RECORD NO. 17-1564

In The

United States Court Of Appeals

For The Fourth Circuit

MICHAEL D. MICHAEL, as the Administrator of the Estate of Jack D. Michael; JUDITH A. KUHN, as the Administratrix for the Estate of Paul F. Henderson, *et al*.,

Plaintiffs – Appellants,

v.

CONSOLIDATION COAL COMPANY, a Delaware Company,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT CLARKSBURG

BRIEF OF APPELLEE

William E. Robinson
W. Henry Jernigan
DINSMORE & SHOHL LLP
707 Virginia Street, E.
Suite 1300
Charleston, WV 25301
(304) 357-0900

Counsel for Appellee

Alex M. Greenberg
Christopher M. Jones
DINSMORE & SHOHL LLP
215 Don Knotts Blvd.
Suite 310
Charleston, WV 26501
(304) 296-1100

Counsel for Appellee

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1564
(1:14-cv-00212-IMK-JES)

MICHAEL D. MICHAEL, as the Administrator of the Estate of Jack D. Michael; JUDITH A. KUHN, as the Administratrix for the Estate of Paul F. Henderson, et al.,

Plaintiffs - Appellants,

v.

CONSOLIDATION COAL COMPANY, a Delaware Company,

Defendant –Appellee

and

ESTATE OF ALEX KOVARBASICH, By and through Albert F. Marano, Sheriff of Harrison County as administrator for the estates of Alex Kovarbasich

Defendant.

DISCLOSURE STATEMENT PURSUANT TO FED. R. CIV. P. 7.1

Pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, Defendant Consolidation Coal Company makes the following disclosure:

1. Is the party a non-governmental corporate party?

☒ Yes ☐ No

2. If the answer to Number 1 is "yes," list below any parent corporation or state that there is no such corporation:

Ohio Valley Resources, Inc., Murray Energy Corporation, Murray Energy Holdings Co.

3. If the answer to Number 1 is "yes," list below any publically-held corporation that owns 10% or more of the party's stock or state that there is no such corporation:

No publicly-held corporation currently owns stock of Consolidation Coal Company

The undersigned party understand that under Rule 7.1 of the Federal Rules of Civil Procedure, it will promptly file a supplemental statement upon any change in the information that this statement requires.

Respectfully submitted,

CONSOLIDATION COAL COMPANY,
By Counsel

/s/ William E. Robinson
William E. Robinson (WV State Bar # 3139)
W. Henry Jernigan (WV State Bar #1884)
Dinsmore & Shohl LLP
P.O. Box 11887
707 Virginia Street, East, Suite 1300
Charleston, WV 25339-1887
Telephone (304) 357-0900
Facsimile (304) 357-0919
william.robinson@dinsmore.com
henry.jernigan@dinsmore.com

Alex M. Greenberg (WV State Bar #12061)
Dinsmore & Shohl LLP
215 Don Knotts Boulevard, Suite 310
Morgantown, WV 26501
Telephone (304) 296-1100
Facsimile (304) 296-6116
alex.greenberg@dinsmore.com

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Defendant.

CERTIFICATE OF SERVICE

I, William E. Robinson, do hereby certify that the foregoing **Disclosure Statement Pursuant to Fed. R. Civ. P. 7.1** was served upon all parties via the CM/ECF Court System on this the 12th day of May, 2017 to the following counsel of record:

Scott S. Segal, Esquire
The Segal Law Firm
810 Kanawha Boulevard, East
Charleston, WV 25337
Counsel for Plaintiffs-Appellants

Samuel A. Hrko, Esquire
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301
Counsel for Plaintiffs-Appellants

Mark A .Barney, Esquire
Barney Law PLLC
P.O. Box 505
Hurricane, WV 25526
Counsel for Plaintiffs-Appellants

Timothy C. Bailey, Esquire
Bailey, Javins & Carter, LC
P.O. Box 3712
213 Hale Street
Charleston, WV 25337
Counsel for Plaintiffs-Appellants

C. Paul Estep, Esquire
Steven L. Shaffer, Esquire
Estep & Shaffer L.C.
212 West Main Street
Kingwood, WV 26537
Counsel for Plaintiffs-Appellants

/s/ William E. Robinson
William E. Robinson (WV State Bar #3139)

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JURISDICTIONAL STATEMENT

Jurisdiction exists under 28 U.S.C. §§ 1294 and 1295, which grant this Court appellate review of final orders entered by the United States District Court for the Northern District of West Virginia.

ISSUES PRESENTED FOR REVIEW

I. Whether the District Court correctly concluded that the Plaintiffs' claims are barred by a two-year limitation period.

   A. Whether a cause of action for wrongful death exists in West Virginia separate and apart from the wrongful death statute, W. Va. Code, § 55-7-6 (1967), and, thus, whether the District Court correctly concluded that the Plaintiffs' claims against Consolidation Coal Company are actions for wrongful death.

   B. Whether the two-year limitation period applicable to the Plaintiffs' wrongful death claims was tolled under W. Va. Code, § 55-2-17.

II. Whether, assuming *arguendo* the Plaintiffs' claims arise outside the wrongful death statute, the District Court correctly concluded that the Plaintiffs had failed to state a claim of fraudulent **c**oncealment against Consolidation Coal Company, and that an amendment of the Complaint to assert such a claim against Leonard Sacchetti would be futile.

A. Whether the District Court correctly found that the Plaintiffs have not pled a viable cause of action for fraudulent concealment, but rather have asserted the fraudulent concealment doctrine to toll their actual claim for wrongful death.

B. Whether the District Court correctly found that, even if the Plaintiffs had stated a viable claim of fraudulent concealment against Consolidation Coal Company, it was barred by the applicable two-year limitation period.

C. Whether the District Court abused its discretion in determining that the Plaintiffs' proposed Amended Complaint failed to state a claim of fraudulent concealment against Leonard Sacchetti, and that an amendment of the Complaint would be futile.

STATEMENT OF THE CASE

On November 6, 2014, Michael D. Michael, as the Administrator of the estate of Jack D. Michael, and Judith A. Kuhn, as the Administratrix for the Estate of Paul E. Henderson (collectively "the Plaintiffs") filed this civil action in the Circuit Court of Marion County, West Virginia. The Plaintiffs' Complaint asserted wrongful death claims arising from the deaths of their decedents on November 20, 1968, nearly forty-six year earlier, and named as defendants the appellee, Consolidation Coal Company ("CCC"), and Albert Marano, Sheriff of Harrison County, as Administrator of the Estate of Alex Kovarbasich ("the Kovarbasich Estate").

CCC removed the case to the United States District Court for the Northern District of West Virginia based on diversity jurisdiction. In support of removal, CCC argued that the Plaintiffs fraudulently joined the Kovarbasich Estate to the suit to destroy diversity jurisdiction. CCC contended that any claims asserted against the Kovarbasich Estate were time barred, and that the Harrison County Commission had erred by reopening the long-closed Kovarbasich Estate so that it could be named as a non-diverse defendant in this action.

CCC also moved to dismiss the claims against it pursuant to Fed. R. Civ. P. 12(b)(6), contending that the Plaintiffs' claims were barred by the applicable two-year limitation period.

The Plaintiffs thereafter moved to remand the case to the Circuit Court of Marion County on the basis that the Kovarbasich Estate had not been fraudulently joined in the suit, and, as a consequence, complete diversity did not exist. CCC and the Kovarbasich Estate opposed that motion.

On July 31, 2015, the Plaintiffs sought leave to amend their complaint to add Leonard Sacchetti ("Sacchetti") as an additional, non-diverse, defendant. CCC opposed the amendment on grounds that any cause of action against Sacchetti would be futile and, in the alternative, the post-removal amendment was inappropriate under 28 U.S.C. § 1447(e).

By Order entered August 13, 2015, the Plaintiffs' motion to amend was referred to Magistrate Judge John S. Kaull. A hearing on that motion was held on September 10, 2015.

On September 29, 2015, Magistrate Judge Kaull entered a "Memorandum Opinion and Report and Recommendation" ("R&R") recommending that the District Court deny the Plaintiffs' motion to amend on grounds the proposed amendment would be futile.

