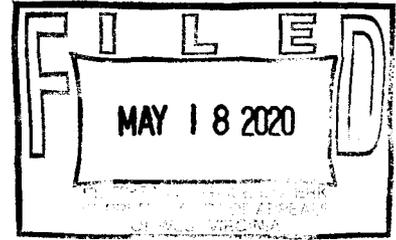


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0063



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

Petitioner,

v.

Appeal from the interlocutory order
of the Circuit Court of McDowell
County (Civil Action No. 16-C-96)

**DREMA DOTSON, a resident of
West Virginia, individually and on
behalf of other similarly situated,**

**DENVER ALLEN HUNT, a resident
of West Virginia, individually and on
behalf of other similarly situated**

**CONNIE LESTER, a resident of
West Virginia, individually and on
behalf of other similarly situated**

**WOODROW KIRK, a resident of
West Virginia, individually and on
behalf of other similarly situated,**

**JOHNNY LOCKHART, a resident
of West Virginia, individually and on
behalf of other similarly situated,**

Respondents.

Petitioner's Brief

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II. ASSIGNMENTS OF ERROR

- A. The Circuit Court of McDowell County erred as a matter of law in its order dated December 30, 2019, which denied West Virginia Department of Environmental Protection's ("WVDEP") motion for summary judgment on qualified immunity grounds.
- B. The Circuit Court of McDowell County erred as a matter of law in its order dated December 30, 2019, which denied West Virginia Department of Environmental Protection's ("WVDEP") motion for summary judgment under the public duty doctrine.

III. STATEMENT OF THE CASE

A. Procedural History

Respondents Dreama Dotson, Denver Allen Hunt, Connie Lester, Woodrow Kirk and Johnny Lockhart filed their *Second Amended Class Action Complaint* in the Circuit Court of McDowell County on or about September 14, 2017 alleging that flooding that occurred on June 5, 2014 along Bull Creek in McDowell County was caused actions and/or inactions taken by Twin Star Mining, Inc. and WVDEP. *J. App. 1: 000028 – 000052*. Respondents' *Second Amended Class Action Complaint* asserts causes of action for trespass to property and chattels, negligence, private and public nuisance, negligent infliction of emotion distress, property damage, punitive damages, prima facie negligence, violations of the West Virginia Surface Coal Mining & Reclamation Act ("SCMRA") and injunctive relief. *Id.*

In addition to the Second Amended Complaint, Respondents filed their *Amended Motion for Class Certification* on or about September 14, 2017 seeking class certification for a class defined as persons residing in the Bull Creek Watershed who sustained damage to their person or property from floodwaters on June 5, 2014. *J. App. 1: 000053 - 000063*. Respondents' Amended Motion for Class Certification sought to establish three (3) subclasses three defined as: (1) Right Fork – class members living downstream of Permits S-4011-97 on Right Fork of Bull Creek; (2) Lower Bull Creek – those living on Bull Creek downstream of its confluence of Right Fork of

Bull Creek and Main Bull Creek and downstream of both Permits S-4011-97 and S-4020-95; and (3) Mud Fork – residents living on Main Bull Creek who live upstream of the confluence of Right Fork of Bull Creek and Main Bull Creek and downstream of Permit S-4020-95. *Id. at 1: 000053 – 000056.* Respondents set forth the following class representatives: (1) Class 1 – Right Fork – Dreama Dotson and Denver Allen Hunt; (2) Class 2 – Lower Bull Creek – Connie Lester and Woodrow Kirk; and (3) Class 3 – Upper Bull Creek – Johnny Lockhart. *Id.*

On or about May 21, 2018, Petitioner WVDEP filed its Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint on the basis of qualified immunity and the public duty doctrine, as well as its Response in Opposition to Plaintiff's Motion for Class Certification on or about October 22, 2018. *J. App. 1: 000094 - 000115.* A hearing on WVDEP's motion for dismissal was held before Judge Booker T. Stephens on October 25, 2018. Judge Stephens withheld ruling on WVDEP's motion and held WVDEP's motion in abeyance until discovery could be completed. *See J. App. 1: 000009 – 000010.* Thereafter, over the next several months, discovery depositions of the proposed class representatives and the purported class members were taken.

Once the depositions were completed and it had been confirmed through testimony that none of the proposed class representatives nor any of the purported class members had any direct written or verbal communication with anyone from the WVDEP, WVDEP submitted its Motions for Summary Judgment on or about March 8, 2019 on the basis of qualified immunity and public duty doctrine. *J. App. 1: 000398 – 000728.*

Soon after, a settlement conference was held on April 22, 23 and 24, 2019 before Judge Stephens during which Respondents and Twin Star Mining, Inc. reached a confidential settlement with the Plaintiffs. *J. App. 1: 000729 - 000731.* The circuit court ordered Plaintiff's

Counsel and Twin Star Mining's Counsel to provide a Dismissal Order. *J. App. 1: 000732 – 000733*. Whereas the Court indicated it was also prepared to hear arguments on WVDEP's Motions for Summary Judgment at the settlement conference, Respondents' argued that they had not yet filed their response to WVDEP's Motions for Summary Judgment and were not prepared to argue the motions. As such, Judge Stephens ordered Plaintiff's Counsel to respond to WVDEP's Motions for Summary Judgment within twenty (20) days, after which it would hear arguments on WVDEP's Motions for Summary Judgment as well as Plaintiffs' Motion for Class Certification. *Id.* The Court set it for hearing on October 16, 2019. *Id.*

The Motions Hearing was held on October 16, 2016 during which Judge Edward Kornish heard arguments regarding Plaintiff's Motion for Class Certification and WVDEP's Motions for Summary Judgment. *J. App. 3: 002450 - 002501*. Upon hearing arguments, Judge Kornish denied Plaintiff's Motion for Class Certification on the basis that they failed to satisfy the "numerosity" and "commonality" requirements under *W. Va. R. Civ. P. 23(a)*. *J. App. 3: 002496 – 002499*. Judge Kornish denied WVDEP's Motions for Summary Judgment under the public duty doctrine erroneously holding that there were remaining questions of material fact as to whether a "special relationship" was formed between Plaintiffs and WVDEP. *J. App. 3: 002487 – 002488; 002709*. Judge Kornish also denied WVDEP's Motions for Summary Judgment under qualified immunity finding that there were remaining questions of fact as to whether WVDEP enforcement of SCMRA was discretionary and whether such discretionary acts violate clearly established law. *Id.*

WVDEP submitted a proposed Order on Judge Kornish's ruling with Plaintiffs submitting their own Order pursuant to Rule 24.01 of the West Virginia Rules for Trial Courts of Record. *J. App. 3: 002502 – 002581; App. 002589 – 002615*. Ultimately, the Court entered its

own Order denying Plaintiffs' Motion for Class Certification and denying WVDEP's Motions for Summary Judgment, which now comes before this Court. *J. App. 3: 002692 - 002724*.

B. Statement of Facts

This matter comes before the Court on appeal from an interlocutory order denying Motions for Summary Judgment of the Petitioner, the West Virginia Department of Environmental Protection ("WVDEP"), which were based on the doctrine of qualified immunity and public duty doctrine. *J. App. 3: 002692 - 002724*.

