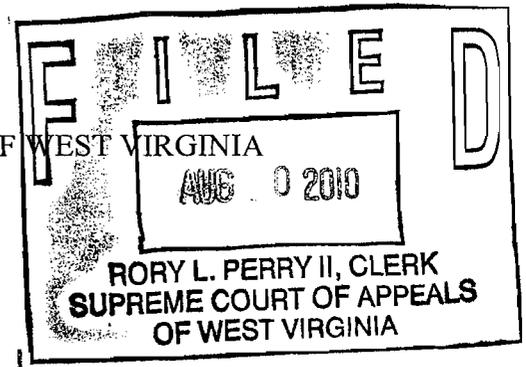


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NORMA ACORD,  
West Virginia Residents,  
Plaintiffs and Class Representatives,

Plaintiff/Petitioner,

v.

Appeal No. \_\_\_\_\_  
Civil Action No. 04-C-151-O  
Circuit Court of Logan County

COLANE COMPANY, a West Virginia corporation, individually and as a successor-in-interest to Cole & Crane Real Estate Trust; COAL & 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 as 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; RICHARD FRY, a West Virginia resident, individually,

Defendants/Respondents.

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**RESPONSE OF OMAR MINING COMPANY, A.T. MASSEY COAL COMPANY, INC.,  
AND MASSEY ENERGY COMPANY TO PETITION FOR APPEAL**

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## I. INTRODUCTION

This 2004 civil action arises from alleged conduct that occurred between fifty and ninety years ago in Logan County, West Virginia. Petitioner alleged that from the 1920s through the 1950s, a tract of land along Island Creek in or around the town of Chauncey was used as a local garbage dump. Subsequently, in the 1960s, the Logan County Board of Education acquired this tract of land and constructed a school on it, which today is known as Omar Elementary School. Petitioner alleged that, as a result of the Omar School being constructed on the same land that was previously used as a garbage dump, individuals that attended and/or worked at the Omar School were at an increased risk of contracting cancer.

It was undisputed that neither Omar Mining Company, A.T. Massey Coal Company, Inc., nor Massey Energy Company ever owned the property in question. Petitioner's claim against Omar Mining Company ("Omar Mining") was based entirely upon the fact that Omar Mining, among many others, was an alleged user of the garbage dump during the 1950s. Petitioner's claims against A.T. Massey Coal Company, Inc. ("A.T. Massey") and Massey Energy was based upon their status as parent companies of Omar Mining and/or as alleged successors-in-interest to the garbage dump's previous owner, West Virginia Coal & Coke Company.

In her Petition for Appeal, Petitioner asserts that this case turns on the lower court's "improper weighing of expert scientific evidence and failure to view fairly drawn inferences in the light most favorable to the Petitioner." (Petition for Appeal at p.3). To the contrary, summary judgment was granted because there was a complete lack of proof against Omar Mining, A.T. Massey, and Massey Energy Company. Despite having nearly five years to develop facts to support the bare allegations in her Complaint, Petitioner was remarkably unsuccessful. The lower court correctly recognized not only Petitioner's lack of evidence, but the utter lack of a legal basis for Petitioner's claims.

In her Petition for Appeal, Petitioner only continues the same practice as she did below before the lower court: making bold and sweeping assertions that have no factual support in the record, and all the while ignoring the West Virginia Rules of Civil Procedure. Just as the lower court did, this Court should see through this tactic and refuse the Petition for Appeal.

## **II. KIND OF PROCEEDING AND NATURE OF RULING BELOW**

The Petition for Appeal arises from a 2004 civil action filed in the Circuit Court of Logan County, West Virginia. Petitioner represented a class of individuals comprised of the current and former students and staff of Omar Elementary School. As set forth above, Petitioner alleged individuals that attended and/or worked at the Omar School were at an increased risk of contracting cancer due to the property's prior use as a garbage dump from the 1920s through the 1950s.

On June 5, 2009, Defendant Omar Mining Company's Motion for Summary Judgment and Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment were filed. On July 16, 2009, the lower court granted summary judgment in favor of, among others, Omar Mining, A.T. Massey, and Massey Energy Company.

On July 27, 2009, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, Petitioner filed Plaintiff's Omnibus Motion to Alter or Amend Orders Granting the Motion to Dismiss of Cole & Crane Real Estate Trust and Motions for Summary Judgment of Colane Corporation, Omar Mining Corporation and Massey Energy Company and A.T. Massey Coal Company, Inc. However, in her Omnibus Motion to Alter or Amend, Petitioner attached hundreds of pages of exhibits that were not submitted and made part of the record at the summary judgment stage. As a result, on September 2, 2009, Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company's Motion to Strike was filed. The Motion to Strike was subsequently joined in, and adopted by, Colane Corporation and Coal & Crane Real Estate Trust.

On December 14, 2009, pursuant to Rule 60(b)(2) of the West Virginia Rules of Civil Procedure, Petitioner filed Plaintiff's Rule 60 Motion for Relief from Judgment Based on Newly Discovered Evidence. Petitioner claimed that she had discovered an additional witness, Harvey Adkins, that would provide further factual support for her experts' opinions. Petitioner also submitted as newly discovered evidence a March 2009 congressional subcommittee staff report concerning the Agency for Toxic Substances and Disease Registry, a federal public health agency under the United States Department of Health and Human Services.

On March 31, 2009, the lower court entered an Order granting in part and denying in part Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company's Motion to Strike and denying Plaintiff's Omnibus Motion to Alter or Amend. That same day, the lower court also entered an Order denying Plaintiff's Rule 60 Motion for Relief from Judgment Based on Newly Discovered Evidence.

On July 30, 2010, Petitioner filed her Petition for Appeal. Petitioner asserts the lower court erred in granting summary judgment in favor of Omar Mining, A.T. Massey, and Massey Energy Company.<sup>1</sup> Petitioner also asserts the circuit court erred in denying her Rule 60 Motion for Relief from Judgment Based on Newly Discovered Evidence.

### **III. STATEMENT OF FACTS**

#### **A. HISTORICAL BACKGROUND.**

##### **1. 1920-1954: Coal & Coke's Operations in the Island Creek Valley.**

West Virginia Coal & Coke Company ("Coal & Coke") was a West Virginia corporation that, beginning in the 1920s, engaged in the business of mining coal in the Island Creek Valley in Logan County, West Virginia. (Depo. Woods 20:11-16, attached as Exhibit A to

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<sup>1</sup> Petitioner also asserts the lower court erred in granting Colane Corporation's Motion for Summary Judgment and Cole & Crane Real Estate Trust's Motion to Dismiss.

Defendant Omar Mining Company's Motion for Summary Judgment). Coal & Coke did not own the land upon which it mined. Instead, Coal & Coke mined the coal pursuant to a lease with the landowner, Cole & Crane Real Estate Trust ("Cole & Crane").

Coal & Coke's property interests in the Island Creek Valley were not limited to its mining leasehold. Incidental to its coal mining operations, as was common then, Coal & Coke had a "company town." The town included, among other things, houses for its miners and a coal-fired power plant to provide electricity. (Depo. Woods 30:9-15). The town also included a general store owned by Junior Mercantile Company ("Junior Mercantile"), a subsidiary of Coal & Coke.

## **2. 1954: Coal & Coke's Exit From the Island Creek Valley.**

In 1954, Coal & Coke sought to get out of the coal mining business, wanting to focus on its Ohio River barge operations. (Depo. Woods 22:16-23:2). As a result, on July 14, 1954, Coal & Coke surrendered all of its leasehold in the Island Creek Valley properties back to Cole & Crane. (7/14/54 Deed of Surrender, attached as Exhibit B to Defendant Omar Mining Company's Motion for Summary Judgment; Depo. Woods 21:3-23:2). Following this, another entity was sought to which to lease the mining rights. Cole & Crane entered into a lease with Omar Mining that gave Omar Mining the right to mine coal from the lands owned by Cole & Crane. (1/2/55 Lease, attached as Exhibit C to Defendant Omar Mining Company's Motion for Summary Judgment; Depo. Woods 22:16-23:20).

In addition to the surrender of its lease, Coal & Coke sold its other assets in the Island Creek Valley. Coal & Coke's coal-fired power plant was sold to an individual by the name of Joe Fish. (Depo. Woods 40:7-15). Coal & Coke transferred the ownership of all of its land interests in Logan County, including the company homes and the land on which they sat, to Colane Corporation ("Colane"). (12/13/54 Deed, attached as Exhibit D to Defendant Omar Mining Company's Motion for Summary Judgment; Depo. Woods 39:1-23, 50:11-23). Colane then took

over the responsibility for management of the homes, collection of rent, etc. (*See Depo. Woods 52:8-12*).

Coal & Coke sold the assets relating to its mining operation, such as mining equipment, to Omar Mining. (Minutes from 12/13/54 Meeting of Board of Directors of Omar Mining at pp.2, 5-6, attached as Exhibit E to Defendant Omar Mining Company's Motion for Summary Judgment). Coal & Coke then continued in its other business endeavors outside of the Island Creek Valley. (*Depo. Woods 22:16-23:2*).

According to West Virginia Secretary of State Records, Coal & Coke subsequently changed its name to Midland Enterprises, Inc. ("Midland"). (W.Va. Secretary of State Records for Coal & Coke, attached as Exhibit A to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc. and Omar Mining Company's Motions for Summary Judgment). Coal & Coke, now known as Midland, then continued in the operation of its barge line. (*Depo. Woods 22:16-23:2*).

