

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

EQUITABLE PRODUCTION COMPANY,

Defendant Below, Petitioner,

v.

Supreme Court No. 13-0934

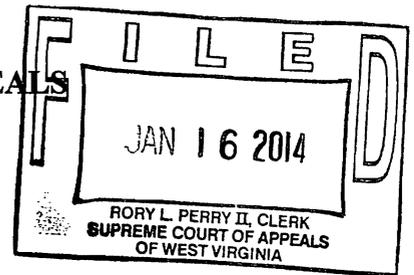
Logan Co. Civil Action No. 06-C-238  
(Consolidated with 06-C-239, 06-C-240,  
06-C-241 and 07-C-234)  
Judge Elliott E. Maynard

CORA PHILLIPS HAIRSTON, *et al.*,

Plaintiffs Below, Respondents.

**RESPONDENTS' BRIEF**

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### III. PETITIONER'S ASSIGNMENTS OF ERROR

1. The circuit court erred in failing to give any punitive damages instructions during the liability phase of trial.
2. The circuit court erroneously gave an adverse inference instruction because there was no anticipation of litigation at the time of the alleged tortious and/or spoliating act.
3. The circuit court erred in failing to instruct the jury that the authority of the Federal Energy Regulatory Commission and the Natural Gas Act did not apply.
4. The circuit court erroneously allowed Respondents' expert to proffer expert opinions beyond the scope of his skill, knowledge, education, experience and training.

### IV. STATEMENT OF THE CASE

#### Procedural History

The initial four (4) Complaints about this matter were filed in August of 2006 and another companion Complaint was filed in July of 2007.<sup>1</sup> SCT 1-57. There are fourteen (14) Plaintiffs involved in this litigation, representing seven (7) decedents and in 2007, the trial court consolidated these Complaints as a matter of judicial economy.<sup>2</sup>

This case previously was before this Court, on certified questions, regarding the nature of a common law cause of action for grave desecration claim. In pertinent part, this Court established the elements for a common law cause of action for grave desecration. *See Hairston v. General Pipeline Const., Inc.*, Syl. Pt. 8, 226 W.Va. 663, 704 S.E.2d 669 (2010). The damages available in such a case include nominal damages; compensatory damages if actual

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<sup>1</sup> The Complaints allege claims for negligence, gross negligence, public nuisance, private nuisance, tort of outrage-intentional infliction of emotional distress, desecration, violations of the West Virginia Oil and Gas Production Damage Act, trespass and punitive damages. The claims of public nuisance, private nuisance, tort of outrage-intentional infliction of emotional distress and violations of the West Virginia Oil and Gas Production Damage Act were dismissed. SCT 319 & 1160-1162.

<sup>2</sup> The Plaintiffs in this case are Cora Phillips Hairston and Shirley Wilder (for the Estate of Louella Phillips Wilder) (06-C-238); Jimmy Early and Edward Early (06-C-240); Carol Coles Jones, Carolyn Coles Monroe and Henry Jones Coles (06-C-241); James Olbert, Daniel Olbert, Jr., Jacqueline Olbert Washington, Jacqueline Powell-Hamlet (for the Estate of Ulysses Olbert) and Gloria Olbert (06-C-239); and Daniel Jerome Newsome and Ann Newsome Lewis (07-C-234). Michael Early was dismissed when he failed to appear for trial. SCT 878.

damage has occurred; mental distress; and punitive damages if the defendant's conduct is determined to be willful, wanton, reckless, or malicious. *Hairston*, at Syl. Pt. 10. The next of kin who possess the right to recover in such a case must be the decedent's surviving spouse or, if such spouse is deceased, the person or persons of closest and equal degree of kinship in the order provided by West Virginia Code § 42-1-1, *et seq.* *Hairston*, at Syl. Pt. 8.

The underlying issues duly were tried on September 24 through October 12, 2012. SCT 168-185. The jury found, by a preponderance of the evidence, Petitioner General Pipeline Construction, Inc. ("General Pipeline" and Petitioner in Docket No. 13-0933) and Equitable Production Company ("Equitable") liable to Respondents for the desecration of their decedents' graves in the Crystal Block Cemetery and made an award to them which included individual \$50,000.00 emotional damage awards to each Respondent and a compensatory award of \$14,000.00 to Respondent Cora Phillips Hairston as the "overseer of restoration of cemetery." In addition, the jury found, by a preponderance of the evidence, that the conduct of General Pipeline and Equitable to be reckless. The circuit court set a punitive damage phase of the trial for October 18, 2012. Afterwards, the jury, by a preponderance of the evidence, returned a punitive damage award to Respondents, in the sum of \$200,000.00, against Equitable.

### **Statement of Facts**

Within Crystal Block Hollow, in Logan County, West Virginia, lies the Crystal Block Cemetery. This cemetery was established through a January 1, 1923, "Deed of Lease and Agreement," (Plaintiffs' Exhibit 54) between Island Creek Mineral Company (lessor) and Crystal Block Coal & Coke Company (lessee). This lease provides that the surface land can be used for purposes consistent with a company town and that necessarily includes the right to

burial. SCT 1085-1089 (8:16-13:8). Since then, the Crystal Block Cemetery also has been identified as a cemetery in adduced Death Certificates, the Register of Death and in local funeral home records. SCT 257-283; 1245-1248 (83:14-85:15). By all accounts, Crystal Block was a typical coal company town with a cemetery. SCT 1251-1253 (21:1-26:22) & 1055-1058 (4:16-7:17).

At trial, each of the fourteen (14) Respondents testified that for many years, the Crystal Block Hollow community marched up the mountain in order to honor their dead at that sacred site. SCT 761 (6:16-7:3) & 1055-1058 (7:18-9:21). The fourteen (14) Respondents, who are the children and grandchildren of seven (7) of the decedents, personally maintained this cemetery on a regular basis. SCT 759-778; 995-1018; 1019-1051; 1052-1077; 1112-1124; 1217 (54:9-15) & 1271 (108:11-109:22). While this case pertained to seven (7) decedents interred in the Crystal Block Cemetery, dozens of other individuals are buried in the cemetery. SCT 759-778; 998-999 (12:21-16:3); 1052-1077 & Updike (79:2-90:15). There were visible grave markers and grave shafts in the area. SCT 759-778; 995-1018; 1019-1051; 1052-1077; 1112-1124; 1217 (54:9-15) & 1271-2 (108:11-109:22). Shrubbery around the area indicated that this area was utilized as a cemetery. *See Id.* There were hand-dug steps in the hillside leading to the graves. *See Id.* By all accounts, the area was identifiable as a cemetery from the topographical outlay of the natural slopes of the mountainside which sets this area apart from the rest of the mountain. *See Id.*; SCT 1261-2 (98:21-99:8) & 1271-2 (108:20-109:19).