The Respondents in this matter are the owners or occupants of real property situated in or near Mohawk, McDowell County, West Virginia. *J. App. 1: 000028 - 000031*. The Respondents allege that Twin Star Mining operated a mountaintop removal operation, known as the Bull Creek Surface Mine No. 45, situated atop the Bull Creek and Trap Fork Watershed. *J. App. 1: 000031 - 000032*. Respondents allege that Twin Star Mining negligently and improperly designed and then failed to properly maintain its water runoff system violating its mining permits under *W. Va. Code § 22-3-1, et seq.*, the West Virginia Surface Mining Control and Reclamation Act ("SCMRA"), which led to severe flooding of Bull Creek on June 5, 2014 causing damage to Respondents' personal and real property. *J. App. 1: 000031 - 000034*.

As far as their allegations against WVDEP, Respondents allege that the WVDEP granted Defendant Twin Star Permits No. S-4011-97 and S-4020-95 to operate Bull Creek Surface Mine No. 45 based upon designs which Respondents allege did not meet requirements under SCMRA. *J. App. 1: 000049*. Respondents further alleged that WVDEP failed to issue Notices of Violation to Twin Star when it allegedly committed statutory violations under the SCMRA. *J. App. 1: 000049 - 000050*.

Petitioner WVDEP moved for dismissal from Respondents' Second Amended Class Action Complaint on the basis of qualified immunity and the public duty doctrine. *J. App. 1: 000094 – 000097; 000098 – 000115*. However, WVDEP's Motion to Dismiss was held in abeyance until discovery on these issues had been completed.

Thereafter, depositions of each of the individual Respondents were taken with regard to communications and contacts between themselves and WVDEP.

In her deposition taken on May 3, 2018, named Plaintiff Connie Lester testified to the following:

Q: Prior to June 5th, 2014, did you yourself ever make any written communications to the DEP?

A: No.

Q: And prior to June 5th, 2014, did you ever request anyone on your behalf to make any written communications to the DEP?

A: No.

Q: After June 5th, 2014, did you yourself ever make any written communication to the DEP?

A: No.

Q: Did you ever make any complaints to the DEP prior to June 5th, 2014, regarding Twin Star Mining operations, any fears of flooding or any issues at all?

A: No.

Q: After June 5th, 2014, did you ever make any complaints to the DEP regarding Twin Star? Flooding fears, mining operations, or any issues at all?

A: No.

J. App. 1: 000139 (p. 53 – 54, lines 6 – 9).

....

Q: Prior to June 5th, 2014, did you yourself ever make any verbal communications to anyone at the DEP regarding Twin Star mining operations, flooding fears or any issues at all?

A. No.

Q. Prior to June 5th, 2014, did you ever request someone on your behalf make any verbal communications to the DEP regarding Twin Star Mining operations or any issues at all?

A. No.

Q. After June 5th, 2014, did you ever make any verbal communications to the DEP?

A. No.

Q. Did you ever request anyone after June 5th, 2014 to make any—

A. No.

Q. --communications to the DEP?

A. No.

Id. (p. 54 – 55, lines 21 – 18).

...

Q: Have you ever attending a meeting in which a person affiliated with the DEP was present?

A: No.

J. App. 1: 000140 (p. 56 – 57, lines 23 – 2).

...

Q. Mrs. Lester, did the DEP ever make any specific promise directly to you?

A. No.

Id. (p. 57, lines 9 – 12).

Put simply, Connie Lester testified to never having engaged in direct written or verbal communication with anyone from WVDEP, further stating that she was not aware of anyone in her community having direct written or verbal communication with WVDEP, as follows:

Q: You understand here today that you have been identified as a class representative?

A: Yes.

Q: With regards to the individuals that you are asserting you are representing – are you aware of any individuals in your class making any type of communication to the DEP prior to June 5th, 2014?

A: No.

Q: When you say “no,” are you asserting that -

A: Not that I know of, you know.

J. App. 1: 000139 - 000140 (p. 55 - 56, lines 19 – 8).

...

Q: After June 5th, 2014, are you aware of any members of the class that you are representing having any communications to the DEP?

A: Not that I know of.

J. App. 1: 000140 (p. 56, lines 14 – 18).

...

Q: With regards to the individuals that you are a class representative of are you aware of the DEP making any specific promise to those individuals?

A: No.

Id. (p. 57, lines 13 – 17).

Again, Connie Lester testified that neither she nor her family had ever engaged in any direct communication with anyone from the WVDEP and that she is unaware of any of her other

members of the community having any direct with WVDEP. Moreover, Mrs. Lester testified that she is unaware of any promise that the WVDEP made specifically to her or to any individual member of the community.

In his deposition taken on May 3, 2018, named Plaintiff Denver Allen Hunt testified as follows:

Q: Mr. Hunt, have you had any written communications to the DEP prior to June 5th, 2014?

A: No.

Q: And written communications, you understand that to mean like letters, writings?

A: Yeah.

Q: Okay. After June 5th of 2014, have you had any written communications with the DEP?

A: Not that I know of, no.

J. App. 1: 000240 (p. 104, lines 8 – 19).

...

Q: Prior to June 5, 2014, did you ever have another individual on your behalf send a written communication to the DEP regarding Twin Star Mining operations, fear of flooding –?

A: No, sir.

Id. (p. 105, lines 3 – 8).

...

Q: After June 5, 2014, beyond anything that your attorney might have submitted to the DEP, did you ever have anyone else on your behalf submit any written communications to the DEP?

A: No.

Id. (p. 105, lines 16 – 21).

...

Q: Prior to June 5, 2014, did you have any type of verbal communications such by telephone or in person with the DEP?

A: No.

Q: After June 5th of 2014, did you have any verbal communications with the DEP?

A: No.

Q: At any time did you have anyone on your behalf make any verbal communications to the DEP regarding Twin Star Mining operations, fear of flooding or any other issues?

A: Other than a lot –

Q: Other than your attorneys. Anyone else?

A: No.

Q: Did you ever make a complaint at any time to the DEP?

A: No.

Id. (p. 106 – 107, lines 6 – 17).

Mr. Hunt's testimony was consistent with testimony provided by the other Plaintiffs in this matter in that he testified to never have engaging in any direct written or verbal communication with anyone from WVDEP.

Likewise, Plaintiff Johnny Lockhart, whose deposition was taken on May 16, 2018, testified as follows:

Q: Prior to June 5, 2014, did you ever make any written communications to the DEP regarding Twin Star mining activities, flooding or flooding fears or any other issue?

A: No.

Q: Did you ever request anybody on your behalf prior to June 5, 2014 to make any written communication to the DEP?

A: No.

Q: After June 5th of 2014, did you ever make any written communications to the DEP regarding Twin Star Mining operations, flooding, fears of flooding or any other issue?

A: No.

Q: After June 5, 2014, did you ever request anybody on your behalf to make any type of written communications to the DEP?

A: No.

Q: Prior to June 5, 2014, did you ever have any type of verbal communications to the DEP regarding Twin Star Mining activities, flooding, fear of flooding, or any other issues?

A: No.

Q: Did you ever request anyone on your behalf to make any verbal communications to the DEP prior to June 5th 2014?

A: No.

Q: After June 5th of 2014, did you ever request anyone to make any type of verbal communication on your behalf to the DEP regarding any issue?

