IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
AUG
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NORMA ACORD, a West Virginia resident,

Petitioner and class representative,

v.

NO.: _____
(Civil Action No.: 04-C-151
Circuit Court of Logan County)

COLANE COMPANY, a West Virginia corporation, individually and successor-in-interest to Cole & Crane Real Estate Trust; COLE & CRANE REAL ESTATE TRUST, a West Virginia Trust; LOGAN COUNTY BOARD OF EDUCATION, a West Virginia public body; WEST VIRGINIA COAL & COKE COMPANY, a West Virginia Corporation; OMAR MINING COMPANY, a West Virginia Corporation, individually and a successor-in-interest to West Virginia Coal & Coke Company; A.T. MASSEY COAL COMPANY, a West Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company; MASSEY ENERGY COMPANY, a Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company,

Respondents.

COLANE CORPORATION AND COLE & CRANE REAL ESTATE TRUST'S RESPONSE TO PETITION FOR APPEAL

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KIND OF PROCEEDING AND NATURE OF THE RULINGS IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

On May 10, 2004, plaintiffs Carlene Mowery, Edgar Franklin and Connie Keith initiated this civil action against defendant Colane Corporation, and others, in the Circuit Court of Logan County, West Virginia. In their Complaint, plaintiffs alleged that prior to 1961, an unregulated landfill existed at the present day situs of Omar Elementary School in Logan County, West Virginia. Further, plaintiffs alleged they, along with other similarly situated persons, were exposed to noxious, toxic, dangerous and deadly chemicals when they attended Omar Elementary School and played at the school's baseball field and playground, which increased their risk of contracting serious, latent diseases.

On May 25, 2005, The Circuit Court of Logan County granted plaintiffs' Motion for Class Certification which, after amendments, defined the class as, "Former and current students and staff of Omar Elementary School." The class representatives sought damages in the form of the establishment of a medical monitoring program for the class members, abatement of public nuisance, monetary damages sounding in general negligence and public nuisance and punitive damages. In addition, the original class representatives were replaced by current class representative Norma Acord by way of the Fourth-Amended Complaint.

By Orders entered July 15, 2009, the Circuit Court of Logan County granted defendant Colane Corporation's Motion for

Summary Judgment and defendant Cole & Crane Real Estate Trust's Motion to Dismiss. The Circuit Court correctly found plaintiff failed to produce evidence of a genuine issue of material fact to support the class' allegations against Colane Corporation and Cole & Crane Real Estate Trust.

Plaintiff responded to the Circuit Court's Orders on July 27, 2009, by filing an Omnibus Motion to Alter or Amend Judgements, pursuant to West Virginia Rule of Civil Procedure 59(e). Further, on December 14, 2009, plaintiff filed a Rule 60 Motion for Relief from Judgment based on newly discovered evidence. Not only did the Circuit Court of Logan County correctly deny plaintiff's motions by Orders entered March 31, 2010, it also struck many of the exhibits referenced in plaintiff's Rule 59(e) Motion finding that the information attached to plaintiff's motion should have been presented in response to the defendants' dispositive motions.

Plaintiff seeks to appeal the lower Court's proper entry of judgment in favor of Colane Corporation and Cole & Crane Real Estate Trust, but does not appeal the lower Court's Order granting the defendants' Motion to Strike certain exhibits to plaintiff's Rule 59(e) Omnibus Motion to Alter or Amend Judgment.

STATEMENT OF FACTS

On or about December 13, 1954, West Virginia Coal & Coke abandoned the entirety of its coal mining operations in West Virginia, and conveyed all of its general assets located in Logan

County to an individual named Tom Stark. On December 27, 1954, by Supplemental Deed recorded in Logan County Deed Book 236, Page 1, West Virginia Coal and Coke conveyed to Mr. Stark 26 tracts of land, miscellaneous leases and easements.

Defendant Colane Corporation ("Colane") was formed on January 18, 1955, as a Delaware Corporation, and registered to do business in West Virginia that same date.[1] On May 10, 1955, Tom Stark, and his wife Iola, deeded to Colane all of the assets conveyed to them by West Virginia Coal and Coke, as evidenced by the Deed recorded in Logan County Deed Book 238, Page 410.

By Deed dated August 15, 1961, which is recorded in Logan County Deed Book 281, Page 165, Colane deeded to the Logan County Board of Education ("Logan BOE") three tracts totaling 4.793 acres. The plat map attached to the August 15, 1961, Deed erroneously labeled Cole & Crane Real Estate Trust ("Cole & Crane") as the owner of the property when, in fact, Colane was the record owner in interest as set forth in the Deed.

Thereafter, the Logan BOE constructed Omar Elementary School upon the real property it purchased from Colane, and opened its doors to the public in 1964. Further, on August 15, 1967, Colane deeded an additional .223 acres to the Logan BOE, which comprised an area of reservation contained on the plat map attached to the August 15, 1961, Deed. The August 15, 1967, conveyance is

[1] Since its inception, Colane has remained in good standing with the Delaware and West Virginia Secretaries of State.

recorded in Logan County Deed Book 316, Page 110 and, again, the plat map attached to this Deed erroneously labeled Cole & Crane as the owner of the property when, in fact, Colane was the record owner in interest as set forth in the Deed.

An unregulated municipal landfill existed on the real property contained within this area of reservation when Tom Stark acquired the property from West Virginia Coal & Coke, and continued in existence after Colane acquired the real property. Disposal of garbage at the site in question ceased, *in toto*, immediately after the Logan BOE completed its initial purchase of the real property on August 15, 1961.

On May 10, 2004, plaintiffs Carlene Mowery, Edgar Franklin and Connie Keith initiated this civil action against defendant Colane, and others, alleging that the real property where Omar Elementary School, the school's playground and adjacent baseball field are situated, was contaminated as a result of the residential and commercial waste discarded at the dump site prior to 1961. The Complaint alleged that the plaintiffs, along with other similarly situated persons, were exposed to noxious, toxic, dangerous and deadly chemicals when they attended school and played at the school's ball field and playground, as a result of the defendants' dumping, and/or allowing others to dump, hazardous materials upon the real property in question prior to 1961.

Plaintiffs alleged that the exposure to the contaminants increased their risk of contracting serious, latent diseases.

On or about December 21, 2004, plaintiffs Carlene Mowery, Edgar Franklin and Connie Keith were granted leave to amend their Complaint to add Cole & Crane Real Estate Trust as a defendant to this civil action, and modified their allegations against Colane claiming that it was a successor-in-interest to Cole & Crane.[2] Cole & Crane is a liquidating real estate trust that was formed by Mr. J. Omar Cole and Mr. Clinton Crane in 1916, and continues in its operation today.

