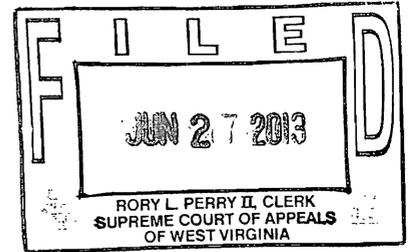


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0159

KIMBERLY LANDIS and ALVA NELSON,
as parents and guardians of A.N., a minor,
Plaintiffs-Below
Petitioners



v.

HEARTHMARK, LLC, d/b/a JARDEN HOME BRANDS,
WAL-MART STORES, INC., C.K.S. PACKAGING, INC.,
PACKAGING SERVICE COMPANY, INC., and
STULL TECHNOLOGIES,
Defendants-Below
Respondents

Honorable John P. Bailey, United States District Judge
United States District Court For The Northern District of West Virginia
Civil Action No. 2:11-CV-00101

BRIEF OF DEFENDANTS/RESPONDENTS, HEARTHMARK, LLC d/b/a JARDEN HOME BRANDS and WAL-MART STORES, INC., ON CERTIFIED QUESTIONS

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CERTIFIED QUESTIONS

This matter is before this Honorable Court on the following four questions certified to it pursuant to W.Va. Code § 51-1A-1 *et seq.* by the Honorable John Preston Bailey of the United States District Court for the Northern District of West Virginia (the “District 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 nonparties for the allocation of fault, even though parental immunity would still bar recovery of the damages allocated to the parents?
4. Whether parental immunity should have continued viability in this jurisdiction?

STATEMENT OF THE CASE

A. Procedural History

Petitioners, Kimberly Landis and Alva Nelson (the “Parents”), filed a Complaint on behalf of their son, A.N., seeking to recover compensatory and punitive damages for burns he sustained in a fire occurring in his home on February 28, 2010. *See* Joint Appendix (“J.A.”), at 000001-000017. Petitioners allege that the fire occurred when hot embers in a fireplace ignited the Diamond Fire Starter Gel that A.N. was applying to kindling to restart a fire. *Id.* at 000003-4, ¶¶ 6, 12. According to Petitioners, the fire “flashed back” and ignited the vapors within the bottle, causing it to rupture and leading to flaming gel being splashed on A.N. *Id.* Petitioners assert product liability causes of action against Stull Technologies (“Stull”), which manufactured

the bottle cap, CKS Packaging Inc. (“CKS”), which manufactured the bottle, Packaging Services Company, Inc. (“PSC”) which produced the gel, Hearthmark LLC (“Hearthmark”), which distributed the gel, and Wal-Mart Stores, Inc. (“Wal-Mart”), from which Petitioners allegedly purchased the gel. *See generally*, J.A., at 000001-17. These defendants are collectively referred to herein as “Respondents.”

Respondents each denied the material allegations of the Complaint and generally asserted defenses based upon the Parents’ misuse of the Diamond Fire Starter Gel, specifically, their intentional and reckless disregard of the product’s warnings. *See* J.A., 000015-58; J.A. 000076-148. For instance, Hearthmark and Wal-Mart alleged that the product was intentionally misused in an unforeseeable manner and separately asserted product misuse defenses. J.A. 000090-92, at ¶¶ 5, 7, 13; J.A. 000115-116, at, ¶¶ 5, 7, 13. They also alleged that the Parents’ reckless conduct was a superseding intervening cause of A.N.’s injuries. J.A. 000096-99; J.A. 000121-23. Each of the Respondents ultimately filed what were deemed by the Court to be third-party complaints against the Parents seeking contribution and indemnity. *See* J.A. 000551.

Petitioners first raised parental immunity by filing a Motion to Strike Stull’s Tenth Affirmative Defense. J.A. 000063-73. In that defense, 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.” J.A. 000049. While specifically directed to Stull’s Answer, in their Supporting Memorandum of Law, Petitioners sought to preclude any defendant from “arguing that the negligence of A.N.’s parents caused or contributed to their child’s injuries.” J.A. 000073. They argued that the parental immunity doctrine’s bar of a child’s claims against his parents extended to preclude “defendant[s] from asserting the

comparative negligence of a parent as a derivative defense to the injury of the child.” J.A. 000067-68. Petitioners thereafter moved for judgment on the pleadings as to the Third-Party Complaints of Hearthmark, Wal-Mart and CKS, arguing that the Parents are also immunized from contribution claims because they are “derivative” of A.N.’s rights against them. J.A. 000210-217.

In response to these Motions, every defendant other than PSC (which did not submit a response at that point) argued that the parental immunity doctrine does not extend to product liability defenses or contribution claims. J.A. 000185-192; J.A. 000221-228. They also challenged the continued vitality of that immunity on the basis of an unbroken line of decisions by this Court over the last forty years creating exceptions to parental immunity. *Id.* at 000185-192. Respondents argued that, at the very least, these decisions demonstrate that this Court would not extend parental immunity beyond children’s claims against their parents. *Id.*

By Memorandum Opinion dated July 13, 2012, the District Court denied Petitioners’ Motions to Strike and for Judgment on the Pleadings without prejudice. J.A. 000237-250. Based upon the number of exceptions created to the doctrine of parental immunity, and after a thorough review of other states’ abandonment of parental immunity, the District Court was reluctant “to predict [its] [] continued vitality in West Virginia.” *Id.* at 000248. After raising *sua sponte* the potential for certification at oral argument, in its Opinion, the District Court expressed a willingness to entertain a motion to certify the issue of whether parental immunity should be abolished once it was determined whether the Parents were insured for the defendants’ contribution claims. *Id.*

After Respondents conducted discovery as to the Parents’ insurance coverage, Petitioners filed a Motion to Certify to this Court the legal issues of whether the parental immunity doctrine

precluded A.N. “from bringing suit against his Parents for claims of negligent parental supervision” and, if it does, whether the “Defendants’ affirmative defenses and third-party complaints alleging claims for comparative contribution against the Parents were 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.’” J.A. 000352-358. Respondents opposed that Motion to Certify on varying grounds. Hearthmark, Wal-Mart and PSC filed a joint opposition in which they argued that Petitioners had not raised a sufficiently serious issue as to whether parental immunity could preclude Respondents from raising standard product liability defenses and pursuing their independent contribution claims against the Parents to require this Court’s guidance. J.A. 000586-87. They argued that the issue of whether parental immunity should be abolished did not warrant interlocutory review because Respondents would inevitably introduce evidence of the Parents’ conduct in defending A.N.’s product liability claims and in pursuing their third-party contribution claims. *Id.* at 000594-97. Alternatively, these Respondents proposed an additional question for certification of whether parental immunity extends to preclude Respondents from asserting well-established product misuse and superseding cause defenses based upon the Parents’ conduct, argued that this issue should be considered first, and reformulated and reordered Petitioners’ proposed questions for certification. *Id.* at 000594-601.

By Order of Certification entered February 19, 2013, the District Court granted the Motion to Certify. J.A. 000649-664. It included Respondents’ proposed issue as to the effect of parental immunity on their product liability defenses as the first issue for resolution, phrasing the question as whether the “parental immunity doctrine precludes defendants from asserting well-established product liability defenses of product misuse and superseding causation.” J.A.

000652-663. In requesting certification of issue whether Respondents may pursue contribution and indemnity claims, the District Court adopted Respondents' characterization of those claims as their "independent rights of contribution and indemnity" over Petitioners' characterization of them as "derivative" of A.N.'s rights. *Id.* at 000663. While the parties generally formulated the issues for review within the context of their factual assertions, the District Court phrased the issues as pure questions of law without reference to the factual background. *Id.*

This Court accepted certification of the issues the District Court proposed without modifying the questions of law for which the District Court sought certification. This is Hearthmark's and Wal-Mart's Brief on the certified issues. These parties have submitted a separate Brief because of conflicts with other defendants and to set forth their view as to how A.N. was injured.

B. Factual Background

The day on which Alex was injured - - February 28, 2010 - - was extremely cold and snowy in Harmon, West Virginia, where Petitioners resided. According to Petitioners' testimony, the family had a fire burning all day in a large hearthen fireplace in the family room on the lower level of their home. J.A. 000795-797. That evening, while all of the family members were on the upper level of the home, A.N. supposedly asked Ms. Landis for permission to go down to the family room to roast marshmallows. *Id.* Ms. Landis handed A.N. - - a seven-year old boy - - a bag of marshmallows and allowed him to go downstairs unsupervised to roast them. *Id.*, at 000796-98. At the time, A.N. was not wearing any clothes. *Id.* at 000797.