A: No.

Q: Did you yourself ever have any verbal communications to the DEP regarding Twin Star Mining activities, flooding, fear of flooding or any other issue after June 5th of 2014?

A: No.

J. App. 1: 000183 – 000184 (p. 160 – 162, lines 22 – 15).

...

Q: Have you yourself ever received any type of written communication from the DEP?

A: No.

J. App. 1: 000184 (p. 163, lines 20 – 23).

...

Q: Prior to June 5, 2014, did you ever attend any meeting in which an employee or representative of the DEP was present?

A: No.

Q: After June 5th of 2014, did you ever attend a meeting where any employee or representative of the DEP was present?

A: No.

J. App. 1: 000185 (p. 165, lines 12 – 20).

...

Q: Did the DEP ever make any specific promise directly to you, sir?

A: No.

Q: Are you aware of the DEP making any type of specific promise to anyone else in this litigation?

A: Not as I know of.

Id. (p. 166, lines 3 – 9).

Plaintiff Woodrow Kirk also testified that he never engaged in any direct written or verbal communication with anyone from the WVDEP. *J. App. 1: 000276 (p. 121 – 124, lines 16 – 5).*

Plaintiff Dreama Dotson testified that she would receive pre-blasting notices once a year but wasn't sure whether those came from the WVDEP or Twin Star. *J. App. 1: 000338 (p. 178 – 179, lines 24 – 23).* Dreama Dotson further testified that she was aware of notices of mining permits being published in the newspaper about every year or so. *J. App. 1: 000340 (p. 187, lines 5 – 11).* However, outside of receiving pre-blasting notices in the late 1990s and early 2000s and permit notices printed in the newspaper, Dreama Dotson testified to never having engaged in direct written communication with anyone from the WVDEP. *J. App. 1: 000338 – 000339 (p. 180 -181, lines 12 – 24).* As far as direct verbal communication, Ms. Dotson testified that she

had a neighbor who worked for the WVDEP but that she had not spoken to him about the mining activity or expressed concerns of flooding. *Id.*

Once the depositions were completed and it was confirmed that none of the Plaintiffs had any direct written or verbal communication with anyone from the WVDEP, WVDEP moved for summary judgment on the basis of qualified immunity and public duty doctrine. *J. App. 1: 000398 – 000728.*

In its memorandum in support of its motion, WVDEP argued that Plaintiffs were seeking recovery from WVDEP based upon negligent enforcement of SCMRA. *J. App. 1: 000717.* However, SCMRA is a statute enacted to protect all West Virginians as well as the State and its resources, or in other words the public as a whole. *Id.* WVDEP argued that a government entity such as the WVDEP cannot be held liable for a breach of a general duty owed to the public as a whole under the public duty doctrine unless it can be demonstrated that a “special relationship” had been formed between the public body and the particular private person(s) creating a duty to the particular private person(s) in addition to and apart from any duty owed to the general public. *J. App. 1: 000717 – 000719.* For there to be a “special relationship”, the WVDEP set forth the legal standard that Plaintiffs must demonstrate (1) an assumption by the state 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 state governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the state governmental entity's affirmative undertaking. *App. 000719 – 000720.* As discussed above, Plaintiffs in their individual depositions all testified to having no such required direct written or verbal communication with

anyone from the WVDEP and were unable to identify any promises or affirmative undertaking by the WVDEP communicating directly to them outside of that to the general public.

Moreover, WVDEP argued that Plaintiffs' allegations go directly to discretionary functions and as a state agency it cannot lawfully be held liable for negligent performance of a discretionary duty under the doctrine of qualified immunity. *J. App. 1: 000721 – 000725*.

In their Responses, Plaintiffs argued that the mining permits issued to Twin Star Mining contained promises and that by publishing these permits in the local newspaper WVDEP had directly communicated these promises to the Plaintiffs thereby satisfying the “special relationship” exception to the public duty doctrine. *J. App. 1: 000750 – 000752; 2: 001090 – 001092; 2: 001430 – 001432; 2: 001770 – 001772; 2: 002111 – 002113*. Plaintiffs further argued that WVDEP was not entitled to qualified immunity on the basis that it allegedly breached its nondiscretionary duty to enforce SCMRA by failing to discover certain mining permit violations by Twin Star and failing to issue Notices of Violation. *J. App. 1: 000752 – 000753; 2: 001092 – 001093; 2: 001432 – 001433; 2: 001772 -001773; 2: 002113 – 002114*.

At a hearing on October 16, 2016, Judge Edward Kornish heard arguments regarding Plaintiff's Motion for Class Certification and WVDEP's Motions for Summary Judgment. *J. App. 2: 002450 – 002501*. After hearing arguments from the attorneys, Judge Kornish denied Plaintiff's Motion for Class Certification on the basis that they failed to satisfy the “numerosity” and “commonality” requirements under *W. Va. R. Civ. P. 23(a)*. *J. App. 3: 002496 - 002499*

With regard to its Motions for Summary Judgment, Counsel for WVDEP argued that the WVDEP being a state agency cannot be held liable for breach of a nondiscretionary duty it owes to the public as a whole unless it can be demonstrated that a “special relationship” had been created, and as WVDEP counsel indicated, “[T]here is no special relationship here.” *J. App. 3:*

002454. WVDEP argued that discovery had been completed in this matter which included taking each and every one of the Plaintiffs' depositions revealing "[n]one of the plaintiffs had any direct contract with DEP" and "[n]o one at DEP made promises to the plaintiffs." *Id.* Plaintiffs are attempting to classify publication of the mining permits as direct communications conveying specific promises, however "[t]hat communication, to the extent the permit is a communication" is a communication to the public at large. *Id.* Simply stated, "You have access to it. I have access to it. People in the Eastern Panhandle have access to it." *Id.* Judge Kornish inquired the following:

THE COURT: Let me ask you a question. The permit is for a certain specific area and involves, as far as this case is concerned, certain watershed; correct?

MR. FULLER: That's – that's correct, Your Honor.

THE COURT: Is there a greater than general public duty to the people that reside within the watersheds affected by the permit?

MR. FULLER: No, sir, there is not. There's not a great duty to the people there. And if you look at it as a regulatory-type act, it is to protect everyone's interest. Everyone in the state of West Virginia has an interest in McDowell County. Everyone in the state of West Virginia has an interest in all 55 counties.

And it's – it's almost like fire protection. You don't provide fire protection just for the residents. You provide fire protection for the gentleman –

THE COURT: – for the community –

MR. FULLER: – driving down the road that, unfortunately, is in a car wreck on his way to Beckley from Princeton. He doesn't have to be part of that community to be offered fire protection.

And this is the same thing. It's to protect the public at large.