On May 25, 2005, The Circuit Court of Logan County granted plaintiffs' Motion for Class Certification which, after amendments, defined the applicable class as, "Former and current students and staff of Omar Elementary School." The class representatives sought damages in the form of the establishment of a medical monitoring program for the class members, abatement of public nuisance, monetary damages sounding in general negligence and public nuisance and punitive damages.

On June 9, 2008, the Circuit Court of Logan County granted plaintiffs' Motion for Leave to file Fourth-Amended

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[2] Identical to its claims against Colane, plaintiffs sought damages in the form of the establishment of a medical monitoring program for the class members, abatement of public nuisance, monetary damages sounding in general negligence and public nuisance, and punitive damages, against Cole & Crane for their alleged exposure to noxious, toxic, dangerous and deadly chemicals at the site in question.

Complaint. The Fourth-Amended Complaint modified plaintiffs' allegations against Cole & Crane, stating defendant Cole & Crane "as the mineral estate owner, was a joint venturer with the various entities which conducted the coal mining operations, coal mine repair shops and power plant operations which ultimately led to the contamination" of the site, and "owned and controlled Defendant Colane Corporation, as well as the real estate where the school now sits and the dump operated."[3] (Fourth-Amended Complaint at para. 4)

Discovery concerning factual issues commenced in the civil action on September 7, 2004. During the discovery phase, counsel for plaintiff obtained testimony from four fact witnesses, Edgar Franklin, Raymond Chafin, Carew Ferrell and Richard Large, who possessed knowledge of the dumping activities that occurred at the site prior to the construction of Omar Elementary School.

During a hearing on May 21, 2009, counsel for plaintiff announced to the Court that Messrs. Franklin, Chafin, Ferrell and Large would be the only fact witnesses called during plaintiff's case-in-chief. The testimony taken from Messrs. Franklin, Chafin, Ferrell and Large, however, failed to identify any specific product, chemical and/or contaminant ever discarded upon the site in question, at any time in the past.

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[3] The Fourth-Amended Complaint also replaced the initial class representatives Carlene Mowery, Edgar Franklin and Connie Keith with current class representative Norma Acord.

The allegations of negligent, willful, reckless and malicious conducted committed and/or permitted to occur by Colane and Cole & Crane, which are contained within plaintiff's Complaint, and the reports and testimony of plaintiff's expert witnesses, are based entirely upon the testimony of Messrs. Franklin, Chafin, Ferrell and Large. Said allegations were not supported by the testimony elicited from these fact witnesses.

Plaintiff alleged in her Fourth-Amended Complaint, and through the reports of her expert witnesses, that the levels of organic and inorganic materials presently found at the site have degraded over time, leading plaintiff and her expert witnesses to speculate that greater concentrations of these organic and inorganic materials must have existed at sometime in the past. Further, plaintiff and her expert witnesses alleged that the historic concentrations of organic and inorganic materials at the site, as well as, the present-day levels of concentration, have left all former and current students and staff of Omar Elementary School susceptible to increased chances of contracting cancer based upon their exposure to these materials.

In its Motion for Summary Judgment, Colane established that the plaintiff and her expert witnesses failed to produce even a mere scintilla of evidence establishing: 1) the organic and inorganic materials presently found at the site resulted from dumping activities that occurred before, or during, the six years, three months and five days Colane owned the real property in

question; and 2) the levels of organic and inorganic materials presently found at the site are, or at any time in the past were, considered harmful to humans.

In its Motion to Dismiss the Fourth-Amended Complaint of plaintiff, Cole & Crane established that the plaintiff and her expert witnesses failed to produce even a mere scintilla of evidence establishing: 1) Cole & Crane was ever a record holder of title to the real property in question; 2) Cole & Crane owned and/or controlled defendant Colane; 3) Colane was a successor-in-interest to Cole & Crane; or 4) Cole & Crane was a joint venturer with any of the various entities that conducted mining operations in the area of the present-day situs of Omar Elementary School.

Plaintiff's Response to Colane's Motion for Summary Judgment consisted of four pages, which referenced: one separately filed Exhibit, an affidavit from Scott Simonton, Ph.D., plaintiff's retained expert environmental engineer; some materials that plaintiff failed to make part of the summary judgment record; and a citation to a decision from the United States District Court for the Northern District of Illinois, which found a genuine issue of material fact was created by an expert witness' affidavit in that case.

Plaintiff's Response to Cole & Crane's Motion to Dismiss contained nothing more than unsupported and, at times, incomprehensible rhetoric regarding allegations of joint venturers, sources of contamination at the site, strawman transactions,

concerns about well documented chains of title to real property and piercing the corporate veil of a non-corporate entity. Plaintiff's Response referenced five separately attached exhibits, which consisted of excerpts from the deposition testimonies of Messrs. Franklin, Chafin, Ferrell, Large and Luther Woods.

On July 15, 2009, the Circuit Court of Logan County entered Orders granting Colane's Motion for Summary Judgment and Cole & Crane's Motion to Dismiss, finding there was no genuine issue of material fact in controversy for the jury to decide and, accordingly, Colane and Cole & Crane were entitled to judgment as a matter of law.

Pursuant to West Virginia Rule of Civil Procedure 59(e), plaintiff filed her Omnibus Motion to Alter or Amend the judgments on July 27, 2009, which numbered 462 pages, including exhibits. On September 2, 2009, defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company filed a Motion to Strike plaintiff's Omnibus Motion, arguing that a Rule 59(e) Motion is not the proper vehicle to raise new arguments, or submit new evidence that could have been presented prior to summary judgment. Colane and Cole & Crane moved to join in and adopt the defendants' motion on September 4, 2009, and the Logan County Circuit Court heard arguments with respect to the Motion to Strike on September 14, 2009.

On September 10, 2009, defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company filed their

joint Response to plaintiff's Omnibus Motion to Alter or Amend. On September 21, 2009, Colane and Cole & Crane moved to join in and adopt co-defendant's joint Response.[4]

On December 14, 2009, plaintiff filed her Rule 60 Motion for Relief from Judgment Based on Newly Discovered Evidence. In her Motion, plaintiff argued that after the Court issued Orders on July 15, 2009, granting the defendants' dispositive Motions and extinguishing plaintiff's claims, she discovered the identity of an individual named Harvey Adkins, and the existence of a United States House of Representatives' subcommittee report criticizing the practices of the United States Agency for Toxic Substance & Disease Registry ("ATSDR") in unrelated site assessments.