On September 30, 2015, the District Court stayed the case pending resolution of CCC's state court appeal to the Circuit Court of Harrison County, West Virginia, of the Harrison County Commission's decision to reopen the Kovarbasich Estate so that it could be sued as a West Virginia defendant in this action. On October 2, 2015, the District Court received the State Circuit Court's order vacating and reversing the decision of the Harrison County Commission, and closing the Kovarbasich Estate.

On January 19, 2016, the Kobarbasich Estate moved to dismiss the claims against it on grounds that, pursuant to the Harrison County Circuit Court's Order, the estate was closed and, as such, no longer had the legal capacity to be sued under West Virginia law. The Plaintiffs subsequently appealed the Circuit Court of Harrison County's Order to the Supreme Court of Appeals of West Virginia. The District Court stayed the proceedings in this matter on February 25, 2016, pending outcome of the state court appeal.

On November 10, 2016, the West Virginia Supreme Court affirmed the Harrison County Circuit Court's decision to re-close the Kovarbasich Estate. *In re Estate of Kovarbasich*, No. 15-1032, 2016 W. Va. LEXIS 828 (Nov. 10, 2016). In light of that decision, on November 23, 2016, the District Court dismissed the Kovarbasich Estate, with prejudice, denied the Plaintiffs' motion to remand, and lifted the stay.

On March 31, 2017, the District Court entered its "Memorandum Opinion and Order Adopting R&R and Granting CCC's Motion to Dismiss." It is from that Order that the Plaintiffs appeal.

STATEMENT OF THE FACTS

I. The Consol No. 9 Mine.

On November 20, 1968, some forty-nine years ago, an explosion occurred at the "Consol No. 9 Mine" in Farmington, West Virginia. That explosion claimed the lives of 78 miners, including the Plaintiffs' decedents. JA 176-77, ¶ 8.

Prior to the explosion, the No. 9 Mine's ventilation system utilized four large surface fans, including one designated the No. 3, or "Mod's Run," fan. JA 180, ¶ 23. Each fan was connected to a "FEMCO Supervisory Control" system, a monitoring and alarm system that included a display board in the mine's lamp house. JA 180, ¶ 25; JA 182, ¶ 36. When a fan was running properly, its indicator on the display board was lit green. *Id*. If a fan slowed or stopped, its indicator turned red

and an alarm sounded. *Id*. If a fan was inoperable for more than 12 minutes, the system shut down all power to the mine. *Id*.

II. Federal and State Investigations of the Explosion.

Over the next 22 years following the explosion (November 1968 until March 1990), the West Virginia Department of Mines, the United States Bureau of Mines, and the Federal Mine Safety and Health Administration ("MSHA") investigated the cause of the explosion. JA 176-77, ¶ 8; JA 182, ¶ 34. Among the first steps in that investigation was a public hearing convened in Fairmont, West Virginia from December 5 through 7, 1968. JA 250-52. During that hearing multiple witnesses testified that, in the year preceding the explosion, one or more of the mine's ventilation fans stopped operating, and that, despite the existence of the FEMCO system, power to some areas of the mine sometimes was not automatically shut down. *See*, *e.g.*, JA 254-60. Lampman Russell Foster, who was responsible for monitoring the alarm system in the lamp house, explained that problems occasionally arose both with operation of the ventilation fans and with the FEMCO system itself. JA 261-62. When such problems occurred, Mr. Foster testified he would summon one or more mine mechanics, including Alex M. Kovarbasich ("Kovarbasich"), to address the issue. *Id*.

Kovarbasich also testified at the Fairmont hearing. Specifically, he testified that his job duties involved responsibility for the Mod's Run fan, including addressing issues when it was down or "there [was] power trouble or such." JA 263-64.

On September 5, 1970, MSHA inspector Larry L. Layne ("Layne") prepared a handwritten memorandum documenting a report he had received from a mine electrician concerning the Mod's Run fan's pre-explosion connection to the alarm system. In that memorandum, Layne stated the following:

> On September 5, 1970, 12am-8am shift, the Mods Run substation was energized for the first time since the explosion of November 20, 1968. The electrician (name withheld by request) reported that while energizing the substation he found evidence to indicate that the Femco fan alarm system for Mods Run fan had been rendered inoperable prior to the explosion. The fan alarm system had been bridged with jumper wires; therefore, when the fan would stop or slow down, there was no way of anyone knowing about it because the alarm system was bypassed….

JA 183, ¶ 39.

Layne filed his memorandum with his federal district supervisor, James D. Michael. JA 434; JA 948; Dkt. 73-2, at 5.[1] Michael, in turn, provided a copy to W.R. Park, an agency district supervisor in Mount Hope, West Virginia, and Joseph

[1] Under Fed. R. App. P. 30(a)(2), "[p]arts of the record may be relied on by the court or the parties even though not included in the appendix." *See e.g*, *United States v. Chittenden*, 848 F.3d 188, 193 n.2 (4th Cir. 2017) ("Even though the parties did not provide the sentencing transcript in the Joint Appendix, we may review and rely on it since it is part of the district court record"); *see also* Fed. R. App. P. 10(a)(1) (providing that the "record on appeal" includes "the original papers and exhibits filed in the district court").

Marshalek, a federal supervising inspector at the No. 9. Mine. JA 434; Dkt. 73-2, at 5. The Layne memorandum was thereafter part of MSHA's agency record. JA 952.

In March 1990, MSHA released an extensive report publicly detailing the findings and conclusions of its investigation. JA 182, ¶ 35. In that report, MSHA found that ventilation had been inadequate in certain areas of the mine prior to the explosion. JA 182, ¶ 35. Though its "investigation could not be completed due to the extent of the damage to the mine," and thus "the actual cause of the explosion could not be determined," the agency went on to state that "(f)ederal investigators believe that the first explosion resulted from inadequate ventilation and/or an ineffective bleeder system…." JA 611.

With regard to the ventilation issues, MSHA specifically reported that the FEMCO alarm system "was not operating properly at the time the explosion occurred, . . . as well as at other times prior to the explosion." JA 182, ¶ 36; JA 612. The report further noted that, prior to the explosion, it was reported that "only one fan was down and that the monitoring system on the other fan was blocked out, but the fan was actually operating." *Id.*

III. Three Prior Civil Actions Filed on Behalf of the Henderson Estate and the Estates of other Miners.

During the course of the state and federal agency investigations, the estates of miners killed in the explosion filed multiple lawsuits against CCC.

On November 19, 1970, within the applicable two-year limitations period, wrongful death claims were brought in the Western District of Pennsylvania against CCC by one of the Plaintiffs, the Henderson Estate, together with the estates of 34 other miners killed in the No. 9 Mine explosion. JA 96-130; *Kaznoski v. Consolidation Coal Co.*, 368 F. Supp. 1022 (W.D. Pa. 1974). In that action, the plaintiffs asserted claims for "negligence and willful misconduct in the operation and maintenance of the mine including violations of mine safety legislation and regulations." JA 92-95. That alleged negligence and willful misconduct led to the explosion and deaths of plaintiffs' decedents. *Id.* The Complaint further detailed the legal duties owed the decedents by CCC, as the alleged owner and operator of the mine, and by CCC's employees. *Id.* It then asserted that the decedents' deaths were proximately caused by breaches of those duties, including failure to ensure proper ventilation of the mine and the proper maintenance of the mine machinery and equipment. *Id.* Based on the foregoing, the plaintiffs in that action sought $110,000 on behalf of each decedent, the maximum amount then available under the West Virginia wrongful death statute, W. Va. Code, § 55-7-6 (1967). JA 96-130.

Litigation proceeded forward for the next four years. During that time the Henderson Estate and other plaintiffs had a full opportunity to discover any and all facts concerning the cause or causes of the November 20, 1968 explosion, including any involvement in those events by Kovarbasich or Sacchetti. At the conclusion of

those four years, the Court dismissed the claims in favor of CCC on the merits. *Kaznoski*, 368 F. Supp. at 1024.

