

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO.: 18-0725

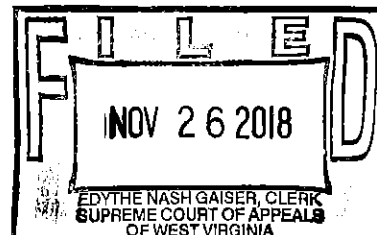
Michael D. Michael, Administrator of the
Estate of Jack D. Michael, et al.,

Petitioners,

v.

Consolidation Coal Company,

Respondent.



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I. CERTIFIED QUESTIONS

The United States Court of Appeals for the Fourth Circuit certified the following questions of the West Virginia law to this Honorable Court:

- (1) Is a fraudulent concealment claim, as set forth in *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998), cognizable when the alleged injury was the plaintiffs' loss of a timely claim for wrongful death under West Virginia Code §§ 55-7-5, 55-7-6 (1967); and
- (2) If the answer to Question (1) is yes: Under the West Virginia discovery rule, does the statute of limitations for a fraudulent concealment claim begin to run against a corporate entity when a plaintiff (A) learns that the entity concealed the intentional act of an unidentified individual, which resulted in the death of other employees at the entity's workplace; or (B) discovers that the entity concealed both the intentional act and the identity of a particular employee, who allegedly acted at the direction of the entity, resulting in the death of other employees at the workplace?

See JA 1783.

II. INTRODUCTION

Fraudulent concealment is hiding facts to deprive a person of some right or property. For nearly forty-six years the Petitioners have sought to find out who was responsible for the deaths of their loved ones. While justice delayed is justice denied, closing the courthouse doors due to fraudulent concealment is no justice at all.

This case concerns fraud, concealment, and nondisclosure of the identity of the management-level persons of the entity responsible for the deaths of seventy-eight coal miners, on November 20, 1968, at the Consol No. 9 coal mine in Farmington, West Virginia. Under West Virginia workers compensation immunity, a worker or the worker's estate is prohibited from bringing a civil action against the employer for workplace injury or death unless the worker or the worker's estate has evidence that the management of the employer willfully, wantonly and recklessly exposed the worker to unsafe working conditions.

Previous to a statutory cause of action created by the West Virginia legislature in 1985, a civil suit by a worker or the worker's estate was a common law cause of action whereby the worker or the worker's estate was required to prove that management willfully, wantonly and recklessly exposed the worker to unsafe working conditions causing injury or death. *Mandolidis v. Elkins Indus.*, 161 W. Va. 695, 246 S.E.2d 907 (1978). Importantly, the *Mandolidis* decision did not "create" the common law cause of action in 1978, but rather it clarified that this common law cause of action had existed from the original enactment of the West Virginia workers' compensation system in the 1930s. The *Mandolidis* decision established the level of conduct necessary to prove that common law action willful, wanton and reckless exposure of workers to unsafe working conditions. Therefore, at the time of the Farmington Mine Disaster in 1968, this was the cause of action the estates of the miners could have brought under West Virginia law against their employer.

West Virginia public policy does not support fraud. Most certainly, it does not support fraud which conceals the identity of management-level employees involved in the intentional exposure of 78 coal miners to unsafe conditions which resulted in their deaths in a horrific mine explosion and fire. Consistent with *Kessel v. Leavitt*, 204 W.Va. 95, 128, 511 S.E.2d 720, 753 (1998), a cause of action exists for fraudulent concealment under the unique facts presented. From November 20, 1968, to June 8, 2014, agents of Consolidation Coal Company hid the identity of the management persons responsible for and participating in rendering the mine fan alarm inoperable before the explosion.

Chief Electrician Alex Kovarbasich was a management-level employee who directed electrician Leonard Sacchetti to assist him in disabling an alarm which would sound if the Mod's Run ventilation fan shut down. The operation of this fan was critical to protect miners from methane build-up inside the mine. If the alarm were operable, if the ventilation fan shut down, the

alarm would sound and the mine would be evacuated. Evacuation of the mine is a costly and time-consuming endeavor. For some inhumane reason, management of Consolidation Coal Company and its agents believed the evacuation of the mine was unwarranted and the alarm was disabled. Defendant Consolidation Coal Company and its agents, including Chief Electrician Alex Kovarbasich, knew the truth and fraudulently concealed the identity of the management-level agents from the estates. Importantly, even though there was evidence that the ventilation fan was inoperable before the explosion, until there was evidence showing the involvement of mine management in the disabling of the fan alarm, the Estates of the miners could not satisfy the requisite factors to file wrongful death suits. Until mine management-level persons were identified, the fan alarm could simply have been accidentally disabled or a co-worker could have disabled it for some reason. Because of the Respondent's conduct, the Petitioners were denied critical information that would have permitted them to prevail in wrongful death actions within two years of the explosion.

On June 8, 2014, it was first discovered that a person responsible for rendering the mine fan alarm system inoperable before the explosion was Consolidation Coal Company's Chief Electrician, Alex Kovarbasich. On November 6, 2014, the Petitioners filed their complaint in the Circuit Court of Marion County, West Virginia, alleging claims of "fraud, concealment and nondisclosure" against the Sheriff of Harrison County, as Administrator for the Estate of Alex Kovarbasich, and the Respondent. After removal to the federal District Court for the Northern District of West Virginia, the District Court ultimately dismissed the case under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Upon appeal, the United States Court of Appeals for the Fourth Circuit certified the above questions to this Honorable Court.

By fraudulent concealment, Respondent Consolidation Coal Company deprived the Petitioners of their ability to prevail in a civil action under West Virginia's Wrongful Death Act within two years of the explosion. The coal company and its agents hid the identity of the persons responsible for the miners' deaths. The Court should note that management-level employees of Consolidation Coal Company, *including Alex Kovarbasich*, were called to testify before the federal investigative panel and, despite their knowledge of the reason why 78 miners were not evacuated after a critical mine ventilation fan shut down, they remained silent. They intentionally and fraudulently sentenced the families of the lost 78 miners to a prison of unanswered questions and no closure to their grief in which they remain to this day. A plaintiff cannot file a claim for fraudulent concealment until the plaintiff knows the critical element of "who" was responsible for the concealment and "who" directed the person to act.