Colane and Cole & Crane filed a joint Response to plaintiff's Rule 60 Motion on January 18, 2010, and the Court heard arguments regarding plaintiff's Rule 59(e) and Rule 60 Motions on February 18, 2010. By Orders entered March 31, 2010, the Court denied plaintiff's Motions and granted the defendants' Motion to

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[4] While the Response to plaintiff's Motion was styled as "Defendants Cole & Crane Real Estate Trust and Colane Corporation's Motion to Join in, and Adopt, Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company's Response to plaintiff's Omnibus Motion to Alter or Amend," the Certificate of Service and cover letter to the clerk improperly identified the document as "Defendants Cole & Crane Real Estate Trust and Colane Corporation's Motion to Join in, and Adopt, Section II, of Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company's Supplemental Memorandum in Support of Motion for Summary Judgment."

Strike Exhibits 3, 4, 5, 6, 7, 9, 12, 13, 14, 15, 16, 17 and 24 to plaintiff's Omnibus Motion to Alter or Amend.[5]

On July 30, 2010, plaintiff filed the Petition for Appeal of Norma Acord from Summary Judgment Order with this Honorable Court. In her Petition, the plaintiff erroneously asserts that the Logan County Circuit Court erred when it entered final judgment in favor of the defendants on March 31, 2010.[6] Plaintiff, however, did not challenge the Logan County Circuit Court's Order granting the defendants' Motion to Strike in her Petition for Appeal and, therefore, any issue plaintiff may have had with the Order granting defendants' Motion to Strike is forever waived.

ASSIGNMENT OF ERROR

The Circuit Court of Logan County committed no error when it entered final judgment in favor of Colane and Cole & Crane.

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[5] Exhibits 4, 5, 7 and 9 contained the entire deposition transcripts of Dr. Scott Simonton, Dawn Seeburger, Edgar Franklin and Raymond Chafin, respectively. In granting the defendants' Motion to Strike, the Court noted that certain portions of these witnesses' transcripts were submitted into the record at the dispositive motion stage by plaintiff and defendants, specifically: Simonton pages 85, 89, 115, 116 and 125-127; Seeburger pages 83, 84 and 121-123; Franklin pages 2-5, 14-17 and 74-81; and Chafin pages 2-8, 18-32 and 46-57. Accordingly, the Court carved out specific exceptions in its Order granting the defendants' Motion to Strike for the pages of deposition testimony that were accurately made part of the record at the dispositive motion stage.

[6] The Logan County Circuit Court actually entered final judgment in favor of the defendants on July 15, 2009. The March 31, 2010, date referenced by plaintiff in her Petition for Appeal was when the lower Court denied plaintiff's Rule 59(e) and Rule 60 Motions, and granted the defendants' Motion to Strike.

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STANDARD OF REVIEW

A *de novo* standard of review is utilized when reviewing a lower Court's entry of summary judgment. Syllabus Point 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994)

"Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith." Syllabus Point 1, *Estate of Robinson ex rel. Robinson v. Randolph County Com'n*, 209 W.Va. 505, 549 S.E.2d 699 (2001)

While the review of the record from a summary judgment proceeding is *de novo,* this Court will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion.
Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W.Va. 692, 700, 474 S.E.2d 872, 880 (1996)

Further, the *Powderidge* Court held, "Our review of a denial of a motion to reconsider is for an abuse of discretion." *Id.* at 705, 885.

DISCUSSION

I. Since plaintiff did not assign error to the Logan County Circuit Court's Order granting defendants' Motion to Strike exhibits to plaintiff's Omnibus Motion to Alter or Amend, this Court is prohibited from considering those exhibits on appeal.

The Petition for Appeal sets forth six assignments of error, excluding sub-parts.[7] None of the assignments of error address the Logan County Circuit Court's decision to grant defendant's Motion to Strike Exhibits 3, 4, 5, 6, 7, 9, 12, 13, 14, 15, 16, 17 and 24 to plaintiff's Omnibus Motion to Alter or Amend. By failing to challenge the lower Court's Order granting defendants' Motion to Strike, the plaintiff has waived any error she may have assigned to that portion of the Court's March 31, 2010, Order.[8]

Due to the Logan County Circuit Court's striking of these exhibits from the record, and plaintiff's decision to refrain from assigning error to that portion of the Order, this Court cannot consider those matters on appeal. In *Browning v. Halle*, 219 W.Va. 89, 632 S.E.2d 29 (2005), this Court was faced with a nearly identical situation after the Upshur County Circuit Court granted summary judgment in favor of the defendants. Plaintiffs responded by filing a Motion to Alter or Amend the Judgment pursuant to Rule

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[7] Petition at pp. 8-9.

[8] *See* Syllabus Point 3, *Higginbotham v. City of Charleston*, 157 W.Va. 724, 204 S.E.2d 1 (1974) *overruled on other grounds by, O'Neil v. City of Parkersburg*, 160 W.Va. 694, 237 S.E.2d 504 (1977).

59(e), which contained exhibits not made part of the record at the summary judgment stage. The lower Court struck the exhibits and plaintiffs appealed.

In affirming the Upshur County Circuit Court's Order, this Court held:

> After carefully reviewing the Appellants' motion to reconsider, we first find that Appellants based many of their arguments on the evidence they improperly sought to introduce after the grant of summary judgment and which *this Court will not consider*.

Id. at 96, 36. (emphasis added)

Further, in *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996), this Court resolved a situation where the appellant relied upon an affidavit that it failed to make part of the summary judgment record. The *Powderidge* Court held:

> In its argument to this Court, the plaintiff relies heavily on the affidavit of George Bell to support its position that there was a genuine issue of fact as to the statute of limitations. However, the affidavit was not made part of the summary judgment record. Although our review of the record from a summary judgment proceeding is *de novo*, this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. *To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling*.

