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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
A governmental entity**

Defendant Below, Petitioner,

v.

Supreme Court No. 20-0063

McDowell Co. Civil Action No. 16-C-96

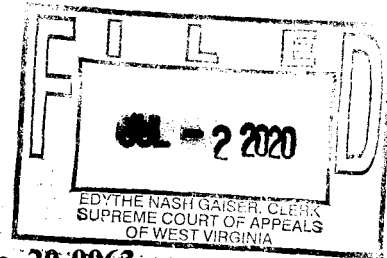
**DREMA DOTSON, a resident of West
Virginia, individually and on behalf of
Others similarly situated, *et al.*,**

Plaintiffs Below, Respondents.

RESPONDENTS' BRIEF

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II. ASSIGNMENTS OF ERROR

1. The Circuit Court of McDowell County did not err in its December 30, 2019, Order which denied the West Virginia Department of Environmental Protection's Motion for summary judgment on qualified immunity grounds.

2. The Circuit Court of McDowell County did not err in its December 30, 2019, Order which denied the West Virginia Department of Environmental Protection's Motion for summary judgment regarding the public duty doctrine.

IV. STATEMENT OF THE CASE

Procedural History

Respondents Drema Dotson, the Estate of Denver Allen Hunt, Connie Lester, Woodrow Kirk and Johnny Lockhart filed their Class Action Complaint initiating this proceeding against Twin Star Mining, Inc. ("Twin Star") and the West Virginia Department of Environmental Protection ("WVDEP") on August 19, 2016 and an Amended Class Action Complaint was filed, before service of process, on October 13, 2016. A.R., 1. In pertinent part, Petitioner WVDEP filed a Motion to dismiss on December 5, 2016, which was denied by a May 24, 2017, Order of the Circuit Court. A.R., 1-2. Afterward, on July 3, 2017, Respondent filed an Answer. A.R., 2. By an Agreed Order entered by the Circuit Court on April 20, 2018, Respondents filed a Second Amended Class Action Complaint. A.R., 4. Thereafter, after the parties conducted discovery, the Circuit Court agreed to conduct a Settlement Conference with the parties on April 22, 23 and 24, 2019. A.R., 12. At these settlement proceedings, all of the claims between Respondents and former Defendant Twin Star were settled and Twin Star was dismissed as a Defendant. The Circuit Court entered an Order on May 9, 2019, dismissing Twin Star and vacating Time-Frame Order deadlines with respect to Petitioner. A.R., 13; A.R., 729-31.

On March 11, 2019, Petitioner WVDEP filed separate Motions for summary judgment against each Respondent. A.R., 12; A.R., 398-728. On July 29, 2019, the Circuit Court entered an "*Order Setting Status, Scheduling Conference and Motions Hearing*" which set a hearing on the WVDEP's Motions and specifically ordered the WVDEP to mediate the case. A.R., 24; A.R., 732-3. On August 13, 2019, Petitioner filed a Motion to be relieved of any obligation to mediate the case, as required by the Circuit Court's July 29, 2019, Order which was granted by the Circuit Court on August 29, 2019. A.R., 24 & 26. On August 19, 2019, Respondents filed

separate responses to the Motions for summary judgment. A.R., 24-6; A.R., 734-2095. On August 29, 2019, Petitioner filed an omnibus reply to Respondents' responses to the Motions for summary judgment. A.R., 26; A.R., 2435-2449. On October 16, 2019, the Circuit Court conducted a hearing on the Motions for summary judgment. A.R., 26; A.R., 2450-2501. On December 30, 2019, the Circuit Court entered "*Order denying WVDEP's Motions for summary judgment and denying Plaintiffs' Motion for class certification.*"¹ A.R., 27; A.R., 2692-2724. Then, Petitioner WVDEP filed its Notice of Appeal with this Court on January 28, 2020. A.R., 27.

Statement of Facts

Respondents are individuals who have suffered economic losses, property losses, and non-economic losses or injuries as the result of a massive flood which emanated from the mining operations of Twin Star, in McDowell County, West Virginia, on June 5, 2014.² A.R., 29; A.R., 35-41 (Second Amended Complaint at ¶s 1, "Class Allegations," 36, 37 & 40-44). Twin Star's McDowell County mining operations have an extreme and extensive violation history which continues to this day based upon designs that should never have been permitted by the WVDEP and the WVDEP should never have released one of the bonds for one of the permits. A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Report of mining expert Jack Spadaro identified as "Exhibit 1" to Respondents' Responses to WVDEP Motions for summary judgment and report of hydrologist John Eichenberger identified as "Exhibit 2" to

¹ The Court also denied Respondents' Motion for class certification and later stayed the deadline for the filing of individual Complaints for the 151 putative class members until the resolution of the WVDEP's interlocutory appeal. A.R., 2709-2724 (Order at pgs. 18-33).

² On August 4, 2014, Alpha Natural Resources, Inc., and a number of its subsidiaries and affiliate companies (collectively "Alpha") filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court"). A.R., 31 (Second Amended Complaint at ¶ 12). By Stipulation entered on July 29, 2016, the Bankruptcy Court granted Respondents relief from the automatic stay under 11 U.S.C. §362 to proceed with Respondents' claims for the purpose of seeking to recover under one or more insurance policies insuring the applicable Debtors. A.R., 31 (Stipulation previously attached to the Complaint as "Exhibit A;" Second Amended Complaint at ¶ 13).

Respondents' Responses to WVDEP Motions for summary judgment). There are three (3) areas which suffered damages as a direct and proximate result of the acts and omissions of Twin Star and the WVDEP: Right Fork; Lower Bull Creek (Tug Fork) and Upper Bull Creek (Mud Fork). A.R., 29; A.R., 35-41 (Second Amended Complaint at ¶s 2, "Class Allegations," 36, 37 & 40-44). Respondents suffered individual damages as a direct and proximate result of the acts and omissions of Twin Star and the WVDEP which turned a heavy Spring rain into a cataclysmic flood. A.R., 29; A.R., 35-41 (Second Amended Complaint at ¶s 3, "Class Allegations," 36, 37 & 40-44). In addition, Respondents in Right Fork and in Tug Fork are threatened by the WVDEP in failing to address, within the last few years, a dangerous seep in the face of Valley Fill 3. A.R., 29; A.R., 35-41; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶s 5, "Class Allegations," 36, 37 & 40-44; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)).

Respondents are residents of McDowell County, West Virginia. Respondent Drema Dotson resides at the head of the Right Fork of Bull Creek. A.R., 776-841; A.R., 116-1181; 1456-1521; A.R., 1798-1862; A.R., 2137-2202. Respondent the Estate of Denver Allen Hunt resided at the mouth of the Right Fork of Bull Creek. A.R., 842-885; A.R., 1182-1225; A.R., 1522-1565; 1863-1906; A.R., 2203-2246. Respondent Connie Lester resides approximately a quarter of a mile downstream of the confluence of the Right Fork of Bull Creek and Main Bull Creek and downstream from Permits S-4020-95 and S-4011-97. A.R., 886-910; A.R., 1126-1250; A.R., 1566-1590; A.R., 1907-1931; A.R., 2247-2271. Respondent Woodrow Kirk resides at the mouth the Main Fork of Bull Creek downstream of the confluence of the Right Fork of Bull Creek and Main Bull Creek, downstream of Permits S-4020-95 and S-4011-97. A.R., 911-958; A.R., 1251-1298; A.R., 1591-1638; A.R., 1932-1979; A.R., 2272-2319. Respondent

Johnny Lockhart resides on Main Bull Creek, upstream of the confluence of the Right Fork of Bull Creek and Main Bull Creek, downstream from Permit S-4020-95. A.R., 959-1020; A.R., 1299-1360; A.R., 1639-1700; A.R., 1980-2041; A.R., 2320-2381. Respondents suffered, as a result of the acts and omissions of Twin Star and the WVDEP, legal harm including, but not limited to, property damage, property repair, loss of use, annoyance, inconvenience, emotional distress, attorney fees and costs of litigation. A.R., 2; A.R., 35; A.R., 776-841; A.R., 116-1181; 1456-1521; A.R., 1798-1862; A.R., 2137-2202 (Second Amended Complaint at ¶s 6 & 36(a); *see also* deposition transcript of Drema Dotson identified as “Exhibit 3” to Respondents’ Responses to WVDEP’s Motions to summary judgment); A.R., 30; A.R., 35; A.R., 842-885; A.R., 1182-1225; A.R., 1522-1565; 1863-1906; A.R., 2203-2246 (Second Amended Complaint at ¶s 7 & 36(a); *see also* deposition transcript of Denver Allen Hunt identified as “Exhibit 4” to Respondents’ responses to WVDEP’s Motions for summary judgment); A.R., 30; A.R., 36; A.R., 886-910; A.R., 1126-1250; A.R., 1566-1590; A.R., 1907-1931; A.R., 2247-2271 (Second Amended Complaint at ¶s 8 & 36 (b); *see also* deposition transcript of Connie Lester identified as “Exhibit 5” to Respondents’ responses to WVDEP’s Motions for summary judgment); A.R., 30; A.R., 36; A.R., 911-958; A.R., 1251-1298; A.R., 1591-1638; A.R., 1932-1979; A.R., 2272-2319 (Second Amended Complaint at ¶s 9 & 36(b); *see also* deposition transcript of Woodrow Kirk identified as “Exhibit 6” to Respondents’ responses to WVDEP’s Motions for summary judgment); and A.R., 31; A.R., 36; A.R., 959-1020; A.R., 1299-1360; A.R., 1639-1700; A.R., 1980-2041; A.R., 2320-2381 (Second Amended Complaint at ¶s 10 & 36(c); *see also* deposition transcript of Johnny Lockhart identified as “Exhibit 7” to Respondents’ responses to WVDEP’s Motions for summary judgment).

