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 APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

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No. 17-1564 Caption: Michael D. Michael, et al. v. Consolidation Coal Co.

Pursuant to FRAP 26.1 and Local Rule 26.1,

MIchael D. Michael, as the Administrator of the Estate of Jack D. Michael
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiac do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Timothy C. Bailey Date: 5.12.2017

Counsel for: Appellants

CERTIFICATE OF SERVICE

****

I certify that on 5.__.2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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5.12.2017
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 17-1564 Caption: Michael D. Michael, et al. v. Consolidation Coal Co.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Judith A. Kuhn, as the Administratrix for the Estate of Paul F. Henderson
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ Timothy C. Bailey Date: 5.12.2017

Counsel for: Appellants

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5.12.2017
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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of West Virginia exercised subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 inasmuch as there was diversity between the plaintiffs and defendant Consolidation Coal Company.

The Court of Appeals for the Fourth Circuit has appellate jurisdiction pursuant to 28 U.S.C. § 1294 and 28 U.S.C. § 1295 which grants appellate review of final decisions of district courts of the United States.

STATEMENT OF THE ISSUES

Whether the District Court erred when finding that the Appellants' claims are wrongful death claims and not fraudulent concealment claims.

Assuming *arguendo* the Appellants' claims sound in wrongful death, whether the Appellants may avail themselves of the application of W. Va. Code § 55-2-17 to toll the limitations period.

Whether the Appellants raise plausible claims for fraudulent concealment where the Appellants pled that the Appellee intentionally hid material facts that were essential to their underlying cause of actions.

Whether the Appellants raise timely claims of fraudulent concealment where they allege that the Appellee hid the critical element of who was responsible for the deaths of the decedents.

Whether the Appellants' proposed amendment to the complaint was futile where Leonard Sacchetti confessed he was directly involved in illegal acts which contributed to the deaths of 78 coal miners.

STATEMENT OF THE CASE

The lynchpin of fraudulent concealment is hiding facts to deprive a person of some right. For nearly forty-six years the Appellants have sought to find out who was responsible for the deaths of their loved ones. While justice delayed is justice denied, closing the courthouse doors due to fraudulent concealment is no justice at all. This case concerns fraud, concealment and nondisclosure of the persons and entity responsible for the deaths of seventy-eight coal miners, on November 20, 1968, at the Consol No. 9 coal mine in Farmington, West Virginia. From November 20, 1968, to June 9, 2014, agents of Consolidation Coal Company hid the identification of those responsible for rendering the mine fan alarm inoperable before the explosion. Electricians at the mine were responsible for the safety of the husbands and fathers that perished. Consolidation Coal Company pushed its agents to run a coal mine without adequate ventilation and put tonnage before lives. Miners relied upon electricians Alex Kovarbasich and Leonard Sacchetti to protect them from methane build up. Consolidation Coal Company and its agents allowed the men to be blown up and thereafter hid who was responsible.

On June 9, 2014, it was first discovered that a person responsible for rendering the mine fan alarm system inoperable before the explosion was Consolidation Coal Company's chief electrician, Alex Kovarbasich. On November 6, 2014, the Appellants filed their complaint in the Circuit Court of Marion County, West Virginia, alleging claims of "fraud, concealment and nondisclosure" against the Sheriff of Harrison County, as Administrator for the Estate of Alex Kovarbasich, and the Appellee. By fraudulent concealment, Appellee Consolidation Coal Company deprived the Appellants of their ability to prevail in a civil action under West Virginia's Wrongful Death Act within two years of the explosion. For instance, Alex Kovarbasich, in his position as chief electrician, concealed the disarming of the mine fan alarm system when he was questioned by investigators following the explosion. Even then, a mine fan chart, which would have shown the ventilation fan was indeed inoperative at the time of the explosion, was missing when investigators arrived at the mine immediately after the explosion. The mine fan chart's glass-door housing was broken rather than accessed by key.

Upon removal from West Virginia state court, on December 17, 2014, Appellee filed a motion to dismiss arguing, in part, that the Appellants' claims sounded in wrongful death, were untimely and failed to state viable claims.

Thereafter, on April 3, 2015, the Appellants first learned that a second agent of Consolidation Coal Company, Leonard Sacchetti, was, in part, responsible for

rendering the mine fan alarm system inoperable before the explosion and hid this fact from the Appellants. On July 31, 2015, the Appellants filed a motion to amend their complaint to add Leonard Sacchetti as a defendant. The Appellants' motion to amend was transferred to the Magistrate Judge for consideration.

On September 9, 2015, the Magistrate Judge entered a *Memorandum Opinion and Report and Recommendation* recommending, in part, that the Appellants' motion to amend be denied as futile because the claims against Leonard Sacchetti were untimely and the Appellants failed to state viable claims of fraudulent concealment against Mr. Sacchetti.

On March 31, 2017, the District Court entered a *Memorandum Opinion and Order Adopting R&R and Granting the Defendant's Motion to Dismiss*. On the same date, a *Judgment in a Civil Action* was entered dismissing the case in its entirety. The District Court adopted the Magistrate Judge's Report and Recommendation in its entirety except for its finding that the Appellants' complaint alleged deliberate intent claims. The District Court: denied the Appellants' motion to amend the complaint to add Leonard Sacchetti as a defendant; and granted Consolidation Coal Company's motion to dismiss.

It is from the March 31, 2017, *Memorandum Opinion and Order Adopting R&R and Granting the Defendant's Motion to Dismiss* and the *Judgment in a Civil Action* that the Appellants appeal.

Statement of the Facts

On November 20, 1968, the Appellants' decedents, and all similarly situated class members, were coal miners at the Consol No. 9 Mine located in or near Farmington, Marion County, West Virginia. JA 177, ¶ 12.[1] "Alex Kovarbasich was a member of mine management and performed mine management duties as the chief electrician at the Consol No. 9 Mine. . . . Alex Kovarbasich was responsible for the maintenance and safe operation of the surface fans which flushed methane from the Consol No. 9 Mine so as to ensure that methane did not reach unsafe levels." *Id.* at ¶ 13. At unsafe levels, methane gas is explosive.

Two entities performed work at the Consol No. 9 Mine: Mountaineer Coal Company and Consolidation Coal Company. JA 176-177, ¶ 8. The Consol No. 9 Mine was under the direction and control of Consolidation Coal Company. JA 178, ¶ 14. It was Consolidation Coal Company's duty and obligation to ensure that the No. 9 Mine was safe and free of hazards. *Id*. at ¶ 16. There existed a fiduciary relationship and a special relationship between the decedents and Consolidation Coal Company. JA 188, ¶ 56.

[1] "Mountaineer Coal Company was the employer of the seventy-eight (78) miners who died in the November 20, 1968, Consol No.9 coal mine explosion. At all times relevant hereto, and upon information and belief, Mountaineer Coal Company operated at the direction and authority of Consolidation Coal Company." JA 178, ¶ 15.