Id. at 700, 880. (emphasis added)

Adhering to precedent, this Court must refuse to consider many of the references to plaintiff's Rule 59(e) Motion contained in her Petition for Appeal, including every citation to her expert

witnesses' deposition testimonies, *Curriculum Vitae*, reports and the ATSDR ToxFAQs. Eliminating these matters from the Court's review leaves the Court to consider plaintiff's references to the depositions of Messrs. Franklin, Chafin, Ferrell, Large and Woods, some miscellaneous photographs, an affidavit from plaintiff's expert Dr. Scott Simonton and a 1924 mineral lease involving Cole & Crane, which had no bearing upon issues presented by plaintiff in this matter.[9]

All of the aforementioned admissible items were evaluated by the Logan County Circuit Court at the dispositive motion stage in a light most favorable to plaintiff and, as discussed *infra*, the well-reasoned Circuit Court entered final judgment in favor of Colane and Cole & Crane. The lower Court committed no error when

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[9] Matters stricken by the lower Court's Order of March 31, 2010, which are discussed, and cited as footnotes in the Petition for Appeals are: Footnotes 1, 4-7, 34, 36, 39, 41, 42, 44-57, stricken in paragraph 15 of Order; Footnotes 25, 35, stricken in paragraph 19 of Order; Footnote 30, stricken in paragraph 13 of Order; Footnotes 27, 29, 32, stricken in paragraph 11 of Order; Footnotes 2 and 21, to the extent they cite Raymond Chafin depo. at p. 17, attached as Exhibit 9 to Rule 59(e) Motion, stricken in paragraph 18 of Order; Footnote 37, to the extent it cites Exhibit 19 to Rule 59(e) Motion, stricken in paragraph 20 of Order; and Footnote 40, stricken in paragraphs 15 and 19 of Order.

Further, in Footnote 60, reference is made to "Cole & Crane 30(b)(7)." While Mr. Montague's deposition transcript was not specifically stricken in the Court's Order of March 31, 2010, plaintiff did not make the transcript part of the record at the dispositive motion stage and should not be considered by the Court.

it entered judgment, and plaintiff's Petition for Appeal should be summarily denied.

II. The Circuit Court of Logan County did not commit error when it granted Colane's Motion for Summary Judgment.

Reviewing the evidence presented at the dispositive motion stage, the Logan County Circuit Court concluded correctly that plaintiff failed to satisfy her burden of proof on the allegations presented in her Fourth-Amended Complaint against Colane.

Reaching its decision, the lower Court found plaintiff alleged in the Fourth-Amended Complaint that the real property comprising the present day situs of Omar Elementary School was the former location of an industrial waste dump and municipal landfill (Fourth-Amended Complaint at para. 10), and that Colane assumed responsibility for the contaminants that were already present in the soils at the dump site when it acquired ownership of the property in 1954[10] [sic]. (*Id.* at para. 13)

Further, the Court found plaintiff's Fourth-Amended Complaint alleged that all of the defendants in this civil action "permitted, conducted, allowed and authorized the disposal of oil waste, pesticides, chemicals, toxins, PCBs, dioxins, transformers,

[10] The facts presented in this civil action clearly establish that Colane was incorporated on January 18, 1955, and took ownership of the real property in question on May 10, 1955. Accordingly, Colane did not own the real property in 1954, and plaintiff's statement to the contrary is in error.

batteries and other dangerous and deadly toxic waste in, on and around the Omar school and playgrounds." (*Id.* at para. 21) Plaintiff also alleged negligence on the part of Colane for ultimately selling the property in 1961 to the Logan County Board of Education "knowing it was to be used as a school." (*Id.* at para. 43)

The Court ordered that when a claim for negligence is presented, the plaintiff has the burden of proving a duty on the part of the person charged with negligence, and a breach of such duty. *Atkinson v. Harman*, 151 W.Va. 1025, 1031, 158 S.E.2d 169, 173 (1967) The Court stated that these elements of duty, breach and injury are essential to actionable negligence and in the absence of any of them the action must fail. *Id.*

Analyzing the testimony of the four fact witnesses plaintiff intended to utilize at trial, the Court concluded there was no evidence that causally connected the presence of any contaminant found at the Omar Elementary School site today, or in the past, with an act, or omission to act, by Colane. In order to satisfy the burden associated with her theory of negligence against Colane, the plaintiff was required to produce affirmative evidence establishing the dumping of specific contaminants found at the site today. Construing the facts presented in a light most favorable to the plaintiff, the Court found that the plaintiff failed to produce a fact witness who verified any specific contaminant discarded on

the property, which eliminated the plaintiff's ability to satisfy the breach of duty element. As stated in *Atkinson*, the absence of an element of negligence causes the action to fail.

The Court concluded that due to absence of factual evidence supporting plaintiff's claims of negligence against Colane, there was no genuine issue of material fact in existence upon which a reasonable jury could render a verdict in plaintiff's favor, and against Colane, on the issue of negligence and entered judgment accordingly.

Looking next to the plaintiff's counts of public nuisance and strict liability in her Fourth-Amended Complaint, the Court determined that those allegations failed for the same reason - lack of factual support.

Paragraph 46 of plaintiff's Fourth-Amended Complaint stated "The Defendants are strictly liable for any and all personal injuries caused by exposure to toxic substances emanating from its property in Chauncey." Further, paragraph 48 of plaintiff's Fourth-Amended Complaint stated, "The conduct of Defendants as set forth herein has created a public nuisance from which the Plaintiffs have derived special damages and demand abatement."

Reviewing the evidence submitted, the 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. The Court added that without testimony proving the

contaminants presently found at the site resulted from dumping specific products containing said contaminants, the plaintiff cannot proceed to the jury on questions of strict liability and public nuisance against Colane.

Due to plaintiff's failure to provide specific evidence supporting her allegations that toxic contaminants were disposed of on the Omar Elementary School site either before, or during, Colane's ownership of the property, the Court ordered there was no genuine issue of material fact in existence upon which a reasonable jury could render a verdict in plaintiff's favor, and against Colane, on the issues of public nuisance and strict liability.

Finally, the Court reviewed plaintiff's claim against Colane seeking establishment of a medical monitoring fund for the benefit of class members. Applying precedent established by this Court, the Logan County Circuit Court determined that plaintiff's claim for medical monitoring failed.

The lower Court correctly applied the standard established in Syllabus Point 3, *Bower v. Westinghouse Electric Corporation*, 206 W.Va. 133, 522 S.E.2d 424 (1999), which states:

> In order to sustain a claim for medical monitoring expenses under West Virginia law, the plaintiff must prove that (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through tortious conduct of the defendant; (4) as the proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations

> different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

According to *Bower*, a jury can award a grant of equitable relief in the form of medical monitoring only after finding that the plaintiff, relative to the general population, was significantly exposed to a proven hazardous substance through tortious conduct of the defendant, and as a proximate result of the exposure, the plaintiff suffered an increased risk of contracting a serious latent disease.

The Court reviewed reports issued by the West Virginia Department of Health and Human Resources ("DHHR"), in conjunction with the ATSDR, which clearly established that the allegations of wrongdoing presented by plaintiff against Colane were based upon local residents' suspicions and beliefs, which was an insufficient basis to deliver this matter to a jury for deliberation. Further, the Court found that the DHHR's February 3, 2005, report specifically stated there were no present, or future apparent public health hazzards at the site and "No public health recommendations are needed to keep people from being exposed to harmful amounts of chemicals found at the site."