In fact, focusing on its shipping and barge operations, not only did Midland continue in existence, it became a substantial corporation. For example, according to a 1995 filing with the Securities and Exchange Commission ("SEC"), Midland was "primarily engaged through wholly-owned subsidiaries in the operation of a fleet of towboats, tugboats and barges, principally on the Ohio and Mississippi Rivers and their tributaries, the Gulf Intercoastal Waterway and in the Gulf of Mexico." (SEC 10-K405 at p.6, attached as Exhibit L to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc. and Omar Mining Company's Motions for Summary Judgment). The SEC filing contains financial statements of Midland, which reveal that as of 1995, Midland's total asset value exceeded \$425,000,000. (SEC 10-K405 at pp.24-31).

A.T. Massey never had any ownership interest in Coal & Coke, either before or after its name change to Midland.

### **3. Coal & Coke II**

In April 1956, a new, separate West Virginia Coal & Coke Corporation ("Coal & Coke II") was incorporated. (W.Va. Secretary of State Records for Coal & Coke II, attached as Exhibit H to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc. and Omar Mining Company's Motions for Summary Judgment). The corporate records make clear that Coal & Coke II was formed solely to protect the trade name of "West Virginia Coal & Coke" following the purchase of assets from Coal & Coke, now Midland. (Coal & Coke II Minute Book at pp.27-28, attached as Exhibit I to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc. and Omar Mining Company's Motions for Summary Judgment). Coal & Coke II had no employees and never conducted any business activity. (5/25/64 Ltr. from E. Morgan Massey to G. Thomas Battle, attached as Exhibit J to Supplemental Memorandum in Support of Defendants Massey Energy

Company and A.T. Massey Coal Company, Inc. and Omar Mining Company's Motions for Summary Judgment). It was subsequently dissolved in May 1964. (W.Va. Secretary of State Records for Coal & Coke II).

**B. THE OMAR SCHOOL SITE.**

The tract of land where the Omar School was constructed and sits today was originally owned by Coal & Coke from the 1920s up until 1954. During this time period, the property was purportedly used as a local garbage dump. Garbage was allegedly dumped there from the homes in the Coal & Coke company town, the Junior Mercantile store, and other locations.

The property on which the garbage dump was located was part of the 1954 transaction between Coal & Coke and Colane in which Coal & Coke transferred to Colane all of its land interests in Logan County. (12/13/54 Deed; Depo. Woods 39:1-23, 50:11-23). According to the plaintiff, the property continued to be used as a local garbage dump until about 1961, at which time Colane transferred the property to the Logan County Board of Education ("Board of Education"). (8/15/61 Deed, attached as Exhibit I to Defendant Omar Mining Company's Motion for Summary Judgment). The Omar School opened on the site in 1964.

Beginning in 2003, in response to residential reports and inquiries, the United States Environmental Protection Agency ("EPA") and the West Virginia Department of Health and Human Resources ("DHHR") began a series of environmental testing at various sites in and around the town of Chauncey, West Virginia. The EPA and DHHR collected water, soil, and sediment samples from private residences, Island Creek, the UPS facility, the former coal-fired power plant, and the Omar School. In both Health Consultations, the EPA and DHHR concluded that there was no public health hazard from any of the sites tested, including the Omar School.

**C. PETITIONER'S CLAIMS AGAINST OMAR MINING, A.T. MASSEY AND MASSEY ENERGY.**

On May 10, 2004, despite the government's findings, Petitioner<sup>2</sup> commenced a class action suit against Colane and the Board of Education. The suit was brought on behalf of current and former students and staff of the Omar School, alleging that the students and staff were exposed to harmful levels of contaminants as a result of past dumping activities that occurred on the property where the Omar School was built. It was not until years later, when the Fourth Amended Complaint was filed, that Omar Mining, A.T. Massey, and Massey Energy were brought into the litigation.

With respect to Omar Mining, Petitioner alleged that Omar Mining was liable because of direct actions it took in polluting the future school grounds from 1954 until the Board of Education purchased the property in 1961. (*See* Fourth Am. Compl. ¶¶ 7, 14). With respect to A.T. Massey and Massey Energy Company, Petitioner alleged they were liable as successors to Coal & Coke I. (*See* Fourth Am. Compl. ¶¶ 6-8). Petitioner also alleged that A.T. Massey and Massey Energy Company's status as parent companies of Omar Mining rendered them liable for any acts or omissions of Omar Mining. (*See* Fourth Am. Compl. ¶¶ 6-8).

**D. THE FACT WITNESS TESTIMONY.**

Petitioner's case was based upon the fact witness testimony of four individuals: Ray Chafin, Edgar Franklin, Richard Large and Carew Ferrell.

As an initial matter, three of the four fact witnesses had no testimony relevant to Omar Mining. First, Edgar Franklin's testimony only referred to the time period Coal & Coke I was

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<sup>2</sup> The original named plaintiffs and class representatives were Carlene Mowery, Edgar Franklin, and Connie Keith. The current plaintiff, Norma Acord, was substituted as plaintiff and class representative via the Fourth Amended Complaint.

in operation. (*See* Depo. Franklin at pp.14-16, attached as Exhibit A to Motion for Summary Judgment of Colane Corporation). Omar Mining was not even mentioned in the entire deposition.<sup>3</sup>

Second, as for Mr. Chafin, he worked for Coal & Coke until 1954. (Depo. Chafin at pp.31-32, attached as Exhibit A to Motion for Summary Judgment of Colane Corporation). Mr. Chafin never worked for Omar Mining and offered no testimony as to what Omar Mining allegedly dumped on the site. In fact, Mr. Chafin testified that the property ceased being used as a local dump by the time Omar Mining began operations. (Depo. Chafin at pp.48-49).

Lastly, with respect to Mr. Ferrell, he worked at the Junior Mercantile Store from 1955 to 1958. (Depo. Ferrell 16:19-23, attached as Exhibit N to Defendant Omar Mining Company's Motion for Summary Judgment). Mr. Ferrell testified that, on occasion, he drove a truck from the Junior Mercantile store that would dump garbage at the site where the Omar School now sits. (Depo. Ferrell 10:2-4). In Defendant Omar Mining Company's Motion for Summary Judgment, Omar Mining came forward with affirmative evidence that it never owned and/or operated the Junior Mercantile store and the Court agreed. (Order Granting Defendant Omar Mining Company's Motion for Summary Judgment at p.11). Petitioner has never challenged this finding, neither in her Omnibus Motion to Alter or Amend or her Petition for Appeal. Thus, Mr. Ferrell's testimony concerning the Junior Mercantile store is irrelevant with respect to Omar Mining.<sup>4</sup>

The only fact witness that possibly had any relevant testimony with respect to Omar Mining was Richard Large. With respect to Mr. Large, he drove a garbage truck for Colane in

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<sup>3</sup> In addition to the fact that Mr. Franklin had no relevant testimony to Omar Mining, he could not in any event even identify any specific materials that were ever placed in the garbage dump. (*See* Depo. Franklin at pp.74-81).

<sup>4</sup> Regardless, the only product Mr. Ferrell could identify that was placed in the garbage from the Junior Mercantile store were common household pesticides/herbicides referred to as "Sevin Dust" and "Blue Dragon." The was no evidence that the active ingredients of these materials were ever detected at the Omar School site. (Order Granting Defendant Omar Mining Company's Motion for Summary Judgment at p.11). Indeed, even if such ingredients were detected, it would not follow that they came from the Junior Mercantile store in the 1950s as these products are readily available today at household retailers such as Wal-Mart.

1956. (Depo. Large 15:4-6, attached as Exhibit M to Defendant Omar Mining Company's Motion for Summary Judgment). Mr. Large worked for Colane for less than a year. (Depo. Large 15:7-9). Mr. Large testified that they would drive and pick up the garbage from the homes in the surrounding towns and dump it at the site where the Omar School now sits. (Depo. Large 12:10-15). Mr. Large was asked whether, other than the household garbage, there were any other users of the garbage dump and he replied as follows:

Q: Other than the household garbage that you took down there, was there other users of the dump?

A: Yes, sir, certainly was. The shop, Omar shop that's where they done the repair for the mines and stuff like that. The shavings and stuff that they swept out of the floors to the shop was took down there and dumped.

(Depo. Large 16:10-16).

Mr. Large also testified that the fifty-five gallon barrels Colane furnished to households for garbage collection "come from the mines and from the power plant." (Depo. Large 13:1-18). The garbage would be dumped from these barrels, into a Colane garbage truck, and then taken to the dump. (Depo. Large 12:4-13:4). Mr. Large testified that these barrels had previously contained an "oil-base" substance that "would barely cover the barrels." (Depo. Large 35:19-23). However, other than the fact that the barrels seemed to previously contain an "oil-based" substance, Mr. Large testified that he did not know what type of product the barrels may have contained. (Depo. Large 35:24-36:2).

Petitioner's entire case against Omar Mining was based upon Mr. Large's testimony that "shavings and stuff" swept from the floors of the "Omar shop" were dumped at the garbage dump.

