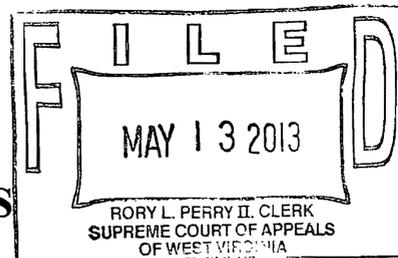


**IN THE  
SUPREME COURT OF APPEALS  
OF THE  
STATE OF WEST VIRGINIA**



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

**Plaintiffs,**

v.

**Supreme Court Docket No. 13-0159**

**JARDEN CORPORATION, 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/Third-Party Plaintiffs,**

v.

**KIMBERLY LANDIS and ALVA NELSON,  
In their individual capacities,**

**Third-Party Defendants.**

**PETITIONERS BRIEF ON CERTIFIED QUESTIONS POSED BY  
THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT WEST VIRGINIA  
Civil Action No.: 2:11-CV-00101  
Honorable John P. Bailey, Presiding**

Dino S. Colombo, Esq. (WVSB #5066)  
Travis T. Mohler, Esq. (WVSB #10579)  
Colombo Law  
1054 Maple Drive  
Morgantown, West Virginia 26505  
*Counsel on behalf of Petitioners – Plaintiff,  
A.N., a minor and Third-Party Defendants  
Kimberly Landis and Alva Nelson*

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## I. CERTIFIED QUESTIONS

This matter is before this Honorable Court pursuant to questions certified to it by the U.S. District Court for the Northern District of West Virginia pursuant to Rule 17(b) of the Revised Rules of Appellate Procedure. The questions which were certified for resolution are as follows:

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?<sup>1</sup>

## II. NATURE OF PROCEEDINGS BELOW

The minor plaintiff A.N., by and through his parents Kimberly Landis and Alva Nelson, filed the instant products liability action in the U.S. District Court for the Northern District of West Virginia as a result of catastrophic burns suffered by A.N. when a combustible, ethanol based gel product, known as Diamond<sup>®</sup> Natural Fire Starter Gel flashed back and exploded upon him while he was using the product to start a fire in his family's fireplace. The defendants designed, manufactured or marketed the product, or its component parts, including the bottle and cap. The defendants have alleged that negligent supervision on behalf of A.N.'s parents caused or contributed to his injuries. After considering the minor plaintiff and parents'/third party

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<sup>1</sup> Because the resolution of certified question number four will be relevant to the determination of the remainder of the certified questions, the Petitioner will address that question first. Likewise, certified question number one will be addressed last because the resolution of the other questions may have a bearing on the determination of that issue. Therefore, the Petitioner's Brief will address the certified questions in the following order: four, two, three, and finally, one.

defendants' motions to dismiss the defendants' claims and defenses against the minor plaintiff's parents, the district court certified these questions of law to this Court to determine the effect of West Virginia's parental immunity doctrine on the defendants' claims for comparative contribution and request for apportionment of damages against the parents.

### III. STATEMENT OF FACTS

On February 28, 2010, the plaintiff, A.N., then seven years old, suffered severe and catastrophic, full-thickness burns on over sixty five percent of his body, face, and limbs when a defective product known as "Diamond<sup>®</sup> Natural Fire Starter Gel" (hereinafter referred to as "Fire Starter Gel") exploded upon him while he was using it to start a fire. (JA at 4-5, ¶ 13). A.N. had gone to the fireplace located in the downstairs family room of their home so that he could roast a marshmallow. (JA at 731-32). Not seeing any hot embers in the fireplace and believing that a fire which had been previously burning during the day had died out, A.N. began to apply the Fire Starter Gel to kindling wood he had stacked in the fireplace in a "tee pee" formation. (JA 732-34). As A.N. was applying the Fire Starter Gel to the kindling, the ethanol-based gel came into contact with a hot ember and a fire started around the kindling. (JA at 756-57). Seeing the fire, A.N. attempted to stop pouring the gel. (Id.). Unfortunately, it was too late; the highly volatile, low flash point ethanol vapors flashed back through the defective cap, and caused the bottle to explode. (JA at 6-7, ¶ 20; 734). Because the Fire Gel is ethanol-based is more flammable and far more dangerous than typical lighter fluids which are petroleum based. (JA at 6). The explosion caused flaming gel to burst from the bottle and onto A.N.'s body. (JA at 6-7; see also picture of subject bottle, at 777).

At or around 8:30 on the same evening prior to the explosion, A.N. was getting ready for his bath. (JA at 731, 797). A.N. asked his mother if he could roast a marshmallow before his

bath; she said yes. (Id.). A.N. went to the kitchen and grabbed a bag of marshmallows (or his mother handed him the bag) and he took them downstairs so that he could roast the marshmallow in the fireplace in the family room. (JA at 731-32, 797-98). A.N.'s mother believed there was already a fire burning in the family room fireplace. (JA at 797-98). A.N. was the only person in the downstairs family room. (JA at 731-32).

A.N.'s father, Alva "Butch" Nelson, was headed downstairs, but paused when A.N.'s mother began to explain to him the day's events and told him of the fact that she took A.N. to the doctor earlier that evening and that A.N. had been prescribed antibiotics which he needed to take. (JA at 798). Only a couple minutes after A.N. had headed downstairs the parents heard A.N. screaming. (Id.). The Parents ran toward the family room and encountered A.N. on the steps, covered in a blue flame. (JA at 799-800). A.N.'s father tried to put the flaming gel out, but was unable to – the viscous, flaming gel could not be extinguished. (JA at 1018-1019). Because the product uses cellulose pulp as a thickening agent, the napalm-like gel adhered to A.N.'s body and could not be easily extinguished. (JA at 6-7, ¶ 20). A.N.'s father eventually wrapped him in a towel and was able to put him in the bathtub in which the mother had begun to run water; the combination of the towel and water was eventually able to extinguish all of the flames on A.N.'s body. (JA at 799-800).

On November 30, 2011, Kimberly Landis and Alva Nelson (the "Parents") filed a Complaint on behalf of A.N. against Hearthmark, LLC, d/b/a Jarden Home Brands ("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 to their son, A.N. in the explosion. (JA. at 1-17). The plaintiff A.N., through his parents, asserted product liability causes of action

sounding in strict liability, negligence, and breach of warranty. (Id.). The Parents do not assert any cause of action on their own behalves, nor do they seek any damages in this civil action. (Id.)

Defendant PSC blended and packaged the Fire Starter Gel and Hearthmark marketed the product under its Diamond® brand. (JA at 5-6). CKS manufactured the bottle for this product and Stull produced the cap. (Id.). The product was purchased from a local Wal-Mart store. (JA at 10). Each of the defendants has filed third-party complaints for contribution against the Parents' alleging that their negligent supervision of A.N. caused or contributed to A.N.'s injuries. (JA at 18-35, 76-100, 101-124, 251-276, 341-345).<sup>2</sup> The various defendants have asserted defenses against A.N. alleging contributory negligence and product misuse. (Id.; JA 36-58). The Defendants have asserted separate product misuse defenses against the Parents, as well as, alleging that the Parents' negligent supervision of A.N. caused or contributed to his injuries, and that the Parents acted as a superseding, intervening cause of A.N.'s injuries. (Id.)

As its Tenth Affirmative Defense, Stull asserted that "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 plaintiff[] complain[s]." (JA at 49). The minor Plaintiff and his Parents moved to strike Stull's Tenth Affirmative Defense on the grounds of parental immunity. (JA at 63-75). The Plaintiff and his Parents thereafter moved for judgment on the pleadings as to CKS's, Hearthmark's, and Wal-Mart's Counterclaims, arguing that the contribution claims are barred by

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<sup>2</sup> CKS, Wal-Mart, and Hearthmark originally filed counterclaims asserting claims of contribution against the Parents instead of third party complaints. PSC later amended its original Answer to allege a counterclaim against the Parents for Contribution. (JA 251-276). Because the Parents are not Plaintiffs in this civil action outside of their representative capacity on behalf of A.N., on October 15, 2012 the district court entered an Order finding that defendants' counterclaims against the Parents shall be considered third party complaints. (JA, at 339-340). Stull subsequently filed a third party complaint against the parents for contribution. (JA 341-345).

the parental immunity doctrine because they are derivative of A.N.'s rights against the Parents. (JA at 206-209, 210-213, 214-217).

The district court denied the Plaintiff's and Parents' motions without prejudice due to the court's uncertainty surrounding the effect the parental immunity doctrine and its application to the defendants' affirmative defenses and claims for contribution. (JA at 237-250). Because this Court, in *Lee v. Comer*, intimated that liability insurance may be relevant to the application of the parental immunity doctrine, at least in the context of automobile injuries, the Court invited the parties to seek certification of the parental immunity issues once they "determine[d] the existence, applicability, and scope of any potential insurance coverage which may cover the parents" for A.N.'s injuries. (Id.). The Parents produced their Homeowners' Policy and two other policies for the Parents' respective businesses. (JA at 1110-1152, 1153-1239, and 1240-1294). The Parents were denied coverage under their Homeowner's Policy (JA at 1295-1297) and neither of their business policies provide coverage for this incident which occurred in their home. (JA 1153-1239, 1240-1294).

Thereafter, on February 19, 2013, the issues herein were certified to this Court.

