INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

JASON WILHELM and CRYSTAL WILHELM,

PLAINTIFFS BELOW,
APPELLANTS,

v.

TUNNEL RIDGE, LLC,

DEFENDANT BELOW,
APPELLEE.

APPEAL NO. 24-ICA-118

CIVIL ACTION NO. CC-35-2021-C-156

BRIEF OF APPELLANTS/PLAINTIFFS

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2. The Circuit Court committed clear errors of law and fact in improperly applying the two-year statutes of limitations for property damages under W.Va.Code § 55-2-12 to lawsuits concerning ongoing mine-subsidence and seeking to enforce the requirements of the West Virginia Surface Coal Mining and Reclamation Act, W.Va.Code §§ 22-1-1, *et seq.*, and related regulations/rules. The Act is designed to not only require mining companies to avoid causing mine subsidence damages but to require such mining companies to act in a reasonable and expeditious manner to repair any damages caused by mine subsidence or to reasonably compensate property owners for such damages. The Circuit Court failed to honor the spirit and public policy behind such Act in mechanically applying the two-year statute of limitations based upon the self-serving affidavits of the mining company as to when the last mining activity occurred in the vicinity of the relevant property and ignoring the ongoing acts and omissions of the Defendant in refusing or failing to reasonably and expeditiously repair the damages caused by the mine subsidence or to appropriately compensate the Plaintiffs for such damages without requiring the Plaintiffs to sign a release from liability.

3. To the extent that a tort statute of limitations applies to actions to enforce the WVSCMRA, the Circuit Court committed clear errors of law and fact in concluding that the continuous tort doctrine does not apply in the case so as to prevent the running of the statute of limitations and in failing to construe all direct and circumstantial evidence, including reasonable inferences which may be drawn therefrom, as well as credibility determinations, in the light most favorable to the Plaintiffs as non-movants. The Court improperly relied upon the Defendant's self-serving affidavits as to the date on which the last mining activity occurred in a

location that could have caused mine subsidence damages to the Plaintiffs' home and real property and in failing to recognize that the Defendant's ongoing failure to act in a reasonable and expeditious manner to repair the damages to Plaintiffs' home and real property or to reasonably compensate the Plaintiffs for such damages without requiring them to sign a release of liability constituted continuing injuries and wrongs that prevented the running of the statute of limitations under the continuous tort doctrine.

II. STATEMENT OF CASE

A. Introduction

The Appellants/Plaintiffs, Jason and Crystal Wilhelm, are a married couple that make their home at 465 McCoy Road, Valley Grove, West Virginia. The Appellee/Defendant Tunnel Ridge, LLC is the alleged owner, operator and/or lease holder of coal interests beneath the surface of the Plaintiffs' property. On or about August 18, 2017, the Defendant, in advance of long wall coal mining operations, conducted, and the Plaintiffs permitted, a pre-mining inspection of the Plaintiff's real property. Beginning in the latter months of 2017 and continuing through 2023, the Defendant conducted mining operations under or near the Plaintiffs' property and the town of Valley Grove. The Plaintiffs began to experience and have continued to experience damage to their home structures and real estate as a result of the Defendant's mining operations. *See* JA, at 181-82, 228-29, & 247-49.

In order to work with the Defendant for the repair of their home, the Plaintiffs allowed the Defendant to conduct post-mine inspections of their home. Thereafter, the Plaintiffs exercised their rights under the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA") by advising the Defendant that they elected to have their real property repaired by the Defendant. *See* JA, at 14-19.

In response to the Plaintiffs' decision to have their real property repaired by the Defendant, the Defendant merely offered to perform cheap, cosmetic repairs that would not remedy the

Plaintiffs' actual property damage. Specifically, among other deficiencies, the Defendant initially determined that the total cost to repair the Plaintiffs' home structures would amount to $13,860. *See* JA, at 153.

On March 20, 2019, the Defendant submitted correspondence to Plaintiffs offering $44,860 contingent upon the Plaintiffs' executing a Release in full satisfaction of any claims against Tunnel Ridge. *See* JA, at 154-56. In the same correspondence, the Defendant attached estimates identified as a "scope of work" which the Defendant would perform only upon the Plaintiffs' "sign[ing] a Release of all claims against Tunnel ridge for mine damage before any work commences." *Id.*

On May 10, 2019, the Plaintiffs sent correspondence to the Defendant with copies of three estimates to perform adequate repairs to the mining subsidence damages. *See* JA, at 159-63. In response, on August 2, 2019, the Defendant sent a document by Pozell & Company evincing their assessment of the damages at Plaintiffs' property. *See* JA, at 164-66. Within the same assessment, the Defendant identified, *inter alia*, that the Plaintiffs' foundation was cracked in several places that were not apparent in the pre-mine inspection. Pozell & Company's suggested solution was to "install foundation coating" rather than replace the foundation. *Id.* The Plaintiffs' consultation of contractors, as reflected in JA, at 159-63, indicated that ensuring the foundation was adequately repaired required greater efforts than merely applying foundation coating to the cracked stones. The Plaintiffs were justifiably concerned that the Defendant's proposed scope of work would not remedy the material damages to their home's foundation. Despite the Plaintiffs' good faith efforts, the Defendant would not facilitate the repairs adequate to address even the undisputed damages revealed by the Defendant's pre and post-mine inspections or agree to remove the requirement of the Plaintiffs signing a release of claims. To date, the Defendant has undertaken no repairs to the Plaintiffs' structures or real estate.

By virtue of the laws set forth in the Plaintiffs' Complaint, the Defendant mining operator maintains an obligation to restore the Plaintiffs' property "to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence" and "correct material damage resulting from subsidence caused to any [of Plaintiffs'] structures." W.Va. C.S.R. 38-2-16.2.c. Defendant has failed to comply with these duties, and Plaintiffs have brought claims to enforce compliance with the WVSCMRA and its corresponding regulations. Plaintiffs have also sought annoyance and inconvenience damages and punitive damages.

B. Procedural History and Negotiations Between the Parties

On April 17, 2020, the Plaintiffs filed a complaint against the Defendant Tunnel Ridge in the U.S. District Court for the Northern District of West Virginia. JA, at 6-11. In response, the Defendant moved to dismiss the federal complaint on jurisdictional grounds. Rather than dragging out procedural matters, the Plaintiffs elected to submit a Notice of Voluntary Dismissal without prejudice to refiling, JA, at 12-13, and emphasized in their response that they would "subsequently be filing their Complaint in the Circuit Court of Ohio County." JA, at 167-69.

As indicated by the background above, the Defendant was well aware of the nature of Plaintiffs' claims for months prior to and as of the date of the filing of the federal complaint, and the Plaintiffs' never gave the Defendant any indication that they would abandon their claims such to constitute prejudice to the Defendant. Indeed, the parties agreed to attempt another round of negotiations to avoid the need for the re-filing of litigation. Over the relevant period, the Defendant was fully cognizant that the Plaintiffs would initiate litigation if negotiations proved to be unsuccessful.

On July 24, 2020, counsel for the parties discussed the terms of a potential settlement whereby the Defendant offered the Plaintiffs a certain sum in exchange for a release of claims.

See JA, at 170. After the Plaintiffs rejected the same offer, the Plaintiffs submitted a counter demand to the Defendant on October 15, 2020. *See* JA, at 172. Counsel for the parties continued to negotiate thereafter in verbal conversations and email correspondence occurring on May 12, 2021, May 20, 2021, and May 24, 2021. *See* JA, at 173-74. As of June of 2021, the parties remained in direct negotiations. *See* JA, at 175. When it became apparent in the summer of 2021 that the parties could not achieve a settlement because the Defendant insisted that the Plaintiffs execute a release of all claims contrary to Defendant's obligations under the WVSCMRA, W.Va.Code §§ 22-1-1, *et seq.*, and related rules, the Plaintiffs filed the instant action on September 24, 2021. *See* JA, at 14-19.

The Defendant filed a motion for summary judgment and supporting memorandum of law, JA, at 94-133, nearly four months prior to the close of discovery on September 1, 2023 and prior to the Plaintiffs' expert disclosure deadline on June 1, 2023. Subsequently, after allowing additional time for discovery, the Circuit Court below granted the Defendant's motion for summary judgment on grounds that the two-year statute of limitations for property damage applied to the statutory claims asserted in this case and had run. The Court also concluded that the continuing tort doctrine did not apply to toll the running of the limitations period. JA, at 278-87.

C. Facts Revealed By Relevant Discovery

Tunnel Ridge has asserted that Plaintiffs' claims accrued from the first instance of "awareness of their alleged damages… as early as November 2017…no later than June 22, 2018." JA, at 104-05. However, as disclosed in discovery, the Wilhelms have experienced new, distinct, and continuing injuries to their home and real property between the spring of 2018 and 2023 for which Tunnel Ridge has refused to initiate repairs. *See* JA, at 228-29. The evidence of the Wilhelms' evolving property injuries is even recorded within Tunnel Ridge's internal emails. On September

27, 2018, Tunnel Ridge agent Bruce Starr wrote the following email to his Tunnel Ridge colleagues, Mark Thomas and Eric Anderson:

> Gentlemen, I just wanted to inform you that just within the hour Mr. Wilhelm called me to inform me that there is additional damage to his house now. He is claiming that there are drywall joints separating in his garage and one additional mortar joint crack on the back side of his garage.

