IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 24-ICA-118

ICA EFiled: Aug 05 2024
03:05PM EDT
Transaction ID 73949752

JASON WILHEM and
CRYSTAL WILHELM,

Plaintiffs Below/Petitioners,

v.

TUNNEL RIDGE, LLC,

Defendant Below/Respondent.

RESPONDENT'S BRIEF

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COUNTER-STATEMENT OF THE CASE

Petitioners, Jason Wilhelm and Crystal Wilhelm (hereinafter collectively "Petitioners"), allege that their residence, located at 465 McCoy Road, Valley Grove, West Virginia, was damaged by subsidence effects from underground mining operations conducted by Respondent, Tunnel Ridge, LLC (hereinafter "Tunnel Ridge" or "Respondent"). [JA, at 0014-0015, ¶¶ 1, 3, 6 and 7]. This appeal pertains to Petitioners' September 24, 2021, Complaint, in which Petitioners allege Respondent's mining operations were conducted under Petitioners' property in the "late spring of 2018" and that Petitioners began to experience damage "thereafter". [JA, at 0015, ¶¶ 6 and 7, hereinafter the "Complaint"].

Notably, however, Petitioners previously filed a complaint on April 17, 2020, making the same allegations in the United States District Court for the Northern District of West Virginia (JA, at 0007, ¶¶ 7 and 8, hereinafter the "Federal Complaint"). As with the present Complaint, Petitioners alleged Respondent conducted mining operations under Petitioners' property in the "late spring of 2018". Petitioners also included a specific allegation that Petitioners first became aware of the alleged subsidence damages in May 2018.

In Paragraph 8 of Petitioners' Federal Complaint, Petitioners allege that "[f]rom May to June 2018 the Petitioners began to experience damage to their structures and real estate as a direct and proximate result of the Respondent's mining operations." (JA, at 0007). In an apparent effort to side-step a facially apparent statute of limitations defense, Petitioners' Complaint in the present action simply states Petitioners began experiencing alleged damage "thereafter", after the mining operations allegedly passed beneath their property. (JA, at 0015).

After Tunnel Ridge filed a Motion to Dismiss the Federal Complaint (JA, at 0020-0035), Petitioners ***voluntarily*** dismissed the Federal Complaint on July 22, 2020, before the court could rule on said motion (JA, at 0012-0013).

In addition to the Petitioners' specific allegations in their Federal Complaint, extensive evidence of record demonstrates Petitioners were aware of their alleged claim for damages more than two and one-half (2½) years prior to filing their Complaint in the current matter before this Court. This evidence includes, but is not limited to:

1. May 2018: Petitioners' Federal Complaint included a specific allegation that Petitioners first became aware of the alleged subsidence damages in May 2018. (JA, at 0006-0011).
2. June 22, 2018: Petitioner commissioned and received an estimate from Tim Templin Trucking & Excavating for the repair of alleged subsidence damages to Petitioners' property. (JA, at 0123).
3. October 3, 2018: Petitioner commissioned and received an estimate from Savage Const. Co. for repairs of subsidence damages Petitioners allege Respondent caused to Petitioners' property. (JA, at 0122).
4. December 19, 2018: Petitioner commissioned and received an estimate from J & D Home Improvement Inc. for repairs of subsidence damages Petitioners alleged Respondent caused to Petitioners' property. (JA, at 0124).
5. March 6, 2019: Respondent received a letter from Petitioners' counsel dated March 6, 2019. In the letter, Petitioners' counsel alleges that subsidence damage has already occurred to Petitioners' home and land and rejects a settlement offer Respondent previously made to Petitioners. (JA, at 0119-0120).

6. May 10, 2019: Respondent received a letter from Petitioners' counsel dated May 10, 2019. In the letter, Petitioners' counsel enclosed copies of the June 22, 2018 and October 3, 2018 estimates to repair the alleged subsidence damages to Petitioners' property, among others. (JA, at 0121). Indeed, the May 10, 2019 letter from Petitioners' counsel included estimates for the repair of damages alleged to have resulted from subsidence caused by Respondent from: (1) from Savage Cont. Co. dated October 3, 2018; (2) from Tim Templin Trucking & Excavating dated June 22, 2018; (3) from J & D Home Improvement Inc. dated December 19, 2018; and (4) an undated estimate from Janovich Masonry LLC, which must have been given on or before the date of the letter with which it was enclosed (May 10, 2019). (JA, at 0121-0125).