Twin Star is a domestic corporation in West Virginia having its principal place of business in Holden, West Virginia. Twin Star operates the mountaintop removal operations, known as the Bull Creek Surface Mine No. 45, that sit atop the Bull Creek watershed in McDowell County, West Virginia, through Permits S-4020-95 and S-4011-97, issued by the WVDEP. In pertinent part, Twin Star's acts and omissions proximately caused the damages to Respondents. A.R., 31; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 11; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). Notwithstanding, the WVDEP is the government entity having the responsibility to issue mining permits and to enforce the requirements of the Surface Coal Mining and Reclamation Act (hereinafter referred to as "SCMRA"), West Virginia Code § 22-3-1, *et seq.* A.R., 32 (Second Amended Complaint at ¶s 14, 15 & 16).

In enacting SCMRA, the Legislature expressed its intent to assure "*that the rights of surface and mineral owners and other persons with legal interest in the land or appurtenances to land are adequately protected from [surface-mining] operations; . . .*" and "*that adequate procedures are provided for public participation where appropriate under this article[.]*" See *Martinka Coal v. Div. of Env. Protection*, 214 W.Va. 467, 470, 590 S.E.2d 660, 663 (2003) (citing W.Va. Code § 22-3-2(b)). The Legislature further provided that this statute serves to allow "*the exercise of the full reach of state common law, statutory and constitutional powers for the protection of the public interest through effective control of surface-mining operations.*" *Id.*

To carry out these purposes, the Legislature, in West Virginia Code § 22-3-25(a), authorizes "*any person having an interest which is or may be adversely affected may commence a civil action in the circuit court of the county to which the surface-mining operation is located on the person's own behalf to compel compliance with this article . . . [a]gainst the state of West*

Virginia or any other governmental instrumentality or agency thereof . . . which is alleged to be in violation of the provisions of this article or any rule, order or permit issued pursuant thereto”

In reviewing WVDEP’s enforcement duties under SCMRA, the Circuit Court determined that:

“Under the *Surface Mining and Control Reclamation Act of 1977* (SMCRA), Congress established “minimum national standards” for regulating surface coal mining and reclamation, but allowed states to enact their own laws incorporating these standards, as well as any “more stringent,” but not inconsistent, standards that they might choose. Once a state has done so, and its program has been approved by the Secretary, the federal laws and regulations drop out and the state becomes the exclusive regulator of surface coal mining (and is known as a “primacy” state).” A.R., 2699 (Order at pg. 8 citing Thomas C. Means and Sherrie A. Armstrong, Back in the Spotlight: The Surface Mining Control and Reclamation Act in 2013, 34 Energy & Min. L. Inst. 10, p. 395 (2013); 30 U.S.C. §§ 1202, 1253; 30 U.S.C. §§ 1201 - 1328).

Under the authority of SMCRA, the West Virginia Legislature enacted the *West Virginia Surface Mining Control and Reclamation Act (WV SCMRA)*, W. Va. Code §§ 22-3-1 through 22- 3-38, to regulate surface mining in West Virginia. Both SMCRA and WV SCMRA provide for citizen suits by a person with interest to enforce these surface mining laws. A.R., 2700 (Order at pg. 9 citing 30 U.S.C. § 1270 and W.Va. Code § 22-3-25). When the West Virginia’s Legislature enacted WV SCMRA, the Legislature made several findings, including:

“(a) (2) Further, the Legislature finds that *unregulated surface coal mining operations may result in disturbances of surface and underground areas* that burden and adversely affect commerce, public welfare and safety by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes; by *causing erosion and landslides*; by *contributing to floods*; by polluting the water and river and stream beds; by destroying fish, aquatic life and wildlife habitats; by impairing natural beauty; by *damaging the property of citizens*; by *creating hazards dangerous to life and property*; and by degrading the quality of life in local communities, all where

proper mining and reclamation is not practiced. A.R., 2700 (Order at pg. 9 citing W.Va. Code § 22-3-2, in part).

The West Virginia Legislature established purposes for WV SCMRA:

“(b) Therefore, it is the purpose of this article to:

(1) Expand the established and effective statewide program to protect the public and the environment from the adverse effects of surface-mining operations;

(2) *Assure that the rights of surface and mineral owners and other persons with legal interest in the land or appurtenances to land are adequately protected from the operations;*

* * *

(6) *Assure that adequate procedures are provided for public participation where appropriate under this article;*

(7) *Assure the exercise of the full reach of state common law, statutory and constitutional powers for the protection of the public interest through effective control of surface-mining operations;*” A.R., 2700-1 (Order at pg. 9-10 citing W.Va. Code § 22-3-2, in part (emphasis added)).

DEP’s enforcement duties related to its issuance of mining permits mandates that DEP ensure:

“A permit application must contain, *inter alia*, the name of the watershed and location of the surface stream into which drainage will be discharged; a determination of the probable hydrologic consequences of the mining and reclamation operations; a map or plan indicating the location of a water treatment facility or drainage system; and a chemical analysis of potentially acid-forming sections of the overburden.” A.R., 2701 (Order at pg. 10 (citing *State ex rel. W. Va. Highlands Conservancy, Inc. v. W.Va. Div. of Env’tl. Prot.*, 191 W.Va. 719, 721, 447 S.E.2d 920, 922 (1994) (internal citations omitted); see W.Va. Code § 22-3-9(a)(10), (11), (13)(1) and (14)(D)).

“A permit application must also include a reclamation plan. Each reclamation plan must demonstrate that reclamation required by *WV SCMRA* can be accomplished and must include, *inter alia*,

“[t]he steps to be taken to comply with applicable air and water quality laws.” Furthermore, W.Va. Code R. 38-2-3.22(f)(1991) states, in relevant part, that each permit application “shall contain a hydrologic reclamation plan” which, *inter alia*, meets “applicable Federal and State water quality laws and regulations [.]”” A.R., 2701 (Order at pg. 10 citing *State ex rel. W. Va. Highlands Conservancy, Inc.*, 191 W.Va. at 721-722, 447 S.E.2d at 922-923).

“The DEP may not issue a mining and reclamation permit until the applicant files a performance bond covering “that area of land within the permit area upon which the [applicant] will initiate and conduct surface coal mining and reclamation operations” and in an amount “sufficient to assure the completion of the reclamation plan if the work [is] to be performed by the [DEP] in the event of forfeiture [.]” 30 U.S.C. § 1259(a) (1988) (footnote added). Under *WV SCMR*A, the DEP may issue site-specific performance bonds. The amount of these bonds, which cannot exceed \$5,000 per acre, must reflect the various factors which affect the cost of reclamation.” A.R., 2702 (Order at pg. 11 citing *State ex rel. W. Va. Highlands Conservancy, Inc.*, 191 W.Va. at 721-722, 447 S.E.2d at 922-923 (internal citations and footnote omitted); *see* W.Va. Code § 22-3-12).

In the subject permits, Twin Star and the WVDEP promised to limit storm water runoff during mining and post-mining to pre-mining levels. A.R., 32; A.R., 39-40; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶s 17 & 39; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). However, on June 5, 2014, a heavy, but not unexpected, rain fell in the vicinity of the Bull Creek Surface Mine No. 45. A.R., 32; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 18; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). As a result of the June 5, 2014, rains and Twin Star and the WVDEP’s actions and/or inactions, Respondents experienced severe flooding. A.R., 32 (Second Amended Complaint at ¶ 19). Rushing waters from the mine site carried shot rock, cut trees and bits of coal down the mountain where it slammed into Respondents’ homes, destroyed belongings, deposited stinking mud, frightened everyone in the path of the torrent and

caused Respondents to endure tremendous annoyance, inconvenience, loss of use and emotional distress. A.R., 32 (Second Amended Complaint at ¶ 20).