III. STATEMENT OF THE CASE

A. Operative Facts

On November 20, 1968, the Petitioners' decedents, and all similarly situated class members, were coal miners at the Consol No. 9 Mine located in or near Farmington, Marion County, West Virginia. JA 177, ¶ 12. "Alex Kovarbasich was a member of mine management and performed mine management duties as the [C]hief [E]lectrician at the Consol No. 9 Mine. . . . Alex Kovarbasich was responsible for the maintenance and safe operation of the surface fans which flushed methane from the Consol No. 9 Mine so as to ensure that methane did not reach unsafe levels." *Id.* at ¶ 13. At unsafe levels between 5% and 15%, methane gas is explosive.

Two entities performed work at the Consol No. 9 Mine: Mountaineer Coal Company and Consolidation Coal Company. JA 176-177, ¶ 8. The Consol No. 9 Mine was under the

direction and control of Consolidation Coal Company. JA 178, ¶ 14.¹ It was Consolidation Coal Company's duty and obligation to ensure that the No. 9 Mine was safe and free of hazards. *Id.* at ¶ 16. There existed a fiduciary relationship and a special relationship between the decedents and Consolidation Coal Company. JA 188, ¶ 56.

"Methane is a highly flammable, odorless, colorless, hydrocarbon. It is a product of the decomposition of organic matter and of the carbonization of coal. During the coal mining process, methane is liberated into the mine environment, necessitating ventilation of the mine area to avoid ignition and explosion." JA 179-180, ¶ 22. To flush methane from the Consol No. 9 Mine, the Respondent "utilized four large surface fans: the No. 1 fan at the slope; the Athas Run fan near the 2 North area of the mine (No. 2. fan); the Mod's Run fan near the 4 North area of the Mine (No. 3 fan); and the Llewellyn fan near the 7 South area of the mine (No. 4 fan). The No. 3 and No. 4 fans ventilated the west side of the mine. By operation of mining regulations and safe mining practices, fans were required to run twenty-four hours a day, seven days a week. . . . Further, by operation of mining regulations and safe mining practices, each fan must be visually inspected at least one time per day." JA 180, ¶ 23.²

Consolidation Coal Company fitted its "fans with a FEMCO brand safety system. Each fan was connected to a display board at the lamp house. If a fan was running, its light on the display board was green. If a fan slowed or stopped, a red light came on and an alarm sounded. The miner in the lamp house would then contact the miners underground. If a fan was down for

¹ Mountaineer Coal Company was a division of Consolidation Coal Company. At this juncture, it is believed that non-management employees were employed by Mountaineer Coal Company while management employees were employed by Consolidation Coal Company.

² "By operation of mining regulations and safe mining practices, if a fan stops and ventilation cannot be restored within 15 minutes, all power to the mine must be shut off and all miners must be withdrawn from the affected areas and/or the mine." *Id.* at ¶ 24.

more than 12 minutes, the system was designed to cut off all the power in the mine.” *Id.* at ¶ 25. This would cease all production in the mine and force the evacuation of the entire underground workforce.

“At approximately 5:30 a.m. on Wednesday, November 20, 1968, an explosion occurred in the Consol No. 9 Mine. The force of the explosion extended throughout the west side of the mine inby the Plum Run overcast which included nine active working sections. Of the ninety-nine (99) miners in the mine, seventy-eight (78) died as a result of the explosion.” JA 181, ¶ 27. Immediately after the “explosion, mine investigators found that the mine fan recording chart for the Mod’s Run fan was taken from the mine fan box sometime after the explosion. The person who absconded with the mine fan recording chart presumably broke the glass covering on the fan chart box to take it.” *Id.* at ¶ 31. The mine fan recording chart would have indicated whether the exhaust fan was running at the time of the explosion. If the fan was not running, the chart would have indicated how long it was inoperable.

“Between 1969 and 1978, the bodies of 59 victims were recovered and brought to the surface. However, recovery operations ceased and all entrances to the mine were permanently sealed in November of 1978, leaving 19 victims buried in the mine.” *Id.* at ¶ 33. Today, this hallowed ground is the final resting place for 19 men.

“From November 20, 1968, to April of 1990, investigation of the cause of the explosion was conducted by the West Virginia Department of Mines, the United States Bureau of Mines, or the United States Department of Labor, Mine Safety and Health Administration.” JA 182, ¶ 34. “In March of 1990, a United State Department of Labor, Mine Safety and Health Administration (“MSHA”) investigation concluded, in part, that “the ventilation along the Main West headings was inadequate overall, and most probably non-existent in some areas between 1 South and 4

North. On the day before the explosion . . . methane accumulated to about four percent on the right side of the 7 South section for a distance of approximately 1,000 feet outby the working section because of inadequate ventilation and the lack of sufficient ventilation controls. . . .” *Id.* at ¶ 35.

“In 2008, a copy of a September [1]5, 1970, handwritten memorandum by federal coal mine inspector Larry L. Layne was discovered. The memorandum provided as follows:

On Sept. 5, 1970, 12am-8am shift, the Mods Run substation was energized for the first time since the explosion of Nov. 20, 1968. The electrician (name withheld by request) reported that while energizing the substation he found evidence to indicate that the Femco fan alarm system for Mods Run fan had been rendered inoperable before the explosion. The fan alarm system had been bridged with jumper wires; therefore when the fan would stop or slow down, there was no way of anyone knowing about it because the alarm signal was bypassed. This information was reported to me Sept 15, 1970.”

Id. at ¶ 37. *See also* JA 434, 1299-1300.

Just a year later, in “2009, a copy of an alleged November 20, 1968, Mod’s Run mine fan recording chart was discovered. The Mod’s Run mine fan recording chart was off schedule with the mine fan recording charts for the other fans. The ink line on the chart is thick and solid, unlike the thin, jagged lines on the other mine fan recording charts. The line on the Mod’s Run mine fan recording chart stops abruptly at 5:00 a.m. on November 20, 1968.” JA 182-183, ¶ 38.