"Methane is a highly flammable, odorless, colorless, hydrocarbon. It is a product of the decomposition of organic matter and of the carbonization of coal. During the coal mining process, methane is liberated into the mine environment, necessitating ventilation of the mine area to avoid ignition and explosion." JA 179-180, ¶ 22. "To flush methane from the Consol No. 9 Mine, the defendants utilized four large surface fans: the No. 1 fan at the slope; the Athas Run fan near the 2 North area of the mine (No. 2. fan); the Mod's Run fan near the 4 North area of the Mine (No. 3 fan); and the Llewellyn fan near the 7 South area of the mine (No. 4 fan). The No. 3 and No. 4 fans ventilated the west side of the mine. By operation of mining regulations and safe mining practices, fans were required to run twenty-four hours a day, seven days a week. . . . Further, by operation of mining regulations and safe mining practices, each fan must be visually inspected at least one time per day." JA 180, ¶ 23.[2]

Consolidation Coal Company fitted its "fans with a FEMCO brand safety system. Each fan was connected to a display board at the lamp house. If a fan was running, its light on the display board was green. If a fan slowed or stopped, a red light came on and an alarm sounded. The miner in the lamp house would then contact the miners underground. If a fan was down for more than 12 minutes, the system was

[2] "By operation of mining regulations and safe mining practices, if a fan stops and ventilation cannot be restored within 15 minutes, all power to the mine must be shut off and all miners must be withdrawn from the affected areas and/or the mine." *Id*. at ¶ 24.

designed to cut off all the power in the mine." *Id*. at ¶ 25. This would cease all production in the mine and force the evacuation of the entire underground workforce.

"At approximately 5:30 a.m. on Wednesday, November 20, 1968, an explosion occurred in the Consol No. 9 Mine. The force of the explosion extended throughout the west side of the mine inby the Plum Run overcast which included nine active working sections. Of the ninety-nine (99) miners in the mine, seventy-eight (78) died as a result of the explosion." JA 181, ¶ 27. Immediately after the "explosion, mine investigators found that the mine fan recording chart for the Mod's Run fan was taken from the mine fan box sometime after the explosion. The person who absconded with the mine fan recording chart presumably broke the glass covering on the fan chart box to take it." *Id*. at ¶ 31. The mine fan recording chart would have indicated whether the exhaust fan was running at the time of the explosion. If the fan was not running, the chart would have indicated how long it was inoperable.

"Between 1969 and 1978, the bodies of 59 victims were recovered and brought to the surface. However, recovery operations ceased and all entrances to the mine were permanently sealed in November of 1978, leaving 19 victims buried in the mine." *Id*. at ¶ 33. Today, this hallowed ground is the final resting place for 19 men.

"From November 20, 1968, to April of 1990, investigation of the cause of the explosion was conducted by the West Virginia Department of Mines, the United

States Bureau of Mines, or the United States Department of Labor, Mine Safety and Health Administration." JA 182, ¶ 34. "In March of 1990, a United State Department of Labor, Mine Safety and Health Administration ("MSHA") investigation concluded, in part, that 'the ventilation along the Main West headings was inadequate overall, and most probably non-existent in some areas between 1 South and 4 North. On the day before the explosion . . . methane accumulated to about four percent on the right side of the 7 South section for a distance of approximately 1,000 feet outby the working section because of inadequate ventilation and the lack of sufficient ventilation controls. . . .'" *Id*. at ¶ 35.

"In 2008, a copy of a September 5, 1970, handwritten memorandum by federal coal mine inspector Larry L. Layne was discovered. The memorandum provided as follows:

> On Sept. 5, 1970, 12am-8am shift, the Mods Run substation was energized for the first time since the explosion of Nov. 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 before 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 signal was bypassed. This information was reported to me Sept 15, 1970."

Id. at ¶ 37. *See also* JA 434, 546.

Just a year later, in "2009, a copy of an alleged November 20, 1968, Mod's Run mine fan recording chart was discovered. The Mod's Run mine fan recording

chart was off schedule with the mine fan recording charts for the other fans. The ink line on the chart is thick and solid, unlike the thin, jagged lines on the other mine fan recording charts. The line on the Mod's Run mine fan recording chart stops abruptly at 5:00 a.m. on November 20, 1968." JA 182-183, ¶ 38.

From November 20, 1968, to June 9, 2014, the identity of the person or entity responsible for rendering the FEMCO alarm system inoperable was unknown to the Appellants and, through the exercise of reasonable diligence, could not have been discovered by the Appellants. JA 183, ¶ 39. Despite a thorough government investigation, neither Alex Kovarbasich nor Consolidation Coal Company disclosed or otherwise advised the Appellants, or any state or federal mine agency, that, **before the explosion, the FEMCO fan alarm system had been intentionally rendered inoperable by a member of mine management**. *Id*.

As time passed, so too did the ability of the victim families to determine who or what entity was responsible for the decedents' deaths. Nevertheless, beginning in June 8, 2014, the truth began to trickle out. On June 8, 2014, Leonard Sacchetti told certain widow victims that Consolidation Coal Company's chief electrician, Alex Kovarbasich, was responsible for rendering the mine fan alarm system inoperable. JA 419, 544. Consolidation Coal Company "affirmatively and intentionally concealed or otherwise prevented" the Appellants "from discovering the existence of their cause of actions . . . by fraudulent act, omission, concealment,

and suppression of the identity of the person" who was a cause of the miners' deaths and other information necessary to put decedents' estates on notice. JA 184, ¶ 44. The Appellants have been kept in ignorance of vital information essential to the pursuit of their claims, without any fault or lack of diligence on their part. *Id*. The Appellants could not reasonably have discovered the fraudulent nature of the Appellee's conduct. *Id*.

On November 6, 2014, the Appellants filed a complaint in the Circuit Court of Marion County, West Virginia, alleging claims of "fraud, concealment and nondisclosure" against Albert F. Morano, Sheriff of Harrison County, as Administrator to the Estate of Alex Kovarbasich (hereinafter "Estate of Kovarbasich"), and Consolidation Coal Company. JA 175. Thereafter, on December 12, 2014, the case was removed to the District Court for the Northern District of West Virginia by Appellee wherein it argued that the Estate of Kovarbasich was fraudulently joined because the Estate was improperly reopened and the claims against the Estate were untimely. JA 24. Subsequently, on December 17, 2014, Appellee Consolidation Coal Company filed a motion to dismiss arguing, in part, that the Appellants' claims were time barred. JA 51. On December 23, 2014, the Appellants filed a motion to remand the case to state court denying that the Estate of Kovarbasich had been fraudulently joined and that their claims were time barred. JA 206.

On February 9, 2015, the Appellants moved to promptly perpetuate the testimony of Leonard Sacchetti. The District Court recognized Mr. Sacchetti's advanced age and granted the Appellants' motion. *See* JA 372. On March 26, 2015, the deposition of Leonard Sacchetti was conducted. His testimony directly contradicted what Mr. Sacchetti previously told certain widows of deceased coal miners. *See* JA 419, 544, 551-554. Mr. Sacchetti testified that he was not working at the Consol No. 9 Mine after the explosion, but worked at Loveridge Mine on the midnight shift. JA 553. Consolidation Coal Company's own records indicate that both before and after the November 20, 1968, mine explosion, Mr. Sacchetti was working at the Consol No. 9 Mine. JA 542-543.

