No. 14-3052

In The

# United States District Court

# For the Southern District of West Virginia

At Huntington

DENNIS PRINCE, *et al*,

*Plaintiffs,*

*v.*

THE PITTSTON COMPANY,

*Defendant.*

BRIEF FOR PLAINTIFFS

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## QUESTIONS PRESENTED

Whether, in violation of Title 30 of the U.S. Code, as pertains to the Federal Coal Mine Health and Safety Act of 1969, the Pittston Company displayed gross negligence worthy of punitive damages.

## LEGAL ISSUES

Title 30 of the U.S. Code deals specifically with coal mining, and 30 U.S.C. § 1266 even more specifically with refuse pile dams. First, it establishes that a permit must be required to engage in refuse pile dam construction. Secondly, it lays out the requirements for such construction, including a rule that any company "stabilize all waste piles created by the permittee from current operations through construction in compacted layers including the use of incombustible and impervious materials if necessary…", as well as "design, locate, construct, operate, maintain, enlarge, modify, and remove, or abandon, in accordance with the standards and criteria developed pursuant to section 1265(f) of this title, all existing and new coal mine waste piles consisting of mine wastes, tailings, coal processing wastes, or other liquid and solid wastes and used either temporarily or permanently as dams or embankments…"[1] There is no evidence whatsoever that the Pittston Company (Pittston) or its subsidiary, the Buffalo Mining Company (Buffalo), ever acquired such a permit. Furthermore, the law specifically stipulates a certain set of regulations for refuse pile dams. In its blatant disregard of this statute, Pittston has violated Federal law and, in so doing, directly caused substantial loss of life and property. Because of the magnitude of this offense, not only were Pittston's actions against the law, but they were also grossly negligent.

[1] 30. U.S.C. § 1266 (1969).

## ARGUMENT

Gross negligence, according to *Conway v. O'Brien*, is "a failure to exercise even a slight degree of care."[2] This is an expansion of the traditional definition of negligence inherited from English common law, which stipulates that, in order for negligence to exist, there must be duty of care, a breach of duty, causation, and harm. In this case, the duty of care is stipulated in the aforementioned U.S. Code, laying out the expectations of the state in regards to refuse pile dams. The Pittston dam did not meet these expectations and, indeed, was explained to be "178 feet across…and about 327 to 498 feet thick," constructed entirely of coal refuse and impounding "130 million gallons of water and 200,000 cubic yards of sludge and silt…," as well as constantly burning.[3] The dam's existence in such a state, as well as the fact that no precautionary measures were taken, no emergency action plan was in place, no regular checks on the dam were made, and the complete lack of a relief system akin to a spillway or fortified clay core are what constitute the breach of duty. Clearly, in violation of the U.S. Code, the company completely disregarded the law it was bound to. Because of the dam's poor construction and maintenance, it was only a matter of time before it broke, as it did in February of 1972, thus laying out causation. Harm is evident in the over 1,000 deaths and over 4,000 men, women, and children made homeless.

Dam failure is not unheard of in America. Indeed, one of the greatest disasters in American history occurred in 1889 when the South Fork dam above Johnstown, Pennsylvania, which was also being poorly maintained, broke, sending floodwaters matching the Mississippi river in force into the town, killing thousands. In 1964, a rockfill dam constructed in much the

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[2] *Conway v. O'Brien* 312 U.S. 492 (1941).
[3] *Prince v. Pittston*, Civil Action no. 3052, pg. 5 (September 3, 1972).

same fashion as the Buffalo Creek dam, but with a clay core, broke after torrential rains dumped 22 inches of water in five days. The Diamond Springs Lime Company sued American River Constructors, the company at the time responsible for the construction and upkeep of the dam, arguing that it was the contractor's negligence that caused the flooding that resulted from the burst dam. The American River Constructors countered by arguing that they could not be held responsible due to the torrential rains being an "act of god." The case was taken to the Third Circuit Court of Appeals of California, at which the court ruled that even though there was greater than average rainfall at the time, the incident was easily forseeable by the contractor as they had ample time to bring the dam up to acceptable standards. As such, the American River Constructors were held liable and negligent even with torrential rains and a better constructed dam than Pittston's.[4]

Forseeability in dam maintenance is crucial to avoidance of an accident, as demonstrated in the previous case. Just as well, in *Curtis v. Dewey*, a dam in Idaho broke in 1967, flooding a large area and causing significant amounts of damage. The dam was constructed well, with "four outlet works, which had a combined discharge capacity of 762 cubic feet per second. The dam also had a large spillway constructed of concrete." Justice McQuade, in his opinion, quotes the Law of Torts: "Negligence is a matter of risk- that is to say, of recognizable danger of injury." There were reports that the spillway was in disrepair and that the dam was not being maintained. Therefore, the court ruled that Dewey knew that there was a risk of the dam breaking, did nothing about it, and was therefore liable and negligent.[5]

[4] *Diamond Springs Lime Co. v. American River Constructors,* 16 Cal. App. 3d 581, 597 (1967).
[5] *Curtis v. Dewey*, 475 P.2d 808 (1970).

