

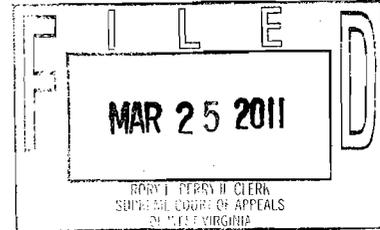
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**NORMA ACORD, a West Virginia Resident,
Appellants and Class Representative,**

v.

Supreme Court No.101366
Logan County Circuit Court
Civil Action No. 07-C-155

**COLANE CORPORATION,
COLE & CRANE REAL ESTATE TRUST,
A.T. MASSEY COAL COMPANY,
And
MASSEY ENERGY COMPANY,
Appellees.**



**ORIGINAL BRIEF ON PETITION FOR APPEAL FROM
SUMMARY JUDGMENT ORDERS ON BEHALF OF PETITIONER, NORMA ACORD**

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I. Proceeding and Nature of Ruling Below

The Court below certified the instant case as a class action on May 25, 2005 with the Appellant herein, Norma Acord, asserting medical monitoring, strict liability, nuisance, negligence, premises liability, and punitive damages claims stemming from the contamination of Omar Elementary situated on the site of a former company town dump along the banks of Island Creek in Chauncey, Logan County.

On March 31, 2010, the circuit court granted a series of dispositive motions in favor of the Defendants therein, Appellees herein:

- Colane Motion for Summary Judgment
- Cole & Crane Real Estate Trust Motion to Dismiss
- Omar Mining Motion for Summary Judgment
- Massey Energy/A.T. Massey Motion for Summary Judgment.

This case turns on the Circuit Court's improper weighing of expert scientific evidence and failure to view fairly drawn inferences in the light most favorable to the Appellant. The Circuit Court favored the conclusions asserted in the West Virginia Department of Health and Human Resources ("WVDHHR") reports regarding the risk of cancer at Omar Elementary as opposed to the conclusions and opinions asserted in the Petitioner's experts' cancer risk analysis of Environmental Protection Agency ("EPA") sampling data. Further, the Circuit Court ignored eyewitness testimony detailing the history of dumping at the site.

The Petition for Appeal presented to this Court several issues on which West Virginia's jurisprudence strongly favors the Appellant's position, and this case also brings into the Court's purview an opportunity to further refine the development of medical monitoring jurisprudence.

II. Statement of Facts

Appellant, Norma Acord, represents a class of individuals exposed to dangerous contaminants while working, playing, and/or schooling at Omar Elementary School and its

surrounding recreational facilities. This civil action is of the utmost importance to the afflicted community, and their reasonable claims demand every ounce of the judicial consideration to which they are fully entitled.

Today, Omar Elementary School's children play in dirt where coal companies once dumped coal ash, oily waste, and pesticides. Samples taken by the EPA in 2003 uncovered heavy metals, oil-derived carcinogens, dioxins and pesticides at the school playground, baseball field, in Island Creek's sediments and in the abandoned power plant immediately south of the



Appellant's Rule 59 Ex, 10- Government Aerial Photography comparing historical use of site as industrial waste area to present-day school site

school. The study concluded that the soil in the schoolyard was a "completed toxic pathway."¹

When the contamination began, Chauncey was a company town devoted to extraction of coal owned by Appellee, Cole & Crane Real Estate Trust. Testimony of Logan County politician, the late Ray Chafin, and Luther Woods, trustee of Cole & Crane since 1955 and partner of Appellee's defense counsel, laid out the history of how the area was affected when two wealthy lumber magnates from Cincinnati formed the Cole & Crane Real Estate Trust in 1915 to exploit the mineral wealth beneath timber lands they acquired through a variety of means in the late nineteenth and early twentieth century. Beginning in 1929, Cole & Crane leased its minerals to a series of coal companies that established company towns, mine repair shops, and a coal-fired electric generating plant to support the mining operations.

¹ Appellant's Rule 59 Mot. - Dr. Simonton's Dep. Ex. 4, at p.35, lines 3-13.

Undisputed eyewitness testimony proves that the present day elementary school site served as the garbage can for not only the company towns lining Island Creek, but also the industrial operations critical to supporting the mining of coal belonging to Appellee, Cole & Crane Real Estate Trust. It is undisputed by the evidence that all of the waste generated by the mine company and by its company towns ended up in that dump.

Every day trucks would dump not only the household garbage from the company towns, but also industrial waste hauled from a mine equipment repair shop that dumped oil, solvents, filters, shavings and other refuse from a repair facility that ran three shifts a day to service, overhaul and rebuild everything from mine cars to locomotives. To run a massive electric shovel for loading coal, to provide electricity for the mine equipment repair shop and to power the company town, West Virginia Coal & Coke built, operated, and expanded a coal-fired electric generating plant with its hulking, dioxin-filled ruins which, to this day, sit directly adjacent to Omar Elementary. Eyewitness testimony confirmed that aerial photographs from the 1930s, 1940s and 1950s depict massive piles of coal ash from the ancient power plant sitting directly on the present-day elementary school site.²

After a December 13, 1954 meeting, Appellee, A.T. Massey Coal Company, took over the operations of West Virginia Coal & Coke and took over the extraction of Cole & Crane's coal. Soon thereafter, A.T. Massey formed a subsidiary, Appellee, Omar Mining. The Omar Mining corporate minutes reflect that it assumed responsibility for mining Cole & Crane's coal through an assignment of A.T. Massey's rights and responsibilities associated with the assets and

² Appellant's Rule 59 Mot. - Dep. Ray Chafin attached thereto as Ex. 9, at p.17, lines 2-17, p.19, line 23, p.20, line 10; Appellant's Rule 59 Mot. - Dep. of Carew Ferrell attached thereto as Ex. 8, at p.9, line 20, p.10, line 1; Appellant's Rule 59 Mot. - Dep. of Richard Large attached thereto as Ex. 8, at p.9, line 20, p.10, line 1, p.12, line 7, p.12, line 11, p. 29, line 22, p. 30, line 16, p.13, lines 5- 9, p. 12, lines 20-24, p.14, line 18, p.16, lines 14-16, p. 17, lines 1-4; Appellant's Rule 59 Ex, 10- Government Aerial Photography; Appellant's Rule 59 Mot. - Dep. of Edgar Franklin attached thereto as Ex. 7, p.15, lines 4-14.

liabilities acquired from West Virginia Coal & Coke. At about the same time that A.T. Massey formed Omar Mining to assume control of West Virginia Coal & Coke's coal mining operation, Cole & Crane Real Estate Trust formed a subsidiary, Appellee, Colane Corporation to assume the West Virginia Coal & Coke's company town real estate. That real estate included the dump and the land where the school now sits. Colane collected rents from the miner's homes, slowly sold off the houses and continued to operate the dump on its new property.³

Undisputed evidence establishes that the dump operated until about 1961 when Colane sold the dump to the Logan County Board of Education. In 2003, citizens became alarmed by what seemed to be an unusual incidence of certain types of cancer in their community. The concerned citizens contacted federal authorities who sampled the soil and sediment throughout Chauncey and Omar - which revealed elevated levels of a variety of toxins - heavy metals, pesticides, dioxins, and polychlorinated biphenyls (PCBs) - on and adjacent to the school premises.

After the testing was complete, the United States Agency for Toxic Substances and Disease Registry ("ATSDR") commissioned the WVDHHR to conduct a health consultation to answer the questions posed by the community about the risks presented by the toxins discovered by the EPA. While acknowledging that a completed toxic pathway existed from the playground dirt to the school children, the WVDHHR study, published in 2005, concluded that there was no threat to human health despite the fact that the study found that the contaminants tremendously increase the risk of cancer for the children at a rate of *seven (7)* additional cancer cases for every *ten thousand (10,000)* people. The cancer risk at the school is exponentially



Photograph from EPA Report depicting test site near teeter totter on playground.

³ Appellant's Resp. to Cole & Crane's Mot. for Summ. J. - Ex. J - Luther Woods Dep. at 20-23, 28, 39.

higher than cancer risk increases deemed acceptable by both EPA and West Virginia regulations. Both the federal and state guidelines find an increased cancer risk of one (1) in one million (1,000,000) to be unacceptable. Both federal and state guidelines find an increased cancer risk of more than one (1) in one hundred thousand (100,000) to be severe enough to warrant medical monitoring.⁴

Appellant's environmental engineering expert disagreed with the WVDHHR conclusion. Dr. Scott Simonton's risk assessment found that as the children who attended Omar Elementary move into middle age, they face an extraordinarily increased cancer risk. Dr. Simonton reached his conclusion by employing cancer risk analysis software to calculate cancer risk factors using contaminant concentration data generated from the EPA sampling report. He utilized a methodology identical to the one employed by the Petitioner's environmental engineering expert in *Perrine v. Dupont*, 2010 WL 1170661 (W.Va. 2010).

Appellant's environmental medicine expert, Dr. Carl Wertz, a professor at West Virginia University Medical School, also took issue with the WVDHHR study. Dr. Wertz found the high concentration of contaminants, the obvious exposure pathway, Dr. Simonton's risk assessment, the age of the children at exposure and the cancer experience in the community to be clear and convincing evidence that the current and former students and staff are at an increased risk of cancer.⁵

Based upon the increased risk of exposure presented by the toxins found at the school site, Dr. Wertz recommended a medical monitoring protocol designed to reduce the threat of

⁴ Appellant's Rule 59 Mot. – Ex. 5, Dawn Seeburger Dep., p.55, line 10, p.145, line 10; p.146, line 7.

⁵ Appellant's Rule 59 Mot. – Ex. 6, Wertz Dep. at p.15, line 5.

dread latent disease.⁶ Dr. Wertz relied upon the same methodologies that he relied upon in designing the medical monitoring protocol in *Perrine*.

Moreover, Appellant's epidemiology expert, Dr. Shira Kramer, after reviewing the same evidence as Dr. Wertz determined that because of their ages, the children of Chauncey elementary are "exquisitely susceptible" to the toxins found by the EPA in the schoolyard.⁷

III. Assignments of Error

A. In Granting Summary Judgment, The Circuit Court Failed to Properly Consider Totality of the Evidence in the Record.

1. Testimony From Fact Witnesses: Richard Large, Edgar Franklin, Carew Ferrell, and Ray Chafin and Expert Witnesses: Dr. Simonton, Dr. Wertz, and Dawn Seeburger Amply Demonstrated Genuine Issues of Material Fact as to Origin of Harmful Contaminants Present at Omar.
2. The Lower Court Inappropriately Dismissed Dr. Simonton's Conclusions and Misapplied Factual Inferences That Must Run in Appellant's Favor Regarding the Origin and Harmful Nature of Contaminants Present at Omar.
3. The Circuit Court Erred by Not Considering Additional Evidence Developed by Agreement of All Parties.
 - a. Dr. Simonton's Expert Witness Deposition Testimony, Eye Witness Testimony and the ATSDR Study Further Demonstrated Genuine Issues of Material Fact as to Origin of Harmful Contaminants Present at Omar.

⁶ Appellant's Rule 59 Mot. – Ex. 6, Wertz Dep. at page 19, line 3; page 20, line 8, p.21, line 1 – 19; page 24, line 11.

⁷ Appellant's Rule 59 Mot. Ex. 17, Kramer Report at page 9, 18.