The Appellants continued to investigate their claims. On April 3, 2015, Lawrence "Larry" Layne (hereinafter "Larry Layne"), a retired federal mine inspector who wrote the September 15, 1970, memorandum, advised the Appellants that **on September 5, 1970, it was Leonard Sacchetti who told him that not only had Alex Kovarbasich bypassed the mine fan alarm system before the explosion, but that Sacchetti had helped him do it**. **Mr. Layne did not disclose this information to anyone prior to April 3, 2015. JA 546, ¶ 9. In fact, in 2010, Mr. Layne went to Mr. Sacchetti's home in Fairmont, West Virginia, to discuss the Consol No. 9 Mine explosion. Upon learning of the reason for Mr. Layne's visit, Mr. Sacchetti threatened him in an effort to keep him quiet. *Id.* at ¶ 10.**

Upon learning of Mr. Sacchetti's involvement in rendering the mine fan alarm system inoperable, and recognizing his outright denial of his involvement, on June 31, 2015, the Appellants filed a motion to amend their complaint to add Mr. Sacchetti as a defendant.[3] JA 549.[4] The motion was transferred to Magistrate Judge John S. Kaull by order entered August 13, 2015, and hearing was held on the motion on September 10, 2015. JA 822, 829. Thereafter, by *Memorandum Opinion and Report and Recommendation* (hereinafter "Report and Recommendation"), entered September 29, 2015, the Magistrate Judge recommended that the Appellants' motion for leave to add Mr. Sacchetti as a defendant be denied as futile. JA 945. The Magistrate Judge ignored the fraud claims, even though specifically pled, and instead held that the Appellants asserted untimely claims for wrongful death and deliberate intent. JA 957-959. Further, the Magistrate Judge found that the statute of limitations barred any claim against Mr. Sacchetti and that any stand-alone claims against Mr. Sacchetti for fraudulent concealment failed. JA 945.

[3] The Appellants' motion to amend specifically requested that, upon granting the motion, the District Court remand the action to West Virginia state court. *Id.*

[4] The Appellants met with Mr. Layne and obtained an affidavit from Mr. Layne. Appellee contended that the affidavit and the Appellants' meeting with Mr. Layne violated the Court's April 10, 2015, order and 29 C.F.R. §§ 2.20, *et seq.* JA 806. Appellee sought to strike the affidavit or otherwise prohibit Mr. Layne from testifying in the case. *Id.* Magistrate Judge Kaull found that the Appellants did not violate any court order or 29 C.F.R. §§ 2.20, *et seq.* JA 925.

On September 30, 2015, the District Court stayed all proceedings pending a ruling by the Circuit Court of Harrison County with regard to the reopening of the Estate of Kovarbasich. JA 986. Subsequently, the Harrison County Circuit Court ordered that the Estate be re-closed. Thereafter, the District Court lifted the stay, directed the Appellants to file objections to the Magistrate Judge's Report and Recommendation and ordered that the parties submit limited discovery plans. *See* JA 987, 1016. On October 13, 2015, Appellants timely objected to the Magistrate Judge's Report and Recommendation and the parties submitted limited discovery plans. *See* JA 1018.

Based upon the closure of the Estate of Kovarbasich by the Circuit Court of Harrison County, West Virginia, on January 19, 2016, the Estate of Kovarbasich, moved to dismiss the claims against it. JA 1043. The District Court, by order entered February 25, 2016, stayed the federal action pending resolution of the Estate issue by the West Virginia Supreme Court of Appeals. JA 1081.

On November 10, 2016, the West Virginia Supreme Court of Appeals affirmed the Circuit Court of Harrison County's decision to re-close the Estate of Kovarbasich. *See In re Estate of Alex Kovarbasich*, 2016 WL 6651583 (W. Va. 2016)(memorandum decision). Thereafter, the District Court lifted the stay and scheduled a status conference. During the status conference, the Court denied the motion to remand, granted the motion to dismiss the Estate of Kovarbasich and permitted the parties to proceed with Larry Layne's deposition.

On March 31, 2017, the District Court entered its *Memorandum Opinion and Order Adopting R&R and Granting the Defendant's Motion to Dismiss*. JA 1223. On the same date, a *Judgment in a Civil Action* was entered dismissing the case in its entirety. JA 1269. The District Court adopted the Magistrate Judge's Report and Recommendation in its entirety except for its finding that the Appellants' complaint alleged deliberate intent claims. The District Court: denied the Appellants' motion to amend the complaint to add Leonard Sacchetti as a defendant because amendment was futile; granted Consolidation Coal Company's motion to dismiss; and dismissed all claims against Consolidation Coal Company with prejudice. JA 1267-1268.

SUMMARY OF THE ARGUMENT

The Appellants are masters of their own complaint. The complaint sounds in fraudulent concealment, not wrongful death. Contrary to the District Court's ruling, the complaint does not assert claims for wrongful death against the Appellee. The fact that the "property" or the "right" which the Appellants were fraudulently denied was the value of their wrongful death actions, does not convert this fraudulent concealment case into one of wrongful death. The fraudulent actions of the Appellee's agents denied the Appellants their ability to prevail upon claims of wrongful death. While the Appellants understand that, as part of their case against the Appellee, they must prove a "case within the case," that does alter or nullify the fraudulent concealment claims alleged in the complaint. A legal malpractice case is analogous.

In a legal malpractice case, where a plaintiff alleges the lawyer filed a wrongful death case too late, the plaintiff must prove not only that the lawyer failed to file the claim within the applicable statute of limitations, but also the viability and value of the claim. The fact that the plaintiff in a legal malpractice case must prove the "case within the case," by evidence of the viability of the underlying wrongful death claim, does not convert the legal malpractice claim into a wrongful death claim.

The remedies available under the Wrongful Death Act are but an element of damages that the Appellants seek through their fraudulent concealment claims. The District Court ignored the existence of a separate cause of action under West Virginia law for fraudulent concealment. Instead, because the fraudulent concealment deprived the Appellants of their wrongful death claims, the District Court erroneously converted the Appellants' fraudulent concealment claims into wrongful death claims.

Assuming *arguendo* the complaint sounds in wrongful death, the District Court erred when finding that the tolling provision of W. Va. Code § 55-2-17 was inapplicable to the Appellants' claims. West Virginia law does not reward fraudulent conduct that deprives a party of its right to obtain remedy under the law. The Wrongful Death Act, being remedial in nature, should be liberally construed.

In granting the Appellee's motion to dismiss for failure to state a claim upon which relief could be granted, the District Court erroneously concluded that the Appellants could not state timely, plausible claims for fraudulent concealment. The

District Court's analysis rests upon a false premise that a lack of precedence requires the Appellants' fraudulent concealment claims to fail. The Appellants have asserted viable fraudulent concealment claims under the unique facts presented.

The District Court erroneously invaded the province of the jury when finding that the Appellants knew or should have known of the entity and persons responsible for rendering the mine fan alarm system inoperable before June 9, 2014. The determination of material facts is the quintessential jury question, especially where the facts of the affirmation defense do not clearly appear on the face of the complaint.

