INDEX

to

SELECTED DOCUMENTS

Dennis Prince et al. v. Pittston

(the "Buffalo Creek Disaster")

/g6

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

DENNIS PRINCE, individually and as Administrator of the estate of Margie Prince;

ROLAND STATEN, individually and as Administrator of the estates of Gladys Staten, Kevin Staten and the unborn child of Gladys Staten;

BOGLE TRENT, individually and as Administrator of the estates of Henry Trent, John Trent, Gene Trent and Dellie Trent;

and

ADDITIONAL PLAINTIFFS LISTED IN APPENDIX A

Plaintiffs

v.

THE PITTSTON COMPANY, a Delaware and Virginia Corporation, 250 Park Avenue New York, New York 10017,

Defendant

Civil Action No. 3052

COMPLAINT

Plaintiffs, for their complaint, bring this civil action by their attorneys and complain and allege as follows:

1. The jurisdiction of this Court arises under 28 U.S.C., Section 1332.

2. The matter in controversy exceeds, for each of the individually-named plaintiffs, the sum or value of $10,000, exclusive of interest and costs.

I. LIABILITY

FIRST CAUSE OF ACTION

Parties

3. All plaintiffs are citizens of the State of West Virginia or of a state other than the states in which the defendant, The Pittston Company, is incorporated or has its principal place of business.

4. The defendant, The Pittston Company, is a corporation incorporated under the laws of the states of Delaware and Virginia, and has its principal place of business in a state other than the State of West Virginia. Pittston's principal executive offices are at 250 Park Avenue, New York, New York 10017, and Pittston's principal operating offices are in Dante, Virginia. Pittston is licensed to do business in the State of West Virginia and is doing business in the Southern District of West Virginia.

5. All plaintiffs are persons who suffered grievous injury as a direct and proximate result of the defendant's actions and failures to act, as more particularly alleged hereafter.

6. Defendant, The Pittston Company ("Pittston") has been in the coal mining business for many years and is one of the largest coal companies in the United States. On or about June 1, 1970, Pittston acquired the Buffalo Mining Company, which also has been in the coal mining business for many years.

7. Pittston is liable to the plaintiffs for Pittston's own acts and failures to act, as a joint tort-feasor with Pittston's wholly-owned subsidiary, the Buffalo Mining Company.

8. Pittston also is liable to the plaintiffs for Pittston's own acts and failures to act, and for the acts and failures to act of Pittston's wholly-owned subsidiary, the Buffalo Mining Company, which is the alter ego and business conduit of Pittston, dominated, directed, and controlled by Pittston and maintained by Pittston in corporate form and name only.

9. Pittston also is liable to the plaintiffs for Pittston's own acts and failures to act and vicariously for the acts and failures to act of Pittston's wholly-owned subsidiary, the Buffalo Mining Company, on the basis of respondeat superior.

The Buffalo Creek Disaster

10. Prior to and on February 26, 1972, the defendant conducted a coal mining operation in Logan County, West Virginia, in the immediate vicinity of the town of Saunders, West Virginia, and of two watercourses -- Middle Fork and Buffalo Creek. This coal mining operation will be referred to hereafter as the "Buffalo Creek Coal Mining Operation."

11. Prior to and on February 26, 1972, the defendant's Buffalo Creek Coal mining operation included a number of coal mines (underground, strip and auger

coal mines), an enormous burning coal refuse pile (hereafter referred to as the "Burning Refuse Pile") approximately 200 feet high and over 1,000 feet long, located near the mouth of the Middle Fork of Buffalo Creek, Logan County, West Virginia, plus three refuse piles used as dams along the Middle Fork above this Burning Refuse Pile. The first refuse pile dam ("Dam 1"), constructed from coal mine refuse, was approximately twenty feet high. The second refuse pile dam ("Dam 2"), also constructed from coal mine refuse, was approximately twenty feet high. The third refuse pile dam ("Dam 3"), also constructed from coal mine refuse, was approximately forty-five to sixty feet high and was still being enlarged by the dumping of coal mine refuse immediately prior to its failure on February 26, 1972.

12. Except for the Burning Refuse Pile and Dams 1, 2 and 3, Middle Fork would be a natural drain or watercourse, approximately six feet wide and six inches deep. As Dams 1, 2 and 3 were constructed and enlarged, the water that ran unobstructed down Middle Fork to Buffalo Creek was impounded.

13. By February 26, 1972, the base of Dam 3 stretched 378 feet across Middle Fork Valley and was about 327 to 498 feet thick from front to back. The bank of Dam 3 was about 43 feet high on the right (northeast) abutment, and rose gradually to the southwest where it was sixty feet high.

14. The refuse pile herein referred to as Dam 3 impeded drainage and impounded water, and as more and more coal mine refuse was dumped on top of and behind Dam 3, drainage through Dam 3 became more and more impeded and obstructed and water began to be impounded behind Dam 3 to a greater and greater extent. By February 26, 1972, approximately 21 million (21,000,000) cubic feet, or approximately 130 million (130,000,000) gallons, of water and 200,000 cubic yards of sludge and silt were impounded behind the refuse pile herein referred to as Dam 3.

15. For some time prior to February 26, 1972, up until approximately 8:00 a.m. on February 26, 1972, the defendant negligently and willfully did:

(a) use coal mine refuse to obstruct a natural watercourse and negligently permit a fire to burn in coal mine refuse in front of large bodies of water;

(b) design, construct, operate, maintain, use and/or enlarge the burning refuse pile, Dams 1, 2 and 3, the impoundment of water behind Dam 3, and the pools of water behind Dams 1 and 2;

(c) fail to inspect the burning refuse pile, Dams 1, 2 and 3, the impoundment of water behind Dam 3, and the pools of water behind Dams 1 and 2;

(d) fail to reinforce Dam 3 and to construct an emergency spillway arcund Dam 3;

(e) fail to warn the residents of Buffalo Creek Valley of the impending danger that Dam 3 would fail or of the failure of Dam 3; and

(f) interfere with, obstruct and deter others from warning the residents of Buffalo Creek Valley of the impending danger that Dam 3 would fail.

16. Paragraphs 17 through 30 contain some of the facts demonstrating the above-alleged negligent and willful acts and failure to act of the defendant.

17. Defendant knew or should have known, for many years, not to use coal mine refuse to obstruct a watercourse and not to permit a fire to burn in coal mine refuse in front of a large body of water.

18. Defendant knew or should have known that on October 21, 1966, in Aberfan, South Wales, United Kingdom, a massive coal mine refuse pile shifted and slid down upon the community of Aberfan, destroying a school, eighteen houses and other property and killing 144 men, women and children, of whom 116 were children.

19. Defendant knew or should have known that, as a result of the Aberfan disaster, the U.S. Geological Survey and the U.S. Bureau of Mines conducted an investigation of coal mine refuse piles in the United States to see if the Aberfan disaster could repeat itself in the United States; and that on December 9, 1966, the U.S. Geological Survey and the U.S. Bureau of Mines inspected the coal mine refuse pile (Dam 1) at Middle Fork, the

only dam then in existence on Middle Fork, and found that the impoundment of 5 million cubic feet of water behind Dam 1, for settling of material and wash water, lacked an adequate spillway and could overtop Dam 1. Defendant knew, or should have known, of the report of this 1966 inspection.

20. Subsequent to and despite the 1966 report of the U.S. Geological Survey and the U.S. Bureau of Mines, Dam 1 was substantially increased in elevation, and Dams 2 and 3 were constructed.

21. On at least one occasion, one of the dams cracked and/or was overtopped causing some damage in the town of Saunders, West Virginia, immediately below the dams and the burning gob pile.

22. In 1971 a small failure occurred on the downstream side of Dam 3 toward the right abutment side, causing the coal mine refuse from Dam 3 to slide into Pool 2 from Dam 3; the defendant simply replaced this lost material by dumping more coal mine refuse on Dam 3.

23. The defendant improperly designed, constructed, operated, maintained, used and enlarged Dam 3.

24. Dam 3 was unstable under the conditions imposed upon it by defendant.

25. For approximately a year or more prior to February 26, 1972, "boils" of black water of about the color of the pool upstream of Dam 3 emerged into the

relatively clear water of Pool 2 between Dam 3 and Dam 2. These boils indicated that excessive seepage had eroded a small flow path, or "pipe" in the foundation of Dam 3. Such piping is a well known danger signal. Nevertheless, defendant made no effort to inspect Dam 3 or the pool of water in front of Dam 3 to check for evidence of "piping" in the foundation of Dam 3.

26. The defendant did not provide an adequate program of technical inspections of Dams 1, 2 and 3, and the burning refuse pile, and did not continuously monitor Dams 1, 2 and 3 during periods of high precipitation.

27. The defendant constructed no emergency spillway or other adequate water-level controls for Dam 3 to permit the runoff of any of the 21 million cubic feet or 130 million gallons of water not needed by it, and took no measures to allow normal drainage to occur past Dam 3.

28. The defendant did not formulate any emergency plan for negating the hazard of rising water behind Dam 3 and warning persons downstream of possible flooding from Dam 3, although defendant knew or should have known, inter alia, that Dams 3 and 2 had failed on prior occasions, that Dam 3 was a hazard, that there were apparently impending dangers with respect to Dam 3, that residents of Buffalo Creek Valley had been concerned as to the stability of Dam 3, that a coal refuse pile was the cause of the 1966 Aberfan disaster, that in 1966 a United States Government report on Dam 1 had

indicated that Dam 1 lacked an adequate spillway, and that the State of West Virginia officials thought Dam 3 needed reinforcement and an emergency spillway.

29. The defendant did not alert or warn, in any way, the residents of the Buffalo Creek Valley, the plaintiffs, the deceased persons represented by the plaintiffs, local public officials, local radio stations or TV stations, state public officials, or federal public officials, including the National Guard and the Bureau of Mines, (a) of the apparent impending dangers and Pittston's concern and alarm, on February 24, 25 and the morning of February 26 prior to the dam's failure, for the stability of Dam 3, and (b) of the failure of Dam 3.

30. The defendant interfered with, obstructed and deterred efforts by concerned persons to learn of the impending dangers and concern and alarm for Dam 3's stability and to alert and warn other persons of the impending dangers and concern and alarm for Dam 3's stability.

31. The defendant's acts and failures to act, as alleged above in paragraphs 6 through 30, were negligent, grossly negligent and in wanton, willful, reckless and intentional disregard of the lives and property of plaintiffs and plaintiffs' decedents.

32. On February 26, 1972, as a direct and proximate result of the defendant's negligence, gross negligence, and wanton, willful, reckless and intentional disregard of the lives and property of the plaintiffs and

plaintiffs' decedents, as alleged above in paragraphs 6 through 31, Dam 3 failed, Dams 1 and 2 failed, the burning refuse pile exploded, and an estimated 130 million (130,000,000) gallons of water and about one million (1,000,000) tons of refuse material descended upon the persons and property downstream of Dam 3 -- killing at least 118 men, women and children, some of whom are still missing; seriously, and in many cases, permanently, injuring thousands of persons in body and mind; totally destroying over five hundred homes and over forty mobile homes; damaging over 250 additional homes; destroying approximately 1,000 automobiles and trucks; leaving approximately 4,000 persons homeless, without water, electricity, telephone, or transportation; destroying community and family life nurtured over many generations; forcing numerous coal miners out of work; and directly and proximately causing the damages suffered and continuing to be suffered by plaintiffs and plaintiffs' decedents, as more particularly set forth in Section II and Appendix B attached hereto.

SECOND CAUSE OF ACTION

33. Plaintiffs repeat and re-allege paragraphs 3 through 32 hereof.

34. The defendant designed, constructed, used, and was in complete control of, an ultra-hazardous activity, i.e., the dumping of coal mine refuse, the maintenance

of a burning refuse pile, the impoundment of massive amounts of water, and the obstruction of a natural watercourse, as more particularly alleged above. Therefore, defendant is absolutely liable, as a matter of law, for the damages suffered by plaintiffs and plaintiffs' decedents, as the direct and proximate result of defendant's ultra-hazardous activity.

35. Defendant's ultra-hazardous activity was and is the direct and proximate cause of the damages suffered and continuing to be suffered by plaintiffs and plaintiffs' decedents, as more particularly set forth in Section II and Appendix B attached hereto.

THIRD CAUSE OF ACTION

36. Plaintiffs repeat and re-allege paragraphs 3 through 32 hereof.

37. Defendant created, maintained, used, and/or kept in existence, for its own use, a public and private nuisance, i.e., a burning refuse pile, Dam 3, Dams 1 and 2, the massive impoundment of water behind Dam 3, and the pools of water behind Dams 1 and 2, all as more particularly alleged above. Therefore, defendant is absolutely liable, as a matter of law, for the damages suffered by plaintiffs, and plaintiffs' decedents, as the direct and proximate result of Pittston's unlawful, unauthorized and illegal acts in creating, maintaining, using, and keeping in existence, for their own use, a public and private nuisance.

38. The defendant's nuisance was and is the direct and proximate cause of the damages suffered and continuing to be suffered by plaintiffs and plaintiffs' decedents, as more particularly set forth in Section II and Appendix B attached hereto.

FOURTH CAUSE OF ACTION

39. Plaintiffs repeat and re-allege paragraphs 3 through 32 hereof.

40. The defendant violated federal safety laws, regulations and standards. More particularly, the defendant violated the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. Section 801, et seq., and mandatory safety standards for the surface work areas of underground coal mines issued pursuant to 30 U.S.C. Section 811(a) of the Federal Coal Mine Health and Safety Act of 1969; e.g., standards for refuse piles in general (30 C.F.R. Section 77.214), standards for construction of refuse piles (30 C.F.R. Section 77.215) and standards for construction, inspection, reporting and record keeping with respect to retaining dams (30 C.F.R. Section 77.216).

41. More particularly, the federal manadatory safety standards for the surface work areas of underground coal mines require, inter alia:

Section 77.215(a) — refuse deposited on a pile shall be spread in layers and compacted in such a manner so as to minimize the flow of air through the pile;

Section 77.215(b) -- refuse shall not be deposited on a burning pile except for the purpose of controlling or extinguishing a fire;

Section 77.215(c) -- clay or other sealants shall be used to seal the surface of any refuse pile in which a spontaneous ignition has occurred;

Section 77.215(e) -- refuse piles shall not be constructed so as to impede drainage or impound water;

Section 77.215(f) -- refuse piles shall be constructed in such a manner so as to prevent accidental sliding and shifting of materials;

Section 77.216(a) -- if failure of a water or silt retaining dam will create a hazard, it shall be of substantial construction and shall be inspected at least once each week;

Section 77.216(b) -- weekly inspections conducted pursuant to paragraph (a) of this Section 77.216 shall be reported and the report shall be countersigned by particular persons specified by the federal mandatory safety standards.