- b. Expert Witnesses Deposition Testimony of Dr. Simonton, Dawn Seeburger, and Dr. Shira Kramer, Eye Witness Testimony and ATSDR Study Further Demonstrated Genuine Issues of Material Fact Regarding Health Risks Presented by Chemicals Present at Omar.
 - c. Expert Witnesses Deposition Testimony of Dr. Kramer, Dawn Seeburger, and Dr. Simonton Further Demonstrated Genuine Issues of Material Fact Regarding the Reliability of ATSDR Study Conclusion that Omar Presents No Risk to Human Health.
 - d. Expert Witness Deposition Testimony of Dr. Werntz Further Presented Genuine Issues of Material Fact Regarding the Necessity of Medical Monitoring.
4. The Circuit Court Improperly Granted Summary Judgment By Weighing Credibility of Expert Witness Testimony That Should Have Been Left for Jury.
 5. The Circuit Court Improperly Held that Appellant Has No Legal Basis Under Theories of Negligence, Strict Liability and/or Nuisance to Assign Liability to Omar Mining.
 6. The Circuit Court Erred by Granting Cole & Crane's Motion to Dismiss Because Evidence Presents Genuine Issue of Material Fact as to Extent of Their Control and Supervision Over Leases of Mineral Rights in Omar Area.

- a. Cole & Crane's Lease, Which Grants Extensive Mining Rights, Presents a Genuine Issue of Material Fact as to Extent of Their Control over Mining Activities in Omar Area.
 - b. Cole & Crane's Retention of a Mining Engineer for the Purpose of Guarding Against Mineral Waste Presents a Genuine Issue of Material Fact as to Extent of Their Control Over Mining Activities in Omar.
7. The Circuit Court Erred by Dismissing Appellant's Claim against Massey Before the Scheduled Deposition of Massey Corporate Representative.
8. The Circuit Court Erred by Dismissing Appellant's Claim Against Massey Because Fact-Intensive Determination of Whether to "Pierce the Corporate Veil" is Inappropriate at Summary Judgment Phase.
9. The Circuit Court Erred in Failing to Grant the Appellant's Rule 60 Motion to Consider Newly Discovered Evidence.

IV. Points and Authorities Relied Upon

<i>Adkins v. City of Hinton</i> , 149 W. Va. 613, 619, 142 S.E.2d. 889, 894 (1965)	18, 19
<i>Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York</i> , 148 W.Va. 160, 133 S.E.2d 770, Syl. Pt. 3 (1963).	13, 14
<i>Alorna Coat Corp. v. Behr</i> , 408 So.2d 496, 498 (Ala.1981)	44
<i>Amfac Mech. Supply Co. v. Federer</i> , 645 P.2d 73, 74-77, 82 (Wyo. 1982).	44
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).	14
<i>Ayers v. Jackson Tp.</i> , 525 A.2d 287 (N.J. 1987).	29, 30
<i>Bowers v. Westinghouse Electric Corp.</i> , 522 S.E.2d 424 (W.Va. 1999).	29, 30, 31
<i>Burns v. Jaquays Mining Corp.</i> , 752 P.2d 28 (Ariz. Ct. Appl. 1987)	30
<i>Campbell v. Am. Foreign S.S. Corp.</i> , 116 F.2d 926, 928, (2d Cir.), <i>cert. denied</i> , 313 U.S. 573, 61 S.Ct. 959, 85 L.Ed. 1530 (1941).	48
<i>Carey v. Kerr-McGee Chem. Corp.</i> 60 F.Supp.2d 800 (N.D.Ill. 1999).	30, 31
<i>Cowvan v. One Hour Valet, Inc.</i> , 151 W.Va. 941, 157 S.E.2d 843 (1967).	33
<i>Curtis v. Vlotho</i> , 313 N.W.2d 469, 472 (S.D.1981).	44
<i>Day v. NLO</i> , 851 F. Supp. 869 (S.D. Ohio 1994).	30
<i>Ferrel v. Trailmobile, Inc.</i> , 223 F.2d 697, 698 (5th Cir.1955).	48
<i>Francisco v. Wendy's Int., Inc.</i> , 221 W.Va. 734, 656 S.E.2d 485 (2007).	20
<i>Friends for All Children v. Lockheed Aircraft Corp.</i> , 746 F.2d 816 (D.C. Cir. 1984)	30
<i>Gentry v. Mangum</i> , 195 W.Va. 512, 527, 466 S.E.2d 171, 186 (1995) (citing <i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i> , 509 U.S. 579, 594, 113 S.Ct. 2786, 2797 (1993)).	20
<i>Hansen v. Mountain Fuel Supply Co.</i> , 858 P.2d 970, 979 (Utah 1993).	30
<i>Heartland, LLC v. McIntosh Racing Stable, LLC</i> , 219 W.Va. 140, 632 S.E.2d 296, Syl. pt. 1 (2006)(citing <i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1995)).	13
<i>In re Flood Litigation Coal River Watershed</i> , 225 W.Va. 574, 668 S.E.2d 203 (2008).	20

<i>In re West Virginia Rezulin Litigation</i> , 585 S.E.2d 52 (W. Va. 2003).	30
<i>Kenney v. Scientific, Inc.</i> , 204 N.J.Super. 228, 497 A.2d 1310 (N.J. Super. Ct. Law. Div. 1985).	39
<i>Lamping v. Am. Home Prods. Inc.</i> No. DV-97-85786/93 (Mont. 4th Dist. Ct. Feb. 2, 2000).	30
<i>Laya v. Erin Homes, Inc.</i> , 177 W.Va. 343, 352 S.E.2d 93, Syl. pt.3 (1986).	43
<i>Lewis v. Lead Indus. Assn' Inc.</i> 793 N.E.2d 869 (Ill. App. Ct. 2003).	30
<i>Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.</i> , 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986).	13
<i>Meyer v. Fluor Corporation, et al.</i> , 220 S.W.3d 712 (Mo. 2007).	30
<i>Niedland v. U.S.</i> , 338 F.2d 254, 260 (3d Cir.1964).	48
<i>O'Dell v. McKenzie</i> , 150 W.Va. 346, 145 S.E.2d 388, Syl. pt. 2 (1965)(citing <i>Flanagan v. Gregory & Poole</i> , 136 W.Va. 554, 67 S.E.2d 865(1951)).	33, 37, 43
<i>Painter v. Peavy</i> , 192 W.Va. 189, 451 S.E.2d 755 (1995)).	13, 14
<i>Perrine v. Dupont</i> , 2010 WL 1170661 (W.Va. 2010).	7, 25, 29
<i>Petito v. A.H. Robins Co.</i> , 750 So.2d 103 (Fla. Dist. Ct. App. 1999)	30
<i>Piccolini v. Simon's Wrecking</i> , 686 F. Supp. 1063 (M.D.Pa. 1988).	39
<i>Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.</i> , 474 S.E.2d 872, 196 W.Va. 692 (W. Va. 1996)(citing <i>Williams v. Precision Coil Inc.</i> , 194 W.Va. 52, 459 S.E.2d 329 (1995)).	13, 46
<i>Pownall v. Cearfoss</i> , 129 W.Va. 487, 497-498, 40 S.E.2d 886, 893 (1946) (citation omitted)(fn13).	37
<i>Potter v. Firestone Tire & Rubber Co.</i> , 6 Cal. 4th 965, 863 P.2d 795 (Cal. 1993).	30, 38, 39
<i>Redland Soccer Club, Inc. v. Department of the Army</i> , 696 A.2d 137 (Pa. 1997).	30
<i>Reynolds v. Pardee & Curtin Lumber Co.</i> , 172 W.Va. 804, 310 S.E.2d 870 (1983).	33
<i>Samuels v. Health and Hosp. Corp.</i> , 591 F.2d 195, 199 (2d Cir.1979).	48
<i>Sipple v. Starr</i> , 205 W.Va. 717, 520 S.E.2d. 884 (1999).	33

Southern Elec. Supply Co. v. Raleigh County Nat'l. Bank, 173 W.Va. 780, 782 n. 5, 320 S.E.2d 515, 517 n. 5 (1984)..... 44

Stale v. Ventron Corp., 94 N.J. 473, 468, 491 – 492, A.2d 150, 159 – 160 (1983). 39

State ex rel. Jones v. Recht, 221 W.Va. 380, 655 S.E.2d 126, Syl. pt. 5 (2007). 19

Strobridge v. Alger, 184 W.Va. 192, 399 S.E.2d 903 (1990). 46

Walker v. Sharma, 221 W.Va. 559, 655 S.E.2d 775, Syl. pt. 3 (2007). 19

Weaver Mercentile Co. v. Thurmond, 68 W. Va. 530, 535, 70 S.E. 126, 128 (1911) (citing *Fletcher v. Rylands*, 1868 WL 9885 (House of Lords 1868)).18

West Virginia Div. of Envtl. Prot. v. Kingwood Coal Co., 200 W.Va. 734, 755, 490 S.E.2d 823, 844 (Starcher J., dissenting)(1997).33, 34

Wheeling Kitchen Equip. Co. v. R & R Sewing Center, Inc., 154 W.Va. 715, 719-20, 179 S.E.2d 587, 589-90 (1971).44

Williams v. Precision Coil, Inc., 194 W.Va. 52, 58, 459 S.E.2d 329, 335-36 (1995).13, 14

Wilson v. Key Tronic Corp., 40 Wash. App. 802, 701 P.2d 518 (Wash. App. 1985). 39

V. Discussion of Law

A. Standard of Review

The West Virginia Supreme Court of Appeals reviews a Circuit Court's entry of Summary Judgment under the *de novo* standard. *Heartland, LLC v. McIntosh Racing Stable, LLC*, Syl. Pt. 1, 219 W.Va. 140, 632 S.E.2d 296, Syl. pt. 1 (2006)(citing *Painter* at Syl. Pt. 1). In this analysis, the Court applies the same standard as the Circuit Court, reviewing all of the facts and reasonable inferences in the light most favorable to the nonmoving party. *See Powderidge*, 196 W.Va. at 698, 474 S.E.2d at 878 (citing *Williams v. Precision Coil Inc.*, 194 W.Va. at 58, 459 S.E.2d at 335-36)(1995):

Under Rule 56 of the West Virginia Rules of Civil Procedure, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, Syl. Pt. 3, 148 W.Va. 160, 133 S.E.2d 770 (1963).

The legal standard for considering a motion for summary judgment provides that the Circuit Court must review all facts and reasonable inferences in the light most favorable to the nonmoving party – here, the Appellant. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335-36 (1995)(citing *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986)). A grant of summary judgment may only be granted where the totality of the evidence available of record shows “... there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” W.Va.R.Civ.P. 56(c).

It is worthy to note that summary judgment is not a remedy to be exercised at the circuit court's option; it may be granted *only* when there is no genuine disputed issue of a material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986); *Williams*, 194 W.Va. at 59 n.7, 459 S.E.2d at 335-36 n.7. A “dispute about a material

fact is 'genuine'... if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211.

As the Circuit Court noted in its Orders:

A motion for summary judgment should be granted **only** when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law. *Aetna Casualty and Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)(emphasis added).

Appellant emphasizes the language above to reinforce her position that factual evidence was still being developed by agreement of all parties thereto. Furthermore:

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) (emphasis added).