**E. OMAR MINING'S ATTEMPTS TO DISCOVER THE FACTUAL BASIS FOR PETITIONER'S CLAIMS AGAINST IT.**

Throughout discovery, Omar Mining sought for Petitioner to identify the most basic of evidence, *i.e.*, what materials Omar Mining even placed in the local garbage dump. Despite three sets of written discovery, Petitioner could never provide an answer to the question. Of course, given the above fact testimony, Petitioner's inability to provide this information did not come as a surprise.

In 2006, Omar Mining served the following interrogatory upon Petitioner asking her for, among other things, the identity of each and every alleged contaminant and/or pollutant she contends that Omar Mining dumped at the future school site:

Please state, in detail, each and every contaminant and/or pollutant which you contend Omar Mining Company deposited into the locations at issue in this case. For each contaminant and/or pollutant identified, state the following:

- (a) the manufacturer of the contaminant and/or pollutant;
- (b) the components and/or chemical composition of the contaminant and/or pollutant;
- (c) the precise location where each contaminant and/or pollutant was deposited; and
- (d) the amounts of each contaminant and/or pollutant deposited at each location identified in subsection (c) above;

Petitioner gave a nonresponsive answer, simply referring Omar Mining to general categories of documents such as "U.S. Government aerial photographs," "Logan County Property Records," and "W.V. Secretary of State Records." (Plaintiff's Responses to Omar Mining Company's First Set of Interrogatories and Requests for Production, attached as Exhibit J to Defendant Omar Mining Company's Motion for Summary Judgment).

In April 2009, Omar Mining again sought to discover from Petitioner the identity of each and every alleged contaminant and/or pollutant she contended that Omar Mining dumped at the future school site and the factual basis for this contention:

In the "START Chauncey PCB Site Trip Report" dated September 25, 2003, eight soil samples were taken at the Omar School, bearing sample designation E1-SS1, E1-SS2, E1-SS3, E1-SS4, E1-SS5, E2-SS1, E2-SS2, and E2-SS3. With respect to the alleged contaminants/pollutants found in the testing of these samples, please identify the following:

- (a) which contaminant/pollutant you attribute to the acts or omissions of Omar Mining;
- (b) the factual basis for your assertion in subparagraph (a) above; and
- (c) the disease and/or condition which contend is associated with each contaminant/pollutant identified in subparagraph (a) above.

In response, Petitioner simply stated that she attributed all of the alleged contaminants/pollutants on the Omar School grounds to the conduct of Omar Mining. (Answer to Interrogatory No. 1 of Responses to Omar Mining Company's Second Set of Interrogatories, attached as Exhibit K to Defendant Omar Mining Company's Motion for Summary Judgment). As the factual basis for this assertion, the plaintiff stated, "Plaintiffs rely upon scientific research and testing." (Answer to Interrogatory No. 1 of Responses to Omar Mining Company's Second Set of Interrogatories). Obviously, scientific research and testing in 2003 and beyond provide no underlying factual basis for what Omar Mining allegedly placed in the garbage dump in the 1950s.

Having received two nonresponsive answers, Petitioner was asked a third time to identity of each and every alleged contaminant and/or pollutant she contended that Omar Mining dumped at the future school site and the factual basis for this contention:

Please identify, in detail, each and every contaminant and/or pollutant which you contend Omar Mining Company deposited on or into the locations at issue in this case. For each contaminant and/or pollutant identified, state the following:

- (a) the manufacturer of the contaminant and/or pollutant;
- (b) the components and/or chemical composition of the contaminant and/or pollutant;
- (c) the precise location where each contaminant and/or pollutant was deposited;
- (d) the amounts of each contaminant and/or pollutant deposited at each location identified in subsection (c) above;
- (e) the factual basis for your assertion that Omar Mining Company deposited such contaminant and/or pollutant; and
- (f) the identity of any statute, rule or regulation, if any, in effect at the time which you contend the depositing of the contaminant and/or pollutant violated.

Finally, Petitioner did list the alleged contaminants and/or pollutants which she attributes to the conduct of Omar Mining. However, it is just a conclusory regurgitation of the same boilerplate list set forth in the Fourth Amended Complaint.<sup>5</sup> The list ranges in everything from naturally occurring elements, such as barium, to commonly used food additives, such as isopropyltoluene. (*See Answer to Interrogatory No. 1 of Amended Responses of Plaintiffs to A.T. Massey Coal Company's First Set of Interrogatories, attached as Exhibit L to Defendant Omar Mining Company's Motion for Summary Judgment*).

Yet, despite the fact that Petitioner wanted to attribute every alleged contaminant/pollutant found on the Omar School grounds to the conduct of Omar Mining, the Petitioner admitted that she has "no knowledge as to the identity of any product" that Omar Mining may have deposited at the site. (*Answer to Interrogatory No. 1 of Amended Responses of Plaintiffs to A.T. Massey Coal Company's First Set of Interrogatories*). Moreover, Petitioner identified the

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<sup>5</sup> The actual list of contaminants the plaintiff attributes to the conduct of Omar Mining are N-nitroso-di-n-propylamine, pentachlorophenol, delta-Benzene hexachloride, 1,2-Dibromo-3-chloropropane, heptachlor, cadmium, lead, manganese, arochlor-1260 (PCB), gamma-chlordane, dieldrin, endrin aldehyde, heptachlor epoxide, TCDD equivalents, thallium, benzo(a)pyrene (PAH), benzo(g,h,i)perylene (PAH), phenanthrene, dibenzo(a,h)anthracene (PAH), acetone, bis-2-ethylhexylphthalate, p-isopropyltoluene, toluene, arsenic, barium, cadmium, and mercury.

factual basis for her claim against Omar Mining as the testimony of Richard Large and Carew Ferrell. (Answer to Interrogatory No. 1 of Amended Responses of Plaintiffs to A.T. Massey Coal Company's First Set of Interrogatories).

As previously stated, given that Mr. Ferrell's testimony concerning the Junior Mercantile was irrelevant, Petitioner's entire case against Omar Mining was based upon Mr. Large's testimony that "shavings and stuff" swept from the floors of the "Omar shop" were dumped at the garbage dump.

**F. PETITIONER'S RESPONSE TO OMAR MINING'S MOTION FOR SUMMARY JUDGMENT.**

Pursuant to the lower court's scheduling order, on June 5, 2009, Defendant Omar Mining Company's Motion for Summary Judgment was filed. Omar Mining argued that, given the testimony, summary judgment was appropriate in that Petitioner had failed to come forward with even the most basic of evidence against Omar Mining, *i.e.*, what materials Omar Mining even placed in the local garbage dump. Omar Mining also argued that Petitioner's could not establish that Omar Mining engaged in any tortious conduct so as to support a claim for medical monitoring damages.

Petitioner's response to Omar Mining's Motion for Summary Judgment consisted of one page. Petitioner's response contained no citations whatsoever to any evidence of record. Petitioner simply claimed in conclusory fashion that "Omar was a direct polluter."

With the record devoid of any fact testimony with respect to Omar Mining, Petitioner tried to "create" evidence and avoid summary judgment with a speculative affidavit from her liability expert, Dr. Scott Simonton. Dr. Simonton (who was not alive during the relevant time period) gave the following sworn affidavit:

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 & waste grease, lead paint, transformer oil, coal ash, pesticide and waste from an industrial equipment repair facility.

(Affidavit of Dr. Scott Simonton at ¶4, attached as Exhibit A to Exhibits in Support of Plaintiff's Response to Motion for Summary Judgment of Defendants, Cole & Crane Real Estate Trust, Colane Company, Omar Mining, A.T. Massey and Massey Energy).<sup>6</sup> Apparently, despite the utter lack of evidence, Petitioner apparently believed she could hold Omar Mining liable solely because it had an "industrial equipment repair facility" in the Omar area during the 1950s.

**G. PETITIONER'S EXPERT'S DEPOSITION TESTIMONY.**

Despite Dr. Simonton's purely speculative affidavit, Petitioner's own experts' testimony only reinforced the utter lack of proof in Petitioner's claims. Dr. Simonton's own deposition testimony, as well as that of Petitioner's other liability expert, Dawn Seeburger, revealed the utter lack of proof in Petitioner's claims.

The only testing of the Omar School grounds was by the Environmental Protection Agency in 2003 and Dr. Simonton in 2007, which consisted of surface soil samples taken 0-6 inches below ground surface and subsurface sampling on the adjoining ballfield consisting of soil samples taken 20-24 inches below ground surface. Both Dr. Simonton and Ms. Seeburger testified that due to fill, flooding, grading, etc., the "native soils" that were present on the surface in the 1920s through the 1950s are several feet below the current surface and have not even been reached in testing.

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<sup>6</sup> Again, the Court has already ruled, and the plaintiff has not challenged, that none of the defendants to this litigation ever owned or operated the coal-fired power plant.

First, with respect to Dr. Simonton, he testified that with regard to his three surface samples taken in 2007, he does not know what the source of the alleged contamination in those samples is:

Q. Lets look at . . . your July 10, 2007 report. Now . . . let me tell you what I believe you said, and you correct me if I am wrong.

A. Okay.

Q. You're representing that this report here is based upon sort of a quick sampling that you did of a stained area on the surface—

A. Correct.

Q. —of the school ground that was brought to your attention; is that correct?

A. Correct.

Q. You don't contend that this was a—or do you contend that this was a scientific planned sampling of the entire school ground to determine what were the contaminants there or what should be addressed?

A. Well—

Q. I mean, this is sort of a grab sample that you made, right?

A. Well,—right. I think you're misusing the term, but, yes, these were grab samples made in one specific spot based on some staining that was observed at that one specific spot.