A second civil action, asserting claims identical to those alleged in *Kaznoski*, was filed in the Circuit Court of Marion County West Virginia in November 1970. The Henderson Estate and the estates of 34 other miners killed in the November 20, 1968 explosion were also plaintiffs in that action. A Partial Order of Dismissal was entered dismissing the claims asserted by the Henderson Estate and 27 other plaintiffs, with prejudice, on April 27, 1974. JA 131-33. The claims of the remaining seven plaintiffs were dismissed on a presently unknown date in 1975. JA 134.[2]

In 1978, a third civil action arising from explosion-related deaths was initiated by survivors of seven miners, including the Henderson Estate, in *Currence, et al. v. Consolidation Coal Co. et al.*, Civil Action No. 78-0044-C (H) (N.D. W. Va. 1978). JA 135-149.[3] In Count IV of their Amended Complaint, the plaintiffs in that civil action alleged that CCC "obstruct[ed] the Plaintiffs from prosecuting their rights and claims against [CCC] for its liability in causing said explosion or explosions, and the

[2] The Circuit Court of Marion County could not locate a complete copy of that Order of Dismissal.

[3] Like the present case, *Currence* initially was filed in the Circuit Court of Marion County, West Virginia and then removed to the United States District Court for the Northern District of West Virginia. JA 135; JA 170.

consequences resulting therefrom," and that it "did unlawfully and fraudulently conceal and cause to be concealed, from the appropriate State and Federal authorities and from the Plaintiffs, and from the public at large, the cause or causes of the aforesaid explosion or explosions." JA 139. The Complaint detailed multiple examples of CCC's alleged acts of fraudulent concealment. JA 139-141.

During the following four years of litigation, the Henderson Estate and other plaintiffs conducted extensive written discovery and depositions, and again had full opportunity to ascertain any and all facts concerning the cause or causes of the November 20, 1968 explosion, including discovery of Layne's September 1970 memorandum and any alleged involvement in the explosion by Kovarbasich or Sacchetti. JA 170-74; JA 952 Dkt. 73-2, at 8. The *Currence* case was settled in 1982, and thereafter dismissed with prejudice. JA 174.

IV. The Underlying Civil Action.

Nearly forty-six years after the November 20, 1968 explosion at the No. 9 Mine, the Plaintiffs filed this civil action.[4] JA 175. Central to the Plaintiffs' current claim against CCC is their allegation that, "[o]n June 9, 2014, it was first discovered that the person responsible for rendering the FEMCO alarm system inoperable before the November 20, 1968, explosion was defendant Kovarbasich, the chief electrician at the Consol No. 9 Mine." JA 183, ¶ 40. Despite the public

[4] Kovarbasich died over 22 years before the Complaint was filed. JA 176.

availability of MSHA's records—including the testimony taken at the 1968 public hearing, Layne's 1970 handwritten memorandum, and MSHA's 1990 report, all of which had long since documented the bypassing of the alarm system for the Mod's Run fan—the Plaintiffs nevertheless claimed in their Complaint that their alleged lack of knowledge that Kovarbasich was personally involved in the bypassing of the alarm system somehow had "prevented the plaintiffs from making an investigation and pursuing legal recourse…" not just against Kovarbasich individually, but also against CCC as the owner and operator of the mine. JA 189, ¶ 61. And, notwithstanding the three prior lawsuits, the Plaintiffs alleged that CCC engaged in "fraud, concealment and nondisclosure" that "deprived plaintiffs of the right to file a common law cause of action against defendants for negligence," and correspondingly "deprived plaintiffs of the right to obtain relief *under the West Virginia wrongful death statute,* W. Va. Code § 55-6-6 (1967)." JA 190-91, ¶¶ 66-67. (Emphasis added). In response, CCC moved to dismiss the Complaint on the grounds that the claims asserted were time barred. JA 24-50, JA 51-54.

In an effort to bolster their allegations, the Plaintiffs obtained an affidavit from Layne dated April 30, 2015. JA 546-48. In his affidavit, Layne identified Sacchetti as the unnamed "electrician" referenced in his 1970 memorandum. JA 547, ¶ 7. Layne further asserted that, during their September 1970 meeting, "Sacchetti told me

… that he and the chief electrician, Alex Kovarbasich, disconnected the FEMCO alarm on the Mod's Run fan before the November 20, 1968 explosion." JA 547, ¶ 8.

The Plaintiffs then sought leave to amend their Complaint to add Sacchetti as a non-diverse defendant. JA 549-50. The Plaintiffs claimed to have only become aware of Sacchetti's role in bridging the Mod's Run fan on April 3, 2015 through verbal statements by Layne as later documented in his affidavit. JA 546-50. CCC opposed the amendment on grounds that any cause of action against Sacchetti would be futile. JA 555-82.

After considering the Plaintiffs' claims, the Layne affidavit and other evidence submitted by the parties, the District Court entered its "Memorandum Opinion and Order Adopting R&R and Granting Defendant's Motion to Dismiss." JA. 1223-68. In its opinion, the Court concluded that (1) the Plaintiffs' claims as set forth in the Complaint and proposed Amended Complaint sound in wrongful death and are governed by the wrongful death statute's two-tear limitation period; (2) the discovery rule and fraudulent concealment doctrines did not apply to wrongful death actions in 1968; (3) the subsequent adoption in West Virginia of the discovery rule and fraudulent concealment doctrine as to wrongful death actions are not retroactively applicable in this case; (4) the Plaintiffs have not asserted a deliberate intent claim and, even if they had, it likewise would be barred by the statute of limitation; (5) although West Virginia has recognized fraudulent concealment as a

stand-alone cause of action in limited circumstances, it is not applicable here; (6) even if the Plaintiffs had asserted a valid fraudulent concealment cause of action against CCC, that claim would be barred by the statute of limitations; and (7) no fraudulent concealment cause of action would lie against Sacchetti since he owed the Plaintiffs no duty to disclose. JA 1267.

SUMMARY OF THE ARGUMENT

The District Court correctly concluded that the Plaintiffs' claims are barred by a two-year limitations period.

Though the Plaintiffs' Complaint labels their single cause of action as one for "fraud, concealment and nondisclosure," it remains one for wrongful death, governed by the West Virginia wrongful death statute, W. Va. Code § 55-7-6 (1967), as a matter of law.

As observed by the District Court, the wrongful death statute "provides for who may bring such a suit, the amount and distribution of damages, and the period of limitation for commencing such an action." The Supreme Court of Appeals of West Virginia has made it clear that no cause of action, however labeled, for the wrongful death of a person exists separate and apart from the wrongful death statute.

Consistent with that principle, the District Court correctly determined that any fraud claim in this case is no more than a thinly veiled argument in support of Plaintiffs' contention that the two-year limitation period regarding wrongful death

actions should be tolled based on fraudulent concealment. That the Plaintiffs seek to maintain claims for wrongful death is apparent on the face of the Complaint.

A contrary result not only would effectively eviscerate the wrongful death statute and the legislative intent behind it, but would run afoul of clearly established limits on this Court's authority under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This Court must apply state law as it presently exists and may not suggest or surmise its expansion. If a party's state claim is not one which would be recognized under state law as it presently exists, a federal court cannot according to its own sense of what is best expand such law so as to recognize the claim. It is only where a federal court can reasonably predict that the state's highest court applying its presently existing law would recognize such a claim, that the federal court can do so.

Consequently, the determination of the intent of the Legislature of the State of West Virginia is solely within the province of the West Virginia Supreme Court of Appeals and its subordinate courts, not with the federal courts. It is not the role of the federal judiciary to contradict the state courts on their law.

Under long established West Virginia law, no right of action for death by a wrongful act exists at common law, and any such action necessarily arises under the wrongful death statute.

Further, the two-year limitation period applicable to the Plaintiffs' wrongful death claims was not tolled under W. Va. Code, § 55-2-17. When the No. 9 Mine explosion occurred in November 1968, W. Va. Code § 55-7-6 (1967) provided that "[e]very such action shall be commenced within two years after the death of such deceased person." The Plaintiffs have never disputed that, if their action is for wrongful death, the applicable limitation period is two years.

In and before November 1968, and continuing for the next 23 years until the Court decided *Miller v. Romero,* 413 S.E.2d 178, 181 (W. Va. 1991), overruled in part, *Bradshaw v. Soulsby*, 558 S.E.2d 681 (W. Va. 2001), West Virginia courts held that the applicable two-year limitations period was absolute, subject to no exceptions. In other words, the two-year period was an element of the action that could not be tolled and, strictly speaking, was not a statute of limitations. The limitation was an integral part of the statute itself and created a condition precedent to the bringing of an action. Once the statutory period expired, there remained no foundation for judicial action.

