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

# REPLY BRIEF OF APPELLANTS/PLAINTIFFS

JAMES G. BORDAS III (#8518)
RICHARD A. MONAHAN (#6489)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
T: (304) 242-8410
F: (304) 242-3936
jbordasiii@bordaslaw.com
rmonahan@bordaslaw.com
*Counsel for Plaintiffs Below, Petitioners Jason and Crystal Wilhelm*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Cases**

**Constitutions, Statutes, and Regulations**

**Rules of Procedure**



**Other Authorities**

## I. REPLY TO COUNTER-STATEMENT OF THE CASE

First and foremost, it must be recognized that as to the issue of whether a statute of limitations applies to this civil action premised upon statutory violations, the Appellee completely ignores that the West Virginia Surface Coal Mining and Reclamation Act ("WVSCMRA"), W.Va.Code §§ 22-1-1, *et seq.*, must 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 and Appellee should have considered in their 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 Appellee also completely ignores that the federal agency responsible for supervising the enforcement of the SMCRA, 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 through a final rule that federal law does not have time limitations on property owners' rights to seek compensation, repair, or replacement and that a state 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).

Additionally, to the extent that a statute of limitations does apply to this lawsuit, Appellee also fails to acknowledge that both the WVSCMRA and the SMCRA require mining companies to not only avoid causing mine subsidence damages but 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 refusals of the Appellee in this case to do so, and their requirement that the Appellants agree to sign a release of all claims before agreeing to make such repairs or to provide such compensation, constitute themselves continuing violations of the Acts and give rise to causes of action for such violations.

As to the occurrence of property damages, Appellants/Plaintiffs, Jason and Crystal Wilhelm, do not contest that they believe and have alleged that the Appellee Tunnel Ridge had engaged in underground mining activities under or near their land that first caused damages to their real property as early as the late spring of 2018. However, as disclosed in discovery, the Wilhelms have also experienced new and distinct damages 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. If these subsequent damages were not new and distinct damages but merely constituted a worsening of already existing damages then it is possible that the continuing tort theory would not apply to toll the running of any applicable statute of limitations. However, if these damages were new and distinct damages their occurrence would or, at the very least, could support that the Appellee was still engaging in underground mining activities under or sufficiently near the Appellants' land so as to cause such new and distinct damages. As previously noted by Appellants, 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 two years preceding the lower court's ruling, 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 new and distinct damages originating from Tunnel Ridge's mining activities as recently as the year of 2023. *Id.*

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 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.* 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.[1] 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:

[1] "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].

> 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.
>
> **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.

While the affidavits submitted by the Appellee concerning when underground mining activities occurred under the Appellants' home certainly contains evidence that could be admissible at trial through the testimony of the affiants, such evidence would not be necessarily conclusive or dispositive on the issue of when the underground mining activities occurred under the Appellants' home or on the issue of when underground mining activities occurred within a sufficient distance from Appellants' property so as to cause new and distinct damages thereto. A jury as the factfinder would be permitted to conclude that any such testimony by the affiants was biased and not credible. Rather, a jury could reasonably conclude under the circumstances that the Appellants' evidence that new and distinct damages were occurring to their home and real property

in subsequent years establish that the Appellee was still engaging in underground mining activities under or sufficiently near the Appellants' land during such subsequent years so as to cause such new and distinct damages. Assuming that a statute of limitations applies to this case, the Circuit Court should have recognized that a genuine issue of material fact exists as to this issue of a continuing tort for resolution by a jury. Lastly, as already noted, the refusals of the Appellee in this case to make reasonable and expeditious repairs or to provide compensation for such repairs, and their requirement that the Appellants agree to sign a release of all claims before agreeing to make such repairs or to provide such compensation, constitute themselves continuing violations of the Acts and give rise to causes of action for such violations.

## II. REPLY TO ARGUMENT

### A. The Circuit Court Committed Reversible Error in Concluding that the Appellants' Claims Are Time Barred by W.Va.Code § 55-2-12's Two-Year Statute of Limitations.

#### 1. Time Limitations Do Not Apply to Claims of Land Owners Brought Under the SMCRA Or the WVSCMRA.

Appellants have consistently argued that statutes of limitations do not apply to claims brought under the SMCRA or the WVSCMRA and have noted that neither statute contains express limitations by which landowners and/or property owners must bring claims for repair, replacement, or compensation or otherwise refer to other statutes of limitations that should be applied to any such claims. The lower court and Appellee should have considered that such omissions were indeed intentional and show the legislative 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. Appellants have also acknowledged that the Appellee has been unable to cite to any case law applying a two-year statute of limitations to claims brought under either such statutes. Rather than admitting that the absence of any such case law supports the Appellants'

position, Appellee submits that the absence of such precedent merely demonstrates "the novelty and outlandish nature of their theory." Appellee's Response Brief, at p. 9.

