more than ten feet away from a dwelling, and that the Surratt well was less than ten feet away from the dwelling. (Id. at 193). Mr. Hartsog goes on to explain drawings he has produced, in accord with the current standards, to show a standard vent and cap, casing, and concrete pad and compares them to the Surratt well. (Id. at 194-196). Mr. Hartsog further testified that if Mr. Surratt had followed state and local regulations in constructing his well, the methane ignition would most likely not have happened. (Id. at 230).

The water well regulations that these witnesses are referring to, 64 CSR 46 (1984), 64 CSR 46 (2008) and Water Well Design Standards, West Virginia Board of Health Interpretive Rules, Chapter 16-1, Series III, (1983), were not in effect at the time the Surratt well was

constructed, some 60 years ago. Furthermore, the 1983 Interpretive Rules applied only to “well drillers,” there were no provisions for hand dug or manually excavated wells, indoor wells could be constructed, and proper vents were only to be provided “as applicable.” Moreover, nothing in the Interpretive Rules or the Code of State Regulations expressed intent for the rules and standards to be applied retroactively. These rules and regulations were not in effect and not applicable at the time Mr. Surratt dug the subject well. Accordingly, it was not possible for Mr. Surratt to follow these rules and regulations, and they can therefore have no bearing on the probability of whether the well would have exploded had Mr. Surratt followed them. The rules and regulations are inapplicable and irrelevant to this case and any evidence, testimony or reference to them should be excluded.

# Evidence of Water Well Standards and Regulations, 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 matters that are foreign to the case. 75A Am.Jur.2d Trial § 545 (footnote omitted). Argument is improper when it is designed to draw “the minds of the jury away from the matter in dispute” and subject “them to influences entirely foreign to the case.” Id.

Applying the Rule 403 balancing test to the facts of this case, evidence regarding the standards and regulations must be excluded. First, as discussed above, they have no probative value with regard to Mr. Surratt’s actions at the time he dug the well.

On the other side of the scale, the danger of unfair prejudice, confusion of the issues, or

misleading the jury is high. The Defendant’s witnesses are focusing much of their attention, and accordingly much of the jury’s attention, on standards and regulations that were not even in effect at the time this well was dug. Allowing Defendant to present testimony, evidence, and references to theses standards and regulations will unfairly prejudice, confuse and mislead the jury. Mr. Surratt’s father was not subject to these rules and regulations and a jury should not judge his actions according to them. In further support of this argument,

Under West Virginia law, a statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application. *See Mildred L.M. v. John O.F.,* 192 W.Va. 345, 351–352 n. 10, 452 S.E.2d 436, 442–443 n. 10 (1994),

*citing Landgraf v. USI Film Products,* 511 U.S. at 244, 114 S.Ct. at 1483, 128 L.Ed.2d at 229; *see also* Norman J. Singer, *Statutes and Statutory Construction* § 41.04 at 349–50 (5th ed.1993). To be specific, this means that, unless expressly stated otherwise by the statute, such a statute will not apply to pending cases or cases filed subsequently based upon facts completed before the statute's effective date. *See generally State ex rel. Blankenship v. Richardson,* 196 W.Va. 726, 738–739, 474 S.E.2d 906, 918–919 (1996).

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The test of the interpretive principle laid down by the United States Supreme Court in *Landgraf* is unitary. It is whether the “the new provision attaches new legal consequences to events completed before its enactment.” 511 U.S. at 270, 114 S.Ct. at 1499, 128 L.Ed.2d at 255. If a new procedural or remedial provision would, if applied in a pending case, attach a new legal consequence to a completed event, then it will not be applied in that case unless the Legislature has made clear its intention that it shall apply.

*Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 334–35, 480 S.E.2d 538, 543–

44 (1996). *See also, Landgraf*, *supra,* 511 U.S. at 270, 114 S.Ct. at 1499, 128 L.Ed.2d at 255 (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly ”); *White v. Califano*, 473 F.

Supp. 503, 506 (S.D.W. Va. 1979) (an additional point against retroactive application is where the amended regulations themselves make no mention of their being applied retroactive); *Stonehocker v. Gen. Motors Corp*., 587 F.2d 151, 156 (4th Cir. 1978) (it is well known that

retroactive application of statutes in general is not favored); *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 281 (4th Cir. 1993) (same). Further,

As a general rule, statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts or by necessary or unavoidable implication.

In accordance with fundamental notions of justice that have been recognized throughout history, retrospective or retroactive legislation is not favored. Retroactive legislation, as opposed to the prospective kind, can present more severe problems of unfairness because it can upset legitimate expectations and settled transactions. Thus, unless it is expressly stated otherwise, statutes should not be construed so as to be retroactive but should be construed prospectively from their effective date.