Notwithstanding over a century of controlling case law preceding *Miller,* the Plaintiffs wrongly contend that this Court should apply W. Va. Code, § 55-2-17 to salvage their long-stale claims. The District Court correctly found that argument unavailing, and properly concluded that none of the cases preceding *Huggins* recognized any statutory tolling provisions applicable to the wrongful death statute.

As found by the District Court, the instant suit, brought forty-six years after the explosion, is late by more than forty-four years.

Even assuming *arguendo* the Plaintiffs' claims arise outside the wrongful death statute, the District Court correctly concluded that the Plaintiffs had failed to state a claim of fraudulent concealment against CCC, and that amendment of the Complaint to assert such a claim against Sacchetti would be futile.

First, the District Court correctly found that the Plaintiffs have not pled a viable cause of action for fraudulent concealment, but rather have asserted the fraudulent concealment doctrine to toll their real claim for wrongful death. Throughout West Virginia jurisprudence, no court has ever recognized a separate fraudulent concealment action in the context of an alleged wrongful death.

Next, the District Court correctly found that, even if the Plaintiffs had stated a viable claim of fraudulent concealment against CCC, it was barred by the applicable two-year limitation period. West Virginia law historically has strictly adhered to statutes of limitation, which serve a crucial judicial purpose, and are intended to preclude stale claims—in this case, long stale claims—and to prevent the resulting prejudice against defendants.

A fraudulent concealment claim in West Virginia is governed by a two-year statute of limitation. Generally, the statute of limitations begins to run when a tort occurs; however, under the "discovery rule," the statute of limitations is tolled until

a claimant knows or by reasonable diligence should know of his claim. More particularly, the limitation period commences when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Applying that standard, the District Court correctly concluded that the Plaintiffs discovered their action for fraudulent concealment much earlier than two years prior to the filing of this lawsuit. The Plaintiffs concede that their own knowledge of Layne's September 1970 memorandum goes back at least to 2008, six years before they filed this action. Upon discovering that memorandum, the Plaintiffs were aware that CCC allegedly had not disclosed all of the facts surrounding the explosion, including that the fan had been physically bypassed, or that certain individuals might have been involved in bypassing or re-energizing the fan. The Plaintiffs have not alleged any change of circumstances between the time they discovered the Layne memorandum and the filing of this action, except for the discovery of the identity of Sacchetti as the unnamed electrician, and the allegation that he and Kovarbasich had disabled the FEMCO alarm.

Neither of those facts, however, was necessary for the Plaintiffs to assert a claim of fraudulent concealment against CCC. Upon discovery of the Layne

memorandum in 2008, Plaintiffs were aware that someone had disabled the FEMCO alarm and that CCC had never disclosed such information. The specific identity of the person who had disabled the alarm was irrelevant to a claim of fraudulent concealment, which the Plaintiffs could have asserted once they knew CCC had not disclosed that the FEMCO alarm had been bypassed.

In sum, the District Court correctly concluded that the Plaintiffs knew in 2008 (1) that they had been injured, (2) that CCC owed them a duty to act with due care, and may have engaged in conduct that breached that duty by failing to disclose the disabling of the FEMCO alarm, and (3) that the conduct of CCC had a causal relation to the injury.

Finally, the District Court did not abuse its discretion in determining that the Plaintiffs' proposed Amended Complaint failed to state a claim of fraudulent concealment against Sacchetti, and that amendment of the Complaint would be futile.

Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud. It requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, and mere silence or unwillingness to divulge wrongful activities ordinarily is not sufficient.

The District Court correctly found that (1) Sacchetti owed no duty to the Plaintiffs to disclose his alleged involvement in disabling the FEMCO alarm on the Mod's Run fan, and (2) Sacchetti took no steps to affirmatively conceal that he had disabled the alarm system. To the contrary, it is clear that Sacchetti was fully forthcoming during his meeting with Layne in September 1970, going so far as to self-report himself and Kovarbasich as the persons who had bridged the alarm system prior to the explosion. He obviously concealed nothing, including his identity and his role in that event, from MSHA, the federal agency leading the investigation of the explosion. The Layne memorandum was thereafter a part of MSHA's agency record, available for the asking to anyone who sought it. The fact that Sacchetti may later have chosen to remain silent, or perhaps was unwilling to divulge wrongful activities to persons other than Layne, is insufficient to establish the Plaintiffs' claims as a matter of law.

ARGUMENT

I. Standards of Review.

A. The Motion to Dismiss Standard.

This Court reviews *de novo* a district court's grant of a motion to dismiss under Rule 12(b)(6). *Owens v. Balt. City State's Attys. Office*, 767 F.3d 379, 388 (4th Cir. 2014); *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). A motion to dismiss filed pursuant to Rule 12(b)(6) is meant to test the legal sufficiency of a

complaint. *See Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). "[T]he legal sufficiency of a complaint is measured by whether it meets the standard stated in Rule 8 [of the Federal Rules of Civil Procedure] (providing general rules of pleading) … and Rule 12(b)(6) (requiring that a complaint state a claim upon which relief can be granted)." *Id.*

Rule 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, a complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

In reviewing a motion to dismiss, a court must "accept as true all of the factual allegations contained in the complaint." *See Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). Importantly, however, statements of bare legal conclusions "are not entitled to the assumption of truth" and are insufficient to state a claim. *Iqbal*, 556 U.S. at 679. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice . . . [because courts] 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.*, at 678

(quoting *Twombly*, 550 U.S. at 555). Furthermore, a court need not "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 1999).

Thus, in order to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). This "plausibility standard requires a plaintiff to demonstrate more than 'a sheer possibility that a defendant has acted unlawfully.'" *Francis*, 588 F.3d at 193 (quoting *Twombly*, 550 U.S. at 570). Stated differently, a plaintiff must "articulate facts, when accepted as true, that 'show' that the plaintiff has stated a claim entitling him to relief, i.e., the 'plausibility of 'entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). "[W]here well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief,'" and thus does not meet the plausibility standard. *See Iqbal*, 556 U.S. at 679 (citing Fed. R. Civ. P. 8(a)(2)).

B. The Motion to Amend Standard.

The Court reviews a district court's decision to grant or deny a party leave to amend for an abuse of discretion. *Ga. Pac. Consumer Prods., LP v. Von Drehle Corp.*, 710 F.3d 527, 533 (4th Cir. 2013) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999). As long as a district court's reasons for denying leave

to amend are apparent, its failure to articulate those reasons does not amount to an abuse of discretion. *Edwards*, 178 F.3d at 242 (citing *Healthsouth Rehabilitation Hosp. v. American Nat'l Red Cross*, 101 F.3d 1005, 1010 (4th Cir. 1996))

Fed. R. Civ. P. 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served …. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Under Rule 15(a), leave to amend shall be given freely, absent bad faith, undue prejudice to the opposing party, or futility of amendment. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *United States v. Pittman*, 209 F.3d 314, 317 (4th Cir. 2000); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980).

"An amendment is futile if the proposed claim would not withstand a motion to dismiss," *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995), or "when the proposed amendment is clearly insufficient or frivolous on its face." *Johnson v. Orowest Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986). "Where the statute of limitations bars a cause of action, amendment may be futile and therefore can be denied." *Pittman*, 209 F.3d at 317; *Keller v. Prince George's County*, 923 F.2d 30, 33 (4th Cir. 1991); *FDIC v. Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994) (holding amendment would be futile "when leave is sought to add a claim upon which the statute of limitations has run").

II. The District Court correctly concluded that the Plaintiffs' Claims are barred by a Two-Year Limitations Period.

A. No Cause of Action for Wrongful Death Exists in West Virginia Separate and Apart from the Wrongful Death Statute. Thus, the District Court Correctly Concluded that the Plaintiffs' Claims Against CCC are Actions for Wrongful Death.

Though the Plaintiffs' Complaint labels their single cause of action as one for "fraud, concealment and nondisclosure," it remains one for wrongful death, governed by the West Virginia wrongful death statute, W. Va. Code § 55-7-6 (1967), as a matter of law.

As observed by the District Court, the wrongful death statute "provides for who may bring such a suit, the amount and distribution of damages, and the period of limitation for commencing such an action." JA 1239. Indeed, the Supreme Court of Appeals of West Virginia has made it clear that no cause of action, however labeled, for the wrongful death of a person exists separate and apart from the wrongful death statute.