Q. Do you believe that the staining was a result of the original use of that area for a dump?

A. I don't know what the staining came from.

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Q. If you look at the last page of this report that you prepared . . . dated July 10, 2007, the first sentence on that page says, "The full nature and extent of the contamination in the Omar playground is not presently known, nor is the source of the contamination."

Then when you go down through there and you say, "As contaminant levels are likely higher, at least with depth, in areas other than those sampled, it would be prudent to conduct an additional investigation prior to the start of the new school

year.” Now, you did not do any sampling beyond the surface, right.

A. Right.

Q. You said “nor is the source of the contamination.” What are you talking about there when you said “nor is the source of the contamination?”

A. Well, the full nature and extent of the contamination isn’t known, nor is the source of that contamination. I mean, that explains—that’s pretty—

Q. Do you know the source of the contamination?

A. That’s the void.

Q. You don’t know the source of the contamination down there; is that correct?

A. It’s not presently known, nor is the source of the contamination, right.

(Depo. Simonton 115:18-116:23, 125:19-127:2, attached as Exhibit N to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.’s Motions for Summary Judgment (emphasis added)). Next, just as Dr. Simonton does not know the source of the alleged contamination in his surface soil samples, Dr. Simonton testified the same with respect to the EPA’s sampling:

Q. How about your concerns? What if they set down a grid and they took samples down to two feet, a foot, whatever?

A. Two feet or a foot?

Q. Yes.

A. No, that wouldn’t come anywhere close to my concerns.

Q. Why is that?

A. Because that’s not deep enough. Basically, they put in—my understanding is that they put in a dump, and then they covered up the dump with several feet of soil. So, no, you would have to go down to below the level of the original dump, at least.

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Q. Have you done any kind of analysis, a core drilling, for example, to determine what was dumped in there?

A. No. You've asked me that already. No, I have not.

(Depo. Simonton 85:5-18, 89:12-16 (emphasis added)).

Next, with respect to Ms. Seeburger, she also testified that, in her opinion, insufficient sampling had been done and she would not even be able to point to a potentially responsible party:

Q. But given the possibility of fill, or as you said, flooding sediments, simply doing zero to six inches, as we sit here today, we can't be sure we've ever hit the native historical soils that were there in the 1950s and earlier.

A. I can guarantee you we haven't hit the native historical soil.

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Q. Would you agree that it would be patently unfair to impose the remediation costs on any entity at the current time based upon the state of the record as we currently know it to exist?

A. Repeat that, please.

Q. Would you agree with me that it would be patently unfair to impose any liability for remediation upon any entity based upon the state of the record as we currently know it to exist?

A. No, I don't think I would agree with that at all.

Q. I thought you just told Mr. Anderson that the state of this record was such that you have overtly criticized the EPA report. You have acknowledged that the Simonton report is incomplete so that, therefore, you are uncertain and could not perform a risk assessment currently based upon the information that you have today?

A. You're asking me whether I think it's unfair for anyone to be responsible to remediate the site. First, you have to do a site characterization to determine if there are contaminants there that are above the de minimis values and it has to be an adequate characterization and then if it shows that the source of the problem is pointing to a certain potentially responsible

party, by rights and by law, they're responsible to clean that up.

Q. We're not communicating.

A. Okay.

Q. That site assessment has not yet been completed, has it?

A. No as far as I'm concerned.

MR. THOMPSON: He's saying, would it be patently unfair to impose –

Q. To impose liability upon any entity today inasmuch as the site assessment has not yet been completed.

A. Do you mean could I point a finger and say, "You're the responsible party"?

Q. Or could anybody point a finger today?

A. No, I don't think so.

(Depo. Seeburger 83:21-84:3, 121:14-123:5, attached as Exhibit O to Supplemental Memorandum in Support of Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motions for Summary Judgment (emphasis added)).

#### IV. DISCUSSION OF LAW

##### A. PETITIONER CONTINUES TO RELY UPON EVIDENCE THAT SHE IMPROPERLY SOUGHT TO INTRODUCE AFTER THE GRANTING OF SUMMARY JUDGMENT.

Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving part is entitled to a judgment as a matter of law." W.Va. R. Civ. P. 56(c) (2009).

In responding to a properly supported motion for summary judgment, the nonmoving party must follow two simple steps. First, the party must place any materials in opposition to the

motion in the record. See *Jackson v. Putnam County Bd. of Educ.*, 221 W.Va. 170, 177, 653 S.E.2d 632, 639 (2007) (per curiam) ("[T]he parties have an obligation to make sure that evidence relevant to a judicial determination be placed in the record before the lower court . . ."). Second, once part of the record, the "nonmovant must identify specific facts in the record and articulate the precise manner in which the evidence supports its claims." *Powderidge Unit Owners Assoc. v. Highland Properties, Ltd.*, 196 W.Va. 692, 699, 474 S.E.2d 872, 879 (1996). "Rule 56 does not impose upon the circuit court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Id.* at 700, 474 S.E.2d at 880.

This Court has long recognized that that "appellate review in summary judgment cases is limited to the record as it stood before the circuit court 'at the time of its ruling.'" *Jackson*, 221 W.Va. at 177, 653 S.E.2d at 639 (quoting *Powderidge Unit Owners Assoc. v. Highland Properties, Ltd.*, 196 W.Va. at 700, 474 S.E.2d at 880). Post-judgment motions pursuant to Rule 59 or Rule 60 of the West Virginia Rules of Civil Procedure are not the proper time to supplement the record with evidence or materials not properly before a court at the time of granting summary judgment. See *Powderidge*, 196 W.Va. at 706, 474 S.E.2d at 886 ("It is established also that a Rule 60(b) motion does not present a forum for the consideration of evidence which was available but not offered at the original summary judgment motion . . . The great weight of authority is that the failure to file documents in an original motion does not convert the late filed documents into 'newly discovered evidence.'"); Franklin D. Cleckley, et al, *Litigation Handbook on West Virginia Civil Procedure* 1179 (3d edition 2008) ("A motion under Rule 59(e) is not appropriate for presenting new issues or evidence that could have been previously litigated. . . Rule 59(e) is not a vehicle for a party to undo his/her own procedural failures or to advance argument that could and should have been presented to the trial court prior to judgment.").

For example, in *Browning v. Halle*, 219 W.Va. 89, 632 S.E.2d 29 (2005) (per curiam), the Circuit Court of Upshur County granted summary judgment in favor of the defendants. Thereafter, the plaintiffs filed a Rule 59(e) motion accompanied by additional exhibits which were never made part of the record at the summary judgment stage. The circuit court struck the plaintiffs' additional exhibits. On appeal, this Court agreed:

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, 632 S.E.2d at 36.

In *Jackson*, the circuit court granted summary judgment in favor of the defendant. On appeal, the plaintiff attempted to make a Policy Manual of the Putnam County Board of Education part of the record. The Policy Manual had been exchanged during discovery. Similarly, both parties referenced the Policy Manual in their respective pre-trial memorandums as potential trial exhibits. However, the Policy Manual itself was never filed and never made part of the record. This Court struck the submission of the Policy Manual as not part of the record. *Jackson*, 221 W.Va. at 176-77, 653 S.E.2d at 638-39. Indeed, with respect to the plaintiff's argument that the Policy Manual was made part of the record because it was simply exchanged during the course of discovery, this Court stated, "The documents served included the Policy Manual . . . which, according to the appellant, became part of the record before the Circuit Court by virtue of the certificate [of service]. The West Virginia Rules of Civil Procedure, however, suggest otherwise." *Id.* (citing Rule 5 defining filing with the court).

In this case, at the summary judgment stage, in addition to the defendants below submitted with their respective motion to dismiss and motions for summary judgment, Petitioner filed a document titled "Exhibits in Supports of Plaintiffs' Response to Motion for Summary Judgment of Defendants, Cole & Crane Real Estate Trust, Colane Company, Omar Mining, A.T.

Massey and Massey Energy." This filing consisted of forty-four pages. (Order Granting Motion to Strike at pp.5-6). However, in her Omnibus Motion to Alter or Amend pursuant to Rule 59(e), Petitioner attached over four hundred pages of exhibits. (Order Granting Motion to Strike at p.6). As a result, the defendants below moved to strike all exhibits Petitioner's Omnibus Motion to Alter or Amend.

On March 31, 2010, the lower court granted in part and denied in part the Motion to Strike.<sup>7</sup> In her Petition for Appeal, Petitioner has not made any assignment of error with respect to the lower court's granting of the Motion to Strike. As a result, Petitioner has waived any claim that the lower court erred in this regard. *See, e.g., Canterbury v. Laird*, 221 W.Va. 453, 655 S.E.2d 199 (2007) (per curiam) ("Our cases have made clear that this Court ordinarily will not address an assignment of error that was not raised in a petition for appeal."); *Koerner v. West Virginia Dep't of Military Affairs and Pub. Safety*, 217 W.Va. 231, 617 S.E.2d 778 (2005) (refusing to consider an argument in appellant's brief that was not assigned as error in petition for appeal); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998) ("Issues not raised on appeal or merely mentioned in passing are deemed waived." (citation omitted)).