JA, at 230.

Tunnel Ridge agent Eric Anderson responded to the same email acknowledging that the subsidence damages to the Wilhelm property could get worse in the future: "Sounds like we need to get this settled or else there could be additional claims made in the future." JA, at 231.

Although Tunnel Ridge now illegitimately disputes that its longwall mining was the cause of the Wilhelms' property damage, internal Tunnel Ridge correspondence illustrates that Tunnel Ridge was worried about the Wihelms' property damage getting worse in July of 2018. Tunnel Ridge agent Bruce Starr emailed fellow employee Eric Anderson as follows:

> In these pictures you will see a crack that has appeared in the block of Mr. Wilhelm's crawl space. **There are also pictures of the slip that is moving towards the area we mined below his property and in one picture you can see how much the power pole is being pulled down the hill.** Prior to getting this estimate we offered Mr. Wilhelm $5,000 which at this point he only was claiming land damage. He refused the offer and told me he would like to get an estimate done… Since then he has discovered a crack in his block which is on the end of his house closest to our mining.

JA, at 232.

Indeed, the Wilhelm property continued to experience discrete damages throughout 2018, starting with the sinking and destruction of their driveway in the spring, later cracks in the foundation of their then five-year old house, and cracks in the garage ceiling in or about September. See JA, at 228-29. In late 2020, the Wilhelms noticed new sinkholes and depressions immediately surrounding their home. *See* Photographs at JA, at 233-35; *see also* Affidavit, JA, at 228-29. In the past two years, Plaintiff Jason Wilhelm has found his house increasingly out of level, new

water problems associated with his roof, and finding windows and doors not able to open or close properly. JA, at 228-29. The Wilhelms had none of these issues with their virtually brand new house before Tunnel Ridge began mining under and near their property. *Id.* The Wilhelms have suffered distinct damages originating from Tunnel Ridge's mining activities as recently as the year of 2023. *Id.*

Contrary to its assertions, Tunnel Ridge's acts and omissions causing damages to the Plaintiffs' property did not simply cease during the time period it alleges. In applying for an underground coal mining permit, Tunnel Ridge is required by W. Va. Code R. § 38-2-3.12 to submit a "Subsidence Control Plan" to regulators, which must include, *inter alia*:

> **3.12.a.2**. A survey of the condition of all non-commercial building or **residential dwellings and structures related thereto that may be materially damaged or for which the foreseeable use may be diminished by subsidence** within the area encompassed by the applicable angle of draw;
>
> **3.12.a.5**. A description of the physical conditions, such as depth of cover, seam thickness, strike and dip, lithology, and other geologic and hydrologic conditions, which affect the likelihood or extent of subsidence and subsidence-related damage;
>
> **3.12.a.7**. An **acknowledgment** that if subsidence causes material damage or reduces the value or reasonably foreseeable use of the surface lands, **then the operator shall restore the land to a condition capable of supporting uses it was capable of supporting before subsidence regardless of the right to subside**;
>
> **3.12.a.8**. Except for those areas where planned subsidence is projected to be used, a detailed description of the subsidence control measures that will be taken to prevent or minimize subsidence[.]

W.Va.Code R. § 38-2-3.12 (emphasis added).

Following Plaintiffs' Motion to Compel Discovery, Tunnel Ridge belatedly produced a subsidence control plan involving the area encompassing the Wilhelm property. The subsidence damage types that Tunnel Ridge anticipated from their longwall mining activities in Valley Grove mirrored exactly those that the Wilhelms experienced, *i.e.*, cracked foundation, level problems, etc. As stated in such plan, in part:

MR-4-PR
Tunnel Ridge, LLC
Attachment S-3

> There are multiple property owners with structures above and within 30° angle of draw. Prior to mining beneath the property, owners of surface and structures above the area to be mined will be notified in writing in accordance with the WVDEP Surface Mining Regulations and applicable policies in affect at the time of mining.
>
> Typical subsidence effects tend to vary with depth of cover, topographic conditions, and the relative location of the structure to the underground mining operations. Typical subsidence effects to a structure include cracked foundations and sub-floors, out-of-level problems, and cracked plaster, block, and brick walls. Those problems affecting the utilization of the house or the safe occupation of the structure are repaired on an ongoing basis to minimize inconvenience to the homeowner. No damage can also be an outcome of mining under a structure.

JA, at 238.

Tunnel Ridge misrepresented its procedures to the West Virginia Department of Environmental Protection ("WVDEP") in filings that are mandated by legislative rule. In applying for its mining permit[1], Tunnel Ridge assured the WVDEP that it would "repair [problems affecting the utilization of the house] on an ongoing basis to minimize inconvenience to the homeowner." *Id.* In reality, Tunnel Ridge's policy is to attempt to aggressively limit its exposure to affected landowners at any cost by--among other stonewalling, lowball estimates, and delay tactics--requiring surface owners to execute a release from further liability as a condition to Tunnel Ridge starting repairs or offering compensation. At the Rule 30(b) deposition of Tunnel Ridge's corporate designee, Mr. Evan Midler, he testified as follows:

> Q. -- do you see where it says "In return for the guarantee of payment by Tunnel Ridge, you will be required to sign a release of all claims against Tunnel Ridge for mine damage before any work commences. After the release is signed, you will still have a contractual right to have the specified work completed by the

[1] Syl. Pts. 9 & 10, *Antco v. Dodge Fuel Corp.*, 209 W.Va. 644, 550 S.E.2d 622 (2001) ("9. The terms and conditions of a mining permit issued pursuant to the West Virginia Surface Coal Mining and Reclamation Act, W. Va.Code § 22–3–1, et seq., may limit rights that a mining company otherwise would have enjoyed. Mining activity may not exceed the limitations contained in the permit, or any other statutory limitation."; "10. Because a mining company must have a valid permit to mine, a violation of the terms or conditions of a permit issued pursuant to the [WVSCMRA] is a violation of the Act, and therefore a violation of statute.").

contractor and will have no further claim against Tunnel Ridge for damage to your land or structures." Did I read that correctly?

A. I believe so.

Q. Okay. And this is – this was authored by you, this letter?

A. Yes. I signed it.

Q. Okay. Is it a policy of Tunnel Ridge to require claimants to execute a release before agreeing to do any work or compensate owners for – landowners for mine subsidence damage?

A. Yes.

Q. Okay. And is that requirement reflected in SMCRA?

A. I don't believe so.

Q. Okay. So it's not a requirement under SMCRA for Tunnel Ridge to require the release of claims as a condition to repairing or reimbursing claimants' claims for mine subsidence damages?

A. Can you repeat that?

Q. Yeah. There's no rule under SMCRA or its corresponding regulations that claimants have to execute a release before Tunnel Ridge has the duty to repair or reimburse them. Is that fair to say?

A. I'm not aware of a – of any rule.

See Tunnel Ridge Rule 30(b) Depo., JA, at 242-43.

As suggested by Defendant employee Eric Anderson, it is in Tunnel Ridge's interest to solicit releases from liability before all mining subsidence damages have manifested and thereby prevent "additional claims made in the future." See JA, at 231.[2] Not only is this practice violative of surface owner rights per the SCMRA, it is directly contrary to Tunnel Ridge's representations to the WVDEP. Plaintiffs submit that Tunnel Ridge has violated and remains in violation of its continuing duties under the SCMRA and its corresponding regulations by, *inter alia*: (1) conditioning the performance of Tunnel Ridge's statutory obligations on Plaintiffs' execution of a

[2] Although Tunnel Ridge knows full well that mining subsidence damages can manifest months and/or years after longwall extraction has completed, Defendant's position in this particular case is that "material subsidence occurs within the first two weeks." *See* Tunnel Ridge Rule 30(b) Depo., JA, at 245.

release from liability; (2) failing to take legitimate efforts to evaluate Plaintiffs' claim for reimbursement; (3) disregarding repair estimates and scopes of work submitted by the Plaintiffs; and (4) failing to initiate repairs to Plaintiffs' house and land after Plaintiffs' request.

Tunnel Ridge argues that the only time Defendant's mining operations passed in the vicinity of Plaintiffs' residence was in November 2017, and, therefore, each of the Plaintiffs' claims were barred after the months of either November 2019 or June 2020 at the latest. JA, at 104-05. As this is a unique case involving subsurface mining and a company that self-reports its activities to the WVDEP, no one but Tunnel Ridge can provide direct knowledge of when and what operations happened hundreds of feet below the surface, and Defendant has produced no unbiased or objective evidence of such knowledge in support of its Motion or otherwise.

In any case, Tunnel Ridge successfully succeeded in getting the Circuit Court to essentially disregard the summary judgment standard by construing two issues of material fact exorbitantly in its own favor. The first is that Tunnel Ridge only conducted any operations near the Wilhelm residence in November of 2017, in support of which it only cited two self-serving affidavits from its own biased agents.