The Parents kept a bottle of Diamond® Natural Fire Starter Gel (hereinafter sometimes referred to as "the Product") either sitting on, or right next to, the downstairs hearth. J.A. 000791-792; J.A. 001099. The Product is an ethanol based gel of a class of products commonly used as fire starters for wood and wood pellet stoves. Hearthmark began marketing the Product

for these purposes in 2008. On the front label, immediately under the name of the Product, is the statement that the Product is “Perfect for Wood and Pellet Stoves.” J.A. 000617.

In their Brief, Petitioners refer to the Product in inflammatory terms, such as “highly volatile,” “incendiary,” and “explosive” and compare it to “napalm.” The Product, in fact, has none of those characteristics. While the Product is flammable - - it is a fire starter after all - - it is reasonably safe if used for its intended purposes with just a modicum of care. Indeed, although hundreds of thousands of bottles of Diamond Natural Fire Starter Gel have been sold, there are no reports whatsoever of anyone, other than A.N., being injured when using the Product to start a fire. Not one. There is also no evidence of any ethanol based fire starter gel ever causing any injury when used to start a fire. The Consumer Product Safety Commission reviewed Diamond Fire Starter Gel on two occasions, including in response to reports of A.N.’s injuries, and did not find any issues as to the Product’s safety.

Even though the Product was produced and marketed for use in wood and pellet stoves, Ms. Landis testified that she chose to use it together with traditional fire starter logs when she was only able to obtain green wood to burn. J.A. 000790; J.A. 000792. Ms. Landis permitted A.N. to use the Product to start fires in her presence. *Id.* at 000815. She did so, and the Parents left the Product next to the fireplace within easy reach of A.N., even though the label expressly warns that the fire starter gel’s vapors are flammable and that it must be kept out of the reach of children. J.A. 000617; J.A. 000791-793. That label specifically states: “DANGER! flammable vapors;” and, in red capital letters against a yellow background, “Keep Out of Reach of Children.” *Id.* The Parents also left the bottle immediately next to the large fireplace even though the directions for use state that it should be closed and removed from the immediate area

before the wood or wood pellet stove is lit and that the Product should be stored away from heat and flame “as vapors are flammable.” *Id.*

Ms. Landis testified that she “disregarded” the warning to keep the Fire Starter Gel out of the reach of children both in allowing A.N. to use the product and in storing the product on the floor:

Q. So you would agree with me that the gel was kept within [T.’s] -- pardon me – [A.’s] –

A: [A.].

Q: - reach, correct?

A: Yes.

Q: Okay. So you knew that the warning label told you to keep it out of the reach of children?

A: Yes.

Q: So you chose to disregard that warning, correct?

A: Yes.

Q: Okay. Now, when you – you told me you read the label, the warnings, when you first –

A: Uh-huh.

Q: -purchased the product; correct?

A: Yes.

J.A. 000792.

Additionally, both Parents admitted that keeping the Product next to the fireplace was inconsistent with the Product’s labeling. J.A. 000792; J.A. 001055. In fact, Ms. Landis testified that she substituted her own judgment for that of the warning label in deciding where the gel would be kept. J.A. 000792. She admittedly did so even though she believed the gel could explode. *Id.* Mr. Nelson recalled that the Product was to be used to start a “new fire” that had

never been burned and stated that he understood, prior to the incident, that the word “flammable” meant “something very dangerous.” *Id.* at 001053; J.A. 001055.

If A.N. was injured while using the Product, it is clearly because he was given access to and encouraged to use a product that a seven year child should never even touch. Against this clear record, Petitioners contend that the parental immunity doctrine mandates that Respondents bear all responsibility for the Parents’ actions without even being afforded a right of contribution. That is not, and should not be, the law.

SUMMARY OF ARGUMENT

An immunity that bars a child’s claims against his parents has no application to Respondents’ ability to pursue what the District Court recognized to be well-established product liability defenses and independent rights of contribution. There is no authority to support, and no policy reason to extend, this immunity to claims against third parties or to bar well-established product liability defenses of product misuse and superseding intervening causation or claims of contribution or indemnity. Petitioners have not and cannot identify one jurisdiction that applies parental immunity to third-parties’ product liability defenses or contribution rights.

In fact, Petitioners do not even address the substance of the certified questions. Instead, they argue the substantive law and evidentiary issues of whether evidence of the Parents’ conduct is germane to any material issue in a products liability action. Those issues are not before this Court. In any event, the Parents’ conduct is highly probative as to whether the condition of the Product was materially altered, the Product was defective and misused and there were superseding intervening causes of A.N.’s injuries. The Parents’ admitted disregard of the Product’s warnings to keep it out of the reach of children and away from heat and flame and their failure to prevent their child from using a flammable fire starter to relight or rekindle a fireplace fire are inherently at issue in the underlying litigation and go far beyond any discretion afforded

to them in supervising their child. Hearthmark and Wal-Mart do not seek to impute the Parents' negligence to A.N. for purposes of establishing contributory negligence. They submit that the Parents' actions relieved them of any further responsibility for the Product.

To the extent this Court is inclined to address the continued vitality of parental immunity in this State, it should join the majority of jurisdictions throughout the country who have abolished the doctrine. Parental immunity is an unwelcome vestige of long repudiated societal views on parents' authority over their children. Any lingering concerns for interfering with parental authority or right to supervise one's children do not justify denying children a complete remedy for legal wrongs done to them and may be addressed via jury instructions establishing the scope of parents' duties to their children.

STATEMENT REGARDING ORAL ARGUMENT

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

ARGUMENT

A. Standard of Review

This Court conducts a plenary, or de novo, review when, as here, it is called upon to resolve certified questions posed by a federal district or an appellate court. *Osborne v. U.S.*, 211 W.Va. 667, 670, 567 S.E.2d 677, 680 (2002).

B. The Legal Issues Presented Are Addressed In The Sequence The District Court Certified Them

The parties argued the order in which the certified questions should be presented before the District Court. *See* J.A. 000352-358; J.A. 000586-601. That Court certified the questions in the specific order Respondents advocated presumably because it believed that considering the

issues in that sequence was appropriate. *See* J.A. 000663. Accordingly, Respondents herein analyze the certified questions in that order. It is also appropriate to consider the effect of parental immunity first because A.N. is not attempting to assert negligence claims against his parents and, as such, parental immunity has no independent significance in this case. Its only possible significance is its impact on the defenses and third-party claims product liability defendants may assert.

Moreover, the issues of whether parental immunity precludes Respondents from asserting well-established product liability defenses and contribution claims are narrower than whether parental immunity should be abrogated or whether the Parents' fault can be allocated for purposes of assessing contributory negligence. Should the Court decide those issues in Respondents' favor, it need not address the public policy laden issue of the continued viability of parental immunity. *See McComas v. Bd. of Educ.*, 197 W.Va. 188, 206-07, 475 S.E.2d 280, 298-99 (1996) (“[t]he judicial task, properly understood, should concentrate on those questions that must be decided in order to resolve a specific case. Courts must resist the temptation to pluck issues from the stalk before their time. This is especially true when unsettled issues of broad public concern are afoot”).

C. Question 1 -- Parental Immunity Has No Bearing Upon A Minor Child's Burden of Proof In A Product Liability Action Or Well-Established Product Liability Defenses

1. The Parental Immunity Doctrine Has No Application to a Child's Product Liability Claims Against Product Manufacturers, Distributors and Sellers

The parental immunity doctrine precludes children from asserting negligence claims against their parents to recover for personal injuries. *Cole v. Fairchild*, 198 W.Va. 736, 749, 482 S.E.2d 913, 926 (1996), *citing Lee v. Comer*, 159 W.Va. 585, 587-88, 224 S.E.2d 721, 722 (1976). A minor child's product liability claim is simply not one against his parents. Parental

immunity should have no bearing upon the elements a minor child must prove in a product liability claim against non-family members or the defenses that may be asserted to such a claim. Petitioners have not identified a single jurisdiction that applies parental immunity in such a manner. If this Court were to extend the parental immunity doctrine as Petitioners advocate, West Virginia would stand alone on this issue.