Traditionally, negligence must conform to a broken law, but there have also been instances when, even in the absence of statutory law, negligence was still at stake. In *The T.J. Hooper*, the plaintiffs owned barges being pulled along the Atlantic coast by the defendants' tugboats, which were subsequently lost at sea. The plaintiffs sued on account of the tugboat owners' lack of foresight in making their boats seaworthy. Specifically, they cited a lack of radios on the tugboats. The defendants countered by stating that there was no statute in existence stating that they must have radios on board and they therefore could not be held liable. The case was brought before the U.S. 2nd Circuit Court of Appeals, and the court ruled that while the defendant was correct, seaworthiness is a dynamic concept. Radio was regularly used at the time and had demonstrated its worth and commonality in the tugboat industry. As such, the equipment of radios in tugboats had become a widely accepted custom for safety purposes, and the tugboat company was held both liable and negligent. [6]

Each of these cases have demonstrated a situation in which the defendant had paid more diligence than Pittston has with its refuse pile dams. The California company had a dam with a clay core and a spillway and was still found negligent. The Idaho company had a sophisticated drainage system, though it did not maintain it, and was found negligent. There was no law binding the tugboat company to equip reasonable safety measures, and it was found negligent. The reality is that the Pittston Company dam has none of these safety precautions, customary or not, though it seems clear that spillways are customary in the manufacture of dams. If the previous cases bore grounds for negligence, then so too does this one. All three cases also included large and abnormal rainfalls. The defendants in the cases argued that the rainfall was the cause, and without cause that can be tied to a defendant, negligence does not come into play.

[6] *The T.J. Hooper,* 60 F.2d 737 (2d. Cir. 1932).

The courts ruled, however, that plaintiffs did not have to establish total liability for there to be negligence.

In *Bratton v. Rudnick*, a 1932 case in Massachusetts, a court ruled that the owner of a dam that broke should not be held liable for damages due to the fact that there was considerable evidence that the dam would have broken regardless. It was suspected that the defendant in the case had been negligent, but the court decided that, because the same result happened that would have occurred had he not been negligent, he could not in good faith be held liable.[7] What that case determined was that the defendant held no liability. If the defendant can be shown to even have partial liability, however, there are still grounds for negligence. This is buttressed by the conclusions of *Perkins v. Vermont Hydroelectric Corp.* in 1934. In that case, a Vermont power company built a dike alongside private property. When an extraordinary and sudden flood caused the dike to fail and damage that private property, a lawsuit was filed. The Vermont Supreme Court ruled that, although the flooding was severe enough to warrant "act of god" status, the power company had built and maintained its dikes improperly and, as such, was held negligent. This case showed that a combination of natural events and defendant negligence still constituted negligence. [8]

The Pittston Company had plenty of foresight to be able to predict this flood. Of the 3 dams built on the Middle Fork of Buffalo Creek, dam 2 actually had a spillway built in, and it was the only one of the three that did not break. This evidence, combined with the relevant precedent above and the relevant statutes, shows that spillways are federally mandated, that they are common in dam construction, and that even when they are built, negligence can still be

[7] *Bratton v. Rudnick*, 283 Mass. 556 (1933).
[8] *Perkins v. Vermont Hydroelectric Corp.*, 106 Vt. 367 (1934).

proven. Dam 3, the one that failed, did not have any such mechanism.[9] The widely publicized Aberfan Disaster, which had eerily similar circumstances to those at Buffalo Creek also lends credence to Pittston's foresight. The Crane Creek Flood of 1924, The Letcher County slate slide of 1923, the explosion in Buchanan County, Virginia, in 1942, as well as evidence that a Mr. Dasovich, vice president of Buffalo, knew full well about the rainfall and the dam's inability to deal with it, as well as a blatant shirking of any engineering practices in the dam's construction, all demonstrate that Pittston had no reason not to be able to foresee the circumstances that led to the Buffalo Creek flood.[10]

## CONCLUSION

If duty, breach of duty, cause, and harm are the rules which define negligence, then the Pittston Company has been beyond negligent. In its blatant disregard for federal law as relates to refuse pile dams and its lack of maintenance of its improperly built dams, the company has displayed "a failure to exercise even a slight degree of care." Presence of heavy rainfall, while likely a contributing factor, could not have caused this disaster alone. Previous cases and examples from around the country in a multiplicity of scenarios have time and again demonstrated that dams built far closer to code than Pittston's have been held accountable for floods. Thus, not only is the company negligent, but they are grossly negligent and, as such, punitive damages, in addition to compensatory damages, should be levied against the company for its actions, or rather, inactions.

[9] Gerald Stern, *The Buffalo Creek Disaster*, (New York: Random House Books), 2008. 189.
[10] Ibid., 126-143.

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