The Appellants raised viable claims against former Consolidation Coal Company electrician Leonard Sacchetti and the District Court erred when finding that amendment would be futile. As an electrician at the No. 9 Mine, Mr. Sacchetti had personal knowledge of the disabling of a life-saving alarm system because he was personally involved in that very act with a member of mine management. While one might argue he disclosed this to Larry Layne in 1970, when Larry Layne discovered that no one had followed up on his 1970 memorandum, and when he visited Mr. Sacchetti to confirm this, Mr. Sacchetti threatened the former federal mine inspector and thereafter lied under oath when confronted with his knowledge of the explosion. There were sufficient facts in the proposed amended complaint to establish that Leonard Sacchetti participated in the continuation of a fraudulent scheme to cover up the disabling of the mine fan alarm system.

The Appellants stated plausible claims against both the Appellee and Leonard Sacchetti. Judicial experience and common sense dictate that the District Court's dismissal of the Appellants' claims, and denial of the Appellants' motion to amend, be reversed.

ARGUMENT

A. The motion to dismiss standard

Review of a district court's ruling on a motion to dismiss is *de novo*. *See Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007). All well-pled facts must be assumed as true. *Trulock v. Freeh*, 275 F.3d 391, 399 (4th Cir. 2001). All reasonable inferences must be drawn in favor of the Appellants. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). "[B]ut we [the Court] need not accept the legal conclusions drawn from the facts, and we [the Court] need not accept as true unwarranted inferences, unreasonable conclusions or arguments." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008)(quotations omitted).

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a motion to dismiss must be denied where the complaint provides "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 697, 129 S. Ct. 1937, 1960 (2009) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (citation omitted). Determining whether a complaint states a plausible claim for relief requires a reviewing court to "draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (citation omitted).

B. The motion to amend standard

This Court reviews a district court's denial of a motion to amend under the abuse of discretion standard. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999). Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend its pleading at any time with leave of court. This Rule further directs that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). This Rule is based on the general policy embodied in the Federal Rules favoring the resolution of cases on their merits. *See Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987). A motion for leave to amend "should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile," as "only these truly relate to protection of the judicial system or other litigants." *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002)(emphasis omitted). An amendment to add a claim is futile where it would not survive a motion to dismiss. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995). The burden is on the

party opposing amendment to prove futility. *Edwards v. City of Goldsboro*, 178 F.3d 231, 242.

C. The District Court erred when finding that that the Appellants' claims were wrongful death claims and not fraudulent concealment claims.

The Appellants are "the master[s] of the complaint." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831, 122 S. Ct. 1889, 1894 (2002). *See Harless v. CSX Hotels, Inc.*, 389 F.3d 444, 450 (4th Cir. 2004)(citation omitted). In their complaint, the Appellants raised claims of "Fraud, Concealment and Nondisclosure" against Appellee Consolidation Coal Company. *See* JA 188. The Appellants' allegations are not mere labels or conclusions. The Appellants alleged, in part, that Consolidation Coal Company failed to "disclose, omitting and/or intentionally concealing that Alex Kovarbasich disabled the FEMCO alarm system for the Mod's Run fan at the Consol No. 9 Mine before the November 20, 1968, explosion" and concealed "and/or provid[ed] half-truths regarding the causes of the November 28, 1968, explosion." JA 188-189, ¶ 59, a, b. Such conduct was done "in order to deprive the plaintiffs their ability to investigate and seek redress for the harms and losses suffered. . . ." JA 189, ¶ 60. The Appellants have been deprived of their ability to prevail in a wrongful death action because of the Appellee's fraud, concealment and non-disclosure. *See* JA 190-191, ¶ 66.

A civil action seeking monetary damages is considered "property" under the law. Civil actions are routinely listed as either assets or liabilities in bankruptcies and divorces filed every day in this country. Civil actions, as "property," have "value." Just as a con man can, through deceit and concealment, steal money (property of value), a person or entity can, through deceit and concealment, steal a civil action (property of value) from an estate by hiding information necessary to prevail in a civil action. It should follow that just as a con man can be sued for fraud for stealing cold hard cash by deceit, a coal company can be sued for stealing a civil action by deceit.

A wrongful death action is a right of action belonging to the distributees of the deceased coal miners' estates. *See Burgess v. Gilchrist*, 123 W. Va. 727, 729, 17 S.E.2d 804, 806 (W. Va. 1941). *See also Miller v. Romero*, 186 W. Va. 523, 526, 413 S.E.2d 178, 181 (W. Va. 1991) overruled on other grounds by *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681 (W. Va. 2001)(recognizing a wrongful death action as a "legislatively created right."). Damages available under W. Va. Code § 55-6-6 (1967) are an element of damages the Appellants may recover as part of this fraudulent concealment action. *See* JA 191, ¶ 67. Consolidation Coal Company, through fraud and deceit, stripped the Appellants of their ability to prevail in a statutory wrongful death action.

The District Court found that the Appellants' claims sounded in wrongful death, not fraudulent concealment. JA 1240. As explained by the District Court,

"any fraud claim in this case is no more than a thinly veiled argument in support of the Plaintiffs' contention that the two-year limitations period regarding wrongful death actions should be tolled based upon fraudulent concealment." *Id*. The District Court's analysis fails to properly consider the factual and legal claims raised in the complaint.

The Appellants' claims are neither thin nor veiled. A basic tenant of the Rule 12(b)(6) analysis is that "when ruling on a defendant's motion to dismiss, a [trial] judge must accept as true all of the factual allegations contained in the complaint." *Anderson v. Sara Lee Corp*., 508 F.3d 181, 188 (4th Cir. 2007) quoting *Erickson v. Pardus*, 551 U.S. 89, 94, 127 S. Ct. 2197 (2007). The District Court's analysis transmutes the Appellants' factual averments when ruling that the Appellants' claims sound in wrongful death. The complaint sets forth only claims for "Fraud, Concealment and Nondisclosure." JA 188. The complaint does not allege a cause of action for wrongful death. The Appellants have been deprived their ability prevail in a wrongful death action against the persons and entity responsible for the deaths of their loved ones. JA 191, ¶ 67.

"[J]udicial experience and common sense" support the reversal of the District Court's ruling. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009)(citation omitted). This District Court was mandated to "accept as true all of the factual allegations contained in the complaint.'" *Anderson v. Sara Lee Corp*.,

508 F.3d 181, 188. When transmuting the Appellants' factual allegations, the District Court's finding went beyond its jurisprudential mandate. The District Court ignored the existence of a separate cause of action under West Virginia law for fraudulent concealment.[5] It was error to do so. The District Court's finding that the Appellants raised claims of wrongful death should be reversed.

D. Assuming *arguendo* the Appellants' claims sound in wrongful death, the District Court erred when finding that W. Va. Code § 55-2-17 does not toll the limitations period.

A defendant should not be permitted to object to being sued because of the defendant's own fraud. *See generally Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (W. Va. 1997); *Curl v. Vance*, 116 W. Va. 419, 181 S.E. 412, 416 (W. Va. 1935)(citations omitted). Even if the Appellants' claims sound in wrongful death, W. Va. Code § 55-2-17 (1923) operates to toll the limitations period.