J. App. 3: 002456 – 002457.

Additionally, counsel pointed out, "Not a single plaintiff had ever looked at that permit. There's no testimony of any of them even getting a copy of the permit. How can you rely upon something you never see or hear or go look at?" *J. App. 3: 002486.* As there was no direct communication extending promises to the Plaintiffs which were then relied upon by the Plaintiffs, no "specific relationship" was created and WVDEP was entitled to summary judgment in its favor under the public duty doctrine. *Id.*

Turning to qualified immunity, counsel for WVDEP argued that being a state agency WVDEP was immune to liability for negligent performance of a discretionary function under the doctrine of qualified immunity. *J. App. 3: 002457.* Counsel argued "while the DEP has a nondiscretionary duty to enforce [SCMRA], the manner in which it enforces it is discretionary." *Id.* WVDEP compared its duty to that of a police officer having a nondiscretionary duty to enforce traffic regulations but also having discretion with regard to the manner in which she goes about in enforcing those regulations, as follows:

MR. FULLER: ...I heard on the radio the other day that construction on 64 through Beckley, the speed limit has been reduced to 55 miles an hour, and people continue to speed. In the last 30 days the state police have issued 90 speeding citations. I'm willing to bet they could have issued more, but the state police have discretion into which vehicles they stop and who gets cited.

Similar to a county prosecutor. He doesn't have to prosecute every time it's possible a crime was committed. He has discretion to decide who gets prosecuted and for what.

THE COURT: So you know what I did before I became a judge.

MR. FULLER: I sure do, Your Honor. It's – it's usually best if you sell what people know.

THE COURT: Well done, there. Go ahead.

MR. FULLER: So you very well know as a prosecutor, you could have prosecuted 24 hours a day, but it is not feasible. You had to pick your fights. And you had the discretion to determine who gets prosecuted and what they get charged with. You can overcharge; you can undercharge. But it's your discretion.

J. App. 3: 002457 – 002458.

WVDEP counsel pointed out that Plaintiff's own experts indicated in their reports that WVDEP had issued thirty-eight (38) Notices of Violations to Twin Star prior to the flooding event on June 5, 2015, indicating that Plaintiffs are not alleging that WVDEP neglected to enforce SCMRA with regard to Twin Star Mining but rather that WVDEP did not issue the specific Notices of Violations or the number of Notices of Violations the Plaintiffs felt the WVDEP should have. Counsel argued, "[T]hat's getting back to the example of the state police who stopped 90 people ... Could they have stopped more? Probably. Could they have stopped less and gotten away with it? Absolutely." *J. App. 3: 002480*. In other words, Plaintiffs' allegations against WVDEP go directly to discretionary decisions.

Counsel for WVDEP argued that it is a question of law as to whether the manner in which WVDEP carried out enforcement of SCMRA was a discretionary or nondiscretionary duty. *J. App. 3: 002481*. If the Court found that it was discretionary, then WVDEP was entitled to summary judgment on the basis of qualified immunity. *Id.* Alternatively, if the Court found that it was nondiscretionary, WVDEP was entitled to summary judgment under the public duty doctrine. *Id.*

On December 30, 2019, Judge Kornish entered an Order denying WVDEP's Motions for Summary Judgment. *J. App. 3: 002692 – 002724*. With regard to qualified immunity, Judge Kornish held that if WVDEP's enforcement duties were discretionary then WVDEP would be immune under qualified immunity, however if the enforcement duties were nondiscretionary then qualified immunity would not apply. *J. App. 3: 002705*. Citing to *State v. Chase Sec., Inc.* 188 W. Va. 356, 424 S.E.2d 591 (1992), Judge Kornish further acknowledged that when confronted with governmental acts or omissions that give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated a defendant's actions violated clearly established law. *J. App. 3: 002705 – 002706*. Yet, the Court denied WVDEP's Motion for Summary Judgment holding: "If Plaintiffs can prove their case, then WV DEP's enforcement actions violated clearly established law and qualified immunity would not apply. However, Plaintiffs' proof is disputed by WV DEP and material issues of fact exist as to whether Plaintiffs can prove their case." *App. 002706*. Turning to the public duty doctrine, Judge Kornish acknowledges that the linchpin of the public duty question is whether a special relationship existed between WVDEP and the Plaintiffs. *J. App. 3: 002707 – 002708*. Judge Kornish further acknowledges that "[p]laintiffs admit that they had no direct, individual contact with WV DEP..." and that the only communication, to the extent that it can be considered a communication, is issuance of the mining permits, yet held that "material issues of fact exist regarding any 'special relationship' or 'special duty' between Plaintiffs and WV DEP that preclude the grant of summary judgment based on public duty." *Id.*

IV. SUMMARY OF ARGUMENT

The Circuit Court of McDowell County erred in denying WVDEP's Motions for Summary Judgment on the basis of the public duty doctrine. Plaintiffs seek recovery from

WVDEP based upon allegations of negligent enforcement of the Surface Coal Mining and Reclamation Act (“SCMRA”), which is a regulatory statute enacted to protect all West Virginians as well as the State and its resources. Under the public duty doctrine, a government entity such as WVDEP cannot be held liable for failure to enforce regulatory or penal statutes such as SCMRA. Put simply, the doctrine precludes a department and its officers from being liable based upon a breach of a nondiscretionary duty owed to the public at large. The only exception to the public duty doctrine is when it can be demonstrated that a “special relationship” existed between the government entity and a specific individual. Plaintiffs are unable to demonstrate a “special relationship” between themselves and the WVDEP as they have all testified to having no direct contact with anyone from the WVDP. They had never spoken to, written to or been contacted by anyone from the WVDEP. None of the Plaintiffs had engaged in the direct verbal or written communication necessary to meet “special relationship” exception to the public duty doctrine.

The Circuit Court of McDowell County further erred in denying WVDEP’s Motions for Summary Judgment on the basis of qualified immunity. Being a state agency, the WVDEP remains immune to liability for negligent performance of a discretionary function under the doctrine of qualified immunity. Plaintiffs in this matter allege that the WVDEP were negligent in detecting violations and issuing Notices of Violations to Twin Star Mining. Plaintiffs argue that WVDEP is not entitled to qualified immunity as it has a statutory nondiscretionary duty to enforce mining regulations under SCMRA. While the WVDEP does have a nondiscretionary duty to enforce SCMRA, the manner in which it enforces involves the exercise of judgment. In other words, determining the manner in which it enforces provisions under SCMRA is a discretionary function. Because Plaintiffs are asserting negligence claims against WVDEP for its

discretionary judgments, decisions, and actions, the WVDEP is entitled to summary judgment on the basis of qualified immunity.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners assert that oral argument is necessary and appropriate pursuant to Rule 19 of the *West Virginia Rules of Appellate Procedure* and recognize that memorandum decisions are deemed appropriate in limited circumstances in accordance with Rule 21(d).

VI. STANDARD OF REVIEW

In *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, the Supreme Court of Appeals of West Virginia recognized that “it is well-established that ‘[t]his Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.” Syl. Pt. 1, *W.Va. Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W.Va. 492, 766 S.E.2d 751 (2014), citing Syl. Pt. 1, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). Furthermore, “[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.” *Id.* at Syl. Pt. 2, citing Syl. Pt. 2, *Robinson v. Pack*, 223 W.Va. 828, 679 S.E.2d 660 (2009). The Court recognized that this review is guided by the following principle regarding immunity:

[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.

Id. at Syl. Pt. 3, citing Syl. Pt. 1, *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996).

VII. ARGUMENT

A. The Circuit Court of McDowell County erred in denying WVDEP's Motions for Summary Judgment on the basis of the public duty doctrine.

Plaintiffs seek recovery from WVDEP for alleged negligent enforcement of SCMRA. However, SCMRA is a regulatory statute enacted to protect all West Virginians as well as the State and resources of the State, or in other words – the public as a whole. As such, the Plaintiff's claims against the WVDEP are barred by the Public Duty Doctrine.