Plaintiffs countered that their new and distinct damages occurring in all of the years between 2018 and 2023 indicates either that Tunnel Ridge undermined in close proximity within those years, or that subsurface events originating from Defendant's activities occurred months or years after Tunnel Ridge's initial extraction. Pursuant to W. Va. Code R. § 38-2-3[3.12.a.2.B], "the presumption of causation will apply to any damage to structure(s) as a result of earth movement within a 30-degree angle of draw from any underground extraction." Tunnel Ridge has provided no evidence to counter this presumption of causation.

Second, Tunnel Ridge also asked the Circuit Court to infer in its own favor that the exclusive "traumatic event" that could have caused any possible subsidence to Plaintiffs' property was Tunnel Ridge's initial longwall extraction. Despite having conducted no official mine subsidence evaluation of Plaintiffs' property, Tunnel Ridge successfully convinced the Circuit Court to simply take it at its word that Tunnel Ridge never conducted any underground activities after November 2017 near Plaintiffs' property and that the only subsurface event that could cause any damage to Plaintiffs' property was such initial longwall extraction.

It is undisputed that Tunnel Ridge performed both longwall mining and extensive "exploratory" or "development mining" directly under or very near the Wilhelm property at 465 McCoy Road as indicated by the narrow routes in the below map[3]:

Plaintiffs' expert witness, Dr. Tim Bechtel, conducted an in-person inspection of the Plaintiffs' property and concluded that Tunnel Ridge's mining activities caused damages to the

[3] Plaintiffs obtained the depicted map within Tunnel Ridge's document production following their Motion to Compel Discovery.

Plaintiffs' house and land. *See* Dr. Bechtel Affidavit, JA, at 247-49. Through his topographic evaluation, Dr. Bechtel determined that distinct subsidence damages manifested in 2018 and between November 2019 and March 2020. *Id.* ("complete subsidence can for various reasons related to specific geologic stratigraphy and structures continue for several years"); *see also* Syl. Pt. 11, *Graham v. Beverage*, 211 W.Va. 466, 469, 566 S.E.2d 603, 606 (2002) (describing accrual from date of last injury). Contrary to Tunnel Ridge's assertion, Dr. Bechtel concluded that the Wilhelm property was indeed well within the angle of draw where mine subsidence effects from longwall and exploratory mining are presumed.[4] JA, 248, at ¶ 14.

To illustrate the paucity of Defendant's theory, Tunnel Ridge has identified no expert to conduct any mine subsidence evaluation of the Wilhelm property. Therefore, Defendant has produced no evidence to support its theory that its initial extraction could be the only cause of any subsidence damages. In Defendant's Expert Disclosure, Tunnel Ridge stated that Dr. Keith Heasley would opine that "given the proximity of Plaintiffs' property and structure to Defendant's underground longwall mining operations any resulting subsidence effects to Plaintiffs' property would have been minimal." At his deposition, Dr. Heasley provided absolutely no support whatsoever to lend credence to the Defendant's story. First, Dr. Heasley denied having significant experience analyzing subsidence events that had already taken place; rather, his experience involved "predicting" subsidence events based upon statistical probability:

> Q. Does the majority of your work involve forecasting expected subsidence events versus determining whether or not a property owner has or a surface owner has experienced damage caused by underground subsidence.

[4] "In addition, the presumption of causation will apply to any damage to structure(s) as a result of earth movement within a 30 ° angle of draw from any underground extraction." W. Va. Code R. § 38-2-3 [3.12.a.2.B].

A. I think it's fair to say the majority of my work has just been the prediction of the subsidence. . . . And I leave the damage analysis to the people with more experience in that area than me.

Dr. Heasley Depo., JA, at 251.

Likewise, Dr. Heasley has never been asked to render an opinion as to the timing and duration of longwall mining activities:

Q. Have you ever been retained in any form of consulting to make an opinion as to when longwall mining activities started and stopped aside from this case?

A. No. I certainly don't recall anything like that.

Dr. Heasley Depo., JA, at 253.

Dr. Heasley never visited the Wilhelm property or surrounding area and has no basis whatsoever to suggest that the Wilhelms' property damage was linked to any specific extraction event. By his own admission, the nature of his expertise is forecasting what *may* occur, which bears no relevance towards the present dispute.

Q. Have you ever been to the Wilhelms' property?

A. No.

Q. Was that something that you thought might be important before reaching any conclusions in this case?

A. If I were to go beyond predicting the subsidence and potential damage, I would probably want to visit the property. [...]

Id.

Dr. Heasley took no action to verify the dates when Tunnel Ridge reported that it undermined Plaintiffs' property and merely parroted information that Tunnel Ridge provided him.

Q. With respect to these dates, December 31, 2017, or prior, did you do anything to independently verify when Tunnel Ridge was in the longwall panel near the Plaintiffs' residence besides reviewing the mine maps provided by Tunnel Ridge?

A. No. I used the mine maps for that information.

Q. Okay. Could you do anything besides take Tunnel Ridge's word for it as to when they were there?

A. Not – not within reason.

Q. Okay. So we're sort of at the same place where we have to rely upon what Tunnel Ridge documents in order to determine when they were actually underneath the Plaintiffs' property; is that fair to say?

A. That's fair. [...]

Q. Did you review any data points that originated from anyone, any other entity, besides ones created by Tunnel Ridge?

A. I think that – no. I think all the pertinent information came through Tunnel Ridge. [...]

Q. Did you see any material indicating daily – the status of daily operations?

A. I have not, no. I have not asked.

Dr. Heasley Depo. JA, at 252 & 254.

III. SUMMARY OF ARGUMENT

The Ohio County Circuit Court committed errors of law and fact in improperly and mechanically applying the tort statute of limitations for property damages under W.Va.Code § 55-2-12 when claims brought pursuant to the WVSCMRA, W.Va.Code §§ 22-1-1, *et seq.*, and related rules do not require a showing of the commission of a tort or otherwise require that claims be brought within any statute of limitations. The WVSCMRA is a remedial statute which must be construed liberally so as to accomplish its purposes of protecting the public from the devastating effects of mining to our land, forests, waters, and related property.

The WVSCMRA must also be construed consistent with and at least as stringently as the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201 *et seq.* The Circuit Court should have considered in its analysis not only that neither the WVSCMRA nor the SMCRA contain any time limits or referrals to any other statutes of limitations, but that such omissions

were indeed intentional and show the intent that no such time limitations are to be imposed on claims brought by land and/or homeowners to repair, replace, or compensate them for damages caused by mining activities. Indeed, the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, when addressing the Pennsylvania Regulatory Program for purposes of superseding portions of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act ("BMSLCA") to the extent that they were inconsistent with the requirements of SMCRA, has concluded that federal law does not have time limitations on property owners' rights to seek compensation, repair, or replacement and that imposing such time limits on such rights is inconsistent with federal law. Pennsylvania Regulatory Program, 69 FR 71551-01, 2004 WL 2811502(F.R.), at **11-12 (Dec. 9, 2004).

The Defendant has failed to identify any cases wherein the two-year tort statute of limitations for property damages has been applied to claims to enforce the WVSMCRA. Indeed, Plaintiffs are not required to demonstrate that the Defendant committed any tort or even that the Defendant violated any rule, order, or permit issued under the WVSMCRA to obtain the relief provided in the West Virginia Code of State Rules §§ 38-2-16.2.c to 38-2-16.2.c.2. Moreover, the Circuit Court below failed to acknowledge that Plaintiffs' claims do not consist solely of the alleged damages to their property caused by underground mining. In addition to the underground mining conducted by the Defendant that caused mine subsidence damages to the Plaintiffs' property, the acts and omissions of the Defendant in refusing to reasonably repair, replace, or compensate the Plaintiffs for such property and related damages and in improperly demanding that the Plaintiffs' sign a release of all claims also constitute violations of the WVSCMRA entitling the Plaintiffs to damages, including damages for annoyance and inconvenience. Accordingly, the

Defendant's violations of the Act have been ongoing and did not cease prior to the filing of the instant lawsuit.

In the few cases in which the federal counterpart of W.Va.Code §§ 22-3-1 *et seq.* has been subject to statutes of limitation challenges, a two-year tort statute of limitations has never been imposed. Rather, within those rare instances in which the SMCRA has been challenged based on limitations periods, a majority of federal courts have opined that no statutes impose time limitations upon the government's right to recover reclamation fees under 30 U.S.C. § 1232, while a minority of federal courts have concluded that a six-year statute of limitations for actions based upon contracts or a six-year statutes of limitations for collection of excise taxes applies to the government's collection of reclamation fees. Similarly, a minority have applied the five-year statute of limitations under 28 U.S.C. § 2462 when the disputes involved the assessment of civil monetary penalties for violations of the Surface Mining Control & Reclamation Act.

To the extent that any statute of limitations must apply to such lawsuits, the Circuit Court should have applied the five-year statute of limitations provided in W.Va.Code § 55-2-6 for enforcement of rights of an implied or express contractual nature inasmuch as West Virginia law recognizes that a statute is treated as a contract when the language and circumstances demonstrate a legislative intent to create private rights of a contractual nature. Appellants' claims are more properly treated as implied contractual rights created by the remedial WVSCMRA rather than tort claims; particularly given that the Appellants need not establish a tort or even a violation of any rule, order, or permit issued under the WVSMCRA in order to obtain the relief provided in the West Virginia Code of State Rules §§ 38-2-16.2.c to 38-2-16.2.c.2. Moreover, Appellants are also seeking to enforce the obligations of the Appellee to reasonably and expeditiously repair, replace, or compensate them for their damages as required by the Act. Consistent with this argument,

under West Virginia law, a complaint that could be construed as being either in tort or in contract will be presumed to be on contract whenever the action would be barred by the statute of limitation if construed as being in tort.