> At common law there was no right of action for damages for injury occasioned by the death of a person by a wrongful act. As no right of action for death by a wrongful act existed at common law, the right or cause of action for wrongful death, if maintainable, exists under and by virtue of the provisions of the wrongful death statute of this State….

Baldwin v. Butcher, 184 S.E.2d 428, 429 (W. Va. 1971); *see also*, *Miller v. Romero*, 413 S.E.2d 178, 181 (W. Va. 1991), overruled in part, *Bradshaw v. Soulsby*, 558 S.E.2d 681 (W. Va. 2001).

A court must be "mindful of the need to examine the substance of Plaintiff's allegations rather than the formal labels attached to each cause of action." *O'Connor v. Sand Canyon Corp.*, 2014 U.S. Dist. LEXIS 1142069, at *7-8 (W.D. Va. Oct. 6, 2014). Consistent with that principle, the District Court correctly determined that "any fraud claim in this case is no more than a thinly veiled argument in support of Plaintiff's contention that the two-year limitation period regarding wrongful death actions should be tolled based on fraudulent concealment." JA 1240.

It is apparent from the face of their Complaint that the Plaintiffs sought to maintain claims for wrongful death. This action was brought by the Plaintiffs on behalf of themselves and a putative class comprised of the estates of the other 76 miners who died in the No. 9 Mine explosion on November 20, 1968. JA, 175-76 ¶¶ 1, 46-47. The central claim in the Plaintiffs' Complaint is that CCC concealed information which allegedly "deprived plaintiffs of their right to obtain relief against defendants ***under West Virginia's wrongful death statute.***" JA 188-91, ¶¶ 57-59, 66, 67 (emphasis added). The sole element of compensatory damages sought by the Plaintiffs is an award, ***"[p]ursuant to W. Va. Code § 55-6-6 (1967) [the wrongful death statute]***, (sic) one hundred and ten thousand dollar (sic) ($110,000) per class member ***for the wrongful death of each deceased coal miner."*** JA 193 (emphasis added). The Plaintiffs' argument that the District Court erroneously "transmuted"

their claims into one governed by the wrongful death statute is meritless, and the District Court's decision should be affirmed.

A contrary result not only would effectively eviscerate the wrongful death statute and the legislative intent behind it, but, as the District Court concluded, would run directly contrary to long established West Virginia law. Because on appeal this Court sits in diversity, it must apply West Virginia state substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Further, under *Erie*, "the federal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its expansion." *Burris Chem., Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993).

In *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344 (S.D. W. Va. 1990), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992), the Court summarized the constraints on a federal court's authority as follows:

> It is elementary that a United States District Court when acting with diversity jurisdiction must follow the settled law of the state in which it sits. Where such law is unclear or unsettled, a district court must faithfully predict how the highest court of such state would rule if the case were before it. *Kline v. Wheels by Kinney, Inc.*, 464 F.2d 184, 187 (4th Cir. 1972). …
>
> If a party's state claim is not one which would be recognized under state law as it presently exists, a federal court cannot according to its own sense of what is best expand such law so as to recognize the claim. It is only where a federal court can reasonably "predict" that the state's highest court applying its presently existing law would recognize such a claim, that the federal court can do so.

Id., 755 F. Supp. at 1350-51. This limitation applies with equal force to this Court's authority. *See also Wade v. Danek Med., Inc.*, 182 F.3d 281, 286 (4th Cir. 1999) ("In predicting how West Virginia state courts would act, the Court must not expand upon the laws of West Virginia"); *Martin Marietta Corp. v. Gould, Inc.*, 70 F.3d 768, 771 (4th Cir. 1994) ("It is not our place to suggest expansions of state law").

Under long established West Virginia law, no right of action for death by a wrongful act exists at common law, and any such action necessarily arises under the wrongful death statute. *Baldwin*, 184 S.E.2d at 429. Accordingly, this Court must decline, as did the District Court, the Plaintiffs' invitation to adopt a new, expansive interpretation of West Virginia law that allows prosecution of common law fraudulent concealment claims, either in lieu of or in addition to wrongful death claims, based on the deaths of their decedents.

Under both the *de novo* standard applicable to the grant of CCC's motion to dismiss, and the abuse of discretion standard applicable to the Plaintiffs' motion to amend, the decision of the District Court should be affirmed.

B. The Two-Year Limitation Period applicable to the Plaintiffs' Wrongful Death Claims was not Tolled under W. Va. Code, § 55-2-17.

1. The Historical Rule that the Two-Year Limitation upon the Bringing of an Action for Wrongful Death is an Integral Part of the Statute itself and creates a Condition Precedent to the Bringing of such an Action.

When the No. 9 Mine explosion occurred in November 1968, W. Va. Code § 55-7-6 (1967) provided that "[e]very such action shall be commenced within two years after the death of such deceased person." JA 1240. The Plaintiffs have never disputed that, if their action is for wrongful death, the applicable limitation period is two years. *Id*.

Rather, the Plaintiffs contend that, under a "liberal construction" of the wrongful death statute, its two-year limitations period is tolled under W. Va. Code § 55-2-17.[5] The Plaintiffs are wrong.

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[5] Section 55-2-17 provides:

> Where any such right as is mentioned in this article shall accrue against a person who had before resided in this state, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, or if such right has been or shall be hereafter obstructed by war, insurrection or rebellion, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted. But if another person be jointly or severally liable with the person so obstructing the prosecution of such right, and no such obstruction exist as to him, the exception contained in this section as to the person so absconding shall not apply to him in any action or suit brought against him to enforce such liability. And upon a contract which was made and was to be

As the District Court recognized, "[a]n action for wrongful death is a statutory creation." JA 1241. In and before November 1968, and continuing for the next 23 years until the Court decided *Miller* in 1991, West Virginia courts held that the applicable two-year limitations period was absolute, subject to no exceptions. "In other words, it was an element of the action that could not be tolled and, strictly speaking, was not a statute of limitations." JA 1241.

As early as *Lambert v. Ensign Manufacturing Co.*, 26 S.E. 431 (W. Va. 1896), the Supreme Court of Appeals of West Virginia recognized:

> The bringing of the [wrongful death] suit within two years … is made an essential element of the right to sue….And it is made absolute, without saving or qualification of any kind whatsoever. There is no opening for explanation or excuse. Therefore, strictly speaking, it is not a statute of limitation.

Id., 26 S.E. at 432; *see also, Prater v. Norfolk & Western Ry. Co.*, 1995 U.S. App. LEXIS 25808, at *1 (4th Cir. 1995) (holding that "[t]he two-year limitation is an integral part of the wrongful death statute, and it is a condition precedent to suit rather than a statute of limitations. [citation omitted]. Thus, bringing suit within two years of death is an essential element of the cause of action, and, once the statutory period ends there is no cause of action").

> performed in another state or country, by a person who then resided therein, no action shall be maintained after the right of action thereon is barred either by the laws of such state or country or by the laws of this state.

In *Rosier v. Garron, Inc.*, 199 S.E.2d 50 (W. Va. 1973), decided five years after the No. 9 Mine explosion, the Court reinforced that proposition, stating that "the two year limitation period upon the bringing of an action for wrongful death is an integral part of the statute itself and creates a condition precedent to the bringing of an action which bears no relationship to statutes of limitation and contains no language that would justify a joint construction with the statutes of limitation." *Id.*, 199 S.E.2d at 53 (citing *Smith v. Eureka Pipe Line Co.*, 8 S.E.2d 890 (W. Va. 1940)).

Later, in *Huggins v. Hospital Board of Monongalia County*, 270 S.E.2d 160 (1980), the Court explained the still controlling rule of law as follows:

> This Court has reasoned that the two-year limitation upon the bringing of an action for wrongful death is an integral part of the statute itself and creates a condition precedent to the bringing of an action. The condition is made absolute and, strictly speaking, is not a statute of limitations. The time fixed by the statute creating the right is one of the components entering into the plaintiff's right of recovery. . . . Once the statutory period expires, there remains no foundation for judicial action. In a proceeding which is barred by the statute of limitations, however, the basis for relief continues, but the use of the means of enforcing it may be barred if the lapse of time is affirmatively asserted for that purpose. . . . The issue here is whether the action was properly commenced within two years after the death of the appellant's decedent.