Beyond Petitioners' allegations and their extensive correspondence over the years, the record also reflects Tunnel Ridge never actually undermined the Petitioners' residence. The only time Respondent's mining operations passed in the general vicinity of Petitioners' residence was in November 2017, as evidenced by the mine timing map produced and verified by affidavit. (JA, at 0126-0129). Tunnel Ridge never again conducted any operations in the vicinity of Petitioners' property after November 2017, as verified by the Affidavits of by the General Manager of Tunnel Ridge, LLC (JA, at 0128-0130) and the Manager of Land, Environmental and Government Affairs for Tunnel Ridge, LLC (JA, at 0131-0133).

Petitioners filed their Complaint herein on September 24, 2021, more than fourteen (14) months after voluntarily dismissing the Federal Complaint, and considerably more than three (3) years after clear evidence reflecting Petitioners' awareness and knowledge of their alleged subsidence damages.

In this action, Respondent filed a Motion to Dismiss on the grounds of the expiration of the statute of limitations, on November 1, 2021. (JA, at 0039-0058). After consideration, the Circuit Court denied Respondent's Motion on the grounds Tunnel Ridge relied upon facts beyond the Complaint filed by the Petitioners in the present action. To be clear, the additional "facts" relied upon by Respondent was Petitioners' previously filed and voluntarily dismissed Federal Complaint. (JA, at 0076-0084). In denying Respondent's Motion, however, the Circuit Court made clear in that Petitioners' theory of continuing tort would not save Petitioners' claims upon a Motion for Summary Judgment if discovery confirmed the allegations made by Respondent in its Motion to Dismiss.

On May 10, 2023, following written discovery, Respondent filed its Motion for Summary Judgment and Memorandum in Support. Respondent requested the Circuit Court enter judgment in its favor based upon Petitioners' claims being barred by the applicable two-year statute of limitations. On May 25, 2023, the Circuit Court cautiously deferred ruling upon Respondent's Motion for Summary Judgment and provided Petitioners the opportunity to file a supplement to their response at the conclusion of discovery. Specifically, Petitioners' supplemental filing was to deal "only with the 'continuing tort' argument, as all other arguments have been fully briefed by the parties." Petitioners' supplemental filing was due "either one (1) month after the discovery deadline of September 1, 2023, or one (1) month after the deposition of the 30(b) witness set for June 7, 2023, whichever the [Petitioner] chooses." (JA, at 0205).

Petitioners chose not to file until the conclusion of discovery, filing their Supplemental Response in Opposition to Respondent Tunnel Ridge, LLC's Motion for Summary Judgment on October 30, 2023. (JA, at 0208-0254). Respondent filed its Reply to Petitioners' Supplemental Response and in Support of Respondent's Motion for Summary Judgment on November 13,

2023. (JA, at 0255-0276). The Circuit Court granted Respondent's Motion for Summary Judgment on February 21, 2024, and said Order of the Circuit Court is the subject of this appeal. (JA, at 0277-0287).

SUMMARY OF ARGUMENT

The Circuit Court correctly found that Petitioners' claims, as stated in both their Federal Complaint and Complaint herein, are for alleged damage to their property and time barred by the two-year statute of limitations found in W. Va. Code Ann. § 55-2-12. Petitioners' claims, as claims for alleged subsidence damage to property resulting from underground mining, do not accrue because Respondent operated an underground coal mining operation or even mined in the vicinity of Petitioners' property. Petitioners' cause of action is tied to the date upon which the alleged damage to their property occurred or otherwise became apparent. The West Virginia legislature unambiguously mandates that all claims for damage to property must be brought within the two-year statute of limitations found in W. Va. Code Ann. § 55-2-12. Petitioners' claims herein are not exempt or distinguishable from this clear statute of limitations and, thus, are time barred.

The record developed below and reflected in the Joint Appendix reveals that the Circuit Court committed no errors of law or fact in reaching its decision. While Petitioners alleged in their Complaint that their damages are "ongoing", nowhere in their Complaint, or any other filing or any evidence submitted, have Petitioners attributed said "ongoing" damage to ongoing mining operations or activities – only that ongoing failure to correct the alleged damages inexplicably tolls the statute of limitations. Petitioners have never alleged – and cannot prove – that Respondent conducted additional mining activities. Indeed, the record is devoid of any such evidence because none exists. As such, there is no conduct (in the record or otherwise) to even

suggest a viable claim or debate on Petitioners' invocation of the continuing tort doctrine or potential "ongoing damages."