The Circuit Court should have also considered principles of equity and equitable doctrines such as equitable tolling and equitable estoppel in relation to the acts and omissions of the parties. Indeed, the Plaintiffs' claims are more aptly grounded in equity, *i.e.*, to compel the Defendant to comply with its repair or reimbursement/compensation duties under W.Va. C.S.R. §§ 38-2-16.2.c. to 38-2-16.2.c.2, for which statutes of limitations are inapplicable. As to equitable tolling and equitable estoppel, the Defendant has not been prejudiced by the timing of the filing of Plaintiffs' instant action. The Plaintiffs attempted in good faith to resolve their claims without re-filing litigation and were actively participating in regular negotiations with the Defendant in 2020 and 2021, during the COVID pandemic, immediately prior to filing this lawsuit. At no point did the Plaintiffs ever convey to the Defendant that they would abandon their claims if the settlement negotiations were unsuccessful. Rather, it was the Defendant's improper attempt to deceive the Plaintiffs that it was entitled to have a release of all claims executed before paying to repair any of the damages that caused the delay in negotiations and ultimately necessitated that the Plaintiffs refile the lawsuit. The Plaintiffs' reasonably relied upon the Defendant's representations during multiple settlement discussions throughout the spring and summer months of 2021, merely weeks prior to the initiation of the instant dispute. Evidently, the Defendant's deceptive purpose in engaging and prolonging such negotiations was to pursue the dismissal of any litigation on non-merit-based grounds. Only when the Defendant made clear that it would not, contrary to the requirements of WVMSCA, in any event finalize a settlement without the Plaintiffs executing a release of all claims did the Plaintiffs realize that re-filing the lawsuit was necessary. Accordingly,

based upon the Defendant's deceptive conduct in connection with the settlement negotiations, any statute of limitations should have been tolled due to equitable estoppel or tolling.

However, to the extent that the two-year tort statute of limitations for property damages does apply to any claims in this lawsuit, the Circuit Court committed errors of law and fact in failing to interpret all direct and circumstantial evidence in the light most favorable to the Appellants, including reasonable inferences and credibility determinations, as to when the Appellee last engaged in underground mining activities that caused any damages to Appellants' home and real property. Moreover, the Court similarly erred in concluding that the continuous tort doctrine did not apply to the claims and facts presented in this case. In addition to the underground mining activities of the Defendant that have caused the damages to Plaintiffs' home and real property, the Circuit Court completely ignored that the Defendant has committed ongoing violations of the Act by refusing to reasonably and timely repair or compensate the Plaintiff for the damages to their home and property; instead demanding contrary to the requirements of the Act that the Plaintiffs sign a release of all claims in order to reach a settlement or to begin any repairs or compensation. Plaintiffs have submitted evidence both that the subsidence injuries to their real property did not occur all at once or from a single completed act or omission, and that the damages manifested in distinct, observable time periods. Moreover, Plaintiffs have asserted that Tunnel Ridge has caused them damages through ongoing violations of its continuing statutory duties to repair, replace, or compensate them.

IV. STATEMENT REGARDING ORAL ARGUMENT

Appellants/Plaintiffs respectfully assert that oral argument is appropriate under Rule 20(a) of the West Virginia Rules of Appellate Procedure inasmuch as this matter involves assignments

of error that raise issues of apparent first impression as well as issues of fundamental public importance. W.Va.R.App.P. 20(a)(1) & (2).

V. ARGUMENT

A. Statement of Jurisdiction and Standards of Review

1. This Court Has Jurisdiction Over This Appeal.

The Circuit Court's Order granting the Defendant's motion for summary judgment resolves all claims in this civil action and, accordingly, constitutes a final appealable judgment order. W.Va.R.Civ.P. 54(b). Indeed, the Court's Order also expressly includes a finding that "there is no just reason for delay and certifies that this Order is immediately appealable pursuant to W.Va.R.Civ.P. 54(b)." J.A., at 287.

2. Standards of Review

a. Summary Judgment

On appeal, a circuit court's grant of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994); *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 698, 474 S.E.2d 872, 878 (1996). "'We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court.'" *Gastar Exploration Inc. v. Rine*, 239 W.Va. 792, 798, 806 S.E.2d 448, 454 (2017) (quoting *Blackrock Capital Investment Corp. v. Fish*, 239 W.Va. 89, 96, 799 S.E.2d 520, 526 (2017)).

However, as to a circuit court's findings of fact and conclusions of law:

> "In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review. *See* syl. pt. 1, *Burnside v. Burnside,* No. 22399, [194] W.Va. [263], [460] S.E.2d [264] (Mar. 24, 1995)."

Phillips v. Fox, 193 W.Va. 657, 661, 458 S.E.2d 327, 331 (1995).

Syl. Pt. 1, *Barney v. Auvil*, 195 W.Va. 733, 466 S.E.2d 801 (1995) (per curiam). *Accord* Syl. Pt. 5, *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009). "Even when our review is *de novo*, '[w]e review a circuit court's underlying factual finding under a clearly erroneous standard.' *See Staten v. Dean*, 195 W.Va. 57, 62, 464 S.E.2d 576, 581 (1995)." *Barney v. Auvil*, 195 W.Va. at 737, 466 S.E.2d at 805.

> A circuit court's entry of summary judgment is reviewed *de novo. See Drewitt v. Pratt,* 999 F.2d 774 (4th Cir.1993). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In Syllabus Point 1 of *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992), we reiterated the standard for granting summary judgment:
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> " 'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963)."
>
> *See also Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The circuit court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). We, therefore, must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Masinter v. WEBCO Co.,* 164 W.Va. 241, 262 S.E.2d 433 (1980). *Andrick,* 187 W.Va. at 708, 421 S.E.2d at 249.

Painter v. Peavy, 192 W.Va. at 192, 451 S.E.2d at 758. *Accord Fravel v. Sole's Elec. Co., Inc.*, 218 W.Va. 177, 178, 624 S.E.2d 524, 525 (2005) (*de novo* review on appeal).

> In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]". . . Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn

> therefrom.". . . Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied.

Williams v. Precision Coil, Inc., 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) (citations omitted).

b. Interpretation of Statute

> "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrstal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Syl. Pt. 1, *In re Brandi B.*, 231 W.Va. 71, 743 S.E.2d 882 (2013). *Accord Kester v. Small*, 217 W.Va. 371, 374, 618 S.E.2d 380, 383 (2005); Syl. Pt. 2, *Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 582 S.E.2d 841 (2003).

> "Statutes which are remedial in their very nature should be liberally construed to effectuate their purpose." Syl. Pt. 6, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953)."

Syl. Pt. 17, *McElroy Coal Co. v. Schoene*, 240 W.Va. 475, 813 S.E.2d 128 (2018).

> Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended. *Kisamore v. Coakley*, 190 W.Va. 147, 437 S.E.2d 585 (1993) (per curiam); *Hubbard v. SWCC and Pageton Coal Co.*, 170 W.Va. 572, 295 S.E.2d 659 (1981); *Wheeling Dollar Savings & Trust Co. v. Singer*, 162 W.Va. 502, 250 S.E.2d 369 (1979).

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 773, 461 S.E.2d 516, 523 (1995). *Accord Dunlap v. Friedman's, Inc.*, 213 W.Va. at 399, 582 S.E.2d at 846 (liberally construing remedial statute so as to adopt the more liberal statute of limitations for claims brought thereunder; allowing consumer to "bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later"); *Harper v. Jackson Hewitt, Inc.*, 227 W.Va. 142, 151-53, 706 S.E.2d 63, 72-74 (2010) (liberally construing remedial statute so as to adopt the more liberal statute of limitations for claims brought thereunder); *Vanderbilt Mortg. and Finance, Inc. v. Cole*, 230 W.Va. 505, 510-

11, 740 S.E.2d 562, 567-68 (2013); *Barr v. NCB Management Services, Inc.*, 227 W.Va. 507, 512-14, 711 S.E.2d 577, 582-84 (2011).