1. The Public Duty Doctrine

The public duty doctrine is a defense based upon the absence of a specific duty owed to the specific party asserting the negligence claim. *Holsten v. Massey*, 200 W. Va. 775, 780, 490 S.E.2d 864, 869 (1997). Simply stated, the public duty doctrine holds that a government entity is not liable for a failure to enforce regulatory or penal statutes. *Rhodes v. Putnam County Sheriff's Dept.*, 207 W.Va. 191, 530 S.E.2d 452 (1999). Specifically, the public duty doctrine establishes that a governmental entity's liability for nondiscretionary (or "ministerial" or "operational") functions may not be based upon the breach of a general duty owed to the public as a whole; instead, only the breach of a duty owed to the particular person injured is actionable. *Walker v. Meadows*, 206 W. Va. 78, 521 S.E.2d 801 (1999).

The public duty doctrine is separate and distinct from the principle of immunity. *Id.* at 83. Where the public duty doctrine would apply, there is simply no duty and therefore no need to inquire as to the existence of immunity. *Id.* Essentially, the doctrine precludes a department and its officers from being liable based upon a breach of a general duty owed to the public, such as failing to provide general police protection. *Id.*

For example, in *Benson v. Kutsch*, 181 W. Va. 1, 380 S.E.2d 36 (1989), resident of an apartment building where a fire occurred brought suit against city alleging that in addition to the

building owner, the city was liable to them for its failure to inspect or its negligent inspection of the apartment building. This Court upheld the circuit court's dismissal of plaintiffs' claims against the city holding that "[t]he public duty doctrine, simply stated, is that a governmental entity is not liable because of its failure to enforce regulatory or penal statutes. *Id.* at Syl. Pt. 1.

Moreover, in *Randall v Fairmount City Police Department*, this Court noted that at common law, a local governmental agency was immune from tort liability for acts or omissions constituting the exercise of a "discretionary" function. 186 W. Va. 336, 412 S.E.2d 737, 474 (1991). Following this reasoning, the *Randall* Court restricted the public duty doctrine and stated that "a local governmental entity's liability for non-discretionary (or 'ministerial' or 'operational' [mandatory] functions) may not be predicated upon the breach of a general duty owed to public as a whole." *Id.* The Court defined a "discretionary" function as "the exercise of a legislative or judicial function or the exercise of an administrative function involving the determination of fundamental governmental policy." *Id.* Therefore, the public duty doctrine is only available when the government conduct, act, or omission in question is non-discretionary [mandatory] in nature.

2. The "special relationship" exception

An exception to the public duty doctrine "arises when a 'special relationship' exists between the government entity and a specific individual." *W. Va. State Police v. Hughes*, 238 W. Va. 406, 408, 796 S.E.2d 193, 195 (2017). In other words, "the state may be liable where it has taken on a special duty to a specific person beyond that extended to the general public." *Id.*

In order to recover from the WVDEP, the Plaintiffs in this matter must not only demonstrate that WVDEP had a duty under SCMRA to regulate Twin Star's mining activities, but also that some "special relationship" had been created between the Plaintiffs and WVDEP

and with that special relationship there arose a duty to protect Plaintiff from Twin Star's mining activities.

Recently, this Court took the opportunity to explain in detail the public duty doctrine and the special relationship exception, as follows:

Under the public duty doctrine, a government entity or officer **duty owed to the public as a whole**. "Often referred to as the 'duty to all, duty to no one' doctrine, the public duty doctrine provides that since **government owes a duty to the public in general, it does not owe a duty to any individual citizen.**" For example, under the public duty doctrine, "the duty to fight fires or to provide police protection runs to all citizens and is to protect the safety and well-being of the public at large[.]" Generally, no private liability attaches when a fire department or police department fails to provide adequate protection to an individual. The public duty doctrine is restricted to "liability for nondiscretionary (or 'ministerial' or 'operational') functions[.]"

The 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.**" In determining whether a "special relationship" or "special duty" exists, a plaintiff must prove four factors:

(1) An assumption by the state 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 state governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the state governmental entity's affirmative undertaking.

Hughes at 238 W. Va. 412–13, 796 S.E.2d 199–200. *Emphasis added.* Thus, the four requirements for the application of the "special relationship" exception are: (1) An assumption by the state 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 state governmental entity's

agents that inaction could lead to harm; (3) some form of direct contact between the state governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the state governmental entity's affirmative undertaking. *Parkulo, v. W. Va. Bd. of Prob. & Parole*, 199 W. Va. 161, 178-179, 483 S.E.2d 507, 524-525 (1996).

3. Plaintiffs are unable to satisfy the elements of the “special relationship” exception to defeat WVDEP’s protections under the public duty doctrine.

In the instant matter, while there is no dispute that the WVDEP is a governmental agency subject to protections under the public duty doctrine, Plaintiffs contend that a “special relationship” exception applies. However, Plaintiffs are unable to prove the four (4) requisite elements for establishing a “special relationship”. For instance, Plaintiffs fail to satisfy the very first element of establishing a “special relationship” by failing to demonstrate the WVDEP assumed an affirmative duty through promises or actions. Whereas Plaintiffs argue the mining permits issued to Twin Star made “specific promises” to the individual Plaintiffs, they fail to cite to any language in either Permit S-4020-95 or Permit S-4011-97 that extend any such promises. While these permits certainly provide for the protection of the general public, the permits do not extend specific promises to these Plaintiffs beyond that of the general duty owed to the public at large through SCRMRA. Accordingly, Plaintiffs are unable to satisfy the very first element for the “special relationship” exception and as such fail to defeat WVDEP’s protections under the public duty doctrine.

In turning to the third factor of the “special relationship” exception, Plaintiffs are also unable to demonstrate any direct contact between themselves and WVDEP. Plaintiffs all testified to having absolutely no direct contact with the WVDEP. For instance, in his deposition taken on May 3, 2018, Plaintiff Denver Allen Hunt testified to the following:

Q: Mr. Hunt, have you had any written communications to the DEP prior to June 5th, 2014?

A: No.

Q: And written communications, you understand that to mean like letters, writings?

A: Yeah.

Q: Okay. After June 5th of 2014, have you had any written communications with the DEP?

A: Not that I know of, no.

J. App. 1:000240 (p. 104, lines 8 – 19).

...

Q: Prior to June 5, 2014, did you ever have another individual on your behalf send a written communication to the DEP regarding Twin Star Mining operations, fear of flooding –?

A: No, sir.

Id. (p. 105, lines 3 – 8).

...

Q: After June 5, 2014, beyond anything that your attorney might have submitted to the DEP, did you ever have anyone else on your behalf submit any written communications to the DEP?

A: No.

Id. (p. 105, lines 16 – 21).

...

Q: Prior to June 5, 2014, did you have any type of verbal communications such by telephone or in person with the DEP?

A: No.

Q: After June 5th of 2014, did you have any verbal communications with the DEP?

A: No.

Q: At any time did you have anyone on your behalf make any verbal communications to the DEP regarding Twin Star Mining operations, fear of flooding or any other issues?

A: Other than a lot –

Q: Other than your attorneys. Anyone else?