#### **IV. SUMMARY OF ARGUMENT**

Despite a trend toward creating specific exceptions to the absolute immunity afforded parents by the parental immunity doctrine in situations where the policy concerns underlying the doctrine (i.e., preservation of family harmony, collusion, etc.) no longer exist (i.e., intentional act committed by parent on a child, negligence of a parent in contributing to the death of a child and then seeking damages for the death, or negligent operation of a motor vehicle by a parent where a child is injured but liability insurance covers the loss), the doctrine continues to be recognized in West Virginia. Therefore, the State's continued adherence to the doctrine should be

reaffirmed in this product liability action where the defendants' assertions of negligent parental supervision, if permitted to be advanced in spite of the protections afforded the parents by the parental immunity doctrine, would erode the longstanding law of this state and would allow the courts to stand in judgment of the day-to-day exercise of parental discretion, control and authority over a parent's upbringing of his child.

Similarly, the parental immunity doctrine bars a defendant in a civil action such as this from asserting derivative claims for contribution, indemnity, or apportionment of fault against the parents of an injured child because the parents, through application of the doctrine, could never be parties to an action such as this. The defendants have no claims against the parents where the minor himself is precluded from asserting a claim against his parents. Defendants are therefore precluded from seeking an allocation of fault against the non-party parents because such an allocation against non-parties such as the Parents, who could never be joint tortfeasors, if permitted, would abrogate the law of joint and several liability, which is still adhered to in West Virginia and codified by statute.

Because a parent's negligence cannot be imputed to a child in this instance, the defendants may not advance a product-misuse defense against individuals (i.e., A.N.'s parents) who were not themselves using the product, did not know the product was being used by their child, and were not in the vicinity of their child at the time the product failed and caused life-altering injuries to A.N. While the defendants are free to assert a product-misuse defense against A.N., they are prohibited from advancing the same, duplicate defenses against A.N.'s parents, especially where the parents' negligence could never be imputed to their child.

Under West Virginia law, evidence concerning the conduct of non-parties is neither relevant, nor admissible outside of the rare case in which such evidence is relevant to show

intervening, superseding cause. The Parents alleged negligent supervision of A.N., however, cannot be an intervening, superseding cause. If A.N. is found to have used the product in a reasonably foreseeable manner, the parents' negligent supervision, if any, would be irrelevant because A.N.'s proper use of the product means there is no causation. Like a negligent credentialing case in the context of a hospital, if the alleged negligently credentialed doctor does meet the applicable standard of care, the hospital's negligent credentialing of said doctor, if any, is irrelevant because causation is broken. Likewise, if A.N. is found to have used the product in an inappropriate fashion, his claim will likely be barred; making the parents' supervision of A.N. irrelevant.

For these reasons, petitioners would submit that certified questions one (1), two (2) and four (4) be answered in the affirmative, while certified question three (3) be answered "No".

## **V. ORAL ARGUMENT**

Pursuant to this Court's Order dated March 28, 2013, the Court is of the opinion that this matter be scheduled for oral argument under Rule 20 of the Revised Rules of Appellate Procedure. The Petitioner concurs.

## **VI. DISCUSSION OF LAW AND ARGUMENT**

### **A. Standard of Review**

As this Court recently opined in *Osborne v. United States*, 211 W.Va. 667, 670, 567 S.E.2d 677 (2002), "[w]hen this Court is called upon to resolve a certified question, we employ a plenary review." "A de novo standard is applied by this [C]ourt in addressing the legal issues presented by a certified question from a federal district or appellate court." *Id* citing Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998).

**B. [Certified Question Number Four] This Court Should Reaffirm the State of West Virginia's Continued Adherence to the Parental Immunity Doctrine**

While there has been a trend to modify the scope of the parental immunity doctrine from its early, absolute application, the rumors of its demise have been greatly exaggerated. Only six states have never recognized parent-child immunity<sup>3</sup> and a minority of states has abrogated the parental immunity doctrine<sup>4</sup>; the remaining and vast majority of states, including West Virginia, continue to recognize the doctrine in some form, usually with one or more exceptions or limited to certain types of parental conduct.<sup>5</sup> See *Newman v. Cole*, 872 So.2d 138, 141 (Ala.

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<sup>3</sup> Six states – Hawaii, Nevada, North Dakota, South Dakota, Utah, and Vermont, and the District of Columbia – have declined to adopt the doctrine. See *Rousey v. Rousey*, 528 A.2d 416 (D.C.1987); *Petersen v. City & County of Honolulu*, 51 Haw. 484, 462 P.2d 1007 (1969); *Rupert v. Stierne*, 90 Nev. 397, 528 P.2d 1013 (1974); *Nuelle v. Wells*, 154 N.W.2d 364 (N.D.1967); *Kloppenburg v. Kloppenburg*, 66 S.D. 167, 280 N.W. 206 (1938); *Elkington v. Foust*, 618 P.2d 37 (Utah 1980); and *Wood v. Wood*, 135 Vt. 119, 370 A.2d 191 (1977).

<sup>4</sup> See, e.g. *Gibson v. Gibson*, 3 Cal.3d 914, 479 P.2d 648, 92 Cal.Rptr. 288 (1971); *Broadbent v. Broadbent*, 184 Ariz. 74, 907 P.2d 43 (1995); *Hartman v. Hartman*, 821 S.W.2d 852 (Mo.1991); *Miller v. Leljedal*, 71 Pa.Cmwlth. 372, 455 A.2d 256 (1983); *Anderson v. Stream*, 295 N.W.2d 595 (Minn.1980); *Kirchner v. Crystal*, 15 Ohio St.3d 326, 474 N.E.2d 275 (Ohio 1984).

<sup>5</sup> See, e.g. *Newman v. Cole*, 872 So.2d 138 (Ala. 2003)(immunity with exceptions); *Greenwood v. Anderson*, 2009 Ark. 360, 324 S.W.3d 324 (Ark. 2009); *Henderson v. Wooley*, 644 A.2d 1303, 1307 (Conn. 1994)(immunity for negligent parental supervision); *Cates v. Cates*, 156 Ill.2d 76, 619 N.E.2d 715 (Ill. 1993); *Rigdon v. Rigdon*, 465 S.W.2d 921, 923 (Ky. 1971); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (Wis. 1963); *Zellmer v. Zellmer*, 164 Wash.2d 147, 188 P.3d 497 (Wash. 2008)(immunity for negligent parental supervision); *Dellapenta v. Dellapenta*, 838 P.2d 1153 (Wash. 1992); *Herzfeld v. Herzfeld*, 781 So.2d 1070 (Fla. 2001); *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994); *Schlessinger v. Schlessinger*, 796 P.2d 1385 (Colo. 1990); *Donegan v. Davis*, 310 Ga.App. 446, 714 S.E.2d 49 (Ga. App. 2011)(immunity with exceptions); *Barnes v. Barnes*, 603 N.E.2d 1337 (Ind. 1992)(immunity with exceptions); *Spikes by Simmons v. Banks*, 586 N.W.2d 106 (Mich.App. 1998)(abolishing parental immunity while retaining exceptions for negligent parental supervision and negligent discharge of parental duties); *Sixkiller v. Summers*, 680 P.2d 360 (Okla. 1984)(immunity for negligent supervision); *Foldi v. Jeffries*, 461 A.2d 1145 (N.J. 1983)(immunity for negligent supervision); *Jilani v. Jilani*, 767 S.W.2d 671 (Tex 1988)(immunity from negligent supervision); *Pavlick v. Pavlick*, 491 S.E.2d 602 (Va. 1997)(immunity with exceptions); *Renko v. McLean*, 697 A.2d 468 (Md. 1997)(immunity with exceptions); *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974)(declining to recognize negligent parental supervision claim following abrogation of parental immunity doctrine); *Brunner v.*

2003)(collecting cases); *see also Dellapenta v. Dellapenta*, 838 P.2d 1153, 1157 (Wyo. 1992). West Virginia's modified form of the parental immunity doctrine is consistent with the majority of jurisdictions across the country and, therefore, should have continued viability in its current form.

**i. The Parental Immunity Doctrine Remains a Viable Concept In West Virginia**

The parental immunity doctrine in West Virginia prohibits a child from bringing a civil action against his or her parents. *Lee v. Comer*, 159 W.Va. 585, 587-88, 224 S.E.2d 721, 722 (1976). The doctrine appears to have been first adopted in West Virginia in *Securo v. Securo*, 110 W.Va. 1, 156 S.E. 750 (1931). In its original form, the parental immunity doctrine operated as an absolute bar to suit by a child for personal injuries allegedly caused by a parent regardless of the nature or type of conduct involved. *See id.*; *Hewlette v. George*, 68 Miss. 703, 9 So. 885 (1891). West Virginia, however, has narrowed the doctrine by creating exceptions to it where the doctrine's public policy purposes do not appear to be served.