The Logan County Circuit Court ordered that the statements contained within reports from these independent governmental agencies clearly defeated the plaintiff's allegations of toxic exposure, and prevented the plaintiffs from succeeding

upon a claim for medical monitoring under the first prong of the *Bower* factors.

In her Rule 59(e) Motion, Rule 60(b) Motion and Petition for Appeal, the plaintiff expended a significant amount of effort challenging the lower Court's reliance upon the governmental reports. Plaintiff argued that the Court improperly viewed the reports in a light most favorable to Colane and Cole & Crane, since plaintiff's retained experts challenged the accuracy of said reports. Plaintiff concluded that her expert witnesses' contradictory opinions created a question that only a jury could resolve, thereby making entry of summary judgment inappropriate.

The Logan County Circuit Court did not address plaintiff's concerns about the governmental reports in its Order denying plaintiff's Rule 59(e) Motion, but clearly disposed of plaintiff's argument in its Order denying the Rule 60 Motion for Relief from Judgment when it held:

> The Court stated in its Order granting Colane's Motion for Summary Judgment that the plaintiff was required to meet her burden of proof on each and every factor set forth in *Bower*, including factor three dealing with "tortious conduct of the defendant" and factor four pertaining to causation.
>
> Having previously found that the plaintiff failed to produce a genuine issue of material fact for the jury to consider against Colane on *Bower's* tortious conduct and causation requirements, the Court could have granted judgment in favor of Colane without any reference to the March 8, 2004, ATSDR report. Therefore, the plaintiff's statement in her Rule 60 Motion that the "Congressional ATSDR Report is vital and wholly relevant because it casts significant doubt upon the government reports upon

> which this Court relied in making its rulings,"[11] is not supported by the record.
>
> When this Court announced in paragraph 35 of the Conclusion of Law section in its Order granting Colane's Motion for Summary Judgment that "the plaintiff's claim against Colane seeking establishment of a medical monitoring fund for the benefit of class members fails under the first four prongs of *Bower* and, thereby renders the final two prongs moot," it could have easily written the paragraph to say plaintiff's claim fails under prongs three and four, making prongs 1, 2, 5 and 6 moot. In doing so, the Court would have never addressed the March 8, 2004, ATSDR report and still granted judgment in favor of Colane.[12]

Moving to the second *Bower* factor, which required plaintiff to prove exposure to a known, hazardous substance, the lower Court found that plaintiff failed to produce any evidence establishing the identity of materials discarded at the dump, which contained contaminants presently found at the site. The Court opined it was impossible to determine from the factual evidence on record if the contaminants presently found at site existed: before Colane owned the property; during Colane's ownership; or after Colane sold it. Additionally, the Court found that the DHHR conclusively stated in multiple reports that the present-day contaminants found at the school site did not pose a present, or future, public health threat.

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[11] Plaintiff's Rule 60 Motion for Relief from Judgment at p. 5.

[12] Order Denying Plaintiff's Rule 60 Motion for Relief from Judgment in favor of Defendants Colane Corporation and Cole & Crane Real Estate Trust at pp. 9-10.

Continuing in its analysis of the *Bower* factors, the lower Court correctly applied West Virginia's general negligence law in arriving at its decisions upon factor three, proof of tortious conduct on behalf of the defendants, and factor four, the establishment of causation. Having resolved plaintiff's theories of negligence in favor of Colane, which were extensively addressed in its Order, the Court ruled plaintiff could not satisfy her burden of proving tortious conduct and proximate causation against Colane; which eliminated any genuine issue of material fact for a reasonable jury to consider and caused plaintiff's claim for medical monitoring to fail under the third and fourth factors of *Bower*. The Court concluded that Colane was entitled to judgment as a matter of law on more than one *Bower* factor and, therefore, found it unnecessary to address factors five and six.

Attacking the Court's entry of final judgment in favor of Colane, the plaintiff continued in her efforts to subdue justice by way of an extensive, yet mostly inadmissable, Rule 59(e) Omnibus Motion to Alter or Amend. In her Motion, plaintiff established, once again, that she misconstrued the requirement for satisfying her burden of proof.

Responding to the Rule 59(e) Motion, Colane and Cole & Crane reasserted that the four fact witnesses who testified by deposition in this action failed to identify any specific product discarded at the dump, which contained any of the contaminants

identified in: plaintiff's Complaint; reports prepared by the United States Environmental Protection Agency ("EPA"), the DHHR and/or the ATSDR; or the reports prepared by plaintiff's expert witnesses.[13] Colane and Cole & Crane asked the Court to ignore the baseless allegations to the contrary, which were contained in plaintiff's Omnibus Motion to Alter or Amend.

In support of their position, Colane and Cole & Crane established that plaintiff stated on page 6 of her Omnibus Motion to Alter or Amend that fact witness Richard Large testified, "The drums contained oil products, specifically transformer oil and hydraulic oil." A careful review of Mr. Large's transcript, however, established he actually testified that the mines used "hydraulic oil and different types of oil," and he "guessed" the power plant used transformer oil, but he was unable to positively identify the oily residue remaining in the 55 gallon drums as a remnant of any of these specific examples, and admitted to being uncertain as to how the power plant disposed of its transformer oil.[14]

Further, plaintiff's Omnibus Motion to Alter or Amend devoted several pages to her interpretation of her retained expert witnesses' testimonies. None of her expert witnesses possessed any firsthand knowledge of the alleged dumping that occurred on the

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[13] Plaintiff's experts' reports were stricken in Order denying Rule 59(e) Motion. *See* fn. 9, *supra*.

[14] Large depo. at pp. 13-14, lines 19-1; p. 17, lines 14-19.

real property in question. While addressing these matters in response to Colane and Cole & Crane's dispositive motions, the lower Court correctly concluded that Dr. Simonton's affidavit was based entirely upon speculation. The plaintiff then offered additional justification, by way of her Rule 59(e) Motion, to support the lower Court's conclusion that the content of Dr. Simonton's affidavit was speculative.

On pages 19 and 20 of her Rule 59(e) Motion, the plaintiff provided excerpts from Dr. Simonton's deposition where he stated:

> [T]hose are two industries that *would have* used PCB-contaminated oil in a time period in which it was *very commonly used*...; *I would think*, I would certainly - everything that went into the maintenance shop that was wasted went to - *could have or - I don't know that 100 percent of it did*, but a lot of that went into the dump...; Well, *I mean it's a general understanding of what happens in maintenance shops* of any kind...those fluids *likely would have contained* PCB's, et cetera. So That's what I'm basing it on.