Notwithstanding, pursuant to West Virginia Code § 22-3-20, the WVDEP directed and approved, at the time of the submission of the application for the subject mining permits and again upon their transfer, public notice of Permits S-4020-95 and S-4011-97. SCMRA identifies Respondents and the other adjacent residents as protected persons who should receive notice. W.Va. Code § 22-3-20. Based upon the WVDEP's required public notice, Respondents expected to be kept safe from harm by the WVDEP and relied upon the WVDEP's promises to be kept safe from harm which are articulated in the subject mine permits. A.R., 842-885; A.R., 959-1020; A.R., 1116-1225; A.R., 1299-1360; A.R., 1456-1565; A.R., 1639-1700; A.R., 1798-1906; A.R., 1980-2041; A.R., 2137-2246; A.R., 2320-2381 (Exhibit 3 at pgs. 184-6 (Dotson deposition transcript), Exhibit 4 at pgs. 105-114 (Hunt deposition transcript) and Exhibit 7 at pgs. 173-5 (Lockhart deposition transcript)). In addition, there was testimony from individuals, from each sub-watershed, about their expectation to be kept safe from harm by the WVDEP and reliance upon the WVDEP's promises to be kept safe from harm which are articulated in the subject mine permits. A.R., 1021-1056; A.R., 1361-1396; A.R., 1701-1736; A.R., 2042-2077; 2382-2417 (pertinent portions of deposition transcripts identified as "Exhibit 8" (Tug Fork resident Tyler Kirk at pgs. 45 & 49-51; Mud Fork resident Kennith Coleman, Jr. at pgs. 53-55; Right Fork resident Jordan Morgan at pgs. 33-35; Right Fork resident Stephen Birchfield at pgs. 69-71; Right Fork resident Leroy Bevins at pgs. 75-77; Right Fork resident Darrell Bailey at pgs. 100-102; Right Fork resident Conley Blankenship at pgs. 57-59; Tug Fork resident Junior Cline at pgs. 56-59; Mud Fork resident Michael Roberts at pgs. 74-79; Mud Fork resident Randy Hunt at pgs. 88-91; Mud Fork resident Calvin Branch at pgs. 54-56; Right Fork resident Kevin

Lockhart at pgs. 35-39; Right Fork resident James Blankenship at pgs. 56-57; and Tug Fork resident (and husband of Plaintiff Connie Lester) Rickey Lester at pgs. 195-6)).

Twin Star failed to limit storm water runoff during mining and post-mining to pre-mining levels at the Bull Creek Surface Mine No. 45, causing tremendous damage to Respondents. A.R., 33; A.R., 39-40; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶s 21 & 39; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). Twin Star designed the Bull Creek Surface Mine No. 45 without proper runoff curve numbers upon which to base engineering plans for storm water control. A.R., 33; A.R., 39-40 (Second Amended Complaint at ¶s 22 & 39). Twin Star designed the Bull Creek Surface Mine No. 45 without sufficient storm water runoff controls. A.R., 39-40; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶s 23 & 39; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). Twin Star designed the Bull Creek Surface Mine No. 45 without sufficient storm water detention capacity. *Id.* However, the WVDEP granted Twin Star the subject permits based upon designs which, based upon explicit SCMRA requirements, it knew or should have known did not meet the requirements of SCMRA. *Id.*

Twin Star, in its operation of the Bull Creek Surface Mine No. 45, did not meet the applicable performance standards as required by the terms of its permit, pursuant to West Virginia Code § 22-3-13(a), which failure caused flood damage to Respondents. A.R., 39-40; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136. Twin Star, in its operation of the Bull Creek Surface Mine No. 45, failed to minimize the disturbance to the prevailing hydrologic balance and to the quantity of water in the surface water system in violation of West Virginia Code § 22-3-13(a)(2) along with related regulations and permit

requirements. *Id.* Twin Star, in its operation of the Bull Creek Surface Mine No. 45, failed to conduct its surface mining operations so as to prevent to the extent possible, using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area in violation of West Virginia Code § 22-3-13(b)(10)(B) and related regulations and permit requirements. *Id.* Twin Star, in its operation of the Bull Creek Surface Mine No. 45, failed to conduct surface mining operations so as to prevent to the extent possible channel deepening or enlargement in operations requiring the discharge of water from mines West Virginia Code § 22-3-13(b)(10)(D) and related regulations and permit requirements. *Id.* Twin Star, in its operation of the Bull Creek Surface Mine No. 45, failed to conduct contemporaneous reclamation and establish permanent vegetation in violation of West Virginia Code of State Regulations § 38-2-14.15. A.R., 34; *Id.* Twin Star, in its operation of the Bull Creek Surface Mine No. 45, failed to conduct surface mining operations so as to ensure that the construction, maintenance and post-mining conditions of access and haul roads into and across the site of operations controlled or prevented erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property in violation of West Virginia Code § 22-3-13(b)(17) and related regulations and permit requirements. *Id.* Twin Star, in its operation of the Bull Creek Surface Mine No. 45, failed to conduct surface mining operations so as to protect off-site areas from slides or damage occurring during surface mining operations in violation of West Virginia Code § 22-3-13(b)(21) and related regulations and permit requirements. *Id.* Twin Star's actions and/or inactions, as set forth herein, directly and proximately caused Respondents to incur damages. A.R., 34; A.R., 39-40; A.R., A.R., 756-760; A.R., 1096-1100; A.R., 1436-1440; A.R., 1777-1781; A.R., 2117-2121 (Second Amended Complaint at ¶s 33 & 39 and *see also* Exhibit 1 (Spadaro Report)).

Importantly, the WVDEP allowed the aforementioned violations to occur without issuing Notices of Violation or requiring permit revisions, in violation of its duties under SCMRA. Respondents of Right Fork and Tug Fork also seek injunctive relief, pursuant to the Citizen's Suit Provision of SCMRA, West Virginia Code § 22-3-25(a)(2) because the WVDEP failed to perform its duties. A.R., 35; A.R., 39-40; A.R., A.R., 756-760; A.R., 1096-1100; A.R., 1436-1440; A.R., 1777-1781; A.R., 2117-2121 (Second Amended Complaint at ¶ 34; *see also* Exhibit 1 (Spadaro Report)).

Twin Star's conduct presents common factual questions. Fundamentally, all of the Respondents' claims arise out of a single course of action or inaction generally and specifically, by area, by Twin Star that caused the June 5, 2014, flood. A.R., 39-40 (Second Amended Complaint at ¶ 39). With respect to Permit S-4011-97, the factual issues are: 1) Common factual issues relating to the mine permit and mine conditions of Permit S-4011-97 impacts on Right Fork and Tug Fork only because that permit does not drain into the Mud Fork sub-watershed. 2) A key factual inquiry central to liability for the flood damages and damages associated with the newly identified valley fill seep is whether the site was ever designed to withstand the sort of 25 year and 100 year rain events called for by the laws, regulations and permits. Evidence resolving that factual inquiry pertaining to design standards is found in the permit and government guidance documents. That evidence is common to everyone in the case and primarily resides in the WVDEP permit file. 3) Much of the discussion will center on run-off curve numbers. Run-off curve numbers express the characteristics of native pre-mining soils to absorb and otherwise slow down storm water flowing down a natural mountainside. Obviously, after the mountaintop has been removed, much more storm water will flow fast from the mountainside. 4) The pre-mining soil on this permit is classified as Pineville-Berks soil with small amounts of Kaymine

soil where earlier contour mining occurred. 5) According to the USDA Urban Hydrology for Small Watersheds TR-55 Manual, the proper run-off curve number for the pre-mining soil in undisturbed woods on this mountain before mining is 60 with a hydrologic soil group B classification. 6) In the original Storm Water Run Off Analysis (SWROA), Twin Star used a curve number of 70 instead of 60 and a soil classification of C instead of B. A.R., 39; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 39(a); *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)).

With respect to Permit S-4020-95, the common factual issues are: 1) Common factual and legal issues relating to the mine permit and mine conditions of Permit S-4020-95 impacts on Tug Fork and Mud Fork only because that permit does not drain into the Right Fork sub-watershed. Of course the overriding legal issue for the Mud Fork sub-watershed is the legal effect of the bond release granted to this permit by the WVDEP. 3) Respondents contend that the evidence of such extraordinary flooding in the face of such a typical seasonal reason proves that the fill should not have been released by the WVDEP and thus the WVDEP improperly issued such relief. 3) Two (2) common questions of fact and law determine the claims for the residents of Upper Bull Creek and Mud Fork: a) Did the Permit S-4020-95 disturbance contribute to the flood damages sustained by Respondents? b) What responsibility does the WVDEP have under the mining regulations and laws for the waters flowing over the S-4020-95 permit? A.R., 40; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 39(b); *see* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)).