Appellant again emphasizes the above language to reinforce her position that it is the Circuit Court's duty to consider the totality of the evidence entered into the record of this action, whether pointed at in written paper oppositions or at oral argument or otherwise.

As is unequivocally demonstrated below, Appellant has met her summary judgment burden in full measure because genuine issues of material fact abound with respect to Colane, Omar Mining, Cole & Crane, A.T. Massey, and Massey.

B. Colane Motion for Summary Judgment

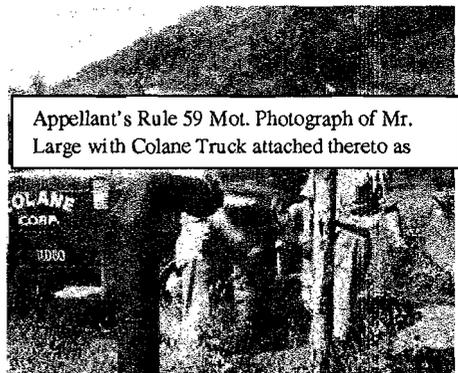
1. Colane's Premises Liability and the Circuit Court's Failure to Consider Evidence Creating Genuine Issues of Material Fact

In Conclusion of Law 18, the lower Court found that "Plaintiff failed to proffer any proof as to how the present-day contaminants found in the soils at Omar Elementary School arrived there." Directly to the contrary, Appellant demonstrated genuine issues of material fact by

presenting undisputed testimony supported by photographic evidence that proves how the contaminants arrived at the site.

Uncontested factual evidence reveals that:

- Colane took over the ownership and operation of the dump from 1955 until 1961.
- Colane garbage trucks dumped on the site every day.
- Colane allowed Appellee, Omar Mining, to dump industrial waste from its mine equipment repair shop every day.
- For decades prior to Colane's ownership, coal companies mining Cole & Crane's mineral wealth used the parcel for an industrial garbage can.
- Colane did nothing to remediate the site covered with obvious noxious filth before transferring the parcel to the Logan Board of Education for the construction of the school.
- EPA testing uncovered toxic substances at, and adjacent to, the site of Omar Elementary.



Appellant presented the deposition testimony of Richard Large who worked as a garbage man for Colane in 1956.⁸ Mr. Large averred the following facts:

- On a daily basis, he dumped household waste and other garbage from all the “coal camps” from Rossmore, Chauncey and Omar all the way to Sterritt in the dump

⁸ Pet'r's Rule 59 Mot. - Richard Large Dep. attached thereto as Ex. 1, p.12, line 7.

owned by Colane in a truck owned by Colane.^{9/10} Colane owned all the properties; Omar Mining employed the miners in the area.¹¹

- Each household had two (2) fifty-five (55) gallon drums, furnished by Colane, came from “the Omar shop” and originated from the coalmines.¹² Colane would pick up the garbage continuously in rotation throughout the coal camp communities.¹³
- The drums contained oil products, specifically transformer oil and hydraulic oil in addition to the usual household waste generated from the homes in the area.¹⁴
- These oil-laced drums containing household and industrial wastes were emptied at the Chauncey trash dump “directly in the edge of the creek.”¹⁵
- The Omar Mining shop facilitated mine-related repairs, and their “shavings and stuff” which were “swept out of the floors to the shop” were also dumped at the subject location.¹⁶
- Power plant ashes were also dumped at the subject location.¹⁷

Mr. Large’s testimony provides an eyewitness account linking the waste deposited at the dump to the harmful contaminants found there to this day. Appellant’s expert findings explain the chemical fingerprints of present-day contaminants and how they are linked to the industrial waste dumped there several years prior.

⁹ *Id.* at p.12, line 11

¹⁰ Appellant has presented photographic evidence that Colane was an active dumper in 1955 (*See* Appellant’s Rule 59 Mot. Photograph of Mr. Large with Colane Truck attached thereto as Ex. 2).

¹¹ *Id.* at p. 29, line 22; p. 30, line 16

¹² *Id.* at p.13, lines 5- 9.

¹³ *Id.* at p. 12, lines 20-24.

¹⁴ *Id.* at p. 13, line 16; p. 14, line 1

¹⁵ *Id.* at p.14, line 18.

¹⁶ *Id.* at. p.16, lines 14-16.

¹⁷ *Id.* at p. 17, lines 1-4.

Mr. Large's undisputed testimony establishes that oil-based industrial waste, including transformer oil and hydraulic fluids, were dumped at the school site as a matter of regular course. As established by Appellant's expert testimony (discussed fully, *infra*), the present day contaminants found at the school site consistently match the type of waste dumped for years as witnessed by Mr. Large. Perhaps the Circuit Court was not persuaded by Mr. Large's testimony as elicited to date and believed more evidence would be needed for Appellant to win at trial; however, weighing the evidence is not the Court's role at the summary judgment stage. And, it *cannot* be disputed that, in the very least, genuine issues of fact have been raised for Appellant to carry her summary judgment burden. The testimony of Mr. Large, especially when considered in light of the chemical fingerprints still at the site, is sufficient in and of itself to show both the fact of contamination and its source. Genuine issues of material fact abound.

Moreover, Mr. Large's eyewitness testimony is corroborated by the eyewitness testimony of Ed Franklin who specifically recalled trucks coming from the Omar Mining repair shop and from the "Junior Mercantile" company store to dump waste every morning. He recalled that materials from the shop had a black oily base and "if you got in it you'd get oil and stuff on you."¹⁸ Mr. Franklin's testimony supports Appellant's contention that oil-based industrial waste was routinely dumped at the subject site. Genuine issues of material fact abound.

Yet another eyewitness provides corroborative testimony, further raising genuine issues of fact. Carew Ferrell testified that pesticides and paint would be tossed in the garbage when he worked at the company store in 1955.¹⁹ Mr. Ferrell further testified that the company store's garbage would be disposed of in the dump, that he drove the store's truck to the dump and that the dumping occurred either every day or every other day: "It was a two-ton flatbed, stake-bed

¹⁸ Appellant's Rule 59 Mot. - Dep. of Edgar Franklin attached thereto as Ex. 7, p.15, lines 4 -14.

¹⁹ Appellant's Rule 59 Mot. - Dep. of Carew Ferrell attached thereto as Ex. 8 at p.9, line 20; p.10, line 1.

truck we had. We took the garbage down to Chauncey and dumped it, I would say, normally every morning, but probably at least every other morning. I mean as soon as you had anywhere near a truckload, why it was carried off.”²⁰ Genuine issues of material fact abound.

Furthermore, Ray Chafin’s testimony illustrates that the process discussed above had continued for decades before Mr. Large and Mr. Ferrell began to dump waste on the property. Mr. Chafin testified that he drove the truck from the company store to dump waste early as 1933.²¹ Eyewitness factual evidence supports the conclusion that the same harmful industrial waste was dumped at the subject site for decades upon decades.²² Genuine issues of material fact abound.

In Conclusion of Law Number 31, the lower Court posits: “it is impossible to determine if the contaminants presently found at the school site, where Plaintiff alleges that the exposure occurred, existed: before Colane owned the property; during Colane’s ownership; or after Colane sold it.”

If the contaminants found on the subject property were present before and during Colane’s ownership thereof, then fundamental tenets of premises liability imposes liability upon Colane because they owned and controlled the dump. If, however, the unrefuted evidence shows the subject property to be pristine until 1961, and the construction and operation of the Omar School yielded contamination, then perhaps Colane could escape the inference of liability. To the contrary, the unrefuted evidence shows and the Circuit Court found as fact that the property ceased to be used as a dump in 1961. The only logical inference, then, is that the contaminants

²⁰ *Id.* at p.10, lines 2 – 12.

²¹ Appellant’s Rule 59 Mot. - Dep. Ray Chafin attached thereto as Ex. 9 at p.17, lines 2-17; p.19, line 23; p.20, line 10.

²² Further, Appellant submits government aerial photographs of the subject property dating from the late 1940’s. See Appellant’s Rule 59 Mot. Government Aerial Photos attached thereto as Ex. 10.

were present when Colane purchased and/or operated the municipal dump and when it sold the dump to the local Board of Education.

As owner and controller of the dump, liability can be imposed upon Colane sounding in theories including negligence, strict liability, and nuisance:

- “We think the true rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. . . this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.” *Weaver Mercantile Co. v. Thurmond*, 68 W. Va. 530, 535 (1911) (quoting *Fletcher v. Rylands*).
- Persons “who, for their own profit, bring onto their premises, and collect and keep there anything, which if it escapes, will do damage to another, are liable for all consequences of their acts, and are bound at their peril to confine it...” *Adkins v. City of Hinton*, 149 W. Va. 613, 619 (1965).
- Thus in *Adkins*, evidence was sufficient for the City of Hinton to have been found liable (Petitioner had sued under negligence theory) for allowing a dump to engulf the home of a Hinton resident.
- “In the instant case the defendant city operated a facility which created a constant hazard to those residing in the area thereof. It was well aware of the hazard, having been cautioned on several occasions that a strong possibility existed that the dump would slide down into the hollow. In view of this situation the damages which occurred were plainly foreseeable. The defendant was bound to anticipate the consequences of its failure or refusal to make such improvements as were necessary to eliminate the dangers.” *Adkins*, 149 W. Va. at 619.

The contaminants arrived at the site in the back of Mr. Large’s truck, Mr. Ferrell’s truck, similar trucks across previous decades, the townspeople, from the power plant and from burning the trash on the site. The undisputed evidence in the record carries Appellant’s factual burden. Defendants offer no contrary *evidence*, merely lawyer argument based on speculative facts.

Thus, Colane, as owner/operator of the dump is bound under *Adkins* to “anticipate the consequences of its failure or refusal to make such improvements as were necessary to eliminate the dangers,” *Adkins*, 149 W. Va. at 619. Here, the foreseeable consequences would necessarily

include remediation or clean up of the dangers upon the sale of property. In plain terms, Colane cannot purchase contaminated land, continue to contaminate the land, sell the contaminated land to a school board and then evade any and all accountability for the contamination. As to Colane's liability for Appellant's allegations, genuine issues of material fact abound.

2. The Circuit Court Improperly Weighed the Credibility of Expert Scientific Evidence Regarding the Source of Contaminants Found on Colane's Former Property.

The lower Court erred by failing to credit the Appellant with the fairly drawn inference that if eyewitness testimony identifies dumping of certain materials known by science to contain certain toxic constituents and later scientific testing reveals the presence of the same toxic constituents, then the dumping observed by the eyewitnesses placed the toxins on the site.

The Court below further erred when it engaged in impermissible weighing of expert scientific evidence. In recent decisions, the West Virginia Supreme Court reversed four circuit court judges and made very clear that issues about the strength of expert witness testimony are to be evaluated *by the jury, not judges*.²³ "[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Gentry v. Mangum Court*, 195 W.Va. 512, 527, 466 S.E.2d 171, 186 (1995) citing *Daubert*, 509 U.S. at 594.

