IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**DANNY WEBB CONSTRUCTION, INC.
AND DANNY WEBB,**

Defendants Below, Petitioners,

v. **Supreme Court No. 22-789**

Fayette Co. Civil Action No. 19-C-2

NORTH HILLS GROUP, INC.,

Plaintiff Below, Respondent.

RESPONDENT'S BRIEF

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II. ASSIGNMENTS OF ERROR

1. A jury found for Defendants on each of Plaintiff's claims. But the Circuit Court vacated the jury's verdict, concluding that the verdict was contrary to the clear weight of the evidence. Did the Circuit Court abuse its discretion in vacating the jury's verdict and granting a new trial?

2. The doctrine of *res judicata* precludes the relitigation of claims that were raised or could have been raised in a prior case. In the current case, Plaintiff seeks claims and remedies that could have been requested in the prior case. Did the Circuit Court err by granting a new trial on such claims?

3. Each of Plaintiff's tort claims—negligence, trespass, nuisance, and breach of fiduciary duty—are subject to a two-year limitations period. Though Plaintiff's claims accrued in Spring 2015 and were the subject of a separate lawsuit filed in January 2016, it did not file the present lawsuit until January 2019. Did the Circuit Court err by granting a new trial on such time-barred claims?

4. The "gist of the action" doctrine bars plaintiffs from pursuing tort claims for what are, in reality, disguised breach of contract claims. Each of Plaintiff's tort claims squarely arise from the contractual relationship between the parties. Did the Circuit Court err by granting a new trial on these claims?

5. Quasi-contract claims—like unjust enrichment—are unavailable when an express agreement exists because such claims only exist in absence of an agreement. Plaintiff and Defendant are parties to an oil and gas lease, from which Plaintiff's unjust enrichment claim arises. Did the Circuit Court err granting a new trial on the legally infirm claim for unjust enrichment?

6. The fiduciary duty is a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law. Plaintiff and Defendant are counterparties to an oil and gas lease, from which Plaintiff's claimed breach of fiduciary duty claim supposedly arises. Did the Circuit Court err by granting a new trial on this claim where there was no basis to find the existence of a fiduciary duty?

IV. STATEMENT OF THE CASE

Procedural History

On January 7, 2019, Respondent, Plaintiff below, North Hills Group ("NHG") filed its Complaint against Petitioners, Defendants below, Danny Webb and Danny Webb Construction Company, Inc. ("DWC"), in the Circuit Court of Fayette County, West Virginia, being Civil Action No. 19-C-2. A.R. Pg. 0011 (Docket Sheet). Respondent NHG made claims against Petitioners for trespass, nuisance, negligence, unjust enrichment and breach of fiduciary duties.

On May 5, 2022, the Circuit Court conducted a Pretrial Conference and on May 12, 2022, the Court entered the Pretrial Conference Order. A.R. Pgs. 0645-50 (Pretrial Conference Order). The Pretrial Conference Order set the trial for May 17-18, 2022. *Id*. Moreover, in pertinent part, Petitioners indicted to the Court that they did not have any trial exhibits, no jury instructions and would only be calling Petitioner Danny Webb and West Virginia Department of Environmental Protection ("WVDEP") Inspector Terry Wayne Urban as trial witnesses. *Id*.

On May 17, 2022, the jury was selected and the trial of this matter began which concluded the following day. A.R. Pgs. 0043-297 (Trial Transcript Vol. I), 0298-633 (Trial Transcript II). After Respondent finished their case, Petitioners filed "Trial Memorandum" requesting the Circuit Court dismiss the case. A.R. Pgs. 526-45 (oral argument); 0636-44 (Trial Memorandum). The Circuit Court denied the Motion. *Id*. Afterward, Petitioners rested their case. Petitioners neither adduced any exhibits nor called any witnesses to rebut or contradict NHG's evidence. A.R. Pg. 0545; *Id*.

On May 18, 2022, the jury returned a verdict for Petitioners, but this verdict was plainly contrary to the clear weight of the evidence and without sufficient evidence to support it. A.R. Pgs. 0634-5 (Verdict Form).

On May 27, 2022, Respondent NHG timely filed its "*Plaintiff's Motion to set aside verdict and for a new trial*" seeking, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, to set aside this verdict and requesting a new trial. A.R. Pgs. 0028-35 (Motion).

On July 18, 2022, the Circuit Court conducted a hearing on the Motion and, at that time, took the Motion under advisement and directed the parties to submit proposed Orders regarding the Motion. A.R. Pgs. 0002-10 (Order).

On September 16, 2022, the Circuit Court entered an Order granting "*Plaintiff's Motion to set aside verdict and for a new trial*." *Id.*

Statement of Facts

Previously, NHG filed a "Petition for Declaratory Relief & Verified Petition for Injunctive Relief" in the Circuit Court of Fayette County, being Civil Action No. 16-C-19. A.R. Pgs. 1712-21 (Petition). That Petition sought termination of the Oil & Gas Lease between Petitioners and Respondent NHG due to Petitioners converting the 508 well into a frack waste injection well instead of a production well. The Circuit Court granted the Petition. A.R. Pgs. 1722-35 (Order granting Petition). This Court held, in affirming in part, the Circuit Court's termination of the Oil and Gas Lease as well as its issuance of the cease and desist injunction in Fayette County Civil Action No. 16-C-9 that:

> "Thus, we find that in those instances where the Oil and Gas Lease used the term "brine," it plainly and unambiguously meant water with salt." *See Webb v. North Hills Group, Inc.*, No. 16-0640 (W.Va. Supreme Court, June 9, 2017)(memorandum decision) at pg. 8.
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> "When the granting clause references the 'right to inject air, gas, water, salt water, brine, and other fluids from any source,' it is not incorporating and expanding the injection right contained in paragraph 14. Rather, the granting clause is strictly limited to the

purpose of exploring, operating for, producing, and storing oil and gas." *Id*. at pg. 9.