42. The Federal Coal Mine Health and Safety Act and the safety standards issued pursuant to that Act were intended to provide the highest possible standards in health and safety in coal mining, to protect persons dependent on the safety of coal mining for their health and livelihood, to protect persons dependent upon the

efficiency and productivity of the national coal industry, to prevent coal mining accidents and disasters, to prevent injury to coal miners and their families, and, in particular, to protect persons such as plaintiffs and plaintiffs' decedents.

43. Dam 3, Dams 1 and 2 and the burning refuse pile were designed, constructed, maintained, used, enlarged and continued in existence in violation of the Federal Coal Mine Health and Safety Act and mandatory safety standards for the surface work areas of underground coal mines issued pursuant to that Act.

44. All plaintiffs are coal miners, members of their families, or persons directly dependent upon the safety of coal mining for their own health. Therefore, defendant is liable, as a matter of law, for the damages suffered by plaintiffs and plaintiffs' decedents as a direct and proximate result of the defendant's violations of federal safety regulations.

45. Defendant's violations of federal safety regulations were and are the direct and proximate cause of the damages suffered and continuing to be suffered by plaintiffs and plaintiffs' decedents, as more particularly set forth in Section II and Appendix B attached hereto.

FIFTH CAUSE OF ACTION

46. Plaintiffs repeat and re-allege paragraphs 3 through 32 hereof.

47. The defendant violated safety laws, regulations, orders and interpretations of the State of West Virginia and its administrative agencies. More particularly, the defendant violated Section 61-3-47 of the West Virginia Code which provides that it is a crime to construct a dam or other obstruction more than fifteen feet high across any stream or watercourse or to construct a dam or other obstruction more than ten feet high if it creates a body of water of ten or more acres unless both the design and construction shall have been declared to be safe by the Public Service Commission of the State of West Virginia.

48. The defendant violated the statutory safety standard (Section 61-3-47 of the West Virginia Code), by constructing and enlarging Dam 3 without obtaining design or construction approval from the Public Service Commission of the State of West Virginia. The defendant also violated the West Virginia statutory safety standard by ignoring and refusing to comply with specific safety requests made by the Public Service Commission of the State of West Virginia with respect to Dam 3, including requests that an emergency spillway be constructed for Dam 3 and that Dam 3 be reinforced.

49. All plaintiffs are persons intended to be protected from improperly designed and constructed dams such as Dam 3, prohibited by the West Virginia statutory safety standard (Section 61-3-47 of the West Virginia Code). Therefore, defendant is liable, as a matter of law, for the damages suffered by plaintiffs and plaintiffs' decedents as a direct and proximate result of defendant's violations of safety regulations of the State of West Virginia.

50. Defendant's violations of the safety regulations of the State of West Virginia were and are the direct and proximate cause of the damages suffered and continuing to be suffered by plaintiffs and plaintiffs' decedents, as more particularly set forth in Section II and Appendix B attached hereto.

II. COMPENSATORY DAMAGES

51. As a direct and proximate result of the defendant's negligent acts and failures to act, and as a direct and proximate result of the defendant's ultra-hazardous activity, and as a direct and proximate result of the defendant's nuisance, and as a direct and proximate result of the defendant's violations of the Federal Coal Mine Health and Safety Act and the mandatory safety standards issued pursuant to the Act, and as a direct and proximate result of the defendant's violations of safety statutes and

interpretations of the State of West Virginia, as more particularly alleged in Section I above:

A. The deceased persons whom plaintiffs represent suffered intense physical pain and mental anguish and lost their lives by drowning and/or in other ways, and lost all of their personal and/or real property; and

B. Plaintiffs suffered intense physical pain and mental anguish, and/or the loss of immediate members of their family and/or close personal friends; and/or lost all, or a large part, of their personal and/or real property; and/or lost their previous community and family life; and/or lost their physical and/or mental health; and/or received injuries to their bodies (all or a portion of said injuries being permanent in nature); and/or suffered and continue to suffer extensive medical expenses; and/or lost wages from employment; and/or suffered in their ability to make a living; and/or incurred and continue to incur great expenses in attempting to support and maintain the remaining members of their families; and/or have been forced to live in undesirable and severely depressing circumstances at great expense of time, money and effort; and/or lost the companionship, services, society and/or consortium of immediate members of their family and/or close personal friends of themselves or their children; and/or suffered humiliation, insult and aggravation;

and/or other members of their family.

52. More particularly, plaintiffs have suffered damages in the amounts set forth in Appendix B attached hereto.

III. EXEMPLARY DAMAGES

53. Pittston's actions and failures to act in connection with Dam 3, Dams 1 and 2, the burning refuse pile, the massive impoundment of water behind Dam 3, and the pools of water behind Dams 1 and 2, as more particularly alleged in Sections I and II above, and as further alleged in this Section III, were done wantonly, willfully, intentionally, recklessly, maliciously, consciously, and in complete disregard of the consequences to the lives and property of plaintiffs and plaintiffs' decedents; and Pittston's gross negligence and wanton, willful, intentional, reckless, conscious and malicious conduct in complete disregard of the consequences to plaintiffs and plaintiffs' decedents was the direct and proximate cause of the damages suffered by plaintiffs and of the deaths of plaintiffs' decedents. Accordingly, in addition to compensatory damages due them, plaintiffs are entitled to damages of an exemplary and punitive nature.

54. In order to punish Pittston for its wanton and reckless disregard of human life and property and

to deter Pittston from continuing such wanton and reckless disregard of human life and property, exemplary damages must be calculated in such a way and in such an amount, together with compensatory damages, so as to provide an effective punishment and deterrence of Pittston.

55. Pittston has asserted, in its filings with the Securities and Exchange Commission, that although the aggregate claims against Pittston will be substantial in amount, Pittston "believes that the ultimate result of such claims should not be material in relation to the company's consolidated financial position" (emphasis added). To effectively punish and deter Pittston, the effect on Pittston must be material in relation to its consolidated financial position.

56. In determining the amount of exemplary damages which would provide an effective punishment and deterrence of defendant Pittston, Pittston's ability to pay must be considered. In the fiscal year ended December 31, 1971, Pittston earned net income of approximately $42 million, including extraordinary credits of $8 million, and its net worth as of December 31, 1971, was approximately $208 million.

57. Accordingly, effective punishment and deterrence of defendant Pittston requires that the exemplary damages, based on Pittston's ability to pay, in what was the worst coal refuse-water disaster in the history of

the State of West Virginia, amount to at least $21 million, in addition to compensatory damages.

58. Exemplary damages are required not only effectively to deter defendant Pittston but also effectively to deter others in like situations to Pittston. Although, it has been clear for many years in West Virginia that coal refuse piles should not be used to impound large amounts of water, and should not be permitted to burn for a number of years, Pittston and possibly other coal companies in the Buffalo Creek area have used for many years, and continue improperly to use, coal refuse piles as water impoundments and continue improperly to let coal refuse piles burn for many years. To deter Pittston and any such other companies from continuing to flaunt the law in the use of coal refuse piles as water impoundments, exemplary damages must be awarded in an amount, together with compensatory damages, sufficient to deter not only Pittston but also these other companies.

IV. INJUNCTIVE RELIEF

59. Plaintiffs repeat and re-allege paragraphs 1 through 50 hereof.

60. On information and belief, Pittston is maintaining and continuing to use the burning refuse pile, other burning refuse piles and water or silt impoundments

constructed with coal refuse in its Buffalo Creek mining operations; is continuing to permit fires to burn in these burning refuse piles; is continuing to dump, above ground, coal refuse from its Buffalo Creek mines; is continuing to dam or obstruct natural watercourses in the vicinity of its Buffalo Creek mines without obtaining design and construction approval from the Public Service Commission of the State of West Virginia; is continuing to construct coal refuse piles in the vicinity of the Buffalo Creek mines in such a way as to impede drainage or to impound water; is continuing to construct coal refuse piles in the vicinity of the Buffalo Creek mines in such a manner as to permit accidental sliding and shifting of materials; is failing to inspect at least once each week every one of its water impoundments in the vicinity of its Buffalo Creek mines; is continuing to fail to establish and maintain an emergency warning system to provide accurate and sufficient warning to all residents in the vicinity of its Buffalo Creek mines of the imminence of any hazard or danger arising out of its Buffalo Creek mining operations; is continuing to fail to drain all of its water impoundments constructed of coal mine refuse, wherever they may be; and is continuing to fail to dismantle all of its above-ground coal mine refuse piles, wherever they may be -- all of which threatens plaintiffs with imminent hazard and peril.

61. Plaintiffs have no adequate remedy at law to compensate them for these imminent hazards and perils continually being forced on them by Pittston. Monetary damages alone are inadequate to compensate plaintiffs for these continuing hazards and perils.

PRAYERS FOR RELIEF

WHEREFORE, plaintiffs pray:

1. Judgment against Pittston for compensatory damages in the approximate amount of $31 million as set forth in Appendix B attached hereto and made a part hereof;

2. Judgment against Pittston for exemplary damages of $21 million to be apportioned among plaintiffs in proportion to their compensatory damages;

3. To the extent that monetary damages do not provide complete relief, a permanent injunction requiring Pittston to provide plaintiffs with the same or equal housing and community facilities they enjoyed prior to February 26, 1972;

4. A permanent injunction enjoining and restraining Pittston from constructing refuse piles in the vicinity of its Buffalo Creek mines so as to impede drainage or impound water; from constructing water or silt retaining dams out of coal refuse; from failing to construct water or silt retaining dams of substantial construction; from failing to inspect at least once each

week all of its water or silt retaining dams; from violating any of the federal mandatory safety standards for the surface work areas and underground coal mines set forth in C.F.R. Sections 77.214-77.216; from maintaining and continuing to use the burning refuse pile on Middle Fork and any other burning refuse piles in the vicinity of the Buffalo Creek mines; from failing to extinguish forever any and all fires burning in any of its burning refuse piles in the vicinity of its Buffalo Creek mines; from damming or obstructing or continuing to dam or obstruct any natural watercourse in the vicinity of its Buffalo Creek mines without obtaining design or construction approval from the Public Service Commission of the State of West Virginia; and from failing to establish and to maintain an emergency warning system to provide accurate and sufficient warning to all residents in the vicinity of its Buffalo Creek mines of the imminence of any hazard or danger arising out of the operations of its Buffalo Creek mines; from failing to drain all of its water impoundments, wherever they may be, constructed of coal mine refuse; and from failing to extinguish forever all fires in all of its coal mine refuse piles, wherever they may be.

5. Such other, further and additonal relief as to the Court may seem just and proper, together with the

interest, costs and disbursements of this action, including just and reasonable attorneys' fees and expenses.

Gerald M. Stern

Harry Huge

Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Tel. 202-223-9200

Willis O. Shay

Steptoe & Johnson
10th Floor
Union Bank Building
Clarksburg, West Virginia 26301
Tel. 624-5601

Of Counsel:

Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Steptoe & Johnson
10th Floor
Union Bank Building
Clarksburg, West Virginia 26301

PLAINTIFFS DEMAND A JURY TRIAL AS TO SECTIONS I, II AND III AND PARAGRAPHS 1 AND 2 OF THE PRAYERS FOR RELIEF

APPENDIX B

Wrongful death damages, special damages and general damages:

ADKINS, George, Rodeen, Kathi, Terrie, Joe

Special	$175,000.00
General	250,000.00
TOTAL	$425,000.00

ADKINS, Willard, Grace

Special	$ 74,000.00
General	100,000.00
TOTAL	$174,000.00

ALBRIGHT, Jesse

Special	$ 7,800.00
General	50,000.00
TOTAL	$ 57,800.00

ALLISON, Evan, Lucille

Special	$ 57,000.00
General	100,000.00
TOTAL	$157,000.00

BAILEY, Newson, Nellie, Ronald, Newson Dwane Reed, Glena Rena Reed

Special	$140,000.00
General	250,000.00
TOTAL	$390,000.00

BAILEY, Ruby, Ailene Peters, Kimberly Peters

Special	$112,000.00
General	150,000.00
TOTAL	$262,000.00

BAISDEN, Samuel, Edna, Robert Samuel, Jr.

Special	$120,000.00
General	150,000.00
TOTAL	$270,000.00

BARTLEY, Carolyn Sue, James Wayne

Special	$ 46,000.00
General	100,000.00
TOTAL	$146,000.00

BARTLEY, James Lester, Elaine, Lester Ellis, Deborah Lynn

Special	$ 70,000.00
General	200,000.00
TOTAL	$270,000.00

BERRY, Irene

Special	$160,000.00
General	50,000.00
TOTAL	$210,000.00

BERRY, Victor Lee, Janet

Special	$ 6,200.00
General	100,000.00
TOTAL	$106,200.00

BOWENS, Robert, Kathern, George, Robert, Jr., Silvia, Chassie, Nancy, Irene

Special	$128,000.00
General	400,000.00
TOTAL	$528,000.00

BOYKINS, Betty Jean, individually and as Administratrix of the estate of MARY ELIZABETH BOYKINS;
BOYKINS, John Tom, James A., William E., Timothy E., Phillip S., Richard T., Felicia, Anna M., Christine, Beatrice

Wrongful Death	$110,000.00
Special	62,000.00
General	550,000.00
TOTAL	$722,000.00

ENTERED
IN OFFICE DOCKET
Served & Filed
11/17/72

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

DENNIS PRINCE ET AL.,

Plaintiffs,

V. CIVIL ACTION NO. 3052

THE PITTSTON COMPANY,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION (A) FOR JUDGMENT ON THE GROUND THAT DEFENDANT IS NOT A PROPER PARTY TO THIS ACTION, (B) FOR A MORE DEFINITE STATEMENT AS TO CERTAIN ALLEGATIONS CONTAINED IN THE COMPLAINT, AND (C) TO STRIKE CERTAIN ALLEGATIONS CONTAINED IN THE COMPLAINT

DONOVAN, LEISURE, NEWTON & IRVINE
Two Wall Street
New York, N. Y. 10005

SLAVEN, STAKER AND SMITH
National Bank of Commerce Building
Williamson, West Virginia 25661

Counsel for Defendant

Williamson, West Virginia

November 16, 1972

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

DENNIS PRINCE ET AL.,

Plaintiffs,

V. CIVIL ACTION NO. 3052

THE PITTSTON COMPANY,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION (A) FOR JUDGMENT ON THE GROUND THAT DEFENDANT IS NOT A PROPER PARTY TO THIS ACTION, (B) FOR A MORE DEFINITE STATEMENT AS TO CERTAIN ALLEGATIONS CONTAINED IN THE COMPLAINT, AND (C) TO STRIKE CERTAIN ALLEGATIONS CONTAINED IN THE COMPLAINT

TO THE HONORABLE SIDNEY L. CHRISTIE,
JUDGE OF SAID COURT:

This memorandum of law is respectfully submitted on behalf of defendant The Pittston Company ("Pittston") in support of its motion addressed to the Complaint herein. Specifically, Pittston moves for an Order of this Court granting the following relief:

A) dismissing the Complaint, pursuant to Rules 12(b) (6) and 56 of the Federal Rules of Civil Procedure, on the ground that Pittston is not a proper party to this action and the Complaint fails to state a claim upon which relief can be granted against Pittston;

B) if the Complaint is not dismissed , requiring plaintiffs to amend the Complaint to provide a more

definite statement, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, (i) as to the nature and amount of damages allegedly sustained by them and (ii) as to the citizenship of each plaintiff, on the ground that the present allegations are so vague and ambiguous that defendant cannot reasonably be required to frame a responsive pleading; and

C) if the Complaint is not dismissed, then striking that portion of the Complaint, pursuant to Rule 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure, which seeks certain injunctive relief to which plaintiffs are not entitled as a matter of law.