²³ See also *Walker v. Sharma*, Syl. Pt. 3, 221 W.Va. 559, 655 S.E.2d 775 (2007)("[I]ssues that arise as to the physician's personal use of a specific technique or procedure to which he or she seeks to offer expert testimony go only to the weight to be attached to that testimony and not to its admissibility."); see also *State ex rel. Jones v. Recht*, Syl. Pt. 5, 221 W.Va. 380, 655 S.E.2d 126 (2007)("[P]ursuant to West Virginia Rules of Evidence 702 an expert's opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. The jury, and not the trial judge, determines the weight to be given to the expert's opinion.") and see also *Francisco v. Wendy's Int., Inc.*, 221 W.Va. 734, 656 S.E.2d 485 (2007). See *Walker, supra*; See *State ex rel. Jones, supra* and See *Francisco, supra*. See also *In re Flood Litigation Coal River Watershed*, 225 W.Va. 574, 668 S.E.2d 203 (2008)(the West Virginia Supreme Court reversed a Circuit Court's decision to grant a new trial when it struck the Petitioner's expert testimony, citing the above referenced cases).

In its Findings of Fact Numbers 20 and 21, the Court below failed to give any weight to Appellant's eyewitness testimony and concomitantly dismissed Dr. Simonton's conclusions based thereon. As discussed *supra*, the fact witness testimony describes the types of industrial products that were dumped. This testimony draws a descriptive picture of the general dumping practices of all the parties involved. The waste described therein matches with the contaminants found at the site to this day. That nexus was corroborated by the unchallenged professional opinion of Appellant's environmental expert. The Court below fundamentally misapplied the summary judgment standard when it did not make this factual inference and then ignored the material issues of fact without any justification.

In its cover letter to the Orders on dispositive motions, the Circuit Court dismissed Dr. Simonton's scientific opinion set forth in his affidavit as "rank speculation."²⁴ In its July 16, 2009 Orders, the Court did not consider Dr. Simonton's opinions, nor those of Appellant's other experts. Obviously, the lower Court gave zero factual weight to Dr. Simonton's opinions and conclusions. The Circuit Court could only reach this conclusion by ignoring the ample factual underpinnings for Dr. Simonton's opinions and the fair inferences that are supposed to be applied in Appellant's favor. Furthermore, Dr. Simonton's qualifications and reliability as an expert have not actually been challenged.²⁵ The Court below improperly weighed the testimony of an expert witness and failed to view the factual evidence developed by eyewitness testimony in the light most favorable to the non-moving party. This is an improper application of the summary judgment standard and must be amended or altered accordingly.

²⁴ See: Appellant's Rule 59 Mot. - Judge Perry's Cover Letter attached thereto as Ex. 8.

²⁵ See: Appellant's Rule 59 Mot. - Curriculum Vitae of Dr. Simonton attached thereto as Ex. 12.

Appellant submitted the affidavit of Dr. Scott Simonton to demonstrate the link between the above-discussed eyewitness testimony and the present day contaminants found as a result of the government's scientific tests. In his affidavit, Dr. Simonton averred as follows:

As a result of my review of available evidence, it is evident that the contaminants present on the subject property today are what one trained and experienced in my field would expect to find based upon the eyewitness testimony related to the operation of a coal-fired power plant and a dump which received among other things oil & grease waste, lead paint, transformer oil, coal ash, pesticide and waste from an industrial equipment repair facility.²⁶

Dr. Simonton's expert conclusion connects eyewitness testimony regarding what was dumped with contaminants presently found on the subject property almost half a century after it was last used as a dump in amounts that still endanger human health. In fact, Dr. Simonton's scientific conclusion is based on clear testimony of fact witnesses and fortified by his knowledge, training, and experience. This evidence is far from speculative and is amply sufficient for a reasonable jury to find in Appellant's favor.

In Finding of Fact Number 30, the Court below found that Appellant failed to produce evidence establishing that the present day contaminants resulted from dumping activities occurring before or during Colane's ownership tenure of the subject property. Quite to the contrary, as fully discussed above, Mr. Large speaks volumes of the Colane-era dumping. He was a Colane employee, he dumped coal camp waste for Colane, and he described the specific type of waste that he dumped for Colane. He worked for Coal & Crane before Colane. He recited the history of dumping at the site. His testimony was corroborated and extended back to at least 1933 by eyewitness testimony of Ed Franklin and Ray Chafin. Mr. Large's eyewitness testimony establishes (or, in the very least, raises genuine issues of material fact) that the same industrial and household waste was dumped at the subject property *consistently*. The fingerprints

²⁶ Appellant's Rule 59 Mot. - Aff. of Dr. Scott Simonton attached thereto as Ex. 11 at ¶ 4.

for the present day contaminants all come from the same sources: mine-repair shop waste, mine waste, power plant waste, and company town waste – all consistent with eyewitness testimony.

The same Finding of Fact secondarily held that the levels of present day contaminants are not, and never have been, considered harmful to humans. This finding is directly inconsistent with the testimony of Appellant's expert, Dr. Werntz, which demonstrates accepted science recognizes the toxicity of such contaminants.^{27/28}

In Conclusion of Law Number 11, the Circuit Court found that Appellant's fact witness testimony does not amount to evidence that causally connects the presence of present day contaminants at the subject property with any act or omission by Colane. However, the Circuit Court found that the subject property ceased to be used as a dump "*in toto*" in 1961. It logically follows, then, that whatever contaminants found there now have remained there since the cessation of dumping in 1961. Here, the Circuit Court weighs the expert witness testimony and speculates that Colane's arguments will prevail instead of properly applying the glaring factual inferences in favor of the Appellant as the summary judgment standard requires.

Dr. Simonton's conclusions are steeped in logical reasoning based on his expert training, experience and education; his analysis is far from speculative. Moreover, Dr. Simonton's conclusions are supported by the presence of contaminants found by the EPA. The following contaminants found on the subject property by the EPA are linked to the hydrocarbons that eyewitnesses testified were dumped thereon: Polycyclic Aromatic Hydrocarbons ("PAHs") and Polychlorinated Biphenyls (PCBs).²⁹

²⁷ See Appellant's Rule 59 Mot. - ATSDR ToxFAQs Ex. 3

²⁸ Dr. Werntz's deposition was not completed until the evening before the pre-trial hearing such that this Court did not have the opportunity to review that part of the record.

²⁹ See: Appellant's Rule 59 Mot. Ex. 3 ATSDR ToxFAQs.

While the lower Court dismissed Dr. Simonton's learned conclusion as "rank speculation," Dr. Simonton expounded upon the basis for his conclusions in his deposition taken on June 23, 2009 by agreement of all parties. Dr. Simonton explains in the excerpt below that "unless this particular facility had *magical mining equipment* that worked unlike any other mining equipment on the planet, I know what it would have contained. I know what kind of fluids would have been used."³⁰ The deposition dialogue, in pertinent part, reads as follows:

A Well, again, we're talking about a site that received a lot of waste starting in – I don't know – the '20s or '30s. A lot of that waste consisted of used oil. The used oil came from both the power facility and from I believe a mine maintenance shop. This was during a period -- *those are two industries that would have used PCB-contaminated oil in a time period in which it was very commonly used.*

Furthermore, Dr. Simonton testified that certain contaminants discovered at the site by the EPA are linked to coal ash. Eyewitness testimony discussed above demonstrates that coal ash dumped at the subject property, which has been confirmed by aerial photographs of the site taken from the 1940's forward.

Ray Chafin

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2 Q. ...now on this picture

3 there is a dark area behind the power plant

4 right here, do you know what that is?

5 A. Yeah

6 Q. What is that?

7 A. It had a cin—that's where they dumped

8 their cinders³¹.

Dr. Simonton's testimony is supported by government scientific documents linking the following contaminants *found at the site* to coal burning: dioxins, PAHs, Thallium, Mercury, and Cadmium.³²

³⁰ Appellant's Rule 59 Mot. - June 23, 2009 Dep. of Dr. Simonton attached thereto as Ex. 4 p.59, lines 8-22.

³¹ Appellant's Rule 59 Mot. - Ray Chafin Dep. Ex. 9, p.30, lines 2-8.

³² See: Appellant's Rule 59 Mot. - Ex. 3 - ATSDR ToxFAQs.

Eyewitness testimony, when read in conjunction with government scientific documents identifying specific contaminants, in the very least raises genuine issues of material fact. More likely, it places responsibility for dioxin contamination squarely on the shoulders of any entity that may have ever exercised ownership, control, or dominion over the dump, which unequivocally includes Colane as both owner and dumper. Government scientific documents in the record link PAHs to the incomplete burning of garbage. *Id.* Relatedly, Mr. Large testified, “there was an old man, Masten Bailey, that would take the paper and the stuff out and burn it.”³³

Dr. Simonton’s reasoning and conclusions link the eyewitness testimony regarding industrial waste dumping to the constituent make-up of the present day contaminants on the subject property. Furthermore, his expert testimony *directly refutes* the findings of the government studies upon which the lower Court relied to conclude that the contaminants pose no potential harm to human beings.

3. The Circuit Court’s Improperly Weighted Expert Scientific Evidence Regarding the Risk to Human Health of the Children of Omar Elementary Presented by the Contaminants Detected.

In Conclusion of Law Number 28, the lower Court clearly weighed expert scientific evidence when it stated: “The statements contained within the reports from these government agencies [ATSDR and WVDHHR] *clearly defeat the Plaintiff’s allegations of toxic exposure...*” In Conclusion of Law Number 32, the lower Court adopted the findings of the WVDHHR: “Furthermore, the DHHR stated in multiple reports that the present-day contaminants found at the school site do not pose a present, or future, public health threat.”

In *Perrine*, the trial court noted the Petitioners had been provided with information from supposedly knowledgeable sources that cleared the Defendant of responsibility:

³³ Appellant’s Rule 59 Mot. – Ex. 1, at p.15, line 14.

The undisputed evidence reflects Dupont publicly assured the Petitioners they had no reason to be concerned. Media reports were equivocal at best. Government agencies – e.g., the Harrison County Planning Commission and the EPA- appear to remain uncertain to this day whether... the residents should be concerned for their property or their health. *Id.* at 58.

In the instant case, Appellant had been provided with information from supposedly knowledgeable sources that cleared Appellees of responsibility or claimed that evidence was not in existence to draw such conclusions. In Finding of Fact Number 26, the lower Court cited the WVDHHR, “WVDHHR concluded that the site *poses an indeterminate public health hazard in the past* because of lack of data for the past.” [emphasis added by the Court below]

Dr. Simonton also testified that the EPA performed an inadequate site assessment during their investigation of the subject property; however, he also expressed that the limited site assessment work done to date by the government proves the existence of an unacceptable risk.

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3 Q Do you think that there should be more
4 sampling and more testing done on that site before
5 you can reach an opinion as to whether it poses a
6 risk?

7 A Well, I think more needs to be done.
8 I think clearly, again, that the levels -- if we
9 look back in time, again, at the levels at the
10 school, using the data from EPA, using the data that
11 ATSDR uses, ***that clearly this site has created a***
12 significant additional risk of health impacts to
13 those associated with the site³⁴.

Dawn Seeburger is a licensed remediation specialist who has prepared an expert report on the subject property.³⁵ Her later deposition testimony is relevant and reliable to refute the conclusions of the government studies.³⁶ To summarize, the WVDHHR, in conjunction with the ATSDR, found that the subject site poses “no apparent public health hazard for the future” and

³⁴ Appellant’s Rule 59 Mot. - Ex, 4, at p.35, lines 3-13.

³⁵ See: Appellant’s Rule 59 Mot. -Dawn Seeburger Expert Report attached thereto as Ex. 16.

³⁶ See: Appellant’s Rule 59 Mot. - June 30, 2009 Dep. of Dawn Seeburger attached thereto as Ex. 5.