* * *

"Paragraph 14, on the other hand, does not grant the right to Webb Construction to inject any permittable or licensed fluid into a well that is proven unproductive of oil and gas and/or coalbed methane. Rather, paragraph 14 is quite specific. It provides only the right to inject salt water or brine." *Id*. at pg. 10.

* * *

"[T]he record, including the permit documents, clearly establishes that fluids other than salt brine were injected into the 508/1A well. Moreover, the fluids were injected into a well that was not proven to be unproductive. We reject the argument that the best evidence of unproductivity is the fact that the 508/1A well had been plugged inasmuch as there is no documentary evidence of any effort by Webb Construction to rework the well, drill it to a different depth, or stimulate it to gain production. Because there were no drilling operations on the leased premises and there has not been salt water, brine, or salt brine injected into or stored in the 508/1A well, the Oil and Gas Lease terminated of its own accord at the conclusion of the secondary term of the lease." *Id*. at pg. 11.

* * *

"In declaring the rights of the parties based on that language, we have herein concluded, in part, that the Oil and Gas Lease provided for the continuation of the lease only on the basis of continuing injection of salt water or brine and the making of the annual injection payment. However, fluids other than salt water or brine were injected into the 508/1A well. Thus, the lease terminated." *Id*. at pg. 13.[1]

Notwithstanding, this case concerns contamination of Respondent NHG's property in Lochgelly in Fayette County, West Virginia. A.R. Pgs. 0651-5 (Deed), 0895-901 (Deed). Petitioner Danny Webb, at the time in question, owned Petitioner Danny Webb Construction Company, Inc., at the time in question. A.R. Pgs. 0120-0124, 0167, 0236-0237 (Webb). In

[1] This Court reversed the Circuit Court's finding about piercing of the corporate veil of Petitioner DWC. *Id*.

April of 2008, Petitioners entered into the aforementioned Oil and Gas Lease with Respondent NHG. A.R. Pg. 0199 (Webb); 0656-68 (Oil & Gas Lease). Afterward, Petitioners installed a gate at the NHG property to prevent access to the property. A.R. Pg. 238 (Webb).

On May 8, 2008, less than a month after signing the subject Lease, Terry Wayne Urban, the WVDEP inspector for Kanawha & Fayette Counties since 2008, issued Petitioners a Notice of Violation for injecting frack fluid into well 508. A.R. Pgs. 0133-0135, 180 (Webb), 0243-56 (Urban); 0902-19 (Consent Order with Notice of Violation), 0920-1696 (WVDEP permit applications and permit records). On July 7, 2008, Petitioners entered into an agreement with the WVDEP to apply for an Underground Injection Control (UIC) permit. A.R. Pg. 0215 (Webb); *Id*. On September 29, 2008, Petitioners filed the UIC Permit Application. A.R. Pg. 0181 (Webb); *Id*. Based upon the foregoing, the evidence clearly demonstrated that Petitioners never intended to produce natural gas from well 508. A.R. Pgs. 233 (Webb).

Petitioners could not explain what exactly was in the fluid injected into the well, other than to indicate the fluids with was within the UIC permit and analytical results were submitted to the WVDEP. A.R. Pg. 0131, 0146-0147, 0169, 0176-0177, 190 (Webb). Petitioners do not know whether there were any substances other than water with salt in the fluids you injected into the 508 well. *Id*. (Webb). Mr. Webb testified that he did not understand the analytical results. A.R. Pg. 0131, 146-147 (Webb). Petitioners had record manifests regarding the injection fluids, but they did not what happened to those records. A.R. Pgs. 0176-0177 (Webb). Petitioners did not have any sales documents regarding the injection fluids. A.R. Pgs. 0177-0178, 0190 (Webb). Any such records probably were destroyed by Petitioners. A.R. Pg. 0190 (Webb).

While Inspector Urban claimed Mr. Webb was a "good operator," he had no basis for making such a claim. Inspector Urban did not know what went into the well and he never

inspected the test results. A.R. Pgs. 0256-8, 00281 (Urban). Inspector Urban also has not reviewed the permit for the 508 injection well. A.R. Pgs. 0247-8 (Urban).

Moreover, Mr. Webb and Inspector Urban admitted that the June 30, 2008, production history documents regarding the attempt to rework well 508 indicated that it was a productive well. A.R. Pgs. 0136-0140, 0174-176, & 233-234 (Webb); 0251, 0288 (Urban); 1627-1665 (Exhibit 34). Mr. Webb knew that injecting substances other than water with salt has an impact on future gas exploration. A.R. Pgs. 0143-0144 (Webb).

Petitioners were aware of breaks in the injection pipeline along the NHG property while operating it. A.R. Pg. 198 (Webb). Inspector Urban also observed multiple leaks in the injection pipeline and noted there was no remediation of the property. A.R. Pgs. 0259-62 (Urban). Meanwhile, Petitioners were pumping 2,400 barrels of toxic chemicals per day into the NHG property and they were receiving between $1.00 to $100.00 a barrel for it. A.R. pgs. 0190-2, 0231, 234-6 (Webb). Inspector Urban testified that millions of gallons of fluid were injected into the 508 well. A.R. Pgs. 00258 (Urban).

Former NHG President and attorney, Philip Douglas Mooney, negotiated the Lease with the Petitioners. A.R. Pgs. 1701-6 (Mooney). The Lease was for natural gas production in well 508, not a frack was injection well. *Id*. NHG sold Petitioners an adjacent piece of property, but NHG retained the mineral rights. *Id*. NHG was neither informed about the potential for gas production nor about frack waste injection. *Id*. Mr. Mooney testified that if he had known that Petitioners were going to inject fracking fluid or other similar substances into the 508 well, he would have never recommended entering into the sale of the adjacent property or the Lease. A.R. Pg. 1706. Mr. Mooney did not have knowledge about any damage to the NHG property. *Id*.