(emphasis added)

Colane and Cole & Crane successfully argued that Dr. Simonton's thoughts, general understandings, could haves, should haves and would haves, were not enough to overturn the lower Court's well-reasoned rulings granting their dispositive motions. Dr. Simonton's references to events based solely upon his own surmise, speculation and conjecture, did not create genuine issues of material fact. As stated in *Jones v. Garnes*, 183 W.Va. 304, 306, 395 S.E.2d 548, 550 (1990), "In order to be admissible, an

expert's testimony needs to have a factual basis, which may be derived from personal observation..." Dr. Simonton did not personally observe any dumping that occurred at the site prior to 1961, or at any other time, and the fact witnesses failed to provide the needed factual basis for his opinions. Based on the foregoing, the lower Court was correct when it deemed the opinion contained in Dr. Simonton's affidavit as "rank speculation."[15]

Plaintiff's Rule 59(e) Motion was replete with mis-characterizations and gross exaggerations of the fact witnesses' testimonies, along with overreaching/unsupported opinions from Dr. Simonton. At the dispositive motion stage, the lower Court was presented with actual quotations from, and citations to, the fact witnesses' deposition transcripts in Colane and Cole & Crane's motions. Exerting due diligence and the proper application of law, the lower Court navigated through plaintiff's unsupported, misconstrued, and sometimes incoherent claims, to appropriately rule in Colane and Cole & Crane's favor. Colane and Cole & Crane now pray rational thought continues to prevail, and that this Honorable Court denies the Petition for Appeal.

III. The Circuit Court of Logan County did not commit error when it granted Cole & Crane's Motion to Dismiss.

[15] Exhibit 8 to plaintiff's Rule 59(e) Motion.

Reviewing the evidence presented at the dispositive motion stage, the Logan County Circuit Court concluded correctly that plaintiff failed to satisfy her burden of proof on the allegations presented in her Fourth-Amended Complaint against Cole & Crane.

Reaching its decision, the lower Court found Paragraph 4 of the Fourth-Amended Complaint alleged, "The Defendant, Cole and [sic] Crane Real Estate Trust, a West Virginia trust, previously owned the property comprising Omar Elementary, Chauncey and other properties in the Island Creek Watershed." In addition, the Court noted that during a status conference on November 22, 2005, the plaintiffs elected to limit their inquiries of toxic exposure in this action to the parcels of real property that comprised Omar Elementary School and the immediate surrounding areas, such as the playground and ballpark. Accordingly, the Court ruled the allegations in plaintiff's Fourth-Amended Complaint that Cole & Crane previously owned parcels of property comprising Chauncey and other properties in the Island Creek watershed are overbroad and had no bearing upon the real issues in controversy.

The Court went on to state that plaintiff failed to produce even a mere scintilla of evidence in response to Cole & Crane's Motion to Dismiss, which substantiated her allegation that Cole & Crane previously owned the property comprising Omar Elementary School, or the immediate surrounding areas. In reaching

its conclusion, the Court referenced the affidavit of Phillip G. Montague, president of Colane, which was submitted as an exhibit to Cole & Crane's Motion to Dismiss. Mr. Montague clearly established, through un-refuted testimony, that Cole & Crane never owned any portion of the real property in question.

Plaintiff attempted to discredit Mr. Montague's affidavit citing *Belcher v. Powers*, 212 W.Va. 418, 573 S.E.2d 12 (2002), for the proposition that deeds and plat maps are to be read together when resolving issues concerning the ownership of real property. Plaintiff claimed that even though Cole & Crane was not listed in any deed as the record title owner of the real property in question, the presence of Cole & Crane's name upon the plat maps attached to the 1961 and 1967 Deeds created a genuine issue of material fact concerning ownership of the real property, and should be resolved by the jury.

The Court found that the allegations presented against Cole & Crane in this action differed significantly from the issues presented in *Belcher*. The *Belcher* Court held that ambiguous language contained within a deed was sufficient to place a prudent person on notice of need to attempt to locate and examine the plat map as a source of information concerning the title to property. To the contrary, Mr. Montague's affidavit proved there was no ambiguous language contained within the deeds reflecting the chain of title to the real property in question. The lower Court

correctly concluded that the language set forth in the deeds controlled in this matter and there was absolutely no factual support for plaintiff's proposition that Cole & Crane was a record owner of the property.

Since the plaintiff failed to come forth with any affidavits of her own rebutting Mr. Montague's testimony, the lower Court found and declared that Cole & Crane was never a record owner of the real property in question. Further, the lower Court found and declared, based upon the research conducted by Mr. Montague and the evidence set forth in his affidavit, that the placement of Cole & Crane's name upon the plat maps was in error. Accordingly, the Court Ordered that Cole & Crane could not be liable to plaintiff for any amount, or for any reason set forth in the Fourth-Amended Complaint, since it never owned any of the parcels of real property, which plaintiff alleged to be contaminated and was entitled to judgment as a matter of law against plaintiff, with prejudice.

Plaintiff continued in her attempts to assert a cause of action against Cole & Crane by alleging Colane was a successor-in-interest to Cole & Crane as an owner of the real property in question, and Cole & Crane owned and controlled defendant Colane. The lower Court concluded that neither assertion was supported by the record.

Defining "successor-in-interest," the Court referred to *Black's Law Dictionary* (8th ed. 2004), which defined the phrase as "One who follows another in ownership or control of property." The Court concluded that since Cole & Crane never owned title to the real property in question, Colane could not be a successor-in-interest to Cole & Crane, and ruled in its favor.

Further, the Court recognized that Defendant Colane Corporation was formed on January 18, 1955, as a Delaware Corporation, and was registered to do business in West Virginia that same date. It determined from the evidence that Colane was a closely-held private corporation with its own board of directors and shareholders, and its present-day primary function is the operation of a subsidiary, Colane Cable TV, Inc., which supplies cable television service to its subscribers in southern West Virginia. The lower Court ruled that the Cole & Crane Real Estate Trust never owned any shares of Colane and, according to the non-rebutted evidence presented by Cole & Crane, the trust's Federal tax status as a pass-through entity would be jeopardized if it did own shares of Colane, or any other public or private company for that matter.

Based upon this evidence, the Logan County Circuit Court correctly found there were no genuine issues of material fact to be resolved by a reasonable jury in this action concerning plaintiff's unsupported allegations that Colane was a successor-in-interest to

Cole & Crane as an owner of the real property in question, or that Cole & Crane owned and controlled defendant Colane, and entered final judgment in favor of Cole & Crane on these issues.