Instead, the record contains ample evidence from Respondent regarding a ***lack*** of ongoing mining operations or activities in the vicinity of Petitioners' property, including:

1. Two (2) affidavits – from Eric K. Anderson, General Manager for Tunnel Ridge, and Evan D. Midler, Manager of Land, Environmental and Government Affairs of Tunnel Ridge – both stating that "[Respondent]'s mining operations passed in the vicinity of [Petitioners]' residence only once, in November 2017, and [Respondent] conducted no operations in the vicinity of [Petitioners]' property after November 2017". (JA, at 0128-0133).
2. Deposition testimony of Mr. Midler, as the 30(b)(6) witness for Tunnel Ridge, and the deposition of Dr. Keith A. Heasley, PhD., stating that Tunnel Ridge never performed additional mine operations near the Petitioners' property after November, 2017, and in fact could not have performed any further mining operations given that longwall extraction causes the collapse of the void left after mining, rendering the area incapable of further longwall mining extraction within the coal seam. (JA, at 0266-0276).
3. A Timing Map depicting the location of Respondent's mine operations, the location of Petitioners' property and the timing of the subject mining operations, verified by both Mr. Midler and Mr. Anderson by Affidavit. (JA, at 0126-0127, 0129, 0132).

The record contains **no** evidence or testimony from Petitioners to rebut the evidence offered by Respondent regarding the timing or extent of Respondent's mining operations.

Indeed, Petitioners' only response is the baseless aspersion that data maintained by Tunnel Ridge, such as the mine timing map, must be unreliable because it is derived from Tunnel Ridge's own records. Such unsupported speculation and aspersions do not meet the burden necessary for Petitioners to survive summary judgment.[1]

Petitioners further suggest the lack of a statute of limitations within the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA") and corresponding regulations evinces an intent to impose no limitations period. In support, Petitioners cite wholly irrelevant case law all founded upon the general rule that, in the absence of an express limitations period imposed on itself, **the federal government** is exempt from the operation of statutes of limitations. This matter is a private civil claim; no government agency is a party and Petitioners' reliance upon this general proposition is grossly misplaced.

Similarly, Petitioners' incorrect contention that their claims amount to an implied contract, subject to the five-year statute of limitations found in W. Va. Code Ann. § 55-2-6, relies upon inapplicable and distinguishable precedent. Indeed, each case cited by Petitioners involves enforcement of employment benefit requirements imposed upon employers by statute. Contractual agreements between employers and employees are not at issue here. By contrast, Petitioners' claims herein for alleged damage to their property are claims founded in tort, and neither West Virginia statutes nor case law demonstrate any existence of or intent to create a private, implied contractual right to an extended statute of limitations.

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[1] Petitioners' evidence "must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a 'trial worthy' issue." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329, 337 (1995) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986)). Petitioners' "'unsupported speculation is not sufficient to defeat a summary judgment motion,'" Id. at 61, 459 S.E.2d at 338 (quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)).

Petitioners' claims are founded upon alleged damage to their property, squarely subject to the two-year statute of limitations found in W. Va. Code Ann. § 55-2-12, and are time barred. The Circuit Court committed no error in granting Respondent's Motion for Summary Judgment.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary or suitable in this matter. Under Rule 20(a) of the West Virginia Rules of Appellate Procedure, oral argument is suitable when: (1) the case involves an issue of first impression; (2) the case involves issues of fundamental public importance; (3) the case involves constitutional questions regarding the validity of a statute, municipal ordinance, or court ruling; and (4) the case involves inconsistencies or conflicts among the decisions of lower tribunals. Petitioners assert that this matter involves issues of first impression and of fundamental public importance.

Contrary to Petitioners' contention, this matter does not present an issue of first impression. The application of W. Va. Code Ann. § 55-2-12's two-year statute of limitations to a property damage claim has been the law for decades. Though this Court may have yet to apply said statute to a claim for alleged property damage resulting from underground mining, it is well settled law that the two-year statute of limitations applies to **any** claim for damage to property.

In addition, this matter does not present an issue of fundamental public importance. The facts in this matter are unique and apply only to Petitioners' claims. Applying a two-year statute of limitations to Petitioners' property damage claims has no bearing on the public as the standard has been the understood and accepted law in West Virginia for decades.

Given that Petitioners' claims are founded upon alleged damage to property and this Court and the legislature long ago determined that a two-year statute of limitations applies to

such claims, a memorandum decision pursuant to Rule 21(c) of the West Virginia Rules of Appellate Procedure is appropriate.

STANDARD OF REVIEW

As stated by Petitioners in their brief, this Court's review of the Circuit Court's decision is *de novo*. *See Drewitt v. Pratt*, 999 F.2d 774 (4th Cir.1993); *Painter v. Peavy*, 451 S.E.2d 755, 758 (W. Va. 1994).