82 C.J.S. Statutes § 582 (footnotes omitted). *See also, Cruz v. Maypa*, 773 F.3d 138 (4th Cir. 2014) (If the statute does have a retroactive effect, it will not apply absent clear congressional intent favoring such a result); *Patterson v. Board of Educ. of County of Raleigh*, 744 S.E.2d 239 (W. Va. 2013) (Presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect); *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 118–19, 705 S.E.2d 806, 815–16 (2010)

(“Because W. Va.Code § 20–5–2(b)(8) and its predecessor were not in effect at the time of the 1960 deed's execution, they cannot be applied to bar the issuance of the requested well permits. Accordingly, we affirm the circuit court's ruling finding the DEP Office of Oil and Gas' reliance on W. Va.Code § 20–5–2(b)(8) to be misplaced because such statute was not effect at the time of, nor does it govern, the 1960 deed.”).

Permitting the Defendant to offer such evidence is also analogous to application of an ex post facto law. The United States Constitution prohibits the passing of ex post facto laws. U.S. Const. art. I, § 9, cl. 3. “Through the prohibition of ex post facto laws, the framers of the United States Constitution sought to assure that legislative acts give fair warning of their effect and

permit individuals to rely on their meaning until explicitly changed.” 16B Am. Jur. 2d Constitutional Law § 689. “The ‘ex post facto’ prohibition forbids Congress and states to enact any law which imposes punishment for an act which was not punishable at time it was committed, or imposes additional punishment to that then prescribed.” [*Turman v. Romer*, 729](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1990029950&amp;pubNum=0000345&amp;originatingDoc=N9E89DE909DFA11D8A63DAA9EBCE8FE5A&amp;refType=RP&amp;originationContext=notesOfDecisions&amp;contextData=%28sc.DocLink%29&amp;transitionType=NotesOfDecisionItem) [F.Supp. 1276](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&amp;serNum=1990029950&amp;pubNum=0000345&amp;originatingDoc=N9E89DE909DFA11D8A63DAA9EBCE8FE5A&amp;refType=RP&amp;originationContext=notesOfDecisions&amp;contextData=%28sc.DocLink%29&amp;transitionType=NotesOfDecisionItem) (D.Colo.1990).

In *State v. R. H.,* 166 W.Va. 280, 288-89, 273 S.E.2d 578, 583-84 (1980), *overruled on*

*other grounds by State ex rel. Cook v. Helms,* 170 W.Va. 200, 292 S.E.2d 610 (1981), the West Virginia Supreme Court adopted “[t]he early classic definition of an ex post facto law [as] was set forth by the United States Supreme Court in *Calder v. Bull,* 3 Dall. 386, 3 U.S. 386, 1 L.Ed. at 648 (1798)[.]” In that case, *ex post facto* laws are defined as

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, or makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the commission of the offense, in order to convict the offender. 3 Dall. at 390, 3 U.S. at 390, 1 L.Ed. 648.

*Hensler v. Cross*, 210 W. Va. 530, 534, 558 S.E.2d 330, 334 (2001).

Permitting evidence of current standards and regulations to set the standards for the construction of a well 60 years ago is also akin to issues that arise in product liability law:

Generally, an industrial standard developed after the plaintiff's injury occurs is inadmissible, because it cannot affect the reasonableness of the design of the product in question at any time relevant to the plaintiff's action.

§ 30:47.Admissibility and sufficiency of evidence of industry standards, Am. L. Prod. Liab. 3d § 30:47 (footnote omitted).

An industrial standard developed after the plaintiff's injury cannot affect the reasonableness of the design of the product in question at any time relevant to plaintiff's action.

Generally, industry standards adopted after the manufacture of a product are inadmissible.

63A Am. Jur. 2d Products Liability § 983 (footnotes omitted).

A plaintiff may not offer evidence of a custom or practice on the part of the defendant, which was not followed in the particular instance, where the custom or practice is not shown as necessarily followed in the locality where the sale of the product took place.

§ 10:21.Effect of industry custom, usage, or standards, Am. L. Prod. Liab. 3d § 10:21 (footnote omitted).

In West Virginia, the design process is to be judged by the general state of the art in the industry as of the date of manufacture and not by subsequent developments that improve that process.

5. The term “unsafe” imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.

Syl. Pt. 5, *Morningstar v. Black & Decker Mfg. Co*., 162 W. Va. 857, 858, 253 S.E.2d 666, 667

(1979).

Because the potential for unfair prejudice, confusion and the misleading of the jury far outweighs any probative value of evidence of current water well standards and regulations, such evidence must be excluded from the trial of this matter. The misleading evidence and likely confusion of the jury will only be multiplied by the cumulative testimony of Defendant’s witnesses.

Wherefore, the Plaintiffs James and Rose Surratt respectfully request that the Court grant their motion and enter an order *in limine* excluding evidence regarding the current water well standards and regulations.

JAMES SURRATT and ROSE SURRATT, et al.

By Counsel

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**5:15-cv-15528, and 5:15-cv-15526)**

**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 To Current Water Well Standards And Regulations” 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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