THE COMPLAINT

The Complaint in this action was filed on September 8, 1972, and is purportedly brought on behalf of more than 400 named plaintiffs against a single defendant, The Pittston Company (Compl., Appendix A). Jurisdiction is asserted on the basis of diversity of citizenship, plaintiffs being alleged to be citizens of West Virginia or other unnamed states (Compl. ¶3). It is alleged that the matter in controversy as to each individually-named plaintiff exceeds the jurisdictional amount of $10,000 (Compl. ¶¶ 1, 2). The Complaint contains five alleged causes of action and seeks approximately $31 million for compensatory damages and $21 million for exemplary damages, as well as certain broad injunctive relief (Compl., Prayers for Relief).

According to the Complaint, Pittston, a Delaware and Virginia corporation, with its principal offices in New York, is

alleged to have been in the coal mining business for many years, and, on or about June 1, 1970, Pittston purportedly "acquired the Buffalo Mining Company, which also [had] been in the coal mining business for many years" (Compl. ¶¶ 4, 6). Except for noting that Buffalo Mining Company ("Buffalo Mining") became a wholly-owned subsidiary of Pittston as a result of the June 1970 acquisition, Buffalo Mining and the nature and location of its business are not further identified. That company is not named as a defendant in this action. Rather, the Complaint glosses over the relationship between Pittston and Buffalo Mining by asserting that:

> "Prior to and on February 26, 1972, the defendant [Pittston] conducted a coal mining operation in Logan County, West Virginia, in the immediate vicinity of the town of Saunders, West Virginia, and of two watercourses -- Middle Fork and Buffalo Creek. This coal mining operation will be referred to hereafter as the 'Buffalo Creek Coal Mining Operation'" (Compl. ¶ 10).

The unspecified losses and/or injuries allegedly suffered by plaintiffs are said to have been proximately caused by the flood which occurred on Buffalo Creek on February 26, 1972, when a porous embankment of coal mine waste and related structures said to have been included within the Buffalo Creek Mining Operation gave way (Compl. ¶¶ 11, 51). The First Cause of Action alleges negligence in the design, construction, use and control of the embankment which failed; the Second Cause of Action alleges that the design, construction, use and control of the embankment constituted "an ultra-hazardous activity"; the Third Cause of Action alleges "a public and private nuisance"; the Fourth Cause of Action asserts violations of "federal safety laws, regulations and standards"; and the Fifth Cause of Action asserts violation of "safety laws,

regulations, orders and interpretations of the State of West Virginia and its administrative agencies."

The liability of Pittston, as the only defendant in the case, is predicated solely upon the following conclusory allegations contained in the First Cause of Action and thereafter incorporated by reference in each of the succeeding counts of the Complaint:

> "7. Pittston is liable to the plaintiffs for Pittston's own acts and failures to act, as a joint tortfeasor with Pittston's wholly-owned subsidiary, the Buffalo Mining Company.
>
> "8. Pittston also is liable to the plaintiffs for Pittston's own acts and failures to act, and for the acts and failures to act of Pittston's wholly-owned subsidiary, the Buffalo Mining Company, which is the alter ego and business conduit of Pittston, dominated, directed, and controlled by Pittston in corporate form and name only.
>
> "9. Pittston also is liable to the plaintiffs for Pittston's own acts and failures to act and vicariously for the acts and failures to act of Pittston's wholly-owned subsidiary, the Buffalo Mining Company, on the basis of respondeat superior."

The alleged losses suffered or injuries sustained by the named plaintiffs or the persons on behalf of whom they claim to sue are purportedly described in paragraph 51 of the Complaint. Since, however, this compendium of possible losses and injuries is written in both the conjunctive and disjunctive, it is, except in the case of wrongful death claims, totally unenlightening as to the loss or damage allegedly sustained by any particular plaintiff or even by plaintiffs as a group. In the case of wrongful death claims, it is indicated only that "the deceased persons whom plaintiffs represent . . . lost their lives by drowning and/or in other ways, . . ." (Compl. ¶ 51A.). The compensatory damages to which plaintiffs claim entitlement are said to be set forth in Appendix

B to the Complaint, but the amounts contained in such appendix are, in most instances, ascribed to what appears to be family units rather than individual plaintiffs and no effort has been made to allege special damages where sought with any specificity whatever. The following entry from Appendix B is typical:

> "CANNON, Arthur, Noreen, Judith, Sharon Lynn, Rosemarie, Lizabeth, William Arthur
>
> | | |
> |---|---|
> | Special | $ 42,000.00 |
> | General | 350,000.00 |
> | TOTAL | $392,000.00" |

In their prayers for relief, plaintiffs, as already noted, seek compensatory damages totaling approximately $31 million, exemplary damages of $21 million "to be apportioned among plaintiffs in proportion to their compensatory damages," and a permanent injunction of considerable scope. First, plaintiffs request:

> "To the extent that monetary damages do not provide complete relief, a permanent injunction requiring Pittston to provide plaintiffs with the same or equal housing and community facilities they enjoyed prior to February 26, 1972."

Secondly, they seek to enjoin and restrain certain action by Pittston "in the vicinity of its Buffalo Creek mines" and conclude with a blanket request that Pittston be enjoined "from failing to drain all of its water impoundments, wherever they may be, constructed of coal mine refuse; and from failing to extinguish forever all fires in all of its coal mine refuse piles, wherever they may be."

pp. 6-21 NOT Included

B. THE COMPLAINT'S ALLEGATIONS AS TO (I) THE NATURE AND AMOUNT OF DAMAGES SUSTAINED BY PLAINTIFFS AND (II) THE CITIZENSHIP OF EACH PLAINTIFF ARE SO VAGUE AND AMBIGUOUS THAT PLAINTIFFS SHOULD BE REQUIRED TO PROVIDE A MORE DEFINITE STATEMENT WITH RESPECT TO THE SAME, IF THE COMPLAINT IS NOT DISMISSED

I. Allegations as to the Nature and Amount of Damages.

The allegations in plaintiffs' Complaint concerning the nature and amount of damages allegedly sustained by them are so vague and ambiguous that the defendant cannot reasonably frame a proper responsive pleading. The allegations which are particularly deficient in this regard are contained in Section II and Appendix B of the Complaint:

1. Section II of the Complaint (paragraphs 51 and 52) purports to identify the nature of the losses which plaintiffs are claimed to have sustained. However, since the various forms of alleged damage are set forth in paragraph 51 in both the conjunctive and disjunctive, it is impossible, except perhaps in the case of wrongful death claims, for defendant to know the kind of loss or injury which any particular plaintiff claims to have sustained.

2. Appendix B to the Complaint compounds the problem by improperly setting forth the amount sought as compensatory damages only in terms of what appear to be family groupings instead of by individual plaintiffs, notwithstanding that each plaintiff is claimed to be exercising a separate and distinct right to sue. As a result, defendant is not informed as to

the amount of damages claimed by each plaintiff and is unable to determine whether each plaintiff's claim meets the jurisdictional amount of 28 U.S.C. § 1332, as alleged in paragraph 2 of the Complaint.

3. Appendix B to the Complaint also fails, as to plaintiffs claiming special damages, to itemize by type and amount the special damages assertedly sustained as required by Rule 9(g), F.R. Civ. P.

Accordingly, defendant moves, pursuant to Rule 12 (e), F.R. Civ. P., for an order requiring plaintiffs to amend their Complaint to provide a more definite statement as to the nature and amount of the damages, if any, allegedly suffered by each plaintiff and, for each plaintiff claiming special damages, the amount and type of special damages allegedly incurred.

Although a complaint under the Federal Rules need only present "a short and plain statement of the claim showing that the pleader is entitled to relief," Rule 8(a)(2) F.R. Civ. P., it must at a minimum give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 48 (1957). Plaintiffs' Complaint fails this test because it lumps together every form of injury allegedly suffered by one or more plaintiffs in such a way that defendant has no possible way of knowing whether a given plaintiff claims to have suffered any legally compensable injury or loss at all. Plaintiffs' conjunctive-disjunctive statement of possible losses is not only uninformative, it precludes any determination

as to whether the Court has jurisdiction as to every plaintiff and whether every plaintiff has alleged a legally cognizable claim for damages. See Binger v. Unger, 6 F.R.D. 44 (S.D.N.Y. 1946). Plaintiffs' opaque and imprecise pleading is especially inexcusable in a multi-party action as complex as this one, where, we submit, plaintiffs have a special obligation to plead in a comprehensible manner facts readily available to them but accessible to defendant only after expensive and time-consuming discovery.

A motion for a more definite statement is directed at unintelligibility rather than at want of detail. 2A MOORE'S FEDERAL PRACTICE ¶ 12.18. What defendant seeks by this motion is precisely that: not greater detail, but a rearrangement in meaningful form of facts already pleaded. Plaintiffs surely know the nature of the loss or injury allegedly suffered by each of them, and defendant should be given this information without having to undertake extensive discovery. Only with such information can defendant make an initial assessment of the nature of the claims against it and intelligently answer the same. For example, a claim for damages for mental suffering unaccompanied by physical injury may be objectionable under West Virginia law. See Bishop v. Byrne, 265 F. Supp. 460 (S.D.W. Va. 1967). However, whether such damages are claimed by any plaintiff in this action is patently unclear from the Complaint. Certainly unnecessary confusion can be eliminated if the Court requires each plaintiff to plead his case.

Plaintiffs apparently believe that by combining their actions under Rule 20, F.R. Civ. P., they have somehow freed themselves of the pleading requirements an individual plaintiff would be expected to meet. But Rule 20, in permitting separate claims

to be joined, does not affect the sbustantive rights of the parties, and separate causes joined in one action remain separate. 3A MOORE'S FEDERAL PRACTICE ¶ 20.05. Indeed, the liberality of Rule 20 demands special clarity and care in pleading in order to avoid the confusion inherent in a complex multi-party case. Thus, in this case, it should be clear from the Complaint what each party is doing in the case: the nature of the right asserted by each plaintiff, whether jointly, severally or alternatively, should be evident, and the particular relief asked by each plaintiff should be clearly stated. See notes to Form No. 14:1, MOORE'S MANUAL OF FEDERAL PRACTICE FORMS, at 14-4.

The first shortcoming of Appendix B of the Complaint is, that by alleging the amount of damages sought in apparent family groups instead of by individual plaintiffs, it fails to plead damages with requisite specificity. Since each plaintiff claims to be pursuing an independent cause or causes of action, his or her pleadings must conform to that which would have been required if he or she had sued in a separate action, namely, to state in the ad damnum clause the amount of damage claimed to have been sustained. See Official Form 9. There is certainly no basis whatever for pleading the amount of damages claimed merely by groups of plaintiffs, for the cause of action belongs to the individual plaintiff, not to the family. Thus, it is not surprising that cases involving multiple claims by family members arising out of a common accident have held that each individual must plead his own damages or, in many instances, be dismissed from the case. Cox v. Livingston, 407 F.2d 392 (2d Cir. 1969); Hymer v. Chai, 407 F. 2d 136 (9th Cir. 1969); Arnold v. Troccoli, 344 F.2d 842 (2d Cir. 1965); Payne v. State Farm Mutual Auto Ins. Co., 266 F.2d 63 (5th Cir. 1959); Takashi Katanka v. May Dept' Stores Co., 115 F.2d

521 (9th Cir. 1940), cert. den., 312 U.S. 700 (1940); McCormick v. Labelle, 189 F.Supp. 453 (D. Conn. 1960); Anicola v. J.C. Penny Co., 98 F.Supp. 911 (E.D. Pa. 1951); Mitchell v. Great American Indemnity Co., 87 F.Supp. 961 (W.D. La. 1950).

Once again, in seeking a more definite statement as to the amount of damages allegedly sustained by each plaintiff, defendant requests not evidentiary matter but merely the figures which underlie plaintiffs' summary statements. The calculations must necessarily already have been performed by plaintiffs and should, accordingly, be specified in the Complaint rather than made the subject of expensive and time-consuming discovery.

Finally, defendant additionally objects to Appendix B on the ground that, in contravention of Rule 9(g), F.R. Civ. P., plaintiffs have made no attempt whatever to identify the nature and itemize the amount of special damages claimed by them nowithstanding that the amount in some instances purportedly exceeds $100,000. Even prior to the adoption of the Federal Rules, special damages had to be specially pleaded in order not to take the defendant by surprise. Coca-Cola Bottling Co. of Henderson v. Munn, 99 F.2d 190 (4th Cir. 1938). Today that requirement has been codified in Rule 9(g) of the Federal Rules:

> "When items of special damage are claimed, they shall be specifically stated."

Thus, Rule 9(g) constitutes an exception to the permissive pleading allowed by Rule 8, 5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 1311, and a liberal approach to the granting of motions for a more definite statement is appropriate when they are used to enforce Rule 9(g). Id. at CIVIL § 1376.

Although the required level of specificity in pleading has been stated variously by different courts, see Id. at CIVIL § 1311, it has been almost uniformly held that Rule 9(g) demands itemization of special damages. E.g., Burlington Transp. Co. v. Josephson, 153 F.2d 372, 377 (8th Cir. 1946) (the Federal Rules required a statement "of the special circumstances giving rise to the special damages"); Kuenzell v. United States, F.R.D. 96, 100 (N.D. Cal. 1957) ("Where special damages are alleged, they should be set forth in an itemized form rather than as a lump sum."); accord, Henry Pratt Co. v. Stoddy Co., 15 F.R. D. 175 (S.D. Cal. 1954).

