

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

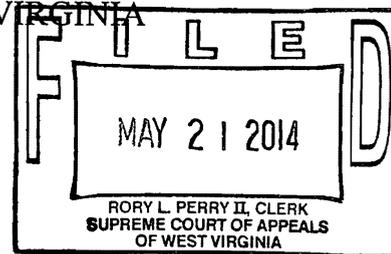
KENNETH GOLDSBOROUGH and  
MARY GOLDSBOROUGH,

Plaintiffs below, Petitioners,

v.

BUCYRUS INTERNATIONAL, INC.,  
BURCYRUS AMERICA, INC.,  
BUCYRUS MINING EQUIPMENT, INC.,  
and STRUCTURED MINING, INC.,

Defendants below, Respondents.



Docket No. 13-1323  
(Kanawha County Circuit Court  
Civil Action No. 10-C-1170)

**PETITIONERS' REPLY BRIEF**

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## **I. STATEMENT OF THE CASE**

Petitioners disagree with the facts as stated by the respondents, particularly with regard to facts that are left out of respondents' Response. Petitioners do not attempt here to restate all of the material facts set forth in their opening Brief, but limit their comments to address certain statements and characterizations of the record made by respondents in both the fact and argument sections of their Response.

### **A. Lay Witness Testimony**

Respondents attempt to discredit or minimize petitioner Kenneth Goldsborough's consistent statements as to the circumstances of his injury. For example, the respondents rely on the statement Mr. Goldsborough made at his deposition, "I just don't know what happened." Response, 2 (quoting App. 0218). However, respondents ignore the context in which the statement was made. Read in context, it is clear that by his statement that he did not know what happened, Mr. Goldsborough was indicating that he did not see or hear the continuous miner move before it struck him, nor did he know at that time what caused the machine to suddenly move. *See* Petitioners' Brief, 4-5.

Respondents' reliance, at 7-8, on the statements of two witnesses, Jason Nealis and John Stemple, ignores the other evidence in the case and does not negate or discredit Mr. Goldsborough's testimony. Mr. Nealis's statements regarding when he heard the continuous miner running prior to Mr. Goldsborough calling for help are uncertain and cannot support an inference that the miner was running right up until it hit Mr. Goldsborough. Also, Mr. Stemple's assertion that Mr. Goldsborough, as he was being transported out of the mine following his serious injury, said to Mr. Stemple, "I messed up," is highly questionable and is not supported by other evidence in this case. *See* Petitioners' Brief, 24; *infra*, 7-8.

## **B. Post-Accident Investigation**

Respondents set forth, at Response, 4-5, various conclusions made by the federal and state investigators but do not respond to petitioners' arguments that these reports are not properly admissible, or that, even if they are admissible, they are not dispositive of any issue in this case. *See* Petitioners' Brief, 26-27. MSHA and the West Virginia Office of Miner Health Safety and Training (WVOMHST) apparently reached their conclusion that Mr. Goldsborough was operating the continuous miner at the time of the accident because they failed to uncover any other explanation. However, as petitioners noted and as petitioners' expert witness Dr. Roy F. Nutter pointed out, the investigators failed in a number of respects, including to examine or test all of the relevant components from both the continuous miners in use at the time of Mr. Goldsborough's injury, conduct a detailed examination of the few components they did collect, or actually examine the inside of the TX-944 transmitter used by Mr. Goldsborough. *Id.* Nor did the investigators seek an explanation of the missing data on the CF card designed to record the continuous miner's functions or the 21 incidents of "teach-learn" errors during the 24 hours preceding Mr. Goldsborough's injury. Petitioners' Brief, 24 (citing at MSHA remote system report, 11 (App. 1121)); 12 (citing Nutter depo at 209:1-3 (App. 1309)). Dr. Nutter testified that he could not reach the same conclusions as MSHA based on what he reviewed in this case. (App. 1311).

The only known post injury examination of the actual TX-944 transmitter used by Mr. Goldsborough showed "evidence of water" inside the case – consistent with the prior reported instances of moisture ingress problems with these transmitters which cause unintended movement of the miner, and consistent with petitioners' expert witness testimony that a short circuit created by water caused the miner to move. *See* Petitioners' Brief, 8 (citing TX-944 SN 168 History (App.

0840, 0846); *id.*, at 8-10, 11. Respondents speculate, without citing any evidence, that this moisture somehow entered the transmitter after it was damaged. Response, 14.

### **C. Expert Testimony**

Contrary to respondents' assertions, at Response, 7-8, Dr. Nutter did testify that the Bucyrus continuous miners, when equipped with the TX-944 remote control system, were defective and that the most likely cause of Mr. Goldsborough's injuries involved these product defects. *See* Petitioners' Brief, 10-12. Respondents additionally ignore, at 5, that Dr. Nutter also rebutted the testimony of Clyde Reed, a Bucyrus employee whom respondents designated as an expert witness and rely on to support their theory that Mr. Goldsborough drove the continuous miner into himself. Although Mr. Reed "interpreted" the incomplete data<sup>1</sup> recovered from his own laptop computer to coincide with the respondents' version of events, Dr. Nutter testified that it was "more probable [the injury] occurred after the machine was shut down." (App. 1311.) *See also* Petitioners' Brief, 12. Thus, the interpretation of the limited computer data available is a matter disputed by the parties' expert witnesses. In fact, the completeness and admissibility of this "recovered" evidence is also disputed.