Id., at 162-63; *see also*, *Miller*, 413 S.E.2d at 180 (stating that "[t]he plaintiff's argument for extending the time limitations for wrongful death cases ignores a crucial line of West Virginia case law interpreting our wrongful death act").

2. Fraudulent Concealment as a Tolling Doctrine did not Apply to Wrongful Death Actions in 1968.

The District Court correctly observed that, in 1991, the West Virginia Supreme Court's decision in *Miller* for the first time extended the tolling doctrine of fraudulent concealment to wrongful death actions. JA 1247. In response to a certified question, the Court held as follows:

> The two-year period which limits the time in which a decedent's representative can file suit is extended only when evidence of fraud, misrepresentation, or concealment of material facts surrounding the death is presented.

413 S.E.2d at 183. The Court's reasoning in *Miller* arose from stated public policy concerns, and related in no way to W. Va. Code, § 55-2-17, the statute on which the Plaintiffs attempt to rely here.

> Our decision to extend the time to file in wrongful death cases, however, is necessarily limited. As discussed above, the two-year filing requirement is legislatively created and we can find no reason to remove that time constraint in normal circumstances. The only portion of W. Va. Code § 55-7-6 [the wrongful death statute] which we find to be against the public policy of this State, and thus not limited by the two-year filing period, is when fraud or concealment of material facts surrounding the death is involved.

Miller, 413 S.E.2d at 183.

Notwithstanding over a century of controlling case law preceding *Miller*, the Plaintiffs contend that this Court should apply W. Va. Code, § 55-2-17 to salvage their long-stale claims. Distilled to its essence, the Plaintiffs' argument is that,

because none of the case law preceding *Miller* specifically addressed § 55-2-17, it should be applied here so as to permit them to prosecute a civil action filed almost a half century after the No. 9 Mine explosion. [6]

The District Court correctly found that argument "unavailing." JA 1248. It properly concluded that "none of the cases preceding *Huggins* recognized any statutory tolling provisions applicable to the wrongful death statute," and that the Court in both *Rosier* and *Smith* "had emphasized that even the one-year savings statute, W. Va. Code, § 55-2-18, had no impact on the strict two-year limitation." JA 1248-49. "Clearly, from the time of the miners' deaths in 1968 until 1991, when the Supreme Court of Appeals decided *Miller v. Romero*, the doctrine of fraudulent concealment was unavailable to toll the two-year limitation on filing wrongful death actions." JA 1249.

Contrary to the Plaintiffs' argument, the District Court is not alone in that determination. The Plaintiffs' contention that a liberal construction of the wrongful death statute requires a finding that § 55-2-17 can be applied to toll the limitation period in wrongful death actions was similarly rejected in *Adkins v. Monsanto Co.*,

[6] Throughout the proceedings below, the parties' tolling arguments focused largely on whether the discovery rule and fraudulent concealment, as adopted by the West Virginia Supreme Court in *Bradshaw* and *Miller*, respectively, could be retroactively applied to events occurring decades earlier. Dkt. 12, at 6-7; JA 564-66; JA 571; JA 1023-25; JA 1178-80. The District Court ruled there could be no such retroactive application. JA 1249-52. The Plaintiffs have since abandoned those arguments, instead focusing their tolling argument entirely on W. Va. Code § 55-2-17.

1983 U.S. Dist. LEXIS 11358 (S.D. W. Va. Nov. 28, 1983). Recognizing both the constraints on federal courts imposed by *Erie*,[7] and the aforementioned long line of cases holding that the two-year limitation was made absolute, Judge Copenhaver stated:

> Based upon this rather lengthy line of West Virginia authority, the court is of the opinion that the law in West Virginia regarding the two-year limitation of the wrongful Death Act is clear; that is, a wrongful death action in West Virginia must be brought within two years of the death of the decedent. This is an absolute rule and is to be strictly enforced despite the otherwise liberal nature of the Act. *See Bond* v. *City of Huntington*, 276 S.E.2d 539 (W. Va. 1981).
>
> Further, the inapplicability to the Wrongful Death Act of W. Va. Code § 55-2-17, which generally tolls the running of statutes of limitation when a person obstructs the prosecution of a suit, similarly indicates the rigid nature of the time constraints imposed by the Death Act.
>
> ***It thus appears that an equitable tolling doctrine would not apply to the West Virginia Wrongful Death Act, even assuming arguendo that defendant had concealed material facts.***

Adkins, 1983 U.S. Dist. LEXIS 11358, at *9-11 (emphasis added).

Here, the District Court correctly concluded that the Plaintiffs are not entitled under W. Va. Code, § 55-2-17 to a tolling of the wrongful death statute's two-year limitations period, and "the instant suit, brought forty-six years after the explosion, is late by more than forty-four years." JA 1244.

[7] 1983 U.S. Dist. LEXIS 11358, at *2.

Under both the *de novo* standard applicable to the grant of CCC's motion to dismiss, and the abuse of discretion standard applicable to denial of the Plaintiffs' motion to amend, the decision of the District Court should be affirmed.

III. Assuming *arguendo* the Plaintiffs' Claims arise outside the Wrongful Death Statute, the District Court correctly concluded that the Plaintiffs had Failed to State a Claim of Fraudulent Concealment against CCC, and that an Amendment of the Complaint to assert such a Claim against Sacchetti would be Futile .[8]

A. The District Court correctly found that the Plaintiffs have not pled a Viable Cause of Action for Fraudulent Concealment, but rather have asserted the Fraudulent Concealment Doctrine to Toll their Actual Claim for Wrongful Death.

The District Court well summarized the elements of a fraudulent concealment claim under West Virginia law:

> It must be remembered that, at its core, fraudulent concealment is a form of fraud. To succeed on a fraud claim, a plaintiff in West Virginia must prove the following elements: "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it." *Trafalgar House Constr., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 567 S.E.2d 294, 300 (W. Va. 2002) (quoting Syl. Pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (W. Va. 1981)); see also *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720, 752 (W. Va. 1998). Fraud by concealment, however, "involves the concealment of

[8] If this Court affirms the District Court's decision that the Plaintiffs' claims against CCC, and their proposed claims against Sacchetti, are governed by the West Virginia wrongful death statute, and that W. Va. Code, § 55-2-17 cannot be applied to toll the two-year limitation period, the remaining issues briefed below are moot and need not be considered by this Court.

> facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Quicken Loans, Inc. v. Brown*, 230 W. Va. 306, 737 S.E.2d 640, 654 (W. Va. 2012) (quoting *Trafalgar*, 567 S.E.2d at 300). Notably, fraudulent concealment requires "active concealment of information from a party with the intent to thwart that party's effort to conduct an investigation." *Kessel*, 511 S.E.2d at 753.

JA 1259-60.

After discussing the relative dearth of state case law on the issue, the District Court then correctly recognized that "[a] serious problem with the Plaintiffs' claim of fraudulent concealment is that it is unclear whether such a cause of action exists in West Virginia where a wrongful death is involved." JA 1260. The District Court focused on the fact that, throughout West Virginia jurisprudence, no court has ever recognized a separate fraudulent concealment action in the context of an alleged wrongful death. "There appears to be only one case of fraudulent concealment that does not involve a business or commercial transaction. That case is distinguishable from the case at bar, and is unavailing to the Plaintiffs." *Id.* [9]

[9] The District Court was referring to *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998), where the defendants had fraudulently concealed information from a father regarding the status and whereabouts of his child, which prevented the father from establishing a relationship with his child. *Id.* at 755-56. The Supreme Court of Appeals of West Virginia recognized that *Kessel* involved a "novel" cause of action. *Id.* at 754.

The District Court correctly found that *Kessel* was distinguishable from the present case because, unlike the present case, the purported fraudulent concealment actions in *Kessel* had not prevented the plaintiff from bringing a different cause of action. JA 1260-61.

In short, the Plaintiffs' argument that the District Court failed to determine whether their claims were "plausible" ignores the fact that the Court specifically concluded that those claims are not cognizable under West Virginia law. Accordingly, in the opinion of the District Court, "the Plaintiffs have not pleaded a cause of action for fraudulent concealment, but rather have asserted the fraudulent concealment doctrine to toll their real claim for wrongful death." JA 1260-61. The Court's decision was correct and should be affirmed.