B. Substantive Issues

1. **The Circuit Court committed clear errors of law and fact in mechanically applying a tort statutes of limitations for property damages under W.Va.Code § 55-2-12 when claims brought pursuant to the West Virginia Surface Coal Mining and Reclamation Act, W.Va.Code §§ 22-1-1, *et seq.*, and related regulations/rules do not require a showing of the commission of a tort or otherwise require that claims be brought within any statute of limitations. In light of the remedial nature and purpose of the Act, which must be construed consistent with and at least as stringent as the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201 *et seq.*, the Circuit Court should have considered in its analysis that such statutes do not contain any time limits. To the extent that any statute of limitations must apply to such lawsuits, the Circuit Court should have applied the five-year statute of limitations provided in W.Va.Code § 55-2-6 for enforcement of rights of an implied or express contractual nature inasmuch as West Virginia law recognizes that a statute is treated as a contract when the language and circumstances demonstrate a legislative intent to create private rights of a contractual nature. Moreover, the Circuit Court should have also considered principles of equity and equitable doctrines such as equitable tolling and equitable estoppel in relation to the acts and omissions of the parties.**

   a. **Neither the West Virginia Surface Coal Mining and Reclamation Act nor the Surface Mining Control and Reclamation Act contain any time limits for property owners to bring claims or require the commission of a tort.**

The West Virginia Supreme Court of Appeals has held that "[t]he West Virginia Surface Coal Mining and Reclamation Act, W.Va.Code § 22-3-1, *et seq.*, is remedial legislation that has as one of its primary purposes the protection of the public from the potentially destructive effects that mining may have on our lands, forests and waters." Syl. Pt. 3, *Antco, Inc. v. Dodge Fuel Corp.*, 209 W.Va. 644, 550 S.E.2d 622 (2001). *Accord* Syl. Pt. 18, *McElroy Coal Co. v. Schoene*, 240 W.Va. 475, 813 S.E.2d 128 (2018). Importantly, the Court has also held that "[w]hen a provision of the West Virginia Surface Coal Mining and Reclamation Act, *W.Va.Code,* 22A–3–1 *et seq.,* is inconsistent with federal requirements in the Surface Mining Control and Reclamation

Act, 30 U.S.C. § 1201 *et seq., the state act must be read in a way consistent with the federal act.*" Syl. Pt. 1, *Canestraro v. Faerber*, 179 W.Va. 793, 374 S.E.2d 319 (1988) (emphasis added). *Accord* Syl. Pt. 7, *Antco, Inc. v. Dodge Fuel Corp., supra.* Similarly, the Court has held that *"[a] state regulation enacted pursuant to the West Virginia Surface Coal Mining and Reclamation Act*, West Virginia Code §§ 22A–3–1 to –40 (1993), [now West Virginia Code §§ 22–3–1 to –32 (1994 & Supp.1995)], *must be read in a manner consistent with federal regulations enacted in accordance with the Surface Mining Control and Reclamation Act*, 30 United States Code Annotated §§ 1201 to –1328 (1986)." Syl. Pt. 5, *Schultz v. Consolidation Coal Co.*, 197 W.Va. 375, 475 S.E.2d 467 (1996) (emphases added), *cert. denied*, 519 U.S. 1091 (1997). *Accord* Syl. Pt. 6, *Antco, Inc. v. Dodge Fuel Corp., supra.*

A review of both Statutes reveals that neither of them contain express time limitations by which landowners and/or property owners must bring claims for repair, replacement, or compensation. Indeed, as noted in pertinent part in the Rules and Regulations of the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, when addressing the Pennsylvania Regulatory Program for purposes of superseding portions of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act ("BMSLCA") to the extent that they were inconsistent with the requirements of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"):

> *Federal law does not have time limitations on citizens' rights to seek compensation, repair or replacement.* We certainly agree that it is prudent to file claims soon after damage occurs and expect that, in most cases, that will occur. To delay means not only living with the damage, but possibly weakening a claim of cause and effect related to subsidence that occurred long before. However, that does not alter the fact that *imposing a time limit on an owner's right to compensation, repair or replacement is inconsistent with Federal law*. Therefore, we have superseded that aspect of BMSLCA to the extent that it limits an operator's liability.

Pennsylvania Regulatory Program, 69 FR 71551-01, 2004 WL 2811502(F.R.), at **11-12 (Dec. 9, 2004) (emphases added) (rejecting Pennsylvania's argument that the statutory rights to pursue a claim for damages are merely statutory tort remedies for which a State has a legitimate interest in imposing statutes of limitations in order to bar "claims that are premised on stale evidence and which are not pursued until memories have faded or evidence is lost or destroyed.").

Plaintiffs submitted to the Circuit Court that a property owner's right to submit claims under either the State Act or the Federal Act are not governed or limited by any statute of limitations. However, rather than recognizing the significance of neither the State Act nor the Federal Act containing any time limitations for a property owner to file claims for repair, replacement, or compensation, the Circuit Court blindly accepted the Defendant's argument that Plaintiffs' statutory claims must be treated the same as any common-law tort claim for property damages and filed within the two-year statute for limitations for such torts. *See* JA, at p. 0285 ("WVSCMRA does not prescribe any statutory limitation period for claims. As Plaintiffs' claims only arise from alleged damage to their property, the two-year period provided for in W.Va. Code Ann. § 55-2-12 applies to Plaintiffs' claims.").

Moreover, contrary to the Circuit Court's findings, Plaintiffs' claims do not consist solely of the alleged damages to their property caused by the mining. In addition to the underground mining conducted by the Defendant that caused mine subsidence damages to the Plaintiffs' property, the acts and omissions of the Defendant in refusing to reasonably repair, replace, or compensate the Plaintiffs for such property damages and in improperly demanding that the Plaintiffs' sign a release of all claims also constitute violations of the WVSCMRA entitling the Plaintiffs to damages, including damages for annoyance and inconvenience. Accordingly, the

Defendant's violations of the Act have been ongoing and did not cease prior to the filing of the instant lawsuit.

Notably, the Defendant has failed to identify a single case whereby the tort-based statute of limitations for property damage set forth in W.Va. Code § 55-2-12 was applied to claims to enforce the WVSMCRA. Pursuant to the West Virginia Supreme Court of Appeals in *McElroy Coal Company v. Schoene, supra*, Plaintiffs are not required to demonstrate that the Defendant committed any tort, or even that the Defendant violated any rule, order, or permit issued under the WVSMCRA to obtain the relief provided in the West Virginia Code of State Rules §§ 38-2-16.2.c to 38-2-16.2.c.2. Syl. Pt. 13, *McElroy Coal Company v. Schoene, supra.*

As held, in pertinent part, in *McElroy*:

> 9. "The definitions of 'surface mine,' 'surface mining,' or 'surface-mining operations' contained within the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code § 22-3-1, *et seq.*, include 'surface impacts incident to an underground coal mine,' and areas 'where such activities disturb the natural land surface.' " Syl. Pt. 4, *Antco, Inc. v. Dodge Fuel Corp.*, 209 W.Va. 644, 550 S.E.2d 622 (2001).
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> 10. "Pursuant to the West Virginia Surface Coal Mining and Reclamation Act, W.Va. Code, 22A-3-14 (1985) [now W.Va. Code, 22-3-14 (1994)], and 30 U.S.C. § 1266 (1977) of the federal Surface Mining Control and Reclamation Act and their accompanying regulations, the operator of an underground mine is required to correct any material damage resulting from subsidence caused to surface lands, to the extent technologically and economically feasible by restoring the land to a condition capable of maintaining the value and reasonable foreseeable uses which it was capable of supporting before subsidence." Syl. Pt. 4, *Rose v. Oneida Coal Co., Inc.*, 195 W.Va. 726, 466 S.E.2d 794 (1995).
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> * * *
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> 12. "The West Virginia Surface Coal Mining and Reclamation Act allows for a private cause of action: 'Any person or property who is injured through the violation by any operator of any rule, order or permit issued pursuant to this article may bring an action for damages, including reasonable attorney and expert witness fees, in any court of competent jurisdiction. ...' W.Va. Code § 22-3-25(f) (1994)." Syl. Pt. 5, *Antco, Inc. v. Dodge Fuel Corp.*, 209 W.Va. 644, 550 S.E.2d 622 (2001).

> 13. A surface owner may commence a civil action against a coal operator pursuant to West Virginia Code § 22-3-25(f) (1994) alleging that injury to the surface owner's person or property was caused through the coal operator's violation of a rule, order, or permit issued under the West Virginia Coal Mining and Reclamation Act [West Virginia Code §§ 22-3-1 to 22-3-38]. If the surface owner proves a violation and that the violation caused the alleged injury, the surface owner may recover monetary damages including, but not limited to, damages for annoyance and inconvenience resulting from the violation. In the event the surface owner is unable to prove that the coal operator violated such rule, order, or permit, or proves the violation but fails to prove that the violation caused the alleged injury, then the surface owner's remedies for subsidence damage caused by a coal operator are those provided in the West Virginia Code of State Rules §§ 38-2-16.2.c to 38-2-16.2.c.2.
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> 20. The West Virginia Code of State Rules §§ 38-2-16.2.c. to 38-2-16.2.c.2, which were promulgated pursuant to the West Virginia Surface Coal Mining and Reclamation Act [West Virginia Code §§ 22-3-1 to 22-3-38], provide that when a coal operator causes subsidence damage to structures or facilities, the operator is required to either correct the material damage caused to any structures or facilities by repairing the damage or compensate the owner of such structures or facilities in the full amount of the diminution in value resulting from the subsidence. The owner of the damaged structures or facilities shall choose between the two remedies.