### **D. Known Prior Problems with the TX-944 Remote Control System**

In their Response, the respondents wholly ignore a crucial category of evidence presented to the trial court – the voluminous history of documented problems with the TX-944 system, specifically instances of water ingress into the transmitters and unplanned machine movement. *See* Petitioners' Brief, 8-12. This evidence supports Mr. Goldsborough's testimony as to the nature of

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<sup>1</sup> Dr. Nutter noted that the data Mr. Reed saved on his laptop computer did not appear to contain the information regarding errors logged by the continuous miner near the time of Mr. Goldsborough's injury. Petitioners' Brief, 27 (citing Nutter depo, 83:9-21 (App. 1278)). The data regarding the errors would likely provide important information regarding the functioning of the miner at the time of Mr. Goldsborough's injury.

the accident and Dr. Nutter's opinions that the transmitters were defective and that an unintended movement occurred in this case as a result of those defects. These are facts the jury should consider in this case.

## **II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioners reiterate their request that this Court set the instant case for oral argument under Rule 20 of the Revised Rules of Appellate Procedure because this appeal presents issues of fundamental public importance. A severely injured worker or consumer should not be barred from the opportunity to present his product liability claim to the jury where the critical evidence is not available for testing because it has been lost by one of the respondents or a third party and no exemplars are available for testing. Circumstantial evidence regarding other incidents, the unwavering testimony of the injured worker and the testimony of an expert regarding the product defects and/or malfunctions that probably caused the injury, as in this case, are sufficient evidence from which a jury could reasonably find in petitioners' favor and, under this Court prior opinions, is enough to provide the injured worker with his day in court.

## **III. ARGUMENT**

Although respondents have not specifically responded to each assignment of error, as required by Rule 10(d) and this Court's December 10, 2012 Administrative Order, petitioners have endeavored to address their arguments within the context of the errors assigned in Petitioner's Brief.

### **A. Respondents Have Failed to Apply the Proper Standards to the *Anderson* Malfunction Theory, as Discussed in the 1<sup>st</sup> Assignment of Error**

The parties appear to agree that petitioners can prove their strict liability in tort, or product liability, claim through circumstantial evidence under the malfunction theory established by this

Court in Syllabus Point 3 of *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991). However, in their Response, the respondents make the same errors that the trial court made when it adopted the respondents' proposed orders *in toto*, *i.e.*, ignoring this Court's clarification of the showing these petitioners must make to withstand summary judgment in a malfunction theory case and construing material questions of fact against the nonmoving petitioners. As discussed in Petitioners' Brief, 17-18, this Court in *Bennett v. ASCO Servs.*, 218 W. Va. 41, 49, 621 S.E.2d 710, 718 (2005), explained:

*Anderson* does not require a plaintiff, to succeed at the summary judgment stage, to conclusively eliminate all possible contributing causes other than a defect for an accident. Instead, a plaintiff is only required to submit evidence that *has the capacity to sway the outcome of the litigation, and from which a jury could fairly conclude that the most likely explanation of the accident involves the causal contribution of a product defect.*

*Id.* at 48, 621 S.E.2d at 717 (emphasis added). Therefore, as stated by this Court, the proper inquiry at this stage is "whether the appellants in the instant case raised triable questions of fact that the products at issue . . . were not reasonably safe for their intended use." *Id.* at 49, 621 S.E.2d at 718.

Petitioners have presented evidence sufficient for a jury to reasonably conclude that the transmitter for the TX-944 remote system was not reasonably safe for its intended use and, therefore, a defect in the TX-944 system was the most likely cause of Mr. Goldsborough's injury. *See, e.g.*, Petitioners' Brief, 19-21 (Goldsborough's description of properly shutting down the continuous miner); *id.* at 21-24 (Nutter's testimony regarding defects in the TX-944 system and probable causes for the unintended movement); *id.* at 8-10 (prior incident reports involving unplanned movement attributed to water or signal interference).