Also as stated by Petitioners in their brief, different standards are applied when reviewing the findings of fact and conclusions of law from a Circuit Court's decision:

> 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. ——, 460 S.E.2d 264 (Mar. 24, 1995).
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> *Phillips v. Fox*, 458 S.E.2d 327, 331 (W. Va. 1995).

ARGUMENT

A. Assignment of Error No. 1: The Circuit Court correctly held that that the Petitioners' Complaint, clearly seeking recovery for alleged damage to property, is subject to W. Va. Code Ann. § 55-2-12's two-year statute of limitations and time barred.

i. West Virginia law regarding the statute of limitations for all claims for property damage is two years, and WVSCMRA does not provide relief to Petitioners.

Petitioners contend the absence of a state limitations period in WVSCMRA, as well as an absence of case law applying a two-year statute of limitations to claims such as the Petitioners' claims, evidences an implicit legislative intent that no limitations period applies to potential WVSCMRA property damage claims. On the contrary, the lack of precedent is evidence of the novelty and outlandish nature of their theory.

W. Va. Code Ann. § 55-2-12 clearly applies to Petitioners' claims and their position here flies in the face of basic logic and plain language provided by the Code:

> ***Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property***; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative. [Emphasis added].

The legislature did not leave any room for interpretation. No ambiguity exists to require further analysis and interpretation. Every action for damage to property for which no limitation is otherwise provided in the Code shall be brought within two years. "Every," in fact, means every. And the absence of a limitations period explicitly set forth in WVSCMRA means Petitioners' claims fall squarely within "every" of the Code and the default two-year period. Petitioners' claims are barred. Contrary to Petitioners' arguments, the silence within WVSCMRA does not evidence **no** statute of limitations, but rather explicitly supports the legislative intent that a two-year statute of limitations (as applied by the Circuit Court) applies by default.

Petitioners further argue that the rebuttable presumption found in W. Va. Code R. § 38-2-16.2.c.3[2] somehow morphs the nature of their claims outside of the realm of tort. However, while a rebuttable presumption may relieve a plaintiff from an initial burden of proof on causation, the defendant is then afforded the opportunity to rebut such presumption by offering competent evidence of its own[3]. Regardless, however, the fact that a claim involves the

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[2] 16.2.c.3. Presumption of Causation. If alleged subsidence damage to any non-commercial or residential dwellings and structures related thereto occurs as the result of earth movement within the area which a pre-subsidence structural survey is required, a rebuttable presumption exist that the underground mining operation caused the damage.

[3] The presumption will be rebutted if, for example, the evidence establishes that: the damage predated the mining in question; the damage was proximately caused by some other factors or

application of a statutory rebuttable presumption does not change or alter the underlying nature of the claim. Indeed, a property owner like the Petitioners here must still meet all the other requirements to recover damages upon their claims (i.e., the nature and scope of alleged damages), including the prerequisite of filing the claim in accordance with the generally applicable statute of limitations.

In support of their contention that no limitations period applies, Petitioners cite a series of federal cases where either no limitations period was found applicable, or various non-tort limitations periods were applied. None of those cases are on-point here. In each case the federal courts were interpreting the federal government's tardy efforts to collect fees or taxes from coal operators provided for in the Federal Surface Mining Control and Reclamation Act (hereinafter the "FSMCRA"), and for which no clear limitations period was established, wholly distinguishable from a private, civil action.

As a threshold matter, the fact that any of the cases approved the application of a limitations period is a direct contradiction of Petitioners contention. However, the primary distinguishing factor of all of the cases is that the analysis of each case begins with the general rule recited in *U.S. v. Gary Bridges Logging and Coal Co.*, 570 F. Supp. 531 (E.D. Tenn. 1983), that the **government** is exempt from any limitations period unless it expressly imposes one on itself:

> The general rule is that "the government is exempt from the consequences of its laches and from the operation of statutes of limitation." *United States v. Weintraub*, 613 F.2d 612, 618 (6th Cir.1979). "An exception to the general rule exists when the sovereign ... expressly imposes a limitation period on itself." Id. at 619, citing, *Guaranty Trust Co. v. United States*, 304 U.S. 126, 133, 58 S.Ct. 785, 789, 82 L.Ed. 1224 (1938).

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was not proximately caused by subsidence; or the damage occurred outside the surface area within which subsidence was actually caused by the mining in question. *See* W. Va. Code R. § 38-2-16.2.c.3.B.