Notwithstanding, in July 2004, General Pipeline was hired by Equitable to relocate a pipeline. SCT 487-501. During the relocation project, a road was constructed through the Crystal Block Cemetery by General Pipeline bulldozer operator Vandle Keaton. SCT 759-778;

728-758. Before starting work, Mr. Keaton alleged that he did a walk-through of the area, but other on-site employees dispute that claim. SCT 742-44 (13:7-21:10). Equitable failed to supervise the project, failed to survey the area for the presence of cemeteries and failed to do a walk-through. SCT 695-704; 732 (17:13-21) & 751 (48:18-20). General Pipeline and Equitable, while aware of the subject cemetery, did nothing to prevent or deter the continued invasion of the cemetery by other trespassers alike using the road through the Crystal Block Cemetery for an ATV trail and a “party spot.” SCT 212-4 & 289-290 (164:14-165:22).

Oather Bud Baisden, a life-long Crystal Block resident, observed General Pipeline’s activities heading towards the Crystal Block Cemetery and he drove his ATV along a nearby gas well road beside the cemetery in order to warn Mr. Keaton about the cemetery before he entered it. SCT 759-769 (5:20-38:8); 889-897 (5:22-13:24) & 977-983. Mr. Keaton replied to Mr. Baisden, “F- them ‘N’s.” SCT 209; 762-763 (11:20-15:5); 894-895 (9:14-15:4). Later, Mr. Baisden observed that Mr. Keaton indeed bulldozed the cemetery after his warning. Mr. Baisden also noticed missing graves and soil, including the hand-dug steps. SCT 763-769 (15:15-38:8). According to forester Ruffner Woody, who inspected the scene after the incident, he reported the area obviously was a cemetery and a bulldozer rumbled through the cemetery five (5) to nine (9) times in order to cut three (3) separate roads. SCT 206-210 & 985-988 (5:7-17:17).

On-site General Pipeline employees Michael O’Dell and Gary O’Dell testified that Mr. Keaton stopped the bulldozer once he entered the cemetery and the road-cut was not finished. SCT 285; 728-732 (5:5-17:21) & 742-752 (13:7-53:12). They observed that the bulldozer push-pile contained numerous grave markers and some of these markers later disappeared. In addition, they testified that they dug out the grave markers and did their best to reset them at the

site. Afterward, Mr. Keaton finished cutting the road through the cemetery and did not contact the Logan County Sheriff. Equitable learned of the incident the following day. SCT 291-300 & 613-4 (121:21-122:20). Later, Equitable sent employees to backfill, grade, seed and mulch the area and again two years later at the time of the lawsuit. SCT 211-4; 289-90 & 590-614 (31:10-124:1). Internal Equitable memorandums indicate that the cemetery looked better after this work. SCT 211-4; 266-268 & 288-90. However, this area became an ATV trail and “party spot.”

On August 7, 2004, Plaintiff James Olbert, visited the Crystal Block Cemetery in order to pay respects to his deceased father, Daniel Olbert, Sr. SCT 996-1010. However, upon arriving at the scene, Mr. Olbert, observed that a road had been cut through the middle of the cemetery. The constructed steps at the bottom of the mountain, leading to the cemetery, were destroyed and several gravestones had been bulldozed aside and some were missing. SCT *Id.* & 253-256. Numerous witnesses testified that, after the respective site work of General Pipeline and Equitable, a lot of graves, along with the hand-dug steps, unfortunately were removed from the area and simply disappeared from the scene. SCT 206-10; 253-256; 759-778; 995-1018; 1019-1051; 1052-1077; 1112-1124 & 1217 (54:9-15) & 1271-2 (108:20-109:22). All of the Respondents testified that their decedents’ graves had been moved or removed from the cemetery thereby causing them emotional distress. *See Id.* The overwhelming evidence at trial was that, at the time of the bulldozing, the Crystal Block Cemetery clearly was identifiable as a cemetery and General Pipeline and Equitable, despite having notice of it, were reckless in their conduct toward it.

## V. SUMMARY OF ARGUMENT

Throughout the trial, the circuit court diligently sought to follow the road-map provided by this Court in the *Hairston* decision and it did not abuse its discretion. The circuit court properly refused Equitable's punitive damage jury instruction due to the bifurcation of the case and by not defining terms with common usage. Equitable tried to take advantage of the bifurcation of the trial through these instructions, but the circuit court rejected it. The circuit court properly refused Equitable's Federal Energy Regulatory Commission Regulations (FERC), 42 U.S.C. § 7171 and Natural Gas Act, 15 U.S.C. § 717, instruction because it simply was irrelevant to the case. The circuit court properly gave the adverse inference instruction because the weight of the evidence indicated there was an anticipation of litigation. Finally, the circuit court did not abuse its discretion in allowing the opinions of expert archeologist William Updike because they were within his field of expertise and were supported by the evidence. Consequently, this Court should not disturb the jury's verdict for the Respondents, Plaintiffs below.

## VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Based upon the abuse of discretion assignments of errors set forth by Equitable, counsel for Respondents believe that oral argument is unnecessary under Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure because the facts and legal arguments are presented adequately in the briefs and record on appeal and the decisional process would not be aided significantly by oral argument. However, if this Court determines that oral argument is appropriate, in accordance with Rules 19 and 20 of the West Virginia Rules of Appellate Procedure, then oral argument should be limited to twenty (20) minutes.

## VII. ARGUMENT

### 1. The circuit court did not abuse its discretion in refusing Petitioner's requested punitive damages instructions during the liability phase of trial.

With respect to jury instructions:

[a] trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion. *See State v. Guthrie*, Syl. Pt. 4, 194 W.Va., 657, 461 S.E.2d 163 (1995).