Despite the above, throughout her Petition for Appeal, Petitioner not only fails to assign any error to the lower court's granting of the Motion to Strike, Petitioner simply acts as if it never occurred. Petitioner continues to cite to exhibits to her Rule 59(e) motion that were not before the lower court at the time of summary judgment and which, for that reason, were struck. Indeed, in arguing the lower court improperly granted summary judgment, the Petition for Appeal

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<sup>7</sup> Specifically, the lower court struck in their entirety Exhibits 3, 6, 12, 13, 14, 15, 16, 17, 19, and 24 to the Omnibus Motion to Alter or Amend. The lower court struck, in part, Exhibits 4, 6, 7, and 9. The lower court denied the Motion to Strike with respect to Exhibit 20 to the Omnibus Motion to Alter or Amend.

makes sixty-six footnote citations. However, of these sixty-six citations, thirty-two of these were exhibits to Petitioner's Rule 59(e) motion that were previously struck.<sup>8</sup>

Petitioner should not and cannot be permitted to simply ignore the West Virginia Rules of Civil Procedure and the rulings of the lower court. It is improper and misleading for Petitioner to make arguments to this Court that summary judgment was erroneously granted based upon evidence that she knows is not of record.<sup>9</sup>

**B. THE CIRCUIT COURT PROPERLY GRANTED OMAR MINING COMPANY'S MOTION FOR SUMMARY JUDGMENT.**

**1. The Circuit Court Properly Concluded There Was Insufficient Evidence Against Omar Mining to Sustain Petitioner's Claim for Medical Monitoring.**

Under West Virginia law, in order to sustain a claim for medical monitoring damages, a plaintiff must prove the following elements:

[T]hat (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a 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.

Syl. pt. 3, *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (1999) (emphasis added).

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<sup>8</sup> Specifically, the exhibits cited in footnotes 1, 4, 5, 6, 7, 21, 25, 27, 29, 30, 32, 34, 35, 36, 37, 39, 40, 41, 42, and 44 through 57 of the Petition for Appeal were all previously struck by the lower court.

<sup>9</sup> In the Petition for Appeal, Petitioner argues that the lower court failed to take into consideration evidence that was still being developed by the agreement of the parties. This argument is, quite frankly, disingenuous. The apparent "agreement" and "evidence" Petitioner refers to is the fact that Petitioner did not make her own experts available to the defendants for deposition until after the close of discovery. In effect, Petitioner tried to claim that her own experts, whom had been retained for a period of years, were some source of evidence unavailable to her until the defendants took the deposition. To the contrary, Petitioner obviously could have gotten an affidavit from her own experts and/or filed a Rule 56(f) affidavit if she felt it necessary in order to oppose summary judgment. Moreover, the deposition transcripts of Petitioner's experts were available prior to summary judgment, as indicated by the fact that the defendants submitted portions of the transcript via a supplemental memorandum of law. It was not until after summary judgment that Petitioner's counsel claimed that there was somehow additional evidence being developed by the agreement of the parties. The lower court properly saw through Petitioner's tactics and rejected Petitioner's absurd argument.

Throughout this litigation, and in her Petition for Appeal, Petitioner references the opinions of her experts that the current and former students and staff of the Omar School are at an increased risk of contracting cancer and that, as a result, medical monitoring is necessary. Obviously, the defendants below disputed this conclusion, just as did the EPA and DHHR. However, what Petitioner fails to grasp is that the lower court never even had to reach these elements under *Bowers*. The reason is simple. Petitioner's evidence concerning materials allegedly placed in the garbage dump by the defendants during the 1950s was wholly lacking. Thus, Petitioner could not prove that she and the class she represents were exposed to any substance through the defendants conduct, much less significantly exposed to a proven hazardous substance. *See id.*

In this case, there was no dispute that Omar Mining never owned or managed the land upon which the garbage dump was located and where the Omar School was eventually built. The land was originally owned by Coal & Coke and, upon Coal & Coke's exit from the Island Creek Valley, subsequently transferred to Colane. There was likewise no dispute that Omar Mining was in any way involved in the transfer of the land to the Board of Education in 1961. That was a transaction solely between Colane and the Board of Education. Petitioner's only apparent basis for liability against Omar Mining is that it, along with others, was involved in the dumping of garbage at the garbage dump.

Mr. Large's testimony that "shavings and stuff" from the "Omar shop" were swept out on the floors and dumped in the garbage simply fails on its face. There is no evidence of what the "shavings and stuff" were, how much of the materials was involved, or how these materials were any different from the household garbage that was regularly placed in the dump. Petitioner apparently expects to hold Omar Mining liable merely based upon the fact that it placed "shavings

and stuff' in its garbage nearly sixty years ago and these "shavings and stuff" were placed in a local garbage dump.

It is unheard of that a defendant can be liable in a toxic exposure case when the plaintiff cannot even tell the defendant to what it allegedly exposed the plaintiff. Having an expert such as Dr. Simonton attempt to create evidence by giving a purely speculative affidavit does not change this result. *See 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 . . . ."). Accordingly, the lower court properly granted summary judgment in favor of Omar Mining and the Petition for Appeal should be refused on this issue.

**2. The Circuit Court Properly Concluded There Was No Underlying Tort to Support Petitioner's Claim Against Omar Mining.**

In addition to the utter lack of evidence against Omar Mining, the lower court correctly held that Petitioner did not have a valid tort theory of recovery to support her claim for medical monitoring damages against Omar Mining.

*Bowers* makes clear that medical monitoring is not a completely separate and independent cause of action, but is based upon the underlying "tortious conduct" of a defendant. Thus, a plaintiff seeking medical monitoring expenses must still prove that the defendant is liable under a traditional tort theory of liability. *Bowers*, 206 W.Va. at 142, 522 S.E.2d at 433 ("Liability for medical monitoring is predicated upon the defendant being legally responsible for exposing the plaintiff to a particular hazardous substance. Legal responsibility is established through application of existing theories of tort liability."). The Fourth Amended Complaint asserted three tort theories of liability: public nuisance, strict liability, and negligence.

**(i) The lower court correctly held that Omar Mining could not be liable under a public nuisance theory.**

“A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons.” *Hark v. Mountain Fork Lumber Co.*, 127 W.Va. 586, 595-96, 34 S.E.2d 348, 354 (1945). Importantly, “[p]ublic nuisances always arise out of unlawful acts, and that which is lawful, or is authorized by a valid statute, or which the public convenience imperatively demands, cannot be a public nuisance.” *Pope v. Edward M. Rude Carrier Corp.*, 138 W.Va. 218, 225, 75 S.E.2d 584, 589 (1953) (internal quotations and citation omitted).

Petitioner's public nuisance claim failed as a matter of law because there was nothing at all unlawful about the actions of Omar Mining. The sole claim against Omar Mining was based upon the allegation that, during the 1950s, Omar Mining was a user of the local garbage dump in or around the town of Chauncey. However, there was absolutely nothing unlawful about the land's owner, Colane, using the land for this purpose during this time period. Nor did Omar Mining dump anything in violation of any law in effect at the time. Indeed, in discovery, Petitioner was asked to identify any federal, state, or local statute, rule or regulation in effect at the time that the actions of Omar Mining violated. Petitioner could not so do. (*See* Answers to Interrogatory Nos. 1 and 5 of Amended Responses of Plaintiffs to A.T. Massey Coal Company's First Set of Interrogatories).

Moreover, the lower court correctly held that Petitioner lacked standing to bring a public nuisance claim. “Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public.” *Hark*, 127 W.Va. at 596, 34 S.E.2d at 354. Here, the proper public officials, the EPA and DHHR, had already determined that the Omar School grounds present no health hazard to the students or staff there.

Simply put, Omar Mining, among many others, was an alleged user of a perfectly legal garbage dump in the 1950s. Simply because the Board of Education subsequently elected to

purchase the property from Colane and construct a school on it does not make Omar Mining liable for creating a public nuisance.

**(ii) The lower court correctly held that Omar Mining could not be liable under a strict liability theory.**

The Fourth Amended Complaint alleged that “[t]he Defendants are strictly liable for any and all personal injuries caused by exposure to toxic substances emanating from its property in Chauncey.” (Fourth Am. Compl. ¶ 46). This too fails on its face with respect to Omar Mining. First, Omar Mining never owned the property upon which the garbage dump was located and upon which the Board of Education ultimately constructed the Omar School. Strict liability is reserved for those activities that are abnormally dangerous. *See Peneschi v. Nat’l Steel Corp.*, 170 W.Va. 511, 295 S.E.2d 1 (1982). Petitioner came forward with no authority, case law or otherwise, that strict liability attaches to the mere user of a garbage dump.

**(iii) The lower court correctly held that Omar Mining could not be liable under a negligence theory.**

The traditional elements of a common law negligence claim are duty, breach, causation, and damages. *See Carter v. Monsanto Co.*, 212 W. Va. 732, 737, 575 S.E.2d 342, 347 (2002) (“[B]efore one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and damages.”).

“In order to establish a prima facie case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.” Syl. pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 870, 280 S.E.2d 703, 706 (1981). “The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law.” Syl. pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d

576 (2000). “The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?” Syl. pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

In this case, again, it was undisputed that Omar Mining never owned the property in question. It was the mere user, as were many individual households, of a local garbage dump in the 1950s. Subsequently, the owner of the property, Colane, transferred it to the Board of Education. The Board of Education then decided to construct the Omar School on the property. It is undisputed that Omar Mining was not a party to these transactions.