U.S. v. Gary Bridges Logging and Coal Co., 570 F. Supp. 531, 532 (E.D. Tenn. 1983)

Despite that general rule, as Petitioners acknowledged in their brief, a number of the courts did impose limitations periods, found outside the boundaries of FSMCRA, where a limitations period clearly encompassed the nature of the claims brought under FSMCRA. It was immaterial that the claims were brought regarding rights afforded to the government pursuant to FSMCRA.

In any case, private property owners, such as the Petitioners, do not enjoy the same entitlements and deference as the government. Moreover, as Petitioners' claims are clearly encompassed by the language of W. Va. Code Ann. § 55-2-12, one could infer that – even if similar governmental entitlements were applicable to Petitioners' claims – the two-year statute of limitations would still be imposed and otherwise bar their claims.

ii. The language of W. Va. Code St. R. § 38-2-16 requiring a coal operator to repair or compensate are akin to property damage claims founded in tort and the plain language evinces no intention to create private rights of a contractual nature.

Petitioners assert that the rebuttable presumption of causation provided for in W. Va. Code R. § 38-2-16.2.c.3 alters the nature of their claims allowing this Court to interpret the rights afforded to them under WVSCMRA as implied contracts subject only to the five-year statute of limitations found in W. Va. Code Ann. § 55-2-6. As discussed above, the rebuttable presumption of causation does not change the nature of Petitioners' claims. Petitioners' claims do not lie without first establishing the threshold matter that they suffered damage to their property. Without damage to their property no cause of action lies for Petitioners against Respondent.

If the legislature intended to provide a different limitations period for claims made under WVSCMRA or clarify that – despite the nature of the claims – the relief provided thereunder is

contractual in nature, they would have done so: they did not. Accordingly, as W. Va. Code Ann. § 55-2-12 explicitly states, in no uncertain terms, every personal action regarding property damage, no matter whether the obligation to repair said damages is founded upon common law or legislation, must be brought within two years unless a statute states otherwise.

Petitioners mistakenly rely upon cases where this Court has interpreted statutory benefits required to be provided by employers to employees as creating implied contractual rights. However, that precedent has no bearing on this matter. This Court has held that "[a] statute is treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature". *Dadisman v. Moore*, 384 S.E.2d 816, 826 (W. Va. 1988), holding modified by *Benedict v. Polan*, 413 S.E.2d 107 (W. Va. 1991). Accordingly, this Court will only employ such an interpretation when the language and circumstances clearly demonstrate that the legislature intended to create contractual rights.

Such an interpretation of legislative intent makes sense when reviewing statutes imposing statutorily required employment benefits, the only instances cited by Petitioners in their brief. Rights of that nature can only otherwise be created by the consummation of a contract between the employer and employee. However, the plain language of W. Va. Code R. § 38-2-16.2.c demonstrates clear legislative intent to create rights in surface owners for private causes of action that are virtually identical to the remedies available to property owners under common law, by requiring coal operators to repair any material damage caused or compensate the landowner for the diminution in value resulting from the alleged damage.

As a result, Petitioners argument regarding the legislative intent of W. Va. Code R. § 38-2-16.2.c lacks merit.

iii. The record contains no evidence to support Petitioners' contention that the doctrines of equitable estoppel or equitable tolling prevents Petitioners' claims from being barred by the two-year statute of limitations.

Petitioners further contend the Circuit Court erred by not invoking the doctrines of equitable estoppel or equitable tolling to salvage their claims. However, the record is devoid of any evidence which supports a finding the Respondent waived any defenses, including the expiration of the statute of limitations, while Petitioners took over a year to re-file their action after voluntarily dismissing their Federal Complaint. Nowhere in the record have Petitioners even alleged that a specific representation was made such that equitable estoppel or equitable tolling could potentially apply to the present case.

Petitioners' own actions and admissions clearly show Petitioners were fully aware of their alleged claims at least as early as June 22, 2018, the date of the first repair estimate obtained by Petitioners. Further, the evidence clearly demonstrates that at least as early as March 6, 2019, Petitioners were represented by counsel regarding these claims and therefore cannot claim ignorance of the law and its applicable deadline.

Petitioners contend Respondent's demand that a release of claims against Respondent be executed prior to commencing any repair work was somehow deceptive and caused delay in filing Petitioners' action. This argument is disingenuous at best and is contradicted by the record.