Such evidence does not require a jury to speculate about the cause of Mr. Goldsborough's injuries, as asserted by the respondents at 14 of their Response. Rather, it provides the jury with material facts sufficient for it to reasonably conclude that the most likely cause was one of the defects pointed to by the petitioners and their expert.<sup>2</sup>

In their Response, the respondents seek to use to their advantage their failure to either (1) adequately resolve, prior to Mr. Goldsborough's injury, the known problems with the ingress of water into the TX-944 transmitters and/or the issue of all of the TX-944 remote systems operating on the same frequency or (2) conduct their own inspection and/or testing, after Mr. Goldsborough's injury, of the components of the TX-944 remote system that were in use on both the miner Mr. Goldsborough was operating and the second miner that was being operated in the section. Further, there is no evidence that either Bucyrus or Structured did anything to investigate the missing information from the CF card or to inspect any of the components until the transmitter was returned to Structured for repair, despite their knowledge that the intent of the recorded information was to be able to see precisely how the miner was functioning and to record errors so that problems could be tracked and resolved and that water in the transmitters had previously caused unintended movement. Yet, the respondents seek to bar the Goldsboroughs from presenting their case to a jury

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<sup>2</sup> At Response, 14, respondents argue that "[t]here is no evidence to suggest that [the Structured report of water having been in the transmitter] is reflective of the condition of the subject transmitter unit at the time of Petitioner's accident." However, the evidence shows that, between the time of Mr. Goldsborough's injury and the Structured report, the transmitter was in the custody of either Mr. Goldsborough's employer, MSHA or the respondents. *See* Petitioners' Brief, 6 (discussing whereabouts of the transmitter), 7-8 (describing testing of remote components at Bucyrus facility; mentioning return of CF card and remote control components to the mine). Further, there is no evidence that any of these custodial parties subjected the transmitter to conditions that would explain the evidence of water found by the Structured technician. Thus, whether water was in the transmitter at the time of Ms. Goldsborough's injury is a question of fact for the jury.

by criticizing these petitioners for being unable to point to the specific defect that caused the miner to suddenly move and crush Mr. Goldsborough into the mine rib.

The conclusions reached by MSHA and WVOMHST, discussed at Response, 17, are not dispositive of any fact or inference a jury may reasonably draw. As discussed in Petitioners' Brief, 25-26, these investigations were admittedly incomplete. For example, MSHA expressly stated it failed to conduct a detailed examination of the TX-944 remote system components in its possession. MSHA also failed to conduct a meaningful examination or testing of the remote control components from the second miner; to inspect the interior of either transmitter for water, despite Bucyrus's participation and its knowledge of the propensity for water ingress into these units and of water previously causing unintended movement; or to investigate the missing information from the CF card. Without a complete investigation, the conclusions reached by MSHA and WVOMHST can only be based on speculation and, therefore, the conclusions drawn are unreliable and inadmissible.

Nor is the testimony of Mr. Nealis or Mr. Stemple, relied upon by the respondents at 17, dispositive of any issue in this case. The purpose for which respondents rely on these witnesses is highly disputed and, viewed in the context of other evidence, is likely to lead a jury to reasonably agree with the petitioners' position. Respondents rely on a selected quote from Mr. Nealis's deposition but ignore that Mr. Nealis also testified that he did not see the accident happen because a ventilation curtain was blocking his view of Mr. Goldsborough (App. 1070-71), that he could not actually remember how long he thought the machine had been off before he heard Mr. Goldsborough calling for him (App. 1404), but that the machine was in fact off when he reached the scene. (App. 1072). *See* Petitioners' Brief, 24-25. Mr. Nealis's testimony was not certain and is insufficient to

establish any fact regarding when and how the continuous miner moved and injured Mr. Goldsborough.

Similarly, Mr. Goldsborough's alleged "admission" to Mr. Stemple that he "messed up" is a matter of disputed fact concerning whether the statement was made and, if so, what it meant. Even if it was actually made, the statement was made while Mr. Goldsborough was being transported out of the mine with life-threatening injuries and he may well have said "I'm messed up" or meant something else entirely. Respondents ignore that, although others were around at the time, no one has corroborated Mr. Stemple's recollection of this conversation nor did it appear in any documentation regarding the accident, including Mr. Stemple's statements to MSHA, until Mr. Stemple's deposition in this case. This disputed evidence should be presented to a jury for resolution.

At 18-19 of the Response, respondents attempt to distinguish the present case from *Anderson* and *Bennett*, asserting that it is more similar to *Beatty v. Ford Motor Co.*, 212 W. Va. 471, 574 S.E.2d 803 (2002) (*per curiam*). As demonstrated by the evidence discussed in Petitioners' Brief and in this Reply, respondents are incorrect. The import of the *Anderson* decision and the clarification in *Bennett*, discussed in Petitioners' Brief at 16-18, is to allow an injured party to prove a product defect by circumstantial evidence. There is no evidence or allegation in the present case of abnormal use of the transmitter Mr. Goldsborough was using on the day of his injury. Similar to the facts in *Anderson*, the transmitter had been serviced by Structured twice in the three (3) months before Mr. Goldsborough's injury with no notations of abnormal use. *See* Petitioners' Brief at 11 (citing Cervis Customer Repair Report (App. 0840); Nutter depo., 263:21-272:4 (App. 1323-25)). In fact, the transmitter had only been returned from Structured on June 24, 2008, three (3) days

before the malfunction that caused Mr. Goldsborough's June 27, 2008 injury. See App. 848. Also similar to the facts in both *Anderson* and *Bennett*, the crucial evidence is not available for the petitioners or their expert to examine or test.