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[5] The Appellants agree that their complaint does not directly raise a claim of common law deliberate intention. *See Mandolidis v. Elkins Industries, Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (W. Va. 1978); W. Va. Code § 23-4-2 (1968). Nevertheless, insofar as the Appellants were denied the ability to prevail on a deliberate intent claim against their employer, damages available under West Virginia's deliberate intent law are recoverable through this action. *See* JA 190-191, ¶ 66, 970-977. The District Court erred when failing to recognize that the Appellants may recover damages under West Virginia's deliberate intention scheme where the Appellee hid evidence that would have permitted them to prevail on a deliberate intent claim against their employer. JA 1255-1258. The Appellants stated viable claims for deliberate intent damages.

W. Va. Code § 55-2-17 provides, in part, as follows:

> [w]here 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*.

Emphasis added. Hence, under the statutory scheme, where an entity or person by "indirect ways or means" obstructs the right of prosecution of a civil action, the limitations period is tolled by virtue of such obstruction. *Id*.

The prism through which W. Va. Code § 55-2-17 and W. Va. Code § 55-7-6 (1967) must be viewed is one of liberal construction. West Virginia's Wrongful Death Act, being remedial in nature, must be liberally construed. *See City of Wheeling ex rel. Carter v. American Casualty Co*., 131 W. Va. 584, 590, 48 S.E.2d 404, 408 (W. Va. 1948)("The statute, being remedial, should be liberally construed."); *Wilder v. Charleston Transit Co*., 120 W. Va. 319, 322, 197 S.E. 814, 816 (W. Va. 1938)("The policy of the statute is remedial and not punitive."); *Richards v. Riverside Iron Works*, 56 W. Va. 510, 515, 49 S.E. 437, 438 (W. Va. 1904)("The statute is remedial, and should be construed liberally for the purpose of carrying out the legislative intent.").

"[S]tatutes which are not inconsistent with one another, and which relate to the same subject matter, are *in pari materia*." *State ex rel. Slatton v. Boles*, 147 W. Va. 674, 682, 130 S.E.2d 192, 198 (W. Va. 1963). No West Virginia case has addressed W. Va. Code § 55-2-17 within the context of the applicable West Virginia Wrongful Death Act. West Virginia Code § 55-7-6 provides that "every [wrongful death] action shall be commenced within two years after the death of such deceased person." Accordingly, recognizing the liberal construction of West Virginia Wrongful Death Act, where an entity or person by "indirect ways or means" obstructs the prosecution of a wrongful death action, the limitations period is tolled under W. Va. Code § 55-2-17.

When finding that W. Va. Code § 55-2-17 did not toll the running of the limitations period, the District Court held that "[n]one of the case law preceding *Huggins* [*Huggins v. Hospital Board of Monongalia County*, 270 S.E.2d 160, 165 W. Va. 557 (W. Va. 1980)] recognized any statutory tolling provisions applicable to the wrongful death statute." JA 1248. The District Court's reliance upon *Huggins*, 270 S.E.2d 160, 165 W. Va. 557, is misplaced.

In *Huggins*, 270 S.E.2d 160, 165 W. Va. 557, counsel for the plaintiff failed to issue summons within two years of the date of the decedent's death. In affirming the trial court's granting of the defendants' motions to dismiss, the *Huggins* Court held 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." *Huggins v. Hosp. Bd.*, 165 W. Va. 557, 560, 270 S.E.2d 160, 162.

Absent from the *Huggins* Court's analysis is any mention of the interplay between W. Va. Code § 55-2-17 and the Wrongful Death Act. The mere fact that the plaintiff's counsel in *Huggins* failed to raise the argument, and ergo the *Huggins* Court failed to address it, does not sound the death knell to the Appellants' claims. *Huggins* is not dispositive of the issue because it did not address the issue. The District Court's finding that the *Huggins* case is dispositive of an issue the *Huggins* court did not address strays from logic and is erroneous.

The District Court, in rejecting the Appellants' argument, additionally relied upon the cases of *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50 (W. Va. 1973) and *Smith v. Eureka Pipe Line Co.*, 122 W. Va. 277, 8 S.E.2d 890 (W. Va. 1940).[6] As the District Court recognized, *Rosier* and *Smith* concerned application of the savings statute, W. Va. Code § 55-2-18, to the Wrongful Death Act. JA 1248-1249. Generally, the savings statute is a universal rule that permits the re-filing of

[6] Both *Rosier* and *Smith* were overruled, in part, by the 2001 case of *Bradshaw v. Soulsby*, 210 W. Va. 682, 558 S.E.2d 681.

an action "if the initial pleading was timely filed and (i) the action was involuntarily dismissed for any reason not based upon the merits of the action or (ii) the judgment was reversed on a ground which does not preclude a filing of new action for the same cause." W. Va. Code § 55-2-18(a). The saving statute directly applies to statutes of limitations.

Unlike the saving statute, the tolling statute applies to more than just statutes of limitations. Indeed, the plain language of W. Va. Code § 55-2-17 provides that "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." The Appellants were unable to commence their actions "within two years after the death of such deceased person" because of the Appellee's obstruction of the fair prosecution of their rights. W. Va. Code § 55-7-6.

Rosier v. Garron, Inc., 156 W. Va. 861, 199 S.E.2d 50, and *Smith v. Eureka Pipe Line Co.*, 122 W. Va. 277, 8 S.E.2d 890, are silent as to the application of W. Va. Code § 55-2-17 where a defendant, through fraud, obstructs a plaintiff's ability to prosecute his or her claim. W. Va. Code § 55-2-17 applies where fraudulent concealment operates to deny a plaintiff his or her fair day in court. Insofar as the District Court found that W. Va. Code § 55-2-17 was inapplicable to the Appellants' claims, and recognizing the remedial nature of West Virginia's Wrongful Death Act, the District Court's decision should be reversed.

E. The District Court erred when finding that the Appellants failed to raise viable claims of fraudulent concealment where the Appellee hid who rendered the mine fan alarm system inoperable.

The Appellee's fraudulent conduct was so reprobate that no reported West Virginia case has ever examined an identical factual scenario. The fallacy of the District Court's analysis is that the mere fact that this factual scenario has never been presented does not, standing alone, deny a plaintiff his or her cause of action. "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." *Trafalgar House Constr. v. Zmm, Inc.*, 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (W. Va. 2002). As recognized in *Kessel v. Leavitt*, 204 W. Va. 95, 128, 511 S.E.2d 720, 753 (W. Va. 1998):

> fraudulent concealment may arise when the defendant successfully prevents the plaintiff from making an investigation that he would otherwise have made, and which, if made, would have disclosed the facts; or *when the defendant frustrates an investigation*. . . . Even a false denial of knowledge or information by one party to a transaction, who is in possession of the facts, may subject him to liability as fully as if he had expressly misstated the facts, if its effect upon the plaintiff is to lead him to believe that the facts do not exist or cannot be discovered.

(Emphasis added).[7] Fraudulent concealment requires "some action affirmative in nature designed or intended to prevent, and which does prevent, the discovery of facts giving rise to the fraud claim, some artifice to prevent knowledge of the facts

[7] Quoting Restatement (Second) of Torts § 550, Comment b (1976).

or some representation intended to exclude suspicion and prevent inquiry." *Kessel v. Leavitt*, 204 W. Va. 95, 128, 511 S.E.2d 720, 753.