A: No.

Q: Did you ever make a complaint at any time to the DEP?

A: No.

Id. (p. 106 – 107, lines 6 – 17).

Mr. Hunt, like all the Plaintiffs in this matter, testified to never having engaged in direct written or verbal communication with anyone from WVDEP. Another example is Plaintiff Johnny Lockhart's deposition taken on May 16, 2018, in which he testified as follows:

Q: Prior to June 5, 2014, did you ever make any written communications to the DEP regarding Twin Star mining activities, flooding or flooding fears or any other issue?

A: No.

Q: Did you ever request anybody on your behalf prior to June 5, 2014 to make any written communication to the DEP?

A: No.

Q: After June 5th of 2014, did you ever make any written communications to the DEP regarding Twin Star Mining operations, flooding, fears of flooding or any other issue?

A: No.

Q: After June 5, 2014, did you ever request anybody on your behalf to make any type of written communications to the DEP?

A: No.

Q: Prior to June 5, 2014, did you ever have any type of verbal communications to the DEP regarding Twin Star Mining activities, flooding, fear of flooding, or any other issues?

A: No.

Q: Did you ever request anyone on your behalf to make any verbal communications to the DEP prior to June 5th 2014?

A: No.

Q: After June 5th of 2014, did you ever request anyone to make any type of verbal communication on your behalf to the DEP regarding any issue?

A: No.

Q: Did you yourself ever have any verbal communications to the DEP regarding Twin Star Mining activities, flooding, fear of flooding or any other issue after June 5th of 2014?

A: No.

J. App. 1: 000183 – 000184 (p. 160 – 162, lines 22 – 15).

...

Q: Have you yourself ever received any type of written communication from the DEP?

A: No.

J. App. 1: 000184 (p. 163, lines 20 – 23).

...

Q: Did the DEP ever make any specific promise directly to you, sir?

A: No.

Q: Are you aware of the DEP making any type of specific promise to anyone else in this litigation?

A: Not as I know of.

J. App. 1: 000185 (p. 166, lines 3 – 9).

Plaintiff Woodrow Kirk also testified that he never engaged in any direct written or verbal communication with anyone from the WVDEP. *J. App. 1: 000276 (p. 121 – 124, lines 16 – 5)*. Likewise, named Plaintiff Connie Lester testified that she nor anyone in her family has never had any direct communication with the WVDEP. *J. App. 1: 000139 - 000140 (p. 53 – 57, lines 6 – 17)*. Dreama Dotson testified that whereas she would receive pre-blasting notices once a year, she couldn't say whether those came from the WVDEP or Twin Star. *J. App. 1: 000338 (p. 178 – 179, lines 24 – 23)*. Outside of receiving those pre-blasting notices in the late 1990s and early 2000s as well as being aware of permit notices printed in the newspaper, Dreama Dotson testified to never having engaged in direct written communication with anyone from the WVDEP. *J. App. 1: 000338 – 000339 (p. 180 -181, lines 12 – 24)*. As far as direct verbal communication, Ms. Dotson testified that she had a neighbor who worked for the WVDEP but she had never spoken to him about Twin Star's mining activity nor had she ever discussed any concerns of flooding. *Id.* Put simply, the Plaintiffs all testified to having absolutely no direct verbal or written communication with the WVDEP, thereby making it impossible for a "special relationship" to have formed between the WVDEP and themselves. Accordingly, Plaintiffs fail to defeat WVDEP's protections under the public duty doctrine.

Although Plaintiffs all testified to having no direct verbal or written communication with anyone from the WVDEP, counsel for the Plaintiffs argue that WVDEP engaged in some form of direct contact with the Plaintiffs by publishing notices of the mining permits in the local paper

and making subject mining permits available for inspection, *J. App. 1: 000751 – 000752, 2: 001091 -001092, 2: 001431 – 001432, 2: 001771 – 001772, 2: 002112 - 002113*. However, Plaintiffs are incorrect in their assertion. “Direct contact” as it pertains to the special relationship exception can be defined as some form of contact undertaken by a governmental entity beyond that of contact it has with all citizens. *Wolfe v. Wheeling*, 182 W. Va. 253, 257, 387 S.E.2d 307, 311 (1989). In the instant matter, publication of permit notices in the newspaper, if considered a “contact” at all, is a contact the WVDEP has with all citizens and not specifically with the named Plaintiffs in this case. Accordingly, Plaintiffs are unable to meet yet another the element to the “special relationship” exception.

Even after nearly four (4) years of factual development, the Plaintiffs remain unable to satisfy the “special relationship” exception to WVDEP’s protections under the public duty doctrine. Accordingly, Petitioner WVDEP is entitled to summary judgment in its favor under the public duty doctrine as a matter of law.

4. The Circuit Court erred in denying WVDEP’s Motion for Summary judgment on the basis there were no remaining questions of fact.

This Court has made clear that the question as to whether a special duty arises to protect an individual from a local governmental entity’s negligence in the performance of a nondiscretionary governmental function is not exclusively a question of fact left to the jury. Syl. pt. 3, *Wolfe v. Wheeling*, 182 W. Va. 253, 254, 387 S.E.2d 307, 308 (1989). For example, the petitioner in *Upchurch v. McDowell County* filed an appeal to an order granting summary judgment which found the petitioner failed to prove that McDowell County 911 owed a special duty to a decedent. *Upchurch v. McDowell Cty.* 911, 232 W. Va. 91, 93, 750 S.E.2d 644, 646 (2013). In *Upchurch*, Mr. Mallory called McDowell County 911 requesting assistance because a man was banging on his front door threatening to harm him. *Id.* Mr. Mallory spoke to a

McDowell County 911 dispatcher and asked for help while providing a description of the man and the man's vehicle. *Id.* The McDowell County dispatcher told Mr. Mallory that she would alert the police. *Id.* The dispatcher called a West Virginia State Police Trooper who was stationed in McDowell County. *Id.* The Trooper informed the dispatcher that he was between shifts and was not ready for duty and asked the dispatcher to call Mr. Mallory back and obtain additional information. *Id.* When the dispatcher called Mr. Mallory back, Mr. Mallory informed the dispatcher that that man had left but feared the man would return and hurt him. *Id.* Mr. Mallory indicated that he had a shotgun that he could use to protect himself. *Id.* The McDowell County dispatcher cautioned Mr. Mallory not to shoot anyone and instructed him to call her back should the man return. *Id.* The next day it was reported that Mr. Mallory had been found dead having been stabbed more than thirty times in the head, face and arms. *Id.* Thereafter, the petitioner filed a wrongful death action on behalf of Mr. Mallory's estate against McDowell County 911 and the West Virginia State Police. *Id.* McDowell County 911 moved for summary judgment arguing that it owed no special duty to Mr. Mallory. *Id.* The circuit court entered an order granting summary judgment to McDowell County 911 holding that the plaintiff was unable to present evidence that Mr. Mallory had justifiably relied upon the dispatcher's conduct that created a special relationship between the two. *Id.* The circuit court held that the plaintiff could not, as a matter of law, demonstrate a special duty had been created. *Id.*

On appeal, this Court held that whereas the question of whether a special duty was assumed by a governmental entity is ordinarily a question of fact left to the trier of fact, it found that the plaintiff failed to prove that McDowell County 911 owed Mr. Mallory a special duty. *Id.* at 95 – 96. In *Upchurch*, this Court went on to hold, "While it is undisputed that [the dispatcher]

had direct contact with Mr. Mallory, [the plaintiff] is unable to establish the existence of the remaining elements of the special relationship test. *Id.* at 96.