A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties. *See Tennant v. Marion Health Care Foundation, Inc.*, Syl. Pt. 6, 194 W.Va. 97, 459 S.E.2d 374 (1995). Instructions must be read as a whole, and if, when so read, it is apparent they could not have misled the jury, then the verdict will not be disturbed, even though one of the instructions which is not a binding instruction may have been susceptible of a doubtful construction while standing alone. *See Tennant* at Syl. Pt. 7.

In *Skaggs v. Elk Run Coal Co., Inc.*, this Court made clear that:

[t]o challenge jury instructions successfully, a challenger must first demonstrate the charge as a whole created a substantial and ineradicable doubt about whether the jury was properly guided in its deliberations. Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the

entire record, that the challenged instruction could not have affected the outcome of the case. *See Id.*, 198 W.Va. 51, 70, 479 S.E.2d 561, 580 (1996).

Furthermore, as a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. *See State v. Hinkle*, Syl. Pt. 1, 200 W.Va. 280, 489 S.E.2d 257 (1996). A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense. *See State v. Derr*, Syl. Pt. 11, 192 W.Va. 165, 451 S.E.2d 731 (1994). There is a presumption that a trial court acted correctly in giving or in refusing to give instructions to the jury, unless it appears from the record in the case that the instructions were prejudicially erroneous or that the instructions refused were correct and should have been given. *See Matheny v. Fairmont Gen. Hosp., Inc.*, Syl. Pt. 3, 212 W.Va. 740, 575 S.E.2d 350 (2002).

In *Mayer v. Frobe*, this Court held that a circuit court should instruct the jury that it may return an award for punitive damages if it finds, by a preponderance of the evidence, that the defendant acted with gross fraud, malice, oppression, or with wanton, willful, or reckless conduct, or with criminal indifference to civil obligations affecting the rights of the plaintiff. *Id.*, 40 W. Va. 246, 22 S.E. 58 (1895); *Hairston* at Syl. Pt. 10. In addition to this general punitive damages instruction, Syllabus Point 3 of *Garnes v. Fleming Landfill, Inc.*, establishes other factors that a trial court should instruct the jury about in order to consider in awarding punitive damages. *Id.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

Prior to trial, Equitable filed a Motion to bifurcate the punitive damage phase of case from

the liability phase. SCT 329; 421-422 & 478-482. At the insistence of General Pipeline and Equitable, the circuit court granted that Motion in order to insulate and protect Equitable and did not allow Plaintiffs to put on evidence about corporate wealth. *See Id.*; *Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W. Va. 358, 367-8, 572 S.E.2d 881, 890-91 (2002). Based upon the ruling on Equitable's Motion, jury instructions on punitive damages were inappropriate during the liability phase of the trial. *See Id.* At this point, only the general *Mayer* instruction on punitive damages was appropriate and the *Garnes* factors would be addressed in the punitive phase. In so doing, the trial court provided a careful explanation about punitive damages in the liability phase of the trial. *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. at 667-668, 413 S.E.2d at 908-909.

However, Equitable, through its proposed jury instructions 52, 53 and 54 (SCT 118-120), wanted to do an end-run around the bifurcation and instruct the jury on punitive damage which it did not need to know until the punitive phase of the trial. SCT 329; 417; 421-423 & 478-482. Meanwhile, Equitable successfully had the circuit court exclude Respondents' similar jury instructions based upon the bifurcation. SCT 412-423. The circuit court ruled that to give Petitioner's instructions would create jury confusion and prejudice to the Plaintiffs because, in the liability phase, the jury would be told that it has right to assess punitive damages, but it is not allowed to assess them. *See Id.* Likewise, the Plaintiffs would be prejudiced because the circuit court did not allow evidence about the Defendants' corporate wealth. The circuit court determined that it would be inherently unfair to the Plaintiffs to tell the jury, after a three (3) week trial, that it would have to come back if it decided to make an award of punitive damages. *See Id.* As such, the circuit court refused Equitable's proposed jury instructions on punitive damages. The circuit court gave the further jury instructions as part of the punitive phase of the trial, in accordance with

the requested bifurcation. *See Id.*

Equitable wants to have its proverbial “cake and eat it to.” It wanted to bifurcate the trial, then tell the jury about punitive damages, but not allow the jury to award punitive damages or have its corporate wealth considered. That situation would not be fair to the Plaintiffs. Then, Equitable wanted to interject legalese into the jury instructions to terms which have such common, ordinary understanding and usage that their attempt to define them simply would have created confusion or misled the jury. While this Court has discussed the usual meanings assigned to the terms “willful,” “wanton,” “reckless” or “malicious,” it has never required the giving of these terms to the jury as instructions, rather it has been to determine the legal sufficiency of such terms. *Cline v. Joy Mfg. Co.*, 172 W.Va. 769, 772 n. 6, 310 S.E.2d 835, 838 n. 6 (1983); *WV Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 44, 602 S.E.2d 483, 497 (2004); *State v. Burgess*, 205 W.Va. 87, 89-90, 515 S.E.2d 491, 493-494 (1999)(holding that “malice is a well-known legal term and hard to define; *see also U.S. v. Walton*, 207 F.3d 694 (4<sup>th</sup> Cir. 2000)(*per curiam*)(refusing to define “reasonable doubt” because of potential confusion and its self-evident meaning). There was no reason to explain these terms to the jury during the liability phase. During the liability phase of the trial, the jury was instructed on Syllabus Point 10 of the *Hairston* decision which indicated that an award of punitive damages could be made if Equitable’s conduct was determined to be willful, wanton, reckless, or malicious. *See* SCT 144. In viewing the given instructions as a whole and the jury verdict, the jury did not have a problem understanding the terms “willful,” “wanton,” “reckless” and “malicious.”

On the jury form, the jury indicated that the conduct of the Defendants was “reckless only,” thereby rejecting the terms “willful,” “wanton,” and “malicious.” *See* SCT 176. By so

indicating, the jury clearly understood these terms and was not misled. So, Equitable cannot establish that there was any prejudice from the circuit court's refusal of its jury instruction. Equitable would have this Court, based upon other precedent from other jurisdictions, impose confusing instructions about self-evident words and their common usage when this Court has not done so in the past and they had no bearing on the jury's deliberations or decision in this case. The Court should reject this invitation.