Here, the respondents again repeat their mistake, one that was adopted by the trial court, regarding the showing the petitioners must make in order to survive summary judgment and present their case to a jury. As discussed *supra* and in Petitioners' Brief at 17-27, the petitioners are "not required to eliminate with certainty all other possible causes of the accident." *Bennett*, 218 W. Va. at 48, 621 S.E.2d at 717 (quoting 2 Am.L.Prod.Liab. 3d § 31:26 (footnotes omitted)). Under *Anderson* and *Bennett*, the petitioners are not even required to show that a malfunction was the only cause of Mr. Goldsborough's injury. In *Bennett*, the showing the petitioners must make to survive summary judgment is explained by this Court as follows.

The Bennetts are not required under *Anderson* to eliminate all other possible causes, or prove that the alleged defect was the only cause, of the malfunction in the alarm system. They are only required to eliminate those causes which would prevent a jury from finding that it was more probable than not that the alarm system was defective. An expert for the Bennetts opined that the failure of the alarm system was caused by a 'defect in the system or an installation and servicing error by ASCO Services, or both. The Bennetts' evidence suggests that a malfunction caused by a defect in the alarm system is a likely explanation for, the destruction of their home; they need not prove, under *Anderson* - nor certainly under Rule 56(c) at the summary judgment stage - that it was the only explanation. Accordingly, a genuine issue of material fact exists regarding whether or not a defect in the alarm system caused the system not to activate.

218 W. Va. at 50, 621 S.E.2d at 719 (emphasis added). As discussed in Petitioners' Brief, 8-10 and 19-28, petitioners have presented sufficient evidence to raise a triable jury question regarding the cause of the petitioners' injuries. The trial court erred in granting summary judgment and depriving petitioners of their opportunity to present these questions of disputed fact to the jury .

The petitioners' claims in the present case are only similar to *Beatty* in that both cases rely upon the *Anderson* malfunction theory. In *Beatty*, the plaintiff was driving a Ford van on a wet interstate highway when he lost control of the vehicle which struck a guardrail, crossed traffic and landed on top of the opposite guardrail. 212 W. Va. at 473, 547 S.E.2d at 805. Plaintiff filed suit against Ford, relying on his own testimony, acting as his own expert, that the loss of control was caused by a broken drag link which, in turn, was caused by a manufacturing or design defect. *Id.* at 474, 547 S.E.2d at 806. In upholding the trial court's grant of summary judgment to defendant Ford, this Court found that the plaintiff had failed to present evidence, other than his own testimony, to show that the drag link would not ordinarily break in the absence of a defect or to "exclude from consideration other reasonable secondary causes" such as that the plaintiff simply lost control of the van on the wet highway. *Id.* at 475, 547 S.E.2d at 807. Nor was there any evidence to show that the plaintiff used the van properly prior to the accident, *id.*, or to rebut the defendant's experts' opinions that the drag link was broken as a result of the accident and that the vehicle movements described by the plaintiff were not consistent with the movement that would occur with a broken drag link. *Id.* at 474, 547 S.E.2d at 806. Further, there was no evidence that the post-accident investigation by the police was incomplete or otherwise deficient. In sum, the *Beatty* plaintiff simply presented no evidence to support his malfunction claim other than his own testimony.

In contrast, petitioners in the present case have presented evidence well beyond Mr. Goldsborough's testimony, including the opinions of their expert Dr. Nutter and information from respondents' own documents. *See* Petitioners' Brief, 19-28. Further, unlike in *Beatty*, the post-accident investigations are admittedly incomplete, as discussed *supra* at 7, and Dr. Nutter has rebutted respondents' employee-expert regarding the cause of the incident. *See* discussion, *supra*

at 3 and *infra* at 14. In sum, unlike the *Beatty* plaintiff, the petitioners in the present case have presented sufficient evidence to raise triable issues of material fact which must be resolved by a jury. The trial court erred when it adopted the respondents' position and construed disputed facts in respondents' favor.

The common theme running through the cases respondents rely upon is an absence of evidence. *See Beatty v. Ford Motor Co.*, 212 W. Va. 471, 574 S.E.2d 803 (2002) (*per curiam*) (no evidence that broken auto part was defective or regarding the cause of the wreck other than his own testimony); *Crane & Equip. Rental Co. v. Park Corp.*, 177 W. Va. 65, 350 S.E.2d 692 (1986) (no evidence presented regarding the cause of the movement that lead to plaintiffs' damages); *Oates v. Continental Ins. Co.*, 137 W. Va. 501, 72 S.E.2d 886 (1952) (no evidence on crucial inferences necessary to determine whether the plaintiff set the fire that destroyed her home). This lack of evidence distinguishes these cases from the claims made by the Goldsboroughs in the present case where these petitioners have substantial evidence to support each aspect of their claims. Thus, despite respondents' assertions, a jury has no need to speculate in order to reach a reasonable conclusion.