Moreover, as a fair reading of the District Court's opinion makes clear, the lack of precedent that might allow the Plaintiffs to assert a viable fraudulent concealment action arising from their decedents' deaths was not the only factor considered by the District Court in determining that CCC's motion to dismiss should be granted, and that the Plaintiffs' proposed amendment was futile.

B. The District Court correctly found that, even if the Plaintiffs had stated a Viable Claim of Fraudulent Concealment against CCC, it was barred by the Applicable Two-Year Limitation Period.

1. The Plaintiffs' Impermissible Arguments Relating to CCC's Motion to Dismiss.

Notably, the Plaintiffs are relegated to relying largely on impermissible facts and arguments that must be disregarded by this Court. First, the Plaintiffs rely heavily on arguments admittedly "supported by revelations learned after the action was filed." Appellants' Brief, at 35-38. A district court considering a motion to

dismiss is governed by the "well established Four Corners Rule," which generally limits the court to an examination of the complaint and any documents that are attached to it. *See CACI Int'l, Inc. v. St. Paul Fire & Marine Ins. C*o., 566 F.3d 150, 154 (4th Cir. 2009). In the proceedings below, the parties and the District Court properly restricted their arguments and analyses to the allegations set forth in the Complaint and associated matters of public record. *See Walker v. Kelly*, 589 F.3d 127, 129 (4th Cir. 2009) (in reviewing a motion to dismiss, the court may consider matters of public record such as documents from prior court proceedings); *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004). The same limitations are required on review.

Second, the Plaintiffs argue that the District Court's decision "invaded the province of the jury because material issues of fact exist," an obvious reference to summary judgment standards under Rule 56(c). Appellants' Brief, at 35. Those standards likewise are not applicable here.

Third, the Plaintiffs argue that, until they learned of Kovarbasich's identity in 2014, they lacked the requisite information to plead fraudulent concealment with the particularity required under Rule 9(b). Appellants' Brief, at 37-38. The Plaintiffs did not raise that argument below, nor did the District Court address it. As a result, that argument is not properly before this Court. *Robinson v. Equifax Information Services, LLC*, 560 F.3d 235, 242 (4th Cir. 2009) ("Absent exceptional

circumstances . . . we do not consider issues raised for the first time on appeal.") (quoting *Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 603 (4th Cir. 2004)); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) ("As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered.").

2. The Untimeliness of the Plaintiffs' Claim.

West Virginia law historically has strictly adhered to statutes of limitation.

> No rule of law could be more widely accepted and easily understood than that a statute of limitations imposes a bright line test as to when a cause of action has been timely filed. *See, e.g., Cart v. Marcum*, 188 W. Va. 241, 245, 423 S.E.2d 644, 648 (1992) (recognizing "predictability that bright line rules like a strict statute of repose create"). Correspondingly, this Court traditionally has been reluctant to find exceptions to the filing requirements imposed by a statute of limitations and has enforced such temporal limits as they are written. *See, e.g., Humble Oil & Ref. Co. v. Lane*, 152 W. Va. 578, 583, 165 S.E.2d 379, 383 (1969) (declaring that statutes of limitation "are entitled to the same respect as other statutes, and ought not to be explained away" (internal quotations and citations omitted)).

Wright v. Myers, 597 S.E.2d 295, 299 (W. Va. 2004) (Davis, J., dissenting).

Of course, statutes of limitations serve a crucial judicial purpose, and are intended to preclude stale claims—in this case, long stale claims—and to prevent the resulting prejudice against defendants. As explained by this Court in *Hamilton v. 1st Source Bank*, 928 F.2d 86, 89 (4th Cir. 1990):

> Statutes of limitations are not mere technicalities. Rather, they "have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980). They are designed not to defeat justice, but to promote it by preventing "surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 88 L. Ed. 788, 64 S. Ct. 582 (1944). By encouraging parties to file their claims promptly, statutes of limitations protect litigants from the potential errors of witness recall that might otherwise result. They reflect the need to have a point at which the possibility of litigation is past, and in due course they replace the uncertain prospects of a potential litigant with repose. *See generally Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738 (4th Cir. 1990) (en banc).

A fraudulent concealment claim in West Virginia is governed by a two-year statute of limitation. W. Va. Code § 55-2-12. "Generally, the statute of limitations begins to run when a tort occurs; however, under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim." *Gaither v. City Hosp., Inc.*, 487 S.E.2d 901, 906 (W. Va. 1997). More particularly, the limitation period commences when:

> The plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Dunn v. Rockwell, 689 S.E.2d 255, 268 (W. Va. 2009) (quoting Syl. Pt. 4, *Gaither*, 487 S.E.2d at 901).

Under the discovery rule, whether a plaintiff "knows of" or "discovered" a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action. *See* Syl. Pt. 5, *Dunn*; Syl. Pt. 4, *Gaither*.

In *McCoy v. Miller*, 578 S.E.2d 355 (W. Va. 2003), the Court made it clear that, through evolution of the discovery rule "we did not eliminate the affirmative duty the law imposes on a plaintiff to discover or make inquiry to discern additional facts about his injury when placed on notice of the possibility of wrongdoing. The crux of the 'discovery rule' has always been to benefit those individuals who were either unaware of their injuries or prevented from discovering them. *Id.*, 578 S.E.2d at 359; *Gaither*, 487 S.E.2d at 908 (recognizing that "discovery rule has its origins in the fact that many times an injured party is unable to know of the existence of any injury or its cause"). Importantly:

> This critical element of the 'discovery rule' has not been vitiated with the Court's modification of the rule's application. Where a plaintiff knows of his injury, and the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an

> affirmative duty to further and fully investigate the facts surrounding that potential breach."

McCoy, 578 S.E.2d at 359.

Against that backdrop, the District Court concluded:

> The relevant inquiry here is when did the Plaintiffs discover the alleged fraudulent concealment by CCC. They contend that CCC has concealed the truth since the time of the explosion. But the record is clear that the Plaintiffs discovered their action for fraudulent concealment much earlier than two years prior to the filing of this law suit.

JA 1263.

The correctness of that determination is unassailable. The linchpin to the Plaintiffs' claim is the fact that the connection between the FEMCO alarm system and the Mod's Run fan had been bypassed prior to the explosion. During the public hearings in December 1968, multiple witnesses testified that one or more of the mine's ventilation fans had stopped operating from time to time, and that, despite the existence of the FEMCO system, power to some areas of the mine sometimes was not automatically shut down as designed. JA 254-60. Foster explained that problems occasionally arose both with operation of the fans and with the FEMCO system itself, and that in the event of such an outage he would summon one or more mine mechanics, including Kovarbasich, to address the issue. JA 261-62. Kovarbasich testified that his job duties at the mine had involved responsibility for the Mod's Run fan, including instances in which "it's down or there is power trouble

or such." JA 263-64. At the conclusion of its investigation, MSHA publicly announced in its report that that (1) the alarm system "was not operating properly at the time the explosion occurred, … as well as at other times prior to the explosion," (2) it had been reported that "only one fan was down and that the monitoring system on the other fan was blocked out," and (3) inadequate ventilation was believed to be a cause of the explosion. JA 612; JA 627.

Perhaps most importantly, the bypassing of the connection between the Mods Run fan and the FEMCO alarm system was expressly reported to federal authorities in September 1970, and simultaneously recorded in Layne's agency memorandum. JA 183, ¶ 39; JA 1263. As succinctly stated by Magistrate Judge Kaull in the R&R, the requisite information was "readily available for the asking from Layne," or from MSHA, beginning in 1970. JA 981.

The Plaintiffs concede that their own knowledge of the 1970 memorandum goes back at least to 2008, six years before they filed this action. JA 182, ¶37; JA 1263-64. Thus, the District Court correctly found as follows:

> Upon discovering this [memorandum], the Plaintiffs were aware that CCC had not disclosed all of the facts surrounding the explosion, including that the fan had been physically bypassed, or that certain individuals might have been involved in bypassing or re-energizing the fan

JA 1264.

The Plaintiffs' assertion that they were legally precluded under West Virginia law from filing their claims until they conclusively knew "that the person who disabled the alarm be a member of mine management or acting under the direct control of mine management" stretches credulity, and the District Court easily dispensed with that argument.