Charlie Flint, the Vice-President of NHG since 2008, resides near the subject NHG property. A.R. Pgs. 0303-7, 0310-1 (Flint). Mr. Flint was asked to sign a document which turned out to be a waiver for the UIC permit and he was led to believe it was for natural gas production. A.R. Pgs. 0308-10; 1604-26 (Exhibit 33). This document did not indicate it was for a UIC permit. *Id*. Mr. Flint testified that would not have signed the document if he knew it was for the UIC permit. *Id*. (Flint). Mr. Flint was never told that the annual $3,624.00 payments by Petitioners were for frack waste injection. A.R. Pgs. 0312-3 (Flint).

Prior to 2019, Mr. Flint did not have knowledge of any leaks or breaks in the injection pipeline. A.R. Pgs. 0310-1. Mr. Flint could not access the property because of Petitioners' gate which prevented access to the property. *Id*. Once Mr. Flint gained access to the property in approximately 2019, he observed numerous leaks in the injection pipeline. *Id*. Afterward, he immediately informed Ms. Hamilton about the condition of the property. *Id*.

Patti Hamilton has been the President of NHG since 2016. A.R. Pg. 0322 (Hamilton). After she became NHG President, she, by happenstance, learned of Petitioners' injection activities in the 508 well and took action to stop it which culminated in the 2017 WVSCA decision. A.R. Pg. 0172-3, 208 (Webb); 0320-5, 0329-32, 0336-7 (Hamilton); 1712-21 (Civil Action 16-C-9 Petition for Declaratory and Injunctive Relief), 1722-35 (Civil Action 16-C-9 Order granting Petition for Declaratory and Injunctive Relief). Moreover, as NHG President, she accepted the annual $3,624.00 payments from Petitioners until she realized the payments were for their injection activities and then she rejected them. *Id*. (Hamilton), 1697-1699 (checks).

Ms. Hamilton was not aware of any damage on the property until Charlie Flint told her about it around 2019. A.R. Pgs. 0335-7 (Hamilton). Ms. Hamilton believes that the property has been devalued until it is remediated. A.R. Pg. 0355 (Hamilton).

At trial, NHG adduced appraisals for the subject property which were not contradicted or rebutted by Petitioners. Rachel Vass, NHG's mineral estate appraiser, appraised the mineral estate. A.R. Pgs. 0396-407 (Vass), 0783-841 (Vass Report & CV).[2] Ms. Vass determined that, as of April 8, 2008 (the date of the mineral Lease), the value of the mineral estate was $46,600.00. A.R. Pgs. 0409-23 (Vass). Ms. Vass, like Petitioner Webb and Inspector Urban, opined that as of June 30, 2008, the production history document (Exhibit 34) indicated that well 508 was a viable production well. A.R. Pgs. 0418-20 (Vass). In addition, Ms. Vass opined that, like Petitioner Webb, injecting anything into a productive well would completely nullify the potential production in the future and its corresponding value. A.R. Pgs. 0415-8, 0423 (Vass). Moreover, JD Koontz, NHG's real estate appraiser, appraised the surface property. A.R. Pgs. 0359-70 (Koontz). According to Mr. Koontz, assuming no environmental damage, the property had a fair market value of $370,000.00 and it had a fair market value of $10,000.00 with environmental damage. A.R. Pgs. 0371-81 (Koontz), 0842-866 (Koontz Report & CV).

Furthermore, Marc Glass, NHG's environmental science and environmental remediation expert witness, testified at trial and his testimony was not contradicted or rebutted by Petitioners. A.R. 673-80 (Glass CV). Mr. Glass has been to the site on several occasions, he took soil samples, he took a section of the injection pipeline, he inspected the WVDEP sample testing results and he prepared a report. A.R. Pgs. 0448-60 (Glass), 0681-782 (Glass Report). While on the NHG property, Mr. Glass observed numerous patches in the injection pipeline which indicated numerous leaks. A.R. Pgs. 0466-70 (Glass). According to Mr. Glass, Petitioners' frack waste injection pipeline is a source for contamination on the NHG property, including synergistic effects on health risks. A.R. Pgs. 0461-502 (Glass). While there were no

[2] The Circuit Court properly admitted the reports of the respective expert witnesses into evidence as W.V.R.E. 803(6) business records. *See Lacy v. CSX Transp., Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999).

exceedances of health-based standards, Mr. Glass opined that the synergistic effects on known health risks necessitated remediation of the property. *Id*. Mr. Glass also analyzed soil samples and pipe-section samples to compare the contaminants and confirm Petitioners were responsible for the contamination on the property. *Id*. The probable cost to complete removal of Petitioners' pipeline, implement a confirmatory soil sampling program, and to complete well plugging and well site restoration on the NHG property is $381,816.67 and the probable cost to perform remediation of soil impacted by Petitioners' pipeline, based on the percentage of confirmatory samples showing impacts, ranges from $65,199.68 to $1,303,993.54. *Id*.

At the close of NHG's case, Petitioners moved to dismiss the case, but the Circuit Court denied that Motion. A.R. Pgs. 0526-45 (argument); 0636-44 (Defendants' Trial Memorandum). The Circuit Court did not err in denying that Motion and this Court should affirm that decision. Afterward, without putting on any evidence or witnesses, Petitioners closed their case. A.R. Pg. 0545.

As aforementioned, the jury returned a verdict for Petitioners and NHG timely filed its "*Plaintiff's Motion to set aside verdict and for a new trial*" seeking, pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, to set aside this verdict and requesting a new trial. A.R. Pgs. 0002-10 (Order granting Plaintiff's Motion to set aside verdict and for a new trial); 0634-5 (Verdict Form). Then, the Circuit Court conducted a hearing on the Motion and, at that time, took the Motion under advisement and directed the parties to submit proposed Orders regarding the Motion. *Id*.