Finally, the lower Court addressed plaintiff's citations to several cases, including references to dissenting opinions, in which she attempted to support her allegation that Cole & Crane was liable in this action as a joint venturer with the various entities that conducted coal mining operations, coal mine repair shops and power plant operations in the vicinity of the real property in questions, which led to the property's contamination. The Court found that the cases cited by plaintiff in her Response to Cole & Crane's Motion to Dismiss were clearly distinguishable from the matters at issue in this action, and failed to produce evidence of a genuine issue of material fact for a reasonable jury to resolve.

The Court ruled the evidence put forth in the record established that Cole & Crane was a liquidating land trust and its primary function was the leasing of real property, timber and mineral rights, in order to collect rental and/or royalty payments from its lessees. Further, the Court noted that plaintiff admitted in her Response to Cole & Crane's Motion to Dismiss that Cole & Crane "never opened a portal, negotiated with a union or shipped a single ton of coal." (Response at p. 5)

Resolving the issue regarding plaintiff's joint-venturer allegation, the lower court relied upon this Court's holding in

West Virginia Division of Environmental Protection v. Kingwood Coal Company, et al., 200 W.Va. 734, 490 S.E.2d 823 (1997). In *Kingwood*, this Court affirmed a ruling of the West Virginia Surface Mine Board, which found a lessor of mineral rights was not a joint venturer with it lessee due to the fact that the lessor did not possess the right to control the lessee, nor did the lessor have actual authority to determine the manner in which the lessee conducted its mining operations. *Id.* at 740, 829

The lower Court ruled that, according to the precedent established in *Kingwood*, the plaintiff was required to put forth evidence of a genuine issue of material fact in response to Cole & Crane's Motion to Dismiss, establishing Cole & Crane had the actual authority to control and/or determine the manner in which its lessees conducted their mining operations in the area of Omar Elementary School, in order for Cole & Crane to be deemed a joint venturer.

The plaintiff's response to the Court's directive was the creation of fanciful stories regarding corrupt land and mineral barons, and the production of a 1924 mineral lease between Cole & Crane and Hutchinson Island Creek Coal Corporation, which: is not a party to this action; may have never mined an ounce of coal or cut one piece of timber from Cole & Crane's properties; and/or dumped any contaminant on or near the present day situs of Omar Elementary School. Providing no credible evidence to refute the

record made by Cole & Crane, or otherwise establish the existence of a material issue of genuine fact in dispute regarding her allegation that Cole & Crane asserted control over its mineral lessees in the area of Omar Elementary School, the lower Court ordered final judgment in favor of Cole & Crane.

Cole & Crane prays this Honorable Court will affirm the decision of the Logan County Circuit Court, and deny the Petition for Appeal.

IV. The Circuit Court of Logan County did not commit error when it denied plaintiff's Rule 60 Motion.

After plaintiff tendered her Rule 59(e) Motion to the Court, she attempted to supplement the Motion with additional exhibits and arguments regarding newly discovered evidence. The lower Court opined that it was improper to supplement a Rule 59(e) Motion after the 10-day filing period expired, and instructed plaintiff to tender her additional arguments and exhibits in a Rule 60(b) Motion. Plaintiff acquiesced, and filed her Motion on December 14, 2009.

In the Rule 60 Motion, plaintiff argued that after the Court issued Orders on July 15, 2009, granting Colane and Cole & Crane's dispositive Motions, she discovered the identity of an individual named Harvey Adkins, and the existence of United States House of Representatives' subcommittee report criticizing the practices of the ATSDR in unrelated site assessments. Plaintiff claimed the information was not available at the time she responded

to the defendants' dispositive Motions, and should be considered by the Court in assessing her request of relief from final judgment. The Court found plaintiff's Motion, and its extensive amount of exhibits, failed to produce any new evidence, which would cause it to alter and/or disturb its Orders of July 15, 2009.

In arriving at its decision, the Court found that on June 25, 2009, Colane brought on for hearing its Motion for Summary Judgment, while Cole & Crane brought its Motion to Dismiss. Following extensive oral arguments by counsel on those matters, the Court issued separate Orders on July 15, 2009, granting the respective dispositive motions, finding that plaintiff failed to satisfy her burden of proving the existence of a genuine issue of material fact for the jury to consider.

After final judgment was entered in favor of Colane and Cole & Crane, plaintiff filed her Rule 60 Motion for Relief from Judgment on December 14, 2009, Colane and Cole & Crane filed a joint response on January 18, 2010, and plaintiff filed a Reply on January 29, 2010.

After carefully reviewing the plaintiff's Rule 60 Motion for Relief from Judgment and its accompanying exhibits, the Response, Reply and after listening to the arguments of counsel, the Court found that plaintiff failed to proffer any evidence by way of her Motion, which entitled her to relief from the Final Judgment Orders entered in favor of Colane and Cole & Crane.

In formulating its Order, the Court first addressed the issue of determining whether the testimony of Harvey Adkins and/or the Congressional ATSDR report should be classified as "newly discovered" evidence, pursuant to West Virginia Rule of Civil Procedure 60(b)(2) and precedential case law. The lower Court reviewed the plaintiff's submission in accordance with the precedent established in *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996), where this Court held:

> To come within the "newly discovered" evidence rule, the plaintiff at a minimum must show that the evidence was discovered since the adverse ruling and that the plaintiff was diligent in ascertaining and securing this evidence. By this, we mean that the new evidence is such that due diligence would not have permitted the securing of the evidence before the circuit court's ruling.

Id. at fn 25.

While the plaintiff claimed in her Motion that she acted with due diligence in her search for fact witnesses, the lower Court opined that the record clearly established plaintiff noticed the depositions of four fact witnesses prior to the summary judgment stage: Edgar Franklin and Raymond Chafin on September 17, 2004; Carew Ferrell on January 10, 2006; and Richard Large on April 4, 2006.[16] Plaintiff did not notice any other depositions of fact

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[16] In addition, plaintiff also secured the deposition testimony of Luther Woods on December 28, 2006. While counsel for plaintiff identified Mr. Woods as a "fact witness" during a hearing on June 9, 2009, Mr. Woods' testimony focused upon: the history of the transfer real property between West Virginia Coal & Coke to Tom Stark; the

witnesses between April 4, 2006, and July 15, 2009 - the date when the Logan County Circuit Court entered final judgment in favor of Colane and Cole & Crane.

Further, the lower Court stated that during the 39-month period between the last fact witness deposition secured by plaintiff and the entry of final judgment, counsel for plaintiff urged the Court at every opportunity to schedule the matter for trial. The record established that it was not until after the Court granted defendants' dispositive motions that counsel for plaintiff claimed his diligent efforts to locate additional fact witnesses resulted with the identification of Harvey Adkins.