However, while making such contention that Appellants' theory is novel and outlandish, Appellee completely ignores that the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, the federal agency responsible for supervising the enforcement of the SMCRA, has entered a final rule 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"), providing in pertinent part:

> *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."). *See also, e.g., 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).[2]

However, Appellee cannot simply ignore such final rule because, as noted in Appellants' opening brief and as dictated by the Supremacy Clause of the United States Constitution, Article VI, Clause 2, the WVSCMRA and its regulations must be construed consistently with and at least as stringently as the SMCRA and its regulations. *E.g.,* Syl. Pt. 1, *Canestraro v. Faerber*, 179 W.Va. 793, 374 S.E.2d 319 (1988); Syl. Pts. 6 & 7, *Antco, Inc. v. Dodge Fuel Corp.*, 209 W.Va. 644, 550 S.E.2d 622 (2001); Syl. Pt. 5, *Schultz v. Consolidation Coal Co.*, 197 W.Va. 375, 475 S.E.2d 467 (1996), *cert. denied*, 519 U.S. 1091 (1997). Moreover, both of these statutes are remedial legislation that must be liberally construed to accomplish their primary purposes of protecting the public, including land and homeowners, from the potentially destructive effects of mining. Syl. Pt. 3, *Antco, Inc. v. Dodge Fuel Corp.*, *supra*; Syl. Pt. 18, *McElroy Coal Co. v. Schoene*, 240 W.Va. 475, 813 S.E.2d 128 (2018). Accordingly, both the lower court and the Appellee has erred in concluding that West Virginia's two-year statute of limitations for property damages caused by torts apply to the statutory claims presented in this lawsuit.

2. **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.**

[2] Appellants acknowledge that these cases involve the United States government (and not homeowners) as does the case relied upon by the Appellee. *See U.S. v. Gary Bridges Logging and Coal Co.*, 570 F. Supp. 531, 532 (E.D.Tenn. 1983) ("The Court is of the opinion, however, that actions to collect delinquent fees are subject to the six year statute of limitation for actions based on contract, or alternatively, to the statute of limitation for the collection of excise or income taxes."). However, most importantly, neither of the parties have found any cases applying a two year statute of limitation to claims of land or homeowners under the SMCRA or the WVSCMRA or which otherwise disagree with the final rule reached by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, discussed above.

In arguing that the Appellants' claims are more akin to tort claims than claims of an implied contractual nature, the Appellee ignores that 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).
>
> 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).
>
> * * *
>
> 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.
>
> * * *
>
> 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.*

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). Contrary to the Appellee's assertion, the fact that these particular cases involve claims concerning statutes addressing pension and related benefits arising from employment relationships does not render them irrelevant or unpersuasive in this case because none of these cases expressly limit their holdings to such particular facts and statutes. *See id.*

Indeed, when engaging in negotiations to fulfill their statutory obligations, the Appellee, itself, treated its obligations as contractual in nature when attempting to improperly require the Appellants to execute a release of all claims in order for them to comply with the requirements of the WVSCMRA.

> 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.**

JA, at 156 (emphases added).

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. Moreover, Appellee's argument ignores that the West Virginia Supreme Court of Appeals has held 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." Syl. Pt. 1, *Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 246 S.E.2d 624 (1978). *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). To the extent that a statute of limitations applies to Appellants' statutory claims, as their 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.

**3. 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.**

As argued in Appellants' opening brief, the lower 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 explaining such equitable doctrines, the West Virginia Supreme Court of Appeals has explained:

> 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 v. West Virginia Human Rights Com'n*, 180 W.Va. 406, 408, 376 S.E.2d 612, 614 (1998).

In arguing against the applicability of such equitable doctrines, the Appellee ignores 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 argued in Appellants' opening brief, 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.").

**B. The Circuit Court committed reversible error by improperly applying the two-year statute of limitations and by finding that genuine issues of material fact did not exist as to when the Appellee engaged in mining activities in a vicinity close enough to Appellants' property so as to cause them new and distinct damages.**