Throughout the course of the development of the parental immunity doctrine various rationales have been offered in support of the immunity – that it preserved familial harmony, that it prevented fraud and collusion among family members, and that it averted the threat that intra-familial litigation would deplete family resources in favor of one child to the detriment of others. *See* 1 J.D. Lee and Barry Lindahl, *Modern Tort Law: Liability and Litigation* § 18.01 (Rev. ed. 1988). The majority of courts, however, have disavowed many of these early rationales in

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*Hutchinson Div.*, 770 F.Supp. 517, 525 (D.S.D. 1991)(applying south Dakota law)(parent is privileged from liability for negligent supervision); *Winn v. Gilroy*, 296 Or. 718, 681 P.2d 776, 784 (1984)(rejecting reasonable parent standard in favor of *Restatement* approach); *Pedigo v. Rowley*, 101 Idaho 201, 610 P.2d 560 (1980)(adopting exceptions for parental authority and discretion rather than reasonable parent standard); *Sears, Roebuck & Co. v. Huang*, 652 A.2d 568 (Del. 1995)(adhering to parental immunity where parental control, authority, or discretion is involved).

recognition of the “real purpose” behind the doctrine – to protect parental discretion – and in the process have limited the scope of the rule. *See, e.g. Zellmer*, 164 Wash.2d at 154, 188 P.3d at 500 (Wash. 2008); *Cates*, 156 Ill.2d at 98-100, 619 N.E.2d at 726-727 (Ill. 1993) (noting that the traditional rationales for parental immunity have been discounted in favor of preventing litigation concerning conduct involving parental discretion).

Like the majority of other jurisdictions, West Virginia has recognized that “the real purpose behind the doctrine ‘is simply to avoid undue judicial interference with parental discretion. The discharge of parental responsibilities . . . entails countless matters of personal private choice.’” *Cole v. Fairchild*, 198 W.Va. 736, 482 S.E.2d 913 (1996). The Supreme Court of Connecticut explained that “the parental immunity doctrine affords special protection to acts of parental control, authority, and discretion” for the following reasons:

The supervision, care and instruction of one's child involves issues of parental control, authority and discretion that are uniquely matters of a very personal type.... Each parent has unique and inimitable methods and attitudes on how children should be supervised. Likewise, each child requires individualized guidance depending on intuitive concerns which only a parent can understand. Also, different cultural, educational and financial conditions affect the manner in which different parents supervise their children. Allowing a cause of action for negligent supervision would enable others, ignorant of a case's peculiar familial distinctions and bereft of any standards, to second-guess a parent's management of family affairs.... ‘Courts should not unnecessarily involve themselves in the day-to-day exercise of parental discretion regarding the upbringing and care of children. To do so would undermine parental authority in the very personal endeavor of child rearing and inject the machinery of the state into an area where its presence might be the occasion for family discord.

*Crotta v. Home Depot, Inc.*, 249 Conn. 634, 643-44, 732 A.2d 767, 773 (1999) (citations omitted). The Supreme Court of Tennessee dismissed the early rationales for parental immunity stating, “the sole policy consideration which justifies its application [is] a parent’s right to discipline and use discretion in the care and rearing of children. *Broadwell v. Holmes*, 871 S.W.2d 471, 473 (Tenn. 1994), *citing Barranco v. Jackson*, 690 S.W.2d 221, 230 (Tenn. 1985).

Like the majority of states, this Court has continually reaffirmed the viability of the parental immunity doctrine, yet has limited the scope of the rule by carving out discrete exceptions where the Court did not feel the purpose of the rule would be served. For instance, in *Lusk v. Lusk*, this Court first noted an exception to the rule when a child was injured while riding on a bus which her father was employed to maintain and operate. 113 W.Va. 17, 166 S.E. 538, 538-539 (1932). This Court found that the reason for the rule of parental immunity did not justify extending such immunity when the parent was acting in his business capacity (as opposed to his parental capacity) and was covered by liability insurance through his employer. *Id.*

In *Lee v. Comer*, this Court created an exception to the parental immunity doctrine “where a child is injured in an automobile accident as a result of his parent’s negligence.” *Lee*, 159 W.Va. at 589-90. In creating this exception, the Court stated that “[i]n the realm of automobile accident cases we cannot brush aside or ignore the almost universal existence of liability insurance.” *Id.*, at 590. The Court also noted that the originally recognized policy bases for the immunity (i.e., the preservation of family harmony and prevention of collusion and fraud) do not sufficiently justify its application in automobile negligence cases. *Id.*, at 592-93. Other states have created a similar exception finding that “the negligent operation of an automobile is not conduct inherent to the parent-child relationship [and] such conduct does not represent a parent’s decision-making in disciplining, supervising or caring for his child” and, therefore, does not justify application of parental immunity. *See, e.g. Cates v. Cates*, 156 Ill.2d 76, 106, 619 N.E.2d 715, 729 (Ill. 1993); *Broadwell*, 871 S.W.2d at 476-77; *see also Warren v. Warren*, 336 Md. 618, n.2, 650 A.2d 252, n.2 (Md. 1994)(collecting cases of, at that time, forty-three jurisdictions which permit suits between parents and children for motor torts).

In *Courtney*, this Court found in syllabus point nine that the parental immunity doctrine “is abrogated where the parent causes injury or death to his or her child from intentional or willful conduct, but liability does not arise from reasonable corporal punishment.” *Courtney v. Courtney*, 186 W.Va. 597, 607, 413 S.E.2d 418, 428 (1991). The Court cited with approval this reasoning:

While it may seem repugnant to allow a minor to sue his parent, we think it more repugnant to leave a minor child without redress for the damage he has suffered by reason of his parent’s willful or malicious misconduct. A child, like every other individual, has a right to freedom from such injury.

*Id.* (quoting *Emery v. Emery*, 45 Cal.2d 421, 429-30, 289 P.2d 218, 224 (1955)(other citations omitted).

Finally, in *Cole v. Fairchild*, the West Virginia Supreme Court of Appeals considered application of the parental immunity doctrine to the defense of contributory or comparative negligence of parents asserted in a wrongful death action. The Court concluded 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. Syl. Pt. 7, *Cole v. Fairchild*, 198 W.Va. 736, 482 S.E.2d 913 (1996). In a wrongful death action, the Court recognized that the espoused purpose of the parental immunity doctrine is less forceful when a child dies and a wrongful death suit is brought inasmuch as the potential conflict between the child and the parent no longer exists. *See id.*, at 750. Additionally, the Court reasoned that parents bringing a wrongful death action seek compensation and benefit to themselves as a result of the child’s death. “[I]t would be inequitable for such a parent to collect the total amount of an award [where] the parent is found to be at least partially at fault.” *Id.*, at 750.

Although this Court has carved out these exceptions, it has made it clear as recently as 1996 that, “although there may be some exceptions, the parental immunity doctrine remains a

viable concept in West Virginia.” *Cole*, 198 W.Va. at 749, (citing *Courtney*, 186 W.Va. at 606). No additional exceptions have been created to the parental immunity doctrine in West Virginia since 1996.

ii. **West Virginia’s Treatment and Continued Adherence to the Parental Immunity Doctrine Is In Accordance With the Majority of Jurisdictions Throughout the Country Which Recognize a Modified Form of the Rule**

West Virginia’s treatment and continued adherence to a modified form of the parental immunity doctrine is in line with the majority of other jurisdictions. *See* note 5, *supra*. Some jurisdictions, including West Virginia, have modified the parental immunity doctrine to be in proportion with its purpose by creating specific exceptions, while others have chosen instead to delineate areas where immunity would be maintained; either way, the result is the same. *See Dellapenta*, 838 P.2d 1153, 1157 (Wyo. 1992). While no uniform standard has been established among the states, “the overwhelming majority of jurisdictions hold parents are not liable for negligent supervision of their child . . . .” *Zellmer*, 164 Wash.2d at 157, 188 P.2d at 501 (Wash. 2008).

The Supreme Court of Illinois described modification of the parental immunity doctrine from its early, absolute application to the current modified, majority position. The court noted that parent-child tort immunity arose in American case law as the result of three decisions, often termed the “great trilogy” (*Hewlett*, 68 Miss. 703, 9 So. 885 (married, minor child barred from suing mother for malicious imprisonment in insane asylum); *McKelvey v. McKelvey* (1903), 111 Tenn. 388, 77 S.W. 664 (minor child barred from suing parent for cruel and inhumane punishment); *Roller v. Roller* (1905), 37 Wash. 242, 79 P. 788 (minor child barred from suing father for rape)). *See Cates*, 156 Ill.2d 76, 88, 619 N.E.2d 715, 721 (Ill. 1993). These early cases articulated several public policy reasons to justify the immunity: preservation of family

harmony, preservation of parental authority to control children by way of analogy to spousal immunity, and the avoidance of depletion of family assets to the detriment of the injured child's siblings. *Id.*

With such extreme cases as its basis, legal criticism of the parent-child tort immunity doctrine inevitably followed and courts sought to modify the scope of the immunity. *Id.* (citations omitted). A number of states have applied a standard limiting parent-child liability by relying on *Goller v. White*, 20 Wis.2d 402, 122 N.W.2d 193 (Wis. 1963) (*Goller* standard). Under the *Goller* standard, a child may sue his parent for negligent conduct except where the conduct involves "an exercise of parental authority . . . [or] an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." *Goller*, 20 Wis. 2d at 413, 122 N.W.2d at 198.

The *Goller* standard prevents parent-child lawsuits in the area of parental discipline and areas of parental discretion, "such as a duty to supervise." *Cates*, 619 N.E.2d at 722, *citing Thoreson v. Milwaukee & Suburban Transport Co.*, 56 Wis.2d 231, 246-47, 201 N.W.2d 745, 753 (Wis. 1972). "Arguably, under the *Goller* standard, a child could not sue his parent for a failure to maintain the family residence in some manner (for instance, a failure to secure carpeting)." *Cates*, 619 N.E.2d at 722. Several courts have adopted the *Goller* approach with modifications to clarify the standard. *See Broadwell*, 871 S.W.2d at 474.