Thus, the jury, in the liability phase, was instructed adequately about whether Equitable's conduct warranted punitive damages. To be clear, Equitable's conduct in this case warranted a finding of reckless by the jury. Equitable claims innocence, but the undisputed testimony was that Equitable failed to survey the area, failed to supervise the pipeline relocation project and then, after learning of the bulldozer trampling through the cemetery five to nine times, twice backfilled, graded, seeded and mulched the area without consulting an archeologist or working with community groups as it promised in a press release. SCT 206-214; 266-268; 286-290; 601-603 (72:5-5-78:10); 609-610 (102:19-106:7); 612-613 (116:11-118:3) & 1266-71 (100:3-108:9). As such, while the proposed instructions may have been correct statements of law, they were substantially covered in the charge actually given to the jury and they did not concern an important point in the bifurcated trial so that the failure to give them seriously impaired Equitable's ability to effectively present its defense. Under these circumstances, Equitable fails to meet its burden under the test outlined in *State v. Derr*. Therefore, there was no abuse of discretion in the circuit court's refusal to give Equitable's punitive damage instructions in its requested bifurcated trial and this Court should not disturb the verdict.

**2. The circuit court did not abuse its discretion in giving an adverse inference instruction because there was an anticipation of litigation at the time of Petitioner's tortious and/or spoliating acts.**

In *Tracy v. Cottrell*, this Court established a four (4) part analysis for determining whether to give an adverse inference instruction. *See Id.*, 206 W.Va. 363, 371, 524 S.E.2d 879, 887 (1999); *see also Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003). Before a trial court may give an adverse inference jury instruction for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault (meaning a determination of whether the destruction of the evidence was intentional or negligent) in causing the destruction of the evidence. The party requesting has the burden of proof on each element of the four (4) factors of the spoliation test. If, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, then the requisite analysis ends and no adverse inference instruction may be given.

Here, the evidence supported the circuit court's decision to give the adverse inference instruction and Equitable only argues the third prong of the test. SCT 150. First, there is no dispute that Equitable had control, ownership, possession or authority over the destroyed graves and the surrounding area. There is no dispute that Equitable was the mineral leaseholder of the

subject property. SCT 491-495 (8:1-12:15). As such, Equitable had ultimate control of the area and directed the activities of General Pipeline and when it conducted its activities at the scene. Equitable was informed about the desecration immediately after the incident and its employees went to the site shortly after Vandle Keaton bulldozed the area. SCT 291-300 & 614 (121:21-122:20). Then, Equitable employees twice backfilled, graded, seeded and mulched the area, including at the initiation of litigation. SCT 206-214; 266-268; 286-290; 601-603 (72:5-5-78:10); 609-610 (102:19-106:7) & 612-613 (116:11-118:3).

Secondly, there is no dispute that there was no prejudice suffered by Equitable as a result of the missing or destroyed evidence and even assuming such prejudice, if any, it was not substantial to Equitable. Equitable assisted General Pipeline in removing all indices of the Crystal Block Cemetery. Grave markers, graves and hand-dug steps were removed from the site. Then Equitable twice backfilled, graded, seeded and mulched the area. SCT 206-214; 266-268; 286-290; 601-603 (72:5-5-78:10); 609-610 (102:19-106:7) & 612-613 (116:11-118:3). Equitable took advantage of this missing evidence, which was in its possession, to deny knowledge of the cemetery and to claim there was no damage to the cemetery. Finally, based upon the foregoing, there is no dispute about Equitable's degree of fault in causing the destruction of the evidence. *See Id.*

Third, contrary to the argument of Equitable, there was a reasonable anticipation that the evidence would be needed for litigation. As aforementioned, grave markers, graves and hand-dug steps, along with the dirt itself, are essential to a desecration case. Respondents' expert witnesses did not have an opportunity to inspect the cemetery as it existed before the pipeline construction or immediately after the incident. Equitable knew or should have known that

Respondents would need this evidence, especially since they directed employees to work on the site, including at the initiation of litigation. Lastly, the Defendants below intentionally caused the destruction of the evidence. General Pipeline was on the notice of the cemetery before Vandle Keaton trammed through the cemetery five (5) to nine (9) times. SCT 206-210; 591-601 (33:14-71:10). Then, Equitable sent employees to alter the scene. SCT 206-214; 266-268; 286-290; 601-603 (72:5-5-78:10); 609-610 (102:19-106:7) & 612-613 (116:11-118:3).

Before the inception of pipeline relocation activities, Equitable failed to do a walk-through of the area, including with General Pipeline employees. SCT 498-511 (15:13-28:24). Equitable also failed to survey the area for structures like the Crystal Block Cemetery. According to Equitable's then manager of natural resource relations and corporate representative at trial, Joseph Gilmore, Equitable would have relocated the pipeline if a cemetery was discovered. SCT 509 (26:3-12). Equitable merely pointed out the relocation area from the roadside. SCT 695-697 (72:4-75:20 & 78:24-79:15); 501-502 (18:16-19:2) & 511 (28:19-24). Mr. Gilmore admitted that if Equitable would have walked the access road, then the Crystal Block Cemetery would not have been desecrated. SCT 512 (29:6-24). Afterwards, General Pipeline bulldozer operator Vandle Keaton testified that he immediately informed Equitable about the desecration. SCT 700 (90:19-91:14); 705-706 (113:20-114:2) & 613-614 (121:21-122:20). West Virginia Code §29-1-8a(d) imposed a duty on Equitable, upon discovering these graves, to cease all activity and contact law enforcement. Equitable did neither, rather it completed the project despite full knowledge of the cemetery. Then, Equitable graded, seeded and mulched this area. Internal Equitable memorandums indicated that the area "looked better" after its activities. SCT 211-214; 266-268; 288-290; 601-603 (72:5-5-78:10); 609-610 (102:19-106:7) & 612-613 (116:11-118:3). What

Vandle Keaton failed to destroy or conceal in his bulldozing operation, Equitable certainly finished in its activities. Equitable complains about the weight of the evidence on this prong, not the correctness of the law or the facts.