In responding to Appellants' argument on this issue, Appellee commits the common error committed by most moving parties of only focusing on the evidence that supports its own position rather than focusing on the direct and circumstantial evidence, including all reasonable inferences that may be drawn therefrom, in favor of the nonmovant as required by W.Va.R.Civ.P. 56. *See, e.g., Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995); *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); *Fravel v. Sole's Elec. Co., Inc.*, 218 W.Va. 177, 178, 624 S.E.2d 524, 525 (2005). While Appellee discusses all of the evidence that favors its own position, it ignores or fails to adequately consider that the Plaintiffs have not alleged merely a "discrete tortious act" on the part of the Appellee measured by its first operations beneath the Appellants' property. Rather, genuine issues of material fact remain as to whether and to what extent the Defendant's mining activities continued near Plaintiffs' property in a close enough vicinity so as to cause further new and distinct damages to Plaintiffs' home and real property. Moreover, as explained above and in the Appellants' opening brief, the Appellee continued to commit ongoing violations of the Act by refusing to fairly and timely repair or compensate the Appellants 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.[3] 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, JA, at 247-49, as well as the affidavit of the Appellant Jason Wilhelm, JA, at 228-29, further refute the Defendants' contentions in such regard. The Circuit Court's reliance on the two affidavits submitted by the Appellee 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 Appellants' expert, the affidavit of Appellant Jason Wilhelm, and the other evidence discussed herein and in the Appellants' opening brief concerning the ongoing damages to Plaintiffs' home and property.

Moreover, quite aside from the issue of how long the underground mining activities of the Appellee that have caused the damages to Appellants' home and real property continued to occur, the Circuit Court completely ignored that the Appellee has committed ongoing violations of the Act by refusing to reasonably and timely repair or compensate the Appellants for the damages to their home and property; instead demanding that the Appellants 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

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

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 Appellee's actions in such regard constitute ongoing violations of the Act that must be considered when determining whether any applicable statute of limitations has run. Accordingly, for all of these reasons, the Circuit Court has committed reversible error.

**C. The Circuit Court committed reversible error in concluding that the continuing tort doctrine does not apply in this case so as to prevent the running of any statute of limitations or that at the very least genuine issues of material fact exist so at to prevent any such finding by the Court.**

Based upon the evidence noted above and in the Appellants' opening brief, it should be clear that the continuing tort doctrine either applies so as to prevent the running of any statute of limitations or, at the very least, that genuine issues of material fact exist so as to prevent the Circuit Court from concluding that such continuing tort doctrine does not apply to the statutory claims presented in this case. However, Appellee likewise ignores any such evidence favoring the Appellants' position on this issue. Moreover, Appellee incorrectly attempts to distinguish the facts in this case from those contained in cases such as *McEvoy v. Diversified Energy Company PLC*, No. 5:22-CV-171, 2023 WL 2808469 (N.D.W. Va. Apr. 4, 2023); *Graham v. Beverage*, 211 W.Va. 466, 469, 566 S.E.2d 603, 606 (2002); *Roberts v. West Virginia American Water Co.*, 221 W.Va. 373, 655 S.E.2d 119 (2007).

As noted in Appellants' opening brief, 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." For reasons explained above, and more fully in Appellants' opening brief, genuine issues of material fact exist as to when the Appellee last conducted underground mining activities in a vicinity close enough to Appellants' property so as to cause new and distinct damages thereto as opposed to merely a worsening of damages already existing. Moreover, in addition to such issue of liability, the Appellee also committed other violations of the WVSMCRA by failing to reasonably and expeditiously repair or compensate the Appellants for all such damages; instead choosing to make inadequate monetary offers and insisting that the Appellants execute an improper release of all claims in order for the Appellee to pay for any such necessary repairs.

As explained by the court in *McEvoy*:

> "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 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.
>
> * * *
>
> 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*, similarly to the West Virginia Supreme Court of Appeals in *Graham, supra; Roberts, supra*; and *Handley v. Town of Shinnston*, 169 W.Va. 617, 619, 289 S.E.2d 201, 202 (1982), recognized that the defendants remained in continuous violation of their obligations by failing to remediate the property damage and plug the abandoned wells just as Tunnel Ridge has in this case not only by their continuing underground mining activities resulting in new and distinct damages but by its ongoing failure to repair, replace, or compensate Appellants for the damages at issue—all in violation of its statutory duties and responsibilities.

## III. CONCLUSION

For all of the foregoing reasons, as well as those set forth in the opening brief, 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,

By: /s/James G. Bordas III
JAMES G. BORDAS III #8518
RICHARD A. MONAHAN #6489
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
(304) 242-8410
*Counsel for Appellants Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 26th, 2024, the foregoing *REPLY BRIEF OF APPELLANTS/PLAINTIFFS BELOW* was served upon the below through the Court's e-filing system:

H. Brann Altmeyer
Jacob C. Altmeyer
Phillips, Gardill, Kaiser & Altmeyer, PLLC
61 Fourteenth Street
Wheeling, WV 26003
brannaltmeyer@pgka.com
jacobaltmeyer@pgka.com
*Counsel for Respondent/Defendant Below*

*/s/ James G. Bordas III*
JAMES G. BORDAS III (# 8518)
RICHARD A. MONAHAN (#6489)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
jbordasiii@bordaslaw.com
rmonahan@bordaslaw.com

*Counsel for Appellants/Plaintiffs Below*