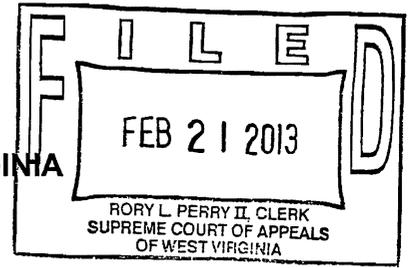


13-0159

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
Elkins



**KIMBERLY LANDIS** and **ALVA NELSON**,  
individually and as parents and guardians  
of A.N., a minor,

Plaintiffs,

v.

**Civil Action No: 2:11-CV-101**  
Judge Bailey

**HEARTHMARK, LLC** d/b/a Jarden Home  
Brands, **WAL-MART STORES, INC.**,  
**C.K.S. PACKAGING, INC.**, **PACKAGING**  
**SERVICE COMPANY, INC.**, and **STULL**  
**TECHNOLOGIES, INC.**,

Defendants.

**ORDER OF CERTIFICATION TO  
THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

This Court respectfully requests that the Supreme Court of Appeals of West Virginia exercise jurisdiction pursuant to W.Va. Code §§ 51-1A-1 to 51-1A-13, and answer the questions of law set forth below. The questions are critical to the disposition of the above-captioned case pending in this Court, and it appears that there is no controlling decision by the Supreme Court of Appeals of West Virginia which permits this Court to accurately and reliably predict how these questions of law would be decided under West Virginia law.

**Factual and Procedural Background**

On November 30, 2011, Kimberly Landis and Alva Nelson (the "Parents") filed a Complaint against Hearthmark L.L.C. ("Hearthmark"), Packaging Services Company, Inc. ("PSC"), Wal-Mart Stores, Inc. ("Wal-Mart"), C.K.S. Packaging, Inc. ("CKS") and Stull

Technologies, Inc. ("Stull"), seeking to recover compensatory and punitive damages for the injuries their son, A.N., sustained in an apparent vapor fire occurring on February 28, 2010. The fire occurred in the Parents' home in Harman, Randolph County, West Virginia.

The Parents have asserted claims of negligence, strict products liability, and breach of warranty against the defendants seeking damages for injuries sustained by their son, A.N., a minor, when a combustible gel product named "Diamond® Natural Fire Starter Gel" exploded upon him while he was attempting to start or rekindle a fire using the product.

The plaintiffs allege that on February 28, 2010, A.N., then seven years old, was severely injured while attempting to start a fire in a fireplace located in the downstairs family room of their home so that he could roast marshmallows. Believing that a fire that had been burning in the fireplace all day had died out, A.N. allegedly applied Diamond® Fire Starter Gel to kindling wood he had stacked in the fireplace. As he applied the gel, it supposedly contacted a hot ember from the previous fire, allegedly causing a flame to "flashback" up the stream, enter the bottle and cause it to explode. The gel allegedly sprayed A.N., causing him severe burns.

PSC blended and packaged the Fire Starter Gel and Hearthmark marketed that product under its Diamond brand for use in wood and wood pellet stoves. CKS manufactured the bottle for this product and Stull produced its child resistant cap. Ms. Landis claims to have purchased the bottle of Fire Starter Gel that A.N. was allegedly using when he was injured from a local Walmart store.

Each of the defendants denied the material allegations of the Complaint and asserted defenses based upon the Parents' reckless conduct. Hearthmark, Wal-Mart and CKS alleged that the Fire Starter Gel product was intentionally misused in an

unforeseeable manner and separately asserted product misuse defenses. They also alleged that the Parents' reckless conduct was a superseding intervening cause of A.N.'s injuries. Stull alleged that the "negligence of the parents of A.N. in failing to properly supervise A.N. and/or permitting him to use the product described in the Complaint without supervision proximately caused or contributed to the injuries and damages of which the plaintiffs complain." PSC later amended its Answer to add more specific affirmative defenses and to assert a Counterclaim against the Parents.<sup>1</sup>

Plaintiffs filed a Motion to Strike Stull's Tenth Defense on the grounds of parental immunity. While specifically directed to Stull's Answer, in their Supporting Memorandum of Law, plaintiffs sought to preclude any defendant from "arguing that the negligence of A.N.'s parents caused or contributed to their child's injuries." Plaintiffs argued that the parental immunity doctrine's bar of a child's claims against his parents extends to preclude "defendant[s] from asserting the comparative negligence of a parent as a derivative defense to the injury of the child." Plaintiffs thereafter moved for judgment on the pleadings as to Hearthmark's and Wal-Mart's Counterclaims, arguing that the contribution claims are barred by the parental immunity because they were derivative of A.N.'s rights against the Parents. In support of these Motions, plaintiffs maintained that defendants' rights of contribution were derivative of A.N.'s rights against his parents and, accordingly, are barred by the parental immunity doctrine.