After reviewing the pleadings and hearing the arguments of counsel, the Circuit Court, on September 16, 2022, entered an Order granting "*Plaintiff's Motion to set aside verdict and for a new trial*" which, in pertinent part, determined:

3. Moreover, the Court **FINDS**, that during the trial, Plaintiffs adduced substantial evidence including, but not limited to: deeds, the 2008 lease, a Notice of violation, the West Virginia Department of Environmental Protection ("WVDEP") Consent Agreement between the WVDEP and the Defendants, injection gas well testing data indicative of a productive well, injection permit information and analytical data which all indicated that the Defendants caused contamination on Plaintiff's property. *See* adduced Trial Exhibits. This evidence was not contradicted by or rebutted by the Defendants. The Plaintiffs also called numerous witnesses, including, but not limited to: Danny Webb, WVDEP Inspector Terry Wayne Urban, attorney Philip Douglas Mooney, corporate representative Patricia Hamilton, former Plaintiff Vice-President Charles Flint, real estate appraiser J.D. Koontz, mineral estate appraiser Rachael Vass and remediation specialist Marc Glass. This testimony was not contradicted by or rebutted by the Defendants. Consequently, the clear and undisputed evidence was that the Plaintiff established its claims and that the Defendants caused contamination on the Plaintiff's property and related damages to Plaintiff, unbeknownst to it, directly related to the Defendants' injection activities. All of which further was reflected in the *Webb* decision and the Court's rulings on the parties respective Rule 50 Motions for judgment as a matter of law.

* * *

8. The Court **FINDS** that the aforementioned findings in the *Webb* decision are determinative on Plaintiff's claims for trespass, nuisance, negligence, unjust enrichment and breach of fiduciary duty. These findings by the West Virginia Supreme Court of Appeals establish the elements for each of Plaintiff's claims against the Defendants.

9. With respect to the evidence adduced at trial, the Court **FINDS** that the deeds, the 2008 lease, a Notice of violation, the West Virginia Department of Environmental Protection ("WVDEP") Consent Agreement between the WVDEP and the Defendants, injection gas well testing data indicative of a productive well, injection permit information and analytical data clearly indicated that there was clear evidence from Plaintiff's trespass, nuisance, negligence, unjust enrichment and breach of fiduciary duty claims and that, unbeknownst to the Plaintiff, the Defendants caused contamination on Plaintiff's property.

A.R. Pgs. 0002-10 (Order granting Plaintiff's Motion to set aside verdict and for a new trial).

In paragraph 10 of the Circuit Court's Order, the Court analyzes the trial testimony of each witness as outlined above. Then, the Circuit Court went on to hold as follows:

> 11. The Court **FINDS** that in analyzing the evidence, Plaintiff established the lease was terminated due to Defendant's violation of the lease. The Defendants only were allowed to inject salt water or brine in conjunction with natural gas production. However, the Defendants violated this lease by injecting an unknown amount of substances from unknown sources into the 508 well. The Defendants failed to keep any records about what was injected into the well and from where they obtained the substances. The evidence also established that the subject well could have been a production well, but Defendants converted it into an injection well in violation of the lease. Meanwhile, the Defendants merely made the meager $3,624.00 yearly payment to Plaintiff, instead of natural gas production royalties, while using Plaintiff's property for a substantial profit, but not informing Plaintiff of their injection activities. Defendant's [*sic*] have been unjustly enriched by such verdict. Thereafter, the Plaintiff's property was contaminated by the Defendants' injection activities and needs remediation. The clear weight of the evidence indicated that the Defendants were using Plaintiff's property as a toxic fracking waste dump site. For the jury to return a verdict for the Defendants, indicating there was no injury, the verdict flies in the face of common sense and results in a flagrant miscarriage of justice.
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> 12. Based upon the foregoing, the Court **FINDS** that the jury simply ignored the weight of the evidence, including, but not limited to the evidence in the case, the testimony of the witnesses and the adduced documentary evidence, as outlined herein, which conclusively proved Defendants were responsible for the contamination on Plaintiff's property. Likewise, the Court **FINDS** that there was insufficient evidence to support the verdict. Under these circumstances, the Court is inclined to grant the Motion, set aside the verdict and grant a new trial.

Id. Based upon the facts and West Virginia law, there is no basis to disturb the Circuit Court's ruling granting Respondent's "*Plaintiff's Motion to set aside verdict and for a new trial*," and this Court should affirm that decision.

V. SUMMARY OF ARGUMENT

First, despite clear and uncontroverted evidence that Petitioners contaminated Respondent NHG's property, the jury returned a verdict for Petitioners. The verdict was against the clear weight of the evidence and the Circuit Court did not err in setting aside the verdict and granting a new trial. Secondly, the doctrine of *res judicata* does not apply in this case because this case is not the same as the prior decision of this Court and the Circuit Court did not err in denying Petitioners Motion to dismiss on this basis. Third, the statute of limitations is not applicable to Respondent NHG's tort claims due to the discovery rule and the Circuit Court did not err in denying Petitioners Motion to dismiss on this basis. Fourth, the "gist of the action" doctrine does not bar Respondent NHG from pursuing tort claims because its claims are separate and distinct from the subject Oil and Gas Lease and the Circuit Court did not err in denying Petitioners Motion to dismiss on this basis. Lastly, Respondent NHG has viable claims for unjust enrichment and breach of fiduciary duty and the Circuit Court did not err in denying Petitioners Motion to dismiss these claims.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Based upon the assignments of error set forth by Petitioners, counsel for Respondent believes 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

Rule 59 of the West Virginia Rules of Civil Procedure authorizes a circuit court to grant a new trial "to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law[.]" Consequently,

> [a] motion for a new trial is governed by a different standard than a motion for [judgment as a matter of law]. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Syl. pt. 3, *In re State Pub. Bldg. Asbestos Litig.*, 193 W.Va. 119, 122, 454 S.E.2d 413, 416 (1994); *Grimmett v. Smith*, 238 W.Va. 54, 59-60, 792 S.E.2d 65, 70-1 (2016).

"While syllabus point three of *Asbestos Litigation* authorizes a trial court to weigh the evidence in the context of granting a new trial, such authorization does not obviate the essential role of the jury in resolving conflicting evidence." *Shiel v. Ryu*, 203 W.Va. 40, 46, 506 S.E.2d 77, 83 (1998).

"When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syl. pt. 4, *Laslo v. Griffith*, 143 W.Va. 469, 102 S.E.2d 894 (1958).