Courts in other jurisdictions have consistently held that parents' misuse or failure to comply with product warnings are fatal to their child's product liability claims. In *Simpson v. Standard Container Co.*, the court held that a gas can was misused thereby negating the element of product defect when it was stored in the basement of a home without regard to warnings to "Keep Out of Reach of Children" and "Do Not Store in Vehicle or Living Space." 527 A.2d 1337, 1341 (Md. Ct. Spec. App. 1986). The plaintiff's four year-old daughter and her neighbor went into the basement, removed the cap from the gasoline container and poured or spilled gasoline onto the basement floor. The resultant vapors ignited, the four-year old neighbor was severely burned and the plaintiff's daughter perished. *Id.* at 1339. The court held that the gas can was not used for its intended purpose or in a manner that was reasonably foreseeable when it was left inside and accessible to these two unsupervised four year-olds and, as a matter of law, there was a misuse of the product that negated the element of defect and barred the plaintiff's claim that the gas can was defective because it was designed without a child proof cap. *Id.* *Accord, Akins v. County of Sonoma*, 430 P.2d 57, 64 (Cal. 1967); *Halliday v. Sturm*, 770 A. 2d 1072, 1092 (Md. Ct. Spec. App. 2001) (father's storing of a handgun under his mattress without a trigger lock where his three year-old son found it and later died from a self-inflicted gunshot wound was misuse and a superseding cause that, as a matter of law, absolved the manufacturer and seller of liability); *Van Buskirk v. West Bend Co.*, 100 F. Supp. 2d 281, 282-84 (E.D. Pa.

1999) (child's injuries were not caused by design defect, but by mother's decision to leave infant unsupervised in the vicinity of hot oil); *Kelly v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1044 (W.D. Okla. 1989) (toddler's injuries were caused, not by manufacturing defect, but by "the parents' inattention and supervision" in leaving the child near a slow-cooker filled with hot beans).

This Court has already stated its "firm opinion that [parental immunity] should be abrogated in this State," *Lee v. Comer, supra*, 159 W.Va. at 593, 224 S.E.2d at 725. If parental immunity retains any vitality, it clearly has been narrowly circumscribed. This Court has consistently recognized an exception to parental immunity every time the issue has been presented over the last forty years. *See e.g., Lusk v. Lusk*, 113 W.Va. 17, 19-20, 166 S.E.2d 538, 539 (1932) (finding an exception to parental immunity when a daughter was injured on a school bus operated by her father who was under contract with the board of education); *Lee*, 159 W.Va. at 588-89, 224 S.E.2d at 722 and at Syl. Pts. 1&2 (announcing an exception to parental immunity where a child is injured in an automobile accident); *Courtney v. Courtney*, 186 W.Va. 597, 413 S.E.2d 418 (Syl. Pt. 9) (1991) (abrogating parental immunity where a parent causes injury or death from intentional or willful conduct); *Cole*, 198 W.Va. at 750, 482 S.E.2d at 927 (finding parental immunity inapplicable in a wrongful death action so that the jury could assess the liability of each tortfeasor). *See also* J.A. 006578 (Order of Certification) ("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"). There is no basis to extend this narrowly applied doctrine beyond its specific context and purpose. *Chase v. Greyhound Lines*, 156 W.Va. 444, 456, 195 S.E.2d 816,817 (1973) *overruled by Lee*, 159 W.Va. 585, 224 S.E.2d 721 (the public policies behind the doctrine "should not be extended purely as a matter of form to parties and situations where they should not in logic and common sense apply and where the public

policy enunciated would not be promoted”). *See also, Gibson v. Gibson*, 479 P.2d 648, 652 (Cal. 1971) (noting that preserving the rule of parental immunity “where the reason for it fails appears indefensible”).

As Petitioners recognize, the only remaining potentially legitimate policy reason for retaining parental immunity is to avoid judicial interference in matters of parental discretion. *See* Petitioners’ Brief, at 10 (citing *Cole v. Fairchild, supra.*). Whatever continuing viability this rationale may have does not justify imposing liability upon product liability defendants if the exercise of parental discretion results in injury to their child. As the District Court posed the certified question in terms of whether parental immunity precludes defendants from asserting “well-established product liability defenses,” it must be presumed that the Parents’ conduct would otherwise negate (or at least tend to negate) Respondents’ liability. *See* J.A. 000663. For example, if a neighbor’s child had been playing with A.N. when the fire occurred and were also injured, Respondents could introduce evidence of the Parents’ conduct in defending the neighbor child’s claim. *See, e.g., Simpson*, 527 A.2d at 1339. This scenario illustrates that Petitioners seek to apply parental immunity to hold product liability defendants responsible for injuries a child may suffer while in the care of his parents for which they would not be liable if the child had been in the care of anyone else. While product liability law may make manufacturers, distributors and retailers insurers of their products’ safety when put to their reasonably foreseeable uses, it should not make them insurers that parents’ exercise of “parental discretion” will not harm their children. *See e.g., Robinson v. Reed-Prentice*, 403 N.E.2d 440, 441 (N.Y. 1980) (noting that while immunity may bar an employee’s remedy against his employer, the same “gives the courts no license to thrust upon a third-party manufacturer a duty to insure that its product will not be abused”).

Moreover, the focus in a product liability action is not on parenting decisions or parental supervision, but rather upon the use and handling of the product. A product liability plaintiff must demonstrate that a product was in the same condition at the time of the incident as when it was purchased. *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 889, 253 S.E.2d 666, 683 (1979)(quoting Prosser, *Law of Torts*, 668-89 (4th ed. 1971) (“the seller is not liable when the product is materially altered before use”). If a minor plaintiff’s parents modify a product, there is no basis to impose liability on the manufacturer, distributor or retailer for any injuries that may result because they have no further responsibility for it. *Id.* Hearthmark and Wal-Mart served expert reports after the Certification Order was entered opining, based on extensive testing and analysis, that leaving the bottle on the hearth, in proximity to a burning fire, subjected the bottle to repeated heating and cooling cycles that weakened the plastic. Respondents’ defense of A.N.’s claim on that basis relates directly and solely to the use of the Product; it has nothing to do with the parenting or supervision of A.N.

A defendant also may not be held responsible unless the product was being put to a reasonably foreseeable use and was not misused. *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 441, 307 S.E.2d 603, 609-10 (W.Va. 1983); *Morningstar*, 162 W.Va. at 889, 253 S.E.2d at 683. In allowing A.N. to use the Product, and intentionally leaving it within his easy reach, the Parents misused the Product. Some products should never be utilized by children. Petitioners’ argument that product liability defendants cannot introduce evidence of parents deliberately giving children access to dangerous products would hold them responsible for injuries children sustain from using any product whatsoever, regardless of how dangerous or inappropriate for children. That is simply not the law.

Further, a “seller is entitled to have his due warnings and instructions followed; and when they are disregarded, and injury results, he is not liable.” *Morningstar*, 162 W.Va. at 889, 253 S.E.2d at 683. The Product label expressly warned to keep it out of the reach of children and away from heat and flame. J.A. 000617. As the Parents deliberately ignored those warnings, there is no liability, not because the courts are second guessing parental decisions, but because manufacturers, distributors and retailers have no responsibility where products are used inconsistently with warnings and instructions. *Morningstar*, 162 W.Va. at 889, 253 S.E.2d at 683. The result would not change even if reasonable minds would disagree as to whether the warnings are overly cautious because a producer should not be held liable for the consequences of someone’s decision to reject its judgment.

Petitioners must also prove that A.N.’s injuries were caused by a product defect. *See Hudnall v. Mate Creek Trucking Inc.*, 200 W.Va. 454, 459, 490 S.E.2d 56, 61 (1997). If the fire resulted from circumstances unrelated to any claimed defect, there is no liability. *See Cmty. Antenna v. Charter Communications*, 227 W.Va. 595, 607, 712 S.E.2d 504, 516 (W.Va. 2001) (quoting *Bennett v. Asco Servs., Inc.*, 218 W.Va. 41, 48-49, 621 S.E.2d 710, 717-18 (2005)) (plaintiff satisfies its burden of proof if the evidence reasonably eliminates other causes such as the handling or misuse of the product by others who are not the manufacturer); *accord, Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071-72 (4th Cir. 1974). *See also Morningstar*, 162 W.Va. at 889, 253 S.E.2d at 683 (a seller is not liable when its product is misused).