In *Crane*, a manufacturer hired a crane company to load onto a river barge a 161.5 ton condenser it had built for two power companies. *Id.* at 67, 350 S.E.2d at 694. While loading the condenser from plaintiff's dock, one of the cranes began to tip, causing the condenser to swing out and the other crane to begin to tip. The condenser dropped onto the barge and was damaged. *Id.* The manufacturer, power companies and the crane company sued the defendant dock owner alleging that the defendant was negligent in designing, constructing and maintaining a dock and in failing to warn that the dock was defective as well as breached implied and express warranties regarding the

dock. *Id.* at 68, 350 S.E.2d at 695. On inspection, an employee of the crane company found that one side of the dock had settled 2 ½ inches during the operation. *Id.* at 67, 350 S.E.2d at 694. The evidence showed that heavy loads had been loaded onto barges by heavy equipment without problems both before and after the incident at issue and that the dock had previously settled 6-8 inches and that the parties were aware of this. *Id.* at 67-68, 350 S.E.2d at 695. On appeal from a verdict for the plaintiffs, this Court found that there was “an absence of evidence as to what might have caused the dock to settle.” *Id.* at 68, 350 S.E.2d at 696. With no evidence on the cause of the settling, the Court held that the jury’s finding of negligence “had to have been based solely on speculation.” *Id.* at 69, 350 S.E.2d at 696.

Similarly, in *Oates*, defendant insurance companies alleged that the plaintiff had burned down her own home to collect the insurance money. 137 W. Va. at 504, 72 S.E.2d 889. In support of the claim, the defendants presented evidence that the plaintiff was over insured, that a valve in the house was open which allowed combustible oil to spread on the floor, that plaintiff had the only keys to the door locks, that there were tire tracks from the road toward the house that appeared to be fresh, that plaintiff’s car engine was hot when she returned it to a repair garage early on the morning of the fire and that plaintiff’s testimony regarding her whereabouts the morning of the fire was “somewhat contradictory.” *Id.* at 509-10, 72 S.E.2d at 891. The trial court set aside a verdict in plaintiff’s favor because the plaintiff had violated a provision of the insurance contracts which rendered the policies void. *Id.* at 505, 72 S.E.2d at 889. On appeal, the defendants contended that the trial court’s decision to set aside the verdict was proper on two bases: because the evidence that the plaintiff had set the fire was overwhelming and because the plaintiff had violated a provision of the insurance contracts which rendered the policies void. *Id.* at 509, 72 S.E.2d at 891.

In upholding the trial court's ruling that the insurance policies were invalid, this Court nonetheless rejected the defendants' contention that they had presented sufficient evidence to allow the jury, without speculation, to reasonably conclude that the plaintiff had intentionally set the fire. *Id.* at 510, 72 S.E.2d at 891. Specifically, the defendants failed to present evidence that the plaintiff had used her key to enter the house and open the valve or whether someone had forced entry into the home and opened the valve, that the fresh tire tracks had been made by the plaintiff's car or that the plaintiff's car engine was not hot merely because the car was old and had an oil leak. *Id.* at 510-511, 72 S.E.2d at 891-892. The Court observed that "[t]he fire may have been, as counsel for defendant say, an 'inside job'; but that conclusion does not follow from the facts portrayed by this record. It is merely an hypothesis asserted by defendant's counsel." *Id.* at 510, 72 S.E.2d at 891.

In contrast to *Crane* and *Oates*, petitioners in the present case have presented sufficient evidence for a jury to reasonably reach a conclusion in the petitioners' favor without resorting to speculation. First, the evidence shows that the transmitter for the TX-944 was not designed for the harsh, wet environment at the working face of a coal mine as evidenced by the reports of water and dust ingress in to the transmitters and the frequency of repairs. Also, the TX-944 was designed to operate on only one frequency, despite the fact that these miners were frequently used in close proximity to each other. Second, there is evidence that both Bucyrus and Structured were aware of the problem of water ingress because of prior reports of unintended movement caused by water and an earlier computer programming change to reduce the incidence of signals colliding and interfering with the operations of the miners. Third, Mr. Goldsborough's testimony regarding what happened has been consistent. Finally, Dr. Nutter testified that a malfunction of the transmitter is the probable cause of the unintended movement that injured Mr. Goldsborough.

Respondents, at 19-20 of their Response, would have this Court ignore the fact that evidence crucial to petitioners' case disappeared without explanation from their possession or that of their co-defendants below, petitioner's employer and its parent companies. *See* Petitioners' Brief, 24-25. This lost evidence – any of the components of the TX-944 remote control system that were in use by the two continuous miners on the date of Mr. Goldsborough's injury, including the CF cards that were designed to record data from the Bucyrus 25M continuous miner that struck him – is clearly relevant to the issues in this case.