From November 20, 1968, to June 8, 2014, the identity of the person or entity responsible for rendering the FEMCO alarm system inoperable was unknown to the Petitioners and, through the exercise of reasonable diligence, could not have been discovered by the Petitioners. JA 183, ¶ 39. Despite a thorough government investigation, neither Alex Kovarbasich nor Consolidation Coal Company disclosed or otherwise advised the Petitioners, or any state or federal mine agency, that, **before the explosion, the FEMCO fan alarm system had been intentionally rendered inoperable by a member of mine management.** *Id.*

As time passed, so too did the ability of the victim families to determine who or what entity was responsible for the decedents' deaths. Nevertheless, beginning in June 8, 2014, the truth began to trickle out. On June 8, 2014, Leonard Sacchetti told certain widow victims that Consolidation Coal Company's Chief Electrician, Alex Kovarbasich, was responsible for rendering the mine fan alarm system inoperable. JA 419-420 and 544-545. Consolidation Coal Company "affirmatively and intentionally concealed or otherwise prevented" the Petitioners "from discovering the existence of their cause of actions . . . by fraudulent act, omission, concealment, and suppression of the identity of the person" who was a cause of the miners' deaths and other information necessary to put decedents' estates on notice. JA 184, ¶ 44. The Petitioners have been kept in ignorance of vital information essential to the pursuit of their claims, without any fault or lack of diligence on their part. *Id.* The Petitioners could not reasonably have discovered the fraudulent nature of the Respondent's conduct until Mr. Sacchetti disclosed the person, and hence the entity, responsible for rendering the fan alarm inoperable before the explosion. *Id.*

B. Procedural Posture

On November 6, 2014, the Petitioners filed a complaint in the Circuit Court of Marion County, West Virginia, alleging claims of "fraud, concealment and nondisclosure" against Albert F. Marano, Sheriff of Harrison County, as Administrator to the Estate of Alex Kovarbasich (hereinafter "Estate of Kovarbasich"), and Consolidation Coal Company. JA 175-208. Thereafter, on December 12, 2014, the case was removed to the District Court for the Northern District of West Virginia by Respondent wherein it argued that the Estate of Kovarbasich was fraudulently joined because the Estate was improperly reopened and the claims against the Estate were untimely. JA 24. Subsequently, on December 17, 2014, Respondent Consolidation Coal Company filed a motion to dismiss arguing, in part, that the Petitioners' claims were time barred. JA 51. On

December 23, 2014, the Petitioners filed a motion to remand the case to state court denying that the Estate of Kovarbasich had been fraudulently joined and that their claims were time barred. JA 206.³

On February 9, 2015, the Petitioners moved to promptly perpetuate the testimony of Leonard Sacchetti. The District Court recognized Mr. Sacchetti's advanced age and granted the Petitioners' motion. On March 26, 2015, the deposition of Leonard Sacchetti was conducted. His testimony directly contradicted what Mr. Sacchetti previously told certain widows of deceased coal miners. *See* JA 419, 544, 551-554. Mr. Sacchetti testified that he was not working at the Consol No. 9 Mine after the explosion, but worked at Loveridge Mine on the midnight shift. JA 553. Consolidation Coal Company's own records indicate that both before and after the November 20, 1968, mine explosion, Mr. Sacchetti was working at the Consol No. 9 Mine. JA 542-543.

The Petitioners continued to investigate their claims. On April 3, 2015, Lawrence "Larry" Layne (hereinafter "Larry Layne"), a retired federal mine inspector who wrote the September 15, 1970, memorandum, advised the Petitioners that **on September 5, 1970, it was Leonard Sacchetti who told him that not only had Alex Kovarbasich bypassed the mine fan alarm system before the explosion, but that Sacchetti had helped him do it. Mr. Layne did not disclose this information to anyone prior to April 3, 2015. JA 546, ¶ 9. In fact, in 2010, Mr. Layne went to Mr. Sacchetti's home in Fairmont, West Virginia, to discuss the Consol No. 9 Mine explosion. Upon learning of the reason for Mr. Layne's visit, Mr. Sacchetti threatened him in an effort to keep him quiet. JA 547, ¶ 10.**⁴

³ The Estate of Alex Kovarbasich was subsequently dismissed from this action. *See generally In re Estate of Kovarbasich*, 2016 W.Va. LEXIS 828 (Nov. 10, 2016)(Memorandum Decision). Issues related to the Kovarbasich Estate are beyond the purview of the Fourth Circuit's certified questions.

⁴ On March 8, 2017, as further discussed *infra*, Mr. Layne was deposed. *See* JA 1273-1458.

Upon learning of Mr. Sacchetti's involvement in rendering the mine fan alarm system inoperable, and recognizing his outright denial of his involvement, on June 31, 2015, the Petitioners filed a motion to amend their complaint to add Mr. Sacchetti as a defendant. JA 549. The motion was transferred to Magistrate Judge John S. Kaul by order entered August 13, 2015, and hearing was held on the motion on September 10, 2015. JA 822, 829-924. Thereafter, by *Memorandum Opinion and Report and Recommendation*, entered September 29, 2015, the Magistrate Judge recommended that the Petitioners' motion for leave to add Mr. Sacchetti as a defendant be denied as futile. JA 945. Further, the Magistrate Judge found that the statute of limitations barred any claim against Mr. Sacchetti and that any stand-alone claims against Mr. Sacchetti for fraudulent concealment failed. JA 945.

On March 31, 2017, the District Court entered its *Memorandum Opinion and Order Adopting R&R and Granting the Defendant's Motion to Dismiss*. JA 1223. On the same date, a *Judgment in a Civil Action* was entered dismissing the case in its entirety. JA 1269. The District Court adopted the Magistrate Judge's Report and Recommendation in its entirety except for its finding that the Petitioners' complaint alleged deliberate intent claims. The District Court denied the Petitioners' motion to amend the complaint to add Leonard Sacchetti as a defendant because amendment was futile; granted Consolidation Coal Company's motion to dismiss; and dismissed all claims against Consolidation Coal Company with prejudice. JA 1267-1268.

The Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. After briefing and oral argument, the Fourth Circuit certified the instant questions to this Court. JA 1781-1792.