Even if a defect set in motion a chain of circumstances leading to the fire, intervening acts that break the chain of proximate causation constitute superseding intervening causes that relieve a defendant of responsibility for any liability inducing conduct. *Costoplos v. Piedmont*

Aviation Inc., 184 W.Va. 72, 74, 399 S.E.2d 654, 656 (1990); *Lester v. Rose*, 147 W. Va. 575, 130 S.E.2d 80 (1963) (Syl. Pt. 16). See also *Sydenstricker v. Mohan*, 217 W.Va. 552, 558-59, 618 S.E.2d 561, 568 (2005) (intervening cause “severs the causal connection between [a defendant’s] original improper action and [the plaintiff’s] damages”). This result is not because the Parents exercised their parental discretion improperly, or because the child is held accountable for the Parents’ conduct, but rather because the product liability defendants did nothing to cause, or which constitute a legal cause of, the child’s injuries. See *Van Buskirk*, 100 F. Supp. 2d at 282-84 (holding that child’s injuries were caused not by design defect, but by mother’s decision to leave child unsupervised near hot oil); *Kelley*, 704 F. Supp. at 1044 (holding that child’s injury would have occurred regardless of alleged defect when parents left child unsupervised and near a slow-cooker filled with hot beans). Petitioners concede that immunity, in any form, does not alter this result or bar a defendant’s efforts to establish superseding or intervening causation. See Petitioners’ Brief, at 33.

Other courts agree. In *Sears Roebuck & Co. v. Huang*, the Delaware Supreme Court held that “when parental negligence is relevant but not actionable, a defendant may introduce that evidence to establish that parental negligence was the superseding cause of a minor child’s injury.” 652 A.2d 568, 573 (Del. 1995). The Court, therefore, found that it was error to exclude evidence of a mother’s negligent supervision in allowing her four year-old daughter to walk away from her in a department store and to an escalator where the child got her hand caught. *Id.* at 569-70, 573-74. Similarly, in *Fabian v. Minster Machine Company Inc.*, the court noted that a manufacturer’s efforts to shift causal blame to a defendant who has already settled, or the plaintiff or a fellow employee who is protected by the doctrine of employee non-liability properly “focus[ed] the jury’s attention upon the plaintiff’s duty to prove that the defendant’s

conduct or defective product was a proximate cause of the accident.” 609 A.2d 487, 495 (N.J. Super. 1992) (citations omitted). *See also, Straley v. U.S.*, 887 F. Supp. 728, 742-43 (D.N.J. 1995) (holding that the negligence of a party otherwise insulated from liability by law may be considered as a superseding cause); *accord Grant v. Dist. of Columbia*, 597 A.2d 366, 369 & n.7 (D. D.C. 1991); *Caroline v. Reicher*, 304 A.2d 831, 833-34 (Md. 1973).

2. Petitioners’ Challenges to the Relevance and Materiality of Evidence As To The Parents’ Conduct Transcend The Certified Question and Are Without Basis

Petitioners do not address whether the parental immunity doctrine precludes Respondents from introducing evidence of the Parents’ conduct, but rather argue the substantive product liability law and evidentiary issues of whether that conduct is germane to any material issue in this action. They contend that “defendants are barred from blaming A.N.’s parents for any” misuse of the Product, *see* Petitioners’ Brief, at 33, Respondents may not attribute the Parents’ negligence to A.N., *see id.* at 35, and that “West Virginia law does not recognize the defense of negligent parental supervision.” *Id.* at 38. These arguments are not responsive to the question the District Court certified and this Court accepted and, thus, they should not be considered. *See King v. Lens Creek Ltd. P’ship.*, 199 W.Va. 136, 143, 483 S.E.2d 265, 272 (1996) (declining to consider arguments that exceed the scope of a certified question). The certified question is the pure legal issue of whether parental immunity “precludes defendants from asserting **well-established** product liability defenses of product misuse and superseding intervening causation.” J.A. 000663 (Certification Order, at 15) (emphasis added). The District Court’s reference to “well-established product liability defenses” reflects an underlying conclusion that the Parents’ conduct is relevant to those defenses.

Petitioners challenge the materiality of the Parents' conduct within the context of their inflammatory (and baseless) rhetoric as to the Product's alleged dangers and their version of the events resulting in A.N.'s injuries. However, this rhetoric is based on nothing more than Petitioners' allegations. Indeed, Petitioners cite primarily to their Complaint in support of their factual allegations. Petitioners raised parental immunity at the pleadings stage and, therefore, the applicability of this immunity could only be resolved based on the pleadings. *See* J.A. 000063-73. While Petitioners' Motion to Certify was filed later in the proceedings, it arose out of the District Court's *sua sponte* suggestion during oral argument on the Motions to Strike and for Judgment on the Pleadings. The parties were able to supplement the record on the Motion to Certify, but fact discovery was still ongoing and expert discovery had not commenced. A record sufficient to assess the viability and relevance of any defenses had not been fully developed at that point and, in fact, still has not been fully developed.

To the extent the Court is inclined to consider Petitioners' arguments, Hearthmark and Wal-Mart challenge Petitioners' characterization of the Product and the circumstances leading to A.N.'s injuries. While the Product is flammable and certainly should not be utilized by a seven-year old boy, it is not highly dangerous, particularly when its intended purposes are considered. Respondents' experts have concluded that the bottle was subjected to significant heat as it set next to the fireplace on the day A.N. was injured. This caused the gel to vaporize within the bottle, which caused the internal pressure to rise and the bottle to expand asymmetrically. A.N. either hit, dropped or knocked something onto the bottle causing the bottom of the bottle - - in its weakened condition (from its prior exposure to heat) - - to rupture. Vapors were expelled out of the bottle and spread to the fireplace, causing a flash fire in which A.N. was enveloped. This had nothing to do with parental supervision and everything to do with the Parents' handling of the

Product. Thus, parental immunity should not bar this relevant evidence and these well-established product liability defenses. *See Martin v. Yunker*, 853 P.2d 1332, 1333 (Ore. Ct. App. 1993) (holding that parents' failure to inform diving instructors that their son was severely learning disabled and could not retain the information necessary to dive safely was not protected by parental immunity and reasoning that the court need only focus on the nature of the parents' conduct and "not merely on the existence of the parent-child relationship"); *Laney v. Coleman Co.*, 758 F.2d 1299, 1302, 1305-06 (8th Cir. 1985) (evidence that parents misused a fuel can by storing it within child's reach was admissible to prove product misuse and lack of foreseeability in child's product liability action); *Akins*, 430 P.2d at 64-66 (parental conduct was relevant to issues of foreseeability and actual and legal causation in child's negligence claim).

Even under Petitioners' version of how the fire occurred, the Parents' actions demonstrate significantly more than negligent parental supervision and this evidence is directly relevant to fundamental product liability defenses. The Product was utilized by an unintended user, the child applied the product inconsistently with express instructions (squirted on wood after the wood was already placed in the fireplace rather than applying it to wood before it was placed in a wood or pellet stove), and the gel was superheated at the time it was applied (because it was placed near, and not away from, heat and flame). This occurred not just because of inadvertence, negligence or even recklessness. It occurred, by the Parents' own testimony, because of their deliberate decision to substitute their own (incredibly poor) judgment for the clear instructions on the warning label. *See* J.A. 000792. "No sound public policy would be served" by extending parental immunity to these facts. *Courtney*, 186 W.Va. at 607, 413 S.E.2d at 428.