Another approach to modifying the parental immunity doctrine was articulated by the New York Court of Appeals in *Holodook v. Spencer*, 36 N.Y.2d 35, 364 N.Y.S.2d 859, 324 N.E.2d 338 (1974), in which it was alleged that the minor child's mother had negligently supervised her child when, as a result of being left untended, the child wandered into the street where she was struck by a passing automobile. The court held that negligent supervision was not

a tort actionable by the child, reasoning that there are very few accidental injuries to children that could not have been prevented by more intense parental supervision. *Id.* at 342-43. The court stated that imposing a parental duty of “constant surveillance and instruction” would place an overwhelming burden on parents since it is virtually impossible to supervise a child twenty-four hours a day. *Id.*

California is part of the small minority of jurisdictions which apply a “reasonable parent” standard to test the viability of all negligence actions between parent and child. *Gibson*, 479 P.2d at 653 (“what would an ordinarily reasonable and prudent parent have done in similar circumstances”). This standard has been widely criticized and is only followed by a small minority of states. *See* notes 3-5, *supra* (collecting cases). In rejecting the California “reasonable parent” standard, the New Jersey Supreme Court expressed its fear that this rule “would result in jurors and judges substituting their own philosophy and standards of child-raising for those of the parent whose conduct is at issue.” *Foldi v. Jeffries*, 93 N.J. 533, 547, 461 A.2d 1145, 1155 (N.J. 1983). The *Foldi* court made the salient observation that there are “few accidental injuries a child might sustain that could not have been prevented by closer supervision by his or her parents. Hindsight invariably will expose some slight oversight, some failure to take yet another precaution that somehow contributed to the child’s mishap. No parent can do everything. If such claims were allowed, it would be the rare parent who conceivably could not be called to account in the courts for his or her conduct.” *Id.* at 548; *see also Holodook v. Spencer*, 36 N.Y.2d 35, 364 N.Y.S.2d 859, 324 N.E.2d 338 (N.Y. 1974)(criticizing the minority reasonable parent standard); *Zellmer*, 188 P.3d at 503(“[t]he reasonable parent standard does not adequately protect against undue judicial interference in the parent/child relationship.”).

Upon reviewing the modern development of the parental immunity doctrine, the Illinois court noted that the traditional family harmony and fear of collusion rationales have been diminished and found that “[t]he focus has shifted to a concern with preventing litigation concerning conduct intimately associated with the parent child relationship.” *Cates*, 619 N.E.2d at 726. Getting away from the traditional rationales, the court noted that it was “convinced that the immunity doctrine is supported today by other public policy concerns.” *Id.* at 728. The court found that “[c]ourts should not be involved in deciding matters between parent and child which concerns decisions which those persons are uniquely equipped to make because of that relationship; to allow otherwise would unnecessarily and obtrusively inject courts into family matters which they are ill equipped to decide. Such matters, by definition, involve parental discretion in discipline, supervision and care.” *Id.* It is these underlying policies, the court found, which ought to determine the scope of the immunity. *Id.*

To that end, the Illinois court concluded that “the immunity should afford protection to conduct inherent in the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child. These limited areas of conduct require the skills, knowledge, intuition, affection, wisdom, faith, humor perspective, background, experience, and culture which only a parent and his or her child can bring to the situation; our legal system is ill-equipped to decide the reasonableness of such matters.” *Id.* at 729. The court stated that this standard is consistent with other jurisdictions, but clarified that under the Illinois standard, “parental discretion in the provision of care includes maintenance of the family home, medical treatment, and supervision of the child.” *Id.* (giving the example, “A child may attempt to sue a parent alleging that the child fell on a wet, freshly mopped floor in the home, but the immunity would bar such an action

because the parent was exercising his discretion in providing and maintaining housing for the child.”)

Applying this standard in the context of automobile negligence, the court held that “the negligent operation of an automobile is not conduct inherent to the parent-child relationship; such conduct does not represent a parent’s decision-making in disciplining, supervising or caring for his child.” *Id.* The court continued, “[t]he duty which [the father] owed in operating his vehicle on State highways was owed to the general public and not to . . . his child.” *Id.* Therefore, like West Virginia, the Illinois court found that the parental immunity doctrine cannot be applied to bar a negligence action in the case of automobile negligence. Although the Illinois court came to this conclusion using different reasoning, the holding and exception is consistent with this Court’s holding in *Lee v. Comer*.

Addressing the question of whether the immunity should be abrogated where liability insurance exists, the *Cates* court noted that parental liability should be allowed only where the reasons for its preclusion do not exist for whatever reason. *Id.* at 727. The Court recognized that while the widespread existence of liability insurance may impact the traditional policies against collusion and fraud, it does not serve to diminish the policy of protecting parental discretion in child rearing. *Id.* at 727-28. Excepting an injury to a child which is allegedly caused by negligent supervision of a parent or some other act involving parental discretion simply because that parent might have liability insurance, would involve second guessing that parent’s discretionary decision making in raising his or her child – this type of parental discretion should not be interfered with. *See, e.g. Dubay v. Irish*, 207 Conn. 518, 526, 542 A.2d 711, 716 (Conn. 1988)(collecting cases).

New Jersey, like the majority of jurisdictions, also adheres to a modified version of the parental immunity doctrine in cases of parental supervision. *See, e.g. Foldi v. Jeffries*, 93 N.J. 533, 549, 461 A.2d 1145, 1153 (N.J. 1983). Like West Virginia, New Jersey's highest court has rejected many of the traditional rationales in favor of parental immunity. *See, e.g. Id.* at 545. Nonetheless, the New Jersey court found that significant policy reasons existed for the provision of immunity to parents in matters of parental discretion and supervision:

There are certain areas of activities within the family sphere involving parental discipline, care, and control that should and must remain free from judicial intrusion. Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted. That is both their duty and their privilege. Indeed, every parent has a unique philosophy of the rearing of children. That philosophy is an outgrowth of the parent's own economic, educational, cultural, ethical, and religious background, all of which affect the parent's judgment on how his or her children should be prepared for the responsibilities of adulthood. Such philosophical considerations come directly to the fore in matters of parental supervision.

There is no recognized correct theory on how much freedom a parent should allow his or her children. Some parents believe that a child must be made self-reliant at an early age and accordingly give their children a great deal of independence. To outsiders, such independence may look like indifference or neglect. On the other hand, some parents believe that their children must be vigilantly monitored from infancy through adolescence. To outsiders, such vigilance and concern may appear to shelter the children from the world and to thwart their development.

As each parent is different, so is each child. There is no one ideal "formula" for how much supervision a child should receive at a given age. What may be perfectly safe to entrust to one five year old may be utterly dangerous in the hands of another child of the same age. This disparity often proves true even among siblings in the same household. The parent is clearly in the best position to know the limitations and capabilities of his or her own children. These intangibles cannot be adequately conveyed within the formal atmosphere of a courtroom. Nor do we believe that a court or a jury can evaluate these highly subjective factors without somehow supplanting the parent's own individual philosophy.

*Id.* at 545-46; *see accord. Zellmer*, 188 Wash.2d at 503; *Dubay*, 542 A.2d at 716; *Broadwell*, 871 S.W.2d at 476; *Cates*, 619 Ill.2d at 103-104. Therefore, based upon West Virginia law, the

principles cited above, and consistent with the majority of jurisdictions across the country, the fourth certified question should be answered, “yes,” the parental immunity doctrine, as modified by this Court, has continued viability in West Virginia.

**C. [Certified Question Number Two] The Parental Immunity Doctrine Bars Defendants in a Civil Action Filed By a Child from Asserting Derivative Claims for Contribution, Apportionment of Fault and Indemnification Against the Parents of an Injured Child**

**i. History of Contribution and Apportionment of Fault Among Joint Tortfeasors in West Virginia**

The right of contribution and the concomitant defense of comparative contribution against a joint tortfeasor, which the defendants herein have asserted against the Parents, have not always existed in the state of West Virginia. These sister doctrines were developed by the Supreme Court of Appeals through *Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977)(the right to contribution from joint tortfeasors) and through *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982)(comparative negligence among joint tortfeasors).

Prior to *Haynes*, a plaintiff was permitted “to sue one of several joint tortfeasors and hold him responsible for the entire damage claim, even though other joint tortfeasors had contributed to the damage.” *See Sitzes*, 169 W.Va. at 711. “Because the defendant had no right prior to *Haynes* . . . to bring in by way of contribution another joint tortfeasor, he became liable for the entire judgment.” *Id.* (internal citations omitted). In *Haynes*, the Supreme Court of Appeals “extended a right of contribution to a tortfeasor to bring in as a third-party defendant a fellow joint tortfeasor to share by way of contribution on the verdict recovered by the plaintiff.” *See Sydenstricker v. Unipunch Products, Inc.*, 169 W.Va. 440, 448, 288 S.E.2d 511, 516 (1982)(discussing *Haynes*). The purpose of the right of contribution was to permit defendants to

bring other parties into the litigation that the plaintiff could have sued, but chose not to. *See id.* However, even after the Supreme Court of Appeals' decision in *Haynes*, the defendant tortfeasor still had no means by which they could compare their relative negligence for the purpose of apportioning fault – enter *Sitzes*.