Syl. Pts. 9, 10, 12, 13, & 20, *McElroy Coal Company v. Schoene, supra.*

In the few cases in which the federal counterpart of W.Va.Code §§ 22-3-1 *et seq.* has been subject to statutes of limitation challenges, a two-year tort statute of limitations has never been imposed. Rather, within those rare instances in which the federal Surface Mining Control & Reclamation Act of 1977 has been challenged based on limitations periods, a majority of federal courts have opined that no statutes impose time limitations upon the government's right to recover reclamation fees under 30 U.S.C. § 1232. *United States v. Helton*, Civil Action No. 3:90-0008, 1991 WL 335446, at *2 (S.D.W.Va. July 3, 1991) (Staker, J.) ("The majority [of courts] holds that there is no limitation period for the collection of reclamation fees."); *United States v. Tri-No Enterprises*, 819 F.2d 154, 158-59 (7th Cir. 1987); *United States v. E & C Coal Co., Inc.*, 647 F. Supp. 268, 273-74 (W.D.Va. 1986), *aff'd in part, rev'd in part*, 846 F.2d 247 (4th Cir. 1988);

United States v. Hawk Contracting, Inc., 649 F. Supp. 1, 2-3 (W.D.Pa. 1985); *United States v. Ringley*, 750 F. Supp. 50, 58 (W.D.Va. 1990). *See also United States v. Friedus*, 769 F. Supp. 1266, 1272 (S.D.N.Y. 1991) ("Similarly, in a series of decisions with regard to the Surface Mining Control and Reclamation Act, courts have concluded that actions to collect delinquent reclamation fees, which are owed as a consequence of statute, not by contractual agreement, are not subject to the limitations provisions of [28 U.S.C.] Section 2415(a)."). A minority of federal courts have concluded that a six-year statute of limitations for actions based upon contracts or a six-year statutes of limitations for collection of excise taxes applies to the government's collection of reclamation fees. *United States v. Gary Bridges Logging and Coal Co.*, 570 F. Supp. 531, 532-33 (E.D.Tenn. 1983). A minority have similarly applied the five-year statute of limitations under 28 U.S.C. § 2462 when the disputes involved the assessment of civil monetary penalties for violations of the Surface Mining Control & Reclamation Act. *United States v. McCune*, 763 F. Supp. 916, 917-18 (S.D.Ohio 1989); *Arch Min. Corp. v. Babbitt*, 894 F. Supp. 974, 983–84 (S.D.W. Va. 1995) (applying five-year statute of limitations).

b. To the extent that any statute of limitations must apply to such lawsuits, the Circuit Court should have applied the five-year statute of limitations provided in W.Va.Code § 55-2-6 for enforcement of rights of an implied or express contractual nature inasmuch as West Virginia law recognizes that a statute is treated as a contract when the language and circumstances demonstrate a legislative intent to create private rights of a contractual nature.

To the extent that this Court finds that a statute of limitations must be applied to WVSMCRA, as explained above, the *McElroy* Court clarified that the Plaintiffs' right to relief is not grounded in tort as the Plaintiffs need not prove the Defendant's negligence or even any violation of the WVSMCRA. *Id.* Accordingly, the tort-based catchall statute of limitations in W.Va. Code § 55-2-12 is inconsistent with the WVSMCRA and its purpose as remedial legislation to "protect the public from the potentially dangerous effects of mining activities. *Id.*, at 490, 143.

Indeed, to the extent that a statute of limitations would apply to Plaintiffs' efforts to compel enforcement of the WVSMCRA, the statute of limitations provided in W.Va. Code § 55-2-6 is decidedly the more suitable statute, which provides:

> Every action to recovery money, which is founded upon an award, or on any contract other than a judgment or recognizance, shall be brought within the following number of years next after the right to bring the same shall have accrued, that is to say: ... if it be upon any other contract, express or implied within five years . . . .

As the Plaintiffs' WVSMCRA remedy is not conditioned upon the commission of any tort, the WVSMCRA indicates a legislative intent that landowners affected by mining should be afforded private rights of a contractual nature. *See Adams v. Ireland*, 207 W.Va. 1, 9, 528 S.E.2d 197, 205 (1999) (quoting *Dadisman v. Moore*, 181 W.Va. 779, 789, 384 S.E.2d 816, 826 (1988) ("[a] statute is treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature")). *Accord Nicewarner v. City of Morgantown*, 249 W.Va. 120, 894 S.E.2d 902, 910 (2023).

The Plaintiffs have in essence brought claims to compel the Defendant to perform an implied contract mandated by statute, *i.e.*, to repair or reimburse them for the property damage caused by the Defendant's mining activities. The WVSCMRA and its corresponding regulations require that a coal operator correct material damage resulting from subsidence "even if there is no proven violation of a rule." *McElroy*, 240 W.Va. at 489, 813 S.E.2d at 142.

Notably, even the Defendant has treated the Plaintiffs' WVSCMRA remedies as being contractual in nature as demonstrated by its March 20, 2019 correspondence, JA, at 156:

> 5) Release of Claims – In return for the guarantee of payment by Tunnel Ridge you will be required to sign a Release of all claims against Tunnel ridge for mine damage before any work commences. After the Release is signed, you will still have the contractual right to have the specified work completed by the contractor but you will have no further claim against Tunnel Ridge for damage to your land or structures.

In Syllabus Point 1 of *Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 246 S.E.2d 624 (1978), the Supreme Court stated that "[a] complaint that could be construed as being either in tort or on contract will be presumed to be on contract whenever the action would be barred by the statute of limitation if construed as being in tort." *Accord* Syl. Pt. 4, *Smith v. Stacy*, 198 W.Va. 498, 482 S.E.2d 115 (1996); Syl. Pt. 2, *Fuller v. Riffe*, 209 W.Va. 209, 544 S.E.2d 911 (2001). As the Plaintiffs' claims are more properly treated as contract rights created by remedial legislation rather than in tort, and particularly given the sheer absence of authority suggesting a two-year, tort-based limitations period would apply to their claims, the minimum statute of limitations applicable, if any, should be that provided in in W.Va. Code § 55-2-6. *See Adams v. Ireland*, 207 W.Va. at 9, 528 S.E.2d at 205.

As such, the Plaintiffs' claims could have not accrued earlier than the Plaintiffs' discovery of mining-subsidence damage which triggered under WVSCMRA the Defendant's duty to repair or compensate the Plaintiffs. As the Defendant concedes that it's mining operation passed "in the relative vicinity of Plaintiffs' property in November 2017," JA, at 104, Plaintiffs initiation of the instant action on September 24, 2021 would still fall within the proper five-year limitations period as their statutory claims could not accrue, under any conceivable theory, until reasonable discovery of the mining-related damages. The Plaintiffs submit that the actual accrual date applicable to W.Va. Code § 55-2-6 would occur "when the breach of the contract occurs or when the act breaching the contract becomes known," which could only have occurred after learning of the triggering of the Defendant's WVSCMRA repair or reimburse obligations. *McKenzie v. Cherry River Coal*, 195 W.Va. 742, 749, 466 S.E.2d 810, 817 (1995). Under this analysis, the Plaintiffs' statutory claims are well within the limitations period of W.Va. Code § 55-2-6.

c. The Circuit Court should have also considered principles of equity and equitable doctrines such as equitable tolling and equitable estoppel in relation to the acts and omissions of the parties.

The Circuit Court also erred in failing to consider whether equitable principles may apply to this case, including equitable tolling and equitable estoppel. Indeed, the Plaintiffs' claims are more aptly grounded in equity, *i.e.*, to compel the Defendant to comply with its repair or reimburse duties under the W.Va. C.S.R. §§ 38-2-16.2.c. to 38-2-16.2.c.2. In *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009), the Court emphasized that "[o]ur law is clear that there is no statute of limitation for claims seeking equitable relief," and where "a lawsuit involves cause of action that sound in equity, and other causes of action in law, only the causes of action sounding in law would be subject to statutes of limitation." *Dunn*, 225 W.Va. at 55, 689 S.E.2d at 267 (citing *Depue v. Miller,* 65 W.Va. 120, 64 S.E. 740 (1909) ("The statute of limitations never runs against a right, the vindication of which belongs to the exclusive jurisdiction of the equity courts.")).

In *Independent Fire Co. No. 1 v. West Virginia Human Rights Com'n*, 180 W.Va. 406, 376 S.E.2d 612 (1998), the West Virginia Supreme Court of Appeals described the doctrines of equitable tolling and equitable estoppel as provided:

> Indeed, two types of equitable modification are generally recognized: "(1) equitable tolling, which often focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant and (2) equitable estoppel, which usually focuses on the actions of the defendant." *Naton v. Bank of California* 649 F.2d 691, 696 (9th Cir.1981) (citations omitted).

Independent Fire Co. No. 1, 180 W.Va. at 408, 376 S.E.2d at 614.

The U.S. Supreme Court has further outlined that the determination of whether a party's inaction is a result of excusable neglect "is at bottom an equitable one taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). These relevant circumstances include "the danger of

prejudice to the nonmovant, the length of delay and its potential impact on the judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *U.S. ex rel. Shaw Env't, Inc.*, 225 F.R.D. 526, 528–29 (E.D.Va. 2005) (citing *Pioneer*, 507 U.S. at 395).