IV. SUMMARY OF THE ARGUMENT

The Petitioners are masters of their own complaint. The Petitioners have asserted a claim for fraudulent concealment, as recognized by *Kessel v. Leavitt*, 204 W.Va. 95, 128, 511 S.E.2d 720, 753 (1998), based upon the Respondent's concealment of the entity and person responsible for deaths of their loved ones. But for the Respondent's concealment, the Petitioners would have prevailed in timely actions under West Virginia's Wrongful Death Act. This Court's holding in *Kessell v. Leavitt*, as well as the public policy of this State, make clear that a cause of action exists for fraudulent concealment under the unique facts presented.

The remedies available under the Wrongful Death Act are but an element of damages that the Petitioners seek through their fraudulent concealment claims. West Virginia law does not reward fraud. The fact that the "property" or the "right" which the Petitioners were fraudulently denied was the value of their wrongful death actions does not convert this fraudulent concealment case into one of wrongful death. The fraudulent actions of the Respondent's agents denied the Petitioners their ability to prevail upon claims of wrongful death. While the Petitioners understand that, as part of their case against the Respondent, they must prove a "case within the case," that does not alter or nullify the fraudulent concealment claims alleged in the complaint. A legal malpractice case is analogous. In a legal malpractice case, where a plaintiff alleges the lawyer filed a wrongful death case too late, the plaintiff must prove not only that the lawyer failed to file the claim within the applicable statute of limitations, but also the viability and value of the claim. The fact that the plaintiff in a legal malpractice case must prove the "case within the case," by evidence of the viability of the underlying wrongful death claim, does not convert the legal malpractice claim into a wrongful death claim.

The discovery rule acts to toll the limitation period on the Petitioners' fraudulent concealment claims because the Petitioners did not know the persons or entity responsible for

rendering the mine fan alarm inoperable were members of mine management until June 8, 2014. The Petitioners could not meet the strictures of Rule 9(b) until they knew the identity of the persons and entity responsible for rendering the mine fan alarm inoperable prior to the November 20, 1968, explosion were members of mine management. Whether they knew or should have known that members of mine management ordered and participated in rendering the mine fan alarm system inoperable before June 8, 2014, is a factual issue for a jury.

V. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to an October 4, 2018, Order, this Court indicated it will hear oral argument under Rule 20 of the Rules of Appellate Procedure on a later date during the January 2019 Term of Court. Oral argument is proper because the certified questions presented raise important issues regarding a plaintiff's ability to recover for fraudulent concealment where a defendant hides critical facts of a plaintiff's underlying cause of action. The certified questions implicate a citizen's ability to obtain justice within the context of on-going fraud.

VI. STANDARD OF REVIEW

"The Supreme Court of Appeals of West Virginia may answer a question of law certified to it by any court of the United States. . . ." W.Va. Code § 51-1A-3. Further, this Court "may reformulate a question certified to it." W.Va. Code § 51-1A-4. *See* Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

"A *de novo* standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court." Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998). Syl. Pt. 2, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000).

VII. ARGUMENT

A. Certified Question No. 1: A fraudulent concealment claim is cognizable where a defendant conceals the identity of the entity and person that caused the death of a plaintiff's loved one and denies a plaintiff the right to fair consideration of a wrongful death claim.

A cause of action for fraudulent concealment exists under West Virginia law where a defendant, through concealment, denies a plaintiff of some right or property. The mere fact that the right or property denied is a wrongful death action does not excuse fraudulent conduct. "In West Virginia, claims for fraud can . . . be based on concealment of the truth, because '[f]raud is the concealment of the truth, just as much as it is the utterance of a falsehood.'" *Talbot 2002 Underwriting Capital, Ltd. v. Old White Charities, Inc.*, 2016 U.S. Dist. LEXIS 52088, at *35 (S.D. W.Va. Apr. 19, 2016)(citations omitted).

In this regard, West Virginia follows the basic principles set forth in the *Restatement (Second) of Torts* § 550 (1976). See *Kessel v. Leavitt*, 204 W.Va. 95, 128, 511 S.E.2d 720, 753 (1998). "One party . . . who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering." *Restatement (Second) of Torts* § 550.

The rule of the *Restatement* commonly applies to two non-exclusive scenarios. *Id.* at Comment a. The first scenario occurs where a party actively conceals facts or defects. *Id.* "The second situation occurs when the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or when the defendant frustrates an investigation." *Id.* at Comment b. Both *Restatement* scenarios occurred in this action. Consolidation Coal Company "affirmatively and intentionally concealed or otherwise prevented" the Petitioners "from discovering the existence of their cause of actions . . . by fraudulent act, omission, concealment, and suppression of the identity of the

person” who was a cause of the miners’ deaths and other information necessary to permit the Petitioners to prevail on wrongful death claims. JA 184, ¶ 44.

“Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud.” *Trafalgar House Constr. v. Zmm, Inc.*, 211 W.Va. 578, 584, 567 S.E.2d 294, 300 (2002). In *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, the defendants, through misinformation and omissions, hid the post-birth whereabouts of a father’s child. The defendants’ conduct denied the plaintiff-father his right to establish and maintain a parental relationship with the child. *Id.*, 204 W.Va. 95, 125, 511 S.E.2d 720, 750. The *Kessel* Court recognized that “one who does anything, or permits anything to be done, without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights, is absolutely liable.” *Id.*, 204 W.Va. at 127, 511 S.E.2d at 752. The *Kessel* Court held that the plaintiff-father stated a viable claim for fraudulent concealment. *Id.*, 204 W.Va. at 131, 511 S.E.2d at 756. As recognized in *Kessel*:

fraudulent concealment may arise when the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or **when the defendant frustrates an investigation**. Even a false denial of knowledge or information by one party to a transaction, who is in possession of the facts, may subject him to liability as fully as if he had expressly misstated the facts, if its effect upon the plaintiff is to lead him to believe that the facts do not exist or cannot be discovered.