There is also no legal basis for Petitioner's position. They make the bald statement, without any citation to authority or other substantiation, that only the conduct of the person actually using the product at the time of the injury can establish product misuse. Petitioners' Brief, at 34. To the contrary, this Court and others have consistently held that the acts of third-parties may establish product misuse. *See Fawcett v. Pittsburg, Cincinnati & St. Louis Ry. Co.*, 24 W.Va. 755, 759 (1884) (noting that a defendant may prevail by showing that "a third person d[id] some act [that] was an immediate cause of the injury"); *accord Costoplos*, 184 W. Va. at 74, 399 S.E.2d at 656; *Bennett*, 218 W.Va. at 48-9, 621 S.E.2d at 717-18 (plaintiff must reasonably eliminate other causes of the alleged defect "such as the handling or misuse of the product by others than the manufacturer"); *Morningstar*, 162 W.Va. at 889, 253 S.E.2d at 683; *Nicholas v. Steelcase Inc.*, No. 2:04-0434, 2005 WL 1862422, at *8 (S.D. W.Va. Aug. 4, 2005) (considering whether the plaintiff or a third party misused the allegedly defective product); *Sydenstricker*, 217 W.Va. at 559, 618 S.E.2d at 568 (an intervening cause "can be established only through the introduction of evidence by a defendant that shows the negligence of another party or of a non-party"). The reason, of course, is that product misuse or other intervening acts negates the existence of defect and causation. *See Cmty. Antenna*, 227 W.Va. at 607, 712 S.E.2d at 516 (if the accident resulted from circumstances unrelated to any claimed defect, there is no liability). Thus, if anyone misused the Product and otherwise caused the accident, there is no basis to hold Respondents liable for A.N.'s injuries. *Id.*

Since product defect and causation are elements of Petitioners' burden of proof, product misuse is not, *per se*, an affirmative defense; instead, it is a "defense" in the sense that proof of misuse negates one or more elements of a *prima facie* case and, thereby, may defeat recovery. *See Morningstar*, 162 W.Va. at 889, 253 S.E.2d at 683 ("the issue of appropriate use of the

product has as a counterpart the defense of abnormal use, which may at times carry companion defenses of contributory negligence and assumption of the risk on the part of the user”); *Fawcett*, 24 W.Va. at 759; *Ellsworth*, 495 A.2d at 356. In this respect, if A.N. cannot prove that the Product remained in the same condition as when it was put into the stream of commerce, he cannot recover. It does not matter who modified the Product. Respondents are no longer responsible for its condition.

Petitioners cite several cases holding that a parent’s negligence may not be imputed to a child. However, each of these cases are negligence actions. The courts merely held that the parents’ negligence could not be imputed to the children to demonstrate contributory negligence as a bar, or an offset, to the defendant’s liability. For instance, in *Tugman v. Riverside and Dan River Cotton Mills*, a young child was injured when she fell into a hole a landlord dug during construction and left unguarded. 144 W.Va. 473, 132 S.E. 179 (1926). The landlord responded that the parents were negligent in allowing the child to roam unsupervised. The Court held that, once the landlord was found to have acted negligently, it could not prove the child was contributorily negligent by imputing the parents’ negligence to her. *Id.*, at 481, 132 S.E. at 181. In *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (1990), a family, including a child, was injured in a motel room fire. The plaintiffs claimed that the fire occurred from a heater igniting a bed while the defendant claimed it was caused by the parents smoking in bed. The Court reversed a judgment for the defendant because the Judge’s instructions were confusing and may have led the jury to find the child’s claim barred by contributory negligence. *Id.* at 563, 390 S.E.2d at 209 (“[t]he verdict may have meant that the defendant was not negligent; or, that the adult plaintiffs or one of them was contributorily negligent, and his or her negligence was at least 50% responsible for the injuries”). In finding the verdict could have been on valid grounds, *i.e.*,

that the defendant was not negligent, the Court recognized that the evidence of the parents' smoking in bed was properly admitted, even against the child, to show the defendant was not responsible for the fire.

Similarly, Respondents contend that A.N. cannot meet his burden of proof as to crucial elements of a product liability claim in part because the acts of others - - his Parents - - solely and proximately caused his injuries. *See Halliday*, 770 A.2d at 1080, n.4 (recognizing that a father's negligence could not be imputed to his infant son, but holding that negligence/misuse was an "independent and superseding cause of the child's injuries" and, thus, could be used to preclude the infant's recovery against the manufacturer and/or seller). They do not seek to impute the Parents' negligence to A.N.

Alternatively, to the extent this Court concludes that parental immunity limits Respondents' ability to assert well-established product liability defenses, Petitioners concede that parental immunity should extend no further than in areas of parental discipline and discretion. Petitioners' Brief, pp. 14-15 As such, parental immunity should correspondingly limit Respondents' product liability defenses only to the extent that actions involving the exercise of parental authority or discretion are challenged. In this action, even if allowing A.N. to roast marshmallows unsupervised could be said to be within a parent's discretion, Respondents are not just challenging that decision, or any matter reasonably within the scope of parental discretion or authority. No sane person would argue that parents should have discretion to allow their children to utilize a potentially dangerous product or **intentionally** leave such an instrument within an unsupervised child's reach. *See e.g., Halliday*, 770 A. 2d at 1092; *Simpson*, 527 A.2d at 1339. Further, the Parents' decision to leave the Product immediately next to the fireplace, where it was exposed to significant heat, had nothing to do with their parenting of A.N.

For all of these reasons, Respondents respectfully request that this Court answer the first certified question in the negative and hold that parental immunity does not bar well-established product liability defenses of product misuse and superseding intervening causation in order to demonstrate lack of defect in a child's product liability action.

D. Question Two - - Parental Immunity Does Not Impair Respondents' Independent Right To Assert Contribution And Indemnity Claims Against The Parents

Parental immunity does not apply to the contribution and indemnity claims Hearthmark and Wall-Mart have asserted because, as discussed above, that immunity only applies to a minor's claims against his parents. Respondents are asserting rights independently afforded to them under the law. *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 344, 256 S.E.2d 879, 886 (1979) (contribution and indemnity rights are afforded to defendants to address the fundamental inequity of imposing the entire burden upon one party for harm to which others' breaches of duty contributed); *Puller v. Puller*, 110 A.2d 175, 177 (Pa. 1955) ("contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done") In establishing comparative contribution, this Court held that "as between joint tortfeasors a right of comparative contribution exists *inter se* based on their relative degrees of fault." *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 713, 289 S.E.2d 679, 688 (1977). In doing so, this Court recognized that contribution is the defendant's, not the minor child's, right. This Court, thereafter, on several occasions characterized contribution as a right. *See e.g., Grant Thornton, LLP v. Kutak Rock, LLP*, 228 W.Va. 226, 236, 719 S.E.2d 394, 404 (2011) ("[t]he touchstone of th[is] right of inchoate contribution . . ."); *Bd. of Edu. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796, 802 (1990) (referring to the "the right of contribution"). Further, the District Court characterized contribution as an independent right.

A parents' immunity from a direct claim by their child does not *a fortiori* extend to contribution and indemnity claims. Different rights of action are involved. To the extent parental immunity is retained, that decision would be based upon the familial relationship involved and the public policy considerations warranting immunizing parents' conduct given that relationship. No such familial relationship exists with third-party defendants. Contribution developed "because it was thought unfair to have one of several joint tortfeasors pay an entire judgment" while others escape liability. *Sitzes*, 169 W.Va. at 709, 289 S.E.2d at 686. Indemnity is also grounded in equity and is "based on the principle that everyone is responsible for his or her own negligence." *Harvest Capital v. W. Va. Dept. of Energy*, 211 W.Va. 34, 37, 560 S.E.2d 509, 512 (2002). It is one matter to preclude a child from bringing a claim against his parent where family members may normally be reluctant to bring such a claim anyway and parents have an independent obligation to support their child. It is quite another to require third-parties to bear all or some responsibility for the fault of individuals with whom they have no such relationship either with regard to contribution or indemnity claims and where the parents may be largely or primarily at fault. *See Vitale v. Longshore Sailing Sch., Inc.*, No. 08-CV-0920120155, 2011 WL 2478276, at *8-9 (Conn. Super. May 19, 2011) (allowing parental immunity to apply in an action where the child does not name as a defendant a parent who may be liable to another for indemnity may take parental immunity beyond its recognized purpose).

As discussed in response to the fourth certified question, parental immunity is an anarchistic doctrine that is subject to significant criticism and numerous exceptions and, thus, it should not be extended to contribution and indemnity claims. As even Petitioners recognize, most of the public policy considerations that once justified this immunity have been discredited. The only remaining potential policy for retaining parental immunity - - avoiding judicial

interference in matters committed to parental discretion - - does not justify allowing parents to shift to other parties the entire responsibility for harm they jointly and tortiously cause their children. *See, e.g., Bishop v. Nielsen*, 632 P.2d 864, 868 (Utah 1981) (reasoning that it would be “an unconscionable and unjustifiable hardship” to hold a defendant wholly responsible for a child’s damages merely because the joint tortfeasor happened to be the child’s parent). This is particularly true in that, even if parental immunity applies, parents’ general support obligations require them, at least, to provide for the payment of any medical or other expenses the child may incur as a result of their tortious conduct. Since the child would recover for those expenses in a tort action, denying a defendant contribution and indemnity from the parents would not only require that defendant to absorb the parents’ share of liability in tort, it would also require the defendant to cover the parents’ general support obligations.