As clearly indicated by the above-referenced background, the Defendant has not been prejudiced by the timing of the Plaintiffs' instant action. The Plaintiffs attempted in good faith to resolve their claims without re-filing litigation and were actively participating in regular negotiations with the Defendant in 2020 and 2021 prior to initiating the present dispute. At no point did the Plaintiffs ever convey to the Defendant that they would abandon their claims, and the claims made in this Court did not substantively expand those made in their federal complaint. Moreover, the Plaintiffs' filing of the voluntary dismissal of their federal complaint explicitly referenced Plaintiffs' intention to re-file in state court as well as their intention to not needlessly delay the resolution of the Plaintiffs' claims by disputing jurisdictional issues. Rather, it was the Defendant's improper attempt to deceive the Plaintiffs that they were entitled to have a release of all claims executed before paying to repair any of the damages that caused the delay in negotiations and ultimately necessitated the Plaintiffs to refile the lawsuit. *See New York Cent. & H.R.R. v. Kinney*, 260 U.S. 340, 346 (1922) ("when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.").

The Defendant should further be estopped from relying upon the two-year limitations period under the present circumstances. As referenced in *Independent Fire,* "[a]mong other factors, the granting of equitable estoppel should be premised upon (1) a showing of the plaintiff's

actual and reasonable reliance on the defendant's conduct or representations and (2) evidence of improper purpose on the part of the defendant or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct." *Independent Fire Co.*, 180 W.Va. at 408 (citing *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981)). *See Springfield Library and Museum Ass'n, Inc. v. Knoedler Archivum, Inc.*, 341 F. Supp.2d 32, 41 (D.Mass. 2004) ("The doctrine of equitable estoppel, in contrast, is available when a defendant lulls a plaintiff into a false belief that it is not necessary to commence suit within the statutory period.")

Estoppel is proper here as the Defendant engaged in negotiations with the explicit understanding that the Plaintiffs' claims would be re-filed if settlement discussions were unfruitful. The Plaintiffs' reasonably relied upon the Defendant's representations during multiple settlement discussions throughout the spring and summer months of 2021, merely weeks prior to the initiation of the instant dispute. Evidently, the Defendant's deceptive purpose in engaging and prolonging such talks was to pursue the dismissal of any litigation on non-merit-based grounds. Only when the Defendant made clear that it would not, contrary to the requirements of WVMSCA, conclude a settlement without the Plaintiffs executing a release of all claims did the Plaintiffs realize that re-filing the lawsuit was necessary. Accordingly, based upon the Defendant's deceptive conduct in connection with the settlement negotiations, any statute of limitations should have been tolled due to equitable estoppel or tolling. *See, e.g., Cerbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45, 50 (2nd Cir. 1985) ("One factor that frequently appears in the estoppel cases is a settlement negotiation. Thus, where the defendant assures the plaintiff that he intends to settle and the plaintiff, in reasonable reliance on that assurance, delays in bringing his suit until after the statute has run, the defendant may be estopped to rely on the limitations defense." (citations omitted)); *Reece v. Bank of New York Mellon*, 381 F. Supp.3d 1009, 1020 (E.D.Ark. 2019)

("Arkansas courts do recognize that a promise to cure or offer to settle may also serve to toll the statute of limitations under certain circumstances."); *Townes v. Rusty Ellis Builder, Inc.*, 98 So.3d 1046, 1056 (Miss.2012) ("Here, the Towneses assert that REB inspected the property, suggested certain remedial measures, and promised to make the repairs, all of which go beyond mere settlement negotiations. . . . Thus, we find that genuine issues of material fact exist as to whether: (1) REB promised to make the repairs; (2) whether the Towneses reasonably relied on REB's promises; and (3) whether the Towneses acted diligently in filing their complaint upon realizing REB would not make the (allegedly) promised repairs. Because genuine issues of material fact exist as to the application of equitable estoppel, we reverse the grant of summary judgment as to all claims and remand for further proceedings."); *City of Brooksville v. Hernando County*, 424 So.2d 846, 848 n. 2 (Fla. 5th DCA 1982) ("There may, of course, be situations in which such an accused may be held to have waived, or to be estopped from asserting, such defense: For instance, should it be made to appear that the claimant delayed commencement of suit as a result of representations by the defendant that the claim would be settled or that an agreed settlement would be paid on some reasonable future contingency, or by recognition of validity of the claim and a promise to pay it."); *Robinson v. Pan American World Airways, Inc.*, 650 F. Supp. 125, 127 (S.D.N.Y. 1986) ("a company cannot string a plaintiff along with repeated promises to render a decision that might moot a lawsuit (in response to diligent inquiries) and then turn around and claim that the statute of limitations has lapsed while the plaintiff awaited the oft promised decision."; " 'An equitable estoppel rests largely on the facts and circumstances of the particular case; consequently any attempted definition usually amounts to no more than a declaration of estoppel under those facts and circumstances.' " (citation omitted)); *Hart v. Bridges*, 591 P.2d

1172, 1174 (Okla. 1979) ("Plaintiff must show he relied on the settlement negotiations and that such reliance was reasonable under the facts of this case, thus inducing him to delay filing suit.").

The failure of the Circuit Court to consider and address all of the above discussed issues in its ten-page Order granting summary judgment to the Defendant was in error and has created manifest injustice which must be corrected by this Court on appeal. *See* JA, at 278-87.

2. **The Circuit Court committed clear errors of law and fact in improperly applying the two-year statutes of limitations for property damages under W.Va.Code § 55-2-12 to lawsuits concerning ongoing mine-subsidence and seeking to enforce the requirements of the West Virginia Surface Coal Mining and Reclamation Act, W.Va.Code §§ 22-1-1, *et seq.*, and related regulations/rules. The Act is designed to not only require mining companies to avoid causing mine subsidence damages but to require such mining companies to act in a reasonable and expeditious manner to repair any damages caused by mine subsidence or to reasonably compensate property owners for such damages. The Circuit Court failed to honor the spirit and public policy behind such Act in mechanically applying the two-year statute of limitations based upon the self-serving affidavits of the mining company as to when the last mining activity occurred in the vicinity of the relevant property and ignoring the ongoing acts and omissions of the Defendant in refusing or failing to reasonably and expeditiously repair the damages caused by the mine subsidence or to appropriately compensate the Plaintiffs for such damages without requiring the Plaintiffs to sign a release from liability.**

In Syllabus Point 11 of *Graham v. Beverage*, 211 W.Va. 466, 566 S.E.2d 603 (2002), the Supreme Court of Appeals of West Virginia provided: "Where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from **the date of the last injury *or* when the tortious overt acts or omissions cease**." (Emphasis added). Further, in Syllabus Point 4 of *Roberts v. West Virginia American Water Co.*, 221 W.Va. 373, 655 S.E.2d 119 (2007), the Court stated that the "distinguishing act of a continuing tort with respect to negligence actions is continuing tortious conduct, that is, a continuing violation of a duty owed the person alleging injury, rather than continuing damages emanating from a discrete tortious act."

As illustrated above, the Plaintiffs' WVSCMRA claims do not rely upon proving that the Defendant negligently caused their real property damage. However, to the extent that the Circuit Court or this Court would apply the W.Va. Code § 55-2-12 tort-based limitations period, the Plaintiffs have not alleged merely a "discrete tortious act" on the part of the Defendant measured by their first operations beneath Plaintiffs' property. Rather, genuine issues of material fact remain as to whether and to what extent the Defendant's mining activities continued near Plaintiffs' property and caused further damage to Plaintiffs' home and real property. Moreover, the Defendant continued to commit violations of the Act by refusing to fairly and timely repair or compensate the Plaintiffs for their damages as required by the Act.

In response to the Plaintiffs' Requests for Admission No. 3, the Defendant admitted that it conducted mining operations beneath the surface of the geographic area within the town limits of Valley Grove, WV in every year between 2017 and 2022.[5] JA, at 181-82. This admission alone renders the Defendant's self-serving and vague contention that the "only time Defendant's mining operations passed in the vicinity of Plaintiffs' residence [at 465 McCoy Road, Valley Grove] was in November 2017" inaccurate. *See* JA, at 100. Furthermore, the opinions of Plaintiffs' expert, discussed above, further refute the Defendants' contentions in such regard. The Circuit Court's reliance on the two affidavits submitted by the Defendant when ruling upon a motion for summary judgment is in error because the jury as fact finder has every right to discount the purported testimony contained in such affidavits as self-serving, biased, and not credible; particularly in light of the opinions of Plaintiffs' expert, the affidavit of the Plaintiff, and the other evidence discussed herein concerning the ongoing damages to Plaintiffs' home and property.

[5] The official boundaries of Valley Grove, West Virginia encompass only 0.5 square miles approximately. *See:* https://censusreporter.org/profiles/16000US5482732-valley-grove-wv/.

Moreover, quite aside from the underground mining activities of the Defendant that have caused the damages to Plaintiffs' home and real property, the Circuit Court completely ignored that the Defendant has committed ongoing violations of the Act by refusing to reasonably and timely repair or compensate the Plaintiff for the damages to their home and property; instead demanding that the Plaintiffs sign a release of all claims that is completely contrary to the intent and purpose of the Act in order to reach a settlement or to begin any repairs or compensation. Simply stated, the Act requires a mining company to repair, replace, or compensate property owners for all damages caused to homes and/or real property by their mining activities and does not permit a mining company to escape liability for future claims and damages by requiring owners to sign releases of claims in order to have current damages repaired or replaced or the owners compensated for such current damages. The Defendant's actions in such regard constitute ongoing violations of the Act.

A recognition of these errors by the Circuit Court readily leads into the third assignment of error asserted by the Plaintiffs.