(Emphasis added).⁵ Fraudulent concealment requires “some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts or some representation intended to exclude suspicion and prevent inquiry.” *Kessel v. Leavitt*, 204 W.Va. at 128, 511 S.E.2d at 753. Nevertheless, when examining the act of a party, “any act or omission tending to suppress the truth

⁵ Quoting *Restatement (Second) of Torts* § 550, Comment b (1976).

is enough.” *Merrill v. W.Va. Dep't of Health & Human Res.*, 219 W.Va. 151, 632 S.E.2d 307 (2006).⁶

Neither Alex Kovarbasich, Leonard Sacchetti, nor Consolidation Coal Company ever disclosed that they rendered the mine fan alarm inoperable so that the men would not know the mine was unsafe. Alex Kovarbasich, in his position as Chief Electrician, concealed the disarming of the mine fan alarm system even when questioned by investigators following the explosion.

Leonard Sacchetti told federal mine inspector Larry Layne to withhold his name from a September, 1970, memorandum referencing the rendering of the Mod's Run fan alarm system inoperable before the explosion. Thereafter, for the first time, on June 8, 2014, Mr. Sacchetti told certain widow victims that Consolidation Coal Company's Chief Electrician, Alex Kovarbasich, rendered the mine fan alarm inoperable. *See* JA at 419-420 and 544-545. Upon being deposed, Mr. Sacchetti testified that he was not working at the Consol No. 9 Mine after the explosion, but worked at Loveridge Mine on the midnight shift. JA 553. Consolidation Coal Company's own records indicate that both before and after the November 20, 1968, mine explosion, Mr. Sacchetti worked at the Consol No. 9 Mine. JA 542-543.⁷

⁶ Insofar as fraudulent concealment requires a duty to disclose, where a special relationship exists between parties, a duty to disclose will be found. *See generally* *Glasco v. City Nat'l Bank*, 213 W.Va. 61, 62, 576 S.E.2d 540, 541 (2002); *White v. AAMG Constr. Lending Ctr.*, 226 W.Va. 339, 340, 700 S.E.2d 791, 792 (2010); *Kidd v. Mull*, 215 W.Va. 151, 160, 595 S.E.2d 308, 317 (2004). Moreover, a duty to disclose may arise “when one party makes a partial and fragmentary statement of fact.” *Brush Engineered Materials, Inc.*, 383 F. Supp. 2d 814, 820 (D. Md. 2005)(citations omitted). Whether a special relationship exists is an issue of fact. *See generally* *Aikens v. Debow*, 208 W.Va. 486, 499, 541 S.E.2d 576, 589 (2000). As alleged in the complaint, a special relationship existed between Consolidation Coal Company and the men who perished on November 20, 1968. JA 188, ¶ 56.

⁷ Mr. Sacchetti's testimony is also directly contradicted by the testimony of federal mine inspector Larry Layne. Mr. Layne testified that Leonard Sacchetti reported to him in September of 1970 that the mine fan alarm was rendered inoperable and Mr. Sacchetti assisted Alex Kovarbasich in rendering the fan inoperable. *See* JA at 1296-1303.

Beyond mere words, circumstances surrounding the mine fan chart indicate the intentional concealment of the cause of the miner's deaths. The mine fan chart for the Mod's Run area of the mine was stolen immediately after the explosion. As former federal mine inspector Larry Layne explained, he arrived at the Consol No. 9 mine around 8:00 a.m. on the morning of the explosion. JA 1285. Layne went to the Mod's Run area of the mine and smoke was coming out. He then went to the building near Mod's Run where the fan chart⁸ gauge operated. The fan charts provide a chronological history of the Mod's Run fan's operation. *Id.* at 1287 and 1291. The building was undamaged from the explosion. *Id.* at 1450. The fan charts were stored in a metal box with a glass front. *Id.* at 1287. The metal box normally opened with a key. *Id.* However, Mr. Layne found that someone had broken the glass enclosure where the fan charts were stored and stolen the fan charts for the Mod's Run fan. *Id.*

Sometime in 2009, a copy of a mine fan chart purported to be the Mod's Run fan chart during the time period in question was discovered. It was altered. The line abruptly stops at 5:00 a.m. on November 20, 1968. Former federal mine inspector Larry Layne testified that he has seen thousands of fan charts and never one with these characteristics. *Id.* at 1315. A heavy line appears on the fan chart which appears to have been superimposed on it. *See generally id.* at 1315-1322; 1579.

This case is not different than *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720. Like the *Kessel* defendants, Consolidation Coal Company concealed critical facts from the Petitioners; had a duty to disclose such facts; and intentionally misled the Petitioners. The Petitioners, like the

⁸ A fan chart is a round, circular chart that rotates in a pressure gauge machine. A needle makes a mark on the chart based upon the pressure of the fan. *Id.* at 1290. A fan chart continuously measures the fans operation. So long as the fan is constant, the mark is constant. If the fan stops, the mark drops down. *Id.*

Kessel plaintiff, were denied “the enjoyment of his [their] legal rights” by virtue of being denied their right to a fair day in court where the full merits of their claims are considered. *Kessel*, 204 W.Va. at 127, 511 S.E.2d at 752. **See W.Va. Const. Art. III, § 17 (stating “[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy to due course of law”); W.Va. Const. Art. III, § 1 (recognizing the inherent rights of “the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.”).** “Nowhere in the United States Constitution are the terms ‘equally free and independent’ or ‘safety’ or comparable rights guaranteed. . . . The federal constitution is devoid of any language stating that the federal government is instituted for the “common benefit” and “security” of its citizens.” *Women's Health Ctr. v. Panepinto*, 191 W. Va. 436, 441, 446 S.E.2d 658, 663 (1993). These enhanced rights must be interpreted independent from federal precedent. *Id.*, 191 W. Va. at 442, 446 S.E.2d at 664. The right to safety ensures the Petitioners that their husbands and fathers will return to the sanctity of their home or they will otherwise be afforded recourse for the deaths of their loved ones. Through fraud, the Petitioners were stripped of their constitutional rights. West Virginia law cannot operate to deny the Petitioners their fair day in court where their rights have been stripped through fraud and deceit.