The trial court's denial of petitioners' motion to amend their Complaint to add spoliation claims does not affect the propriety of explaining the absence of the relevant evidence to this Court and to a jury. First, the trial court denied the motion to amend at that time based on respondent Bucyrus's admission that it did in fact possess some digital evidence from the CF card, but indicated that petitioners could raise the matter again. Subsequent to that ruling, respondents produced incomplete evidence in the form of the data recovered from Clyde Reed's laptop, and Dr. Nutter testified that the absence of the actual physical components, particularly the transmitter and the CF card, prevented him from testifying to a greater certainty as to the exact nature of the defect that most probably caused the continuous miner to malfunction. *See* Petitioners' Brief, 24.

Second, Dr. Nutter testified to a probability based on the evidence before him, which is all that was required of petitioners on summary judgment. Petitioners and Dr. Nutter are entitled to explain to the jury what evidence is missing and its last known whereabouts, regardless of whether a separate claim for spoliation is brought in the case. Otherwise, the jury would be left to speculate on why these components were not examined, tested and brought to trial. Also, as they have done in their pleadings below and before this Court, respondents attack Dr. Nutter's testimony by pointing

out that he did not actually test or examine these components and/or does not have a detailed knowledge of how they were put together, beyond what is available on paper and in photographs.

Indeed, the loss or destruction of direct physical evidence is a hallmark of cases arising under the malfunction theory, such as *Anderson* and *Bennett, supra*. Had respondents preserved the critical evidence, petitioners would possibly not be limited to circumstantial evidence such as the TX-944 remote control system's history of problems and evidence that water had entered Goldsbrough's transmitter. Although such evidence, taken together with lay and expert testimony, is sufficient to support a jury finding in petitioners' favor, it must be viewed in light of all the evidence – and lack thereof – the jury could reasonably consider.

**B. Respondents Have Failed to Show That Additional Elements Have Been Adopted by this Court for a *Prima Facie* case for Strict Liability in Tort Case, as Argued Against in the 2<sup>nd</sup> Assignment of Error**

Petitioners' second assignment of error is addressed by the respondents at section (d) of their Response.

**1. Respondents have not shown the risk/utility analysis is an essential element of the *prima facie* case in a defective design claim.**

Respondents quote Syllabus Point 5 from *Morningstar*, which defines the term “unsafe” in the context of a product liability case, in their attempt to infer that a risk/utility test is thus embedded in the elements of a *prima facie* case of product liability. Response, 23-24. However, in Syllabus Point 5, this Court merely notes that what a “reasonably prudent manufacturer” would do is relevant to an inquiry of whether a product is safe. This definition of “unsafe” does not add an additional element to the *prima facie* test established by this Court in Syllabus Point 4.

In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended

use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made.

*Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E. 2d 666 (1979). Clearly, this Court in *Morningstar* found that the only essential elements for a defective design product liability claim are that (1) the product was not reasonably safe for its intended use due to a defective design (2) which proximately caused the plaintiff's injury. Nothing in either syllabus point, which both discuss what a reasonably prudent manufacturer would do, suggest the factors of the risk/utility analysis. *Compare id.* at Syl. Pt. 4 ("The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made.") and *id.* at Syl. Pt. 5 ("The term 'unsafe' imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.") *with id.* at 885, fn. 20 ("(1) The usefulness and desirability of the product -- its utility to the user and to the public as a whole. (2) The safety aspects of the product -- the likelihood that it will cause injury, and the probable seriousness of the injury. (3) The availability of a substitute product which would meet the same need and not be as unsafe. (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. (5) The user's ability to avoid danger by the exercise of care in the use of the product. (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions. (7) The feasibility, on the part of the

manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.” (quoting *Cepeda v. Cumberland Engineering Co., Inc.*, 386 A.2d 816, 826-27 (1978)).

Even in *Beatty*, the case respondents primarily rely upon in their Response, this Court made no mention of either the feasible alternative design or risk/utility analysis. Instead, this Court reaffirmed the elements of a defective design cause of action under West Virginia law. *Beatty*, 212 W. Va. at 474, 574 S.E.2d at 806. Therefore, the respondents have failed to show that the risk/utility analysis of an element of the *prima facie* case petitioners must prove, and the trial court erred when it required petitioners to present evidence to meet that analysis.

**2. Feasible alternative design is not an essential element for a *prima facie* products liability claim.**

Respondents also conflate a risk/utility factor with a required element in order to persuade this Court that providing a feasible alternative design is a separate, essential element of a *prima facie* strict liability/product liability claim in West Virginia. Although the petitioners must show evidence demonstrating why the Bucyrus continuous miner with the TX-944 remote control system is not reasonably safe for its intended use, they are not required to present an alternative design in order to prevail at the summary judgment stage, nor must they demonstrate such evidence to support a jury verdict. *See* Petitioners’ Brief, 33-34.