Respondents were and are at risk for future flooding because of the condition of the storm water control structures at the Twin Star Mine. Respondents seek damages and final injunctive

relief. A.R., 41-2; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 45; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). With respect to Permit S-4011-97, the adduced facts for damages and injunctive relief in Right Fork and Tug Fork are: 1) After a site inspection, on June 28, 2017, Respondents' expert hydrologist, John Eichenberger, noted three (3) large seeps during a period of dry weather and that the perimeter drainage ditches were either dry or had *de minimis* flow at the time of the inspection. Mr. Eichenberger opined, "[t]he presence of the seeps indicates that storm water flow is not being effectively routed off of the Valley Fills and is being allowed to infiltrate into the fill material. This condition compromises the integrity of the Valley Fills and presents an immediate risk for downgradient flooding associated with slumping of the Valley Fill, and damage to the storm water conveyance system." Additionally, Mr. Eichenberger went on to state, "Storm water conveyance systems are either absent, improperly maintained or not effectively routing storm water . . . Significant erosion, sediment deposition and standing water were observed in these areas which have increased the risk of downstream flooding and the associated risks to human health and the environment." 2) Further, additional issues exist which must also be addressed by the WVDEP with an Order directing immediate compliance by Twin Star. 3) Respondents requested that the Circuit Court use its equitable powers to order the WVDEP enforce the regulations and force Twin Star to immediately address the conditions on mine Permit S-4011-97 that created the flooding and still pose a risk. A.R., 42; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 45(a); *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)).

With respect to Permit S-4020-95, the adduced facts for damages and injunctive relief in Tug Fork and Mud Fork are: 1) Flood waters emanated from a deteriorating valley fill

abandoned by Twin Star Mining's predecessor-in-interest Virginia Energy Company on mining Permit S-4020-95. That valley fill sits abandoned atop the Mud Fork of Bull Creek. Flood waters rushed off the fill on June 5, 2014, rushing past and through the property of Respondent Johnny Lockhart causing damage to his property and the properties of those residents situated from the head of Mud Fork downstream to the confluence of the Right Fork of Bull Creek and the Main Branch of Bull Creek ("Lower Bull Creek"). 2) The WVDEP granted full bond release to the Permit S-4020-95 years before the flood complained of herein. The fact that a rain event one might expect every five (5) years resulted in a flooding never seen before in the lifetimes of hundreds of lifelong residents demonstrates that the WVDEP should have never approved full bond release of Permit S-4020-95. 3) Respondents requested that the Circuit Court use its equitable powers to order the WVDEP enforce the regulations and force Twin Star to immediately address the conditions on mine Permit S-4020-95 that created the flooding and still pose a risk. A.R., 42-3; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 45(b); *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)).

Notwithstanding, as aforementioned, the WVDEP had duties to monitor the mining operations at Bull Creek Surface Mine No. 45 and enforce applicable rules, regulations, statutes, and/or permits which caused the flood complained of herein. A.R., 45; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 57); *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). The WVDEP further breached its duty in that it has in recent months either failed to detect or decided to ignore a significant seep on the face of Valley Fill No. 2 which has created an imminent danger to the safety and property of Respondents. The WVDEP should have issued a violation against

Defendant Twin Star. *Id.* The WVDEP breached its duty when it granted full bond release to mine Permit S-4020-95. *Id.* The WVDEP breached its duties to Respondents. *Id.* The WVDEP's breaches constitute negligent and/or gross negligence. *Id.* The WVDEP's breaches caused Respondents to suffer damages. *Id.*

Pursuant to West Virginia Code § 22-3-25(f), Respondents brought this action for damages, including attorney fees and costs of litigation, for compensation for the injuries to themselves and their property which have resulted from the WVDEP's acts and/or omissions which violated their mining permits and certain aforementioned requirements of SCMRA. A.R., 49 (Second Amended Complaint at ¶ 95). The WVDEP failed to discharge its duties relating to enforcement of mine Permits S-4011-97 and S-4020-95 by primarily overlooking obvious violation of permit, regulation and law. *Id.* Respondents as well as approximately 115 other citizens satisfied the pre-suit notice requirements set forth in West Virginia Code § 22-3-25. A.R., 49; A.R., 1057-1073; A.R., 1397-1413; A.R., 1737-1753; A.R., 2078-2094; A.R., 2418-2434 (Second Amended Complaint at ¶ 98; *see also* SCMRA Notices identified as "Exhibit 9" to Respondents' Responses to WVDEP's Motions for summary judgment). Respondents seek damages and injunctive relief pursuant to the Citizen's Suit Provision of the SCMRA, West Virginia Code § 22-3-25(a)(2), because the WVDEP failed to perform its duties. A.R., 50 (Second Amended Complaint at ¶ 101).

West Virginia Code § 22-3-17(a) mandates that the WVDEP "shall" issue a Notice of Violation if an operator is not in compliance with a provision of a statute, rule or permit. The WVDEP failed to issue such violations in this matter. *Id.* Furthermore, the WVDEP has a duty to insure that permitted surface mining activities that are issued design and implement in accordance with the permit, regulations, statutes and accepted standards of mining engineering

such modifications to their operations, engineering and design as are required to bring the surface mining operations into compliance with SCMRA. As such, the WVDEP failed to execute its duty to insure that the Bull Creek Surface Mine No. 45 does not endanger health, safety or the environment and the WVDEP failed to execute its duty when it released the bond for mine Permit S-4020-95. A.R., 50; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 103; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). The WVDEP's failures to perform its duties are continuing in nature and continue to present a threat to the safety and well-being of Residents and local residents, and the property of both. *Id.*

Respondents also demanded injunctive relief for immediate alleviation of the threats to life, health and property presented by the WVDEP's failure to perform its duties. A.R., 51; A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Second Amended Complaint at ¶ 105; *see also* Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). There are a genuine issues of material fact that Respondents can meet their burden for injunctive relief because (1) there is a likelihood of irreparable harm to Respondents without the injunction, (2) there is a minor or *de minimis* likelihood of harm to the WVDEP with an injunction; (3) Respondents' have a likelihood of success on the merits; and (4) there public interest in upholding West Virginia's mining laws. *Id.*

Despite Respondents' substantial evidence demonstrating various questions of fact in this matter and West Virginia law, including, but not limited to, SCMRA, the WVDEP filed individual Motions for summary judgment, based upon the public duty doctrine and the qualified immunity doctrine, in order to dismiss Respondents' claims. After conducting a hearing on these Motions, the Circuit Court denied these Motions in a thirty-three (33) page Order which

extensively detailed the facts and law of the case. In the Order denying the Motions for summary judgment, the Court, in pertinent part, held that:

FINDINGS OF FACT

Taking the facts in the light most favorable to the nonmoving Plaintiffs as the Court must in considering DEP's *Motions for Summary Judgment*, the Court makes the following finding of facts:

1. On June 5, 2014, rains and surface water runoff from Twin Star Mining's surface mining operations known as Bull Creek Surface Mine Number 45 atop the Bull Creek and Trap Fork Watershed flooded residents along Upper Bull Creek (Mud Fork), the Right Fork of Bull Creek and Main Bull Creek, and Lower Bull Creek.
2. The 5 Plaintiffs are among approximately 151 residents that suffered damage from the floods.
3. Named Plaintiffs claim that Twin Star Mining negligently and improperly designed and then failed to properly maintain its water runoff system under the *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 - 1328; the *West Virginia Surface Mining Control and Reclamation Act* ("*WV SCMRA*"), W.Va. Code §§ 22-3-1 through 22-3-38; and violated its mining permits under W.Va. Code § 22-3-13(a) & (b); *see* W.Va. Code § 22-3-25(f).
4. Plaintiffs claim that DEP failed to enforce various portions of the *WV SCMRA*.
5. Plaintiffs claim they are at risk for future flooding and seek injunctive relief to cause DEP to enforce the *WV SCMRA* and mining permit requirements.
6. Plaintiffs seek injunctive relief from WV DEP.
7. Plaintiffs seek monetary damages from WV DEP up to the policy limits of WV DEP's insurance policy.
8. WV DEP does not claim sovereign immunity, has a policy of insurance, and asserts qualified immunity.