When examining the *Kessel* elements of a fraudulent concealment claim under West Virginia law, and comparing that to the allegations in the Appellants' complaint, the reader is left to struggle with the District Court's conclusion that the Appellants failed to set forth plausible claims for fraudulent concealment.

Insofar as fraudulent concealment requires a duty to disclose, where a special relationship exists between parties, a duty to disclose will be found. *See generally Glascock v. City Nat'l Bank*, 213 W. Va. 61, 62, 576 S.E.2d 540, 541 (W. Va. 2002); *White v. AAMG Constr. Lending Ctr.*, 226 W. Va. 339, 340, 700 S.E.2d 791, 792 (W. Va. 2010); *Kidd v. Mull*, 215 W. Va. 151, 160, 595 S.E.2d 308, 317 (W. Va. 2004). Moreover, a duty to disclose may arise "when one party makes a partial and fragmentary statement of fact." *Brush Engineered Materials, Inc.*, 383 F. Supp. 2d 814, 820 (D. Md. 2005)(citations omitted).

As recognized by the District Court, in *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720, the defendants, through misinformation and omissions, hid the post-birth whereabouts of a father's child. The defendants' conduct denied the plaintiff-father his right to establish and maintain a parental relationship with the child. *Id.*, 204 W. Va. 95, 125, 511 S.E.2d 720, 750. The *Kessel* Court recognized that "one who does anything, or permits anything to be done, without just cause or excuse, the

necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights, is absolutely liable." *Id*., 204 W. Va. 95, 127, 511 S.E.2d 720, 752. The *Kessel* Court held that the plaintiff-father stated a viable claim for fraudulent concealment. *Id*., 204 W. Va. 95, 131, 511 S.E.2d 720, 756.

Kessel v. Leavitt is analogous to the instant action. The Appellants' complaint[8] alleges that:

> In recognition of the decedents' reliance upon defendants to provide safe, breathable air while in the Consol No. 9 Mine, there existed a fiduciary relationship and a special relationship between the decedents and the defendants.

JA 188, ¶ 56, in part.

> Defendants deliberately and intentionally misrepresented, omitted, concealed and/or failed to disclose material facts to the plaintiffs and regulatory mining agencies. Such misrepresentations, omissions, and concealments of facts include, but are not limited to:
>
> a. Failing to disclose, omitting, and/or intentionally concealing that Alex Kovarbasich disabled the FEMCO alarm system for the Mod's Run fan at the Consol No. 9 Mine before the November 20, 1968, explosion; and
> b. Concealing and/or providing half-truths regarding the causes of the November 29, 1968, explosion.

Id. at ¶ 59.

[8] When considering a motion under Rule 12(b)(6), all well-pled facts must be assumed as true and all reasonable inferences must be drawn in favor of the plaintiffs. *Trulock v. Freeh*, 275 F.3d 391, 399 (4th Cir. 2001); *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

> Defendants intentionally concealed facts known to them, misrepresented, omitted and failed to disclose material facts, as alleged herein, in order to deprive the plaintiffs of their ability to investigate and seek redress for the harms and losses suffered as a result of the defendants' conduct and to increase profits so as to avoid justly compensating plaintiffs for their harms and losses incurred as a result of the defendants' conduct.

JA 189, ¶ 60.

> From November 20, 1968, to June 9, 2014, defendant, by their misrepresentations, omissions, concealments, and nondisclosures of material facts, prevented the plaintiffs from making an investigation and pursuing legal recourse he [*sic*] would have otherwise made but for defendants' misrepresentations, omissions, concealments, and nondisclosures of the person responsible for disabling the FEMCO alarm system on the Mod's Run fan prior to November 20, 1968.

Id. at ¶ 61.

> Defendants had a duty to disclose their disablement of the FEMCO alarm system and failed to do so. Moreover, defendants knew that their statements were half-truths, knew of the harms and losses sustained by the families of the victims and knew that their omissions rendered their statements false or misleading.

Id. at ¶ 62. Like the *Kessel* defendants, Consolidation Coal Company concealed critical facts from the Appellants; had a duty to disclose such facts; and intentionally misled the Appellants. The Appellants, like the *Kessel* plaintiff, were denied "the enjoyment of his [their] legal rights" by virtue of being denied their right to a fair day in court where the full merits of their claims are considered. *Kessel v. Leavitt*, 204 W. Va. 95, 127, 511 S.E.2d 720, 752. ***See* W. Va. Const. Art. III, § 17 (stating "[t]he courts of this State shall be open, and every person, for an injury done to**

him, in his person, property or reputation, shall have remedy to due course of law . . . .”); W. Va. Const. Art. III, § 1 (recognizing the inherent rights of “the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.”).

Finding that the Appellants failed to state claims of fraudulent concealment, the District Court adopted the Magistrate Judge’s recommendation that the Appellants have not pled a cause of action for fraudulent concealment. JA 1258-1262. The District Court failed to analyze whether the Appellants’ claims against Consolidation Coal Company were “plausible on its [their] face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 697, 129 S. Ct. 1937, 1960. When considering the specific factual allegations contained within the complaint, the Appellants state plausible claims under the unique facts presented. Appellee hid the critical fact of who was responsible for rendering the mine fan alarm inoperable and made fragmented statements of fact. During years of investigation, it never fully disclosed its conduct. After nearly forty-six years, the responsible persons and entity were finally found out. “[A] lack of precedent--standing alone--is an insufficient reason to deny a cause of action." *Kessel v. Leavitt*, 204 W. Va. 95, 130, 511 S.E.2d 720, 755, quoting *Farley v. Sartin*, 195 W. Va. 671, 682, 466 S.E.2d 522, 533 (W. Va. 1995). The Appellants stated plausible claims of fraudulent concealment. The clear language of their complaint leaves no other rational conclusion. The District Court simply

ignored the guidance of *Kessel* on the allegations necessary to plead a claim for fraudulent concealment under West Virginia law. The District Court's decision should be reversed.

F. The District Court erred when finding the Appellants' fraudulent concealment claims were time barred because material issues of fact exist as to the application of the discovery rule and all facts did not clearly appear on the face of the complaint.

The statute of limitations for a fraudulent concealment claim is two years. *See* W. Va. Code § 55-2-12 (2016). *See* JA 1262. Under *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (W. Va. 2009), when analyzing the statute of limitations issue, a Court must identify the applicable statute of limitations and thereafter, "the court (or, if questions of material fact exist, the jury) should identify when the elements of the cause of action occurred." Then, consideration should be given to the discovery rule as well as the fraudulent concealment tolling doctrine. *Id*., at Syl. Pt. 4.