The specificity required by rule 9(g) may be illustrated by comparing the extent of detail found in a complaint held to satisfy the rule with plaintiffs' mere assertion here of a lump sum amount of loss for various groups. In Stevenson v. Hearst Consol. Publications, 214 F.2d 902 (2d Cir. 1954), cert. den., 348 U.S. 874 (1954), for example, the court held that a complaint in a libel action against a newspaper which published an article libelous per se complied with Rule 9(g) since it alleged loss by a 42 year old plaintiff (1) of his $19,000 a year position as corporation treasurer, (2) subsequent inability to obtain higher annual salary than $10,000, and (3) loss of annual pension of $9,671 and possible increment thereto in event of a salary increase to which he would have been entitled if he had retained his position until 65 years of age. See also, Continental Nut Company v. Robert L. Berner Company, 345 F.2d 395 (7th Cir. 1965).

In Great Am. Indem. Co. v. Brown, 307 F.2d 306 (5th Cir. 1962), the court upheld against a post-judgment attack the validity

of a pleading demanding $114,000 for all of plaintiff's personal injuries, permanent injuries, physical pain and suffering, loss of earnings, and expenses, only because defendant waited too long to object. The court specifically stated that defendant should have utilized a Rule 9(g) motion for a more definite statement before trial, as was done in Henry Pratt Co. v. Stoody Co., Inc., supra, and Kuenzell v. United States, supra.

Thus, it is established that Rule 9(g) requires each plaintiff to itemize by amount each type of special damage claimed. The rationale for this requirement is that it is necessary to avoid surprise to the defendant and to enable him to frame a responsive pleading. Many of the cases so holding involved only a single plaintiff. Here, where there are literally hundreds of plaintiffs, there is even greater justification for a strict application of Rule 9(g).

II. Allegations as to the Citizenship of Each Plaintiff.

Paragraph 3 of plaintiffs' Complaint defectively alleges jurisdiction under Title 28 U.S.C., section 1332, because it fails affirmatively to set forth the state of citizenship of each plaintiff, alleging only that "all plaintiffs are citizens of the State of West Virginia or of a state other than the states in which the defendant, The Pittston Company, is incorporate or has it principal place of business." Such a vague allegation of citizenship makes it impossible for defendant to respond to the jurisdictional issue of whether diversity of citizenship exists with respect to each and every plaintiff. Each plaintiff should therefore be required specifically to aver his own state of citizenship.

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

DENNIS PRINCE, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 3052
THE PITTSTON COMPANY,	:	
Defendant.	:	

NOTICE OF TAKING DEPOSITIONS

To: The Pittston Company
250 Park Avenue
New York, New York 10017

Please take notice, pursuant to Rule 30(a) of the Federal Rules of Civil Procedure, that plaintiff will take the testimony, upon oral examination, at the office of Weil, Gotshal & Manges, 767 Fifth Avenue, New York, New York 10022, before an officer authorized by the law to administer oaths, commencing at 10:00 a.m., on October 30, 1972, continuing from day to day thereafter, except on Saturdays, Sundays, and Holidays, until completed, of defendant The Pittston Company, through the following officers of The Pittston Company:

1. Nicholas T. Camicia, President and Chief Executive Officer of The Pittston Company, 250 Park Avenue, New York, New York 10017.

2. John B. Kebblish, Executive Vice President, Coal, of The Pittston Company, 250 Park Avenue, New York, New York 10017.

You are requested, at the time and place specified, to produce the foregoing witnesses and to make available for inspection and copying the documents listed on the Schedule of Documents to be Produced, which Schedule is attached hereto and made a part hereof.

Gerald M. Stern
ARNOLD & PORTER
1229 Nineteenth Street, N. W.
Washington, D. C. 20036
(202) 223-3200

Willis O. Shay
STEPTOE & JOHNSON
Tenth Floor
Union Bank Building
Clarksburg, West Virginia 26301

Attorneys for Plaintiffs

SCHEDULE OF DOCUMENTS TO BE PRODUCED

I. DEFINITIONS

A. As used herein, the terms "document" and "documents" include every writing and record of every type and description prepared, sent or received between (unless otherwise specified) January 1, 1960 and ~~October 2, 1972~~, in the possession, custody or control of The ~~Pittston~~ Company (hereafter "~~Pittston~~"), including, but not limited to, correspondence, memoranda, handwritten notes, minutes of directors' meetings, minutes of shareholders' meetings, minutes of committee meetings, studies, reports, summaries, drafts, transcripts, books, pamphlets, logs, telephone bills, pictures and voice recordings. The terms "document" and "documents" also mean a copy where the original is not in the possession, custody or control of Pittston, and every copy of a document or documents where such copy is not an identical duplicate of the original or other copy or copies.

B. As used herein, ~~Pittston~~ includes ~~Pittston, the Buffalo Mining Company~~ and the subsidiaries, divisions, affiliates and predecessor companies of ~~Pittston and the Buffalo Mining Company~~.

C. As used herein, the terms "Buffalo Creek coal mining operation," "burning refuse pile," "Dam 1," "Dam 2," and "Dam 3" mean what they are defined to mean in the Complaint in this case.

II. DOCUMENTS TO BE PRODUCED

D. All documents relating to or referring to or concerning, in any way, Pittston's acquisition of the stock of the Buffalo Mining Company, including, but not limited to:

1. Documents analyzed, reviewed, studied, obtained, received, or copied by Pittston or persons acting on behalf of or for Pittston in connection with Pittston's acquisition of the stock of the Buffalo Mining Company.

2. Documents prepared by or for Pittston in connection with Pittston's acquisition of the stock of the Buffalo Mining Company, including, but not limited to, assessment, engineering, and financial reports, studies or other such documents, relating to or referring to or concerning, in any way, the Buffalo Mining Company or its assets, properties, operations, refuse piles, dams or water impoundments.

E. The minute books of the Buffalo Mining Company for all shareholders' meetings and directors' meetings of the Buffalo Mining Company, both before and after Pittston's acquisition of the stock of the Buffalo Mining Company, and all minutes of meetings of Pittston shareholders, Directors, Executive committee or other type committee relating to or referring to or concerning, in any way, Buffalo Mining Company.

F. Pittston's By-laws.

G. All documents relating to or referring to or concerning, in any way, the safety or lack of safety of the operations of the Buffalo Mining Company, including, but not limited to, the safety or lack of safety of the burning refuse pile, or of Dams 1, 2 or 3 at the Buffalo Creek coal mining operation.

H. All documents relating to or referring to or concerning, in any way, the Natural Resources Department of the State of West Virginia or the Public Service Commission of the State of West Virginia, including, but not limited to, inspection reports, deficiency reports or notices to comply received by the Buffalo Mining Company, responses thereto and intra-company documents relating thereto.

I. All documents relating to or referring to or concerning, in any way, any application for approval by Pittston of the design and construction of a dam or water impoundment in the State of West Virginia.

J. All documents relating to or referring to or concerning, in any way, safety standards for the surface work areas of underground coal mines (30 C.F.R. Sections 77.214(a)-(d); 77.215(a)-(g); 77.216(a)-(b); and 77.1713(d)).

K. All documents relating to or referring to or concerning, in any way, the engineering studies undertaken by or for Pittston of (1) all of Pittston's reservoirs, water impoundments and similar facilities, and (2) the failure of Dam 3, such documents to include the studies themselves.

L. All documents relating to or referring to or concerning, in any way, the purchase of the property of Mr. and Mrs. Ezra Lusk and Mr. and Mrs. Johnson, including, but not limited to, documents indicating (1) the reasons for the purchase, and (2) the use of the property subsequent to the purchase.

M. All documents relating to or referring to or concerning, in any way, spillways or emergency spillways or water clarification facilities, including, but not limited to, emergency spillways for the Buffalo Creek coal mining operation, the new water clarification facilities being installed at the Number Five Preparation Plant for the Buffalo Creek coal mining operation and any spillways, emergency spillways or water clarification facilities, of any type, previously constructed, planned, proposed or considered for the Buffalo Creek coal mining operation.

N. All documents from February 1, 1972, to October 2, 1972, relating to or referring to or concerning, in any way, the Buffalo Creek disaster, including, but not limited to, (1) each such document released, sent, provided or made available, in any way, to any Pittston director, any Pittston stockholder, any member of the public, any member of the press or any Federal or State official (whether or not such document was dated prior to February 1, 1972), (2) each such document relating to or referring to or concerning, in any way, comments,

statements or testimony of Pittston officials or employees to any member of the press or to any Federal or State official or to the Governor's Ad Hoc Commission of Inquiry, including transcripts of any such statements, comments or testimony, and (3) each such document relating to or referring to or concerning, in any way, the employment of E. J. Wood, the creation of a Claims Office for the receipt and processing of claims arising out of the Buffalo Creek disaster, the standards for determining the validity of such claims or the amount to pay on such claims, the arrangements for providing funds to pay claims arising from the Buffalo Creek disaster, the preparation of so-called "Release" forms to be signed by settling claimants from the Buffalo Creek disaster, and the Assessment Report not made available to the Governor's Ad Hoc Commission of Inquiry.

O. All documents relating to or referring to or concerning, in any way, the burning refuse pile, or Dams 1, 2 or 3, at the Buffalo Creek coal mining operation for the period from February 1, 1972 to October 2, 1972, including, but not limited to, documents of intra-company telephone calls, discussions or meetings between or among officials or employees of Pittston.

P. All documents relating to or referring to or concerning, in any way, trips or visits by Pittston officials or employees to the Buffalo Creek coal mining operation.

Q. All formal legal papers in any legal proceeding in which Pittston has been or is a party.

R. All documents in the correspondence and chronological files of the following persons from January 1, 1970 to October 2, 1972:

1. Nicholas T. Camicia
2. John B. Kebblish
3. Francis J. Palamara
4. Irvin C. Spotte
5. James E. Yates
6. Ben Tudor
7. D. S. Dasovich
8. W. J. Kelleher

S. All documents signed by I. C. Spotte as President of the Pittston Company Coal Group or by any Pittston Coal Group Vice President or by any officer or manager of the Pittston Coal Group or Division of The Pittston Company relating to or referring to or concerning, in any way, the Buffalo Mining Company or employees of the Buffalo Mining Company.

T. All documents from January 1, 1970 to October 2, 1972, relating to or referring to or concerning, in any way, the management, administration or operation of the Buffalo Mining Company, including, but not limited to, (1) the employment of I. C. Spotte, Ben Tudor, D. S. Dasovich, E. J. Wood, A. D. Skaggs, or any Pittston Coal Group Vice President or manager, and (2) executive books, organization charts, method of operations, executive's handbooks or similar documents.

U. All financial statements and tax returns of Buffalo Mining Company and of Pittston, from January 1, 1970 to October 2, 1972.

V. All employment contracts.

W. All documents relating to or referring to or concerning, in any way, Buffalo Mining Company's application to strip mine near Lorado, West Virginia.

X. All documents relating to or referring to or concerning, in any way, coal refuse piles including, but not limited to, documents relating to or referring to or concerning, in any way, the Aberfan Disaster, the survey of coal-refuse banks in the Appalachian States undertaken by William Davies, or the letter from former Secretary of the Interior Stuart L. Udall on March 6, 1967, with respect to Mr. Davies' survey.

Y. All documents relating to or referring to or concerning, in any way, (1) any cracking, overtopping, slumping, sliding, or other failure of Dams 1, 2 or 3, at the Buffalo Creek coal mining operation, and (2) any "boils" of black water or "piping" (as those terms are explained in the Complaint) in connection with the Buffalo Creek coal mining operation.

Z. All documents relating to or referring to or concerning, in any way, the financial needs or requirements of the Buffalo Mining Company.

AA. All documents relating to or referring to or concerning, in any way, the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this Civil Action No. 3052 or to indemnify or reimburse for payments made to satisfy the judgment, including, but not limited to, (1) copies of such insurance agreements, (2) all correspondence between Pittston and any such person carrying on such insurance business relating to or referring to or concerning, in any way, the Buffalo Creek disaster, and (3) the agreements entered into by Pittston and such insurance company or companies with respect to the settlement and payment of claims as described on pages 19 and 20 of Pittston's June 22, 1972 Prospectus. See Rule 26(b)(2), Federal Rules of Civil Procedure.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Taking Depositions of defendant The Pittston Company through certain of its Officers, including the Schedule of Documents to be Produced, which Schedule was attached to and made a part of the Notice, were mailed by First Class Mail, postage prepaid, this _____ day of _____, 1972, to The Pittston Company, 250 Park Avenue, New York, New York 10017, and to each of the persons named in the Notice at the addresses stated for them in the Notice.

_____

Gerald M. Stern

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
At Huntington

DENNIS PRINCE ET AL.,

Plaintiffs,

V. CIVIL ACTION NO. 3052

THE PITTSTON COMPANY,

Defendant.

DEFENDANT'S RESPONSE TO PLAINTIFFS' REQUEST TO PRODUCE DOCUMENTS

Defendant The Pittston Company ("Pittston") responds to plaintiffs' request to produce documents as follows:

Section I: General Objections.

Defendant objects generally to plaintiffs' request to produce documents to the extent that:

(i) where not otherwise specified by plaintiffs, the word "documents" is defined to include documents prepared, sent or received between "January 1, 1960 and October 2, 1972," on the grounds that such time period is unreasonably broad in scope in that it covers a substantial period not relevant to the subject matter involved in the pending action and would make compliance with plaintiffs' request unduly burdensome and oppressive;

(ii) the word "Pittston" is defined to include its subsidiary Buffalo Mining Company ("Buffalo Mining"), and "subsidiaries, divisions, affiliates and predecessor companies of

of Pittston and the Buffalo Mining Company" on the ground that no other such company is a party to this action, and such definition is unduly broad in scope in that it bears no relevant relation to the subject matter involved in the pending action and would make compliance with plaintiffs' request unreasonably burdensome and oppressive;

(iii) the request calls for the production of documents which are the work-product of attorneys or are otherwise privileged;

(iv) the request seeks disclosure of trade secret and confidential commercial information;

(v) the request calls for the production of documents prepared by or for defendant, or by or for defendant's representative in anticipation of litigation or for trial;

(vi) the request seeks disclosure of the mental impressions, conclusions, opinions and legal theories of the attorneys and other representatives of defendant concerning the instant litigation;

(vii) the request seeks to discover facts known and opinions held by experts who may have been retained by defendant;

(viii) the request calls for the production of documents which are already in the possession of plaintiffs or which are readily available to plaintiffs from other sources;

(ix) the request calls for the production of documents relating to, referring to, or concerning any issue which may be presented by the pending action except the issue as to whether Pittston is a proper party until such time as the court has had an opportunity to pass upon such issue.