* * *

CONCLUSIONS OF LAW

1. Plaintiffs as downstream residents of Twin Star Mining's surface mining operations known as Bull Creek Surface Mine Number 45 have protected interest under the *West Virginia Surface Mining Control and Reclamation Act (WV SCMRA)*, W.Va. Code §§ 22-3-1 through 22-3-38.
2. Twin Star Mining negligently and improperly designed and then failed to properly maintain its water runoff system under the *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 – 1328; the *West Virginia Surface Mining Control and Reclamation Act (WV SCMRA)*, W.Va. Code §§ 22-3-1 through 22-3-38; and violated its mining permit under W.Va. Code § 22-3-13(a) & (b); see W.Va. Code § 22-3-25(f).
3. WV DEP is the responsible governmental body that has a duty to supervise Twin Star Mining's compliance with *Surface Mining and Control Reclamation Act of 1977*, 30 U.S.C. §§ 1201 – 1328; the *Surface Mining and Control and Reclamation Act ("WV SCMRA")*, W.Va. Code §§ 22-3-1 through 22-3-38.
4. WV DEP has a duty to enforce the clear law established by *WV SCMRA*.
5. WV DEP's alleged failure to properly supervise Twin Star Mining's permit and coal operations under *WV SCMRA* was at least one of the factors that led to flooding downstream resident Plaintiffs and others.
6. Material issues of fact exist regarding whether WV DEP's duty to enforce *WV SCMRA* were ministerial and nondiscretionary or discretionary.
7. Material issues of fact exist regarding whether WV DEP's acts, or failures to act, to enforce *WV SCMRA*, if discretionary, violated clearly established law.

RULING

Material issues of fact exist regarding WV DEP's acts related to WV DEP's duty to enforce *WV SCMRA*, and WV DEP's relationship with and type of duty owed Plaintiffs that preclude summary judgment; consequently, this Court **ORDERS DENIED** WV DEP's *Motions for Summary Judgment* based on qualified immunity and on the doctrine of public duty.

A.R., 2708-9 (Order at pgs. 17-8).

* * *

Based upon the facts and West Virginia law, there is no basis to disturb the Circuit Court's ruling denying these Motions and this Court should affirm that decision.

V. SUMMARY OF ARGUMENT

The Circuit Court of McDowell County did not err in denying Petitioner's Motions for summary judgment based upon the public duty doctrine and the doctrine of qualified immunity. In this case, Respondents seeks damages and injunctive relief against Petitioner WVDEP, pursuant to the Citizen's Suit Provision of SCMRA, West Virginia Code § 22-3-25(a), to bring the subject surface mining operations into compliance with SCMRA and for damages relating to flooding. Respondents adduced sufficient evidence of genuine issues of material fact whether a "special relationship" was created between the WVDEP and Respondents which would defeat the public duty doctrine. Likewise, Respondents adduced sufficient evidence of genuine issues of material fact that the WVDEP violated "clearly established" law or that the WVDEP acted fraudulently, oppressively or maliciously toward Respondents with regard to the subject mining permits which prevents the application of qualified immunity. Based upon the foregoing, there are genuine issues of material fact regarding the acts or omissions of Petitioner WVDEP in this matter concerning the public duty doctrine and the doctrine of qualified immunity.

Consequently, this Court should affirm the Circuit Court's Order denying Petitioner WVDEP's Motions for summary judgment.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Based upon the assignments of error set forth by Petitioner, counsel for Respondents believe that oral argument is unnecessary under Rule 18(a)(4) of the *West Virginia Rules of Appellate Procedure* because the facts and legal arguments are presented adequately in the briefs and record on appeal and the decisional process would not be aided significantly by oral argument. However, if this Court determines that oral argument is appropriate, in accordance with Rules 19 and 20 of the *West Virginia Rules of Appellate Procedure*, then oral argument should be limited to twenty (20) minutes.

VII. STANDARD OF REVIEW

The West Virginia Supreme Court of Appeals reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by the Court. Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). Moreover, “[a] circuit court’s denial of summary judgment that is predicated on qualified immunity is an interlocutory ruling which is subject to immediate appeal under the ‘collateral order’ doctrine.” Syl. Pt. 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009).³

³ In *W.Va. Dep’t of Health v. Payne*, this Court reiterated the difference between qualified immunity and the public duty doctrine. *Id.*, 231 W.Va. 563, ft. nt. 10, 746 S.E.2d 554, ft. nt. 10 (2013). “Qualified immunity is, quite simply, immunity from suit. The public duty doctrine is a defense to negligence-based liability, i.e. an absence of duty. See *Holsten v. Massey*, 200 W.Va. 776, 782, 490 S.E.2d 864, 871 (1997) (“The public duty doctrine, however, is not based on immunity from existing liability. Instead, it is based on the absence of duty in the first instance.”). This Court dedicated an extensive discussion to the similarities, yet fundamental difference, between the two concepts in *Parkulo v. West Virginia Bd. of Probation and Parole*, 199 W. Va. 161, 172, 483 S.E.2d 507, 518: “[The public duty doctrine] is not a theory of governmental immunity, ‘although in practice it achieves much the same result.’” (quoting Syl. Pt. 1, *Benson v. Kutsch*, 181 W. Va. 1, 380 S.E.2d 36 (1989)). Although both defenses are frequently raised, as in this case, only qualified immunity, if disposed of by way of summary judgment, is subject to interlocutory appeal. All other issues are reviewable only after they are subject to a final order: “In cases where interlocutory review of qualified immunity determinations occurs, any summary judgment rulings on grounds other than immunity are reserved for review at the appropriate time[.]” *City of St. Albans v. Botkins*, 228 W. Va. 393, 397, n.13, 719 S.E.2d 863, 867, n.13 (2011) (emphasis added). Cf. *Fucillo v. Kerner*, No. 11-1783 (W.

In *Gray v. Boyd*, the West Virginia Supreme Court of Appeals, in reversing a trial court's decision to grant summary judgment, reiterated the standard for summary judgment. *Id.*, 233 W.Va. 243, 248-56, 757 S.E.2d 773, 778-89 (2014) (*per curiam*). Precedent interpreting Rule 56 of the West Virginia Rules of Civil Procedure clearly establishes that doubt must be resolved against the party moving for summary judgment. ***"A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment."*** Syl. pt. 6, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963) (emphasis added). In *Hanlon v. Chambers*, the West Virginia Supreme Court of Appeals elaborated upon this standard by explaining:

The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment; in assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought. The inferences to be drawn from the underlying affidavits, exhibits, answers to interrogatories, and depositions must be viewed in the light most favorable to the party opposing the motion. *Id.*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995).

A genuine issue of fact has been defined as follows:

Roughly stated, "*genuine issue*" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of the trialworthy issue is present where the non-moving party can point to one or more disputed "*material*" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable

Va., June 5, 2013) (addressing collateral issue of whether private cause of action exists on interlocutory appeal, where both qualified immunity and collateral issues were disposed of under W.V.R.C.P. 12(b)(6) and collateral issue is dispositive of the case); *Jarvis v. West Virginia State Police*, 227 W. Va. 472, 711 S.E.2d 542 (2010) (same)." *Id.*

law. Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995).

A summary judgment proceeding is not a proper forum for the resolution of issues of material fact, and “the trial judge should resist the temptation to try cases in advance on motions for summary judgment[.]” *Warner v. Haught, Inc.*, 174 W.Va. 722, 731, 329 S.E.2d 88, 97 (1985). The *Hanlon* Court stated:

On a motion for summary judgment, neither a trial nor appellate court can try issues of fact; a determination can only be made as to whether there are issues to be tried. To be specific, if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper. *Id.*, 195 W.Va. at 105, 464 S.E.2d at 747.

Based upon this standard of review and the facts of this case, this Court should affirm the Circuit Court’s denial of WVDEP’s Motions for summary judgment.

VIII. ARGUMENT

A. The Circuit Court of McDowell County did not err in its December 30, 2019, Order which denied the West Virginia Department of Environmental Protection’s Motion for summary judgment regarding the public duty doctrine.

Based upon the evidence adduced in the case, there is a genuine issue of material fact whether there is a “special relationship” which defeats the application of the public duty doctrine. The Circuit Court correctly recognized this issue in its analysis to deny WVDEP’s Motions for summary judgment regarding the public duty doctrine. This Court should affirm that decision.

1. The Public Duty Doctrine

Under the public duty doctrine, a government entity cannot be held liable for breaching a general, non-discretionary duty owed to the public as a whole. *West Virginia State Police v.*

Hughes, 238 W. Va. 406, 412, 796 S.E.2d 193, 199 (2017). The public duty doctrine is restricted to “liability for nondiscretionary (or ‘ministerial’ or ‘operational’) functions[.]” [*Parkulo v. West Virginia Bd. of Prob. & Parole*, 199 W. Va. 161, 174, 483 S.E.2d 507, 520 (1996) (quoting *Randall v. Fairmont City Police Dep’t*, 186 W. Va. 336, 346, 412 S.E.2d 737, 747 (1991))]. An exception to the public duty doctrine “arises when a ‘special relationship’ exists between the government entity and a specific individual. ‘The state may be liable where it has taken on a special duty to a specific person beyond that extended to the general public.’” *Hughes, supra* (quoting Barry A. Lindahl, 2 *Modern Tort Law: Liability and Litigation* § 16:20 (2d ed. 2008)) (footnote omitted).