For years, the Appellants were kept in the dark as to who rendered the mine fan alarm system inoperable before the explosion. This did not forestall their attempts to obtain justice. After the explosion, two civil actions were filed regarding the Consol No. 9 Mine explosion: *Kaznoski v. Consolidation Coal Company et al.*, 368 F. Supp. 1022 (W.D. Pa. 1974); and a 1970 action filed in the *Marion County Circuit Court* (*Kaznoski et al. v. Consolidation Coal Company, et al*., Marion

County Civil Action No. 4405). *See* JA 766.[9] In the *Kaznoski* companion cases, the fact that Consolidation Coal Company rendered the mine fan alarm system inoperable was never disclosed. But for Consolidation Coal Company's fraudulent concealment, the plaintiffs would have prevailed in the *Kaznoski* actions. It is the Appellee's fraud and deceit that deprived the Appellants of their ability to prevail on the merits of the *Kaznoski* actions.[10]

On November 20, 1968, at least two different entities were involved in the operation of the Consol No. 9 mine: Consolidation Coal Company and Mountaineer Coal Company. JA 176-177, ¶ 8. On June 9, 2014, for the very first time, Leonard Sacchetti told certain widows that Appellee's chief electrician, Alex Kovarbasich, rendered the mine alarm inoperable before the explosion. JA 183, ¶ 40, 419, 544.

A few years earlier, in 2008, the Appellants became aware of a September 15, 1970, memo where an *unnamed* electrician reported to a federal coal mine inspector that the mine fan alarm system was rendered inoperable. *See* JA 182, ¶ 37, 434. **In 2009, the Appellants located what is believed to be a mine fan recording chart for the Mod's Run fan that was taken from the mine fan box immediately after**

[9] The *Kaznoski* actions generally concerned the constitutionality of West Virginia's workers' compensation scheme.

[10] A third action, styled *Currence, et al. v. Consolidation Coal Co., et al.*, Civil Action No. 78-0044-C(H)(N.D.W. Va. 1978), primarily concerned the conduct of the Appellee during the recovery efforts. *See* JA 770. The *Currence* plaintiffs filed at least two motions for sanctions due to the Consolidation Coal Company's refusal to produce discovery. *See* JA 171-173.

the explosion and before mine investigators arrived. JA 182-183, ¶ 38. The mine fan chart was altered. ***Id.*** The discoveries in 2008 and 2009 were not enough to establish the critical element of who rendered the mine fan alarm system inoperable. These facts were unknown to the Appellants until June 9, 2014. *See* JA 183, ¶ 40, 419, 544.

The District Court found that the Appellants knew or should have known of their cause of action "no later than 2008." JA 1264. Further, the District Court found that "[t]he 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 [Consolidation Coal Company] had not disclosed that the FEMCO alarm system had been bypassed." JA 1265. That conclusion was simply wrong because it ignored the necessity under West Virginia law that the person who disabled the alarm be a member of mine management or acting under the direct control of mine management. Knowing that the alarm was disarmed was not enough. The Appellants had to know whether a member of mine management, such as chief electrician Alex Kovarbasich, was involved. Only then could the Appellants properly allege: (1) fraudulent concealment; and (2) damages resulting from the concealment of viable underlying claims. The District Court missed this important prong of the analysis. Had the Appellants, as envisioned by the District Court's reasoning, brought a fraudulent concealment case against Appellee shortly

after 2008 alleging actions by "unnamed" individuals who may not have been a management-level agents, and, given the heightened pleading standard for fraud under Rule 9, the complaint would have ran seriously close to, if not afoul of, Rule 11(b).

The District Court's decision invaded the province of the jury because material issues of fact exist. "[U]nder the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." *Dunn v. Rockwell*, 225 W. Va. 43, 52-53, 689 S.E.2d 255, 264-65, quoting Syl. Pt. 4, *Gaither v. City Hosp., Inc*., 199 W. Va. 706, 487 S.E.2d 901 (W. Va. 1997). The Appellants did not know what entity or persons rendered the mine fan alarm system inoperable until June 9, 2014. It was not until this date that the Appellants uncovered who was responsible for the deaths of their loved ones. Insofar as the Court held otherwise, its decision should be reversed.

Reversal is further supported by revelations learned after the action was filed. "[A] motion to dismiss filed under Federal Rule of Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred. But in the

relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). Importantly, the statute of limitations affirmative defense may be considered under Rule 12(b)(6) only "if all facts necessary to the affirmative defense clearly appear on the face of the complaint." *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)(citation and internal quotations omitted).

After the action was filed, former federal mine inspector Larry Layne disclosed: that Leonard Sacchetti was the unnamed electrician who asked that his name be withheld from the September 15, 1970, memorandum; that Mr. Sacchetti told Mr. Layne that he helped render the mine fan alarm system inoperable at the direction of Consolidation Coal Company; that in 2010, Mr. Sacchetti threatened Mr. Layne in an attempt to prevent him from talking about the explosion; and that prior to April 3, 2015, Mr. Layne never disclosed Mr. Sacchetti's involvement in the rendering the fan alarm system inoperable. JA 689. As discussed in Section G *infra*, to this day, Mr. Sacchetti continues to conceal his involvement in rendering the fan alarm system inoperable. Whether the Appellants acted with reasonable diligence is a factual issue for the jury, not the District Court. *See Johns Hopkins University v. Hutton*, 488 F.2d 912, 918 (4th Cir. 1973); *Bell ex rel. Bell v. Board of Educ. of County of Fayette*, 290 F. Supp. 2d 701, 710 (S.D.W. Va. 2003). Even then, all facts related to the statute of

limitations affirmative defense did not "clearly appear on the face of the complaint" and the District Court's finding that the Appellants' claims were untimely was improper. *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250.

The District Court's statute of limitations analysis is inconsistent with the heightened pleading requirement for fraudulent concealment. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b), in part.[11] A plaintiff is required to "at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *U.S. ex rel. Wilson v. Kellogg, Brown & Root, Inc*., 525 F.3d 370, 379 (4th Cir. 2008) quoting *Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776, 784 (4th Cir. 1999)(internal quotation marks omitted). The identity of the persons and entity that rendered the alarm fan system inoperable is a requisite, critical element to the Appellants' fraudulent concealment claims. Furthermore, to have a viable claim (or property) which could be stolen through deceit, the Appellants had to know whether the person or persons disabling the fan alarm were mine management employees or working at the direction of mine management. Not until the discovery that the

[11] "One of the purposes of the particularity and specificity required under Rule 9(b) is to force the plaintiff to do more than the usual investigation before filing his complaint." *Camasta v. Jos. A. Bank Clothiers, Inc*., 761 F.3d 732, 737 (7th Cir. 2014)(internal citations and quotations omitted).

person disabling the fan alarm system was management could the Appellants state viable claims of fraudulent concealment. A contrary finding invites conjecture and speculation as to the facts that were concealed from the Appellants.

"[W]here the 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009)(internal citation omitted). Under the District Court's statute of limitations analysis, the Appellants could never assert viable claims of fraudulent concealment because if the action was filed without the critical element of "who," the mere possibility of misconduct requires the complaint be dismissed under *Ashcroft v. Iqbal*. *Id.* Conceivability does not equate to plausibility under Rule 12(b)(6). *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 129 S. Ct. 1937, 1951. "[J]udicial experience and common sense" dictate that the District Court's decision be reversed. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950.

The District Court committed error when it failed to recognize that the Appellants must show that the person or persons who disabled the fan alarm system were management or directed by management. The statute of limitations did not begin to run until this information was known to the Appellants or should have been known by the Appellants. The District Court then compounded its error on this issue by invading the province of the jury and determining issues of material fact. *See*

Dunn v. Rockwell, 225 W. Va. 43, 689 S.E.2d 255. Further, the District Court's consideration of the affirmative defense under Rule 12(b)(6) was improper because all necessary facts did not clearly appear on the face of the complaint. The District Court's ruling is inconsistent with the Rule 12(b)(6) standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, and should be reversed.