Subject to the above general objections set forth in Section I of this response, defendant responds to the Items in plaintiffs' production request as follows:

1. Response to Item D. Defendant will produce the documents, if there are any, requested in plaintiffs' Item D and the subparts thereof in the possession, custody or control of defendant relating to Pittston's acquisition of the stock of Buffalo Mining to the extent that they relate to or refer to or concern the nature and condition of the properties of Buffalo Mining, but objects to the balance of plaintiffs' Item D on the additional grounds that the request is unduly broad in scope in that it bears no relevant relation to the subject matter involved in the pending action and that production would be unduly burdensome and oppressive.

2. Response to Item E. Defendant will produce such portion of the documents, if there are any, requested in plaintiffs' Item E in the possession, custody or control of defendant, as relate to or refer to or concern the operations of Buffalo Mining.

3. Response to Item F. Defendant will produce such portio of the documents requested in plaintiffs' Item F as relate to or refer to or concern the operation of subsidiary companies.

4. Response to Item G. Defendant will produce the documents, if there are any, in the possession, custody or control of defendant relating to or referring to or concerning the safety or lack of safety of what the complaint herein terms "the burning refuse pile," and "dams 1, 2 or 3 at the Buffalo Creek coal mining operation," but objects to the balance of plaintiffs' Item G on

the additional grounds that the documents sought are not described with reasonable particularity, that the matters covered are not relevant to the subject matter involved in the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence, and that production would be unduly burdensome and oppressive.

5. Response to Item H. Defendant will produce the inspection reports, deficiency reports or notices to comply, if any it has, received by Buffalo Mining from the Natural Resources Department of the State of West Virginia or the Public Service Commission of the State of West Virginia, responses thereto and intra-company documents relating thereto in the possession, custody or control of defendant, but objects to the balance of plaintiffs' Item H on the additional grounds that the documents sought are not described with reasonable particularity, that the matters covered are not relevant to the subject matter involved in the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence, and that production would be unduly burdensome and oppressive.

6. Response to Item I. Defendant objects to plaintiffs' Item I in its entirety on the additional grounds that the request is unduly vague and ambiguous, and that the documents sought are not described with reasonable particularity.

7. Response to Item J. Defendant will produce the documents, if there are any, requested in plaintiffs' Item J in the possession, custody or control of defendant.

8. Response to Item K. Defendant objects to plaintiffs'

Item K in its entirety on the additional grounds that the matters covered are not relevant to the subject matter involved in the pending action and the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence.

9. Response to Item L. Defendant objects to plaintiffs' Item L in its entirety on the additional grounds that the matters covered by the request are not relevant to the subject matter involved in the pending action, and that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence.

10. Response to Item M. Defendant will produce the documents, if there are any, requested by plaintiffs' Item M in the possession, custody or control of defendant insofar as they concern "the Buffalo Creek coal mining operations," but objects to the balance of Item M on the additional grounds that the documents sought are not described with reasonable particularity, that the matters covered by the request are not relevant to the subject matter involved in the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence, and that production would be unduly burdensome and oppressive.

11. Response to Item N. Defendant will produce the documents, if there are any, in the possession, custody or control of defendant requested by plaintiffs in subpart (1) of Item N, and the documents requested by plaintiffs in subpart (2) of Item N except to the extent that such comments, statements or testimony referred to therein are available to plaintiffs from other sources,

additional grounds that the matters covered are not relevant to the subject matter involved in the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence, and that production would be unduly burdensome and oppressive, and further objects to the balance of plaintiffs' Item N on the additional grounds that the request is unduly broad in scope, that the documents sought are not described with reasonable particularity, and their production would be unduly burdensome and oppressive.

12. Response to Item O. Defendant will produce the documents, if there are any, requested by plaintiffs' Item O in the possession, custody or control of defendant to the extent that such documents relate to or refer to or concern the subject matter of plaintiffs' request for the period from February 1, 1972, to February 26, 1972, but objects to the balance of Item O on the additional grounds that the matters covered are not relevant to the subject matter involved in the pending action and that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence.

13. Response to Item P. Defendant will produce the documents, if there are any, requested by plaintiffs' Item P in the possession, custody or control of defendant.

14. Response to Item Q. Defendant objects to plaintiffs' Item Q in its entirety on the additional grounds that the request is unduly vague and ambiguous, that the documents sought are not described with reasonable particularity, that the matters covered

the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence and that production would be unduly burdensome and oppressive.

15. Response to Item R. Defendant objects to plaintiffs' Item R in its entirety on the additional grounds that the request is unduly broad in scope in that it bears no relevant relation to the subject matter involved in the pending action, that the documents sought are not described with reasonable particularity, and that production would be unduly burdensome and oppressive.

16. Response to Item S. Defendant objects to plaintiffs' Item S in its entirety on the additional grounds that the request is unduly broad in scope in that it bears no relevant relation to the subject matter involved in the pending action, that the documents sought are not described with reasonable particularity and that production would be unduly burdensome and oppressive.

17. Response to Item T. Defendant will produce the documents, if there are any, requested by plaintiffs' Item T in the possession, custody or control of defendant from July 1, 1970, concerning the management, administration or operation of Buffalo Mining as limited by subparts (1) and (2) of Item T, but objects to the balance of Item T on the additional grounds that the request is unduly broad in scope in that it bears no relevant relation to the subject matter involved in the pending action, that the documents sought are not described with reasonable particularity, and that production would be unduly burdensome and oppressive.

18. Response to Item U. Defendant objects to plaintiffs'

is unduly broad in scope in that it bears no relevant relation to the subject matter involved in the pending action, that the documents sought are not described with reasonable particularity, that the matters covered by the request are not relevant to the subject matter involved in the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence and that production would be unduly burdensome and oppressive.

19. Response to Item V. Defendant objects to plaintiffs' Item V in its entirety on the additional grounds that the request is unduly broad in scope, that the documents sought are not described with reasonable particularity, that the matters covered by the request are not relevant to the subject matter involved in the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence and that production would be unduly burdensome and oppressive.

20. Response to Item W. Defendant objects to plaintiffs' Item W in its entirety on the additional grounds that the matters covered by the request are not relevant to the subject matter involved in the pending action and that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence.

21. Response to Item X. Defendant will produce the documents, if there are any, requested by plaintiffs' Item X in the possession, custody or control of defendant relating to or referring to or concerning, in any way, the Aberfan Disaster, the survey of coal-refuse banks in the Appalachian States undertaken by William Davies, or the letter from former Secretary of the Interior Stuart L.

Udall on March 6, 1967, with respect to Mr. Davies' survey, but objects to the balance of Item X on the additional grounds that the request is unduly vague and ambiguous, that the documents sought are not described with reasonable particularity and that production would be unduly burdensome and oppressive.

22. Response to Item Y. Defendant will produce the documents, if there are any, requested by plaintiffs' Item Y in the possession, custody or control of defendant.

23. Response to Item Z. Defendant objects to plaintiffs' Item Z in its entirety on the additional grounds that the request is unduly vague and ambiguous, that the documents sought are not described with reasonable particularity, and the matters possibly covered by the request do not appear relevant to the subject matter involved in the pending action.

24. Response to Item AA. Defendant will produce the contents of the insurance policies under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the pending action or to indemnify or reimburse for payments made to satisfy the judgment in the possession, custody or control of defendant (see Rule 26(b) (2), Federal Rules of Civil Procedure), but objects to the balance of Item AA on the additional grounds that the documents sought are not discoverable under the Federal Rules of Civil Procedure, that the matters covered by the request are not relevant to the subject matter involved in the pending action, that the information sought does not appear reasonably calculated to lead to the discovery of admissible evidence and that production would be unduly burdensome and oppressive.

To the extent that the production of documents is agreed to herein, defendant will produce such documents or copies thereof at such time and place and in such manner as is mutually agreed to by and between counsel for the respective parties herein.

Dated at Williamson, West Virginia, this 1st day of November, 1972.

DONOVAN, LEISURE, NEWTON & IRVINE
Two Wall Street
New York, N. Y. 10005

SLAVEN, STAKER AND SMITH
National Bank of Commerce Building
Williamson, West Virginia 25661

By _____
Firm Member

Counsel for Defendant

CERTIFICATE OF SERVICE

The undersigned, Zane Grey Staker, of the law firm of Slaven, Staker and Smith, National Bank of Commerce Building, Williamson, West Virginia, 25661, of counsel for defendant, hereby certifies that a true copy of the foregoing and hereunto annexed DEFENDANT'S RESPONSE TO PLAINTIFFS' REQUEST TO PRODUCE DOCUMENTS was served upon Willis O. Shay, Esquire, of the law firm of Steptoe and Johnson, Tenth Floor, Union Bank Building, Clarksburg, West Virginia, 26301, of counsel for plaintiffs, by United States Mail, postage prepaid, on this 1st day of November, 1972.

(Zane Grey Staker)

... UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

At Charleston 4/15/85

DENNIS PRINCE ET AL.,

Plaintiffs,

-against-

Civil Action No. 3052-HN

THE PITTSTON COMPANY,

Defendant.

DEFENDANT'S INTERROGATORIES

FIRST SERIES

TO: DENNIS PRINCE and all other persons named as plaintiffs in the above-styled action, and WILLIS O. SHAY, ESQUIRE of the law firm of STEPTOE & JOHNSON, Tenth Floor, Union Bank Building, Clarksburg, West Virginia 26301 and GERALD M. STERN, ESQUIRE of the law firm of ARNOLD & PORTER, 1229 Nineteenth Street, N.W., Washington, D. C. 20036, attorneys for plaintiffs:

Defendant requests that each plaintiff in the above-styled action answer under oath, in accordance with Rule 33 of the Federal Rules of Civil Procedure, the following interrogatories; any plaintiff who sues both individually on his or her own behalf and representatively on behalf of one or more other persons is requested to answer each interrogatory for himself or herself and separately for each other person on behalf of whom such plaintiff sues:

1. State your full given name and any other names or nicknames, your date of birth, and your residence address as of

February 25, 1972, and (if not the same) as of the date of the answers to these interrogatories.

2. If you were employed at any time during the period January 1, 1971, through February 26, 1972, state the nature of such employment and the name and address of your employer or employers.

3. If you have been employed at any time since February 26, 1972, state the nature of such employment and the name and address of your employer or employers.

4. If you claim damages in this action for the loss, destruction or diminution in value of real property set forth the following information with respect to such real property, as of February 25, 1972, and (if not the same) as of the date of the answers to these interrogatories:

(a) Location and description of such real property and any improvements thereon;

(b) Nature of your interest in such real property;

(c) Name or names of titled owner of such real property;

(d) Date or dates upon which such person or persons became titled owner of such real property;

(e) Amount of purchase price paid by such person or persons and identity of seller;

(f) Nature and cost of improvements to such real property, if any, made subsequent to such purchase and prior to February 26, 1972;

(g) Nature and extent of damage to such real

property and any improvements thereon caused by the flood on February 26, 1972;

(h) Was such real property subject to mortgage or other lien as of February 26, 1972, and, if so, the name and address of each mortgagor or other lienholder, the amount of each such mortgage or other lien, and the present status thereof;

(i) The dollar amount of damages claimed for the loss, destruction or diminution in value of such real property and the manner in which such amount is calculated.

5. If you claim damages in this action for the loss, destruction or diminution in value of personal property, set forth the following information with respect to each item of personal property as to which such claim is made (any group of items of personal property purchased for a total of $500 or less may be treated as one item):

(a) Description of such personal property;

(b) Nature of plaintiff's interest therein as of February 25, 1972;

(c) Location of such personal property immediately prior to flood on February 26, 1972;

(d) Date such personal property was purchased, amount of the purchase price and name and address of immediate seller;

(e) Nature and extent of damage to such personal property caused by flood on February 26, 1972;

(f) Was such personal property subject to a lien as of February 26, 1972, and, if so, the name and address of each lienholder, the amount of each such lien, and the present status thereof;

(g) The dollar amount of damages claimed for the loss, destruction or diminution in value of such personal property and the manner in which such amount is calculated.

6. If you claim damages in this action for personal injury or injuries, set forth the following with respect to each such personal injury:

(a) Description of the injury and the manner in which it was sustained;

(b) The date or dates upon which treatment for such injury was received, the nature of such treatment, and by whom such treatment was rendered;

(c) Are you presently being treated for such injury, and, if not, when did treatment cease?

(d) Is such injury claimed to be permanent?

(e) An itemized statement of the amount of money which you were obliged to expend for treatment of such injury, including but not limited to, expenses for hospitals, physicians, nurses and medicines, the date or dates of such payments and a description of the services or goods for which such moneys were paid;

(f) The dollar amount of damages which you claim for such injury and the manner in which such amount is calculated.

7. If you claim damages for the wrongful death of one or more deceased persons under § 55-7-5 and/or § 55-7-6 of the West Virginia Code, then for each such claim, set forth the following information:

(a) Have you been appointed the personal representative of the deceased and, if so, on what date and in what court were you so appointed?

(b) The full name, age and residence address of the deceased at the time of death;

(c) If the deceased is known to be dead, (i) the date his or her body was recovered; (ii) where found; and (iii) the name of the funeral home, if any, supervising burial of the deceased;

(d) If the deceased is missing, the date on which, the person or persons by whom, and the place where the deceased was last seen;

(e) Whether the deceased at the time of death was (i) single, (ii) married, (iii) divorced, or (iv) a widow or widower;

(f) The names, addresses, and ages of any surviving children of the deceased;

(g) If any relative or relatives of the deceased lost their lives in the February 26, 1972, flood, the name or names and age or ages of such relative or relatives and the relationship of such relative or relatives to the deceased;

(h) The name, age, and address of the surviving spouse of the deceased, if any;

(i) If the deceased was employed at any time during the period January 1, 1971, through February 26, 1972, with respect to each such employment, state (i) the name of the employer; (ii) the employment location; (iii) the capacity in which the deceased was employed; (iv) the length of time the deceased had been employed in such capacity; (v) the length of time the deceased had been employed by such employer; and (vi) the rate or rates of pat at which the deceased was employed.

(j) The amounts of money, if any, claimed for (i) funeral expenses; (ii) hospital expenses; (iii) physician's expenses; (iv) medical supplies; (v) nurses' services; (vi) any other expenses incurred as a result of the allegedly wrongful act which resulted in death;

(k) For each dependent distributee of the deceased, if any, state his or her name, age and address, his or her relationship to the deceased and whether he or she was a member of the same household as the deceased, the amount of financial or pecuniary loss, if any, sustained by him or her, and how such amount is calculated.

8. If you claim any damages in this action not referred to in your answers to the preceding interrogatories, itemize and describe the nature of such additional damages and state the dollar amount sought and the manner in which such amount is calculated.