“an indeterminate public health hazard in the past...”³⁷ The Court below heavily relied on the findings of these government studies in granting Colane’s summary judgment.³⁸

To the contrary, Ms. Seeburger directly refuted the government report conclusion by maintaining that the government did not perform an adequate risk assessment to lend any credibility to their “no public health hazard” conclusion. Additionally, in agreement with Dr. Simonton’s opinions and conclusions, she maintained that the contaminants that have been unearthed are known to pose health hazards, notwithstanding the inadequacy of the government risk assessment. Ms. Seeburger testified, in pertinent part, as follows:

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16 ... based on the data that has been
17 collected to date, ***there are contaminants there that have
18 been found above the risk assessment guidance documents
19 published in 60 CSR, so if I was going to make any statement
20 at all, I would say yes, until I know otherwise, until the
21 site has been characterized, especially based on proposed
22 or alleged oils or whatever bubbling up and staining a school
23 yard, yes, it is dangerous.***

24 Q That’s purely speculative on your part absent

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the work that you’ve described here today; isn’t that correct?

2 A No, it’s not speculative.

* * *

5 THE WITNESS: ***It’s not speculative when you
6 can look at the data and you see that there samples that have
7 been detected above the risk assessment guidance***³⁹.

Clearly, Ms. Seeburger’s conclusion and opinions cast serious doubt upon the reliability of the government’s risk assessment. Put another way, Ms. Seeburger’s expert analysis as a certified remediation specialist raises genuine issues of fact as to the reliability of the

³⁷ The DHHR report was performed by one wholly unqualified individual with a Master’s in Microbiology whose prior work experience was in the field of agricultural inspection not epidemiology and who while still in the employ of the DHHR sent emails to Massey attorneys offering opinions relevant to a matter she had worked on while at the DHHR. See Pet’r’s Rule 59 Mot. Ex. 19, Excerpts from Barb Smith Deposition in *Halley v. Rawl*.

³⁸ See: Findings of Fact, Numbers 22 to 27.

³⁹ Appellant’s Rule 59 Mot. Ex. 5, p.145, line 10 – p.146, line 7.

government's risk assessment. Further, her expert analysis also raises a genuine issue of fact as to the real health risk posed by the presence of contaminants found on the subject property. Ignoring these genuine issues of material fact imperils the health and safety of the students and staff, past and present, who work and learn at Omar School.

Appellant's expert epidemiologist, Dr. Shira Kramer, offers even further support of Petitioner's allegations.⁴⁰ Dr. Kramer has concluded that, even though the government study is not reliable due to incomplete testing, their underlying data clearly supports a finding that contaminants found on the subject property pose "clear and present dangers" to the population at risk, largely school children.⁴¹ Dr. Kramer has concluded that this population is "exquisitely susceptible" on an order of magnitude of risk.^{42/43} Dr. Kramer further asserts that contaminants found are well-known toxins and carcinogens.⁴⁴ The sampling data shows exceedances even without applying the "order of magnitude" multiplier or considering the "mixture" of chemicals of concern on site and historical levels based on Simonton's back-casting data.⁴⁵

Dr. Kramer's conclusions of note include testimony regarding:

- A "whole range of pesticides" found on the subject property.⁴⁶
- A crucial flaw in the government's report is its failure to use "comparison values" and simply assuming no risk.⁴⁷
- It is the government's job, not Petitioner's or her experts, to do a proper site assessment.⁴⁸

⁴⁰ See: Appellant's Rule 59 Mot. - Dep. of Shira Kramer attached thereto as Ex. 17; Pet'r's Rule 59 Mot. - Expert Reports by Dr. Kramer attached thereto *in globo* as Ex. 14.

⁴¹ Appellant's Rule 59 Mot. - Ex. 17, p.44, lines 5-10; p.64, line 17 - p.65, line 15.

⁴² Appellant's Rule 59 Mot. - Ex. 17, p.153, lines 8-15.

⁴³ Increasing the risk by an order of magnitude effectively means multiplying the levels of contaminants found at the site by 10, or a ten-fold increase in risk posed by the site to schoolchildren.

⁴⁴ Appellant's Rule 59 Mot. - Ex. 17, p.126, line 14; p.127, line 3.

⁴⁵ Appellant's Rule 59 Mot. - Ex. 17, p.154, lines 9-13.

⁴⁶ Appellant's Rule 59 Mot. - Ex. 17, p.27, line 20; p.28, line 18.

⁴⁷ Appellant's Rule 59 Mot. - Ex. 17, p.71, line 14; p.4, line 7.

⁴⁸ Appellant's Rule 59 Mot. - Ex. 17, p.77, lines 15-19.

Dr. Kramer's reports and deposition testimony offer an articulate and revealing critique of the government's flawed studies and of Appellant's expert's opinions. A review of Dr. Kramer's work shows a scientifically sound and complex examination of the factual evidence to date. Dr. Kramer's scientific contributions, in addition to those of Dr. Simonton and Ms. Seeburger, provide an inescapable conclusion: issues of fact abound that squarely refute the government's conclusions regarding risk assessment. The Circuit Court heavily relied upon these flawed government findings. Considering the incompleteness, inadequacies and fundamental flaws in the government's procedures, assumptions, and conclusions, it was wholly untenable and contrary to summary judgment procedure for the Circuit Court to so rely.

WVU Medical School Professor, Dr. Carl Wertz, using the same methodologies that he employed in *Perrine*, also soundly critiqued the ATSDR and WVDHHR conclusions. Dr. Wertz's testimony wraps up the testimony and work of other expert witnesses along with the scientific data gathered by the EPA to establish the most important element of this matter: the health danger posed by these toxins to the Class Members.

Ms. Seeburger, in her deposition, explained the concept of risk-based concentration and risk assessment modeling: "A risk-based concentration is a concentration at which you feel that there either is an adverse health risk to an individual or a population based on exposure to that concentration or not."⁴⁹ She further explained that it is unacceptable under West Virginia's Voluntary Remediation Guidelines to increase one's cancer risk by more than one in a million.⁵⁰ Indeed, this is the established EPA and other public health agencies' standard, as well.

The crux of Dr. Simonton's opinion is expressed numerically as a cancer risk assessment derived by using government risk modeling spreadsheets generally accepted in environmental

⁴⁹ Appellant's Rule 59 Mot. Ex. 5, at p.17, line 11.

⁵⁰ Appellant's Rule 59 Mot. - Ex. 5, at p.55, line 10.

science to be an indicator of excess risk. The total cancer risk expressed is 1.27E-04, or approximately one (1) in eight thousand (8000) excess cancer risk, instead of the EPA/WVDEP Verifiable Estimates for Risk Assessment (“VERA”) number of 1 (one) in one million (1,000,000), or the number at which Dr. Wertz believes monitoring is necessary: one (1) in one hundred thousand (100,000). Dr. Simonton’s calculations alone weigh heavily against a motion for summary judgment, and they are further bolstered by the health impact opinions of Dr. Wertz, who relied on Dr. Simonton’s calculations.⁵¹ Dr. Wertz prepared the medical monitoring protocol that the Court would consider entering – as modified by and adapted to the additional site assessment findings – following a jury’s finding that monitoring is necessary applying the *Bowers* factors.

West Virginia’s leading case on medical monitoring bears a significant relationship to the facts before this court. In *Bowers v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W.Va. 1999), plaintiffs claimed that they were exposed to toxic substances in a “cullet pile” adjacent to their property. The plaintiffs asserted that the cullet pile consisted of various waste materials including broken light bulbs and other materials from the manufacturing process. Similarly, *Ayers v. Jackson Tp.*, 525 A.2d 287 (N.J. 1987), another landmark medical monitoring case whose facts parallel those before this Court, involved residents who brought a nuisance action arising from contamination of water by toxic pollutants leaching into an aquifer from a landfill.

Appellants have proffered expert evidence reports showing the necessity of a medical monitoring protocol. In *Bower*, the court held that a plaintiff need not show that a particular disease is certain or even likely to occur as a result of exposure to a hazardous substance. *Bower*, 522 S.E.2d at 433. Similarly, in *Ayers*, the court found that residents were entitled to damages for cost of medical surveillance based upon an enhanced, ***although unquantified risk*** of disease

⁵³ Appellant’s Rule 59 Mot. - Ex. 6, Wertz Dep. at p.15, line 5.

in the future as a result of exposure to toxic chemicals. *Ayers*, 525 A.2d at 303. The plaintiff need only show that his/her risk of contracting a particular disease has significantly increased when compared to the risk of contracting the disease absent the exposure.⁵² The court stated that “[n]o particular level of quantification is necessary to satisfy this requirement.” Similarly, as provided in *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52 (W. Va. 2003), for a plaintiff to recover medical monitoring costs for exposure to proven hazardous substance, the plaintiff need show a significantly increased risk of contracting a particular disease relative to the risk absent exposure.

Appellants have provided proof of exposure and contamination in the form of photographic evidence, eyewitness testimony, scientific test data, and documentary evidence. Similar evidence was used to deny a defendant’s motion for summary judgment on a medical monitoring claim in *Carey v. Kerr-McGee Chem. Corp.* 60 F.Supp.2d 800 (N.D.Ill. 1999).

In *Carey*, defendants argued that plaintiffs had no evidence of significant exposure and significant risk of contracting serious latent diseases. In addition, defendants argued that plaintiffs could not prove the existence of accepted medical monitoring regimes that make early detection of radiogenic disease possible and beneficial. *Id.* at 811. To combat defendants’ experts, plaintiffs offered an affidavit of their expert who concluded that the exposure levels of plaintiffs exceeded protective limits. Plaintiffs also offered another affidavit of a Professor of Medicine that concluded that medical monitoring will benefit the minor Plaintiffs because (1)

⁵⁴ Other state courts have upheld medical monitoring protocols - even in the absence of a present, physical injury. See *Arizona (Burns v. Jaquays Mining Corp.*, 752 P.2d 28 (Ariz. Ct. Appl. 1987) *California (Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823 (Cal. 1993) (allowed medical monitoring for toxic waste contamination of Petitioner’s drinking water); *District of Columbia (Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984); *Florida (Petito v. A.H. Robins Co.*, 750 So. 2d 103 (Fla. Dist. Ct. App. 1999); *Illinois (Lewis v. Lead Indus. Assn’ Inc.* 793 N.E.2d 869 (Ill. App. Ct. 2003); *Missouri (Meyer v. Fluor Corporation, et al.*, 220 S.W.3d 712 (Mo. 2007); *Montana (Lamping v. Am. Home Prods. Inc.* No DV-97-85786/93 (Mont. Dist. Ct. Feb. 2, 2000); *New Jersey (Ayers v. Township of Jackson*, 525 A.2d 287 (N.J. 1987)); *Ohio (Day v. NLO*, 851 F. Supp. 869 (S.D. Ohio 1994); *Pennsylvania (Redland Soccer Club, Inc. v. Department of the Army*, 696 A.2d 137 (Pa. 1997); *Utah (Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993)).

chronic exposure by members of a vulnerable population significantly increases their risk of developing cancer, and (2) that educational counseling and monitoring will benefit the class. *Id.* at 813. The court held that Plaintiffs need only establish that they have a reasonable need for the protective measure of medical monitoring. Plaintiffs' expert averred that valid published peer review studies demonstrated to a reasonable degree of scientific certainty the risk of genetic changes in exposure levels similar to those experienced by the minor Plaintiffs. Accordingly, the court held that Plaintiffs' expert's affidavit raised a genuine issue of material fact as to whether Plaintiffs can establish justification for medical monitoring. *Id.* at 813.