G. The District Court erred when finding that the Appellants' motion to amend was futile because Mr. Sacchetti confessed he was directly involved in illegal acts which contributed to the deaths of 78 coal miners.

Leonard Sacchetti rendered the mine fan alarm inoperable before the explosion. Then, he asked a federal mine inspector not to disclose his name. Years later, when visited by the former mine inspector, Mr. Sacchetti threatened him. Then, in furtherance of a fraud, Mr. Sacchetti denied under oath even working at the Consol No. 9 Mine during the time period in question. "Fraud is the concealment of truth just as much as it is the utterance of a falsehood." *Frazer v. Brewer*, 310 52 W. Va. 306, 43 S.E. 110, 111 (W. Va. 1902). The Appellants' proposed amendment was not "clearly insufficient or frivolous on its face." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510-511 (4th Cir. 1986).

Leonard Sacchetti participated in rendering the mine fan alarm inoperable before the explosion. JA 688-689. He asked federal mine inspector Larry Layne to withhold his name. JA 689, ¶ 7. After his confession to Mr. Layne, Mr. Sacchetti

remained silent about his knowledge of the disabling of mine fan alarm system and his involvement.

Prior to June 9, 2014, family members of deceased miners visited Mr. Sacchetti and asked about his knowledge of the explosion. He never disclosed his knowledge. Then, on June 9, 2014, certain widows visited Mr. Sacchetti. JA 419, 544. For the first time, Mr. Sacchetti disclosed to the widows that Appellee's chief electrician, Alex Kovarbasich, rendered the fan alarm system inoperable before the explosion. *Id*. After nearly forty-six years, the families learned who was, in part, responsible for the deaths of their loved ones.

After filing this action, and upon being deposed,[12] Mr. Sacchetti, contrary to Appellee's own employment documents, denied working at the Consol No. 9 Mine during the time period in question and denied knowing Mr. Layne. JA 553. The Appellants continued to investigate their claims and Mr. Sacchetti's involvement.

On April 3, 2015, the truth found Mr. Sacchetti out. On April 3, 2015, former federal inspector Larry Layne, for the very first time, disclosed that Mr. Sacchetti told him on September 5, 1970, that Mr. Sacchetti and Alex Kovarbasich disconnected the mine fan alarm system before the explosion. JA 689, ¶ 9. Even then, Mr. Layne disclosed that in 2010 Mr. Layne went to speak with Mr. Sacchetti

[12] Upon being served, Mr. Sacchetti threw the subpoena and related papers in the trash and they were ran over by cars. JA 554.

about the explosion. Mr. Sacchetti asked Mr. Layne to leave and come back after lunch. *Id*. at ¶ 10. Upon returning after lunch, Mr. Sacchetti threatened Mr. Layne to prevent him from talking or asking questions about the mine explosion. *Id*. Upon learning this information, the Appellants moved to amend their complaint to add a claim against Leonard Sacchetti. JA 549.

When considering the facts in a light most favorable to the Appellants, the District Court's ruling was erroneous because the Appellants stated plausible claims against Mr. Sacchetti. "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." *Trafalgar House Constr. v. ZMM, Inc*., 211 W. Va. 578, 584, 567 S.E.2d 294, 300 (W. Va. 2002) citing *Silva v. Stevens*, 156 Vt. 94, 589 A.2d 852, 857 (VT 1991).

Rule 9(b) does not require a party to allege intent with particularity. Nevertheless, in adopting the Magistrate Judge's recommendation, the District Court found that the Appellants failed to state plausible claims with regard to whether Mr. Sacchetti possessed the intent to mislead or defraud. JA 1266-1267, 969. Upon confessing his involvement in rendering the mine fan alarm system inoperable to a federal mine inspector, Mr. Sacchetti asked that his name be withheld. Years later, Mr. Sacchetti threatened the same federal mine inspector who knew about his involvement. JA 689, ¶ 10. Then, upon being deposed, Mr. Sacchetti lied under

oath about his knowledge. There exists a strong inference of fraudulent intent. The District Court's adoption of the Magistrate Judge's finding that Mr. Sacchetti did not possess intent to mislead or defraud was erroneous because the Appellants' proposed amended complaint states plausible claims against Mr. Sacchetti. JA 691.

In addition to finding Mr. Sacchetti did not possess the intent to mislead or defraud, the District Court likewise found that Mr. Sacchetti did not have a duty to disclose. JA 1266. "[A] duty to disclose can arise either when one party is in a fiduciary or confidential relationship with the other," or "when one party makes a partial and fragmentary statement of fact." *Brush Engineered Materials, Inc.*, 383 F. Supp. 2d 814, 820 (D. Md. 2005)(citations omitted).

Contrary to the District Court's analysis, as an electrician at the Consol No. 9 Mine, a special, fiduciary relationship existed between Mr. Sacchetti and the Appellants. Miners underground relied on Mr. Sacchetti, as an electrician working on the operation of the mine fan system, to provide safe, clean air to ventilate the mine. *See* JA 694, ¶ 15, 705, ¶ 59. If the fans did not operate, the miners relied upon Mr. Sacchetti to ensure the mine fan alarm would sound to allow the miners to get out of the mine. Miners put their lives in his hands and relied upon Mr. Sacchetti not to blow the mine up and kill them. The proposed amendment to add Mr. Sacchetti as a defendant was not futile because Mr. Sacchetti had a duty to disclose based upon the special, fiduciary relationship that existed between Mr. Sacchetti and

the miners. Even then, fragmented statements of fact are alone sufficient to create a duty to disclose. *Brush Engineered Materials, Inc.*, 383 F. Supp. 2d 814, 820. Insofar as the District Court held otherwise, its decision should be reversed.

Finally, the District Court adopted the Magistrate Judge's ruling that the proposed amendment to add Mr. Sacchetti as a defendant: was a claim for wrongful death; was not legally viable; and was untimely. Insofar as these arguments overlap with the arguments above, the Appellants hereby incorporate by reference the above Sections C, E and F *supra*. Further, assuming *arguendo* the Appellants claims sound in wrongful death, the claims are timely under W. Va. Code § 55-2-17. The Appellants hereby incorporate by reference Section D *supra*.

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). The Appellants stated plausible claims of relief as to Mr. Sacchetti and the District Court erred when finding that amendment to add Mr. Sacchetti as a defendant was futile and refusing to remand this action to state court for lack of complete diversity.

CONCLUSION

Appellants respectfully request this Honorable Court to reverse and vacate the District Court's grant of Appellee's motion to dismiss, and subsequent dismissal of this action, and remand this action to the District Court with directions that leave be granted to amend and that this action be remanded to West Virginia state court.

STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument in this case. This appeal raises important issues regarding a plaintiff's ability to recover for fraudulent concealment where a defendant hides critical facts of a plaintiff's underlying cause of action. This case implicates a citizen's ability to obtain justice within the context of on-going fraud.

This 21st day of July, 2017.

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I hereby certify that on July 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.

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