9. If you claim punitive or exemplary damages in this action, state the amount claimed.

JACKSON KELLY HOLT & O'FARRELL
Kanawha Valley Building
Charleston, West Virginia 25301

By _____
A Member of the Firm

DONOVAN LEISURE NEWTON & IRVINE
Two Wall Street
New York, New York 10005

By _____
A Member of the Firm

_____
ZANE GREY STAKER
Box 388
Kermit, West Virginia 25674

April 27, 1973

COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I, ROBERT K. KELLY, of counsel for the defendant, hereby certify that on April 30, 1973, I served true copies of the foregoing interrogatories upon Willis O. Shay and Gerald M. Stern, plaintiffs' attorneys, by personally placing the same in properly stamped addressed envelopes and personally depositing the same in the United States mail.

_____

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

4/15/85

DENNIS PRINCE, et al., :

Plaintiffs, :

v. : CIVIL ACTION NO. 3052-HN

THE PITTSTON COMPANY, :

Defendant. :

PLAINTIFFS' FIRST ANSWERS TO DEFENDANT'S INTERROGATORIES -- FIRST SERIES

TO: The Pittston Company, by service upon Daniel R. Murdock, Esquire, of the law firm of Donovan Leisure Newton & Irvine, Two Wall Street, New York, New York 10005; Zane Grey Staker, Esquire, Box 388, Kermit, West Virginia 25624; and Robert K. Kelly, Esquire, of the law firm of Jackson Kelly Holt & O'Farrell, Kanawha Valley Building, Charleston, West Virginia 25301, Attorneys for the defendant, The Pittston Company.

Plaintiffs respectfully submit herewith their first answers to Defendant's Interrogatories -- First Series pursuant to Rule 33, F. R. Civ. P. The following comments are pertinent to and hereby incorporated in said answers:

I. GENERAL COMMENTS

Interrogatories 1, 2 and 3. The answers to Interrogatories 1, 2, and 3 are self-explanatory. We note that Interrogatories 2 and 3 seek information with respect to employment at any time during the periods, respectively, from January 1, 1971 to February 26, 1972

2

(30)

and from February 26, 1972 to the present. Answers listing employment during either or both of those periods therefore do not necessarily imply continuous or steady employment throughout the periods indicated.

Interrogatory 4 -- Real Property Claims. The answers to Interrogatory 4 for plaintiffs or plaintiff-families asserting real property claims appear in the Real Property Appendices to the answers of those plaintiffs or plaintiff-families. Since no plaintiff has undertaken or caused to be undertaken any kind of title search with respect to the real property for which he claims, the answers to Interrogatory 4 are limited to the plaintiffs' understandings of their interests in the real property for which they are asserting claims.

Interrogatory 5 -- Personal Property Claims. The answers to Interrogatory 5 for plaintiffs or plaintiff-families asserting personal property claims appear in the Personal Property Appendices to the answers of those plaintiffs or plaintiff-families. For ease of presentation, the subparts of Interrogatory 5 are answered in an order slightly different from the order in which they were posed. To wit, subparts (a) and (d) and a portion of subpart (g) are answered in chart form (the subparts are shown in the column headings of the chart) and subparts (b), (c), (e), and (f) and the remainder of subpart (g) are answered at the end of the chart. Few plaintiffs

kept complete records with respect to their personal property purchases over the years and most such records any plaintiffs may have had were lost or destroyed in the disaster. As a result, the answers to Interrogatory 5, almost without exception, are limited to plaintiffs' best estimates or recollections of the information requested.

Interrogatory 6 -- Personal Injury Claims. Plaintiffs have attempted in response to Interrogatory 6 to set forth their personal injury claims in the best manner possible. However, most of the plaintiffs have no medical training and their answers are accordingly limited by that fact. In light of preliminary medical, psychiatric, and sociological investigations into the conditions at Buffalo Creek, the results of which are set forth at great length in the Preliminary Statement to Plaintiffs' More Definite Statement of Their Damage Claims filed herein on April 16, 1973, each plaintiff has in response to Interrogatory 6 claimed psychic impairment as a result of the disaster and has claimed that treatment for that injury has not ceased and that that injury is expected to be permanent.

In a number of cases, treatment for psychic impairment has only recently begun and in still other cases there has so far been no treatment at all. Plaintiffs' view is that the psychic impairment they have suffered

is so serious and substantial that lengthy and continuing treatment is or will eventually be called for in every case. In this circumstance, Defendant's Interrogatory 6(c) which reads:

> "Are you presently being treated for such injury and, if not, when did treatment cease?"

would not always permit a direct answer. Thus, on the advice of counsel, every plaintiff has answered that question with the statement "treatment has not ceased" even if treatment has not yet begun.

Many plaintiffs regularly take medication for the injuries they claim. On the advice of counsel, plaintiffs have not interpreted Interrogatory 6(b) as requiring a listing of every time a plaintiff actually took any medication. However, occasions on which prescriptions for medication were written are shown to the extent possible.

Conferences with medical experts retained by the plaintiffs for the purpose of this litigation are not listed as treatment in response to this interrogatory.

Interrogatory 7 -- Wrongful Death Claims. The answers to Interrogatory 7 for those plaintiffs asserting wrongful death claims appear in the Wrongful Death Appendices to the other answers of those plaintiffs.

Interrogatory 8 -- Other Damage Claims. Plaintiffs claiming for lost wages have set forth their claims with respect thereto (to the date of these answers) in

answer to Interrogatory 8. Plaintiffs claiming for loss or interruption of schooling or for loss of consortium have so stated in their answers to Interrogatory 8. Plaintiffs who at this time believe that they have lost the ability to engage in gainful employment as a result of the disaster have so stated in answer to Interrogatory 8, although it is to be noted that the psychic impairment suffered by the plaintiffs can be expected at some later date to impair or destroy the ability of many other plaintiffs to engage in gainful employment. Certain other specific damage claims are also listed in response to Interrogatory 8 by individual plaintiffs.

In addition to the claims mentioned in the preceding paragraph and to the extent not included in other claims, all plaintiffs claim for intense physical pain and mental anguish; for the loss of members of their immediate families and/or close personal friends; for the loss of their previous community and family life; for the loss of their health; for expenses incurred in attempting to support their families under the circumstances caused by the disaster; for being forced to live in undesirable and severely depressing circumstances at great expense in time, money, and effort; for the loss of the companionship, services and society of immediate members of their families and/or close personal friends; and for humiliation, insult, and aggravation. These claims are

hereby made a part of each plaintiff's answer to Interrogatory 8 attached hereto.

Plaintiffs also claim interest, costs and disbursements of this action, including just and reasonable attorneys' fees and expenses. These claims also are hereby made a part of each plaintiff's answer to Interrogatory 8 attached hereto.

Interrogatory 9 -- Exemplary Damages. Each plaintiff claims a share in proportion to his or her compensatory damages or such share as the Court and the jury may determine to be appropriate of any and all exemplary or punitive damages awarded in this action. These claims are hereby made a part of each plaintiff's answer to Interrogatory 9 attached hereto.

II. COMMENTS WITH RESPECT TO DAMAGE CLAIMS

A. General Statement as to Damage Claims

The plaintiffs have, in paragraph 51 of the Complaint herein, listed the injuries for which they seek damages in this action. The Plaintiffs seek to recover with respect thereto such amounts as the jury and the Court may properly award under applicable law. However, for present purposes, the Plaintiffs quantify their claims as follows:

(1) For personal injuries, including pain and suffering, loss of health, and psychic impairment; and/or for loss of relatives or friends; and/or for the loss of

their previous community and family life; and/or for the loss of their ability to make a living; and/or for expenses incurred in attempting to support their families under the circumstances caused by the disaster; and/or for being forced to live in undesirable and severely depressing circumstances at great expense in time, money, and effort; and/or for the loss of the companionship, services and/or society and/or consortium of immediate members of their families and/or close personal friends; and/or for humiliation, insult, and aggravation; and/or for loss or interruption of schooling: $50,000 for each plaintiff, which amount is hereby incorporated into each plaintiff's answers to Interrogatories 6(f) and 8 attached hereto.

(2) For the loss of or damage to or diminution in value of their real property and the loss of use of such property: the amounts stated in the answers to Interrogatory 4(i) attached hereto.

(3) For the loss of or damage to or diminution in the value of their personal property and the loss of use of such property: the amounts stated in the answers to Interrogatory 5(g) attached hereto.

(4) For wrongful deaths: the amounts stated in the answers to Interrogatories 7(j) and 7(k) attached hereto. The amounts stated in answer to Interrogatory 7(k) assume that the laws of the State of West Virginia limit recovery in connection with wrongful death to $110,000 as

a maximum for each wrongful death, despite the fact that in a number of cases it is probable that the damages suffered exceed that amount.

(5) For loss of wages, loss of business profits, and other loss of income to the date hereof: the amounts stated in the answers to Interrogatory 8 attached hereto.

(6) For past and future medical expenses: As to past medical expenses, see section B below. Plaintiffs do not have the expertise or knowledge necessary to estimate what their future medical expenses will be at this time.

B. Statement as to Claims for Medical Expenses

The Plaintiffs have made a diligent effort to itemize medical expenses incurred up to the date hereof as a result of the disaster. However, virtually every plaintiff has run into great difficulty in so doing. Few plaintiffs have kept records of their medical expenses and it has proved difficult for them to obtain complete records of expenses from the doctors, hospitals, pharmacies, and the others that rendered medical services to them. To the extent that the Plaintiffs have so far been able to gather the requested information, that information is set forth in the Medical Expense Appendices accompanying the attached answers. However, all Plaintiffs are continuing in their efforts to obtain further and fuller medical expense data, and such data will be supplied in an orderly way as soon as it becomes

available. All answers to Interrogatory 6(e) are therefore partial answers subject to amendment at a later date.

C. Comments as to Certain Property Damage Claims

(1) Plaintiffs claim for the loss of use of their real property in such amounts as the Court and the jury may properly award. For present purposes, the plaintiffs have, on the advice of counsel, quantified that amount as the greater of $1,000 or ten percent of the estimated cost of repairing or replacing the real property for which claim is made.

(2) Because of the upset economic conditions in the Buffalo Creek area, it has been difficult for plaintiffs to estimate the cost of rebuilding homes that were destroyed or damaged beyond repair. On the advice of counsel, plaintiffs whose homes were so lost have claimed at a minimum the following building costs, which are based on figures developed by the U.S. Department of Housing and Urban Development (HUD) for the area:

1-bedroom house -- $15,500	4-bedroom house -- $27,500
2-bedroom house -- $19,000	5-bedroom house -- $30,500
3-bedroom house -- $22,750	6-bedroom house -- $32,000

(3) Plaintiffs claim for the loss of use of their personal property in such amounts as the Court and the jury may properly award and they also claim for the loss of unaccounted for items. For present purposes, the plaintiffs have, on the advice of counsel, quantified

that amount as $1,000 plus $10 for each line item of personal property for which a claim is made.

(4) Plaintiffs have found clothing losses particularly difficult to estimate. On the advice of counsel, many plaintiffs have therefore claimed clothing losses based on the following schedule:

Adult males	$1,000 each
Adult females	1,000 each
Teenage males	750 each
Teenage females	1,000 each
Children under age 12	300 each

III. OTHER COMMENTS

A very few plaintiffs have been unavailable or inaccessible during the time period during which these answers were required to be prepared under the Federal Rules of Civil Procedure. To the extent that information with respect to those plaintiffs is available to counsel, that information has been included in the attached answers. Full and duly signed and notarized answers for those plaintiffs will be supplied as soon as they can be obtained.

Defendant's Interrogatories -- First Series were designed to be answered by natural persons and do not appear to be applicable to corporate entities. Therefore, the two corporate plaintiffs -- Wilson Mining and Lumber Corporation and Drehel's, Inc. -- have not answered these interrogatories, although they stand ready and

willing promptly to answer interrogatories Defendant may hereafter propound to them in accordance with Rule 33, F. R. Civ. P.

Respectfully submitted,

Gerald M. Stern

Harry Huge

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036

Willis O. Shay

STEPTOE & JOHNSON
Tenth Floor
Union Bank Building
Clarksburg, West Virginia 26301

Of Counsel:

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D. C. 20036
(202) 872-6748

STEPTOE & JOHNSON
Tenth Floor
Union Bank Building
Clarksburg, West Virginia 26301
(304) 624-5601

June 4, 1973

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

DENNIS PRINCE ET AL.,

Plaintiffs,

V.

CIVIL ACTION NO. 3052

THE PITTSTON COMPANY,

Defendant.

NOTICE OF MOTION

TO: THE PITTSTON COMPANY, Defendant in the above-styled action, and Zane Grey Staker, Esquire, Box 388, Kermit, West Virginia, 25674; William T. O'Farrell, Esquire, Jackson, Kelly, Holt & O'Farrell, 1601 Kanawha Valley Building, Charleston, West Virginia, 25322; and Daniel R. Murdock, Esquire, Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza, New York, New York, 10020, Attorneys for Defendant

Please take notice that the plaintiffs will bring the attached motion on for hearing before the Honorable K. K. Hall, United States District Judge, on February 15, 1974, at 10:00 a.m. in Courtroom No. 2, United States Courthouse, The Federal Building, 500 Quarrier Street, Charleston, West Virginia.

GERALD M. STERN
Arnold & Porter
1229 19th Street, N. W.
Washington, D. C. 20036

WILLIS O. SHAY
Steptoe and Johnson
Tenth Floor, Union Bank Building
Clarksburg, West Virginia 26301

Attorneys for Plaintiffs

January 30, 1974

(36)

(502)

59

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

DENNIS PRINCE, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION No. 3052-HN
THE PITTSTON COMPANY,	:	
Defendant.	:	

MOTION TO ORDER PRODUCTION OF DOCUMENTS

Plaintiffs, by their attorneys, respectfully move this Court to order the defendant, The Pittston Company, to produce copies of (1) Mr. Dale Stanton's written psychological reports on each plaintiff and (2) the results of all psychological tests administered to each plaintiff by Mr. Dale Stanton.

As a result of defendant's motion for physical and mental examinations under Rule 35 of the Federal Rules of Civil Procedure, Pittston required almost every plaintiff to travel to South Williamson, Kentucky, to take a battery of psychological tests administered by Mr. Dale Stanton. Rule 35 requires that the defendant submit "a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made . . . " Although Mr. Dale Stanton prepared a written report with respect to the battery of psychological tests which he administered

to each plaintiff, the defendant refuses to produce these written reports. In addition, the defendant refuses to produce the results of these tests even though the medical reports of Pittston's Doctor, Russell Meyers, which reports have been submitted to plaintiffs, invariably include the statement that "the data of these tests are on file with the subject's folder".