Courts in other jurisdictions have generally declined to immunize parents from contribution and indemnity claims in actions their children commence. *See e.g., Bishop*, 632 P.2d at 868; *Perchell v. District of Columbia*, 444 F.2d 997, 999 (D.C. Cir. 1971). Contrary to Petitioners’ assertion that the majority of courts apply parental immunity to contribution claims, as one commentator has recognized, “contribution is the rule rather than the exception in tort cases nationwide.” Rooney, Martin, J. & Colleen M. Rooney, *Parental Tort Immunity: Spare The Liability, Spoil The Parent*, 25 New Eng. L. Rev. 1161, 1179 (1991). Courts generally decline to find parents immunized from third-party contribution and indemnity claims. *See e.g., Vitale*, 2011 WL 2478276, at *8-9 (denying a motion to dismiss a third party claim for contribution despite parental immunity); *Puller*, 110 A.2d at 177 (a tortfeasor has a right of contribution against a joint tortfeasor even though the judgment creditor is the plaintiff’s spouse, parent or minor child and the plaintiff is precluded from enforcing liability against that person.);

Hartigan v. Beery, 470 N.E.2d 571, 573-74 (Ill. App. Ct. 1984) (allowing a third party contribution action against a parent even though the action was based on the negligent supervision of a child and a “realm of conduct clearly within the scope of the parental relationship” because court did not believe “that the parental need for discretion in supervising and disciplining their children should prevail over a third party’s right to contribution”); *Chinos Villas Inc v. Bermudez*, 448 So.2d 1179, 1180 (Fla. App. 3d Dist. 1984) (permitting an action for contribution against a parent whose neglect in parental supervision and control contributed to the minor child’s injuries); *Purwin v. Robertson Enterprises Inc.*, 506 A.2d 1152, 1156 (Me. 1986). See also Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 Fordham L. Rev. 489, 517 (1982) (collecting cases).

It is not just a matter of counting cases. Courts declining to extend parental immunity to contribution and indemnity claims have persuasively found that it would be inequitable to require third-party defendants to bear responsibility for parents’ negligence. *Perchell v. District of Columbia*, *supra*. See also *Hartigan*, 470 N.E.2d at 573 (stating that “the use of parent-child immunity to insulate parents from a contribution action is simply not consistent with our present system of the equitable apportionment of fault”). In *Larson v. Buschkamp*, the court held that “contribution may be sought from a parent of an injured minor plaintiff where the parent’s alleged negligence contributed to the minor’s injuries” in part because equity among tortfeasors outweighs the “speculative harm” that contribution claims will encourage intra-family litigation. 435 N.E.2d 221, 226 (Ill. App. Ct. 1982). In *Moon v. Thompson*, an Illinois court held that parental immunity did not bar a contribution action by a motorist against the parents of a child involved in a car-bicycle accident where the claim was that the parents negligently violated a statutory duty to supervise their son’s operation of the bicycle and where the public policy

considerations underlying the doctrine of parental immunity were not violated. 469 N.E.2d 365, 367-68 (Ill. App. Ct. 1984).

Petitioners argue that parental immunity bars contribution and indemnity claims because the liability to the plaintiff of the person from whom contribution or indemnity is sought is an essential element of those claims. Petitioners' Brief, at 20-21 To the contrary, as this Court recently reaffirmed, contribution arises out of the breach of a duty owed to the plaintiffs. *Grant*, 228 W.Va. at 236, 719 S.E.2d at 404 (“[t]he touchstone of the right to inchoate contribution is this inquiry: did the party against whom contribution is sought breach a duty owed to the plaintiff which caused or contributed to the plaintiff’s damages?”). Parental immunity does not relieve parents of the legal duty to exercise reasonable care to avoid harming their children. It has been long recognized in West Virginia that a parent’s wrongdoing “does not cease to be an unlawful act by reason of [parental] immunity.” *Smith v. Smith*, 116 W.Va. 230, 231, 179 S.E. 812 (1935). *See also, Lusk*, 113 W.Va. 17, 166 S.E. at 538-9 (holding that “the commission of a civil wrong on the child by the parent” remains notwithstanding parental immunity). Parental immunity simply prevents a child from recovering against the parents for this breach of duty; it does not, however, mean that no duty exists. *Fitzpatrick v. Allen*, 955 P.2d 141, 148 (Kan. App. 1998) (parental immunity precludes tort claims as between a parent and child; it does not mean there is no duty; “only that there is a prohibition against the recovery of damages if a duty is breached”). *See also Aimone v. Walgreen’s Co.*, 601 F. Supp. 507, 516 (D. Ill. 1985) (noting that “immunity doctrines do not automatically come into play” because contribution “is concerned with culpability and not the ability of the injured to actually receive compensation,” and, thus, parents can be liable for contribution).

For example, in an action brought by parents individually and on behalf of their minor children to recover damages for injuries to a wife and children in a motor vehicle accident, the Louisiana Supreme Court held that the defendant was entitled to contribution from the parents for the damages awarded to the children. *Walker v. Milton*, 268 So.2d 654, 656 (La. 1972). The court rejected the parents' argument that a statute prohibiting suit by a child against his/her parents also precluded a contribution claim predicated upon the parents' negligence and noted that the statute at issue was a procedural bar to, but did not destroy substantive, causes of action between a parent and a child. *Id. Accord, Larson*, 435 N.E.2d at 223-25; *Trevarton v. Trevarton*, 378 P.2d 640, 642 (Colo. 1963) (quoting *Dunlap v. Dunlap*, 150 A. 905, 915 (N.H. 1930)) (a parent's immunity from suit by his/her child "arises from a disability to sue, and not from a lack of violated duty"). *See also*, 3 Harper & James, *The Law of Torts*, § 10.2, at 47-50 (1986 & Supp. 1998) (noting that "[i]f the purpose of contribution is to make the wrongdoers share the financial burden of their wrong ... [t]he fact that one of the tortfeasors has a personal defense if he were to be sued by the injured party would seem to be irrelevant").

Arguing against the weight of this authority, Petitioners contend that this Court held that contribution claims are "derivative" of the plaintiff's rights against the party from whom contribution is sought in *Sydenstricker v. Unipunch Products Inc.*, 169 W.Va. 440, 449, 288 S.E.2d 511, 517 (1982), and, therefore, such claims cannot be asserted against parties who cannot be held liable to the plaintiff. In *Sydenstricker*, however, this Court did not have to address whether contribution may be obtained from a party with immunity suit by the plaintiffs because it held that the facts alleged in the contribution claim established willful and intentional misconduct and, thus, exempted the employer from whom contribution was sought from workmen's compensation immunity. This Court referred to the derivative nature of contribution

rights simply in concluding that the defendant could certainly pursue contribution on theories of liability available to the plaintiff. The reference to the derivative nature of contribution in this context should not be viewed as overriding an otherwise unbroken line of authority recognizing contribution as a right independently vested in defendants against parties whose violation of duties owed to the plaintiff jointly and severally caused the harm for which the plaintiff seeks compensation. This is particularly true in that *Grant Thornton, supra*, was decided well after *Synderstricker*.

Moreover, workmen's compensation immunity is statutorily based and grounded in accepted public policy. In exchange for imposing absolute liability upon employers to pay the medical expenses and work losses resulting from any work related injuries, the statute immunizes employers from any tort claims for injuries sustained in a work-related incident. *See* W.Va. Code § 23-2-6 (2003) (“[a]ny employer subject to this chapter ... who pays into the workers’ compensation fund the premiums provided by this chapter ... is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring”). *See also* *Bowens v. Allied Warehousing Servs. Inc.*, 229 W.Va. 523, 534, 729 S.E.2d 845, 856 (2012) (internal citation omitted) (noting that a case in which a plaintiff sues in tort the employer who paid his workman’s compensation “strikes at the heart of the Workman’s Compensation law” and “is in unequivocal opposition to the well-known principles on which Workman’s Compensation is founded”). Under these circumstances, interpreting workman’s compensation immunity to extend to common law contribution or indemnity claims does not support similarly extending the much narrower doctrine of parental immunity especially in light of the erosion of parental immunity. *See* *Lee*, 159 W.Va. at 588-89, 592-93, 224 S.E.2d at 722,

724-25 (noting that parental immunity was been “reced[ing] as rapidly as it once spread” and that “the landslide trend” is towards abandoning the doctrine).