3. **To the extent that a tort statute of limitations applies to actions to enforce the Statute, the Circuit Court committed clear errors of law and fact in concluding that the continuous tort doctrine does not apply in the case so as to prevent the running of the statute of limitations and in failing to construe all direct and circumstantial evidence, including reasonable inferences which may be drawn therefrom, as well as credibility determinations, in the light most favorable to the Plaintiffs as non-movants. The Court improperly relied upon the Defendant's self-serving affidavits as to the date on which the last mining activity occurred in a location that could have caused mine subsidence damages to the Plaintiffs' home and real property and in failing to recognize that the Defendant's ongoing failure to act in a reasonable and expeditious manner to repair the damages to Plaintiffs' home and real property or to reasonably compensate the Plaintiffs for such damages without requiring them to sign a release of liability constituted continuing injuries and wrongs that prevented the running of the statute of limitations under the continuous tort doctrine.**

For the same reasons as those set forth in the above section, it is clear that to the extent that a tort statute of limitations applies to any claims brought under the WVSMRA, the Circuit Court erred in concluding that the continuous tort doctrine does not apply in this case so as to prevent the running of the statute of limitations.

The District Court for the Northern District of West Virginia recently addressed the question of whether the tort-based statute of limitations in W.Va. Code 55-2-12(a) allows oil and gas companies to avoid compliance with duties established by another statute. More specifically, in *McEvoy v. Diversified Energy Company PLC*, No. 5:22-CV-171, 2023 WL 2808469 (N.D.W. Va. Apr. 4, 2023), the plaintiffs asserted, *inter alia*, negligence and equitable claims against the defendant oil and gas companies as the defendants breached duties to timely plug natural gas wells and remediate property damage on the plaintiffs' land pursuant to West Virginia Code § 22-6-19.[6] Like the WVSCMRA, *supra*, W.Va. Code § 22-6-19 imposes statutory duties upon energy operators, including the plugging of abandoned gas wells.

The Diversified Defendants similarly attempted to skirt their statutory obligations by asserting that their duties to plug abandoned wells were extinguished by the two-year limitations period in W.Va. Code 55-2-12(a). *Id.*, at *6. The *McEvoy* Court disagreed with the substantively identical arguments and authorities successfully set forth by Tunnel Ridge in the instant case:

> "Where a tort involves a continuous or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury *or* when the tortious overt acts and omissions cease." Syl. Pt. 11, *Graham v. Beverage*, 211 W.Va. 466, 469, 566 S.E.2d 603, 606 (2002) (emphasis added); *see also Moore v. Wilso*n, 2014 WL 1365967, at *2 (S.D. W.Va. Apr. 7, 2014) (Copenhaver, J.) ("It is the continuing misconduct which serves to toll the statute

[6] "Any well which is completed as a dry hole or which is not in use for a period of twelve consecutive months shall be presumed to have been abandoned and shall promptly be plugged by the operator in accordance with the provisions of this article, unless the operator furnishes satisfactory proof to the director that there is a bona fide future use for such well." W.Va.Code § 22-6-19.

> of limitations under the continuing tort doctrine." (citing *Roberts v. West Virginia American Water Co.*, 211 W.Va. 373, 378, 655 S.E.2d 119, 124 (2007))).
>
> The continuing tort doctrine also applies to nuisance and negligence claims. *See Taylor v. Culloden Pub. Serv. Dist.*, 214 W.Va. 639, 647, 591 S.E.2d 197, 205 (2003) (holding that the law of continuing torts set forth in *Graham* "was clearly intended to apply to torts of all types" and applying the doctrine to nuisance); *Handley v. Town of Shinnston*, 169 W.Va. 617, 289 S.E.2d 201 (1982) (applying the doctrine to negligence claims).
>
> Defendants argue that plaintiffs' tort claims are barred by a two-year statute of limitations in West Virginia Code Section 55-2-12(a). *See* [Doc. 105 at 20–24]. West Virginia Code Section 55-2-12(a) provides: "Within two years next after the right to bring the same shall have accrued, if it be for damage to property." Defendants assert because plaintiffs' tort claims accrued more than two years before they filed even the original complaint, the claims are time-barred.
>
> In response, plaintiffs assert that their tort claims are not barred by the two-year statute of limitations because of West Virginia's continuing tort doctrine. *See* [Doc. 126 at 20].
>
> Here, because defendants continue to leave wells unplugged and plaintiffs' property damage unabated, plaintiffs' tort claims are not barred by a two-year statute of limitations in West Virginia pursuant to the continuing tort doctrine.

McEvoy v. Diversified Energy Co. PLC, 2023 WL 2808469, at *6.

Accordingly, the Court in *McEvoy* recognized that the defendants remained in continuous violation of their statutory obligations by failing to remediate the property damage and plug the abandoned wells as required by statute just as Tunnel Ridge remains in similar violation of its statutory duties to the Wilhelms by its failure to repair, replace, or compensate them for the damages at issue.

A further examination of the West Virginia Supreme Court of Appeal's decision in *Graham v. Beverage*, *supra*, is helpful here because it draws a crucial distinction between the claims actually being made in this case versus Tunnel Ridge's mischaracterization of such claims. It does so by contrasting the claim made in *Hall's Park Motel, Inc. v. Rover Construction, Inc.*, 194 W.Va.

309, 460 S.E.2d 444 (1995),[7] a case relied upon by Tunnel Ridge in this matter, with the claim made in *Graham* which was more similar to the claim made in *Handley v. Town of Shinnston*, 169 W. Va. 617, 619, 289 S.E.2d 201, 202 (1982), and the actual claim made by the Plaintiffs in this case. As explained by the Court:

> In *Hall's Park Motel,* the plaintiff complained about the negligent construction of a lift station, which caused damage to the plaintiff's real property. This Court determined in *Hall's Park Motel* that although the construction caused continuous, increased injuries to the plaintiff's property, the cause of the injuries was a "discrete and completed act of negligent commission, **not [ ] a continuing negligent act of omission ....**" *Id.* at 313, 460 S.E.2d at 448. We subsequently held in syllabus point two of *Hall's Park Motel* that "[w]here a plaintiff sustains a noticeable injury to property from a traumatic event, the statute of limitations begins to run and is not tolled because there may also be latent damages arising from the same traumatic event." *Id.* at 310, 460 S.E.2d at 445. . . .
>
> A fair reading of the complaint and the other documents in this case reveals that the Grahams are not complaining solely about the "traumatic event" of the construction of the infiltration system. Rather, the thrust of the Grahams' complaint is **that the construction of the infiltration system as well as the continuing wrongful conduct of the Parkers in negligently failing to take action with regard to correcting the alleged inadequacies of that system is causing continuing injuries to their real and personal property**. As such, we find that the present case presents a much more comparable situation to that found in the *Town of Shinnston*[8] case. We recognize that *Town of Shinnston* was a per curiam opinion which may raise doubt in some minds as to the validity in this jurisdiction of the continuing tort exception to the statute of limitations. **To dispel any such doubts, we hereby hold that where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease**.
>
> Applying this holding to the instant case, we do not find the negligence claim time-barred because the alleged negligence of the Parkers complained of by

[7] In rendering its decision, the *Hall's Park* Court chose not to decide whether claims arising from violations of the West Virginia Coal Mining and Reclamation Act were subject to two-year limitations period or whether the Act's statutory obligations imposed an ongoing duty as the appellant did not raise those arguments before the circuit court. *Id.*, 194 W.Va. at 314; 460 S.E.2d at 449.

[8] "In this case it is clear that the damage did not occur all at once but increased as time progressed; each injury being a new wrong. '[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury, or when the tortious overt acts cease.' 54 C.J.S. Limitations of Actions § 169 (1948). Donald Handley's deposition indicates that the damage to the property continued even after the suit was filed. If the tortious act in this case did indeed cease, it was not until 1978, when the leaking waterline was removed from the appellants' property." *Handley v. Town of Shinnston*, 169 W. Va. at 619, 289 S.E.2d at 202.

> the Grahams constitutes continuing wrongful conduct from which continuing injuries emanate. Accordingly, we reverse the decision of the lower court regarding the statute of limitations.

Graham v. Beverage, 211 W. Va. at 476-77, 566 S.E.2d at 613-14 (emphases added; footnote added).

As in *Graham* and *Handley*, Plaintiffs have submitted evidence that the subsidence injuries to their real property did not occur all at once or from a single completed act or omission, and the damages manifested in distinct, observable time periods. Moreover, Plaintiffs assert that Tunnel Ridge has caused them damages through ongoing violations of its continuing statutory duties to repair, replace, or compensate as described above. The Circuit Court committed reversible errors of law and fact in failing to adequately and properly consider such evidence and claims when granting summary judgment to the Appellee/Defendant and, accordingly, must be reversed.

VI. CONCLUSION

For all of the foregoing reasons, the Appellants/Plaintiffs respectfully request that this Honorable Court reverse the Circuit Court's grant of summary judgment to the Appellee/Defendant and remand this matter for trial. Further, Appellants request any other relief deemed appropriate by this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2024, the foregoing *BRIEF OF APPELLANTS/PLAINTIFFS BELOW* was served upon the below through the Court's e-filing system:

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