During the cross-examination of Steve Perdue, Equitable's then regional land director, counsel for Equitable and Mr. Perdue had an interesting exchange:

Q. I will represent to you that Mr. Olbert has previously testified in this case that when he went Joan Hairston she advised – she provided him with the name of an attorney to hire. I will further represent to you that the evidence in this case so far is that Mr. Olbert testified that he spoke with someone from Equitable about the incident, had called him, and the second time that that person from Equitable called back, he told them that he had a lawyer and that Equitable had to talk to that lawyer. I will represent to you that this is the evidence in this case. As the Director of Land for Equitable in 2004, is it your experience that once people lawyer up, it ties your hands?

A. Yes. (Nods affirmatively.)

Q. Now, when you were trying to look in to what had happened down there, were you simply trying to gather information or were you trying to cover something up?

A. I was just gathering information.

Q. And by the time you received the information, did you know that Ted Streit knew what – at least know something had happened down there?

A. Well, he's the one that told me about it.

Q. And at that time you knew that the forester, Woody Ruffner, know about it, correct?

A. Yes.

Q. Are you sure you weren't trying to cover something up and hide it, what had happened?

A. No, absolutely not, no.  
SCT 620 (147:15-148:22).

Based upon this actual court testimony, elicited by Equitable's own counsel, Equitable simply lacks credibility that it had no anticipation of litigation at the time of the alleged. Mr. Purdue essentially admitted at trial that there was an anticipation of litigation by the time he became involved in the situation.

Notwithstanding, Mr. Purdue later explained to Plaintiffs' counsel that:

Q. Now, he [Equitable's counsel] also asked you a question that, once someone lawyers up, it brings things to a halt, right?

A. Yes, generally, yes.

Q. And you agreed with that, right?

A. Yes.

Q. Well, why then on September – sometime in September, why, and let me get the right memo, if everything comes to a halt –

Equitable's counsel: Objection. Mischaracterizes testimony. He didn't say halt. He said restriction.

The Court: Well, the jury heard the – they heard the evidence and they'll remember and they'll know if it's a mischaracterization, so I'll allow the question.

Q. You do remember the word "lawyer up," right?

A. Well, she – can you read it back? I'm not sure exactly what –

Q. Okay. Well, let me ask you the question. When someone lawyers up, does that bring everything to a halt?

A. What it does is, it limits – the Law Department gets involved, and there's limits of what the Land Department does once there's lawyers out there.

Q. We haven't heard any testimony from you at all about discussing anything with the Law Department. Did you inform the Law Department of this?

Equitable's counsel: Objection, Your Honor. Privileged.

Plaintiffs' counsel: He –

The Court: Well, we're not quite to privileged. He can say whenever he discussed it with the Law Department.

Equitable's counsel: Okay. I withdraw the objection, based on that.

The Court: Okay.

Mr. Perdue: I'm not – I don't remember that I did. I would assume that the Law Department became aware of the situation.

Q. Did the Public Relations –

A. Once I made the Vice President of Land aware, I would say that's, well, I can't say if he made them aware or not. It would be very likely he did.  
SCT 625-626 (168:11-170:5).

Honestly, how can Equitable deny there was not an anticipation of litigation? Mr. Perdue clearly made the point that there was an anticipation of litigation regarding this matter when he learned of the incident and he was one of the first individuals at Equitable to know of it. Thereafter, at a time when things were supposed to be "halted" or "restricted," due to alleged legal constraints, Mr. Perdue, at the time of litigation, embarked on a bold plan to "restore" the cemetery.

Mr. Perdue learned of the incident from a facsimile from Gaddy Engineering which included a letter and an email from Ruffner Woody. SCT 206-210 & 591-601 (31:10-71:10). The Woody email indicated that a General Pipeline bulldozer trammed the area five to nine times and it was obvious that the area was a cemetery with about 20 identifiable grave shafts. SCT 206-210 &

985-988 (5:7-17:7). Then, Mr. Perdue, along with other Equitable personnel, investigated the situation at the Crystal Block Cemetery. Emails exchanged between Equitable personnel indicated that the bulldozing opened the area to ATV traffic. SCT 211-214; 266-268; 288-290; 601-603 (72:5-5-78:10); 609-610 (102:19-106:7) & 612-613 (116:11-118:3). However, Equitable did not contact any eyewitnesses, state officials, archaeologists or other professionals. SCT 518 (35:10-20) & 597 (57:8-21).

Thereafter, Equitable developed and undertook a plan to “restore” the cemetery. SCT 612-613 (116:11-118:3). Specifically, Equitable twice backfilled, graded, seeded and mulched the area. Years later, pursuant to an email from Equitable’s land man, Tom Morris, a headstone was replaced and moved to an upright position. SCT 211-214; 286-290. As aforementioned, Equitable did with work without consulting an archeologist. SCT 518 (35:10-20) & 613-614 (122:21-124:1). Then, Equitable issued a press release which indicated that it is not uncommon to encounter unmarked cemeteries, due in part to West Virginia’s deep history and that it works with community groups to safeguard these cemeteries. SCT 626-633 (171:8-209:23). However, Equitable did not work with any groups regarding the Crystal Block Cemetery. SCT 622 (155:10-156:15). According to Mr. Gilmore, grading a cemetery under these circumstances was desecration. SCT 536-537 (53:20-54:2) & 580-581 (97:14-98:9).

Equitable’s assignment of error regarding the anticipation of litigation prong concerns the weight of the evidence, not the correctness of the law or the facts. The adverse inference jury instruction was a correct statement of the law and the evidence certainly supported it. Equitable merely advances the same argument it made at trial about its role in the desecration, but those

arguments were soundly rejected by the jury. Therefore, there was no abuse of discretion for the circuit court giving the adverse inference instruction.

**3. The circuit court did not abuse its discretion in refusing Petitioner's requested instruction that the authority of the Federal Energy Regulatory Commission (FERC), 42 U.S.C. § 7171 and the Natural Gas Act, 15 U.S.C. § 717, did not apply.**

In this case, there absolutely was no testimony or evidence that the FERC, 42 U.S.C. § 7171 and the Natural Gas Act, 15 U.S.C. § 717, applied to the case. In fact, Equitable first interjected the non-applicability of these statutes into the trial during its cross-examination of its corporate representative Joseph Gilmore. SCT 548 (65:18-21). Thereafter, this testimony was not disputed.