There was no evidence that Omar Mining had no prior knowledge that the property would years later be sold and/or given to the Board of Education. There was no evidence that Omar Mining had no prior knowledge that the Board of Education would years later elect to build the Omar School on the site. None of this was foreseeable from the standpoint of Omar Mining. As a result, the lower court correctly found that Omar Mining owed no duty to Petitioner and the class of current and former students and staff of the Omar School.

If Petitioner was to succeed on this novel theory, then assumingly every individual or entity that dumps garbage or other waste could be held liable fifty or sixty years later, despite the fact that their conduct was proper at the time. And for what? All because a local school board, in its discretion, later decided to purchase the property and construct a school on it? There is simply no legal basis for such an absurd result.

Accordingly, the lower court properly granted summary judgment in favor of Omar Mining and the Petition for Appeal should be refused on this issue.

**C. THE CIRCUIT COURT PROPERLY GRANTED MASSEY ENERGY COMPANY AND A.T. MASSEY COAL COMPANY, INC.'S MOTION FOR SUMMARY JUDGMENT.**

In her Fourth Amended Complaint, Petitioner alleged that two grounds for liability against A.T. Massey and Massey Energy Company. Petitioner's alleged that A.T. Massey "assumed responsibility for Coal & Coke's pollution when it took over Coal & Coke's corporate structure and Island Creek operations in 1954." (Fourth Am. Compl. ¶ 6). Petitioner also alleged that A.T. Massey and Massey Energy Company's status as parent companies of Omar Mining rendered them liable for any acts or omissions of Omar Mining. (*See* Fourth Am. Compl. ¶¶ 6-8).

**1. A.T. Massey and Massey Energy Company's Alleged Successor Liability for Coal & Coke Is Not Before This Court.**

As a general rule, a petition for appeal must be filed no more than four months after the judgment or order from which the appeal is being taken. *See* W.Va. R. App. P. 3(a) (2010) ("No petition shall be presented for an appeal from . . . any judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered . . ."). However, a properly filed motion pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure operates to toll and extend the four-month appeal period.<sup>10</sup>

Although a motion pursuant to Rule 59(e) operates to extend the appeal period, this Court has been very clear that if a party chooses to avail themselves of the extended appeal period provided by a Rule 59(e) motion, they are limited to only those errors or issues raised in the Rule 59(e) motion. *See Thompson v. Branches-Domestic Violence Shelter of Huntington, W.Va., Inc.*, 207 W.Va. 479, 483, 534 S.E.2d 33, 37 (2000) ("We reiterate that the only errors which benefits

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<sup>10</sup> Unlike a Rule 59(e) motion, this Court has been very clear that a post-judgment motion filed pursuant to Rule 60(b) does not toll the four-month appeal period. *See* syl. pt. 3, *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992) ("A motion which would otherwise qualify as a Rule 59(e) motion that is not filed and served within ten days of the entry of judgment is a Rule 60(b) motion regardless of how styled and does not toll the four month appeal period for appeal to this court.").

from the extended appeal period are those which are raised in the Rule 59(e) motion to alter or amend judgment. The issues not assigned as grounds supporting an alteration or amendment of judgment retain the original filing period. Accordingly, we may only consider the errors raised by the Thompsons in their Rule 59(e) motion as their petition for appeal was filed more than four months after summary judgment was granted."); *Wickland v. American Travellers Life Ins. Co.*, 204 W.Va. 430, 435, 513 S.E.2d 657, 662 (1998) (same).

As set forth in the Statement of Facts herein, at the summary judgment stage, A.T. Massey and Massey Energy Company explained in detail the history of the relevant corporate transactions, and came forward with affirmative evidence that A.T. Massey was a mere purchaser of assets and did not assume the liabilities of Coal & Coke, subsequently known as Midland. The lower court agreed. (Order Granting Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment at pp.8-11). In her forty-page Omnibus Motion to Alter or Amend, Petitioner dedicated two paragraphs to arguing that summary judgment in favor of A.T. Massey and Massey Energy Company was erroneous. (Omnibus Motion to Alter or Amend at p.39). Nowhere did Petitioner dispute the lower court's holding regarding the lack of successor liability. The only ground Petitioner raised was the fact that she was unable to secure a 30(b)(7) deposition of A.T. Massey in order to determine whether it was proper to "pierce the corporate veil" and hold A.T. Massey and Massey Energy Company liable for the acts or omissions of Omar Mining. (Omnibus Motion to Alter or Amend at p.39).

Over one year has passed since summary judgment was originally granted in favor of A.T. Massey and Massey Energy Company. In accordance with *Thompson* and *Wickland*, Petitioner may not now claim the lower court erred in finding A.T. Massey and Massey Energy had no successor liability for Coal & Coke when she failed to assign this issue as a ground for alteration or amendment of judgment in her Rule 59(e) motion.

**2. The Lower Court Correctly Found the Evidence Insufficient to Hold A.T. Massey or Massey Energy Liable for Any Acts or Omissions of Omar Mining.<sup>11</sup>**

Mere ownership interest in a corporation is not in itself a sufficient basis to attach liability for the acts of the corporation. *See* W. Va. Code § 31D-6-622 (“[A] shareholder of a corporation is not personally liable for the acts of the corporation . . .”). “The law presumes . . . that corporations are separate from their shareholders.” Syl. pt. 3, *Southern Elec. Supply Co. v. Raleigh County Nat’l Bank*, 173 W. Va. 780, 320 S.E.2d 515 (1984).

“Under exceptional circumstances, the corporate entity may be disregarded to remove the barrier to personal liability of the shareholder(s) activity participating in the business.” *Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 347, 352 S.E.2d 93, 97 (1986). However, “[t]he corporate form should never be disregarded lightly.” *Southern Elec. Supply Co.*, 173 W. Va. at 787, 320 S.E.2d at 522. “[T]he burden of proof is on a party soliciting a court to disregard a corporate structure.” *Id.*

In this case, Petitioner sought to pierce the corporate veil of Omar Mining. In other words, Petitioner sought to hold Massey Energy and A.T. Massey liable for the alleged actions of Omar Mining in connection with this case. However, despite the fact that this went on for five years, Petitioner's evidence was wholly lacking in this regard.

There was no testimony from anyone that worked for Omar Mining, much less during the relevant time period of the 1950s. The only item the plaintiff submitted in support of her argument that Omar Mining’s corporate veil should be pierced was a two-question excerpt from a March 2007 deposition given by a gentleman by the name of Baxter Phillips. The deposition was not taken in connection with this case, but a 2005 breach of contract case in the Circuit Court of Brooke County between Wheeling Pittsburgh Steel Corporation, Central West Virginia Energy

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<sup>11</sup> As set forth above, summary judgment was properly granted in favor of Omar Mining. Obviously, if Omar Mining has no liability, then any analysis as to whether to “pierce the corporate veil” of Omar Mining becomes irrelevant and unnecessary.

Company and Massey Energy Company, Civil Action No. 05-C-85-MJG. (See Exhibit K of Exhibits in Support of Plaintiff's Response to Motion for Summary Judgment of Defendants Cole & Crane Real Estate Trust, Colane Company, Omar Mining, A.T. Massey and Massey Energy). Omar Mining was not a party to that proceeding. Based upon this complete and utter of evidence, the lower court correctly ruled that Petitioner that there was no genuine issue of material fact with respect to the "exceptional" remedy of piercing the corporate veil.

In her Omnibus Motion to Alter or Amend, Petitioner for the first time asserted the lower court's ruling was erroneous because she was unable to secure a Rule 30(b)(7) depositions of corporate representatives of Omar Mining, A.T. Massey, and Massey Energy. In support of her argument, Petitioner's counsel attached an affidavit pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure. The lower court saw through Petitioner's gamesmanship and correctly rejected Petitioner's after-the-fact argument.

Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment was filed on June 5, 2009. On June 15, 2009, Petitioner filed her response. Nowhere in the response did Petitioner ever mention that additional discovery or that Rule 30(b)(7) depositions were required in order to address Petitioner's "piercing the corporate veil" argument. Likewise, at oral argument on June 25, 2009, Petitioner's counsel never once mentioned that additional discovery in the form of a Rule 30(b)(7) deposition was necessary. Indeed, the very first mention of Rule 30(b)(7) depositions was not until July 8, 2009, when the plaintiff unilaterally noticed the deposition for July 21, 2009.

Indeed, the Rule 56(f) affidavit of Petitioner's counsel was not executed until July 27, 2009, after summary judgment was granted and the same day Petitioner's Omnibus Motion to Alter or Amend was filed. If Petitioner believed additional discovery was necessary to oppose a motion for summary judgment, the proper procedure would have been to file a Rule 56(f) affidavit prior to

the granting of summary judgment, not after the fact as an exhibit to a Rule 59(e) motion. *See, e.g., Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 509, 625 S.E.2d 260, 271 (2005) ("Under *Williams*, the Aluises were required to submit an affidavit explaining the need for discovery in order to resist summary judgment as to the Indiana policy. This was not done. Consequently, the Aluises cannot complain to this Court about the need for discovery on that issue."); *Powderidge*, 196 W.Va. at 702, 474 S.E.2d at 882 ("We, like the Fourth Circuit, place great weight on the Rule 56(f) affidavit, believing that [a] party may not simply assert in its brief that discovery was necessary and thereby overturn summary judgment when it failed to comply with the requirement of Rule 56(f) to set out reasons for the need for discovery in the affidavit."). This is precisely why the lower court struck Petitioner's counsel's Rule 56(f) affidavit. (Order Granting Motion to Strike at pp.9-10).