Petitioners’ reliance on *Sias v. Wal-Mart Stores, Inc.*, 137 F. Supp. 2d 699 (S.D. W.Va. 2001) also is misplaced. The defendant in *Sias* appears to have responded to a motion to dismiss by arguing that parental immunity should be abrogated. The Court, therefore, was not presented with the specific issue of whether parental immunity bars claims for contribution or indemnity against a minor plaintiff’s parents. In any event, it is respectfully submitted that, to the extent *Sias* held that parental immunity extends to third party contribution and indemnity claims, it is unpersuasive and should not be followed.

Lastly, denying Respondents their contribution and indemnity rights will not remove the Parents’ conduct from the case altogether because the Parents’ actions are inextricably intertwined with the material issues of fact that A.N. must prove to establish a *prima facie* product liability claim. See *Dreisonstok*, 489 F.2d at 1071-72; *Johnson v. Dial Indus. Sales Inc.*, No. 3:05-CV-47, 2007 U.S. Dist. LEXIS 97469, at *4 (N.D. W.Va. Sept. 21, 2007). These issues, discussed *supra*, include the material alterations to the Product, its unforeseeable misuse and/or applying the Product to an existing fire or burning embers (if that is, indeed what happened) in a fireplace as opposed to in a wood or wood pellet stove.

For these reasons, this Court should answer the second certified question in the negative and hold that parental immunity does not bar product liability defendants from asserting independent rights of contribution and indemnity and/or from allocating fault to parents who were allegedly negligent.

E. Question Three - - If Parental Immunity Applies, Fault May Still Be Allocated To The Parents

If parental immunity applies in any form and/or bars Respondents' claims for contribution and indemnity, the same principles of equity discussed above dictate that the Parents' negligence be considered, at the very least, for purposes of allocating fault. Simply allocating fault against the Parents does not impinge their putative immunity as no claims are being asserted against them and, as non-parties, they would not have to defend themselves. Further, the allocation of fault to the Parents would not place them in an adversarial position with A.N.

Petitioners do not directly respond to this certified question and offer no reason why parental immunity should preclude joining the Parents for purposes of an allocation of fault. Instead, they argue that there is no basis to allocate fault against the Parents other than for the purposes of asserting a contribution claim. The District Court obviously concluded that there are reasons to allocate fault against the Parents other than for purposes of holding them liable for contribution or indemnity or it would not have separately certified this issue. The District Court did not seek review of that conclusion.

In any event, there are other potential reasons to allocate fault against the Parents other than to pursue contribution and indemnity claims. For instance, a plaintiff's negligence is compared to the fault of anyone involved in the incident, including non-parties, for purposes of determining its comparative amount of contributory negligence. *King v. Kayak Mfg. Corp.*, 182 W.Va. 276, 279 n. 4, 387 S.E.2d 511, 514 n.4 (1989). In an interlocutory appeal, it is not possible to determine whether a basis to allocate fault will ultimately be presented at trial and, therefore, the District Court certified only the legal issue of whether parental immunity bars any such allocation. The answer to that specific question is no.

F. Question Four - - Parental Immunity Should Be Abolished As An Anachronistic Vestige Of A Long-Ago Rejected View Of The Parent Child Relationship

It is said that “politics makes strange bedfellows.” Sometimes litigation does too.

Petitioners’ assertion of parental immunity in an effort to preclude well-established product liability defenses and contribution claims leaves Hearthmark and Wal-Mart in the awkward position of arguing the rights of a class individuals encompassing the person bringing a claim against them.¹ While Respondents deny any liability to A.N., they recognize the bedrock principle of American jurisprudence that parties should be held liable for losses resulting from their breaches of legal duties owed to others. Any grant of immunity for tortious acts creates an exception to this fundamental principle. Tortious acts accordingly should only be immunized when mandated by strong countervailing public policy considerations.

Parental immunity was developed decades ago when the parent-child relationship was such that a parent’s authority was absolute and the child was vulnerable. *See* Hollister, Gail D., *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 Fordham L. Rev. 489, 490-96, 527 (1982) (discussing the evolution of parent-child relationship and the development of parental immunity); *accord* Bernstein, Gaia & Zvi Triger, *Over Parenting*, 44 U.C. Davis L. Rev. 1221, 1279, n.123 (Apr., 2011); Saba, Irene Hansen, *Parental Immunity from Liability in Tort*, 36 U. Mem. L. Rev. 829, 847 (Summer, 2006). The perception was that neither society, neighbors nor anyone outside the family should interfere with that relationship. *See* Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, *supra*.

Times, however, have changed. Courts today begin not with the assumption that a minor child is the property of, or subservient to, his or her parents, but rather, with the basic presumption that, regardless of whether the injured party is a child or adult, “for every wrong,

¹ Of course, petitioners also ironically argue to limit A.N.’s rights of action.

there is a remedy.” See *Gibson*, 3 Cal. 3d at 914, 919, 922; *Petersen v. Honolulu*, 462 P.2d 1007, 1008-09 (Haw. 1969). Society more closely scrutinizes how parents care for their children. *Lusk*, 166 S.E.2d at 538 (noting that parental harmony is preserved when a “wrong is righted”). Public policies once justifying parental immunity have little, if any, continuing application. See *Falco v. Pardos*, 282 A.2d 351, 355 (Pa. 1971) (abandoning parental immunity because it “is based on considerations which cannot stand logical scrutiny in modern life”); Hollister, 50 Fordham L. Rev. at 496, 508 (citing W. Prosser, *Handbook of the Law of Torts*, at § 122, p. 865 (4th ed. 1971; 1 F. Harper & F. James, *The Law of Torts*, §§ 8.11, 13.4 (1956)) (noting that the early rationales for parental immunity “have been soundly criticized” and “cannot justify the inequities caused by retention of the immunity”).

For example, the policy concern of preventing fraud or collusion is “insufficiently weighty to render tolerable the basic unfairness and inequity inherent in the denial of a remedy to one who has suffered wrong at the hands of another.” *Moulton v. Moulton*, 309 A.2d 224, 229 (Me. 1973). The argument that parental immunity is necessary to preserve family harmony, likewise, “misconceives the facts of domestic life” because the primary disruption to family harmony is not the lawsuit, but the injury resulting from a parent’s misconduct. *Nocktonick v. Nocktonick*, 611 P.2d 135, 141 (Kan. 1980). As this reasoning illustrates, the refusal to permit the injured party to sue does not eliminate the conflict because the injury exists regardless of any immunity. See *Falco*, 282 A.2d at 355 (holding that the injury is the disruptive act that destroys family harmony); *Lee*, 159 W.Va. at 589, 592 (noting that family harmony is not a proper justification for denying redress to a child and that a judicially created doctrine, such as parental immunity, cannot preserve family unity that does not otherwise exist). Thus, prohibiting suit in the name of family harmony is to claim “that an uncompensated tort makes for peace in the

family.” W. Prosser, *Handbook of the Law of Torts*, § 122, at 866. This makes little sense and it “misconceives the facts of domestic life.” *Nocktonick*, 611 P.2d at 141.