Expert archeologist William Updike specifically testified that there was no accusation that the subject pipeline was a federally regulated pipeline which would require adherence to the archeological guidelines and regulations of FERC and the Natural Gas Act. SCT 1350 (56:4-6). Notwithstanding, during cross-examination, counsel for Equitable invited Mr. Updike to opine that these statutes pertained to the case, but Mr. Updike refused the invitation. SCT 1344-1348 (50:18-54:23). While, Equitable cites testimony from Mr. Updike discussing his knowledge, skill and experience with pipeline relocation projects (SCT 1176-1187), it neglects to mention that this testimony was about his qualifications as an expert in the field of archeology with respect to pipelines. To be clear, this testimony was not part of his substantive opinions – only his qualifications as to archeology in the gas industry.

In this case, the jury would have been misled or confused if the circuit court instructed it that FERC and the Natural Gas Act had no application to the case. There was no dispute that these

statutes did not apply to the case and there was no reason to explain that to the jury. As such, while the proposed instruction may have been a correct statement of law and perhaps not substantially covered in the charge actually given to the jury, it did not concern an important point in the trial so that the failure to give it seriously impaired Equitable's ability to effectively present its defense. Under these circumstances, Equitable fails to meet its burden under the test outlined in *State v. Derr*. Therefore, there was no abuse of discretion in the circuit court's refusal of Equitable's instruction about the Federal Energy Regulatory Commission Regulations and the Natural Gas Act and this Court should not disturb the verdict.

**4. The circuit court did not abuse its discretion in allowing Respondents' expert to proffer expert archeological opinions because the opinions were within the scope of his skill, knowledge, education, experience and training.**

According to Rule 702, there are three major requirements for the admission of expert witness testimony: (1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact. *See Dolen v. St. Mary's Hosp. of Huntington, Inc.*, 203 W.Va. 181, 506 S.E.2d 624 (1998); *Perrine v. E.I. Du Pont De Nemours & Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010). Rule 702 states that a broad range of knowledge, skills and training qualify an expert as such and in *Gentry v. Mangum*, this Court rejected any notion of imposing overly rigorous requirements of expertise. *See Id.*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

"This standard is very generous and follows the general framework of the federal rules which favors the admissibility of all relevant evidence." II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A), at 24; *See also Watson v. Inco Alloys Intern., Inc.*,

209 W.Va. 234, 246, 545 S.E.2d 294, 306 (2001). The use of the disjunctive “or” in Rule 702 allows an expert to be qualified by any of the methods listed.<sup>3</sup> See II Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A)(1), at 24 (1994)(“[I]nasmuch as the rule is disjunctive, a person may qualify to render expert testimony in any one of the five ways listed.”). See *Watson*, 209 W.Va. at 246, 545 S.E.2d at 306. The governing principle is whether the proffered testimony can assist the trier of fact. Necessarily the ‘helpfulness’ standard calls for decisions that are very much *ad hoc*, for the question is always whether a particular expert can help resolve the particular issue at hand. See *Perrine*, 225 W.Va. at 533-538, 694 S.E.2d at 866-871.

In *Gentry*, this Court expressed the concern that there is no “best expert” rule, and “[n]either a degree nor a title is essential and a person with knowledge or skill borne of practical experience may qualify as an expert.” See *Id.*, 195 W.Va. at 525 and n. 18, 466 S.E.2d at 184 and n. 18. Therefore, “[b]ecause of the ‘liberal thrust’ of the rules pertaining to experts, circuit courts should err on the side of admissibility.” See *Id.* The *Gentry* Court stated plainly that “[d]isputes as to the strength of an expert’s credentials . . . go to weight and not to the admissibility of their testimony.” See *Id.*, 195 W.Va. at 527, 466 S.E.2d at 186, citing *Daubert*, 509 U.S. at 594 (“[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). See also *Walker v. Sharma*, Syl. Pt. 3, 221 W. Va. 559, 655 S.E.2d 775 (2007)(“[I]ssues that arise as to the physician’s personal use of a specific technique or

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<sup>3</sup> Rule 702 of the West Virginia Rules of Evidence states: “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

procedure to which he or she seeks to offer expert testimony go only to the weight to be attached to that testimony and not to its admissibility.”); *see also State ex rel. Jones v. Recht*, Syl. Pt. 5, 221 W.Va. 380, 655 S.E.2d 126 (2008)(“[P]ursuant to West Virginia Rules of Evidence 702 an expert’s opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. The jury, and not the trial judge, determines the weight to be given to the expert’s opinion.”) and *see also San Francisco v. Wendy’s Int., Inc.*, 221 W.Va. 734, 656 S.E.2d 485 (2007). This Court made very clear that issues about the strength of expert witness testimony are to be evaluated by the jury, not judges. *See Walker, supra*; *See State ex rel. Jones, supra* and *See San Francisco, supra*; *See also In re Flood Litigation Coal River Watershed*, 222 W.Va. 574, 668 S.E.2d 203 (2008). “The admissibility of testimony by an expert witness is a matter within the sound discretion of the circuit court, and the circuit court’s decision will not be reversed unless it is clearly wrong.” *See Helmick v. Potomac Edison Co.*, Syl. Pt. 6, 185 W.Va. 269, 406 S.E.2d 700 (1991).

Moreover, the alleged failure of an expert to be able to explain all aspects of a case or a controlling principle in a satisfactory manner is relevant only to the witness’s credibility. Should the expert witness later fail to adequately explain, define, or describe the relevant standard of care, opposing counsel is free to explore that weakness in the testimony. *See Friendship Heights Assoc. v. Vlastmil Koubek*, 785 F.2d 1154, 1163 (4<sup>th</sup> Cir. 1986); *see also Dobson v. Eastern Associated Coal Corp.*, 188 W.Va. 17, 22, 422 S.E.2d 494, 499 (1992)(suggests that “[t]he fact that a proffered expert may be unfamiliar with pertinent statutory definitions or standards is not grounds for disqualification ...[; s]uch lack of familiarity” affects credibility, not qualification to testify).