Defendants responded that the parental immunity doctrine does not affect their rights of contribution or ability to introduce evidence of the Parents' deliberate disregard of

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<sup>1</sup> On October 15, 2012, this Court entered an Order that defendants' counterclaims against Kimberly Landis and Alva Nelson shall be considered third party complaints.

product warnings and failure to supervise A.N. to rebut plaintiffs' product defect claims and in support of product misuse and supervening intervening cause defenses. Defendants disputed that their contribution claims were derivative of A.N.'s rights against the Parents, arguing that those rights are vested in defendants held jointly and severally liable to avoid the unfair result of one defendant being required to pay a share of the plaintiff's damages greater than their percentage of fault allocated to them. Relying upon a series of Supreme Court of Appeals of West Virginia decisions creating exceptions to the parental immunity doctrine, defendants argued that your Court would certainly not extend this doctrine to contribution claims or to limit product liability defenses and, if presented with the issue, would likely abolish this immunity.

In this Court's Order Denying Without Prejudice Plaintiffs' Motion to Strike the Tenth Affirmative Defense of Stull Technologies, Inc., Plaintiffs' Motion to Dismiss Defendant C.K.S. Packaging's Counterclaim Against Kimberly Landis and Alva Nelson, Plaintiffs' Motion to Dismiss Defendant Hearthmark, LLC's Counterclaim Against Kimberly Landis and Alva Nelson, and Plaintiffs' Motion to Dismiss Defendant Wal-Mart Stores, Inc.'s Counterclaim Against Kimberly Landis and Alva Nelson and Denying Defendant Hearthmark, LLC's Motion for Partial Judgment on the Pleadings, entered July 13, 2012, this Court discussed the status of the law in West Virginia and other states. For the convenience of your Court, that discussion follows.

**1. Parental Immunity**

**West Virginia Cases**

"The doctrine of parental immunity, as currently known, was introduced into

American jurisprudence by the Mississippi Supreme Court in *Hewlett v. George*, 68 Miss. 703, 9 So. 885 in 1891, and rapidly spread throughout the various jurisdictions of our country. The basis for that doctrine was the preservation of domestic or family tranquillity and was expressed by that court in the following language:

The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.

“In recent years the application of this doctrine has begun to recede as rapidly as it had once spread. There has been a definite trend throughout our courts toward the abrogation or limitation of such doctrine. Many jurisdictions have carved out exceptions to the doctrine which indicates a ‘growing judicial distaste for a rule of law which in one sweep disqualified an entire class of injured minors.’ *Gibson v. Gibson*, 3 Cal.2d 914, 92 Cal.Rptr. 288, 479 P.2d 648, 650 (1971). We perceive no reason why minor children should not enjoy the same right to legal redress for wrongs done to them as others enjoy. Certainly the need for and value of family tranquillity must not be discounted, but to hold that a child's ‘pains must be endured for the peace and welfare of the family is something of a mockery’. *Badigian v. Badigian*, 9 N.Y.2d 472, 482, 215 N.Y.S.2d 35, 43, 174 N.E.2d 718, 724 (1961) (Fuld, J., dissenting).” *Lee v. Comer*, 159 W.Va. 585, 588-89, 224 S.E.2d

721, 722-23 (1976).

West Virginia appears to have first adopted the doctrine in **Securo v. Securo**, 110 W.Va. 1, 156 S.E. 750 (1931). The very next year, the West Virginia Supreme Court noted an exception to the rule where a pupil was injured on a school bus operated by her father under contract with the board of education, noting that the father was protected by indemnity insurance. **Lusk v. Lusk**, 113 W.Va. 17, 166 S.E. 538 (1932).

In 1968, the West Virginia Supreme Court reaffirmed its support for the parental immunity rule, noting that “the cases that adhere to the parental immunity rule constitute the weight of authority.” **Groves v. Groves**, 152 W.Va. 1, 8, 158 S.E.2d 710, 714 (1968).