This Court's holding in *Upchurch* provides that there can only be a question of fact for Rule 56 purposes when a dispute as to the facts exists among the parties. In other words, a petitioner should not be denied summary judgment on the basis of a remaining question of fact where there simply is no dispute as to the facts. Here, just like in *Upchurch*, there is no dispute to the facts. At the time WVDEP submitted its motion for summary judgment, discovery had concluded. The depositions of all the Plaintiffs had been taken with each of the Plaintiffs testifying that they had absolutely no direct verbal or written contact with anyone from the WVDEP. These facts are an undisputed part of the record. Therefore, the issue as to whether a special relationship had formed between WVDEP and the Plaintiffs now becomes a question of law, and as such the circuit court erred in denying WVDEP summary judgment on the basis that there were remaining questions of fact as to whether a special relationship had formed. Moreover, like the plaintiff in *Upchurch*, the evidentiary record demonstrates that these Plaintiffs cannot satisfy all of the elements of the special relationship test. Accordingly, Plaintiffs fail to defeat WVDEP's protections under the public duty doctrine, and as such, WVDP, as a matter of law, is entitled to summary judgment on the basis of the public duty doctrine.

B. The Circuit Court of McDowell County erred in denying WVDEP's Motions for Summary Judgment on the basis of qualified immunity.

1. Qualified immunity standard

The purpose of qualified immunity is to allow officials to do their jobs and to exercise judgment, wisdom, and sense without worry of being sued. *Parkulo*, 199 W. Va. at 177, 483 S.E.2d at 523. As such, the doctrine of qualified immunity bars a claim of mere negligence against a State agency not within the purview of the West Virginia Governmental Tort Claims

and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.” *W. Va. Dep't of Health & Human Res. v. Payne*, 231 W. Va. 563, 572, 746 S.E.2d 554, 563 (2013).

Accordingly, in determining whether the State, its agencies, officials, and/or employees are entitled to qualified immunity, a reviewing court must first identify the nature of the governmental acts or omissions giving rise to the suit for purposes of determining whether such acts or omissions constitute legislative, executive or administrative policy-making acts or involve otherwise discretionary functions. Syl. Pt. 7 of *Parkulo*. If the act or omission is a legislative, judicial, executive or an administrative policy-making act, the State and the official involved are absolutely immune. Syl. Pt. 10 of *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014).

For a plaintiff to sustain a viable claim against a State agency or its employees or officials acting within the scope of their authority sufficient to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. *Parkulo* 199 W.Va. at 161, 483 S.E.2d at 507. Therefore, if the acts or omissions giving rise to the suit fall within the category of discretionary functions, a reviewing court must then 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. Syl. Pt. 11 of *West Virginia Regional Jail and Correctional Facility Authority v. A.B.* In the absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability. *Id.*

Qualified immunity is more than simply immunity from damages, but rather qualified immunity is immunity from the burdens of litigation. *See J.H. v. W.Va. Div. of Rehab. Servs.*, 224 W. Va. 147, 156, 680 S.E.2d 392, 401 n. 12 (2009). “Qualified immunity provides ‘an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.’” *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Additionally, “unless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading immunity is entitled to dismissal before the commencement of discovery.” *See J.H.*, 680 S.E.2d at 401 n. 12. “Because the doctrine seeks to protect government officials from the burdens of trial and preparing for trial, the Supreme Court has ‘repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation.’” *Id.* (internal citations omitted).

2. Plaintiffs’ allegations against WVDEP go to discretionary functions.

In turning to Plaintiffs’ allegations against WVDEP, Plaintiffs allege that the WVDEP was negligent in granting Twin Star Permits No. S-4011-97 and S-4020-95 to operate Bull Creek Surface Mine No. 45 based upon designs which did not meet requirements of SCMRA. *J. App. 1: 000049 at ¶ 95 – 97*. Plaintiffs further allege that the WVDEP failed to issue Notices of Violations against Twin Star when it allegedly committed statutory violations under the SCMRA. *J. App. 1: 000029 at ¶ 3*. Put simply, Plaintiffs allegations against WVDEP go directly to discretionary functions for which WVDEP is immune under qualified immunity.

Section 3 of SCMRA, West Virginia Code § 22-3-2, provides the following:

...[T]he Legislature vests authority in the secretary of the Department of Environmental Protection to:

- (1) Administer and enforce the provisions of this article as it relates to surface mining to accomplish the purposes of this article;

(2) Conduct hearings and conferences or appoint persons to conduct them in accordance with this article;

(3) Promulgate, administer and enforce rules pursuant to this article;

(4) Enter into a cooperative agreement with the Secretary of the United States Department of the Interior to provide for state regulation of surface-mining operations on federal lands within West Virginia consistent with section 523 of the federal Surface Mining Control and Reclamation Act of 1977, as amended; and

(5) Administer and enforce rules promulgated pursuant to this chapter to accomplish the requirements of programs under the federal Surface Mining Control and Reclamation Act of 1977, as amended.

W. Va. Code § 23-3-2(c). Emphasis Added. The language “vests authority” clearly indicates that the State Legislature’s intention to rely on WVDEP’s discretion with respect to the methods of administering and enforcing the rules as they related to surface mining.

A discretionary function is defined as a duty involving the exercise of judgment, wisdom, and sense. *Parkulo*, 199 W. Va. at 177, 483 S.E.2d at 523. Plaintiffs allege that WVDEP officials were negligent in their issuance of permits to Twin Star for its Bull Creek Surface Mine No. 45 site. A WVDEP official reviewing a permit application and determine whether it sufficiently satisfied SCMRA requirements would certainly require the exercise of judgment, wisdom and sense. It was poignantly argued by WVDEP at the motions hearing before Judge Kornish:

How is it not a discretionary decision for a state official to sit down and look at this – this permit application and decide whether or not it is sufficient? That absolutely would trigger qualified immunity and would be ground for this case to be disposed of with summary judgment.

J. App. 2: 002479, lines 2 - 7. Whereas SCMRA does require the WVDEP to review each permit application to ensure it contains the requisite information for approval, the function of

determining whether that information satisfies SCMRA requirements is one requiring the exercise of judgment thereby making it a discretionary function.

Plaintiffs allege that the WVDEP failed to issue Notices of Violations against Twin Star when it allegedly committed statutory violations under the SCMRA. *J. App. 1: 000049 -000050*. W. Va. Code § 22-3-17(a) does mandate that WVDEP “shall” issue a Notice of Violation if an operator is not in compliance with provisions under SCMRA. However, the detection of and determining whether an operator is in violation of SCMRA provisions is clearly a function involving the exercise of judgment, wisdom and sense thereby making it a discretionary function. Besides, Plaintiffs are not alleging that WVDEP neglected to issue Notices of Violations to Twin Star altogether. Plaintiffs’ own experts acknowledge in their respective reports that Bull Creek Surface Mine No. 45 was a heavily cited mine and that the WVDEP had issued a total of thirty-eight (38) Notices of Violation prior to the flooding event on June 5, 2014. *J. App. 1:000763 – 000764; App. 000758*. What Plaintiffs are really asserting in their Complaint is that the WVDEP failed to issue the Notices of Violation that the Plaintiffs in hindsight felt that it should have issued. At the hearing before Judge Kornish, counsel for WVDEP argued that a mine inspector’s discretion in issuing Notices of Violation is similar to that of a county prosecutor, as follows:

MR. FULLER: Similar to a county prosecutor. He doesn’t have to prosecute every time it’s possible a crime was committed. He has discretion to decide who gets prosecuted and for what.