Although respondents contend that the holding in *Church v. Wesson*, 182 W. Va. 37, 385 S.E.2d 393 (1989) (*per curiam*), shows that evidence of a feasible alternative design is a required element for a *prima facie* case, even a cursory reading of the case belies such an assertion. In *Church*, the plaintiff was one of three men working on a roof bolting machine in an underground coal mine. While drilling an eight-foot roof bolt, the roof bolt wrench the plaintiff was using

fractured at the weld, striking the plaintiff in the face and seriously injuring him. *Id.* at 38, 385 S.E.2d at 394. At the trial of plaintiff's defective design and failure to warn claims against the designer and manufacturer of the roof bolt wrench, the trial court granted a directed verdict in favor of the defense. *Id.* at 39, 385 S.E.2d at 395. On appeal, this Court upheld the directed verdict because the petitioner presented *no* evidence that the product at issue did not meet reasonable design standards at the time it was created. In fact, it was undisputed that the plaintiff expert's proposed alternative design was not feasible at the time the roof bolt wrench was manufactured, and the process used by the defendant was "state of the art" at the time. *Id.* at 40, 385 S.E.2d at 396. That the plaintiff in *Church* presented an alternative design in an attempt to bolster his case is not proof that such evidence is a necessary element of a strict liability case and nowhere in *Church* does this Court state such a requirement.

Further, *Church*, where the manufacturing process used at the time of the product's creation was "state of the art," is distinguishable from the present case because here, Dr. Nutter testified that the transmitter for the TX-944 remote control should have been made using other materials and a more watertight switching system to eliminate hazardous defects and that the system should have been designed to operate on different frequencies, materials which were available *at the time it was created*. See Petitioners' Brief at 23-25. Petitioners also produced other evidence of available substitute products that did not present the same risks as the TX-944. See Petitioners' Brief at 35-36.

Nowhere in either *Church* or *Morningstar* does the Court require a feasible alternative design in a *prima facie* case of strict products liability. Moreover, even if such an element was required, petitioners have presented evidence pertaining to a feasible alternative design which is sufficient to avoid summary judgment in this case. See Plaintiffs' Brief, 35-36.

3. **Petitioners presented sufficient evidence to surpass summary judgment on the seven-factor risk/utility test including a feasible alternative design.**

Although petitioners are not required under *Morningstar* to present evidence on the seven-factor risk/utility test in order to establish a *prima facie* case of product defect, petitioners have presented sufficient evidence to avoid summary judgment. *See* Petitioners' Brief, 30-32. As to the second, fifth, and sixth factors, the respondents argue that petitioners have not provided *any* evidence that the Bucyrus continuous miners at issue pose a risk of unintended movement. Response, 25. Yet, petitioners have provided evidence of instances in which Bucyrus continuous miners with the TX-944 remote control system had previously moved without a command from the operator. *See* Petitioners' Brief, 23.

Respondents additionally argue that there is no direct evidence that unintended movement occurred in this specific case. Response, 26. Yet, as discussed *supra*, the petitioners are not required to present direct evidence in this case. Petitioners have provided expert testimony from Dr. Nutter, who can opine to a reasonable probability that such an event occurred. Without the ability to test the specific components from the continuous miners that were being operated at the time of Mr. Goldsborough's injury, Dr. Nutter is unable to opine to absolute certainty but, under *Anderson* and *Bennett*, such a standard is not required to survive a motion for summary judgment. Petitioners' Brief, 8-10; *supra* at 5, 9. Dr. Nutter's expert testimony coupled with the unchanging testimony from Mr. Goldsborough and the evidence of prior unintended movement is sufficient evidence for a jury to reasonably conclude the petitioners are correct without resorting to speculation.

Regarding the seventh factor, respondents rely solely on their version of the facts without regard to the other evidence in the record. Response, 26. As discussed in Petitioners' Brief and

previously in this Reply, petitioners maintain that there is sufficient evidence in the record that Mr. Goldsborough followed proper safety procedures on the day of his injury. That respondents' miner and TX-944 remote control are safe when properly operated is an argument that respondents may make to the jury. But the factual disputes in this case prevent the court from ruling in the respondents' favor at the summary judgment stage.

Respondents cite *Monaham v. Toro Co.*, 856 F. Supp. 955 (E.D. Pa. 1994), for the proposition that the “defendant should not have to spread among its customers economic loss resulting from injuries from a product that is not defective, and for which the risk of harm can be eliminated by operating the product properly . . .” *Id.* at 964. Yet, this out of jurisdiction case is factually inapplicable to the present matter. In *Monaham*, the plaintiff husband sued a lawnmower manufacturer on behalf of his decedent wife, who was killed when the lawnmower rolled on top of her while she drove it in reverse down a slope. *Id.* at 957. On appeal, the court applied the seven-factor risk/utility analysis, which the Pennsylvania courts have adopted as law. Specifically as to the seventh factor, the court held that the allocation of risk should not be placed upon the defendant because the product was not defective and proper operation directions and safety warnings were given to all buyers. *Id.* at 964. Unlike in *Monaham*, where the court held that improper operation of the product led to the death of the user, not a defect in the machine, here, there is evidence indicating Mr. Goldsborough's serious injury occurred because of a defective product, not as a result of operator error. It is a vital business goal to minimize the risk of injury in the coal mining industry and imputing costs upon the respondent to ensure that large, dangerous machines used to mine coal are safe to operate is necessary to obtain such a goal.