In the March 6, 2019, letter from Petitioners' counsel to Respondent, Petitioners made clear they primarily disputed the calculation of compensation amount and were electing to have repairs made by Respondent. (JA, at 0119-0120). In response, Respondent sent a proposed letter agreement to Petitioners dated March 20, 2019, offering to make the repairs recommended by Respondent's contractor and guaranteeing payment of the fees to the contractor, provided that

prior to initiating the repairs the parties enter into a release of claims against Respondent. Respondent never hid and Petitioners cannot reasonably claim unawareness of Respondent's expectation of a release of any alleged claims. Yet, Petitioners did not file their Complaint until September 24, 2021, more than two and one-half (2 ½) years after becoming aware of Respondent's insistence upon a release. A delay of that magnitude cannot be excused by equitable estoppel or equitable tolling.

Additionally, Petitioners' contention Respondent made any representation upon which Petitioners could infer a waiver of any defense, let alone the expiration of the statute of limitations, is unsupported. Limited correspondence was exchanged between the parties. Yet, Petitioners now allege they inferred limited settlement negotiations amounted to a waiver of defenses or deceptive practices by Respondent. (JA, at 0164-0166, 0170-0175). Respectfully, however, the correspondence relied upon by Petitioners in making this contention are internal communications among Petitioners' counsel and only two make any reference to any contact with Respondent's counsel: one from July, 2020[4], and one from May, 2021[5]. Two communications with Respondent over a period of more than fourteen (14) months hardly amounts to active settlement negotiations and none include any allegation of an explicit representation by Respondent's counsel that the statute of limitations was waived or even discussed, and none indicate that the parties were ever close to agreeing on a scope of repair. Petitioners are asking this Court to find that settlement discussions toll the statutory deadline for filing their claim. This flies in the face of all established law and would result in a terrible

[4] JA, at 0170, dated July 24, 2020, confirming that Respondent's counsel reiterated its previous offer for settlement and that Petitioners' counsel made clear that would not be sufficient.
[5] JA, at 0173, dated May 12, 2021, confirming a brief telephone call with Respondent's counsel.

precedent disincentivizing potential defendants from engaging in settlement discussions prior to litigation.

B. <u>Assignment of Error No. 2</u>: The record clearly supports Circuit Court's finding that elements of Petitioners' cause of action accrued on or before May, 2018, as Petitioners have never provided any evidence or allegation to rebut Respondent's evidence regarding the timing of Respondent's mine operations in the vicinity of Petitioners' property.

The record herein contains no evidence, testimony, or even a contrary allegation from Petitioners regarding the timing of Respondent's mining operations. In fact, in both their Federal Complaint and their Complaint herein, Petitioners specifically allege that Respondent undermined their property in the "late spring of 2018". (JA, at 0007, 0015).

By contrast, the record is replete with credible evidence and testimony presented by Respondent regarding the timing of its mining operations. As stated hereinabove, the record contains two (2) affidavits – from Eric K. Anderson, General Manager for Tunnel Ridge, and Evan D. Midler, Manager of Land, Environmental and Government Affairs of Tunnel Ridge – both stating that "[Respondent]'s mining operations passed in the vicinity of [Petitioners]' residence only once, in November 2017, and [Respondent] conducted no operations in the vicinity of [Petitioners]' property after November 2017." (JA, at 0128-0133). Both Affidavits also authenticate a close timing map showing that Respondent's development mining operations passed underneath Petitioners' property in August 2017, and Respondent's longwall mining operations passed in the vicinity of Petitioners' residence in November 2017. (JA, at 0126-0127)

In addition, at his deposition on June 7, 2023, as the 30(b)(6) witness for Tunnel Ridge, Mr. Midler testified repeatedly that Respondent's mining operations passed by Petitioners' property in November 2017, and never returned to the vicinity of Petitioners' property:

> Q. Uh-huh. So you're able to say under oath that there was no -- absolutely no operations that occurred in this area between November and April 2018.

A. I'm saying after November of 2017, there was -- there was no mining operations in this area. The longwall was progressing west until it finished in April 20 of 2018.

Q. Okay.

A. Now, and the development units when this – this longwall started were no longer in this area. They were all committed here in the south.

JA, at 0270.

Q. Does -- is there a void left underground after longwall mining operations are completed?

A. Not -- at the time the longwall is advancing, there are a series of shields that go across the width of the longwall panel. So when the coal is extracted, those shields are holding a small void, maybe a width about the size of this room for personnel that are operating the longwall shear. As the shear extracts the coal, the shields retract and advance forward and then reenergize or expand with taking the place of the coal that was just extracted with the shear. As those shields advance, that void, the ground behind it subsides behind it and takes the place of that void.

JA, at 0271.