2. The “Special Relationship” Exception

“To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity’s agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity’s agents and the injured party; and (4) that party’s justifiable reliance on the local governmental entity’s affirmative undertaking.” Syllabus point 2, *Wolfe v. City of Wheeling*, 182 W. Va. 253, 387 S.E.2d 307 (1989). In examining the allegations about the existence of a special duty, Courts should be mindful that “[t]he question of whether a special duty arises to protect an individual from a local governmental entity’s negligence in the performance of a nondiscretionary . . . function is ordinarily a question of fact for the trier of the facts.” Syllabus Point 3, in part, *Wolfe v. City of*

Wheeling, 182 W. Va. 253, 387 S.E.2d 307 (1989).” Syllabus Point 6, *Bowden v. Monroe Cty. Comm’n*, 232 W. Va. 47, 750 S.E.2d 263 (2013) (*per curiam*).

3. There are genuine issues of material fact whether Respondents are able to satisfy the elements of the “Special Relationship” exception which defeats WVDEP’s claim for protection under the public duty doctrine.

Respondent WVDEP argues there is no genuine issue of material fact that Respondents failed to establish a “special relationship” which would prevent the application of the public duty doctrine. That assertion is incorrect. In this case, there are genuine issues of material fact that Respondents can establish a “special relationship” which prevents an application of the public duty doctrine.

First, there is an assumption by the WVDEP, through promises or actions, of an affirmative duty to act on behalf of Respondents. SCMRA recognizes Respondents as protected citizens. The WVDEP, as the authorized government entity under SCMRA, issued Permits S-4020-95 and S-4011-97 for Twin Star’s mining operations which specifically promised to protect adjacent neighbors, including Respondents, from harm. A.R., 842-885; A.R., 959-1020; A.R., 1116-1225; A.R., 1299-1360; A.R., 1456-1565; A.R., 1639-1700; A.R., 1798-1906; A.R., 1980-2041; A.R., 2137-2246; A.R., 2320-2381 (Exhibit 3 at pgs. 184-6 (Dotson deposition transcript), Exhibit 4 at pgs. 105-114 (Hunt deposition transcript), Exhibit 7 at pgs. 173-5 (Lockhart deposition transcript); Exhibit 8, *Supra* (Class Member deposition transcripts) and Exhibit 9 (SCMRA Notices)). These permits make specific promises to specific individuals, namely Respondents as adjacent neighbors to protect them from offsite harm, including, but not limited to, flooding and/or blasting. In fact, the WVDEP has issued numerous Notices of Violations to Twin Star for hazards to public, including Respondents. A.R., 756-760; A.R., 1096-1100; A.R.,

1436-1440; A.R., 1777-1781; A.R., 2117-2121 (Exhibit 1 (Spadaro Report))). Through these numerous Notices of Violations, the WVDEP knew that Twin Star's mining operation was hazardous to Respondents and nearby residents and that it must be more vigilant with respect to all aspects of Twin Star's permits and mining operations. Despite this knowledge, the WVDEP failed to protect Respondents and the nearby residents.

Secondly, the WVDEP knew or should have known that inaction could lead to harm because conditions, including, but not limited to, drainage, improper bond release and fill seepage, at Twin Star's mining operations have and are going to cause flooding and contamination of the nearby area. A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report))). As aforementioned, the WVDEP, through issuing repeated violations, knew that Twin Star's mining operations were hazardous to Respondents and nearby residents, but did nothing to protect them.

Third, there was some form of direct contact between the WVDEP and Respondents. A.R., 776-885; A.R., 959-1073; A.R., 116-1225; A.R., 1299-1413; A.R., 1456-1556; A.R., 1639-1753; A.R., 1798-1906; A.R., 1980-2094; A.R., 2137-2246; A.R., 2320-2434 (Exhibits 3-4 & 7-9, *Supra*). In accordance with West Virginia Code § 22-3-20, the WVDEP publishes and makes available the subject permits so that Respondents know they should have been kept safe from Twin Star's mining operations. *Id*; see also W.Va. Code § 22-3-20. As adjacent neighbors, the WVDEP assured that Respondents were aware of the subject permit. *Id*; see also *Bowden v. Monroe Cty. Comm'n*, 239 W.Va. 214, 221-5, 800 S.E.2d 252, 259-63 (2017) (holding that when a government agency merely tells a citizen that it will "take care of it," governmental immunity under public duty doctrine may be waved since a "special relationship" has been established with

that citizen). Also, with the issuance of numerous Notices of Violation, the WVDEP indicated to Respondents and nearby residents that it was going to “take care of it,” but it failed to do so to the peril of Respondents and nearby residents.

Lastly, Respondents justifiably relied on the WVDEP’s affirmative undertaking. *Id.* Respondents, through the subject permits, expected to be kept safe from harm. *Id.* Respondents and nearby residents testified that they relied on the WVDEP’s promises to be kept safe from harm. The WVDEP disputes the testimony of Respondents and nearby residents by merely selecting portions of their testimony and ignoring the other pertinent parts of their testimony. The WVDEP’s argument only proves there is a question of fact on this issue. Consequently, there is a genuine issue of material fact that Respondents can establish a “special relationship” which defeats the application of the public duty doctrine and the Court properly denied the Motions for summary judgment.

4. The Circuit Court of McDowell County correctly denied WVDEP’s Motions for summary judgment because there are remaining questions of fact.

As aforementioned, the question of whether a special duty arises to protect Respondents from the WVDEP’s negligence in the performance of its nondiscretionary functions ordinarily is a question of fact for the trier of the facts. *Wolfe* at Syl. Pt. 3 and *Bowden I* Syl. Pt. 6. In *Bowden v. Monroe County Commission II*, this Court held that genuine issues of material fact did exist where a dog warden had been informed of the vicious nature of dogs that subsequently caused injury. *Id.*, *Supra*. The *Bowden II* Court held that when a government agency merely tells a citizen that it will “take care of it,” that was sufficient to establish the “special relationship.” *Id.*, at 221-5, 800 S.E.2d 259-63.

Similarly, in *Walker v. Meadows*, this Court held that genuine issues of material fact existed regarding whether a county sheriff and commission had a special relationship with parents whose daughter had been scheduled to be taken into custody for mental hygiene evaluation. *Id.*, 206 W.Va. 78, 80, 521 S.E.2d 801, 803 (1999). In *Walker*, there was no dispute that the county sheriff did not explicitly promise that it would serve the mental hygiene order immediately at daybreak on the morning of a motor vehicle accident involving the daughter. *Id.* The *Walker* Court determined that the “special relationship” could be established because the sheriff clearly was cognizant of the necessity for immediate action. *Id.*

This case is no different than *Bowden* and *Walker*. During the October, 16, 2019, oral argument, the WVDEP argued that it has a nondiscretionary duty to enforce the SCMRA, but a discretionary duty as to how it enforces the Act. A.R., 2705 (Order at pg. 14 citing the hearing transcript at pg. 8). In order to justify its position, the WVDEP attempts to garble its nondiscretionary and discretionary duties in this matter. The WVDEP attempts to resolve the factual disputes about its nondiscretionary duty to enforce the SCMRA by utilizing analogies of law enforcement enforcing speeding laws and about prosecuting discretion. These analogies merely strengthen the argument that there is ambiguity to the issue. Importantly, the WVDEP was cognitive of the SCMRA violations, but failed to take action to Respondents’ peril. The WVDEP’s so-called “discretionary” duty as to how it enforces its “nondiscretionary” duty to enforce the SCMRA is nothing more than a question of fact for the jury. The Court recognized this situation and correctly denied the WVDEP’s Motions. As such, there are genuine issues of material fact for the jury to consider in this matter.

B. The Circuit Court of McDowell County did not err in its December 30, 2019, Order which denied the West Virginia Department of Environmental Protection's Motion for summary judgment on qualified immunity grounds.

There is a genuine issue of material fact that the WVDEP negligently performed ministerial duties and/or its actions violated clearly established rights. Under these circumstances, the WVDEP is not entitled to qualified immunity in this matter. The Circuit Court correctly recognized this issue in its analysis to deny WVDEP's Motion for summary judgment regarding qualified immunity. This Court should affirm that decision.

1. The qualified immunity standard

The WVDEP asserts that qualified immunity is a bar to Respondents' claims in this matter. This assertion is without merit. In *W.Va. Reg. Jail & Corr. Facility Auth. v. A.B.*, the West Virginia Supreme Court of Appeals articulated the methodology for the application of qualified immunity. *Id.*, 234 W.Va. 492, 766 S.E.2d 751 (2014). In *A.B.*, the Court held that:

To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. To the extent that the cause of action arises from judicial, legislative, executive or administrative policy-making acts or omissions, both the State and the official involved are absolutely immune pursuant to Syl. Pt. 7 of *Parkulo v. W. Va. Bd. of Probation and Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996). *A.B.* at Syl. Pt 10.