In syllabus point five of *Orr v. Crowder*, this Court set forth the methodology for assessing a jury's verdict:

> In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Id., 173 W.Va. 335, 315 S.E.2d 593 (1983). *See also Dodrill v. Nationwide Mut. Ins. Co.*, 201 W.Va. 1, 11, 491 S.E.2d 1, 11 (1996).

Notwithstanding, as stated in syllabus point 4 of *Sanders v. Georgia-Pacific Corp.*:

> Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

Id., 159 W.Va. 621, 225 S.E.2d 218 (1976).[3]

An appellate court is more disposed to affirm the action of a trial court in granting a new trial "than when such action results in a final judgment denying a new trial." *Lamphere v. Consolidated Rail Corporation*, 210 W.Va. 303, 306, 557 S.E.2d 357, 360 (2001); *Adams v. Consolidated Rail Corp.*, 214 W.Va. 711, 714, 591 S.E.2d 269, 272 (2003) (*per curiam*).

VIII. ARGUMENT

1. The Circuit Court did not abuse its discretion in vacating the jury's verdict which was contrary to the clear weight of the evidence.

From the outset, the Circuit Court examined the evidence in a light most favorable to the Petitioners, assumed that all evidentiary conflicts were resolved in favor of the Petitioners,

[3] *See also* Syl. pt. 1, *Matheny v. Fairmont General Hospital*, 212 W.Va. 740, 575 S.E.2d 350 (2002); *Lamphere v. Consolidated Rail Corporation*, 210 W.Va. 303, 306, 557 S.E.2d 357, 360 (2001); *Tennant v. Marion Health Care Found., Inc.*, 194 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995); Syl. pt. 1, *Andrews v. Reynolds Memorial Hospital*, 201 W.Va. 624, 499 S.E.2d 846 (1997); Syl. pt. 1, *Brooks v. Harris*, 201 W.Va. 184, 495 S.E.2d 555 (1997); and Syl. pt. 2, *Witt v. Sleeth*, 198 W.Va. 398, 481 S.E.2d 189 (1996).

assumes as true all facts tended to be proven by the Petitioners' evidence and gave Petitioners the benefit of all favorable inferences which reasonably may be drawn from the facts proved. A.R. Pgs. 0002-10 (Order). The Circuit Court determined that the evidence presented in this case, as outlined above, was not sufficient to sustain the verdict returned by the jury and was "plainly contrary to the weight of the evidence or without sufficient evidence to support it." Syl. pt. 2, *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963). *Id*.

The Circuit Court explained that during the trial, Respondent NHG adduced substantial evidence which indicated that the Defendants caused contamination on Plaintiff's property. *Id*. This evidence was not contradicted by or rebutted by the Petitioners. NHG also called Mr. Webb, Inspector Urban, former NHG President and attorney Philip Douglas Mooney, corporate representative and current NHG President Patricia Hamilton, former Plaintiff Vice-President Charles Flint, real estate appraiser J.D. Koontz, mineral estate appraiser Rachael Vass and remediation specialist Marc Glass as trial witnesses. This testimony was not contradicted by or rebutted by the Petitioners. Consequently, the clear and undisputed evidence was that NHG established its claims and that the Petitioners caused contamination on NHG's property and related damages to NHG, unbeknownst to it, directly related to the Petitioners' injection activities.

The Petitioners injected an unknown amount of substances from unknown sources into the 508 well. The Petitioners failed to keep any records about what was injected into the well and from where they obtained the substances. The evidence also established that the subject well could have been a production well, but Petitioners converted it into an injection well. Meanwhile, the Petitioners merely made the meager $3,624.00 yearly payment to NHG, instead of natural gas production royalties, while using NHG's property for a substantial profit, but not

informing NHG of their injection activities. Thereafter, NHG's property was contaminated by the Petitioners' injection activities and needs remediation. The clear weight of the evidence indicated that the Petitioners were using NHG's property as a dump site.

The Circuit Court did not invade the province of the jury when it held that the verdict flies in the face of common sense and that the jury simply ignored the weight of the evidence. The evidence and testimony in the case were uncontroverted, as outlined herein, which conclusively proved Petitioners were responsible for the contamination on NHG's property. The Circuit Court did not weigh conflicting evidence because Petitioners did not introduce any evidence and did not rebut any of NHG's expert witnesses. After a careful analysis of the evidence and testimony, the Circuit Court concluded that there was insufficient evidence to support the verdict and the Circuit Court granted the Motion to set aside the verdict and grant a new trial. That was the correct decision and this Court should not disturb that decision.

2. The doctrine of *res judicata* does not apply in this case.

Res judicata or claim preclusion "generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action." *State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995). This Court recognized in *Conley v. Spillers* that "the underlying purpose of the doctrine of *res judicata* was initially to prevent a person from being twice vexed for one and the same cause." *Id*., 171 W. Va. 584, 588, 301 S.E.2d 216, 219 (1983). In *Conley*, this Court also observed the following additional rationale underlying the doctrine of *res judicata*:

> To preclude parties from contesting matters that have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, claim preclusion serves to conserves judicial resources, and fosters reliance on

> judicial action by minimizing the possibility of inconsistent decisions.

Id. (quoting *Montana v. United States*, 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74, 59 L.E.2d 210, 217 (1979)).

Accordingly, in *Blake v. Charleston Area Med. Ctr., Inc.*, this Court held:

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Id., Syl. pt. 4, 201 W. Va. 469, 498 S.E.2d 41 (1997). The third prong of this test is most often the focal point, since "the central inquiry on a plea of *res judicata* is whether the cause of action in the second suit is the same as the first suit." *Conley*, 171 W. Va. at 588, 301 S.E.2d at 220. The Circuit Court determined that this case was not the same case as the prior Petition and denied Petitioners Motion to dismiss on this basis. This Court should deny this appeal because Petitioners cannot establish the necessary elements for application of the doctrine of *res judicata*.

a. There must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings.