That same year, the Court determined that parental immunity did not extend to the relationship of father-in-law and daughter-in-law, noting that “[t]he general rule is that one is liable for his tortious act, immunity from such liability being the exception.” **Freeland v. Freeland**, 152 W.Va. 332, 339, 162 S.E.2d 922, 927 (1968).

In **Lee v. Comer**, 159 W.Va. 585, 224 S.E.2d 721 (1976), the Supreme Court held that “1. Unemancipated minors enjoy the same right to protection and to legal redress for wrongs done them as others enjoy” and “2. An unemancipated minor may maintain an action against his parent for personal injuries sustained in a motor vehicle accident caused by the negligence of said parent and to that extent the parental immunity doctrine is abrogated in this jurisdiction.” Syl. Pts. 1 & 2, **Comer**.

In so ruling, the Court stated “[p]rior to **Hewlett**, *supra*, and presently, English and American common law had permitted and now permits a minor child to maintain an action against his parent for matters of contract and property. **Sorensen v. Sorensen**, Mass.,

339 N.E.2d 907 (1975). Recognizing that such right of action by a minor child has long existed, it is stated in Prosser, Torts, § 122 (4th ed. 1971), 'Although there were no old decisions, the speculation on the matter has been that there is no good reason to think that the English law would not permit actions for personal torts as well . . . .' See *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905, 71 A.L.R. 1055 (1930). Experience reveals that some of the most bitter family disputes arise over property, but parental immunity does not in such a case limit the cause of action. 'Is it reasonable to say that our law should protect the property and contract rights of a minor more zealously than the rights of his person?' This question, posed by the Arizona Supreme Court in *Streenz v. Streenz*, 106 Ariz. 86, 471 P.2d 282, 41 A.L.R.3d 891 (1970), was emphatically answered in the negative. We concur in that answer.

"Family tranquillity which serves as the basis for the public policy on which parental immunity is founded is not a proper justification to deprive a minor child of the rights alluded to above. We do not here advocate the total abrogation of the parental immunity doctrine. We do, however, abrogate totally that doctrine in cases where a child is injured in an automobile accident as a result of his parent's negligence.

"The rights of such minor child must be considered in light of today's contemporary conditions and modern concepts of fairness. In the realm of automobile accident cases we cannot brush aside or ignore the almost universal existence of liability insurance. Where liability insurance exists the domestic tranquillity argument is no longer valid, for, in fact, the real defendant is not the parent, but the insurance carrier. *Chase v. Greyhound Lines, Inc.*, W.Va., 195 S.E.2d 810 (1973) (Concurring opinion). We quote with approval from

**Hebel v. Hebel**, (Alaska) 435 P.2d 8 (1967); "We are of the further view that although the existence of liability insurance does not create liability its presence is of considerable significance here. To persist in adherence to family-harmony and parental-discipline-and-control arguments when there is automobile liability insurance involved is in our view unrealistic. If there is insurance there is small possibility that parental discipline will be undermined, or that the peace of the family will be shattered by allowance of the action."

**Comer**, *supra* 159 W.Va. at 589-90, 224 S.E.2d at 723.

In Syllabus Point 9 of **Courtney v. Courtney**, 186 W.Va. 597, 413 S.E.2d 418 (1991), the West Virginia Supreme Court abrogated the doctrine of parental immunity where a parent causes injury or death to his or her child from intentional or wilful conduct (excluding reasonable corporal punishment for disciplinary purposes).

In **Cole v. Fairchild**, 198 W.Va. 736, 482 S.E.2d 913, Syllabus Points 7 and 9 (1996), the West Virginia Supreme Court held that the doctrine of parental immunity did not prohibit the negligence of a parent being asserted as a defense in an action brought by the parent for the wrongful death of a child and that in a wrongful death action, where one or both of the parents of a deceased child are found negligent in contributing to the death of such child, either the judge or the jury should apportion the damages between the parents and other beneficiaries, if any, and assess the relative liability of each tortfeasor in order to apply our comparative negligence rule.

In **Cole**, the Court again reiterated that "although there may be some exceptions, the parental immunity doctrine remains a viable concept in West Virginia." 198 W.Va. at 749, 482 S.E.2d at 926 (citing **Courtney**, 186 W.Va. at 606, 413 S.E.2d at 427).

A review of these cases reveals that since 1968, each time the West Virginia Supreme Court has been confronted with a parental immunity issue, another exception to the rule has been carved out.