Petitioners recognize that that these justifications for parental immunity are inconsistent with prevailing societal norms. Yet, they still insist that parental immunity should be preserved to protect parental discretion in numerous everyday decisions as to how a child should be raised and to protect against liability for harm resulting from a momentary lapse of attention. However, that view remains a vestige of long rejected societal views of a parent’s authority over a child. Parents do not, as Petitioners’ arguments suggest, possess complete discretion in raising their children. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (parental rights are not beyond limitation). Parents should not be given “carte blanche to act negligently” toward their children and parental immunity should not shield parents who do so, leaving third parties to compensate for a loss they did not cause. *See Gibson*, 3 Cal. 3d at 921 (finding it “intolerable” that a parent “may act negligently with impunity”). While parents have a right – and a duty - to exercise authority over their child, they must do so within reasonable limits and act as “an ordinarily reasonable and prudent parent” under the circumstances. *Id.*

As this Court noted more than 35 years ago, parental immunity has been “reced[ing] as rapidly as it once spread” and “the landslide trend” is towards the abandonment of the doctrine. *Lee*, 159 W.Va. at 588-89, 592-93, 224 S.E.2d at 722, 724-5. *See also* J.A. 000653 (Certification Opinion, at 5) (noting that the definite trend among the States has been to abolish or strictly limit the parental immunity doctrine). This rapid erosion is largely due to evolving social attitudes recognizing children as more autonomous individuals. *See, e.g., Cates v. Cates*, 619 N.E.2d 715, 721-24, 730 (Ill. 1993) (tracing the history of, and policies supporting, the parental immunity doctrine and noting that the doctrine “developed in an era which was vastly different from the

present”). The great majority of courts, scholars and commentators advocate the abolishment of this immunity. *See e.g., Nocktonick*, 611 P.2d at 138; *Zellmer v. Zellmer*, 188 P.3d 497, 500 (Wash. 2008) (“there are [presently] very few jurisdictions, if any, which recognize parental immunity in its absolute form”); Restatement (Second) of Torts, § 895G (“[a] parent or child is not immune from tort liability to the other solely by reason of that relationship” although repudiation of general tort immunity does not create liability for an act or omission that is not tortious or is otherwise privileged because of the parent-child relationship).²

By citing to a number of decisions in which parental immunity was applied, Petitioners dispute that a majority of the jurisdictions has abolished this immunity. However, they generally cite cases decided over thirty years ago, and do not provide any indication or authority to suggest that those courts would reach the same result today. Further, jurisdictions that have yet to abolish the immunity completely have “whittle[d] away [parental] immunity by statute and by the process of interpretation, distinction and exception.” *Falco*, 282 A.2d at 354. *See also Gibson*, 479 P.2d at 653 (noting that “other jurisdictions have steadily hacked away at this legal deadwood” of parental immunity); *Dellapenta v. Dellapenta*, 838 P.2d 1153, 1156 (Wyo. 1992) (noting that many courts have carved out exceptions to the immunity rule); *Vitale*, 2011 WL

² Several jurisdictions, including Alaska, Hawaii, Montana, North Dakota, South Dakota, Utah, Vermont and the District of Columbia never adopted parental immunity. *See* J.A. 000659 (Certification Opinion, at p.11, n.2) (citations omitted). JA 000659 Many others adopted, and then abolished the doctrine. *See, e.g., Gibson*, 479 P.2d 648; *Ard v. Ard*, 395 So. 2d 586 (Fla. Dist. Ct. App. 1st Dist. 1981), *aff’d in part*, 414 So. 2d 1066 (Fla. 1982); *Larson*, 435 N.E.2d 221; *Turner v. Turner*, 304 N.W.2d 786 (Iowa 1981); *Nocktonick*, 611 P.2d 135; *Rigdon v. Rigdon*, 465 S.W.2d 921 (Ky. 1970); *Black v. Solinitz*, 409 A.2d 634 (Me. 1979); *Sweeney v. Sweeney*, 262 N.W.2d 625 (Mich. 1978); *Anderson v. Stream*, 295 N.W.2d 595 (Minn. 1980); *Rupert v. Stienne*, 528 P.2d 1013 (Nev. 1974); *Briere v. Briere*, 224 A.2d 588 (N.H. 1966); *France v. A. P. A. Transport Corp.*, 56 267 A.2d 490 (N.J. 1970); *Gelbman v. Gelbrnan*, 245 N.E.2d 192 (N.Y. 1969); *Kirchner v. Crystal*, 474 N.E.2d 275 (Ohio 1984); *Winn v. Gilroy*, 681 P.2d 776 (Or. 1984); *Falco v. Pados*, 282 A.2d 351 (Pa. 1971); *Elam v. Elam*, 268 S.E.2d 109 (S.C. 1980); *Goller v. White*, 122 N.W.2d 193 (Wis. 1963).

2478276, at *8-9 (observing that “[t]he doctrine of parental immunity is not sacrosanct”). These exceptions “reflect a distaste for the injustices which often result from a strict, pervasive application of the parental immunity rule.” *Streenz v. Streenz*, 471 P.2d 282, 284 (Ariz. 1970) (en banc). See also *Gibson*, 479 P.2d at 648 (stating that parental immunity “has become a legal anachronism, riddled with exceptions and seriously undermined”); *Goller v. White*, 122 N.W.2d 193, 197 (Wis. 1963) (noting the courts’ “hostility to the parental immunity rule” given its numerous exceptions); *Dunlap v. Dunlap*, 150 A. 905, 909 (N.H. 1930) (parental immunity “should not be tolerated at all except for very strong reasons; and it should never be extended beyond the bounds compelled by those reasons”).

Simply stated, whatever the continuing vitality of the policy reasons supporting parental immunity may be, it does not justify denying a child full recovery for injuries tortuously caused to him. There is also no basis for holding, for instance, automobile drivers liable for the result of a moment’s inattention, but immunizing parents from a similar lapse. The concern of courts interfering in the exercise of parental discretion ignores that it is typically juries who exercise that oversight. Juries include parents who understand the challenges of raising children. They also routinely make similar assessments, such as determining in negligence actions whether a defendant exercised “reasonable” care under the circumstances. Any vestigial concern for parental authority or discretion is best addressed in charging the jury as to parents’ duty of care and discretion. Under no circumstances does the concern for preserving parental discretion and authority warrant immunizing actions - such as the actions of the Parents here – that are clearly beyond the scope of any reasonable exercise of parental authority or discretion.

As previously set forth, this Court has responded to changing societal conditions by creating numerous exceptions to parental immunity. Doing so only provides piecemeal relief

from an immunity that is no longer consistent with public policy considerations. It also promotes arbitrary results. As an example, this Court has held that parental immunity does not apply where there is insurance coverage. *Lee v. Comer, supra*. Assume for the moment, two children are each permanently injured solely by the negligence of their parents, both sets of which have significant means, but only one of which has insurance. The child whose parents have insurance will obtain (at least to the limits of insurance) full compensation for his losses while the other will not be assured of continuing care beyond the age of majority and receive no reimbursement for pain and suffering. Further, if a parent has insurance, is that parent immunized for damages beyond the policy limits? If not, parents with insurance may actually face execution on their assets while parents without insurance would not.

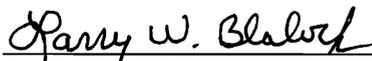
The history of the common law of this State “is one of gradual judicial development and adjustment of the case law to fit the changing conditions of society.” *Bradley*, 163 W.Va. at 340, 265 S.E.2d at 884. The limits of a given principle are not fixed once and for all; rather, they “are discovered gradually by a process of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation.” *Id.*, at 341, 256 S.E.2d at 885. This has been, and should continue to be, the case with the doctrine of parental immunity. This Court has recognized the limits of parental immunity through the various exceptions it has created, but the policies supporting the doctrine no longer exist or are of questionable applicability. This Court should follow its general rule that a party is liable for his torts, *see Lee*, 159 W.Va. at 589, and answer the fourth certified question so as to join the majority of jurisdictions who have abrogated the doctrine entirely. *See, e.g., Courtney*, 186 W.Va. at 606; *Lee*, 159 W. Va. at 591 (relying on the majority rule, “strong modern inclination,” or the “landslide trend” to support a given holding). In so doing, this Court will further its

policies of having all parties stand equally before the court, ensuring that there is a remedy for every proven wrong, and seeing to it that the jury considers the fault of all joint tortfeasors involved in the injury such that each is responsible for only his or her own negligence. *See, e.g., Gardner*, 108 W.Va. at 680, 152 S.E.2d at 533; *Harvest Capital*, 211 W. Va. at 37, 560 S.E.2d at 512; *Cline*, 183 W.Va. at 45, 393 S.E.2d at 925.

CONCLUSION

If parental immunity has any continuing viability, it is the exception, not the rule that Petitioners advance. The doctrine does not apply in this case and no authority or recognized public policy supports using parental immunity to deprive Respondents of traditional product liability defenses, claims for contribution or indemnity, or an apportionment of fault when the Parents' actions in (admittedly) misusing, misplacing, and leaving Diamond Fire Starter Gel within their seven year-old son's reach contributed to his injuries. For these reasons, Respondents respectfully request that the first two certified questions be answered in the negative; that the third certified question, if necessary, be answered in the affirmative; and that the answer to the fourth certified question, if necessary, place West Virginia in the majority of jurisdictions who have abolished the doctrine of parental immunity.

Respectfully submitted,



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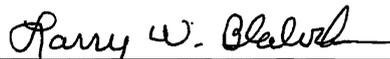
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