In the instant matter, each of these factors is covered by the expert reports and testimony of Dr. Wertz, a Fellow of the College of Occupational and Environmental Medicine and assistant professor at WVU, Dawn Seeburger, a toxicologist under contract with the WVDEP with significant experience in health surveys and toxicology, and Dr. Scott Simonton, Ph. D., an environmental engineer and professor at Marshall University.

In *Bower*, the court found that in order for diagnostic testing to be necessary, it must be "reasonably necessary" in that "it must be something that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent." *Bower*, 522 S.E.2d at 433. Appellants need not demonstrate the probable likelihood that a serious disease will result from the exposure. *Id.* at 431. Significantly, the *Bower* court stated that the financial cost and frequency of testing should not be given significant weight in determining the reasonable basis for undergoing medical testing. *Id.* Additionally, the court found that the subjective desires of the plaintiff for information concerning the state of his or her health may be considered as part of the decision making process by the trial court. *Id.*

At trial, Appellants will provide medical testimony on the necessity of diagnostic testing in light of their significant exposure. Appellant's proof of exposure shows the necessity of medical monitoring. It is up to the jury to decide if the procedures are warranted under the facts of this case. Summary judgment is inappropriate because Appellants will be able to establish the required elements for medical monitoring at trial.

Dr. Wertz explained that his protocol requires testing for ovarian, cervical and breast cancer due to exposure to dioxins found at subject location.⁵³ He further explained that his protocol requires testing for leukemia and colon cancer because of the presence of organics (delta-benzene hexachloride/leukemia and benzo(a)pyrene) as well dioxins which is recognized as a strong promoter of cancer.⁵⁴

In her expert report, Dr. Kramer concluded: "The mixture of chemicals in a complex mixture, and their adherence to particulate matter (such as soil, dust, ash), synergizes their toxic and carcinogenic effects."⁵⁵ Dr. Kramer's report includes an extensive discussion of the synergistic effects of combinations of PAHs, PCBs, and dioxins, all found at the subject location.⁵⁶

Dr. Wertz, in his July 15, 2009, deposition, explained that the contaminants at the school act together to create a combined risk far greater than the risk presented by any single contaminant. As Dr. Wertz explained during his deposition, "...these are not individual exposures, but this is a mixture of exposures that would be expected to have synergistic effects."⁵⁷ Moreover, and it cannot be stressed enough, the principal population at risk here –

⁵³ Appellant's Rule 59 Mot. - Ex. 6, Wertz Dep. at page 19, line 3; page 20, line 8 and page 24, line 11

⁵⁴ Appellant's Rule 59 Mot. - Ex. 6, Wertz Dep. at p.21, line 1 – 19

⁵⁵ Appellant's Rule 59 Mot. Ex. 17, Kramer Report at p. 9.

⁵⁶ Appellant's Rule 59 Mot. – Ex. 17, Kramer Report at p. 18.

⁵⁷ Appellant's Rule 59 Mot. - Ex. 6, Wertz Dep. at p.22, line 5 - 7.

children – are known to be “exquisitely susceptible” to harm from exposure to environmental toxins.

If a jury had before it the government risk assessment (“no harmful hazard”) versus a panel of experts who all agree that the government did not perform an adequate risk assessment, and that, despite detailed inadequacies, the government study *still* demonstrates that harmful contaminants exist on the property that pose real threats to the population studying and working at Omar School, it is certainly reasonable to foresee that the jury could find for the Appellant. The lower Court has improperly assumed the role of the jury by granting summary judgment when such genuine issues of material fact so clearly abound.

C. Cole & Crane Real Estate Trust Motion to Dismiss

The evidence in the record contains sufficient facts to raise a genuine issue of fact as to Appellee, Cole & Crane Real Estate Trust’s ownership and/or status as joint venturer of the subject property. West Virginia case law is clear that a mineral owner acting as a lessor is responsible for acts of pollution committed by coal companies mining the leases. *O’Dell v. McKenzie*, 150 W.Va. 346, 145 S.E.2d 388, Syl. pt. 2 (1965)(citing *Flanagan v. Gregory & Pooh*, 136 W.Va. 554, 67 S.E.2d 865); *Sipple v. Starr*, 205 W.Va. 717, (1999); *West Virginia Div. of Env’tl. Prot. v. Kingwood Coal Co.*, 200 W.Va. 734, 755, 490 S.E.2d 823, 844 (Starcher J., Dissenting)(1997); *Reynolds v. Pardee & Curtin Lumber Co.*, 172 W.Va. 804, 310 S.E.2d 870 (1983); *Cowvan v. One Hour Valet, Inc.*, 151 W.Va. 941, 157 S.E.2d 843 (1967).⁵⁸

The lower Court cited *West Virginia Div. of Env’tl. Prot v. Kingwood Coal Co., et al.*, 200 W.Va. 734, 490 S.E.2d 823 (1997), and found that the Appellant failed to satisfy her burden

⁵⁸ Appellant successfully presented this argument to the lower Court in the Motion to Amend that added Cole & Crane to this lawsuit.

by failing to produce evidence that Cole & Crane asserted any control over its leases of mineral rights in the area of the Omar Elementary School.

The facts in the record, however, refute the Court's conclusory finding. Cole & Crane, the lessor, not only enjoyed extensive rights to supervise mining operations, but also exercised those rights.⁵⁹ Coal & Crane's mineral lease provides, in pertinent part:

[I]f lessees, upon abandoning any rooms or workings or other openings, shall leave any available coal standing, *which in the opinion of the lessor's engineer, is not necessary to be left for the proper security of the works, the said lessors' engineer shall give the lessee notice thereof with directions to mine and remove the same...*

Id. at Section XIV.

[T]he lessee shall promptly submit for written approval of the lessor's engineer a method and plan of developing and mining said coal... and after said method and plan shall have been approved in writing by the Lessor's engineer, the lessee *shall strictly adhere to the said method and plan of mining coal until the same shall have been changed or modified by the written agreement of the lessor's engineer...*

Id. at Section XXVII.

Furthermore, Cole & Crane and Colane have for decades employed a mining engineer who reviewed, on a monthly basis, mine maps created by mineral lessees, in order to guard against waste in mining. Cole & Crane's current chief engineer, Phil Montague, explained in his 30(B)(7) deposition that Cole & Crane did in fact exercise the lease rights quoted above and took measures to guard against the waste of assets with regard to examining the presence of rider seams. Mr. Montague testified as follows:

Q. So how would one do that job? I mean, how
3 would you try to guard against waste?
4 A. Well, unfortunately, every ton of coal
5 doesn't cost the same amount to get mined.
6 Q. Right.
7 A. Some actually maybe even cost more than
8 you can sell them for; some is the profit that you
9 make on the others.
10 And this isn't near the problem that it
11 once was, but every coal company is trying to mine

⁵⁹ See: Appellant's Rule 59 Mot. - 1924 Cole & Crane Mineral Lease, attached thereto as Ex. 20.

12 the most profitable coal. So if there's areas
13 where we feel like the coal is minable and they
14 don't want to mine it because it's maybe not quite
15 as profitable, we certainly make them explain why
16 they feel like that that's not true and maybe even
17 provide financial information to show that that's
18 the case.

19 Sometimes, let's say there's two seams,
20 one on top of the other, and if you mine the seam
21 underneath, the seam on top is going to be lost,
22 because it has no support left under it. So the
23 one on top is four feet and the one on the bottom
24 is six feet, they are going to want to mine that
1 six-foot seam first, and you're going to say, yeah,
2 but you're going to waste this seam up here, you're
3 going to have to mine it first. Things like that.

BY MR. THOMPSON:

22 Q. And you said that this task of trying to
23 prevent the waste of the coal is not nearly the job
24 it used to be. What do you mean by that?

1 A. Well, the quality of mining is much
2 better.

3 Early on, a lot of the coal companies had
4 contractors, and a contractor would go in and he
5 was very poorly financed, very undercapitalized a
6 lot of times, and so he would be given a fixed
7 amount per ton by the coal company mining this
8 coal, and if he couldn't make it, pretty much
9 you're on your own. So a lot of times he was so
10 poorly financed, he might get to the end of a belt
11 conveyer and say, I can't afford to buy another
12 belt drive, so I'm abandoning everything beyond
13 that. And say, well, you know, that's not going to
14 get it. And so that's mainly the problem.
15 And plus, you know, in the seventies, when
16 I first started, there wasn't near the skill
17 level. And I hate to admit it, but there was a
18 bunch of guys fresh out of school like me and there
19 was no older guys still around to teach anybody
20 what to do, so just the knowledge that has been
21 gained in those 30 years has been phenomenal⁶⁰.

As demonstrated by this testimony, Cole & Crane and its lessees have not exemplified a typical lessor/lessee relationship. Cole & Crane had a chief engineer “down in the hole” exercising supervision and control – even with regard to the length of conveyor belts. The

⁶⁰ Appellant's Rule 59 Mot. – Ex. 21- Cole & Crane 30 (b) (7).

record reflects that Cole & Crane asserted control over its leases of mineral rights in the area of the Omar Elementary School.

Later in this brief, Appellant will address the rulings of the lower Court to strike newly discovered evidence pursuant to Rule 60, but part of that evidence is the testimony of a former employee of Omar Mining, Mr. Woody Adkins. Mr. Adkins provides important testimony showing that, even in the early 1950s, Cole & Crane engineers performed the same role that Mr. Montague does today.⁶¹

17 Q. Now what did Cole & Crane do, to your
18 knowledge?

19 A. All I ever knew is they owned the company,
20 owned the land.

21 Q. Did Cole & Crane have any engineers or
22 overseers in the area?

23 A. Oh, yes.

24 Q. And did they ever go down in the mines?
16

HARVEY ADKINS -- EXAM BY MR. THOMPSON

1 A. Yeah, yeah, they had to, you know, they --

2 In other words, they kept Cole & Crane
3 up-to-date on what the coal company was doing, how
4 much coal they were leaving and stuff like that.

5 Q. How much coal they were leaving in the
6 ground?

7 A. Yeah. And outwards. I guess how much
8 they were taking out. I don't know.

Along with Mr. Montague's testimony and the lease itself, Mr. Adkins' testimony proves that Cole & Crane did more than just collect and cash royalty checks. Cole & Crane was an integral actor in the operation of mines, the power plant and the dump.

Cole & Crane shared a common purpose with all of the mining companies to which it leased the right to mine its resources that exposed them to joint liability for bad acts taken in furtherance of that shared purpose. *See O'Dell, supra*. To constitute a joint venture, the parties must combine their property, money, efforts, skill, or knowledge, in some common undertaking

⁶¹ Appellant's Rule 60 Mot. Reply Brief- Adkins Dep. at p.16, line 17.

of a special or particular nature, but the contributions of the respective parties need not be equal or of the same character. There must, however, be some contribution by each party of something promotive of the enterprise. *Pownall v. Cearfoss*, 129 W.Va. 487, 497-498, 40 S.E.2d 886, 893 (1946) (citation omitted)(fn13).