In *Sitzes*, the Supreme Court of Appeals created the doctrine of “comparative contribution” which permitted the apportionment of negligence among joint tortfeasors. *See Sitzes*, 169 W.Va. at 713. The Court concluded “that as between joint tortfeasors a right of comparative contribution exists *inter se* based upon their relative degrees of fault or negligence.” *Id.* “[T]he right of contribution established in *Haynes, supra*, is not mandatory but must be asserted by the defendant by filing a third-party claim.” *Id.* Then, and only then, can a defendant invoke his right of comparative contribution by requesting that special interrogatories be “given to the jury requiring it to allocate the various joint tortfeasors’ degree of primary fault” to the plaintiff. *Id.* Therefore, under West Virginia law, a defendant in a civil action may only apportion fault among non-party, joint tortfeasors if he is able to bring such non-parties into the suit by filing a third-party complaint for contribution. *See id.*

**ii. The Parental Immunity Doctrine Prevents the Defendants from Asserting a Claim for Comparative Contribution Against the Parents Because Contribution Can Only Be Brought Against a Tortfeasor Whom Is Also Liable to the Injured Plaintiff**

The issue presently before the Court is whether the parental immunity doctrine bars a defendant in an action filed by an injured child from asserting a claim for contribution against the child’s parents. “For a contribution action to proceed, the party seeking contribution must establish that the entity from whom contribution is sought is a joint tortfeasor. Consequently, entities that are immune from liability are not subject to contribution actions.” 2 Madden & Owen on Prod. Liab. § 25:12 (3d ed.), *citing* Prosser and Keeton on the Law of Torts (5<sup>th</sup> ed.)

¶339-40 § 50. This Court has previously held that a potential joint tortfeasor is immune from a third-party contribution claim if he is initially immune from tort liability to the injured plaintiff. *Syl. Pt. 6, Unipunch Products*, 169 W.Va. 440 (the impleading party may only assert a theory of liability against the impleaded party that the plaintiff could have asserted). As discussed above, “the parental immunity doctrine in West Virginia prohibits a child from bringing a civil action against his or her parents”. *Lee*, 159 W.Va. at 587-88. Therefore, the Defendants in this matter are barred from asserting a claim for contribution against the minor plaintiff’s parents and thereby have no basis upon which to seek “comparative contribution,” or an apportionment of fault among them.

The issue before the Court in *Unipunch Products* is virtually identical to the issue presently before the Court except the relevant immunity in that case was the workmen’s compensation immunity as opposed to the parental immunity. In *Unipunch Products* an employee was injured while working with a piece of machinery in the course and scope of his employment. *Unipunch Products*, 288 S.E.2d, at 514. The employee-plaintiff filed a products liability complaint against the manufacturer of the machinery, but did not file a claim against his employer. *See id.* In response, the manufacturer of the machinery filed a third-party complaint against the plaintiff’s employer seeking contribution. *See id.* The manufacturer’s third-party complaint alleged that the employer was “guilty of willful, wanton, and reckless misconduct or an intentional tort toward the plaintiff employee resulting in his injuries.” *Id.*, at 515. The employer asserted that West Virginia’s workmen’s compensation immunity precluded the manufacturer’s claim for contribution. *Id.*, at 514.

The immunity provision of West Virginia’s Workmen’s Compensation Act insulates the employer against liability for damages arising out of injuries or death occasioned from

workplace injuries. *Id.*, at 517 (citations omitted). However, the court noted, West Virginia’s workmen’s compensation immunity provision provided an exception which “permits an employee to sue his employer for any injury or death arising from the ‘deliberate intention’ of his employer.” *Id.*, citing *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907 (1978). Based upon this exception to employer immunity, the Court recognized that had the injured employee elected to sue his employer alleging “deliberate intent,” that claim would have been available to him. *Id.*, at 517.

Addressing the issue of contribution, the Court began by recognizing that if the employer is immune from suit as to its employees, it is equally immune from third party claims for contribution:

It is the common or joint liability to the plaintiff on the part of joint tortfeasors that gives rise to a cause of action for contribution. However, where, as here, the right of contribution is initially grounded in common liability in tort, courts have held that a joint tortfeasor employer is immune from a third-party contribution suit because he is initially immune from tort liability to his injured employee by virtue of the workmen’s compensation statutory bar of such tort actions.

*Id.*, at 516. Nonetheless, because the plaintiff-employee could have sued his employer utilizing the “deliberate intent” exception to employer immunity, the court found that the manufacturer could allege a claim for contribution so long as the allegations met the “deliberate intent” standard. The court reasoned that West Virginia’s “right of contribution . . . is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff.” *Id.*, at 518. Therefore, the court concluded that “the deliberate intent exception . . . permits a defendant to bring a third-party action in contribution against the employer of the injured plaintiff” so long as the allegations in the third-party action allege a claim for deliberate intent, not mere negligence. *Id.*, at 518-19.

In *Cole v. Fairchild*, this Court impliedly recognized that if the parental immunity doctrine applies it operates to preclude “consideration of the parent’s negligent acts” through application of the “comparative negligence rule”. *Cole*, 198 W.Va. at 749-751.

In *Sias v. Wal-Mart Stores, Inc.*, 137 F.Supp.2d 699 (S.D.W.Va. 2001), Chief Judge Haden, applying West Virginia law, decided the very issue presently before the court – holding that where a child is injured by a product, the product liability defendant may not assert the negligence of the parents as a defense. In *Sias*, the child’s grandmother purchased a bicycle with training wheels from Wal-Mart for the child’s birthday. *Sias*, 137 F.Supp.2d 699, 700. The child was injured in an accident while riding the bicycle, which the plaintiffs alleged was due to the defective condition of the bicycle, or to Wal-Mart’s negligent assembly and adjustment. *Id.* Wal-Mart filed a claim for contribution against the child’s mother asserting that her negligent supervision of her child or her negligently permitting some third person to supervise her child proximately caused or contributed to the child’s injuries. *Id.* The mother moved to dismiss the contribution claim arguing that it was barred by the parental immunity doctrine. *Id.*

Applying the logic from *Unipunch Products*, the district court held that Wal-Mart’s claim for contribution was barred by the parental immunity doctrine. The Court reasoned that:

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.

*Id.*, at 702. Accordingly, the Court dismissed Wal-Mart’s claim for contribution and prohibited it from asserting the comparative negligence of the parents as a defense pursuant to the parental

immunity doctrine. *See id.* By application of this well-settled West Virginia law, the Defendants are barred from asserting claims of contribution against A.N.'s parents.

Judge Haden's decision in *Sias* is in line with the majority consensus; most courts from around the country hold that parental immunity prohibits contribution actions against parents.<sup>6</sup> In *Crotta*, the Supreme Court of Connecticut decided issues identical to those presented in the instant certified questions. The United States District Court for the District of Connecticut submitted certified questions the Connecticut court asking whether "the doctrine of parental immunity operates to preclude the parent of a minor plaintiff from being joined as a third party defendant for purposes of: (1) apportionment of liability; (2) contribution; or (3) indemnification based on the parent's allegedly negligent supervision of the minor plaintiff." *Crotta*, 249 Conn. at 635. On all issues, the Connecticut Supreme Court found that it does. *Id.*

Michael Crotta placed his son, a minor, in the cargo portion of a shopping cart that was provided by Home Depot for use by its customers. *Id.* at 636. While the father was crouched down examining an item, the plaintiff-child fell from the shopping cart and struck his head on the concrete floor, thereby sustaining serious physical injuries. *Id.* Thereafter, the plaintiff, acting through his mother, brought an action against the Home Depot and the product manufacturer alleging, *inter alia*, a product liability claim against both defendants on the theory

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<sup>6</sup> *See, e.g. Crotta v. Home Depot, Inc.*, 249 Conn. 634, 732 A.2d 767 (Conn. 1999); *Jacobsen v. Schroder*, 117 Idaho 442, 788 P.2d 843 (1990)(parent-child immunity for alleged negligent supervision prohibits third-party contribution claim); *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933 (Tex 1992)(doctrine of parental immunity bars claim for contribution for negligent supervision of child); *Holdook v. Spencer*, 36 N.Y.2d 35, 364 N.Y.S.2d 859, 324 N.E.2d 338 (1974); *Sears, Roebuck & Co. v. Huang*, 652 A.2d 568 (Del. 1995); *Doe by Connolly v. Holt*, 332 N.C. 90, 96 (1992); *Lee by Schlosser v. Mowett Sales Co., Inc.*, 31 N.C. 489, 342 S.E.2d 882 (N.C. 1986); *Brunner v. Hutchinson Div.*, 770 F.Supp. 517, 525 (D.S.D. 1991)(applying south Dakota law); *Baughn v. Honda Motor Co., Ltd.*, 105 Wash.2d 118, 712 P.2d 293 (Wash. 1986)(tortfeasor may not seek indemnity or contribution from parents on theory that parents' negligent failure to supervise child was cause of injury); *Almli v. Santora*, 154 Mich.App. 60, 397 N.W.2d 216 (Mich.App. 1986)(defendants barred from obtaining contribution based on negligent supervision, even where damages were claimed by parents in their individual capacity).

that his injuries had been caused by the defective and unreasonably dangerous condition of the shopping cart. *Id.* The plaintiff also asserted a negligence claim against Home Depot. *Id.* Both defendants filed third party complaints against the father seeking contribution, indemnification and apportionment of liability arguing that the father's negligent supervision of the plaintiff/child caused his injuries. *Id.* at 636-37.