“[A] lack of precedent--standing alone--is an insufficient reason to deny a cause of action.” *Kessel v. Leavitt*, 204 W.Va. at 130, 511 S.E.2d at 755 quoting *Farley v. Sartin*, 195 W.Va. 671, 682, 466 S.E.2d 522, 533 (1995). In their complaint, the Petitioners raised claims of “Fraud, Concealment and Nondisclosure” against Respondent Consolidation Coal Company. *See* JA 188. The Petitioners alleged, in part, that Consolidation Coal Company failed to “disclose, omitting and/or intentionally concealing that Alex Kovarbasich disabled the FEMCO alarm system for the

Mod's Run fan at the Consol No. 9 Mine before the November 20, 1968, explosion" and concealed "and/or provid[ed] half-truths regarding the causes of the November 28, 1968, explosion." JA 188-189, ¶ 59, a, b. Such conduct was done "in order to deprive the plaintiffs their ability to investigate and seek redress for the harms and losses suffered. . . ." JA 189, ¶ 60.

The Petitioners have been deprived of their ability to prevail in wrongful death actions because of the Respondent's fraud, concealment, and non-disclosure. *See* JA 190-191, ¶ 66. As relief, they seek, in part, one hundred and ten thousand dollars (\$110,000) per class member for the wrongful death of their decedents pursuant to W.Va. Code § 55-7-6 (1967), along with applicable interest thereon.

A basic precept of tort law posits that "a wrong-doer is liable for all the direct injury resulting from his act although the resultant injury could not have been contemplated as a probable result." *White v. Ohio V. E. Ry.*, 98 W.Va. 378, 385, 127 S.E. 65, 68 (1925)(citation omitted). Hence, as damages are concerned, causation of damages is an essential element to any tort claim seeking damages for tortious conduct. When establishing causation of damages, a causal link in the chain the Petitioners must prove is the viability of the underlying wrongful death claims.

In this regard, the instant scenario is akin to a legal malpractice claim. *C.f. Calvert v. Scharf*, 217 W.Va. 684, 695, 619 S.E.2d 197, 208 (2005)(discussing causation in a legal malpractice case). If an attorney misses the statute of limitations on behalf of a client, and thereafter hides the fact that the statute of limitations expired from the client, this does not mean that the client cannot assert a claim of fraud and/or legal malpractice because the statute of limitations ran on the underlying, substantive claim. An element of damages the injured client may recover in the fraud/legal malpractice case is the value of the claim that the attorney caused to be lost. Hence, in the legal malpractice scenario, the viability of the underlying claim may be

properly established and the value of the underlying claim is an element of damages the client may recover. This is no different from the instant case. The Petitioners seek, as damages, the value of the cause of actions that the Respondent prevented them from prevailing upon through fraudulent concealment. There is nothing new or expansive about the application of proximate cause principles to damages.

In *Urtz v. N.Y. C. & H. R. R. Co.*, 202 N.Y. 170, 179, 95 N.E. 711, 714 (N.Y. 1911), a widow entered into a settlement agreement with a railroad company after her husband was killed at a highway crossing from a collision between a train and her husband's wagon. *Id.*, 202 N.Y. at 173, 95 N.E. at 712. An agent of the railroad company investigated and misrepresented the facts of the death to the widow claiming that the widow's husband was drunk. *Id.* Subsequently, the widow entered into a settlement with the railroad company. *Id.* The widow recognized that she had been defrauded and filed a civil action sounding in fraud. The action was "not to enforce or vacate the compromise but to recover the actual pecuniary loss sustained by the plaintiff." *Id.*, 202 N.Y. at 176, 95 N.E. at 713.

The *Urtz* Court recognized that "the basic principle underlying all rules for the measurement of damages in actions for fraud and deceit is indemnity for the actual pecuniary loss sustained as the direct result of the wrong." *Id.*, 202 N.Y. 170, 174-75, 95 N.E. 711, 712. Recognizing that the widow could recover for the wrongful death of her husband through a fraud claim, the *Urtz* Court found that:

There was error in the refusal of the trial judge to charge that the plaintiff in order to maintain the action must show, in the first instance, that she had a valid and existing claim against the defendant originally, and in charging that she must show that there was a claim which was disputed and contested; that she was alleging a claim based upon facts sufficient that she could reasonably apprehend that she had a just claim.

Id., 202 N.Y. 170, 179, 95 N.E. 711, 714. The *Utz* Court held that where a plaintiff alleges fraud with regard to a wrongful death claim, the plaintiff must first prove the existence of a valid wrongful death claim and thereafter prove that the plaintiff was defrauded out of wrongful death damages through misrepresentation.

Urtz v. N.Y. C. & H. R. R. Co., 202 N.Y. 170, 95 N.E. 711, is analogous to the instant action. Like the railroad company in *Urtz*, Respondent concealed facts related to the cause of the decedents' deaths. Like the widow in *Urtz*, the Petitioners now seek to recover for pecuniary losses, in the form of the value of their wrongful death claims, through a fraudulent concealment action. Consistent with *Utz*, this Court should find that a plaintiff may recover the value of a wrongful death claim where a defendant conceals critical facts that would have permitted the plaintiff to prevail on a timely wrongful death claim. Such a holding is consistent with the *Kessel v. Leavitt*, 204 W.Va. 95, 511 S.E.2d 720, black letter law concerning the proximate cause of damages, and West Virginia public policy.

West Virginia public policy does not support fraud. *See generally Blake v. Charleston Area Med. Ctr.*, 201 W.Va. 469, 477, 426, 498 S.E.2d 41, 49 (1997); *Curl v. Vance*, 116 W.Va. 419, 181 S.E. 412, 416 (1935)(citations omitted); *Shell v. Metro. Life Ins. Co.*, 183 W.Va. 407, 414, 396 S.E.2d 174, 181 (1990). A civil action seeking monetary damages is considered "property" under the law. Civil actions are routinely listed as either assets or liabilities in bankruptcies and divorces filed every day in this country. Civil actions, as "property," have "value." Just as a con man can, through deceit and concealment, steal money (property of value), a person or entity can, through deceit and concealment, steal a civil action (property of value) from an estate by hiding information necessary to prevail in a civil action. It should follow that just as

a con man can be sued for fraud for stealing cold hard cash by deceit, a coal company can be sued for stealing a civil action by deceit.