THE DOCUMENTS REQUESTED BY PLAINTIFFS

Plaintiffs seek copies of Mr. Dale Stanton's written psychological reports and copies of the data of the psychological tests provided by plaintiffs in connection with these reports. Plaintiffs seek copies of Mr. Stanton's written reports because they are often cited by Dr. Meyers as "independently supporting" his conclusions. But Mr. Stanton's reports have not been produced, even in those cases where Dr. Meyers quotes excerpts from the Stanton reports.

The psychological tests administered to plaintiffs, and the data on file in the plaintiffs' respective folders as to each such test, include the following:

1. Rotter Incomplete Sentences (the plaintiffs completed various incomplete sentences),

2. House-tree-person drawings (the plaintiffs drew various pictures, including a house, a tree and a person),

3. The Bender-Gestalt Test (the plaintiffs reproduced on a sheet of paper a set of nine designs),

4. Thematic Apperception Test (the plaintiffs interpreted scenes depicted on various cards and their interpretations and responses were recorded),

5. Mooney Problem Check List (the plaintiffs checked those problems on a list of problems which they considered applicable to themselves),

6. Wechsler Adult Intelligence Scale*/ (this test yielded a verbal I.Q. for six sub-tests and a performance I.Q. for five sub-tests),

7. Stoelting Wiggly Block Test*/ (plaintiffs were asked to place a series of blocks in holes with a time limit), and

8. Psychogalvanometry (a series of wires were connected to plaintiffs' fingers; then a "test" was administered through use of allegedly "neutral" and allegedly "significant" verbal stimuli (which apparently differed for each plaintiff), the presentation of a number of specific flood photographs (not made available to plaintiffs' counsel), and a discussion by plaintiffs of their particular disaster experiences. Readings were taken to determine pointer deviations in all three phases

---

*/ These tests were infrequently administered.

of the test. In the reports of Dr. Meyers provided to plaintiffs, most of these readings are omitted.)

PLAINTIFFS' ATTEMPTS TO OBTAIN THE REQUESTED DOCUMENTS

On November 13, 1973, after the plaintiffs received a number of the written medical reports prepared by the defendant's Doctor, Russell Meyers, plaintiffs "requested all of the test results referred to by Dr. Meyers in his reports as well as the written reports of Mr. Dale Stanton, also referred to in Dr. Meyers' reports." This oral request on November 13 was confirmed in writing in a letter to counsel for defendant on November 15, 1973. Although defendant's counsel on November 13 promised to check on this matter and get back to counsel for plaintiffs, there was no response either to the November 13 telephone call or the November 15 letter. Accordingly, counsel for plaintiffs reiterated plaintiffs' request for the results of all tests made as well as the written reports of Mr. Stanton with respect to these tests, during a meeting in Charleston, West Virginia with counsel for the defendant on December 6, 1973. On December 7, 1973, plaintiffs' counsel confirmed in a letter to counsel for defendant that plaintiffs' counsel was "awaiting your response with respect to my request for Mr. Stanton's psychological reports on each plaintiff and the test results of each of the psychological tests for each of the plaintiffs."

Again, there being no response, counsel for plaintiffs telephoned counsel for defendant on December 20, 1973. During this conversation, defendant's counsel indicated that plaintiffs' request had been discussed among counsel for the defendant, and it had been decided by defendant's counsel that the request called for a voluminous number of documents. However, defendant's counsel offered to send to plaintiffs' counsel the requested materials as to <u>one</u> plaintiff, to demonstrate that the request called for a voluminous number of documents, with the hope that after plaintiffs' counsel received the materials as to one plaintiff some workable arrangement could be agreed to by the parties if counsel for plaintiffs still persisted in his request. Plaintiffs' counsel immediately agreed to this proposal. Accordingly, on December 20, 1973 plaintiffs' counsel requested Mr. Stanton's written report and the test results as to one plaintiff, Charles Osborne. Defendant's counsel agreed to send the materials.

However, when the promised materials were not forthcoming, plaintiffs' counsel called defendant's counsel, on January 3, 1974, and was told that the materials would be sent promptly, since defendant's counsel would be at Dr. Meyers' office within the next day or two.

When the materials still were not forthcoming, even as to one plaintiff, plaintiffs' counsel again wrote

defendant's counsel, on January 11, 1974. This letter, summarizing much of this history, is attached hereto. Defendant's counsel has never sent plaintiffs' counsel any written response to plaintiffs' January 11, 1974 letter or to any of plaintiffs' other written or oral requests with respect to the materials sought to be produced. However, during the depositions in Charleston, West Virginia on January 14-17, 1974, defendant's counsel finally indicated to plaintiffs' counsel that none of the requested materials would be produced, even as to one plaintiff. The reasons given were: (1) the request for documents as to all plaintiffs called for a voluminous number of documents, (2) Mr. Stanton's reports are handwritten and allegedly are copied in full in each report submitted by Dr. Meyers, and (3) the test results, like x-rays and other such data, do not have to be produced.

ARGUMENT

Plaintiffs are mindful of the fact that the documents requested by plaintiffs may be voluminous. Accordingly, plaintiffs have already indicated to the defendant that they would like to look at the materials for one plaintiff to determine whether it is unreasonable for plaintiffs to request the materials as to all plaintiffs. Since the trial in this case probably will be centered around a very limited

number of plaintiffs, defendant's objection to producing documents for all plaintiffs could be resolved by having the defendant produce such documents only for a limited number of plaintiffs. However, at this point, the defendant refuses to produce the documents even as to one plaintiff. Accordingly, the plaintiffs regretfully have had no alternative except to seek judicial relief by way of this motion.

Our reading of Dr. Meyers' reports, submitted to the plaintiffs by the defendant, indicates that he did not quote verbatim all of the written reports he received from Mr. Stanton. Indeed, in a number of cases he omitted quoting any portion of Mr. Stanton's written reports. Accordingly, plaintiffs believe they are entitled to copies of all of Mr. Stanton's actual written reports.

It is not true that test results, like x-rays and other such data, do not have to be produced pursuant to Rule 35. Indeed the x-ray example cited by defendant's counsel to plaintiffs' counsel demonstrates the error in defendant's position. The Advisory Committee Note to the 1970 Amendment*/ to Rule 35 specifically states:

> "The amendment specifies that the written report of the examining physician includes results of all tests made, such as X-rays and cardiograms."

---

*/ The phrase "including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition" was added by the 1970 amendment to Rule 35(b)(1).

Accordingly, although plaintiffs have not requested copies of the x-rays taken of plaintiffs by the defendant's physicians at South Williamson, Kentucky, plaintiffs do believe they are entitled to the results of other tests made -- and in particular to the psychological test results. There is no question that a battery of psychological tests was made, that the "data of these tests are on file with the subject's folder" and that written psychological reports were prepared in connection with these tests.

It is surprising that the defendant refuses to produce any of "the data of these tests on file with the subject's folder". This data actually is material prepared by the plaintiffs in most cases. Moreover, plaintiffs readily made available to the defendant similar materials obtained as a result of plaintiffs' psychiatric evaluations -- i.e., house-tree-person drawings, Despert Fable responses, etc. -- where such materials were obtained.*/

Finally, a sense of fairness requires the production of the requested documents. The plaintiffs were compelled to undergo a battery of tests, and now are refused copies of the material they prepared during the administration of those tests. This is not fair.

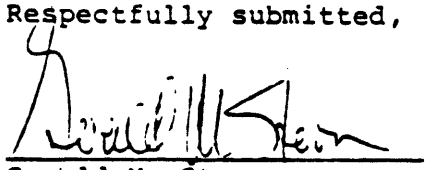
---

*/ Plaintiffs have not produced any of the taped or video-taped interviews conducted by plaintiffs, nor has the defendant produced any of the taped interviews of plaintiffs conducted by the defendant at South Williamson.

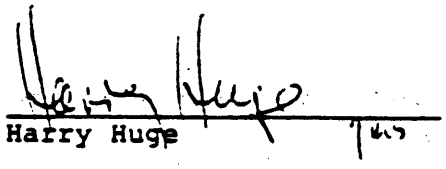
CONCLUSION

For the reasons stated herein, plaintiffs submit that the defendant should be ordered to produce, without further delay, the documents requested by plaintiffs almost three months ago.

Respectfully submitted,

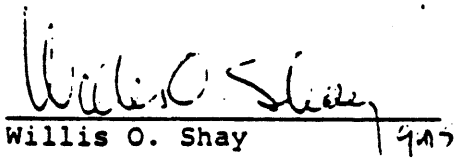


Gerald M. Stern



Harry Huge

ARNOLD & PORTER
1229 Nineteenth Street, N. W.
Washington, D. C. 20036



Willis O. Shay

STEPTOE & JOHNSON
Tenth Floor, Union Bank Building
Clarksburg, West Virginia 26301

Of Counsel:

ARNOLD & PORTER
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 872-6748

STEPTOE & JOHNSON
Tenth Floor
Union Bank Building
Clarksburg
West Virginia 26301
(304) 624-5601

January 31, 1974

January 11, 1974

Zane Grey Staker, Esq.
Box 388
Kermit, West Virginia 25674

Dear Zane:

I am writing to you again concerning my request for all of the test results referred to by Dr. Meyers in his reports -- most of which appear to be tests administered by Mr. Stanton -- as well as all of the written reports of Mr. Dale Stanton, since I have not yet received those materials as to the sample plaintiff, Charles Osborne, pursuant to our agreement.

I first requested these materials from you via a telephone conversation on November 13, 1973, and I confirmed my request via a letter on November 15. I again raised this matter with you when we met in Charleston on December 6 and again confirmed my request to you for these materials on December 7, 1973.

Not hearing from you, I telephoned you on December 20, and at that point, you indicated that you had discussed this matter with Mr. O'Farrell and that my request called for a voluminous number of documents. You suggested that

you could send me materials as to one plaintiff to demonstrate how voluminous my request in fact is, and that thereafter we could try to work out some arrangement if I still persisted in my request. Accordingly, I asked that you send me the materials as to plaintiff Charles Osborne, and you agreed to do so.

Not having received the promised materials with respect to Charles Osborne, I telephoned you on January 3, 1974. You said that you would be going over to Dr. Meyers' office within a day or so and that the materials would be sent to me promptly.

I realize that you have been very busy on this case and in other matters, and if the materials are already in the mail to me I apologize for having had to send this letter. On the other hand, if you have not yet sent the materials, I would appreciate it if you could do so as soon as possible.

Warmest regards.

Sincerely yours,

Gerald M. Stern

cc: Messrs. O'Farrell and Murdock
bc: Willis O.Shay, Esq.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

DENNIS PRINCE, ET AL.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 3052
THE PITTSTON COMPANY,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' "MOTION TO ORDER PRODUCTION OF DOCUMENTS"

This memorandum is respectfully submitted in opposition to plaintiffs' motion seeking an order requiring defendant to obtain and turn over to plaintiffs: "copies of (1) Mr. Dale Stanton's written psychological reports on each plaintiff and (2) the results of all psychological tests administered to each plaintiff by Mr. Dale Stanton."

Preliminary Statement

In order that plaintiffs' motion may be viewed in proper prospective, it is well to review for the Court's convenience the present status of medical discovery in the instant case:

In the complaint herein, a personal injury claim seeking compensatory damages of $50,000 or more was asserted on behalf of all but a very few individual plaintiffs.*

* Approximately 620 plaintiffs allege personal injury and, based on fairly recent disclosures, about 400 plaintiffs are parties to this action solely on the basis of their personal injury claim over $10,000.

It later developed that the injury purportedly common to plaintiffs was a mental injury, for in "Plaintiffs' More Definite Statement of Their Damage Claims," filed on April 16, 1973, plaintiffs' counsel made the following representations concerning plaintiffs' injuries:

> "Each and every plaintiff-survivor also has suffered, presently suffers and will continue to suffer for the remainder of his or her life, psychic impairment and resulting physical injuries . . . [p. 24].
>
> "Among the overt signs of injurious disturbances, prevailing among plaintiff-survivors, are the following: the extensive signs of depression, severe in some, a little less so in others, but so widespread that it exists to some degree in each man, woman and child. . . .
>
> "On the basis of observations of plaintiff-survivors, these and other symptoms can be expected to at times recede and later recur. [p. 33]."

The so-called "More Definite Statement" was accompanied by two volumes of what plaintiff's counsel characterized as "family summaries" which, according to a New York Times article apparently based on an interview with one of plaintiffs' attorneys, "were collected by lawyers and a team of top sociologists and psychiatrists employed by Arnold & Porter, the Washington law firm representing the flood victims." The New York Times, April 18, 1973, p. 93.

In order to obtain a more particularized and individualized statement of each plaintiff's personal injury (as well as other damage) claims, defendant served a set of Interrogatories addressed to each plaintiff on May 1, 1973. With respect to personal injuries the interrogatories requested:

"6. If you claim damages in this action for personal injury or injuries, set forth the following with respect to each such personal injury:

(a) Description of the injury and the manner in which it was sustained;

(b) The date or dates upon which treatment for such injury was received, the nature of such treatment, and by whom such treatment was rendered;

(c) Are you presently being treated for such injury, and, if not, when did treatment cease?

(d) Is such injury claimed to be permanent?

(e) An itemized statement of the amount of money which you were obliged to expend for treatment of such injury, including but not limited to, expenses for hospitals, physicians, nurses and medicines, the date or dates of such payments and a description of the services or goods for which such moneys were paid;

(f) The dollar amount of damages which you claim for such injury and the manner in which such amount is calculated."

In the purported answers served on June 4, 1973, every plaintiff asserting a personal injury claim stated in response to Interrogatory 6(a): "Psychic impairment (see introductory paragraphs)." In response to Interrogatory 6(f), requesting "the dollar amount of damages which you claim for such injury and the manner in which such amount is calculated," every plaintiff asserting a personal injury claim stated: "See introductory paragraphs."

The so-called "introductory paragraphs" thus purportedly incorporated by reference into practically every plaintiff's interrogatory answers turned out to be an 11-page document dated June 4, 1973, signed by plaintiffs' counsel and entitled: "Plaintiffs' First Answers to Defendant's Interrogatories - First Series." After

some inquiry on depositions of plaintiffs concerning the so-called "introductory paragraphs," plaintiffs' counsel conceded in a letter dated July 11, 1973, "the introductory paragraphs' referred to in each Plaintiff's answers to interrogatories 6(a), 6(f), 8, and 9 were not seen by the Plaintiffs prior to their signing their answers."

Among the comments relating to Interrogatory 6 made by plaintiffs' counsel in the "introductory paragraphs" is the following:

> "Plaintiffs have attempted in response to Interrogatory 6 to set forth their personal injury claims in the best manner possible. However, most of the plaintiffs have no medical training and their answers are accordingly limited by that fact. In light of preliminary medical, psychiatric, and sociological investigations into the conditions at Buffalo Creek, . . . each plaintiff has in response to Interrogatory 6 claimed psychic impairment as a result of the disaster . . . .
>
> "Conferences with medical experts retained by the plaintiffs for the purposes of this litigation are not listed as treatment in response to this interrogatory."