In holding that the defendants had no basis upon which to assert common-law claims for contribution against the father, the Supreme Court of Connecticut recited the basic principles behind contribution. "Contribution is a payment made by each, or by any, of several having a *common interest or liability* of his share in the loss suffered, or in the money necessarily paid by one of the parties on behalf of the others." *Id.* at 639 (emphasis in original)(citations omitted). "As a general proposition, [however] a tortfeasor compelled to discharge a liability for a tort cannot recover contribution from a joint tortfeasor whose participation therein gave the injured person no cause of action against him, since the element of *common liability of both tortfeasors to the injured person, essential to the right of contribution, is lacking in such cases. . . .*" *Id.* at 640, *quoting* 25 A.L.R. 4<sup>th</sup> 1123, Joint Tortfeasor Contribution-Family §§ 2[a] (1983); 18 Am.Jur.2d, Contribution § 1 (1985). "The contribution defendant must be a tortfeasor, and *originally liable to the plaintiff*. If there was never any such liability, as where the contribution defendant has the defense of family immunity . . . then there is no liability for contribution." *Id.*, *quoting* W. Prosser & Keeton, Torts (5<sup>th</sup> Ed.1984) § 50, pp. 339-40; 18 C.J.S., Contribution § 29 (1990)(recognizing that third party may not recover contribution against parent where child has no cause of action against parent for negligent supervision).

The Connecticut court also reasoned that "[t]hird party actions against a parent based on that parent's allegedly negligent supervision of his child would be no less disruptive of parental

management of family affairs than would be a direct negligence action by the child against the parent. “ *Id.* at 644 (citations omitted). “Permitting such actions would ‘undermine parental authority’ in a similar manner.” *Id.* (citations omitted). Moreover, the court reasoned, that allowing the defendants’ third party claims against a parent would “permit the defendants to accomplish indirectly that which they could not be accomplished directly.” Based upon these well-established legal principles, the Connecticut Court held that the defendants had no basis upon which to assert the defense of contribution, allocation of damages, and indemnity against the father on the basis of his allegedly negligent supervision of his child. *See id.*, at 640-641, n.8 (collecting cases which hold that parental immunity bars a third-party claim for contribution against the parents). Therefore, the parental immunity doctrine operates to preclude any claim for comparative contribution against the Parents of A.N., and the second certified question should be answered “yes”.

**iii. As in the Case of Contribution, a Third Party’s Claim for Indemnity Against the Parent of an Injured Child is Barred by the Parental Immunity Doctrine, and More Importantly, None of the Defendants Herein Have a Viable Claim for Indemnity Even Absent Such Immunity**

“As in the case of contribution, indemnity is not allowed against one who has a defense, such as family immunity against the original plaintiff.” Prosser and Keeton on the law of Torts, § 51, pp. 343-44, n.26; *Accord Crotta*, 249 Conn. 634, 641-42, 732 A.2d 767, 772-73 (1999); *Baughn*, 105 Wash.2d 118, 712 P.2d 293 (1986) (parental immunity prevents third party action for indemnification against parents for negligent supervision); *Foldi*, 93 N.J. 533, 461 A.2d 1145 (1983)(same).

The Supreme Court of Appeals has found that the requisite elements of an implied indemnity claim in West Virginia are a showing that:

(1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and indemnitee share.

*Harvest Capital v. W. Virginia Dept. of Energy*, 211 W. Va. 34, 39, 560 S.E.2d 509, 514 (2002).

Importantly, “the person claiming implied indemnity in order to recover [must be] without fault in regard to the incident that created the plaintiff’s injuries.” Syl. Pt. 2, *Unipunch Products*, 169 W.Va. 440. Further, in *Unipunch Products*, this Court held that “[i]n a products liability case where the third party is the manufacturer, he is not accorded a right of implied indemnity against the employer because, having made a defective product, he is not fault free.” Syl. Pt. 3, *Unipunch Products*, 169 W.Va. 440. The same logic would apply in the instant matter. Moreover, there is no “special relationship” that exists between the parents and any of the defendants that would make a defendant subject to liability when they did not contribute to the child’s injury. Therefore, regardless of application of the parental immunity doctrine, no claim for implied indemnity may lie.

**D. [Certified Question Number Three] Under Well-Established West Virginia Law, Defendants in a Civil Action are Prohibited from Comparing Their Relative Fault with that of a Non-Party**

Under West Virginia law, the defendants are not permitted to compare their relative fault with the parents’, if any, because the parents are (or should be) non-parties to this litigation by operation of the parental immunity doctrine. The defendants’ are only permitted to compare their relative degrees of fault among those parties against which they have asserted a viable claim for comparative contribution. See *Unipunch Products*, 169 W.Va. at 518-19; *Sitzes*, 169 W.Va. at 713. The defendants may not compare their respective fault against the parents’ because they do not have a valid claim for comparative contribution against them. See *Sitzes*,

169 W.Va. at 713(the right of comparative contribution is not mandatory and can only be asserted by filing a third-party claim).

In West Virginia, the process for determining the percentage of a plaintiff's comparative contributory negligence is different than that for determining the allocation of damages among joint defendants; they are done in two, separate and unrelated steps. *Sitzes*, 169 W.Va. at 687 (“[i]t must be stressed that *Bradley* did not deal with allocation of the primary negligence of the defendant joint tortfeasors [among themselves,] *Bradley's* concern was in the area of the plaintiff's contributory negligence . . .”).

This Court has distinguished the terms comparative contributory negligence and comparative negligence (among joint tortfeasors). See *King v. Kayak Mfg. Corp.*, 182 W.Va. 276, 279, 387 S.E.2d 511, 515 (1989)(“In *Bradley*, we used the term ‘comparative negligence’ as a shorthand method of referring to comparative contributory negligence”). The term “comparative contributory negligence” refers to any negligence the plaintiff, in this case A.N., may have had in causing his own injuries. See *id.* “Comparative Negligence,” on the other hand, refers to “the defendant's right to comparative contribution, i.e., allocation of each defendant's separate degree of fault,” which “is a secondary issue.” See *id.* Determining the Defendants ultimate liability for damages when there is an assertion of comparative contributory negligence is a two-step process.

**i. The First Step: Allocating the Plaintiff's Percentage of Comparative Contributory Negligence, If Any.**

The first step in the process involves determining the plaintiff's percentage of contributory negligence, if any. “It is clear . . . from Syllabus Point 3 of *Bradley* that the plaintiff's contributory negligence[, if any,] is compared with the ‘negligence or fault . . . of the other parties involved’ and so long as the plaintiff's negligence or fault “does not equal or

exceed” that of the other actors, the plaintiff is not barred from recovery because of his contributory negligence.” *Id.* at 514, *citing* Syl.Pt. 3, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979). “Thus, under *Bradley*, it is not initially necessary for the jury to make a comparison of each individual defendant’s negligence” because “[t]he first determination is whether the plaintiff’s percentage of contributory negligence bars recovery.”

“On this issue, the jury is instructed to determine if the defendants are liable to the plaintiff.” *Id.* Then, if the defendants are found to be liable, “the percentage, or degree, of the plaintiff’s contributory negligence is compared to that of all of the other parties involved in the accident.” *Id.* Therein lies the major distinction between determining relative fault for the purposes of “comparative contributory negligence” and “comparative contribution”: “In order to obtain a proper assessment of the total amount of the plaintiff’s contributory negligence under our comparative [contributory] negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation.” Syl. Pt. 3, *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981). The minor plaintiff, A.N., does not allege that the parents contributed to his injuries, but clearly, the defendants do.

The jury would then, at this point, compare the plaintiff A.N.’s alleged negligence against the negligence of any individual or company who contributed to the accident whether they are parties to the litigation or not. *See Id.* If the plaintiff’s negligence or fault does not equal or exceed that of the other tortfeasors’, the trial court will then reduce the damages award by the amount of the plaintiff’s percent of fault. *See Bradley*, 164 W.Va. 343-44.

**ii. The Second Step: Allocating Each Defendant's Separate Degree of Fault**

“The question of the defendants’ right to comparative contribution, i.e., allocation of each defendant’s separate degree of fault, is a secondary issue.” *King*, 182 W.Va. at 514. “Obviously, it need not be addressed if the jury finds that the plaintiff’s contributory negligence bars recovery, as none of the defendants is then liable for damages.” *Id.* “Moreover, if one or more of the defendants are found not to be guilty of primary negligence, such defendant is not liable for any contribution” or to the plaintiff. *Id.* “Furthermore, the right of comparative contribution is not automatic, but must be requested by one of the defendants.” *Id.* at 514-15. “Thus, the jury should not be asked to consider a defendant’s individual degree of negligence until it has first considered the primary issues of the defendants’ liability to the plaintiff and the plaintiff’s degree of contributory negligence.” *Id.* at 515.

**iii. Because the Parents Cannot Be Made Parties to this Litigation Via a Claim for Contribution, Their Fault as Non-Parties, if any, Cannot Be Considered in Allocating Fault Among the Joint Tortfeasor Defendants**

As discussed above, the defendants’ claims of contribution against the parents are barred by operation of the parental immunity doctrine. The defendants’ are only permitted to compare their relative degrees of fault among those parties against which they have a viable claim for comparative contribution. *See Unipunch Products*, 169 W.Va. at 518-19; *Sitzes*, 169 W.Va. at 713. Comparative Contribution is not mandatory and can only be asserted through filing a viable claim for contribution upon any theory or cause of action available to the plaintiff. *Sitzes*, 169 W.Va. at 713.