Respondent NHG does not dispute that there was a trial and appeal in the prior Petition. However, there was not a final adjudication on the merits of the claims asserted in this matter which prevents application of *res judicata*. Under these circumstances, rigidly enforcing *res judicata* would plainly defeat the ends of Justice. *Gentry v. Farruggia*, 132 W. Va. 809, 811, 53 S.E.2d 741, 742 (1949); *White v. SWCC*, 164 W. Va. 284, 291, 262 S.E.2d 752, 757 (1980).

Based upon the foregoing, Petitioners cannot establish the first prong of the *Blake res judicata* test which is fatal to the appeal; therefore, the Court should deny the appeal on this issue.

b. The two actions involving either the same parties or persons in privity with those same parties.

Respondent NHG does not dispute that the two actions involve the same parties in the prior Petition. Again, there was not a final adjudication on the merits of the claims asserted in this matter which prevents application of *res judicata*. Under these circumstances, rigidly enforcing *res judicata* would plainly defeat the ends of Justice. *Gentry*, 132 W. Va. at 811, 53 S.E.2d at 742; *White*, 164 W.Va. at 291, 262 S.E.2d at 757. Based upon the foregoing, Petitioners cannot establish the second prong of the *Blake res judicata* test which is fatal to the appeal; therefore, the Court should deny the appeal on this issue.

c. The cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

In *White v. SWCC*, the West Virginia Supreme Court of Appeals embraced the "*same-evidence*" approach for determining whether two claims should be deemed to be the same for purposes of claim preclusion:

> For purposes of *res judicata*, a cause of action is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief. ... The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues. ... If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by *res judicata*. *Id.*, 164 W.Va. at 290, 262 S.E.2d at 756 (citations omitted); *Blake*, 201 W.Va. at 476, 498 S.E.2d at 48; and *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476, 481, 557 S.E.2d 883, 888 (2001).

The issues previously decided by this Court are not identical to the one presented in the actions in question. As aforementioned, the prior claim concerned declaratory and injunctive relief regarding the termination of the subject Lease. Here, NHG alleged different claims being claims for trespass, nuisance, negligence, unjust enrichment and breach of fiduciary duties regarding Petitioners contamination of its property and related damages. These claims require substantially different evidence to sustain them. Thus, NHG's claims in this matter cannot be said to be the same cause of action as the prior Petition which prevents application of *res judicata*. The Circuit Court found this analysis determinative in denying Petitioners' Motion to dismiss on this issue. The Circuit Court did not err in denying Petitioners' Motion to dismiss on this issue. Based upon the foregoing, Petitioners cannot establish the third prong of the *Blake res judicata* test which is fatal to the appeal and the Court should deny the appeal regarding this issue.

3. Respondent's tort claims were not time-barred because of the discovery rule.

While West Virginia Code § 55-2-12 set a two (2) year statute of limitations for tort actions, the statute of limitations can be tolled by the discovery rule. *Perrine v. E.I. Du Pont De Nemours & Co.*, 225 W.Va. 482, 512-20, 694 S.E.2d 815, 845-53 (2010). With respect to the commencement of the statute of limitations period under the discovery rule, this Court has clarified that:

> [i]n tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Syl. pt. 4, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Elaborating on

Gaither, this Court has explained:

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

Syl. pt. 5, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009).

Moreover, the *Dunn* Court held:

> Under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff "knows of" or "discovered" a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action.

[4] This Court has clearly established that the determination of when the plaintiff possessed the requisite knowledge to trigger the running of the statute of limitations is a question of fact for the jury. In this regard, this Court held that [w]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury. Syl. pt. 3, *Stemple v. Dobson*, 184 W.Va. 317, 400 S.E.2d 561 (1990). *Accord Gaither v. City Hosp., Inc.*, 199 W.Va. at 714-15, 487 S.E.2d at 909-10 ("In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury." However, Petitioners did not submit this issue to the jury on the verdict form.

Syl. pt. 4, *Id*.

Here, NHG's tort claims are not barred by the statute of limitations because they were tolled by the discovery rule. As aforementioned, NHG had an Oil and Gas Lease with Petitioners regarding the 508 well. Petitioners claimed the Lease gave them a right to inject whatever they wanted into the well. NHG disagreed and took legal action to terminate the Lease. This Court rendered its June 9, 2017, decision affirming, on differing reasoning, the Circuit Court's termination of the Oil and Gas Lease as well as its issuance of the cease and desist injunction and then entered the September 6, 2017, Mandate. Until that time, NHG did not know whether it had any cognizable claims against Petitioners. Thus, NHG, acting as a reasonable prudent corporation, would not have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action Petitioners until after the entry of the September 6, 2017, Mandate. The statute of limitations would have begun to run on NHG's claims after the entry of the Mandate. NHG filed the Complaint for this current case on January 7, 2019, which was within the two (2) statute of limitations for the tort claims at issue in this case. The Circuit Court did not err in denying Petitioners' Motion to dismiss on this issue and the Court should deny the appeal regarding this issue.

Furthermore, the Circuit Court found that Petitioners hid their injection activities from NHG. Petitioner Webb testified he did not know what he injected into the 508 well, he testified that he did not how much he injected into the well and he testified that he did not keep any record about what was injected into the well. Meanwhile, NHG did not have knowledge of the actual condition of the property or any injury to the property until former NHG Vice-President Charlie Flint was able to access the subject property in approximately 2019 and assess the situation. Prior to that time, a gate, installed by Petitioners, blocked access to the property. Due

to the blocked access to the property, NHG had no way of knowing, understanding or appreciating what was transpiring on the property. Moreover, once NHG gained access to the property in 2019, it immediately had an expert inspect and test the property for toxic contamination from the injection well. Afterward, NHG, with a knowledge, understanding and appreciation of what occurred on the property, immediately filed suit within two (2) year of such knowledge, understanding and appreciation. Again, NHG, as a reasonable prudent corporation, could not have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action. NHG timely filed its Complaint against Petitioner, alleging tort claims, within two (2) years of discovering the same. The Circuit Court found this analysis determinative in denying Petitioners' Motion to dismiss on this issue. Again, the Circuit Court did not err in denying Petitioners' Motion to dismiss on this issue and the Court should deny the appeal regarding this issue.