THE COURT: So you know what I did before I became a judge.

MR. FULLER: I sure do, Your Honor. It’s – it’s usually best if you sell what people know.

THE COURT: Well done, there. Go ahead.

MR. FULLER: So you very well know as a prosecutor, you could have prosecuted 24 hours a day, but it is not feasible. You had to pick your fights. And you had the discretion to determine who gets prosecuted and what they get charged with. You can overcharge; you can undercharge. But it's your discretion.

J. App. 3: 002457 – 002458. The analogy being that like a county prosecutor having a statutory duty to prosecute crimes, a WVDEP inspector must exercise judgment in determining what amounts to a violation under SCMRA provisions. Accordingly, Plaintiffs' allegations against WVDEP go directly to discretionary functions for which the WVDEP is immune under qualified immunity.

3. Plaintiffs fail to demonstrate that WVDEP's negligent acts or omissions violated clearly established law.

As discussed above, once the acts or omissions giving rise to the suit fall within the category of discretionary functions, a court must then 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. Syl. Pt. 11 of *W. Va. Reg'l Jail and Corr. Facility Auth. v. A.B.*

In the instant matter, Plaintiffs, failing to cite to any specific provisions, allege that WVDEP's acts or omissions violate provisions under SCMRA. In turning to Plaintiffs' allegation that WVDEP violated SCMRA in issuing Twin Star permits to operate Bull Creek Surface Mine No. 45, DEP's enforcement duties related to issuance of permits consist of:

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 probably 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.¹

A permit application must also include a reclamation plan.² 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.”³ Furthermore, W. Va. Code R. 38-2-3.22(f) (1991)⁴ 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 [.]”⁵

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). Under WV SCMRA, the DEP may issue site-specific performance bonds.⁶ The amount of these bonds, which cannot exceed \$5,000 per acre, must reflect the various factor which affect the cost of reclamation.⁷

In reviewing the evidentiary record, Plaintiffs have failed to demonstrate any failure by WVDEP in its enforcement duties as discussed above. In fact, Plaintiffs’ own experts, environmental specialist Jack Spadaro and industrial hygienist John Eichenberger found no violation arising from WVDEP issuing the permits, but instead noted the problem to be Twin Star’s failure to adhere to requirements under the permits as well as WVDEP recommendations, such as failing to adequately maintain the site storm water conveyance system and reclamation activities, for which it was heavily cited by the WVDEP. *J. App. 1: 000763 – 000764; J. App. 1: 000758.*

¹ *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)(L) and (14)(D).*

² *See W. Va. Code § 22-3-9(a)(16); W. Va. Code § 22-3-10.*

³ *Id.*

⁴ *See W. Va. Code R. § 38-2-3.22(f)(1991).*

⁵ *State ex. rel. W. Va. Highlands Conservancy, Inc.*, 191 W. Va. at 721-722, 447 S.E.2d at 922-923.

⁶ *Id.*; *See W. Va. Code § 22-3-12.*

⁷ *Id.*

Turning now to Plaintiffs' allegation that WVDEP violated SCMRA provisions by failing to issue Notices of Violation to Twin Star, Plaintiffs have again failed to demonstrate any clearly statutory law. Section 17 of Article 3 of SCMRA requires "[i]f any of the requirements of this article, rules promulgated pursuant thereto or permit conditions have not been complied with, the director shall cause a notice of violation to be served upon the operator or the operator's duly authorized agent..." *W. Va. Code § 22-3-17(a)*. In the instant matter, Plaintiffs have failed to demonstrate any violations by Twin Star known to WVDEP went unaddressed. On the contrary, Plaintiffs experts, Jack Spadaro and John Eichenberger both acknowledge that Bull Creek Surface Mine No. 45 was a heavily cited mine with WVDEP having issued at least thirty-eight (38) Notices of Violations, clearly demonstrating the WVDEP had not violated any clearly established law. *J. App. 1: 000763 – 000764; J. App. 1: 000758*.

Accordingly, because Plaintiffs have failed to demonstrate WVDEP violated any clearly established law, WVDEP remains immune to Plaintiff's allegations under qualified immunity.

4. The Circuit Court erred in denying WVDEP's Motion for Summary judgment on the basis there were no remaining questions of fact.

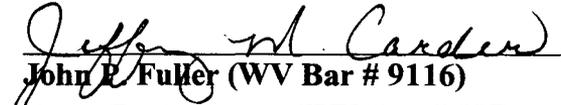
With regard to qualified immunity, the circuit court erred in denying WVDEP's motion for summary judgment on the basis that material facts exists as to whether WVDEP's enforcement actions violated established law. *J. App. 3: 002706*. In the instant matter there is no remaining dispute of facts among the parties. WVDEP filed its motion for summary judgment upon completion of nearly four (4) years of extensive discovery. The actions of WVDEP are not in dispute. The only matter left in dispute is whether WVDEP's acts and/or omissions violated clearly established law. "[U]nless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition. *Syl. Pt. 3, W. Va. Reg'l Jail & Corr. Facility Auth. v.*

A.B., 234 W.Va. 492, 766 S.E.2d 751 (2014), *citing* Syl. Pt. 1, *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). Accordingly, the circuit erred in denying WVDEP's motion for summary judgment.

VIII. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Honorable Court reverse the decision of the Circuit Court of McDowell County denying Petitioners' *Motion for Summary Judgment* on the basis of the public duty doctrine. In the alternative, Petitioners respectfully request that this Honorable Court reverse the decision of the Circuit Court of McDowell County denying Petitioners' *Motion for Summary Judgment* on the basis of qualified immunity.

Respectfully submitted by:


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 20-0063

WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, a governmental entity,

Petitioner,

v.

Appeal from the interlocutory order of the Circuit Court of McDowell County (Civil Action No. 16-C-96)

DREMA DOTSON, a resident of West Virginia, individually and on behalf of other similarly situated,

DENVER ALLEN HUNT, a resident of West Virginia, individually and on behalf of other similarly situated

CONNIE LESTER, a resident of West Virginia, individually and on behalf of other similarly situated

WOODROW KIRK, a resident of West Virginia, individually and on behalf of other similarly situated,

JOHNNY LOCKHART, a resident of West Virginia, individually and on behalf of other similarly situated,

Respondents.

CERTIFICATE OF SERVICE

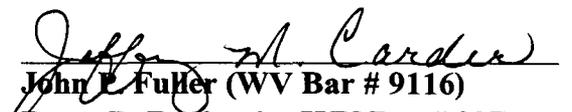
The undersigned does hereby certify that a true copy of the foregoing “**Petitioner’s Brief**” has been served upon the following on May 18, 2020:

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