At the deposition of Dr. Keith A. Heasley, PhD., Dr. Heasley reiterated the impossibility of continued mining operations after the longwall panel passed by the Petitioners' property in November 2017:

Q. Under Number 3 it says, "That the collapse of the mine void after longwall mining is completed makes it impossible for Respondent to ever return to perform additional mining operations after December 31st, 2017." Could you expound on that?

A. Well, as we talked, the longwall mine, of course, is very efficient at taking out all the coal. It is a very large area, so we get a fairly complete collapse of the roof. Wouldn't expect the roof to be hanging up there. And as it moves, it collapses behind them. Certainly, you can't go into the longwall panel after the roof has been caved.

JA, at 0274-0275.

Also, Mr. Midler testified at his deposition regarding the date upon which the entire mining district located south of Petitioners' property was "sealed":

Q. Okay. Now, it says here "Sealed works: 10/20/2018"; right?

A. Yes.

Q. And that -- that's -- does that also apply to this panel here at the top?

A. That actually applies to everything here, the entire area.

Q. Okay. What does that mean "sealed works"? What does that indicate?

A. It's -- it's a mining terminology where walls are built -- would be built -- I'm going to indicate on my finger -- here, here, and here.

Q. Okay.

A. Those walls being built are – essentially there'd be barriers of this -- this area, so it would not affect personnel in active portions of the mine.

Q. Okay. If Tunnel Ridge wanted to, could they get into this area after it was sealed in October of 2018?

A. In -- I guess what do you mean by "getting into this area"?

Q. Well, is there any reason for Tunnel Ridge to want to get back into the areas where they've longwall mined for any monitoring or safety purpose?

A. No. No. So what you are seeing here is the areas of mining, this is all -- all fully extracted. This area is -- Tunnel Ridge is no longer in this area. In fact, it left -- it finished the panel that the -- that -- what we've been referring to, this last panel of -- when I say "district," you know I refer to this as a general district.

Q. Uh-huh.

A. This -- these 12 panels here.

Q. Uh-huh.

A. This -- I'm going to zoom in here, but it was April of 2018 that this panel was finished, and this district -- and the longwall left this district and came to this small district of these two small panels. Okay? Which you'll see -- you'll kind of see here it says May 4th, 2018.

Q. Wow. Yes.

A. Yeah. Yeah. It's small print. But so sequentially, as I've brought up, you know, there's one longwall machine at Tunnel Ridge, so we can look – one panel was mined at a time. So once this panel was finished in April, May 4th Tunnel Ridge moves into this district. After it moved -- which is over 3 miles away.

Q. Uh-huh.

A. And then after that it moved into this district south of I-70 and started this district, and we're talking we're well over probably 5 or 6 miles away October of 2018 in Pennsylvania.

Q. Okay.

A. And so the mining from this date of October 2018 has continued south ever since.

JA, at 0267-0269.

Accordingly, though the mining operations ceased in the vicinity of Petitioners' property in November 2017, the entire district located south of Petitioners' property was sealed on October 20, 2018. On May 4, 2018, after completing the panel nearest to Petitioners' property and the final panel of that "district", Respondent's mining operations resumed over three (3) miles south of Petitioners' property in a new mining district. All mining operations since have proceeded south further and further from Petitioners' property.

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 336 (W. Va. 1995); citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). While the underlying facts and all inferences are viewed in the light most favorable to the nonmoving

party, the nonmoving party must nonetheless offer some "concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor" or other " 'significant probative evidence tending to support the complaint.' " *Id*., at 336-337; citing *Anderson*, 477 U.S. at 256, 106 S.Ct. at 2514, 91 L.Ed.2d at 217, quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569, 593 (1968). See also *Matsushita Elec. Indus. Co.*, 475 U.S. at 587, 106 S.Ct. at 1356, 89 L.Ed.2d at 552.

> In other words, as suggested in *Crain v. Lightner,* 178 W.Va. 765, 769 n. 2, 364 S.E.2d 778, 782 n. 2 (1987), the initial burden of production and persuasion is upon the party moving for a summary judgment. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party "who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." 178 W.Va. at 769 n. 2, 364 S.E.2d at 782 n. 2.
>
> *Id*., at 337.
>
> To be specific, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere "scintilla of evidence" and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. *Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214. The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a "trialworthy" issue.[12] A "trialworthy" issue requires not only a "genuine" issue but also an issue that involves a "material" fact. *See Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211.
>
> *Id*., at 337.

Petitioners' "unsupported speculation is not sufficient to defeat a summary judgment motion" *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987).

In the absence of ***any*** contrary evidence or testimony offered by Petitioners, the Circuit Court committed no error in finding that there was no genuine issue of material fact regarding the timing of Respondent's mining operations in the vicinity of Petitioners' property.