4. The "gist of the action" doctrine does not bar Respondent from pursuing tort claims.

The gist of the action doctrine is designed "to prevent the recasting of a contract claim as a tort claim . . . ." *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013). Under the gist of the action doctrine, a tort claim "will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract." Syl. pt. 9, *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 611, 567 S.E.2d 619, 620 (2002).

This Court observed that a tort recovery is barred where any of the following four factors is present:

> (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were

> grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Gaddy, 231 W. Va. at 586, 746 S.E.2d at 577 (quoted authority omitted) ("Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract.").

In *Good v. Am. Water Works Co.*, the United States District Court for the Southern District of West Virginia analyzed a similar issue with respect to the gist of the action doctrine in denying the water company defendants' Motion to dismiss. *Id*., 2015 U.S. Dist. LEXIS 71646. In pertinent part, in *Good*, the plaintiffs' claims concerned interruption in their water supply caused by a spill of the chemical, 4-methylcyclohexane methanol, along with other chemicals, commonly referred to as "Crude MCHM" into the Elk River. *Id*. at *3. The water company defendants contended that there is no legal duty to provide water to anyone unless a customer contract is first formed. They contended the gateway contract requirement is fatal to plaintiffs' tort claims. The Court determined that the water company had an entirely separate duty in tort not to invade and contaminate the real and personal property of others in the process of providing water. *Id*., at *10.

In formulating its decision, the *Good* Court examined this Court's decision in *Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc*. *Id.*, at *10-12 (citing *Id.*, 176 W.Va. 39, 341 S.E.2d 414 (1986)). In *Chamberlaine*, the plaintiff alleged claims against an insurer in both contract and negligence, asserting as to the latter that the insurer negligently failed to pay a certain coverage amount. This Court concluded that the plaintiff was "dressing a contract claim in a tort's clothing." *Id*., (citing *Chamberlaine*, 176 W.Va. at 41, 341 S.E.2d at 417). The *Chamberlaine* Court additionally analyzed the matter as follows:

> The distinction between tort and contract liability, as between parties to a contract, can be difficult to define. The key distinction is whether the act complained of was one of misfeasance or nonfeasance. Misfeasance, or negligent affirmative conduct, in performing a contract generally subjects the actor to tort liability in addition to contract liability for physical harm to persons and tangible things. On the other hand, there is generally no tort liability for failing to do what one has contracted to do, unless there is some duty to act apart from the contract. USF & G's refusal to pay on the insurance policy was not a negligent act, but an affirmative refusal to act. Such a refusal to act constitutes nonfeasance. Because there is no tort liability for USF & G's nonfeasance . . . , the trial court was correct in dismissing the negligence count of the appellant's complaint.

Id. (citing *Chamberlaine*, 176 W.Va. at 41-42, 341 S.E.2d at 417). Thus, the *Good* Court determined that the water company defendants' alleged conduct constituted misfeasance as opposed to nonfeasance. *Id*. The plaintiffs alleged negligent affirmative conduct by the water company defendants in performing their water supply duties, in essence delivering tainted water to their homes and businesses as a result of active misfeasance. As such, there was a claim stated for both tort and contract.

Furthermore, the *Good* Court examined the decision in *City of Greenville v. W.R. Grace & Co*. *Id*. (citing *Id.*, 827 F.2d 975, 977 (4th Cir. 1987). In *City of Greenville*, the defendant manufactured fireproofing products, one of which contained asbestos and the products were installed some of the material in city hall after the defendant supplied it, apparently under a contract. *See Id*. at *12-13.[5] The Fourth Circuit held that despite a clear-cut contract for the sale of goods, the fact that the goods included a toxic substance that could damage the owner's property gave rise to an independent tort claim. *Id*. The *Good* Court found that the same principle may apply in the case and denied the Motion to dismiss. Thereafter, the *Good* Court

[5] *See City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559, 563 (D.S.C. 1986) (district court opinion noting that "substantial evidence showed that at the time Grace sold Greenville the asbestos-containing Monokote, Grace was actually aware of the hazard to building occupants from asbestos-containing fireproofing").

revisited this issue on the water company defendants' Motion for summary judgment and denied the Motion, but indicated that customers who allege injuries under both a negligence theory and a breach of contract theory must elect whether to proceed on contract or in tort. *Good v. Am. Water Works Co.*, 2016 U.S. Dist. LEXIS 132260, *41-50.

Here, this case is no different than the *Good* case. The liability does not arise solely from the subject Lease between the parties; the alleged duties breached were not grounded in the Lease; the liability did not stem from the subject Lease; and the tort claims do not duplicate the breach of contract claim. Instead, Petitioners conduct constituted misfeasance because they had a duty in tort not to invade and contaminate NHG's property. Without permission, Petitioners injected toxic chemicals through a dilapidated pipeline into NHG's property which contaminated the property and destroyed the mineral estate. Petitioners do not know what was injected into the 508 well, how much was injected into the well and they did not keep any records. Despite the subject Lease, Petitioners' injection activities damaged NHG's property which gave rise to independent tort claims and NHG asserted them as such. In fact, despite Petitioners' persistent claims to the contrary, NHG did not assert a breach of contract claim which was its right to do so along with tort claims. The Circuit Court found this analysis determinative in denying Petitioners' Motion to dismiss on this issue. The Circuit Court did not err in denying Petitioners' Motion to dismiss on this issue. As such, the Court should deny the appeal regarding this issue.