As evidenced by the testimony above, Cole & Crane enjoyed broad rights to supervise and control the mining operations of its lessees, and Cole & Crane in fact exercised those rights. In the very least, the above-cited evidence raises genuine issues of material fact sufficient to allow the jury to make a factual determination as to supervision and control.

Additionally, Cole & Crane should be held accountable for its use of a “straw man transaction.” In addition to the obvious contribution of its mineral ownership, Cole & Crane also engaged in another set of acts “promotive of the enterprise” by assuming ownership and control of the “company town” including the operation of the industrial dump which is central to this cause of action. As was common in the West Virginia coalfields in the early to mid twentieth century, West Virginia Coal & Coke owned the company town in which its miners lived and owned the company store where the miners shopped.

In 1954, when Cole & Crane awarded the right to mine its coal to Massey, Massey did not want to assume responsibility for the company town. Massey took over West Virginia Coal & Coke on December 12, 1954. As part of the transaction, Massey, through its newly acquired subsidiary, West Virginia Coal and Coke, deeded Coal & Coke’s property to Tom Stark, who was the trustee of the Cole & Crane Real Estate Trust and managed Cole & Crane’s business interests. Mr. Stark later transferred the company town, the dump, and the other properties controlled by West Virginia Coal & Coke to the Defendant, Colane.⁶²

⁶² Appellant’s Resp. to Cole & Crane’s Mot. for Summ. J. - Ex. J - Luther Woods Dep. at 20-23, 28, 39.

During the interim, Cole & Crane exercised dominion and control over these assets and continued to operate the dump. Cole & Crane, Tom Stark and Colane all permitted Massey to use the dump for mine equipment waste just as West Virginia Coal & Coke had done for decades.

D. Omar Mining Motion for Summary Judgment⁶³

The lower Court concluded that Appellant has no legal basis, under theories of negligence, strict liability, and/or nuisance, to assign liability to Omar Mining. The lower Court based its conclusion that Appellee is not entitled to medical monitoring because the Court found no “tortious conduct” attributable to Omar Mining. The lower Court found that Omar Mining could not foresee a school being built on the site, and, therefore, Omar Mining had no duty with respect to the afflicted community.

To the contrary, Omar should have foreseen that carelessly dumping industrial waste on the subject property could have eventually harmed the community regardless whether a school was eventually built there or it was put to some other foreseeable use by the community. Common law jurisprudence supports Petitioner’s position. The following cases imposed liability upon the non-owner (dumper) under theories of liability including negligence, strict liability and nuisance:

- *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795 (Cal. 1993): Adjoining landowners to landfill, subjected to prolonged exposure to certain carcinogens, brought negligence and strict liability action against dumper (tire manufacturer) whose hazardous wastes were disposed of at the landfill. The trial court determined that the dumping of large amounts of toxic wastes in a landfill that prohibited toxic substances and liquids because of the danger of groundwater contamination, constituted an ultrahazardous activity. *Potter*, 863 P.2d at 802. This determination was not addressed on appeal, upon which the California Supreme Court allowed medical monitoring costs as compensable items of damages.

⁶³ The foregoing discussion regarding Respondent, Colane, applies with equal force to the Court’s Order regarding Omar Mining. The following argument discusses the findings of the Court below particular to Omar Mining.

- *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063 (M.D. Pa. 1988)
Property owners brought action against generators and transporters of hazardous wastes, and operator of landfill, alleging claims for, *inter alia*, negligence, nuisance and strict liability. As basis for strict liability, Petitioners alleged that defendants' disposal of toxic waste at an illegal landfill was abnormally dangerous and/or ultrahazardous activity, and for negligence, asserted that defendants failed to exercise due care in the transportation and disposal of the waste. The trial court denied defendants' motion to dismiss, finding Petitioner's allegations were sufficient to state claims for strict liability, negligence and nuisance; notably the court found that the allegations "clearly" stated a claim under a negligence theory. *Piccolini*, 686 F. Supp. at 1070.
- *Wilson v. Key Tronic Corp.*, 40 Wash. App. 802, 701 P.2d 518 (Wash. App. 1985)
Landowners sued a manufacturer and county that were disposing of hazardous waste at an adjoining landfill on negligence, nuisance and trespass theories. Judgment for Petitioners was affirmed, and damages for diminished market value of properties was appropriate.
- *Kenney v. Scientific, Inc.*, 204 N.J. Super. 228, 497 A.2d 1310 (Law. Div. 1985)
Residents in vicinity of two landfills at which hazardous waste was disposed brought action against the owners, operators, dumpers and haulers. The haulers' motion for summary judgment was denied as to negligence claims based on (1) negligent choice of landfill by the haulers, (2) making deliveries at a time they knew or reasonably had reason to know of dangerous conditions at the landfill, and (3) negligence in the manner of delivery. *See also: State v. Ventron Corp.*, 94 N.J. 473, 468 A.2d 150, 159-160 (1983) (New Jersey Supreme Court holds that disposal of toxic wastes (past or present) is an abnormally dangerous activity; a party "engaged in the disposing of toxic waste may be performing an activity that is of some use to society. Nonetheless, the unavoidable risk of harm that is inherent in it requires that it be carried on at his peril, rather than at the expense of the innocent person who suffers harm as a result of it").

In Findings of Fact Numbers 17-20, the lower Court highlighted Appellant's Answer to Interrogatories in which the A responded she had "no knowledge as to the identity of any product that may have been deposited at the site other than certain pesticides . . . mentioned in Carew Ferrell's deposition." The lower Court interpreted Appellant's response to mean that Appellant alleges that the *only* waste dumped from Omar Mining were the pesticides, "Sevin Dust" and "Blue Dragon." This is a flagrantly incorrect interpretation. By "product," Appellant merely intended to convey "brand name."

Moreover, reliance on a single interrogatory response ignores the voluminous additional evidence of record in the case. Appellant's eyewitness testimony, coupled with the expert testimony of Dr. Simonton, establishes that Omar Mining dumped myriad pesticides and petroleum-related industrial wastes as part of its ordinary business operations.

Given the totality of the evidence in the record, the Circuit Court's finding that Appellant failed to carry its summary judgment burden is improper and should be amended or altered accordingly.

E. Massey Energy and A.T. Massey Motion for Summary Judgment

Appellant named A.T. Massey Coal Company and Massey Energy as defendants because the evidence points to the liability of several Massey-related companies for the contamination of school. The contamination at issue here stems from (1) the toxic substances deposited in the Chauncey dump by either predecessors-in-interest or subsidiaries of A.T. Massey and Massey Energy, and (2) waste and effluent from the abandoned West Virginia Coal & Coke power plant that still stands there today.

A.T. Massey is liable because in December 1954, A.T. Massey assumed control of West Virginia Coal & Coke and then later transferred its Island Creek operations to Omar Mining, a Massey-operated subsidiary still active today under the Massey corporate structure. While the Appellees failed to produce the asset purchase agreement, the December 10, 1954 minutes of Omar Mining refer four times to obligations from West Virginia Coal & Coke's operations assumed by Massey - these obligations are allegedly outlined in the never-produced asset purchase agreement to which the Appellees constantly refer.⁶⁴

⁶⁴ See: Appellant's Rule 59 Mot. -Ex. B - 12/10/1954 Omar Mining Minutes.

During the Great Depression, West Virginia Coal & Coke began operations in the Island Creek Valley by mining coal owned by Cole & Crane Real Estate Trust.⁶⁵ In support of their coal mining operations, they operated a coal-fired electric generating plant in Chauncey. The coal-fired electric generating plant spewed cinders over the grounds where the school now stands.⁶⁶ Appellant showed that coal ash and cinders are among the sources of the carcinogens found on the school grounds, in the creek sediments and surrounding areas.

At the same time, Coal & Coke also operated a community, commercial, and industrial dump that is now another source of carcinogenic and toxic contamination. For decades, a truck, owned by Coal & Coke until 1954 and owned by Omar Mining after 1954, would arrive at the dump to drop loads of industrial waste, used oil, grease and transformer oil from the coal company's machine repair shop in Omar. The Appellee also deposited ash from the power plant in the dump.⁶⁷ Waste from the dump overflowed into the Creek and deposited contaminants in the sediment, which is now an additional source of contamination because it was later dredged up and used as fill upon which to build the school.

Another source of contamination was the Coal & Coke-owned Junior Mercantile Store from which came years of discarded pesticides, paint products and loads of other noxious substances.⁶⁸ Carew Farrell testified that Massey acquired Coal & Coke and then took over the Coal & Coke company stores through its subsidiary Omar Mining.⁶⁹ Ray Chafin testified that in 1954 Massey also took over Coal & Coke's mining operations.⁷⁰

⁶⁵ Appellant's Rule 59 Mot. - Ex. C - Dep. of Ray Chafin, p. 6-8.

⁶⁶ Appellant's Rule 59 Mot. - Ex. C- Dep. of Ray Chafin, p. 22-28.

⁶⁷ Appellant's Rule 59 Mot. - Ex. D - Richard Large Dep., p. 13, 15-18.

⁶⁸ Appellant's Rule 59 Mot. - Ex. E, Dep. of Carew Farrell, p. 8-10, 15.

⁶⁹ Appellant's Rule 59 Mot. - Ex. E, Dep. of Carew Farrell, p. 7.

⁷⁰ Appellant's Rule 59 Mot. - Ex. C- Ray Chafin Dep., p. 31-32.

Historical documents found in the W.Va. Secretary of State's Office confirm Ray Chafin's and Carew Farrell's recollection. On Dec. 11, 1954, A.T. Massey Coal Company in Richmond formed Omar Mining Company to take control of the Island Creek Valley Coal & Crane mining properties by assuming Coal & Coke's mining assets, corporate structure and Coal & Coke's continuing operations.⁷¹ Appellant alleges that Omar Mining exists to this day as a viable, operating Massey subsidiary and as such is responsible for its actions from Dec. 11, 1954 forward in addition to as a successor to W.Va. Coal & Coke.

While A.T. Massey's Eisenhower-era management team was forming Omar Mining, they were also recapitalizing West Virginia Coal & Coke after having taken control of the company. West Virginia Coal & Coke was originally formed in 1917. It appears to have re-capitalized several times - 1924, 1941, and 1955. In April 1955, fourth months after Omar Mining and Colane replaced West Virginia Coal & Coke on Island Creek, Morgan Massey himself incorporated a recapitalized West Virginia Coal & Coke.⁷²

Colane continued to operate the dump where the school grounds are today. Every morning the same truck came down from the machine repair shop at Omar to drop its load on the dump. Colane assumed control of the town and continued to dump the communities' trash there, pushing it out into the creek as the dump filled up, just as West Virginia Coal & Coke had already done for decades. Years later the school used downstream sediments from Island Creek to build up the ground upon which the school now sits.

In 1965, after the school deal was closed the Secretary of State's records indicate that West Virginia Coal & Coke was dissolved and that further correspondence should be addressed to A.T. Massey's headquarters in Richmond, Virginia.

⁷¹ Appellant's Rule 59 Mot. - Ex. F - Omar Mining Inc. document.

⁷² Appellant's Rule 59 Mot. - Ex. G - WV Sec. of State Incorporator Document; Appellant's Rule 59 Mot. - Ex. H - W.Va. Coal & Coke 4/19/55 Inc. w/ M. Massey's and A.H. Crane's signatures.