A wrongful death action is a right of action belonging to the distributees of the deceased coal miners' estates. *See Burgess v. Gilchrist*, 123 W.Va. 727, 729, 17 S.E.2d 804, 806 (1941). *See also Miller v. Romero*, 186 W.Va. 523, 526, 413 S.E.2d 178, 181 (1991) overruled on other grounds by *Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E.2d 681 (2001)(recognizing a wrongful death action as a "legislatively created right."). Damages available under W.Va. Code § 55-6-6 (1967) are an element of damages the Petitioners may recover as part of this fraudulent concealment action. *See* JA 191, ¶ 67. Consolidation Coal Company, through fraud and deceit, stripped the Petitioners of their ability to prevail in statutory wrongful death actions. A cause of action exists under West Virginia law for fraudulent concealment where a defendant conceals the identity of the entity and person responsible for the death of a plaintiff's decedent and prevents the plaintiff from prevailing on a timely cause of action for wrongful death.

B. Certified Question No. 2: A cause of action for fraudulent concealment does not begin to run until a plaintiff knows or should know the entity and person responsible for the concealment.

Prior to June 8, 2014, the Petitioners did not know whether an employee of Mountaineer Coal Company or an employee of the Respondent disabled the mine fan alarm before the explosion. Prior to June 8, 2014, the Petitioner's did not know whether the person who disabled the mine fan alarm did so at the direction of management or in fact was a member of mine management. The Certified Question posed by the Fourth Circuit Court of Appeals inquires "for purposes of applying the discovery rule, whether the plaintiffs "knew, or by the exercise of reasonable diligence should have known, of the elements of a possible fraudulent concealment claim (1) when they learned in 2008 that the safety system intentionally was disabled by an

individual in the Consolidation Coal mine; or (2) when they discovered in 2014 that the individual who disabled the system was a member of mine management allegedly acting under the direction of Consolidation Coal.” JA 1789 (internal quotations omitted). Under the facts presented, the answer is the discovery rule does not begin to run until 2014 when the plaintiff knew, or by the exercise of reasonable diligence should have known, the identity of the entity and person responsible for rendering the mine fan alarm inoperable before the explosion.

Statutes of limitation are not designed to defeat justice. *Hamilton v. 1st Source Bank*, 928 F.2d 86, 89 (4th Cir. 1990). Where a party hides critical evidence to deny a plaintiff his or her fair day in court, the discovery rule intercedes. The purpose of the discovery rule is to “to toll the running of the applicable statute of limitations until the plaintiff discovers his or her injury and the **identity of the injury-causing entity.**” *Metz v. E. Associated Coal, LLC*, 239 W.Va. 157, 166, 799 S.E.2d 707, 716 (2017)(emphasis added). It is not until a plaintiff knows or should know of the injury-causing persons and entity that the clock begins to run.

The statute of limitations for a fraudulent concealment claim is two years. *See* W.Va. Code § 55-2-12 (2016). “[U]nder the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.” *Dunn v. Rockwell*, 225 W.Va. 43, 52-53, 689 S.E.2d 255, 264-65 (2009) quoting Syl. Pt. 4, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

In Syllabus Point 5 of *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255, the Court held as follows:

A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for

each cause of action. **Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred.** Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. **Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.**

(Emphasis added).

In 2008, the Petitioners became aware of a September 15, 1970, memo where an *unnamed* electrician reported to a federal coal mine inspector that the mine fan alarm system was rendered inoperable before the explosion. *See* JA 182, ¶ 37, 434. In 2009, the Petitioners located what is believed to be a mine fan recording chart for the Mod's Run fan that was taken from the mine fan box immediately after the explosion and before mine investigators arrived. JA 182-183, ¶ 38. The mine fan chart was altered. *Id.* The discoveries in 2008 and 2009 were not enough to establish the critical element of who rendered the mine fan alarm system inoperable because, at the time of the explosion, at least two different entities were involved in the operation of the Consol No. 9 Mine: Consolidation Coal Company and Mountaineer Coal Company. JA 176-177, ¶ 8. And, importantly, the only viable civil cause of action for workplace death under West Virginia law requires affirmative action in the creation of and/or knowledge of management in the existence of unsafe working conditions. *See Mandolidis v. Elkins Indus.*, 161 W. Va. 695, 246 S.E.2d 907 (1978). Until the Farmington widows discovered the identity of the person who ordered and participated in disabling the fan alarm AND that the person was a member of mine management,

they had no idea that they had been defrauded through concealment of their rights to recover damages under the Wrongful Death Act.

On June 8, 2014, for the very first time, Leonard Sacchetti told certain widows that Respondent's Chief Electrician, Alex Kovarbasich, rendered the mine alarm inoperable before the explosion. JA 419-420 and 545-545. The Petitioners did not know what entity or persons rendered the mine fan alarm system inoperable until June 8, 2014. It was not until this date that the Petitioners uncovered the critical piece of who was responsible for the deaths of their loved ones. Even then, it was not until June 8, 2014, that the Petitioners could ascertain whether the act was undertaken at the direction of mine management and that mine management actively participated in creating the unsafe working condition which ultimately killed 78 innocent coal miners.

After the action was filed, former federal mine inspector Larry Layne disclosed: that Leonard Sacchetti was the unnamed electrician who asked that his name be withheld from the September 15, 1970, memorandum; that Mr. Sacchetti told Mr. Layne that he helped render the mine fan alarm system inoperable at the direction of Consolidation Coal Company; that in 2010, Mr. Sacchetti threatened Mr. Layne in an attempt to prevent him from talking about the explosion; and that prior to April 3, 2015, Mr. Layne **never** disclosed Mr. Sacchetti's involvement in the rendering the fan alarm system inoperable to anyone. JA 689.

As discussed *supra* at Page 9, upon being deposed, Mr. Sacchetti continued to conceal his involvement in rendering the fan alarm system inoperable. Whether the Petitioners acted with reasonable diligence is a factual issue for the jury. See *Johns Hopkins University v. Hutton*, 488 F.2d 912, 918 (4th Cir. 1973); *Bell ex rel. Bell v. Board of Educ. of County of Fayette*, 290 F.Supp.2d 701, 710 (S.D.W.Va. 2003).

The fact that the Petitioners were unsuccessful in previously-filed actions related to the mine explosion is evidence of the critical nature of the information the Respondent hid for all these years. *See generally Sattler v. Bailey*, 184 W.Va. 212, 214, 400 S.E.2d 220, 222 (1990) (considering the fraudulent concealment tolling doctrine and finding tolling under W.Va. Code § 55-2-17 application where there is a “cover up” of the identity of all wrongdoers).