This comparative contribution procedure for allocation of each defendant’s separate degree of fault is also consistent with West Virginia’s joint and several liability statute. W.Va.

Code § 55-7-24 (2005). The joint and several liability statute provides that “[i]n any cause of action involving the tortious conduct of more than one defendant, the trial court shall: (1) instruct the jury to determine . . . the proportionate fault of *each of the parties in the litigation at the time the verdict is rendered.*” W.Va. Code § 55-7-24(a)(1)(emphasis added). The parents, immune from liability due to the parental immunity doctrine, will not be parties in the litigation at the time the verdict is rendered. Thus, the jury will not be instructed to determine the parents’ proportionate fault.

Upon a review of the district court’s order certifying these questions, it appears that question number three was certified solely based upon one Colorado Court of Appeals’ case which permitted an immune parent to be designated as a nonparty at fault based upon the mother’s alleged negligent supervision pursuant to a Colorado statute which permits explicitly permits such a designation. (See JA 661), *citing Paris v. Dance*, 194 P.3d 404 (Colo. Ct. App. 2008). A review of the *Paris* case reveals that its holding has zero application in West Virginia and is simply the application of a Colorado statute which is contrary to West Virginia law.

In *Paris*, an injured child filed a negligence complaint, by and through her mother, against two defendants. *Paris*, 194 P.3d at 405. In turn, the defendants, pursuant to Colo. Rev. Stat. § 13-21-111.5 (2007), designated the mother as a nonparty at fault alleging negligent supervision. *Id.* at 405-06. The mother argued that the parental immunity doctrine prevented such a designation. That statute, however, represents the Colorado Legislature’s abolishment of joint and several liability. *Id.* at 407. The court found that the parental immunity doctrine did not prohibit the designation of a parent as a nonparty at fault in a child injury case because the express language of the statute provided, “any provision of the law to the contrary notwithstanding, [a jury] in a civil action may consider the degree or percentage of negligence or

fault of a person not a party to the action, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those who are parties to such action.” *Id.* at 407, *quoting* Colo. Rev. Stat. § 13-21-111.5(3)(a).

Unlike Colorado, the West Virginia legislature has not abolished the doctrine of joint and several liability. To the contrary, “[t]his jurisdiction is committed to the concept of joint and several liability among tortfeasors.” *Sitzes*, 169 W.Va. at 684. Moreover, where the West Virginia legislature has found that the allocation of damages shall only be among “each of the parties in the litigation at the time the verdict is rendered.” W.Va. Code § 55-7-24(a)(1) (2005). Recently, in *Halcomb v. Smith*, 230 W.Va. 258, 737 S.E.2d 286, 288 n. 1 (2012), this Court upheld the trial court’s refusal to instruct a jury to assess the proportionate fault of a non-party driver involved in a motor-vehicle collision. Citing West Virginia’s allocation of fault statute, this Court stated, “[i]t is clear that, when the jury’s verdict was rendered, Mr. Withrow was not a party to any litigation involving the plaintiff,” and thus, allocation of fault to the non-party driver was not permitted. *Id.* For this Court to include the parents as nonparties for the allocation of fault among the defendants, it would have to go against decades of West Virginia law adhering to the joint and several liability of joint tortfeasors and the collective wisdom of the West Virginia legislature. Therefore, the answer to the third certified question must be “no,” West Virginia law does not permit the inclusion of non-parties for the allocation of fault among joint tortfeasors.

**E. [Certified Question Number One] This Court Should Preclude Defendants from Relying Upon the Conduct of the Non-Party Parents to Assert the Affirmative Defense of Product Misuse and Superseding, Intervening Cause Against, A.N., in Order to Demonstrate Lack of Defect and Foreseeability**

This is a strict product liability and negligence action being brought by a minor child (age seven at the time of the incident) where his parents are not asserting any of their own individual claims. Yet, to avoid liability to the child the Defendants seek to assert affirmative defenses against the non-party parents. Because the only person making a claim in this civil action is A.N., the minor child, any affirmative defense asserted by the Defendants is an affirmative defense against A.N., not the Parents. The conduct of the parents, who by proper operation of the parental immunity doctrine are nonparties, is not relevant to this civil action. There is no provision of West Virginia law which Permits the Defendants to assert affirmative defenses against the non-party parents rather than against the claimant, AN, and to do so, would annihilate the long-standing law in West Virginia that a parent's negligence, if any, cannot be imputed to a minor child.

- i. Defendants are precluded from blaming AN's parents for abnormal use or misuse of the Fire Starter Gel, any such defense must be asserted against A.N. directly**

As to A.N. himself, the defendants have available to them all of the traditional well-established product liability defenses, including, if relevant, product misuse and superseding intervening cause. The parents, however, by proper operation of the parental immunity, are non-parties in this litigation because A.N. has no cause of action against them, and therefore, the defendants are unable to make the parents' parties to this litigation for purposes of contribution. *See* section C, *supra*. West Virginia law recognizes that evidence concerning the conduct of non-parties is neither relevant nor admissible outside of the rare case in which such

evidence is relevant to show intervening, superseding cause. *Sydenstricker v. Mohan*, 217 W.Va. 552, 618 S.E.2d 561, 568 (2005).

The defendants have raised the defense of abnormal use or misuse of the Fire Starter Gel by the minor plaintiff's parents. It appears, however, the defendants are disinclined to blame the minor plaintiff himself for misuse or abnormal use of the product. Misuse of a product is using the product in some abnormal manner which was neither intended by the manufacturer nor foreseeable to the manufacturer in light of its intended use. Syl. Pt. 1, *King*, 182 W.Va. at 277; *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 889-891, 253 S.E.2d 666, 683-684 (1979).

The Defendants seek to blame the non-party parents of A.N., rather than A.N. himself, for unforeseeable product misuse. However, there is simply no evidence, nor will there be, that anyone other than A.N. was using the subject fire gel at the time it exploded upon his body, burning him severely. Any product misuse defense or abnormal use defense could therefore only be directed at A.N., and not a non-party such as the Parents. The parents' prior use, misuse, or abnormal use of the fire gel product has no bearing on the question of whether A.N.'s use of the Fire Starter Gel to start a fire was an unforeseeable misuse of the product. There is no dispute that A.N.'s parents were not present, nor using the product when the incident occurred. In fact, A.N.'s parents did not even know A.N. was using or intending to use the Fire Starter Gel when the incident occurred, as their son had merely requested permission to roast a marshmallow and they believed the fire was already going.

It is undisputed that A.N. was the user of the product. If A.N. used the product appropriately, where the product was stored, for instance, or how he was shown to use the product is completely irrelevant and would be offered solely as an attempt to inappropriately

influence the jury. The Defendants, apparently resigned to the fact that A.N. used their fire starter gel product in a reasonably foreseeable manner (i.e., to start a fire), are disinclined to argue misuse against A.N., but would rather inappropriately argue misuse and foreseeability relying upon the Parents' conduct. The law does not afford the *additional defenses* (in addition to the same defenses against A.N.) upon which these Defendants are relying to "blame the Parents" for their defective product.

In short, the adequacy of the Parents' supervision of A.N. is unrelated and irrelevant to whether the product was defective and whether the manner in which A.N. himself used the product (i.e., to start a fire) was reasonably foreseeable. In product liability actions, the affirmative defense of misuse is leveled only against the individual using the product at the time the harm results. So, rather than attempting to blame A.N. himself for unforeseeable product misuse or abnormal use, the Defendants are essentially attempting to impute the Parents' alleged negligence in their prior use of the product, if any, upon A.N. regardless of whether A.N. used the Fire Starter Gel in a reasonably foreseeable manner or not. Such is not permissible under West Virginia law where a parent's negligence cannot be imputed to a child under the facts and circumstances of this case.

**ii. Any alleged negligence of A.N.'s parents in supervising him cannot be imputed to him for purposes of allocating percentages of liability or otherwise reducing his recovery in this action.**

While the defendants have alleged the contributory negligence of A.N. as a defense, they have not been inclined to pursue such a defense; presumably they are resigned to the fact that A.N. used the Fire Starter Gel in a reasonably foreseeable manner (i.e., to start a fire). Rather, the defendants have asserted affirmative defenses or claims for contribution against A.N.'s parents for negligent supervision. Such claims seek to shift or impute the parents' alleged

negligence to A.N. in order to diminish or defeat his recovery in this action. The law in West Virginia as well as the weight of authority throughout the country does not permit such a result.

It has been the law in West Virginia for more than a century that the negligence of a parent cannot be imputed to the child. *Dicken v Liverpool Coal and Salt Co.*, 41 W.Va. 511, 23 S.E. 582 (1895); *Marsh v Riley*, 118 W.Va. 52, 188 S.E. 748 (1936). In *Marsh*, a child was burned in the common bathroom of the rooming house where she lived with her mother. Bath water was heated in a tank by a gas stove which did not have a latch for the door. The landlord argued that the tenant could have obtained a latch for a few cents and prevented the burns to her child, but the court refused to shift that burden to the tenant; similarly, any alleged negligence of A.N.'s parents in failing to keep the Fire Starter Gel out of reach of A.N. or otherwise supervise his use of the product is an improper attempt to shift the burden from the defendants' failure to manufacture and distribute a reasonably safe product. More importantly, this Court rejected the defendant's contention in *Marsh* that the mother's alleged negligence in permitting the child to go to the common bathroom unsupervised, knowing that the stove was open, was the proximate cause of the child's injury. The Court noted in the past New York and a few states had allowed such a result, but in rejecting the imputation of liability on a parent for failing to supervise a child the Court stated "It has not been recognized in the Virginias and most of the other jurisdictions".