Accordingly, the lower court properly granted Defendants Massey Energy Company and A.T. Massey Coal Company, Inc.'s Motion for Summary Judgment and the Petition for Appeal should be refused on that issue.

**D. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S RULE 60(B)(2) MOTION.**

Given Petitioner's attempt to submit after-the-fact evidence and argument in her Omnibus Motion to Alter or Amend, it is not surprising that Petitioner would also claim that she later "discovered" additional evidence, which is exactly what occurred. On December 14, 2009, pursuant to Rule 60(b)(2), Petitioner filed Plaintiff's Rule 60 Motion for Relief from Judgment Based on Newly Discovered Evidence, claiming that she had discovered an additional witness, Harvey Adkins, that would provide further factual support for her experts' opinions. Petitioner also submitted as purported newly discovered evidence a March 2009 congressional subcommittee staff report concerning the ATSDR.

As set forth below, the lower court was well within its discretion in denying Petitioner's Rule 60 motion.

## 1. Standard of Review

Rule 60(b) of the West Virginia Rules of Civil Procedure provides that a court may relieve a party from a final judgment or order upon the following grounds: "(1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (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); (3) fraud, misrepresentation, or misconduct; (4) the judgment is void; (5) the judgment has been satisfied or vacated; or (6) any other reason justifying relief from the operation of the judgment." W.Va. R. Civ. P. 60(b) (2010).

This Court has recognized that granting relief pursuant to Rule 60(b) is an extraordinary remedy that should be rare:

Rarely is relief granted under this rule because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. . . Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted.

*Powderidge Unit Owners Ass'n*, 196 W.Va. at 704 n.21, 474 S.E.2d at 884 n.21. Moreover, a Rule 60(b) motion must satisfy one of the criteria enumerated under it. A Rule 60(b) motion "is simply not an opportunity to reargue facts and theories upon which a court has already ruled." *Id.* at 706, 474 S.E.2d at 886.

"An appeal of the denial of a Rule 60(b) motion brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." Syl. pt. 3, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974). "A motion to vacate a judgment made pursuant to [Rule 60(b)] is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." *Id.* at syl. pt. 5. In *Powderidge*, this Court explained the rationale for apply the abuse of discretion standard of review to Rule 60(b) motions:

This standard of review reflects the circuit court's institutional position as the forum best equipped for determining the appropriate use of Rule 60(b) to ensure that litigants who have vigorously and diligently complied with the summary judgment mandates of Rule 56 are not penalized by the action of those who choose not to comply.

*Powderidge*, 196 W.Va. at 705, 474 S.E.2d at 885.

**2. Petitioner Failed to Show Her Purported "Newly Discovery Evidence" Could Not Have Previously Been Discovered Through the Exercise of Due Diligence.**

Petitioner sought relief pursuant to Rule 60(b)(2) on the grounds of newly discovered evidence. This Court has long held that a party seeking to have a judgment set aside based upon newly discovered evidence carries a significant burden:

A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894); Franklin D. Cleckley, *et al.*, *Litigation Handbook on West Virginia Civil Procedure* 1198 (3d edition 2008).

In order to fall within the "newly discovered" evidence provision of Rule 60(b), a plaintiff against whom summary judgment has been granted "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."

*Powderidge*, 196 W.Va. at 706 n.25, 474 S.E.2d at 886 n.25.

Indeed, courts have generally look with disfavor upon motions asserting newly discovered evidence. The reason is simple. Claims of "newly discovered" evidence are not only particularly susceptible to perjury, but can also serve to mask a party's pure lack of diligence. *See, e.g., Brown v. McMillian*, 737 So.2d 570, 571 (Fla. Dist. Ct. App. 1999) ("To favor such applications would bring about a looseness in practice and encourage counsel to neglect to gather all available evidence for a first trial by speculating upon the verdict, and then, once defeated, allow counsel to become for the first time duly diligent in securing evidence to cure the defects and omissions in the showing during the first trial."); 58 Am. Jur. 2d New Trial § 322 ("Applications for new trials on the ground of newly discovered evidence often are not favored by the courts. Such applications are entertained with reluctance and granted with caution, not only because of the danger of perjury, but also because of the manifest injustice in allowing a party to allege that which may be the consequence of his or her own neglect in order to defeat an adverse verdict.").

Moreover, courts have long and uniformly held it is not sufficient for a party to simply claim that he or she was diligent in obtaining evidence. Instead, a party must set out specific facts showing that due diligence was indeed exercised. *See, e.g., Hartig v. Stratman*, 760 N.E.2d 668, 671 (Ind. App. 2002) ("[A] finding of due diligence does not rest upon abstract conclusions about, or assertions of, its exercise but upon a particularized showing that all methods of discovery reasonably available to counsel were used and could not uncover the newly-found information."); *Seay v. City of Knoxville*, 654 S.W.2d 397, 399 (Tenn. App. 1983) ("Affidavits in support of the motion should set out the fact constituting due diligence with particularity."); *Travis v. Bacherig*, 1928 WL 2063 at \*6 (Tenn. App. 1928) ("Mere general statement that affiant inquired among persons likely to know, is not sufficient, the particulars must be shown."); *Heldmair v. Taman*, 58 N.E. 960, 960 (Ill. 1900) ("It is not sufficient to state merely that due diligence has been used, but the facts constituting diligence must be stated.").

In this case, although Petitioner and her counsel baldly claim they exercised due throughout the five years of litigation to discover all potential sources of evidence, the record is devoid of any such diligence.

With respect to Petitioner's purported newly discovered witness, Harvey Adkins, the first mention of Mr. Adkins was in the form of an affidavit attached to an October 22, 2009 filing styled Supplemental Exhibits in Support of Plaintiffs' Rule 59. Also attached to that filing was an affidavit from Petitioner's counsel, Kevin Thompson. In that affidavit, Mr. Thompson stated, "For the past several years, while investigating the case and during its pendency, I diligently sought eyewitnesses and evidence of contamination of the Omar School area by the West Virginia Coal & Coke /Omar Mining repair shop." (Affidavit of Kevin Thompson at ¶ 2, attached as Exhibit A to Supplemental Exhibits in Support of Plaintiffs' Rule 59). Mr. Thompson further affirms, "I consulted with the United Mine Workers Association to locate former employees of Omar Mining, but the only employees they identified worked in Omar Mining's Boone County operations." (Affidavit of Kevin Thompson at ¶ 4).

In an attempt to show due diligence, Mr. Thompson was representing, or at the very least giving the impression, that these were all actions he took during the pendency of the case prior to judgment. However, on November 17, 2009, Petitioner served Plaintiff's Response to Defendants' Motion to Strike Harvey Adkins' Affidavit. In that filing, again in an attempt to show due diligence, Mr. Thompson set forth his billing records. Interestingly, despite the representations in his prior affidavit, the billing record titled "Acord-Investigation-UMWA & other calls to find Omar Mine Shop Employee," which was the first of its kind, was not until two months after judgment on September 22, 2009. (Plaintiff's Response to Defendants' Motion to Strike Harvey Adkins' Affidavit at p.8).

In yet another example, also attached to the Plaintiff's Response to Defendants' Motion to Strike Harvey Adkins' Affidavit is an affidavit from former plaintiff and class representative, Carlene Mowery. Ms. Mowery's affidavit states, "After the Court granted summary judgment, Mr. Thompson asked Norma Acord and me to make more attempts to find witnesses to the dumping that occurred and to find witnesses who worked for the Defendants." (Affidavit of Carlene Mowery at ¶ 13, attached as Exhibit C to Plaintiff's Response to Defendants' Motion to Strike Harvey Adkins' Affidavit emphasis added)). This only further calls into question Petitioner's counsel's representations of pre-judgment diligence.

Indeed, as the lower court found, throughout this litigation, at every opportunity, Petitioner's counsel represented that the case was "ready for trial." By way of example, at a June 2008 status conference, Petitioner's counsel's announced to the lower court that he was prepared to proceed to trial based upon the four fact witnesses that had been deposed in 2004 and 2006:

MR. THOMPSON: [W]e've got Richard Large, Ray Chafin, Luther Woods, Ed Franklin, and Mr. Carew [Ferrell] . . . [W]e have five fact witnesses that go to liability and tortious liability, and we have one expert which would be Dr. Simonton, and I'm thinking that's the liability case. You know, liability would be what was done when by whom. And those five witnesses will tell that story.

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THE COURT: So, you're saying you've put forth your witnesses. So, then fact witnesses and expert witnesses for the plaintiff.

MR. THOMPSON: Yes.

(Order Denying Rule 60(b) Motion at p.5; Hr. Trans. 6/9/2008 at 11:14-22; 15:16-19).