In 2001, the United States District Court for the Southern District of West Virginia was faced with a parental immunity issue in *Sias ex rel. Mabry v. Wal-Mart Stores, Inc.*, 137 F.Supp.2d 699 (S.D. W.Va. 2001). In his decision dismissing a counterclaim based upon parental immunity, Chief Judge Haden stated:

The general rule remains: West Virginia recognizes parental immunity, which precludes both negligence actions brought by the parent's child and the derivative defensive assertion of contributory negligence against a parent for injuries to the child. The action presently before the Court does not involve an automobile accident where liability insurance is required by public policy and, thus, presumed to exist. It does not arise from an intentional tort committed by a parent to injure his child, nor does it involve a wrongful death action where, unfortunately, the death of the child negates the need to avoid conflict in the parent/child relationship. This Court therefore predicts the Supreme Court of Appeals of West Virginia would apply the general rule of parental immunity to disallow the Defendant's counterclaim.

137 F.Supp.2d at 702.

This Court must confess that it lacks Judge Haden's certainty in his prediction, especially in light of the treatment of the parental immunity doctrine by other jurisdictions and the authors of the Restatements.

#### **The Restatement**

Restatement (Second) of Torts 895G provides as follows:

(1) A parent or child is not immune from tort liability to the other solely by reason of that relationship.

(2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.

The comments provide guidance into the authors' reasoning. Comment c to this section provides that: "In support of the immunity the courts have relied heavily upon the analogy of husband and wife. (See § 895F, Comment c). This appears to be an inapplicable analogy, because of the difference in the original common law concept of the relations. As in the case of husband and wife, the chief reason usually advanced today for the immunity is that domestic peace and parental discipline and control would be disturbed by permitting an action for a personal tort. Again the theory apparently has been that an uncompensated tort makes for family peace and harmony, and that there is somehow a distinction in this respect between personal torts and those affecting only property. Another reason sometimes given is that to allow one child to recover from a parent would deplete the family funds in his favor at the expense of other children. Neither of these reasons would appear to outweigh the more urgent desirability of compensating the injured person, and particularly a child, for genuine harm that may cripple him for life and ruin his entire future. The development of liability insurance, especially in the area of automobile accidents, has removed to a considerable extent whatever theoretical justification this reasoning may once have afforded. In turn the insurance has given rise to an additional argument, that of the danger of collusion against liability insurance companies-which again

would appear not to be beyond the power of the courts to deal with and in any case not to outweigh the desirability of compensating the injured person.”

Comment j provides: “Prior to 1963, the only attempt at complete abrogation of the immunity had been made by an intermediate appellate court in *Wells v. Wells*, (Mo.App.1932) 48 S.W.2d 109, but the decision was not followed. In 1963, in *Goller v. White*, 20 Wis.2d 402, 122 N.W.2d 193, the Supreme Court of Wisconsin for all practical purposes completely abrogated the immunity between parent and child, although it purported to recognize exceptions for acts done in the maintenance of parental authority over the child, and ‘where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provisions of food, clothing, housing, medical and dental services, and other care.’”

#### **Other Jurisdictions**

As noted by Justice Caplan in *Lee v. Comer*, “[i]n recent years the application of this doctrine has begun to recede as rapidly as it had once spread. There has been a definite trend throughout our courts toward the abrogation or limitation of such doctrine.” 159 W.Va. at 588, 224 S.E.2d at 722.

The doctrine of parental immunity was never adopted in Alaska, Hawai’i, Montana, North Dakota, South Dakota, Utah, Vermont and the District of Columbia.<sup>2</sup>

In addition, the doctrine has been abolished or abrogated in Arizona, California,

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<sup>2</sup> *Myers v. Robertson*, 891 P.2d 199 (Alaska 1995); *Peterson v. City & Co. of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1969); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 656 P.2d 820 (1983); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D. 1967); *Brunner v. Hutchinson Div., Lear-Siegler, Inc.*, 770 F.Supp. 517 (D. S.D. 1991); *Farmers Ins. Exch. v. Call*, 712 P.2d 231 (Utah 1985); *Rousey v. Rousey*, 528 A.2d 416 (D.C. 1987).

Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, and Wisconsin.<sup>3</sup>

In abrogating the parental immunity doctrine in California, the California Supreme Court, sitting in bank, “concluded that parental immunity has become a legal anachronism, riddled with exceptions and seriously undermined by recent decisions of this court. Lacking the support of authority and reason, the rule must fall.” 3 Cal.3d at 915-16, 479 P.2d at 648, 92 Cal. Rptr. at 288.