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v.*

Chase Securities, Inc., 188 W. Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. *A.B.* at Syl. Pt. 11.

If the plaintiff identifies a clearly established right or law which has been violated by the acts or omissions of the State, its agencies, officials, or employees, or can otherwise identify fraudulent, malicious, or oppressive acts committed by such official or employee, the court must determine whether such acts or omissions were within the scope of the public official or employee's duties, authority, and/or employment. To the extent that such official or employee is determined to have been acting outside of the scope of his duties, authority, and/or employment, the State and/or its agencies are immune from vicarious liability, but the public employee or official is not entitled to immunity in accordance with *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992) and its progeny. If the public official or employee was acting within the scope of his duties, authority, and/or employment, the State and/or its agencies may be held liable for such acts or omissions under the doctrine of *respondeat superior* along with the public official or employee. *A.B.* at Syl. Pt. 12.

2. There are genuine issues of material fact whether Respondents' allegations against the WVDEP pertain to nondiscretionary or discretionary functions

The Circuit Court examined whether the WVDEP's duty to enforce SCMRA is a nondiscretionary, ministerial duty or a discretionary duty. A.R., 2704 (Order at pg. 13). According to the Circuit Court, this question turns on whether the WVDEP's duty involves legislative, judicial, or executive policy-making decisions. Here, there is no claim that the WVDEP's duty involves legislative, judicial, or executive policy-making decisions. In addition, there is no claim of sovereign immunity. A.R., 2696-9 (Order at pg. 5-8). Notwithstanding, The WVDEP is not entitled to qualified immunity if its duty to enforce SCMRA is a nondiscretionary, ministerial duty. As aforementioned, the WVDEP argued at the October 16, 2019, hearing that it has a nondiscretionary duty to enforce SCMRA, but a discretionary duty as to how it enforces the

Act. A.R., 2705 (Order at pg. 14 citing hearing transcript at pg. 8). Relying on the decisions in *Bennett v. Coffman* and *Goines v. James*, the Circuit Court determined that the WVDEP, performing discretionary functions is entitled to qualified immunity as long as it did not violate clearly established statutory or constitutional rights which are known to a reasonable person and, assuming the law is clearly established, the WVDEP can claim extra ordinary circumstances and can prove that it neither know nor should have known of the pertinent legal standard. *Id.*, Syl. Pt. 1, 178 W.Va. 356, 424 S.E.2d 591(1987); *Id.*, 189 W.Va. 634, 637-8, 433 S.E.2d 572, 575-6 (1993). Then, the Circuit Court reasoned that if Respondents can prove their case, then the WVDEP's enforcement actions violated clearly established law and qualified immunity would not apply, but Respondents' proof is disputed by the WVDEP and material issues of fact exist as to whether they can prove their case. A.R., 2706 (Order at pg. 15). Consequently, the Circuit Court determined that there were material issues of fact exist regarding whether WVDEP's duty to enforce SCMRA were ministerial and nondiscretionary or discretionary. Despite arguing to the contrary, the WVDEP attempts to confuse and muddle this issue. The Circuit Court was correct to disregard the WVDEP's distortion and find a question of fact on the issue.

3. There is a genuine issue of material fact that Respondents' allegations that WVDEP's negligent acts or omissions violated clearly established law

Respondent WVDEP asserts there is no genuine issue of material fact that qualified immunity is a bar to Respondents' claims. This assertion is without merit. The gist of WVDEP's argument is that Respondents fail to articulate a violation of "clearly established" law. *See* WVDEP's brief at pgs. 37-9. The WVDEP argues that it has a "discretionary" duty as to how it enforces its "nondiscretionary" duty to enforce the SCMRA which is a question of fact for the jury.. *Id.* The WVDEP ignores the fact that, in pertinent part, Respondents seek damages and

injunctive relief against the WVDEP, pursuant to the Citizen's Suit Provision of SCMRA, West Virginia Code § 22-3-25(a) which authorizes "*any person having an interest which is or may be adversely affected may commence a civil action in the circuit court of the county to which the surface-mining operation is located on the person's own behalf to compel compliance with this article . . . [a]gainst the state of West Virginia or any other governmental instrumentality or agency thereof . . . which is alleged to be in violation of the provisions of this article or any rule, order or permit issued pursuant thereto . . .*". See also *Bragg v. United States*, 230 W.Va. 532, 741 S.E.2d 90 (2013) (imposing government liability for negligent mine and safety inspections).

The WVDEP is the government entity having the responsibility to issue mining permits and to enforce the requirements of SCMRA. *Id.* According to Respondents' expert witnesses, Mr. Spadaro and Mr. Eichenberger, the WVDEP knowingly granted Defendant Twin Star the subject permits, based upon faulty designs or other related issues which failed to meet the requirements of SCMRA and these faulty designs continue to plague Respondents. A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)). Mr. Spadaro and Mr. Eichenberger opine, in great detail, about specific violations of clearly established law which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive. This evidence demonstrates a genuine issue of material fact regarding the WVDEP's enforcement of SCMRA relating to the subject mining permits which prevents the application of qualified immunity. *Id.*; *Parkulo, Supra*; *A.B.* at Syl. Pt. 11. Consequently, qualified immunity is not bar to Respondents' claims and the Court properly denied the WVDEP's Motions for summary judgment.

In *Bragg v. United States*, this Court considered a certified question from the Fourth Circuit Court of Appeals in a similar situation: "whether a private party conducting inspections of

a mine and mine operator for compliance with mine safety regulations is liable for the wrongful death of a miner resulting from the private party's negligent inspection?" *Id.*, 230 W.Va. 532, 741 S.E.2d 90 (2013). The *Bragg* Court unambiguously answered the question in the affirmative and held that public policy factors including "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden" on a defendant "weigh in favor of finding that a safety inspector owes a duty of care to the employees whose safety the inspection is intended to secure." *Id.*, 230 W.Va. at 541-2, 741 S.E.2d at 99-100. The *Bragg* Court plainly determined "that a private inspector who inspects a work premises for the purpose of furthering the safety of employees who work on said premises owes a duty of care to those employees to conduct inspections with ordinary skill, care, and diligence commensurate with that rendered by members of his or her profession." *Id.* Thus, West Virginia law recognizes a claim against a private inspector for negligent inspection of a mine. The justification for the *Bragg* decision is the same as the situation in this case against the WVDEP. SCMRA imposes the same duty on the WVDEP.

Respondents provided pre-suit notice to the WVDEP, in accordance with West Virginia Code § 22-3-25, describing the permit deficiencies and requested compensation and remediation of the property. A.R., 49; A.R., 1057-1073; A.R., 1397-1413; A.R., 1737-1753; A.R., 2078-2094; 2418-2431 (Second Amended Complaint at ¶ 98; *see also* SCMRA Notices identified as "Exhibit 9"). This Notice put the WVDEP on notice of the conditions on Respondents' property and provided the WVDEP with an opportunity to remedy the conditions of Respondents' property. Despite being put on notice, the WVDEP failed and refused to take any action.⁴ In pertinent part, the WVDEP utterly failed to keep its specific promises or duties, under the permit,

⁴ There is no claim or allegation that any official or employee of the WVDEP was acting outside the scope of his/her duties, authority and/or employment in this case which would make the WVDEP immune from vicarious liability. *A.B.* at Syl. Pt. 12.

to compel SCMRA enforcement in Permits S-4020-95 and S-4011-97 in a proper manner which is a violation of West Virginia Code § 22-3-13(a) & (b) (10) and West Virginia Code of State Regulations § 38-2-14.5. A.R., 33 (Amended Complaint at ¶ 25).

The Circuit Court examined the WVDEP's permit application duties, under SCMRA, as follows:

"A permit application must contain, *inter alia*, the name of the watershed and location of the surface stream into which drainage will be discharged; a determination of the probable hydrologic consequences of the mining and reclamation operations; a map or plan indicating the location of a water treatment facility or drainage system; and a chemical analysis of potentially acid-forming sections of the overburden." A.R., 2701 (Order at pg. 10 (citing *State ex rel. W. Va. Highlands Conservancy, Inc. v. W.Va. Div. of Env'tl. Prot.*, 191 W.Va. at 721, 447 S.E.2d at 922 (internal citations omitted); see W.Va. Code § 22-3-9(a)(10), (11), (13)(1) and (14)(D)).