The Court ruled it was evident from the record that plaintiff believed the testimonies of Messrs. Franklin, Chafin, Large and Ferrell were sufficient to survive the summary judgment stage and she ceased any efforts to discover additional fact witnesses. Accordingly, the Court found no support for plaintiff's allegation in her Motion for Relief from Judgment that she acted diligently in her efforts to discover the identity of Harvey Adkins. Pursuant to *Powderidge*, the Court Ordered that plaintiff did not satisfy the minimum threshold requirement necessary to label Mr. Adkins' testimony as "newly discovered" evidence.

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formation of Colane; and Tom and Iola Stark's transfer of said real property to Colane. Further, his testimony provided a detailed history concerning the creation of the Cole & Crane Real Estate Trust and his understanding of Colane's general nature of business when it was incorporated in 1955.

Additionally, the lower Court found that the Congressional ATSDR report addressed in plaintiff's Motion, which spoke for itself, indicated it was published on March 10, 2009 - more than three months before the hearings on the dispositive motions, and more than four months before entry of the Orders granting said motions. The Court, in denying the Motion, ruled that plaintiff possessed the burden of gathering facts and evidence necessary to prove her case, and since the Congressional ATSDR Report was a matter of public record available to plaintiff in advance of the hearings on the dispositive motions, she failed to establish that she was diligent in ascertaining and securing the evidence.

The lower Court added, however, that regardless of whether the plaintiff was diligent in ascertaining and securing the identity of Harvey Adkins and a copy of the Congressional ATSDR report, neither of those matters provided the Court with a basis to overturn the Final Judgment Orders entered in favor of Colane and Cole & Crane.

Addressing the substance of Mr. Adkins' testimony, the lower Court found that Mr. Adkins worked at the mine machinery repair shop in Omar, West Virginia, from 1951 *until* 1955. In the Orders granting Colane's Motion for Summary Judgment and Cole & Crane's Motion to Dismiss, the Court found that Colane acquired

ownership of the real property in question on May 10, 1955, and that Cole & Crane never possessed an ownership interest therein.

Further, the Court stated the testimony gathered from Mr. Adkins' affidavit and deposition left no doubt that he was unable to identify the exact time in 1955 when his employment at the Omar shop was terminated. Accordingly, plaintiff failed to satisfy her burden of proving that Mr. Adkins' employment at the Omar shop coincided with Colane's acquisition of the real property in question, which occurred on May 10, 1955.

Further, the Court determined in its Judgment Order granting Cole & Crane's Motion to Dismiss that: Cole & Crane was not in the chain of title concerning the real property in question; Colane was never a successor-in-interest to Cole & Crane; and Cole & Crane could not be liable in this action as a joint venturer with any other entity. Mr. Adkins' testimony failed to allege any basis as to why the Court's Judgment Order in favor of Cole & Crane should be overturned.

The Court went on to note Mr. Adkins testified that he only traveled to the dump on two to three occasions during his tenure as an employee at the mine machinery repair shop, when he assisted another shop employee in flushing a calcium carbide tank used by the shop to power acetylene torches. Mr. Adkins added that he did not know if any waste from the shop, be it in the form of scrap metal, hoses, hydraulic fluid, cleaning fluids, oil or any other substance, was ever discarded at the dump. Accordingly, Mr.

Adkins' testimony failed to create a genuine issue of fact for the jury to resolve and, therefore, did not provide the lower Court with a basis for overturning final judgment entered in favor of defendants Colane and Cole & Crane.

Addressing the plaintiff's issues concerning the Congressional ATSDR report, the Court found that in granting defendant Cole & Crane's Motion to Dismiss, the corresponding Order never referenced the March 8, 2004, ATSDR report, of which plaintiff complained. Therefore, plaintiff's evidence concerning the criticisms of the ATSDR found in the March 10, 2009, Congressional report failed to create a genuine issue of material fact for the jury to consider against defendant Cole & Crane, and the final judgment entered in its favor must stand.[17]

Based upon the foregoing, the lower Court determined that even if it deemed the testimony of Harvey Adkins and the Congressional ATSDR report to be "newly discovered" evidence pursuant to West Virginia Rule 60(b)(2) and the applicable case law, the admission of said evidence into the record would fail to prove the existence of even a mere scintilla of evidence in opposition to Colane and Cole & Crane's dispositive motions. Accordingly, plaintiff's Rule 60 Motion for Relief from Judgment was denied, with prejudice to the plaintiff. The lower Court

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[17] Discussion of the lower Court's resolution of the plaintiff's arguments concerning its reliance upon the ATSDR report in granting Colane's Motion for Summary Judgment was addressed in Section II, *supra*.

committed no error, and did not abuse it discretion, when it denied plaintiff's Rule 60 Motion.

For the same reasons, Colane and Cole & Crane pray this Honorable Court will affirm the decision of the Logan County Circuit Court, and deny the Petition for Appeal.

REQUEST FOR RELIEF

Your respondents, Colane Corporation and Cole & Crane Real Estate Trust, respectfully request that this Honorable Court deny the Petition for Appeal and allow the Orders granting Colane's Motion for Summary Judgment and Cole & Crane's Motion to Dismiss, entered by the Circuit Court of Logan County on July 15, 2009, to remain undisturbed.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NORMA ACORD, a West Virginia resident,

Petitioner and class representative,

v.

NO.: _____
(Civil Action No. 04-C-151
Circuit Court of Logan County)

COLANE COMPANY, a West Virginia corporation, individually and successor-in-interest to Cole & Crane Real Estate Trust; COLE & CRANE REAL ESTATE TRUST, a West Virginia Trust; LOGAN COUNTY BOARD OF EDUCATION, a West Virginia public body; WEST VIRGINIA COAL & COKE COMPANY, a West Virginia Corporation; OMAR MINING COMPANY, a West Virginia Corporation, individually and a successor-in-interest to West Virginia Coal & Coke Company; A.T. MASSEY COAL COMPANY, a West Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company; MASSEY ENERGY COMPANY, a Virginia corporation, individually and as a successor-in-interest to West Virginia Coal & Coke Company,

Respondents.

CERTIFICATE OF SERVICE

The undersigned, of counsel for respondents Colane Corporation and Cole & Crane Real Estate Trust, does hereby certify that the foregoing Colane Corporation and Cole & Crane Real Estate Trust's Response to Petition for Appeal, was this day served upon counsel of record by mailing a true copy of the same this date, postage prepaid, to:

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Done this 30th day of August, 2010.

Respectfully submitted,

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