The Massey Appellees are thus liable to Appellant because they directly polluted through Omar Mining Company between 1954 and 1964 and also assumed liability for West Virginia Coal & Coke's actions from the Great Depression through 1954 by taking over West Virginia Coal & Coke's corporate structure and assets. It is without question that Massey shared a common purpose with West Virginia Coal & Coke, Cole & Crane and Colane. Sharing in that common purpose makes Massey jointly liable for the bad acts taken in furtherance of that purpose. *O'Dell v. McKenzie*, 150 W.Va. 345 (1965).

Appellees, A.T. Massey and Massey Energy, cannot deny the unity of interest and ownership it shares with Co-Appellee, Omar. And it further cannot deny the inequitable result that would occur if a medical monitoring protocol could not be effectuated because a manipulation of corporate assets made Omar Mining judgment-proof.

To pierce the corporate veil in a contract case, the West Virginia Supreme Court has provided a "two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement), and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement). *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 352 S.E.2d 93, Syl. pt. 3 (1986). The law disfavors summary judgment on the determination of whether to pierce the corporate veil because the relevant evidence will often not be in the record until trial.

The propriety of piercing the corporate veil usually involves numerous questions of fact for the trier of fact to determine based upon all of the evidence. *See: Southern Elec. Supply Co. v. Raleigh County Nat'l. Bank*, 173 W.Va. 780, 782 n. 5, 320 S.E.2d 515, 517 n. 5 (1984); *Wheeling Kitchen Equip. Co. v. R & R Sewing Center, Inc.*, 154 W.Va. 715, 719-20, 179 S.E.2d

587, 589-90 (1971); *Alorna Coat Corp. v. Behr*, 408 So.2d 496, 498 (Ala.1981) (motion to dismiss); *Curtis v. Vlotho*, 313 N.W.2d 469, 472 (S.D.1981) (trial court in nonjury trial improperly considered only the evidence on lack of fraudulent representation, without analyzing other factors for piercing corporate veil); *Amfac Mech. Supply Co. v. Federer*, 645 P.2d 73, 74-77, 82 (Wyo. 1982) (motion to dismiss improperly granted in nonjury trial at close of Petitioner's evidence; trial court improperly relied exclusively on lack of fraud; prima facie case for piercing shown by evidence of grossly inadequate capitalization and disregard of corporate formalities).

Here, the jury alone should have decided the issue, not the judge. If nothing else, the jury should have been permitted to hear the explanation of the missing Asset Purchase Agreement and decide if its unavailability indicates an attempt to hide the truth from them. Without that proof, as well, the jury could infer just as readily agree that Massey assumed control as it could agree with the Circuit Court and Massey that it did not.

F. Rule 60 Newly Discovered Evidence Excluded by the Court Below

Appellant recently discovered Harvey "Woody" Adkins, who has offered factual testimony through affidavit and deposition that provide full factual support for the opinions and conclusions offered by Dr. Simonton. Mr. Adkins avers that waste oil was drained from every piece of equipment that came into the shop for overhaul and that parts were washed in a solvent called Varsol.⁷³ Mr. Adkins also testified that on more than one occasion he assisted in the draining of a carbide tank used in the Omar shop's welding operations on the site where the school now sits.⁷⁴ Mr. Adkins also confirmed Richard Large's testimony that the 55-gallon drums from the shop were widely used as garbage cans in the community.⁷⁵

⁷³ Appellant's Rule 60 Mot. - Harvey Adkins Aff. attached as Ex. 1, ¶7.

⁷⁴ Appellant's Rule 60 Mot. - Harvey Adkins Aff. attached as Ex. 1 ¶12.

⁷⁵ Appellant's Rule 60 Mot. - Harvey Adkins Aff. attached as Ex. 1 ¶9.

In his affidavit, Mr. Adkins testified that the Omar school site was the only site of which he was aware where the company could have disposed of waste.⁷⁶ He provides yet another layer of proof of what everyone in Chauncey now knows: the Omar Elementary School rests upon the site of a municipal and industrial dump, the contents of which were placed there or permitted to be placed there by the Appellees. Coupled with the eyewitness testimony of Ed Franklin, Ray Chafin, Carew Ferrell, and Richard Large, Mr. Adkins' testimony further connects the link between the Appellees' operations and the school site dump. Scientific evidence adduced through government reports and extensive expert testimony proves that heavy metals, pesticides and PCBs linked to the Appellees' operation are present at the school site. Pesticides that have been outlawed in this country for over thirty years are still found on the playground today.

Rule 60 of the West Virginia Rules of Civil Procedure allows Appellant relief from the Circuit Court's granting of summary judgments because new evidence surfaced which, through the exercise of due diligence, could not have been discovered prior to issuance of the lower Court's order. Rule 60 provides, in pertinent part:

RULE 60. Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Unavoidable Cause; Newly Discovered Evidence; Fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

W.V. R.C.P. Rule 60(b)(2).

Generally, a motion under Rule 60 is subject to the trial court's sound discretion. *Strobridge v. Alger*, 184 W.Va. 192, 399 S.E.2d 903 (1990). To come within the newly discovered evidence rule, a party must minimally show that evidence was discovered since the adverse ruling and that it was diligent in ascertaining and securing the evidence; new evidence

⁷⁶ Appellant's Rule 60 Mot. - Harvey Adkins Aff. attached as Ex. 1 ¶11.

must be such that due diligence would not have secured the evidence before the ruling. *Powderidge Unit Owners Ass'n v. Highland Prop., Ltd.*, 474 S.E.2d 872, 196 W.Va. 692 (1996).

A subpoena to the UMWA would have not yielded the identity, location or importance of Harvey Adkins. Appellant's Counsel, Kevin Thompson, on September 22, 2009, contacted the UMWA District 17 Headquarters in an effort to locate any surviving UMWA member who may have worked at the Omar Mine Repair Shop. The September contact with District 17 was in addition to earlier interviews with local union members who counsel believed may have had relevant knowledge. The only lead that the union could provide was to Mr. Ballentine. Upon contacting Mr. Ballentine, counsel learned that Mr. Ballentine, while a former employee of the Omar Mining, had never worked at any of the Appellee's Logan County operations and instead worked in Boone County for his entire tenure.⁷⁷

Further, after the Massey Appellees removed this case to federal court, they were required by Magistrate Stanley's September 8, 2006 Order to provide the names of potential witnesses by November 9, 2006 pursuant to Fed. R. Civ. P. 26(a)(1). Counsel for Massey admitted in open Court that he personally interprets the rule to mean that must only disclose witnesses he actually intended to call at trial. That reading undercuts the reason for open disclosures and conflicts with the plain language of the rule:

[A] party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information — along with the subjects of that information — that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

Counsel for Appellant was entitled to rely on Appellee to make a good faith disclosure, which apparently did not happen. They disclosed no witnesses at all, much less any who may

⁷⁷ Appellant's Rule 60 Mot. - Ex. 7, Aff. of Kevin Thompson.

have led Appellant to find any witnesses. Nothing the Appellant disclosed would have uncovered the four eyewitnesses Appellant found before June 25 or Mr. Adkins.⁷⁸

The only way to have found Mr. Adkins is exactly the way the Appellant did - through a vigorous grassroots, word-of-mouth process to find eyewitnesses. To find these eyewitnesses, Appellant's counsel and Class Representatives interviewed those known in the community, contacted old coal miners, contacted the union, interviewed and deposed the four witnesses themselves, asked Class Representatives to find other witnesses and conducted community meetings at churches and restaurants in and around Chauncey. Either Appellant's counsel or the initial Class Representative attended no less than eight community meetings about this subject. This does not include countless encounters over Carlene Mowery's kitchen table with various members of the community.⁷⁹

In the instant matter, it is clear from the attached affidavits that no routine formal discovery tool would have uncovered the identity or relevance of Harvey Adkins. Further, in this case, it is clear that Appellant's counsel actively investigated the history of contamination and engaged the community in on-going discourse that, through diligent pursuit, actually did uncover five eyewitnesses to activities that occurred over fifty years ago. Appellant employed a detailed and sustained protocol to uncover relevant information and witnesses. Despite Appellant's persistent efforts, the whereabouts of Mr. Adkins remained unknown until recently.

In addition, even in the face of the ample evidence of diligence and providence outlined above, should this Honorable Court consider that the newly discovered evidence could have been found through reasonable diligence, this evidence should still be admitted to prevent a "grave miscarriage of justice" or "manifest injustice." WVRCP Rule 60 (b)(6).

⁷⁸ Appellant's Rule 60 Mot. - Ex. 8 - Mag. Stanley Order and Notice and Ex. 9 - Omar Mining Disclosures.

⁷⁹ Appellant's Rule 60 Mot. - Ex. 7, Aff. of Pet'r's Counsel Kevin Thompson.

“Newly discovered evidence” is “evidence of facts in existence at the time of trial of which the party seeking a new trial was justifiably ignorant.” *Campbell v. American Foreign S.S. Corp.*, 116 F.2d 926, 928 (2d Cir.), *cert. denied*, 313 U.S. 573, 61 S.Ct. 959, 85 L.Ed. 1530 (1941). A new trial may be ordered to prevent a grave miscarriage of justice even though the “newly discovered evidence” supporting that order would have been available to the moving party at trial had that party exercised proper diligence. *Ferrel v. Trailmobile, Inc.*, 223 F.2d 697, 698 (5th Cir.1955); *Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 199 (2d Cir.1979). New trials have been granted when the new evidence is practically conclusive like it is here. *Niedland v. United States*, 338 F.2d 254, 260 (3d Cir.1964).

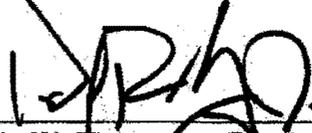
It is undisputed Mr. Adkins’ evidence has been discovered since the hearing on dispositive motions. A grave miscarriage of justice will occur if his affidavit is stricken because it solves the Court’s summary judgment conclusion that, without a witness from Omar Mining, Petitioner fails to prove that Omar Mining was a contributor of oil and other wastes to the subject property.⁸⁰

VI. Relief Prayed For

Appellant prays that the Supreme Court of West Virginia vacate and reverse the Orders dismissing the Appellant’s claims against Colane, Omar Mining, Massey Energy and A.T. Massey Coal in the instant case and remand the matter to the Logan County Circuit Court for jury trial.

⁸⁰ Mr. Adkins was an Omar Mining employee at the mine shop for a year after Omar took over, and he continued to work for Omar Mining for several years thereafter.

Respectfully Submitted, by Counsel
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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NORMA ACORD, a West Virginia Resident,
Appellant and Class Representative,

v.

Supreme Court No. 101366
Logan County Circuit Court
Civil Action No. 07-C-155

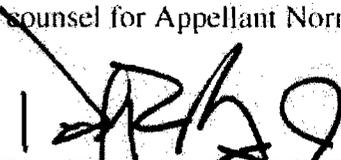
COLANE CORPORATION,
COLE & CRANE REAL ESTATE TRUST,
A.T. MASSEY COAL COMPANY,
And
MASSEY ENERGY COMPANY,
Appellees.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on March 25, 2011, the foregoing "*Original Brief on Petition for Appeal from Summary Judgment Orders on behalf of Petitioner, Norma Acord*" was served upon counsel of record by hand delivery or First Class U.S. Mail as follows:

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