"A permit application must also include a reclamation plan. Each reclamation plan must demonstrate that reclamation required by *WV SCMRA* can be accomplished and must include, *inter alia*, "[t]he steps to be taken to comply with applicable air and water quality laws." Furthermore, W.Va. Code R. 38-2-3.22(f)(1991) states, in relevant part, that each permit application "shall contain a hydrologic reclamation plan" which, *inter alia*, meets "applicable Federal and State water quality laws and regulations [.]'" A.R., 2701 (Order at pg. 10 citing *State ex rel. W. Va. Highlands Conservancy, Inc.*, 191 W.Va. at 721-722, 447 S.E.2d at 922-923).

"The DEP may not issue a mining and reclamation permit until the applicant files a performance bond covering "that area of land within the permit area upon which the [applicant] will initiate and conduct surface coal mining and reclamation operations" and in an amount "sufficient to assure the completion of the reclamation plan if the work [is] to be performed by the [DEP] in the event of forfeiture [.]" 30 U.S.C. § 1259(a) (1988) (footnote added). Under *WV SCMRA*, the DEP may issue site-specific performance bonds. The amount of these bonds, which cannot exceed \$5,000 per acre, must reflect the various factors which affect the cost of reclamation." A.R., 2702 (Order at pg. 11 citing *State ex rel. W. Va. Highlands Conservancy, Inc.*, 191 W.Va. at 721-722, 447 S.E.2d at 922-923 (internal citations and footnote omitted); see

W.Va. Code § 22-3-12).

Additionally, the Circuit Court noted the specific language of West Virginia Code of State Regulations § 38-2-3.22(f) (1991) which, in pertinent part, states as follows:

Each permit application shall contain a *hydrologic reclamation plan. The plan shall be specific to the local hydrologic conditions.* It shall contain in the form of maps and descriptions the steps to be taken during mining and reclamation through bond release *to minimize disturbances to the hydrologic balance within the permit and adjacent areas*; to prevent material damage outside the permit area; *to meet applicable Federal and State water quality laws and regulations; and to protect the rights of present water users.* The plan shall include the measures to be taken to:

1. *Avoid acid or toxic drainage;*

* * *

3. *Provide water treatment facilities when needed[.]*

(emphasis added).

Furthermore, West Virginia Code § 22-3-13(a) & (b) (10) state as follows:

(a) Any permit issued by the secretary pursuant to this article to conduct surface mining operations shall require that the surface mining operations meet all applicable performance standards of this article and other requirements set forth in legislative rules proposed by the secretary.

(b) The following general performance standards are applicable to all surface mines and require the operation, at a minimum, to:

* * *

(10) Minimize the disturbances to the prevailing hydrologic balance at the mine site and in associated off-site areas and to the quality and quantity of water in surface and groundwater systems both during and after surface mining operations and during reclamation by: (A) Avoiding acid or other toxic mine drainage by such measures as, but not limited to: (i) Preventing or removing water from contact with toxic producing deposits; (ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses; and (iii)

casing, sealing or otherwise managing boreholes, shafts and wells and keep acid or other toxic drainage from entering ground and surface waters; (B) conducting surface mining operations so as to prevent to the extent possible, using the best technology currently available, additional contributions of suspended solids to streamflow or runoff outside the permit area, but in no event may contributions be in excess of requirements set by applicable state or federal law; (C) constructing an approved drainage system pursuant to paragraph (B) of this subdivision, prior to commencement of surface mining operations, the system to be certified by a person approved by the secretary to be constructed as designed and as approved in the reclamation plan; (D) avoiding channel deepening or enlargement in operations requiring the discharge of water from mines; (E) unless otherwise authorized by the secretary, cleaning out and removing temporary or large settling ponds or other siltation structures after disturbed areas are revegetated and stabilized, and depositing the silt and debris at a site and in a manner approved by the secretary; (F) restoring recharge capacity of the mined area to approximate premining conditions; and (G) any other actions prescribed by the secretary;

West Virginia Code of State Regulations § 38-2-14.5 states as follows:

14.5. Hydrologic Balance. All surface mining and reclamation activities shall be conducted to minimize the disturbance of the hydrologic balance within the permit and adjacent areas, to prevent material damage to the hydrologic balance outside the permit area, to assure the protection or replacement of water supplies, and to support the approved post mining land use.

Contrary to WVDEP's argument, these cited SCMRA provisions and regulation are "clearly established" law which pertain to the WVDEP because it is the specific entity charged with responsibility for enforcing these laws, but the WVDEP failed and refuses to do so. As such, Respondents provide specific violations of clearly established law that demonstrate that the WVDEP, as reasonable person, would have known or are otherwise fraudulent, malicious, or oppressive toward Respondents with regard to enforcement of the subject mining permit which prevents the application of qualified immunity. *Id.*; *Parkulo*, 199 W. Va. at 174, 483 S.E.2d at 520; *A.B.* at Syl. Pt. 11. As indicated by Mr. Spadaro and Mr. Eichenberger, these allegations rise

beyond mere negligence against the WVDEP. A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)).

Respondents bring this action for damages, including compensation for the injuries to themselves and their property, injunctive relief, attorney fees and costs of litigation, against the WVDEP, pursuant to West Virginia Code § 22-3-25(f), which have resulted from the WVDEP's acts and/or omissions which violated their mining permits and certain aforementioned requirements of SCMRA. A.R., 49 (Second Amended Complaint at ¶ 95). In this case, the WVDEP utterly failed to keep its specific promises or duties to enforce Permits S-4020-95 and S-4011-97 in a proper manner which is a violation of West Virginia Code § 22-3-13(b) (10) and West Virginia Code of State Regulations § 38-2-14.5. A.R., 756-775; A.R., 1096-1115; A.R. 1436-1455; A.R., 1777-1797; A.R., 2117-2136 (Exhibit 1 (Spadaro Report) and Exhibit 2 (Eichenberger Report)); *see also Bragg, Supra* (imposing government liability for negligent mine and safety inspections).

4. The Circuit Court of McDowell County correctly denied WVDEP's Motions for summary judgment because there are remaining questions of fact.

As aforementioned, the WVDEP's claims a "discretionary" duty as to how it enforces its "nondiscretionary" duty to enforce the SCMRA which is a question of fact for the jury. The Circuit Court reasoned that if Respondents can prove their case, then the WVDEP's enforcement actions violated clearly established law and qualified immunity would not apply, but Respondents' proof is disputed by the WVDEP and material issues of fact exist as to whether they can prove their case. A.R., 2706 (Order at pg. 15). Based upon the confusion created by the WVDEP, the Circuit Court held that material issues of fact exist regarding whether the WVDEP's

duty to enforce WV SCMRA was ministerial and nondiscretionary or discretionary. The WVDEP presents nothing in this appeal which adequately refutes this reasoning.

Instead of focusing on the validity of Respondents' SCMRA claims, the WVDEP's qualified immunity analysis improperly focuses on the weight of the evidence. Respondents allege specific violations of SCMRA, identified as "clearly established" law, by the WVDEP which a reasonable person would have known or are otherwise fraudulent, malicious or oppressive toward Respondents with regard to enforcement of the subject mining permits. Based upon the foregoing, the Circuit Court held that material issues of fact exist regarding whether WVDEP's acts, or failures to act, to enforce SCMRA, if discretionary, violated clearly established law. The WVDEP presents nothing in this appeal which adequately refutes this reasoning. Thus, the WVDEP's Motions for summary judgment were properly denied by the Circuit Court with respect to application of qualified immunity. This Court should affirm that decision.


IX. CONCLUSION

Based upon the foregoing, there is no basis for Petitioner's appeal and relief should be denied by this Court. The Circuit Court properly denied WVDEP's Motions for summary judgment. There are material issues of fact regarding whether the WVDEP's duties to enforce SCMRA were ministerial and nondiscretionary or discretionary and whether WVDEP's acts, or failures to act, to enforce SCMRA, if discretionary, violated clearly established law.

WHEREFORE, Respondents Drema Dotson, the Estate of Denver Allen Hunt, Connie Lester, Woodrow Kirk and Johnny Lockhart respectfully request this Honorable Court deny Petitioner West Virginia Department of Environmental Protection's appeal regarding the denial of its Motions for summary judgment, affirm the Circuit Court's December 30, 2019, Order and for all other relief this Court deems just and proper.

Dated: July 2, 2020

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
A governmental entity**

Defendant Below, Petitioner,

v.

Supreme Court No. 20-0063

McDowell Co. Civil Action No. 16-C-96

**DREMA DOTSON, a resident of West
Virginia, individually and on behalf of
Others similarly situated, *et al.*,**

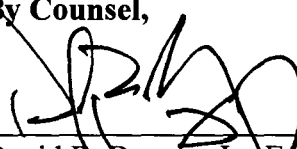
Plaintiffs Below, Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondents hereby certifies that on **July 2, 2020**, a copy of the foregoing "*Respondents' Brief*" was served upon counsel of record by Hand-Delivery, Facsimile or U.S. Mail:

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