In **Cates v. Cates**, 156 Ill.2d 76, 619 N.E.2d 715 (1993), the Supreme Court of Illinois, in limiting the parental immunity doctrine to the **Goller** or Restatement exception, noted that even prior to that time, “Illinois courts also reject[ed] application of the parent-child tort immunity doctrine as a bar to third-party contribution actions against allegedly negligent parents. (**Hartigan v. Beery** (1984), 128 Ill.App.3d 195, 83 Ill.Dec. 445, 470 N.E.2d 571; **Moon v. Thompson** (1984), 127 Ill.App.3d 657, 82 Ill.Dec. 831, 469 N.E.2d

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<sup>3</sup> **Broadbent v. Broadbent**, 184 Ariz. 74, 907 P.2d 43 (1995); **Gibson v. Gibson**, 3 Cal.3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); **Cates v. Cates**, 156 Ill.2d 76, 619 N.E.2d 715 (1993); **Turner v. Turner**, 304 N.W.2d 786 (Iowa 1981); **Bentley v. Bentley**, 172 S.W.3d 375 (Ky. 2005); **Black v. Solmitz**, 409 A.2d 634 (Maine 1979); **Stamboulis v. Stamboulis**, 401 Mass. 762, 519 N.E.2d 1299 (1988); **Plumley v. Klein**, 388 Mich. 1, 199 N.W.2d 169 (1972); **Anderson v. Stream**, 295 N.W.2d 595 (Minn. 1980); **Hartman v. Hartman**, 821 S.W.2d 852 (Mo. 1991); **Rupert v. Steinne**, 90 Nev. 397, 528 P.2d 1013 (1974); **Briere v. Briere**, 107 N.H. 432, 224 A.2d 588 (1966); **Foldi v. Jeffries**, 93 N.J. 533, 461 A.2d 1145 (1983); **Guess v. Gulf Ins. Co.**, 96 N.M. 27, 627 P.2d 869 (1981); **Gelbman v. Glebman**, 23 N.Y.2d 434, 245 N.E.2d 192 (1969); **Kirchner v. Crystal**, 15 Ohio St.2d 326, 474 N.E.2d 275 (1984); **Winn v. Gilroy**, 296 Ore. 718, 681 P.2d 776 (1984); **Falco v. Pados**, 444 Pa. 372, 282 A.2d 351 (1971); **Elam v. Elam**, 275 S.C. 132, 268 S.E.2d 109 (1980); **Broadwell v. Holmes**, 871 S.W.2d 471 (Tenn. 1994); **Goller v. White**, 20 Wis.2d 402, 122 N.W.2d 193 (1963).

365; *Larson v. Buschkamp* (1982), 105 Ill.App.3d 965, 61 Ill.Dec. 732, 435 N.E.2d 221.)

The *Larson* court reasoned that (1) several Illinois decisions had restricted application of the doctrine, (2) the child's injury rather than the suit disrupted the family, and (3) the prevalence of liability insurance mitigated against the possibility of domestic disharmony. *Larson* allowed a third-party contribution action against a parent despite the argument that the parent might defend himself by asserting the child's negligence or discrediting his injuries. In *Hartigan*, a third-party contribution action was allowed against a parent even though the action was based on negligent supervision of the child, a realm of conduct clearly within the 'scope of the parental relationship.' (*Nudd*, 7 Ill.2d at 619, 131 N.E.2d 525; *Schenk v. Schenk* (1968), 100 Ill.App.2d 199, 203, 241 N.E.2d 12.) *Hartigan* reasoned that the right of contribution prevailed over application of the immunity as a bar to actions by parties outside the family." 156 Ill.2d at 94, 619 N.E.2d 723-24.

Other states have modified the parental immunity rule in ways that could be relevant to the issues in this case. For example, in *Paris ex rel. Paris v. Dance*, 194 P.3d 404 (Colo. App. 2008), the appellate court held that the parent could be designated as a nonparty for the allocation of fault, even though parental immunity would still bar recovery of the damages allocated to the parent.

In this Court's Order dated July 13, 2012 (Doc. 148), this Court then added:

Given this Court's reluctance to predict the continued vitality of the parental immunity doctrine in West Virginia and given the numerous options available to the West Virginia courts should they attempt to limit or abrogate the rule, this Court is of the opinion that the issue must be certified to the

West Virginia Supreme Court of Appeals. As this Court discussed at the oral argument on the Motions, such a certification would be premature until the parties determine the existence, applicability, and scope of any potential insurance coverage which may cover the parents in this case. In prior cases, the existence of insurance has been cited as a factor by Courts in this state and in other states.