This doctrine remains the law of West Virginia. In *Miller v Warren*, 182 W.Va. 560, 390 S.E. 2d 207 (1990), a minor child and his parents were injured in a fire at a motel which they alleged was caused by the bed being placed too close to a baseboard heater compounded by the failure of the motel to have smoke detectors. The motel alleged the cause of the fire and injuries was negligent smoking by one or both adults. Relying on *Dicken*, this Court again found that

negligence by a parent cannot be imputed to a child. An adult's negligence can be imputed to the child only "...when the child's claim is derivative, only, for example in a survivor's wrongful death action where the child was not personally involved in the events giving rise to the cause of action." *Id at 210*. This is not the situation here and plainly no negligence by the parents can be imputed to A.N.

Virginia also follows the majority; as first enunciated in *Tugman v Riverside etc, Cotton Mills*, 144 Va. 473, 132 S.E. 179 (1926) "...in a suit by an infant to recover damages for personal injury, the negligence of the parent or other person having custody and care of an infant will not be imputed to the infant." This rule was followed in *American Tobacco Company, Inc v Harrison*, 181 Va. 800, 27 S.E.2d 181 (1943). The minor plaintiff was struck by a car and it was argued by the defendant that her mother failed to negligently supervise her, allowing her to cross the street between intersections. The defendant attempted to establish that the child herself was negligent but, relying on *Tugman*, the court concluded that any negligence by the mother could not be imputed to the child.

Representative of the authority similarly holding that any negligence by the parents cannot be imputed to the child are decisions in Maryland, South Carolina, Tennessee, Colorado and Missouri. In Maryland, "it is clear that the negligent acts of a parent cannot be imputed to the minor child, and that the negligent acts of the parent that merely contribute to the injury do not necessarily rise to the level of superseding causation". *Bartholomew v Casey*, 103 Md.App.34, 651 A.2d 908 (1994), fn 16, citing *Caroline v Reicher*, 269 Md. 125, 304 A.2d 831 (1973); see also *Barksdale v Wilkowsky*, 419 Md. 649, 20 A.3d 765 (2011). In rejecting the notion that the parent's negligence can be imputed to the child, the Supreme Court of South Carolina has stated: "To impute contributory negligence to such a child would be to make him a

tortfeasor by imputation when he could not be such in fact. It would be visiting the innocent with the faults of the guilty.” *Daniels v Timmons*, 216 S.C.539, 544, 59 S.E.2d 149, 151 (1950). *See also Cleghorn v Thomas*, 58 Tenn.App. 481, 432 S.W.2d 507 (1968); *Denver City Tramway Co. v. Brown*, 57 Colo. 484, 143 P.364 (1914); *Neff v Cameron*, 214 Mo. 350 (1908).

Defendants’ argument that they may impute the alleged negligence of A.N.’s parents to A.N. in order to limit or defeat his recovery in this case accordingly must fail. It is well established not only in West Virginia but throughout the country that in a suit by a minor to recover damages for injuries caused by a third party, any alleged negligence by his parent is not to be imputed to him. Such imputation would make A.N. a tortfeasor by extension. If the defendants want to prove that A.N. was contributorily negligent or used the Fire Starter Gel in an unforeseeable manner, they may try; they may not do so, however, by attributing negligence of his parents to him indirectly.

### **iii. West Virginia Law Does Not Recognize the Defense of Negligent Parental Supervision by Parents**

The defendants’ alleged defense of “negligent parental supervision” is not a defense that should be recognized by the State of West Virginia in product liability cases such as the present. The Plaintiff should not be held to prove, as required in every products liability case, that the product is not reasonably safe for adult use and then, even in the face of such proof, have to confront an allegation that the user of the dangerous product may not recover because his parents were not supervising his proper use of the product. If the child used the product in a reasonably foreseeable manner, such a finding breaks causation with the parents’ negligent supervision, if any. The Defendants are seeking a “free pass” based upon the fact that the product was used by a child – even if he used it as an adult would.

Moreover, this is not a case where the plaintiffs allege that the product is dangerous because the defendants failed to consider its use by children. The Plaintiffs do not allege that Fire Starter Gel is dangerous only to children, but to everyone. The Plaintiffs make no allegation that the Defendants failed to anticipate that children might use their product. The allegations are that the Fire Starter Gel posed the same dangers to A.N. which it poses to adults. The Plaintiff does not make any allegation that the Defendants should have taken any precaution with respect to children which would not be necessary in the case of adults, nor does he allege that he was injured because he was a child. Therefore, foreseeability to the Defendants that a child might use the product is not an issue in this case.

The focus of this case should be on the product defect and on how A.N. used of the product. If A.N. used the product in a reasonably foreseeable manner the parents' negligent supervision of A.N. is wholly irrelevant. If, on the other hand, A.N. did not use the product in a reasonably foreseeable manner then his claim would likely be defeated – even if the parents were adequately supervising him. Therefore, the parents' conduct in this litigation is not relevant or admissible unless offered to demonstrate supervening or intervening cause – which it is difficult to envision such a scenario in a products liability case such as this. The parents were not using the product at the time it exploded; in fact, they were not even in the room. To be a superseding, intervening cause the parents' conduct must have been a negligent act or omission that constituted “a new effective cause and operates independently of any other act, making it and it only, the proximate cause of injury.” *Mohan*, 217 W.Va. at 559. Regardless of the parents' conduct, the product is either not reasonably safe for its intended uses, or it is – those are the options. Surely, there can be no scenario where (1) the product is found to be defective, and (2) A.N. is found to have used the product in reasonably foreseeable manner, but because he is a

minor and his parents were not watching him use the product, his meritorious product liability claim would be precluded.

## VII. CONCLUSION

For the reasons stated herein, petitioners respectfully request an order from this Court answering the certified questions as follows:

1. Yes. The parental immunity doctrine precludes defendants from asserting the Parents conduct and/or negligent supervision as a defense against A.N. in this product liability action.

2. Yes. 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. No. A.N.'s parents should not be included on any verdict form as non-parties for the allocation of fault.

4. Yes. The parental immunity should have continued viability in West Virginia.

Respectfully submitted this 13<sup>th</sup> day of May, 2013,



Dino S. Colombo (WVSB # 5066)  
Travis T. Mohler (WVSB #10579)  
Colombo Law  
1054 Maple Drive  
Morgantown, WV 26505  
Phone: (304) 599-4229  
Fax: (304) 599-3861  
dinoc@ColomboLawWV.com  
travism@ColomboLawWV.com  
*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I, Dino S. Colombo, hereby certify that on this 13<sup>th</sup> day of May, 2013, I served the foregoing Petitioner's Brief upon all counsel of record via electronic mail and by placing true, copies thereof with the United States Postal Service, postage pre-paid and addressed as follows:

P. Joseph Craycraft, Esquire  
Edward A. Smallwood, Esquire  
Swartz Campbell, LLC  
1233 Main Street, Suite 1000  
Wheeling, WV 26003  
***Counsel for Defendant CKS***

Thomas Mannion, Esquire  
Andrew D. Byrd, Esquire  
Mannion & Gray Co., LPA  
122 Capitol Street, Suite 100  
Charleston, WV 25301  
***Counsel for Packaging Services Co.,  
Packaging, Inc. Inc.***

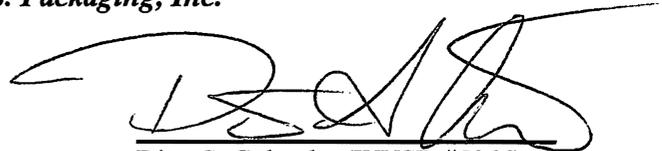
Stephen R. Brooks, Esquire  
Lindsey M. Saad, Esquire  
Alonzo D. Washington, Esquire  
Flaherty Sensabaugh Bonasso, PLLC  
48 Donley Street, Suite 501  
Morgantown, WV 26508  
***Counsel for Stull Technologies, Inc.***

Robert Hayes, Esquire  
Cozen O'Connor  
1900 Market Street  
Philadelphia, PA 19103  
***Counsel for Hearthmark, LLC d/b/a  
Jarden Home Brands, and Wal-Mart  
Stores, Inc***

Larry W. Blalock, Esquire  
Jennifer Z. Cain, Esquire  
Jackson Kelly, PLLC  
1144 Market Street  
Wheeling, WV 26003  
***Counsel for Jarden Corporation,***

***Hearthmark, LLC d/b/a Jarden Home Brands,  
and Wal-Mart Stores, Inc.***

Thomas T. Locke, Esquire  
Rhett E. Petcher, Esquire  
Seyfarth Shaw, LLP  
975 F Street, N.W.  
Washington, DC 20004  
***Counsel for C.K.S. Packaging, Inc.***



Dino S. Colombo (WVSB #5066)