5. Respondent had a viable unjust enrichment claim against Petitioners.

NHG established a claim based on the theory of unjust enrichment against Petitioners. The elements of a claim for unjust enrichment under West Virginia law are: "(1) a benefit conferred upon the defendant, (2) an appreciation or knowledge by the defendant of such benefit, and (3) the acceptance or retention by the defendant of the benefit under such circumstances as

make it inequitable for the defendant to retain the benefit without payment of its values." *Dunlap v. Hinkle*, 173 W.Va. 423, 317 S.E.2d 508, 512 n.2 (1984); *Employer Teamsters – Local Nos. 175/505 Health & Welfare Tr. Fund v. Bristol Myers Squibb Co.*, 969 F. Supp. 2d 463, 472 (S.D. W. Va. 2013); *CSS, Inc. v. Herrington*, 306 F. Supp. 3d 857, 881–82 (S.D. W. Va. 2018). West Virginia specifically requires that the benefits were "received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value." *Realmark Devs., Inc. v. Ranson*, 208 W.Va. 717, 542 S.E.2d 880, 884–85 (2000) (citing *Copley v. Mingo Cnty. Bd. of Educ.*, 195 W.Va. 480, 466 S.E.2d 139 (1995)).

Here, Respondent NHG established a claim for unjust enrichment. First, NHG conferred a benefit upon Petitioners. Petitioners were given access to NHG's property for the sole purpose of creating a natural gas production well. Instead, Petitioners used the property for a frack waste injection well. Secondly, Petitioners had an appreciation or knowledge of the benefit. Danny Webb admitted that the prior testing results for the subject well indicated that it had the potential to be a productive well. Lastly, Petitioners' acceptance or retention of the benefit under such circumstances as to make it inequitable for them to retain the benefit without payment of its values. Petitioners used the injection well to pump millions of gallons of toxic waste into NHG's property and received payment for it, thereby creating a large profit for them, but not for NHG. Meanwhile, Petitioners' injection activities destroyed NHG's mineral estate and the ability to create a productive well on the property in the future and also contaminated the property. The Circuit Court found this analysis determinative in denying Petitioners' Motion to dismiss on this issue. The Circuit Court did not err in denying Petitioners' Motion to dismiss on this issue and the Court should deny the appeal regarding this issue.

6. Respondent had a viable breach of fiduciary duty against Petitioners.

NHG established a claim against Petitioner for breach of their fiduciary duty owed to NHG. "Fiduciary duty" is defined as "'[a] duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied by law[.]'" *Elmore v. State Farm Mut. Auto Ins. Co.*, 202 W.Va. 430, 435, 504 S.E.2d 893, 898 (1998) (quoting Black's Law Dictionary, 625 (6th ed.1990). Explained another way, "[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary... to the beneficiary...; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person ...." Black's Law Dictionary 523 (7th ed. 1999). A fiduciary duty arises when a person assumes a duty to act for another's benefit, while subordinating his or her own personal interest to that other person.

The elements necessary to prove a breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damages. *State ex rel. Affiliated Const. Trades Found. v. Vieweg*, 205 W.Va. 687, 701, 520 S.E.2d 854, 868 (1999) (Workman, J., concurring); *Jane Doe v. Logan Cnty. Bd. of Educ.*, 242 W. Va. 45, 829 S.E.2d 45, n. 5 (2019). "A violation of the fiduciary relationship may result from oppressive conduct, which is conduct that departs from the standards of good faith and fair dealing which are inherent in the concept of a fiduciary relationship." Syl. pt. 3, *Masinter v. WEBCO Co.*, 164 W. Va. 241, 262 S.E.2d 433 (1980).

Here, Respondent NHG established a claim for breach of fiduciary duty. First, Petitioners had a fiduciary duty to care for NHG's mineral rights and to protect NHG's property. Secondly, Petitioners breached their breach by creating a frack waste injection well instead of a production well which destroyed the potential for gas exploration and contaminated the property. Petitioners did not have a right to establish an injection well for their own benefit and to the

detriment of NHG. That was affirmed by this Court in the prior case regarding termination of the Lease. The evidence clearly indicated that Petitioners never intended to establish a production well. Petitioners never attempted to create a production well after signing the Lease. Shortly after signing the Lease and before obtaining an injection well permit, Mr. Webb was issued a Notice of Violation by Inspector Urban for injecting frack waste into the well without a permit. Petitioners' conduct was oppressive conduct, which departed from the standards of good faith and fair dealing. Lastly, NHG suffered damages from Petitioners' breach of their fiduciary duty by the creation of the injection well. There was no dispute in the testimony of Mr. Webb, Inspector Urban and expert Rachel Vass that when Petitioners created the injection well, it destroyed the possibility of using the well as a production well. Mr. Glass opined that Petitioners' injection activities contaminated the property. Petitioners destroyed the mineral estate and contaminated the property for their own benefit. The Circuit Court found this analysis determinative in denying Petitioners' Motion to dismiss on this issue. The Circuit Court did not err in denying Petitioners' Motion to dismiss on this issue and the Court should deny the appeal regarding this issue.

IX. CONCLUSION

Based upon the foregoing, there is no basis for Petitioners' appeal and relief should be denied by this Court. The Circuit Court did not err in granting of Respondent's "*Plaintiff's Motion to set aside verdict and for a new trial*" because the verdict was against the clear weight of the evidence. In addition, the Circuit Court did not err in denying Petitioners' Motion dismiss because res judicata did not apply since this case is not the same as the prior case, the statute of limitations was tolled by the discovery rule, the separate claims apart from the subject Lease

prevented application of the "gist of the action" doctrine and NHG established claims for unjust enrichment and breach of fiduciary duty.

WHEREFORE, Respondent North Hills Group, Inc., respectfully requests this Honorable Court deny Petitioners Danny Webb Construction Company, Inc. and Danny Webb's appeal regarding the granting of Respondent's "*Plaintiff's Motion to set aside verdict and for a new trial*," affirm the Circuit Court's September 16, 2022, Order and for all other relief this Court deems just and proper.

Dated: March 2, 2023

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DANNY WEBB CONSTRUCTION, INC.
AND DANNY WEBB,

Defendants Below, Petitioners,

v. **Supreme Court No. 22-789**

Fayette Co. Civil Action No. 19-C-2

NORTH HILLS GROUP, INC.,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that on **March 2**, **2023**, a copy of the foregoing "*Respondent's Brief*" was served using the File & ServeXpress system, which will send notification of such filing to all counsel of record:

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