For years, the Petitioners were kept in the dark as to who rendered the mine fan alarm system inoperable before the explosion. This did not forestall their attempts to obtain justice. After the explosion, two civil actions were filed regarding the Consol No. 9 Mine explosion: *Kazoski v. Consolidation Coal Company et al.*, 368 F. Supp. 1022 (W.D.Pa. 1974); and a 1970 action filed in the Marion County Circuit Court (*Kazoski et al. v. Consolidation Coal Company, et al.*, Marion County Civil Action No. 4405). *See* JA 766. In fact, because the families were deprived of the knowledge that mine management was involved in the disabling of the ventilation fan alarm system, the *Kazoski* case did not even allege intentional exposure by management to unsafe working conditions. Instead, the families were left to argue that the pittance amount of widows and dependents benefits provided under West Virginia law were unconstitutional and therefore they should be able to pursue a common law negligence case against the coal company. Had the families known that Chief Electrician Alex Kovarbasich disabled a life-saving alarm system, no doubt the action would have been filed under another theory and with that information would likely have been successful. The state court companion case was no different. In the *Kazoski* companion cases, the fact that Consolidation Coal Company rendered the mine fan alarm system inoperable was never disclosed. But for Consolidation Coal Company’s fraudulent concealment, the plaintiffs would have prevailed in the *Kazoski* actions. It is the Respondent’s

fraud and deceit that deprived the Petitioners of their ability to prevail on the merits of the *Kaznoski* actions.⁹

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” W.Va. R.C.P., Rule 9.¹⁰ See *Bausch v. Philatelic Leasing*, 1994 U.S. App. LEXIS 22289, at *21 (4th Cir. Aug. 19, 1994)(applying the heightened pleading standard to the tolling doctrine of fraudulent concealment); *Belville v. Ford Motor Co.*, 13 F. Supp. 3d 528, 546 (S.D. W.Va. 2014)(dismissing fraudulent concealment claims related to an omission and applying Rule 9(b)). Rule 9(b) is not satisfied where a complaint vaguely attributes fraudulent conduct to multiple defendants or “is bereft with any detail concerning **who** was involved in each allegedly fraudulent activity.” Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, Rule 9 § 9(b)(4th Ed.)(emphasis added). In alleging fraud, a plaintiff “is required to plead **in detail the ‘who, what, when, where, and how’** of the circumstances constituting the alleged fraud.” *Pocahontas Mining Co. Ltd. Pshp. v. Oxy USA, Inc.*, 202 W.Va. 169, 173, 503 S.E.2d 258, 262 (1998)(citations omitted)(emphasis added). See *U.S. ex rel. Wilson v. Kellogg, Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008). Without identification of the person or entity responsible for the fraud, a plaintiff cannot meet the strictures of Rule 9(b).

The identity of the persons and entity that rendered the alarm fan system inoperable is a requisite, critical element to the Petitioners’ fraudulent concealment claims. Furthermore, to have

⁹ A third action, styled *Currence, et al. v. Consolidation Coal Co., et al.*, Civil Action No. 78-0044-C(H)(N.D.W.Va. 1978), primarily concerned the conduct of the Respondent during the recovery efforts. See JA 770. The *Currence* plaintiffs filed at least two motions for sanctions due to the Consolidation Coal Company’s refusal to produce discovery. See JA 171-173.

¹⁰ “The reason for the deviation from the general pleading requirements when fraud is charged is both to allow the party alleged to have committed fraud to defend such charges and to permit the tribunal hearing the matter to conduct a full review of the complaining party’s claims.” *Mason v. Torrellas*, 238 W.Va. 1, 10, 792 S.E.2d 12, 21 (2016).

a viable claim (or property) which could be stolen through deceit, the Petitioners had to know whether the person or persons disabling the fan alarm were mine management employees or working at the direction of mine management. Not until the discovery that the person disabling the fan alarm system was a member of management could the Petitioners state viable claims of fraudulent concealment. A contrary finding invites conjecture and speculation as to the facts that were concealed from the Petitioners.

A company cannot be held responsible for fraudulent concealment simply because a concealment occurred. The concealment must be attributable to the company's conduct. *See Humphreys v. Newport News & M. V. Co.*, 33 W.Va. 135, 145, 10 S.E. 39, 43 (1889). Under West Virginia law, the Petitioners are required to establish that the person who disabled the alarm was a member of mine management or acted under the direct control of mine management within the scope of the employee's employment. Knowing that the alarm was disarmed was not enough. The Petitioners had to know whether a member of mine management, such as Chief Electrician Alex Kovarbasich, was involved. Only then could the Petitioners properly allege: (1) fraudulent concealment; and (2) damages resulting from the concealment of viable underlying claims. Had the Petitioners brought a fraudulent concealment case against Consolidation Coal Company shortly after 2008, alleging actions by "unnamed" individuals who may not have been a management-level agent or even employed directly by Consolidation Coal Company, and, given the heightened pleading standard for fraud under Rule 9, the complaint would have run seriously close to, if not afoul of Rule 11(b).

Without knowing the critical element of "who" rendered the mine fan alarm inoperable, the Petitioners could not assert a claim of fraudulent concealment with specificity. Prior to June 8, 2014, the facts were not such that the Petitioners could, in good faith, assert the cover up was

directly attributable to the Respondent. Insofar as the Respondent argues otherwise, such arguments should be directed to a jury, not a court.

VIII. CONCLUSION

For the foregoing reasons, Petitioner prays that this Court answer Certified Question No. 1 in the affirmative and answer Certified Question No. 2 by finding that a claim for fraudulent concealment cannot be brought until the plaintiff knows or should know the identity of the entity and person responsible for the concealment. Petitioner further requests other such relief as deemed equitable and just.



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO.: 18-0725

**Michael D. Michael, Administrator of the
Estate of Jack D. Michael, et al.,**

Petitioners,

v.

Consolidation Coal Company,

Respondent.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **PETITIONERS' BRIEF** and **APPENDIX** has been served upon the following this 26th day of November, 2018, via United States Mail:

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