There is nothing in the record prior to judgment evidencing that Petitioner or her counsel were making diligent efforts to locate additional witnesses. Never once prior to judgment, not even after summary judgment motions were filed, did Petitioner or her counsel ever indicate to the lower court or the parties that they were searching for additional witnesses or that more

discovery was necessary. Again, Petitioner's counsel's first indication that he was diligently seeking additional evidence only comes after judgment has been entered.<sup>12</sup>

Lastly, to the extent the congressional subcommittee staff report regarding the ATSDR is somehow even evidence in this case, it was issued in March 2009 and is a matter of public record. Courts have been consistent that matters of public record which were previously available cannot be considered newly discovered evidence. *See, e.g., Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir. 1987) ("Evidence that is contained in public records at the time of trial cannot be considered newly discovered evidence."); *Federated Conservationists of Westchester County, Inc. v. County of Westchester*, 771 N.Y.S.2d 530, 531 (N.Y. App. Div. 2004) ("Evidence which is a matter of public record is generally not deemed new evidence which could not have been discovered with due diligence before trial. Moreover, it is clear from the record that the plaintiff did not diligently look for the documents before trial because it had expected to prevail at the trial. The plaintiff began a comprehensive search for the documents only after it lost at trial.") (internal quotations and citations omitted); Cleckley, *et al.*, *Litigation Handbook on West Virginia Civil Procedure* 1198 ("Courts reject, as newly discovered evidence, evidence contained in public records").

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<sup>12</sup> In attempting to explain their lack of due diligence, Petitioner and her counsel play the after-the-fact "blame game." In her Petition for Appeal, Petitioner asserts that Mr. Adkins identity was not discovered, in part, because counsel for Omar Mining, A.T. Massey, and Massey Energy Company failed to disclose Mr. Adkins in their Rule 26(a)(1) disclosures filed in November 2006 while this matter was pending in the United States District Court for the Southern District of West Virginia. First and foremost, Mr. Adkins' identify was not known at that time. Second, in any event, counsel's for Omar Mining, A.T. Massey, and Massey Energy Company's interpretation of Rule 26(a)(1) of the Federal Rules of Civil Procedure is absolutely correct. Pursuant to the Rule, a party does not have to disclose any person that may have knowledge of the facts and circumstances of the case. A party need only disclose those individuals with discoverable information that the party "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1) (emphasis added); *see also Lipari v. U.S. Bancorp, N.A.*, 2008 WL 2874373 at \*3 (D. Kan. July 22, 2008) ("The Rule requires the disclosing party to identify those individuals who may have discoverable information that the disclosing party may use to support *its own* claims and defenses. In other words, Plaintiff need only disclose those individuals that may have discoverable information that *Plaintiff himself* may use to support his claims or defenses.").

Accordingly, under the facts and circumstances presented, the lower court was well within its discretion in finding Petitioner did not carry her burden of proving that her purported newly discovered evidence could not have been discovered through the exercise of due diligence.

**2. Petitioner Failed to Show Her Purported "Newly Discovery Evidence" Was of Such Kind that It Ought to Produce a Different Outcome on the Merits.**

With respect to Mr. Adkins, his testimony would have done nothing to change the lower court's granting of summary judgment. Mr. Adkins began working for Coal & Coke at the general mine repair shop in Omar in 1951. (Depo. Adkins 7:19-8:9, attached as Exhibit A to Defendants Massey Energy Company, A.T. Massey Coal Company, Inc., and Omar Mining Company's Response to the Plaintiff's Rule 60 Motion for Relief from Judgment Based on Newly Discovered Evidence).<sup>13</sup> After Omar Mining purchased assets related to Coal & Coke's mining operations in or around December 1954, Mr. Adkins continued to work in the repair shop until some time in 1955. (Depo. Adkins 15:15-22). Mr. Adkins has no recollection of when in 1955 he stopped working for Omar Mining. (Depo. Adkins 39:9-13). His employment with Omar Mining in the mine shop could have been as short as two months.

Mr. Adkins' knowledge was very limited. Over the four to five year period Mr. Adkins worked in the mine shop, he only made two or three trips to the dump, and on each occasion it was to empty the residue from a used calcium carbide tank. (Depo. Adkins 17:9-15; 41:16-20; 42:23-43:3). Mr. Adkins made no other trips to the dump. (Depo. Adkins 42:23-43:3). Mr. Adkins testified he could not recall ever seeing oil, fluids, or anything else from the repair shop taken to the local dump:

Q. On those two or three occasions Mr. Adkins, where you went to the dump on the truck, did you see any item, any piece of trash in that dump that you were certain it came from the Omar shop?

MR. THOMPSON: If you can remember.

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<sup>13</sup> Mr. Adkins' deposition testimony was taken in connection with another proceeding.

Q. And that's based on your memory, sir.

A. Well, now the only thing I can tell you that I can remember is the carbide.

(Depo. Adkins 52:15-24; 53:16-21).<sup>14</sup>

Moreover, Mr. Adkins had no recollection as to when those two or three occasions he visited the dump occurred. (Depo. Adkins 43:17-44:4). Mr. Adkins had no idea whether this occurred from 1951 through December 1954 when he worked for Coal & Coke, or whether it occurred during the brief period he worked for Omar Mining. (Depo. Adkins 43:17-44:4).

Given Mr. Adkins' testimony, this so called "newly discovered evidence" had no probative value whatsoever. Petitioner was simply advancing the same argument made at the summary judgment stage that the lower court correctly rejected. Because Omar Mining may have had a repair facility in the area, Petitioner want to hold it liable for anything and everything that may have ever made its way into a local dump fifty years ago, a dump that was undisputedly used by numerous other users. As the lower court stated in its Order denying the Rule 60(b) motion:

The Court rejects the plaintiff's assertion that, without underlying factual testimony, the plaintiff's expert, and a jury, may simply assume that various materials from the Omar Shop were placed in the local dump over fifty years ago based solely on the type of facility it was and the type of work that may have been performed there.

(Order Denying Rule 60(b) Motion at p.9).

Just as Mr. Adkins testimony was not of a character so as to produce a different result, so was Petitioner's new "evidence" in the form of a March 2009 congressional subcommittee staff report concerning the ATSDR. First and foremost, the relevancy of this document is unclear

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<sup>14</sup> Calcium carbide is used in the production of acetylene gas for welding torches. When water is mixed with the calcium carbide, it reacts to produce the acetylene gas. (Depo. Adkins 41:21-42:16). The byproduct of this reaction, and what Mr. Adkins emptied into the dump, is calcium hydroxide. Calcium hydroxide is a lime, commonly referred to as carbide lime. A simple internet search reveals that, just as with other types of lime, carbide lime has numerous uses such as soil pH control, water treatment, and agriculture. The lime is not carcinogenic or an otherwise harmful substance. Petitioner never contended to the contrary in her Rule 60(b)(2) motion.

given that neither the report nor any of the materials attached thereto apply to the Omar School site. In any event, Petitioner's reliance upon a congressional subcommittee staff report critical of the ATSDR reflects Petitioner's gross misunderstanding of her evidentiary burden and the basis for the lower court's granting of summary judgment.

From the outset of this litigation, Petitioner's experts were critical of every single government entity whose conclusions did not support their claims, whether it be the EPA, the WVDHHR, or the ATSDR. Petitioner for some reason believed that her experts' mere criticisms of the EPA, the WVDHHR, and the ATSDR and their methodologies constituted underlying proof against Omar Mining. In other words, simply having experts criticize the government's testing and findings from 2003, or submitting a March 2009 congressional subcommittee staff report, does not create a genuine issue of material fact regarding Omar Mining's acts or omissions in the 1950s.

Indeed, nowhere in its Orders summary judgment in favor of Omar Mining, A.T. Massey, and Massey Energy Company did the lower court in any way indicate that its ruling was based upon the fact that the government had concluded the Omar School site posed no apparent health hazard. The lower court's granting of summary judgment was based upon Petitioner's complete lack of proof to support her allegations concerning conduct that occurred nearly sixty years ago. Thus, Petitioner could not establish *Bower's* requirement that a plaintiff be significantly exposed to a proven hazardous substance through the tortious conduct of the defendant. Syl. pt. 3, *Bower*, 206 W.Va. at 133, 522 S.E.2d at 424. The lower court never had to reach the *Bower* elements concerning whether Petitioner and the class she represented were at an increased risk of contracting a latent disease. In essence, regardless of what the government testing found concerning the risk posed by the Omar School site, whether good, bad or otherwise, the evidence against Omar Mining was completely lacking.

Accordingly, under the facts and circumstances presented, the lower court was well within its discretion in finding Petitioner did not carry her burden of proving that her purported newly discovered evidence was of such a kind that it ought to have produced a different result on the merits.

## V. CONCLUSION

For the above reasons, respondents Omar Mining Company, A.T. Massey Coal Company, Inc., and Massey Energy Company respectfully request that the Petition for Appeal be denied.

**Respectfully submitted,**

**OMAR MINING COMPANY, A.T. MASSEY  
COAL COMPANY, INC., AND MASSEY  
ENERGY COMPANY**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NORMA ACORD,  
West Virginia Residents,  
Plaintiffs and Class Representatives,

Plaintiff/Petitioner,

v.

COLANE COMPANY, et al.

Appeal No. \_\_\_\_\_  
Civil Action No. 04-C-151-O  
Circuit Court of Logan County

Defendants/Respondents.

**CERTIFICATE OF SERVICE**

I, Jonathan Anderson, one of counsel for Defendant/Respondents Omar Mining Company, A. T. Massey Coal Company, and Massey Energy Company, hereby certify that service of the foregoing *Response of Omar Mining Company, A.T. Massey Coal Company and Massey Energy Company to Petition for Appeal* was made upon counsel of record this the 30<sup>th</sup> day of August, 2010, by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelop, addressed as follows:

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