C. <u>Assignment of Error No. 3</u>: The Circuit Court made no error in declining to apply the continuing tort doctrine; Respondent's and Petitioners' disagreement on the scope of potential repairs does not amount to an ongoing tort.

Petitioners contend that Respondent's failure to agree on the scope and cost of repairs amounts to an ongoing tort which tolls any statute of limitations. With respect to Petitioners' erroneous position, the Circuit Court held in its November 18, 2021, Order:

> Although the Petitioners argue that the Respondent's continuing "misconduct" is that of failing to reach a settlement, this Court rejects this argument. Failure to reach a settlement cannot be the basis for a landowner to claim a "continuing tort" and avoid the tolling of a statute of limitations under the WVSCMRA. Pursuant to the WVSCMRA, once a mining operation is put on notice of potential damage it may have caused to a landowner and it makes an offer to the landowner to remedy the situation, the landowner, if it rejects such an offer, cannot sit on their claims for as long as they please and claim "continuing tort." This could theoretically result in an absurd never-ending statute of limitations if a landowner chose to never accept the mine operator's offer. We cannot have such uncertainty from protections against lawsuits under our law.
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> JA, at 0082-0083.

As acknowledged by Petitioners in their Response to Tunnel Ridge's Motion to Dismiss (JA, at 0059-0068), Respondent investigated the cause and nature of the alleged damages in 2019 and, without any admission of liability, sought to offer compensation or repair of the property in an effort to avoid any potential compliance issues under WVSCMRA requirements. Petitioners rejected Respondent's proposal and neither the repairs nor proposed compensation could be accomplished, in the absence of such agreement from Petitioners. To suggest that Respondent's failure to acquiesce to Petitioners' competing demands somehow constitutes ongoing tortious activity is preposterous. Indeed, if Petitioners' position is correct, a property owner could

literally demand the world and hold the threat of litigation and WVSCMRA compliance issues over a coal operator's head until such demands are met.

In their Brief, Petitioners attempt to distinguish the facts in this matter from the various cases previously cited by Respondent, based solely on the fact that WVSCMRA imposes a duty on underground mine operators to repair or compensate landowners for injury or damage caused to residential structures resulting from the act of mining and that the failure to satisfy that duty tolls the statute of limitations indefinitely, amounting to no limitations period on Petitioners' claims. Petitioners theorize the existence of a duty to repair, and that duty having not been met amounts to "continuing misconduct" which tolls the applicable statute. However, in each example cited by Petitioners, where Courts have tolled the statute of limitations, it is in narrow instances where the failure to repair is causing continuing and repeated damages.

In *Roberts v. W. Virginia Am. Water Co.,* 655 S.E.2d 119 (W. Va. 2007), a *defectively installed* water line was continuing to cause damage that would no longer occur if the necessary repairs were made. In *Graham v. Bev.,* 566 S.E.2d 603 (W. Va. 2002), a defective stormwater drainage system was continuing to cause damage that would no longer occur if the necessary repairs were made. In *McEvoy v. Diversified Energy Co. PLC*, No. 5:22-CV-171, 2023 WL 2808469 (N.D.W. Va. Apr. 4, 2023) wells were left unplugged by an oil and gas operator allowing continuing damage to occur that would no longer occur if the wells were plugged. In each case cited by Petitioners, the failure to make repairs was actively ***causing additional*** harm and damages to the claimant's property, thereby tolling the statute of limitations.

That is clearly distinguishable from the instant matter where Petitioners allege their damages are attributable solely to the Respondent's underground mining operations, all of which occurred in November 2017. As alleged by Petitioners, the act of longwall mining caused their

alleged damages, not a failure to agree on the scope of repairs or damages. The Petitioners do not allege that the lack of repairs to date, or an improperly conducted repair, has caused a new harm or additional damages, as would be necessary to fit within their proffered exceptions in *Graham*, *Roberts* and *McEvoy*.

The record clearly establishes that the Respondent conducted mining operations in the vicinity of Petitioners' property only one time, in November 2017. All of Petitioners' damages are derived solely from that act by Respondent. Petitioners have not even alleged, let alone offered any supporting evidence, that the Respondent has committed any other tortious act.

CONCLSUION

For the reasons detailed herein, Respondent respectfully urges this Honorable Court to affirm the Circuit Court's grant of summary judgment.

Dated: August 5, 2024.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, undersigned counsel for the Respondent, hereby certify that the foregoing **RESPONDENT'S BRIEF** was served upon all parties on August 5, 2024, through the Court's e-filing system, addressed as follows:

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