> The Plaintiffs have not alleged any change of circumstances between the time they discovered the Layne letter and the filing of the instant lawsuit, except for the discovery of the identity of Sacchetti as the unnamed electrician, and the allegation that he and Kovarbasich had disabled the FEMCO alarm.
> Neither of those facts, however, was necessary for the Plaintiffs to assert a claim of fraudulent concealment against CCC. Upon discovery of the Layne letter in 2008, they were aware that someone had disabled the FEMCO alarm and that CCC had never disclosed such information. The specific identity of the person who had disabled the alarm was irrelevant to a claim of fraudulent concealment, which the Plaintiffs could have asserted once they knew CCC had not disclosed that the FEMCO alarm had been bypassed.

JA 1264-65.

Indeed, the Plaintiffs' argument is belied by the civil actions filed by the Henderson Estate and others long ago, in 1970 and 1978. In the 1970 cases the plaintiffs alleged the very elements to which the discovery rule now applies; that they had been fatally injured, that CCC and its employees owed to the decedents a legal duty and had breached that duty, and that the decedents' deaths were proximately caused by those breaches, including failure to ensure proper ventilation of the mine and to maintain machinery and equipment in a safe manner. JA 96-130;

Kaznoski, supra. The 1978 lawsuit specifically, and in much detail, alleged multiple acts of fraudulent concealment by CCC in relation to the cause of the No. 9 Mine explosion. JA 135-49; JA 1265 n. 11. The Plaintiffs' assertion here that fraudulent concealment by CCC somehow prevented them from filing such claims until 2014 is disingenuous at best.

In sum, the District Court correctly concluded that the Plaintiffs knew in 2008 (1) that they had been injured, (2) that CCC owed them a duty to act with due care, and may have engaged in conduct that breached that duty by failing to disclose the disabling of the FEMCO alarm, and (3) that the conduct of CCC had a causal relation to the injury. JA 1265. The District Court's decision is correct and should be affirmed.

C. The District Court did not Abuse its Discretion in determining that the Plaintiffs' Proposed Amended Complaint Failed to State a Claim of Fraudulent Concealment against Sacchetti, and that Amendment of the Complaint would be Futile.

As noted above, fraudulent concealment "involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud." *Quicken Loans, Inc.*, 737 S.E.2d at 654. It "requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, although any act or omission tending to suppress the truth is enough." *Merrill v. West Virginia Dep't of Health and Human Services*, 632

S.E.2d 307, 318 (W. Va. 2006) (quoting Syl. Pt. 3, *Miller*, 413 S.E.2d at 181). However, "mere silence or unwillingness to divulge wrongful activities ordinarily is not sufficient." *Merrill*, 632 S.E.2d at 325; *see also, Sattler v. Bailey*, 400 S.E.2d 220, 227 (W. Va. 1990) ("silence of the wrongdoer" will not toll the limitations period, "unless he or she has done something to prevent discovery of the wrong"); *Kessel*, 511 S.E.2d at 753 (fraudulent concealment requires "active concealment of information from a party with the intent to thwart that party's efforts to conduct an investigation….").

Turning to the duty requirement, the District Court correctly found that, "had the proposed amended complaint asserted a claim for fraudulent concealment against Sacchetti, it would have failed to state a valid claim." JA 1266.

> As Magistrate Judge Kaull recognized in the R&R, the Plaintiffs have cited no case law or statute holding that a "mine electrician has a duty to disclose information regarding his own misconduct to potential litigants and open himself up to civil liability and possible criminal charges (and the [Magistrate] Court's search has turned up no such case or statutory law)." (citation omitted). Nor has this Court found a case or statute establishing such a duty. Consequently, because Sacchetti owed no duty to the Plaintiffs to disclose his alleged involvement in disabling the FEMCO alarm on the Mod's Run fan, any claim of fraudulent concealment against him must fail.

JA 1266.

On appeal, the Plaintiffs likewise fail to cite any authority for the proposition that Sacchetti, a non-management co-worker of the Plaintiffs' decedents, owed such

a legal duty to them. There was none, and the District Court did not abuse its discretion in so finding.

Finally, the District Court correctly adopted Magistrate Judge Kaull's conclusion that the Plaintiffs "have claimed no affirmative action from Sacchetti, to wit: nothing to indicate he took any steps to affirmatively conceal that he had disabled the alarm system." JA 969. Though the Plaintiffs now attempt to paint Sacchetti as a person who for 46 years hid his information from public view, their own proposed Amended Complaint defeats that argument. To the contrary, it is clear that Sacchetti was fully forthcoming during his meeting with Layne in September 1970, going so far as to self-report himself and Kovarbasich as the persons who had bridged the alarm system prior to the explosion. JA 969. He obviously concealed nothing, including his identity and his role in that event, from the federal agency leading the investigation of the explosion. The Layne memorandum was thereafter a part of MSHA's agency record, available for the asking to anyone who sought it. JA 952; JA 981. The fact that Sacchetti may have chosen to otherwise remain silent, or perhaps was "unwilling[] to divulge wrongful activities" to persons other than Layne, is insufficient to establish the Plaintiffs' claims as a matter of law. *Merrill*, 632 S.E.2d at 325; *Sattler*, 400 S.E.2d at 227.[10]

[10] The Federal Mine Safety and Health Review Commission has long recognized the "informant's privilege," which is "the well-established right of the government to

Because amendment of the Plaintiffs' Complaint to add Sacchetti as a defendant would have been futile, the District Court did not abuse its discretion in denying their motion to amend, and the District Court's Order should be affirmed.

CONCLUSION

Based on the foregoing, CCC respectfully requests that this Honorable Court affirm the March 31, 2017 Order of the United States District Court for the Northern District of West Virginia.

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withhold from disclosure the identity of persons furnishing information of violations of law to law enforcement officials. The purpose of the privilege is to protect the public interest by maintaining a free flow of information to the government concerning possible violations of the law and to protect persons supplying such information from retaliation." *Secretary v. Bright Coal Company, Inc.*, 6 FMSHRC 2520, 2522, 1984 FMSHRC LEXIS 344, 7-8 (November 1984) (quoting *Rovario v. United States*, 353 U.S. 53, 59 (1957)); *see also Secretary v. M-Class Mining, LLC*, 36 FMSHRC 1805, 2014 FMSHRC LEXIS 196 (June 2014); *Secretary v. Asarco, Inc.*, 14 FMSHRC 1323, 1992 FMSHRC LEXIS 777 (August 1992). Whatever Sacchetti's own wishes, it is obvious from Layne's affidavit that MSHA elected not to assert application of the informant's privilege as to both Sacchett's identity and the content of his September 1970 disclosures. Thus, as the R&R concluded, "[i]f anyone [previously] conducted an act of concealment, it is Layne," JA 969, an Alabama citizen who offered the Plaintiffs no diversity-defeating target.

STATEMENT REGARDING ORAL ARGUMENT

This appeal presents no novel questions of West Virginia or federal law, or unique factual or procedural issues. The dispositive issues in this case have previously been authoritatively decided by the Supreme Court of Appeals of West Virginia, this Court and West Virginia District Courts, and the District Court's Order represents a straightforward application of clearly settled West Virginia substantive law. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process will not be significantly aided by oral argument. Accordingly, CCC does not believe this appeal merits oral argument.

This 21st day of August, 2017.

Respectfully submitted,

CONSOLIDATION COAL COMPANY,
By counsel

s/ William E. Robinson
William E. Robinson
W. Henry Jernigan
DINSMORE & SHOHL, LLP
707 Virginia Street, E., Suite 1300
Charleston, WV 25301

Alex M. Greenberg
Christopher M. Jones
DINSMORE & SHOHL, LLP
215 Don Knotts Blvd, Suite 310
Morgantown, WV 26501

CERTIFICATE OF COMPLIANCE

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Dated: August 21, 2017

/s/ William E. Robnison
William E. Robinson

Counsel of Appellee

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 21, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all the registered CM/ECF users.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Priscilla C. Winkler

Priscilla C. Winkler
GIBSON MOORE APPELLATE SERVICES, LLC
P.O. Box 1460
Richmond, VA 23218
(804) 249-7770
priscilla@gibsonmoore.net