In light of the repeated representations made by plaintiffs' counsel concerning the injuries purportedly sustained by their clients, defendant moved, pursuant to Rule 35, Federal Rules of Civil Procedure, for an Order requiring each individual plaintiff to submit to a physical and mental examination by Dr. Russell Meyers in South Williamson, Kentucky, and the Court granted that motion on May 16, 1973. These examinations began in early June at the rate of approximately four a day and have continued, five days a week (with few exceptions), until the examinations

1

of substantially all plaintiffs were recently completed.*

On October 31, 1973, this Court made the following Order with respect to reports of medical examinations:

"1. That counsel for defendant furnish immediately to counsel for plaintiffs copies of all written reports of medical examinations caused to be carried out by defendant of plaintiffs which they now have in hand, and that as additional reports of such examinations are hereafter received by defendant, copies of such reports shall be likewise promptly furnished plaintiffs.

"2. That plaintiffs immediately cause to be procured written reports reflecting the results of medical examinations of all plaintiffs who have thus far been examined at the instance of plaintiffs or of plaintiffs' counsel for the purpose of this litigation, and then immediately furnish copies thereof to defendant's counsel and that plaintiffs' counsel shall as to all future medical examinations of plaintiffs carried out for the purpose of this litigation promptly cause written reports thereof to be procured, and copies thereof immediately thereafter to be furnished to counsel for defendant."

---

* In a letter dated June 29, 1973, plaintiffs' counsel wrote to defendant's attorneys: "We also believe Pittston easily could conduct more than four medical examinations each day. We have been conducting medical examinations of our own. Our experience has been that it is possible, if an appropriate number of doctors is made available, to medically examine more than four persons a day." Unbeknownst to defendant then, this so-called "experience" was based solely upon examinations of 57 plaintiffs conducted on June 18-19 and June 25-26, 1973. So far as has been disclosed, no other examinations of any other plaintiffs have been conducted on plaintiffs' behalf.

Following the hearing on October 31, 1973, defendant delivered to plaintiffs' attorneys written reports of medical examinations prepared by Dr. Meyers on approximately 300 plaintiffs; to date, nearly 600 detailed medical reports have been produced, and any further reports will, of course, be turned over as they are received. Defendant did not receive any medical reports from plaintiffs until November 12, 1973, and, to date, defendant has received medical examination reports on only 57 plaintiffs. Moreover, the reports received indicate that all of these examinations were conducted exclusively on June 18-19 and June 25-26, 1973.*

Defendant, however, has not received any report of any medical examination of any plaintiff "examined at the instance of plaintiffs or of plaintiffs' counsel for the purpose of this litigation" which was conducted prior to the time plaintiffs' complaint seeking in excess of $30 million in compensatory damages for personal injuries was filed; nor has defendant received any of the reports of the "observations of plaintiff-survivors" which led plaintiffs' counsel on April 16, 1973 to assert that "each and every plaintiff-survivor ... presently suffers ... psychic

---

* Although plaintiffs' counsel offered to turn over "two general reports on the psychological and psychiatric effect on inhabitants of mass disorder situations such as the Buffalo Creek disaster," only one undated document which might possibly be so characterized has been received.

impairment and resulting physical injuries ...." In addition, defendant has not received any of the reports of the "team of top sociologists and psychiatrists" who assertedly interviewed and examined plaintiffs in preparation for the "family summaries." Finally, although, as noted above, plaintiffs' counsel advised in the belated "introductory paragraphs" of June 4, 1973, to plaintiffs' interrogatory answers that "conferences with medical experts retained by the plaintiffs for the purposes of this litigation are not listed as treatment ..." no report of any conference of any plaintiff with any medical expert retained by the plaintiffs for the purposes of this litigation, other than those which took place on June 18-19 and 25-26, 1973, has been turned over to the defendant.

In a further effort to discover the nature and extent of plaintiffs' personal injury claims, defendant sought, at a hearing on June 11, 1973, to have plaintiffs required to provide authorizations to defendant to obtain medical records from hospitals and treating physicians. The Court, however, upheld the objection of plaintiffs' counsel, and instead directed that: "As to the medical reports, the Court will direct the plaintiff to as received, or if they already have send any medical information they have as to any plaintiff [to defendant] ..." (Transcript of Hearing, p. 11).

Notwithstanding the Court's explicit direction, several months passed without any medical documentation whatever being supplied to defendant. At that point, plaintiffs'

counsel belatedly withdrew his objection sustained by the Court and agreed to provide defendant with authorizations from plaintiffs for medical records. Although those authorizations are still being supplied, defendant has since gathered from diverse sources at considerable expense and supplied to plaintiffs copies of in excess of 1,000 pages of medical records. Defendant anticipates that many additional thousands of documents will be obtained and made available to plaintiffs before its efforts in this regard are complete.

Finally, on August 22, 1973, defendant served and filed a Rule 34 request for document production, Item H of which specifically called for the production of all documents relating to, referring to, or concerning in any way each personal bodily or mental injury as to which damages are claimed by any plaintiff and such plaintiffs' physical and mental health or condition on or before February 26, 1972. Neither plaintiffs' first nor second response to defendant's request contained any objection to Item H. Nevertheless, the number of response documents may be aptly characterized as negligible.*

---

* In their "Memorandum Re Matters To Be Discussed at Status Hearing on October 31, 1973," served on October 29, 1973, plaintiffs stated unequivocally at page 6:

> ". . . plaintiffs have made a full and complete turnover of all medical reports obtained by plaintiffs from their own doctors subsequent to the disaster, in response to the defendant's Rule 34 document request and as required by the Court's June 11 Order."

However, as noted above, no medical reports were turned over to defendant until after the return date for defendant's Rule 34 document request and only a very few had been received by October 29, 1973. Furthermore, neither defendant's Rule 34 document request nor the Court's June 11 Order was limited to "medical reports obtained by plaintiffs from their own doctors subsequent to the disaster," but rather covered all documents containing medical information about one or more plaintiffs.

It is in this context that plaintiffs now move for the production of the voluminous materials developed by Dr. Meyers in the course of the many months he has spent examining plaintiffs and rendering comprehensive and detailed reports of such examinations, each of which has been or will be supplied to plaintiffs.

ARGUMENT

Plaintiffs assert that "Pittston required almost every plaintiff to travel to South Williamson, Kentucky, to take a battery of psychological tests administered by Mr. Dale Stanton, . . . [and] although Mr. Dale Stanton prepared a written report with respect to the battery of psychological tests which he administered to each plaintiff, the defendant refuses to produce these written reports" (Plaintiffs' Moving Papers, p. 1). To set the record straight, the plaintiffs went to South Williamson, pursuant to Court Order (and at defendant's expense) to submit to a physical and mental examination by a physician, namely, Dr. Russell Meyers, pursuant to Rule 35, Federal Rules of Civil Procedure. Furthermore, again pursuant to Rule 35, the party causing the examination, namely, defendant, has delivered and will continue to deliver to plaintiffs' attorneys a copy of each of the detailed written reports rendered to defendant by "the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, ..."

It is defendant's understanding that when Dr. Meyers undertook to examine plaintiffs on behalf of defendant, he retained Mr. Stanton, who is not a physician, and others as

well to assist him in facilitating the examinations to be performed so that they might be completed in the time fixed by the Court. In addition, it is defendant's understanding that Dr. Meyers personally reviewed and evaluated any tests taken by plaintiffs that he did not personally administer before setting forth his "findings, including results of all tests made," in his written report to defendant. Furthermore, while it is now defendant's understanding that Mr. Stanton, in the course of his work, did prepare handwritten memoranda to Dr. Meyers, neither these internal communications nor the documentation covering tests made in the course of the examinations of plaintiffs have been turned over to defendant.

By the clear and unequivocal language of Rule 35 itself, plaintiffs are not entitled to the voluminous material they seek. In pertinent part, Rule 35(b) reads as follows:

> "(b) Report of Examining Physician
> (1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses, and conclusions. . . ." (Emphasis added)

First, it must be emphasized that what Rule 35 requires to be produced is the report of the "examining physician" - not the report of an assistant or technician working under his supervision. Since Mr. Stanton is not a

physician, Rule 35 would not even cover a report rendered by him to defendant (of which there are none), let alone entitle plaintiffs to receive any handwritten notes or memoranda he may have directed to Dr. Meyers in the course of his work.*

Secondly, Rule 35 is equally explicit on the question of tests. It says that the examining physician's report of his findings should include the "results of all tests made" - not that he should turn over, in addition to his report, the underlying raw data on each and every test made, as plaintiffs appear to contend. Clearly such a result was not intended.

In sum, Rule 35 requires an exchange of reports, not the entire files of examining physicians. Not surprisingly, plaintiffs are unable to cite a single case which even arguably suggests otherwise. Rule 35 ought not to be turned into an oppressive document production weapon of limitless and unrestricted scope.

Plaintiffs' view notwithstanding, "results of all tests made" means just that - the physician's analysis of the examinee's condition based on the tests administered, and this was the procedure followed by Dr. Meyers in compiling his reports. Dr. Meyers' reports enumerate the tests given and then explain in detail the results indicated thereby, and,

---

* By contrast, although plaintiffs seek reports of a non-physician, in 50 instances plaintiffs have been examined by more than one of their own doctors and yet each examining physician has not rendered a report.

thus, are more than adequate under Rule 35 to give sufficient notice of his findings. Of course, the results of some psychological tests are not quantifiable - as would be blood pressure, for example, but when and if they are significant, Dr. Meyers sets them forth. In other instances there may be no results per se until the data can be analyzed in conjunction with other information and personal interviews to provide the result - i.e., the psychiatrist's evaluation of the examinee's mental condition, which Dr. Meyers sets out in considerable detail in his reports.

That plaintiffs clearly misread Rule 35 is further evident from a comparison of the rule with its counterpart, Rule 26(b)(4)(A)(i), which governs discovery applicable to non-medical experts and thus in intent and purpose is quite analogous to Rule 35. Rule 26(b)(4)(A)(i) requires merely that the non-medical expert state the subject matter and the substance of the facts and opinions as to which he is expected to testify, as well as a summary of the grounds therefor. While a special Rule was appropriate for discovery in the medical area, the limited disparity between Rules 26 and 35 is not so great as to convert Rule 35 into a device for unlimited discovery of the medical expert. Rather, Rule 35 recognizes the different treatment to be accorded to discovery of ordinary materials and of materials prepared in anticipation of trial. While the former are subject to broad discovery,* discovery of the latter is intentionally limited under the Rules.

---

* Indeed, however, despite the sweeping language of Rule 34, plaintiffs would not even under that Rule be entitled to the material they seek here. See the application of Rule 34 to medical reports in Currie v. Mepe-McCormack Lines, Inc., 23 F.R.D. 660, 661 (E. Miss. 1959), and [illegible] v. [illegible], 29 F.R.D. 10, 13 (D. Md. 1961).

Clearly the purpose behind the more restricted treatment of litigation materials prepared at one party's expense is to give the other party sufficient notice of their contents to eliminate surprise at trial, but to avoid the uncompensated appropriation of the first party's efforts. Thus, the much narrower scope of discovery under Rule 35 is well-illustrated in Cox v. Fennelly, 50 F.R.D. 1 (S.D.N.Y. 1966). There Judge Frankel refused to allow the plaintiff to depose the physician who had examined him at the defendant's request, where a copy of the examination report had already been provided to him. The Court observed: "Rule 35, by allowing an examined party to institute an exchange of written reports should normally obviate the need for such depositions, and appears in fact to have done so in the broad run of cases." 40 F.R.D. 2.

In an effort to minimize the substantial and unreasonable burdens that granting plaintiffs' motion would impose, plaintiffs assert that: "Since the trial in this case probably will be centered around a very limited number of plaintiffs, defendant's objection to producing documents for all plaintiffs could be resolved by having the defendant produce such documents only for a limited number of plaintiffs" (Plaintiffs' Moving Papers, pp. 6-7). This self-serving statement, made in the interests of the present motion is, of course, in marked contrast to the representations made by plaintiffs in their Preliminary Response to Notice of Pre-Trial Procedures, served on March 2, 1973, wherein they stated

unequivocally that at trial:

> "Each plaintiff will testify as to his or her damages. Plaintiffs also will call medical doctors. . .to testify as to the damages suffered by the plaintiffs."

Plaintiffs also contend that they have "readily made available to the defendant similar materials [to those sought on the present motion] obtained as a result of plaintiffs' psychiatric evaluations -- i.e., house-tree-persons drawings, Despert Fable responses, etc. -- where such materials were obtained (Plaintiffs' Moving Papers, p. 8; emphasis added). The broad claim implicit in the foregoing that defendant has been provided voluminous material comparable to that which plaintiffs now seek, however, loses its luster upon examination of the actual materials gratuitously produced. In the first place, the cases "where such materials were obtained" involve less than one-quarter -- twelve -- of the only fifty-seven plaintiffs that have apparently been medically examined to date. Furthermore, with the exception of twelve sets of often illegibly reproduced "house-tree-person drawings", the produced materials assertedly similar to those which plaintiffs now seek are not raw test material, but merely certain passages in plaintiffs' psychiatrists' reports summarizing standardized components of their oral interviews with plaintiffs. Such reporting of the contents of interviews is, of course, also "readily available" in Dr. Meyers' reports.

Finally, it should be noted that plaintiffs conclude their argument by asserting that it would be "unfair" for defendant not to obtain and provide them with the materials

they seek. This rather mystifying notion seems to result principally from the suggestion that plaintiffs were unjustly "compelled" by Pittston to undergo the examinations in question. In point of fact, however, the examinations were not compelled by Pittston; they were performed pursuant to the order of this Court issued under Rule 35 because fairness requires that defendant be permitted such examinations when plaintiffs put their mental or physical condition in controversy. And in the present case each plaintiff has been amply paid for whatever slight inconvenience the examination may have caused. What truly would be unfair would be for the defendant to be required to have Dr. Meyers disgorge his files to plaintiffs in order to provide plaintiffs with even more data regarding their own physical and mental condition than defendant has already supplied. Plaintiffs have known since June of last year what tests Dr. Meyers was administering in the course of his examinations, and they have been free to conduct these and any other tests they deemed appropriate in preparation of their case.

Now to require defendant to produce this voluminous material - gathered only at considerable expense and effort - would be a great inequity.

CONCLUSION

For the reasons stated herein, defendant submits that the plaintiffs' motion to produce should be denied.

February 12, 1974

Respectfully submitted,

Zane Grey Stamper
P.O. Box 388
Kermit, West Virginia