Accordingly, this Court denied without prejudice the Motions concerning parental immunity until such time as the facts concerning insurance are developed. At that time, the parties were invited to seek certification of the issue.

Thereafter, on January 18, 2013, plaintiffs filed a Motion to Certify to the Supreme Court of Appeals of West Virginia the issues of whether parental immunity doctrine precludes a child from bringing a negligence claim against his parents for injuries sustained by the child and, if so, "are the Defendants' affirmative defenses and third-party complaints alleging claims for comparative contribution against the Parents likewise barred inasmuch as claims for comparative contribution are 'derivative in the sense that [they] may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff,' citing *Sydenstricker v. Unipunch Products, Inc.*, 288 S.E.2d 511, 169 W. Va. 440, 451 (1982)."<sup>1</sup> Plaintiffs attached to their Motion to Certify copies of the Parents' homeowners insurance policy and their separate commercial insurance policies and letters from the carrier denying coverage under each of these policies for the third-party claims asserted against them for contribution.

CKS submitted an opposition to the Motion to Certify, in which all of the defendants joined, arguing that there is no need to certify any issues at this point because, even if

parental immunity would still be recognized and even if it barred contribution claims, evidence of the Parents' alleged recklessness and disregard of the product warnings is clearly admissible to refute the allegations of product defect and in support of the defendants' product misuse and superseding intervening cause defenses. Hearthmark, Wal-Mart and PSC submitted a joint response arguing that, if the Court were to seek certification at this point, the primary questions for which certification should be sought are whether parental immunity extends to preclude defendants from relying upon the Parents' conduct in defending A.N.'s claims and from asserting contribution claims against the Parents.

Accordingly, this Court has determined to certify the following questions to your Court:

1. Whether the parental immunity doctrine precludes defendants from asserting well-established product liability defenses of product misuse and superseding intervening causation, in order to demonstrate lack of defect and foreseeability in a child's product liability action?
2. Whether the parental immunity doctrine bars defendants from asserting their independent rights of contribution and indemnity and/or from allocating fault against parents who were allegedly negligent?
3. Whether allegedly negligent parents should be included as a nonparty for the allocation of fault, even though parental immunity would still bar recovery of the damages allocated to the parent?
4. Whether parental immunity should have continued viability in this jurisdiction?

**Acknowledgement**

This Court acknowledges that the Supreme Court of Appeals may reformulate the questions raised herein. W. Va. Code Ann. § 51-1A-4.

**The Names and Addresses of Counsel of Record for the Parties**

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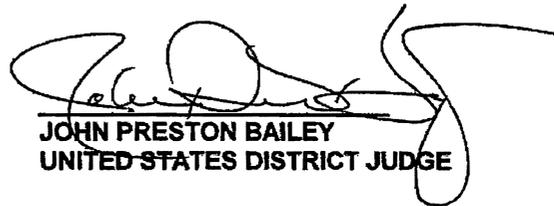
Accordingly, pursuant to the privilege made available by the West Virginia Uniform Certification of Questions of Law Act, it is hereby **ORDERED** that:

1. Plaintiffs' Motion to Certify Questions of Law to the Supreme Court of Appeals of West Virginia (**Doc. 271**) is **GRANTED**;
2. The questions stated above be, and the same hereby are, certified to the Supreme Court of Appeals of West Virginia;
3. The Clerk of this court forward to the Supreme Court of Appeals of West Virginia, under the official seal of this Court, a copy of this Order and, to the extent requested by the Supreme Court of Appeals of West Virginia, the original or a copy of the record in this Court;
4. Any request for all or part of the record be fulfilled by the Clerk of this Court simply upon notification from the Clerk of the Supreme Court of Appeals of West Virginia; and
5. The Clerk of this Court is directed to transmit copies of this Order to all

counsel of record herein.

It is so **ORDERED**.

**DATED:** February 19, 2013.



**JOHN PRESTON BAILEY**  
**UNITED STATES DISTRICT JUDGE**

I hereby certify that the annexed instrument  
is a true and correct copy of the document filed  
in my office.

ATTEST: Cheryl Dean Riley  
Clerk, U.S. District Court  
Northern District of West Virginia

By: Carole Daniels  
Deputy Clerk