**a. Mr. Updike had knowledge, skill, experience, training or education sufficient to provide expert archeological opinions regarding foreseeable circumstances and appropriate standards when relocating a pipeline.**

Equitable's argument, in pertinent part, must be denied because its arguments directly contradict the liberal thrust of Rule 702 of the West Virginia Rules of Evidence and pertinent decisions of the West Virginia Supreme Court of Appeals. With respect to archeologist William Updike, he was proffered to testify in the field of archeology, including searches of land for cemeteries in conjunction with relocating a gas pipeline. SCT 215-251 & 1196-1199 (33:22-36:16). Prior to being qualified by the trial court to provide expert archeology testimony in this case, Mr. Updike testified as to his qualifications. Mr. Updike has a bachelor's degree in anthropology and a master's degree in historic preservation, both from the University of Kentucky. In addition, Mr. Updike is a registered professional archeologist, has taught college-level archeology, has conducted scientific research in archeology and published articles about the concept of company towns (an area he describes as "industrial archeology"). SCT 215-251 & 1167-1196 (4:16-32-13). In fact, Mr. Updike has studied the West Virginia coal company towns Sovereign and Sharples. He has years of archeological field experience, including pipeline relocation projects for gas industry clients. During these projects, Mr. Updike conducted research in county record rooms, conducted surveying fieldwork searching for cemeteries, identifying and locating graves or cemeteries, doing cemetery registry nominations and he is knowledgeable about the standard of care with respect to the discovery of graves or cemeteries. See *Id.* Mr. Updike also testified that he had discovered at least 100 cemeteries.

In addition, to this experience, Mr. Updike conducted an extensive investigation of the

Crystal Block Cemetery. Mr. Updike conducted two site inspections, reviewed literature, mapped the area, prepared two reports, talked with witnesses, reviewed death certificates, funeral home records, register of death records and reviewed aerial images between 2003 (before the desecration) and 2011 (after the desecration). SCT 1200-1214 (40:21-50:6) & 1237-1261 (74:7-78:22 & 79:2-98:20). As such, Mr. Updike was able to opine about all of the factors for a common law desecration claim, as established in the *Hairston* decision. SCT 1213-1238 (56:20-75:9); 1261-1262 (98:21-99:8) & 1270-1291 (107:8-128:4).

Here, Mr. Updike's archeological gas industry experience was sufficient to allow him to opine about the foreseeable circumstances and the appropriate archeological procedures when relocating the subject pipeline. There is no dispute that Mr. Updike worked on similar pipeline relocation projects, but these projects required adherence to federal rules and regulations which mandate archeological work. Regardless whether or not a pipeline relocation project is subject to federal law, the archeological methodology and principles remain the same. SCT 1176-1187. The only distinction is that in a federal relocation project, federal law requires the archeological work and the archeological work for the subject pipeline relocation project was optional.

Equitable argues a distinction without a difference. The cited case law cited by Equitable is inapplicable because it concerns situations where there is methodology outside the expert's scope which is not the case in this matter. The only distinction is when the archeology work is required by federal law, not the methodology itself. While Mr. Updike's experience concerned gas industry pipeline relocation projects where there were federal law requirements, he had sufficient qualifications in order to render opinions about general archeological methodology and principles regarding the relocation of a pipeline where federal law did not apply. Thus, based

upon this experience, Mr. Updike opined about archeological standards of care in the gas industry relating to pipeline relocation, including the reporting requirement of West Virginia Code § 29-1-8a.<sup>4</sup>

Furthermore, Equitable neglects to mention that its then regional land director, Steve Perdue, and then manager of natural resource relations, Joseph Gilmore, both testified about foreseeable circumstances and Equitable's corporate position with respect to cemeteries. Mr. Perdue and Mr. Gilmore testified that it is not uncommon to encounter unmarked cemeteries due, in part, to West Virginia's deep history. SCT 518 (35:1-5) & 622 (154:22-155:2). Mr. Gilmore acknowledges that Equitable did not conduct a survey and if it had, there would have been no desecration. SCT 488-512 (5:11-29:24). Then, Mr. Perdue testified that Equitable has, and will continue, to work with community groups to safeguard cemeteries. Furthermore, Equitable issued a press release confirming Mr. Perdue's testimony. SCT 626-628 (170:18-178:3); 629 (188:5-10); 630-633 (194:4-209:23). However, Mr. Perdue admitted that, during his investigation, he did not work with any community groups regarding the Crystal Block Cemetery. SCT 622 (155:10-156:15). Afterward, as part of Mr. Perdue's investigation and "restoration" project, Equitable did not consult or retain an archeologist. SCT 518 (35:10-20) & 614 (122:21-124:1). Mr. Gilmore, Equitable's corporate representative at trial, described this

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<sup>4</sup> West Virginia Code §29-1-8a(d) - Notification of discovery of human skeletal remains in unmarked locations.

Upon the discovery of human skeletal remains, grave artifact or grave marker in an unmarked grave on any publicly or privately owned property, the person making such discovery shall immediately cease any activity which may cause further disturbance, make a reasonable effort to protect the area from further disturbance and notify the county sheriff within forty-eight hours of the discovery and its location. If the human remains, grave artifact or grave marker appear to be from an unmarked grave, the sheriff shall promptly, and prior to any further disturbance or removal of the remains, notify the Director of the Historic Preservation Section. The director shall cause an on-site inspection of the disturbance to be made to determine the potential for archaeological significance of the site: Provided, That when the discovery is made by an archaeological investigation permitted under state or federal law, the supervising archaeologist shall notify the Director of the Historic Preservation Section directly. . . .

work on the cemetery as desecration. SCT 536-537 (53:20-54:2) & 580-581 (97:14-98:9). Certainly, Mr. Updike, as an archeological expert, was free to comment on this testimony.

Moreover, Equitable acknowledges that Mr. Updike has archeological knowledge, skill, experience, training, and education about the gas industry, but instead argues that he does not have what it considers to be the appropriate amount of or the correct archeological experience in the gas industry. That is not an appropriate ground to strike the testimony. Mr. Updike's alleged failure to be able to explain all aspects of archeological work in the gas industry, in a satisfactory manner, was relevant only to his credibility. Counsel explored this alleged weakness in cross-examination and the jury rejected the argument.

Reviewing the specific expert testimony of Mr. Updike, in light of his testimony regarding his knowledge, skill, experience, training, and education, his expert testimony was within his demonstrated expertise. Mr. Updike plainly detailed his archeology background as it related to the concept of a company town, searching for graves or cemeteries and identifying graves or cemeteries, including on pipeline projects. Not only did he demonstrate his knowledge about these issues, but he was able to explain the standard of care with respect to discovering a grave or cemetery during a pipeline relocation project. This testimony, from a duly qualified expert witness, assisted and helped the jury understand these documents. Equitable's argument merely goes to the weight of the evidence, not its admissibility. Thus, based upon Rule 702 and its interpretation by this Court, the trial did not abuse its discretion court in allowing Mr. Updike's testimony.

**b. Mr. Updike's opinions solely concerned the field of archeology, were based upon the evidence of the case and the circuit court did not abuse its discretion in**

**admitting his testimony.**

Equitable simply ignores the overwhelming evidence that it, in part, desecrated the Crystal Block Cemetery. Equitable chose not order a survey of the area or conduct a walk-through of the area, even though it knew (and issued a press release) that it was common to find cemeteries in such areas. SCT 501-509 (18:12-26:2); 511 (28:19-24); 626-628 (170:18-178:3); 629 (188:5-10) & 630-633 (194:4-209:23). Mr. Gilmore testified that if Equitable would have walked the access road, then there would not have been desecration. SCT 512 (29:6-24). Mr. Updike opined that Equitable should have conducted a survey and walked the area because access roads are commonly walked in the industry. SCT 1183 (20:11-18) & 1270-1271 (107:8-108:16). Then, Equitable learned of the bulldozer trampling through the cemetery five to nine times almost immediately after the incident. SCT 291-300 & 614 (121:21-122:20). Equitable claimed that it worked with community groups to safeguard such cemeteries, but its regional land manager, Mr. Perdue, did not work with any community groups regarding the Crystal Block Cemetery. SCT 622 (155:10-156:15).

Afterward, Mr. Perdue, set upon a plan to “restore” the cemetery without consulting or retaining an archeologist. SCT 518 (35:10-20); 612-613 (116:11-118:3); 614 (122:21-124:1). According to Mr. Perdue, he twice directed that the area be backfilled, graded, seeded and mulched at a time when all activities were to be halted. *See Id.* & 620 (147:15-148:22). Additionally, a headstone was replaced and moved to an upright position. SCT 211-214; 286-290; 601-603 (72:5-78:10); 609-610 (102:19-106:7). Later, after this work, an Equitable land man commented that the site looks much better. SCT 610-611 (106:8-110:11). However, all of the Respondents and Mr. Updike testified that most of the indices of the cemetery, including

grave markers and hand-dug steps leading to the cemetery, were gone and that their loved ones grave markers had been moved or removed. SCT 206-10; 253-256; 759-778; 995-1018; 1019-1051; 1052-1077; 1112-1124; 1218-1219 (55:5-56:12); 1225 (62:11-16) & 1228-1241 (65:11-78:22). Mr. Gilmore indicated that this work amounted to desecration. SCT 536-537 (53:20-54:2) & 580-581 (97:14-98:9). Mr. Updike opined that the Defendants, including Equitable, should have ceased all work in the area and contact the Logan County Sheriff in accordance with West Virginia Code § 29-1-8a(d). SCT 1261-1267 (100:3-104:3) & 1270 (107:4-7). Further, Mr. Updike opined that restoration of the cemetery will be difficult because portions of it have been removed from the scene. SCT 1371 (77:15-22).

Under these circumstances, the circuit court properly recognized Mr. Updike as expert in his respective field of archeology and it properly allowed him to opine about archeology. This expert testimony was not “clearly wrong,” rather it was useful and helpful to assist the jury in making its determination, in pertinent part, against Equitable. Equitable’s generalized argument about Mr. Updike’s alleged “unqualified” opinions is not supported by the law or the facts of the case. The trial court did not abuse its discretion in allowing this testimony and there is no reason to disturb this verdict based upon the testimony of expert archeologist William Updike.

### **VIII. CONCLUSION**

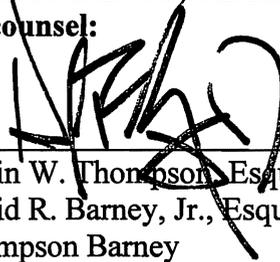
Based upon the law and the facts of the case, the circuit court did not abuse its discretion. The circuit court properly refused Equitable’s punitive damage jury instruction due to the bifurcation of the case and by not defining terms with common usage. The circuit court properly refused Equitable’s FERC and Natural Gas Act instruction because it simply was irrelevant to the case. The circuit court properly gave the adverse inference instruction because there was an

anticipation of litigation. Finally, the circuit court did not abuse its discretion in allowing the opinions of expert archeologist William Updike because they were within his field of expertise and were supported by the evidence.

**WHEREFORE**, Respondents, Plaintiffs below, respectfully request this Honorable Court to deny Petitioner, Defendant below, Equitable Production Company's Petition and to enter an Order effectuating the decision, along with any other relief deemed necessary and proper.

**Dated: January 16, 2014**

**RESPONDENTS, PLAINTIFFS BELOW,**  
**By counsel:**



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

EQUITABLE PRODUCTION COMPANY,

Defendant Below, Petitioner,

v.

Supreme Court No. 13-0934

Logan Co. Civil Action No. 06-C-238  
(Consolidated with 06-C-239, 06-C-240,  
06-C-241 and 07-C-234)  
Judge Elliott E. Maynard

CORA PHILLIPS HAIRSTON, et al.,

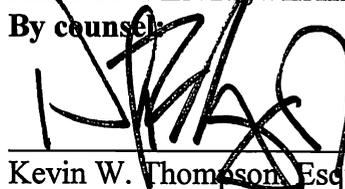
Plaintiffs Below, Respondents.

**CERTIFICATE OF SERVICE**

The undersigned counsel for Plaintiffs hereby certifies that on **January 16, 2014**, a true copy of the foregoing "**Respondents' Brief**" was served upon the following counsel of record by Hand-Delivery:

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