Concerning the feasible alternative design factors – three and four of the risk/utility analysis – petitioners *have* provided sufficient evidence through records of the TX-944 transmitter’s deficiencies, maintenance records of the transmitter, and Dr. Nutter’s expert testimony regarding a feasible alternative design. Petitioners’ Brief, 9-10, 35. There is also evidence that at least Structured was, prior to and at the time of Mr. Goldsborough’s injury, working on and implementing an alternative design for the TX-944 transmitters. This design change involved fortifying the transmitters to improve water tightness so that the TX-944 system could pass inspection to be sold overseas. However, there is no evidence that the respondents were taking any steps to resolve this known water tightness problem for the units in operation in the United States, despite reports of problems. *See* Petitioners’ Brief, 10, 31 and 34 (citing Hearing Transcript, 13:1-18 (App. 1198)).

This Court should overturn the trial court’s grant of summary judgment in the respondents’ favor not only because the trial court erred by adding elements to the *prima facie* case for strict liability in tort based on a defective product that have not been adopted by this Court, but also because petitioners have provided sufficient evidence for a jury to reasonably conclude, without speculation, that the petitioners are correct and enter a verdict in petitioners’ favor.

**C. Respondents Have Failed to Show That There Are No Questions of Disputed Fact Regarding Petitioners’ Negligence and Warranty Claims as Asserted in the 3<sup>rd</sup> Assignment of Error**

Respondents address the petitioners third assignment of error at sections (b)(ii) and (c) of their Response.

**1. There are disputed facts regarding the negligence claim.**

Respondents argue, at 20-22, that *res ipsa loquitur* is inapplicable to this case, as a matter of law, “because the specific accident in this case can be explained (and has been by substantial

evidence) by Petitioner’s own conduct without any negligence on the part of Respondents.” Response, 21. However, respondents’ argument relies solely on their version of the evidence and ignores substantial and material evidence relied upon by the petitioners. This contrary evidence presents a different version of the incident, is further supported by the circumstantial evidence set forth in Petitioners’ Brief, 19-27, and, when compared to the respondents’ version, points out genuine disputes of material fact. Although it is the court’s function to determine whether inferences may reasonably be drawn from disputed evidence by a jury, such disputes are the quintessential province of the jury. *See, e.g., Beatty*, 212 W. Va. at 476, 574 S.E.2d at 808 (quoting *Foster v. City of Keyser*, 202 W.Va. 1, 21, 501 S.E.2d 165, 185 (1998)).<sup>3</sup> Here, it is clear that there is sufficient circumstantial evidence for a jury to reasonably conclude, without relying on speculation, that respondents were negligent based upon petitioners’ circumstantial evidence. Therefore, respondents have failed to make an argument that negates the application of *res ipsa loquitur* in this case, and the trial court erred in reaching its conclusion that the petitioners are unable to sustain a negligence claim.

At Response, 21, respondents cite to *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991), for the prospect that *res ipsa loquitur* cannot be invoked where “the existence of negligence is wholly a matter of conjecture and the circumstances are not proved . . .” *Id.* at 50, 404 S.E. 2d at 539. Yet, the present case is not one that relies wholly on conjecture or unproven circumstances. In *Farley*, a medical negligence case, the plaintiff filed suit against her surgeon because she became pregnant following a tubal ligation sterilization procedure. After delivering her son by Cesarean

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<sup>3</sup> This accords with this Court’s direction in *Bennett*, under the malfunction theory, that the jury determines whether reasonable secondary causes have been eliminated. *See* discussion *supra* at 5, 9.

section, the attending doctor found that one of the bands from the tubal ligation procedure was missing. In her suit, the plaintiff, proceeding without an expert, relied on the *res ipsa loquitur* doctrine claiming that (1) the birth of her son showed the band was not in place, (2) the doctors did not find the band during the Cesarean procedure, and (3) x-rays showed no band in her abdomen. *Id.* at 49.

This Court upheld the trial court's grant of summary judgment to the defendant surgeon, finding that the mere absence of the band, standing alone, was insufficient to support a *res ipsa loquitur* cause of action. The plaintiff presented no evidence that the band had never been in place or that the surgeon had done anything wrong during the sterilization procedure. *Id.* at 49. Further, the surgeon had advised the plaintiff in writing prior to the procedure that there was a 1 in 300 chance of failure. *Id.* at 49. Thus, the *Farley* plaintiff failed to show that the only reasonable inference was that the defendant surgeon was negligent.

Unlike in *Farley*, where the plaintiff solely relied on her own conjecture with no reliance on any expert opinion or circumstantial evidence, petitioners here have presented sufficient evidence of respondents' negligence to survive summary judgment. Petitioners have presented evidence including (1) the failure to design the TX-944 transmitter to withstand the harsh, wet environment that exists at the working face of an underground coal mine; (2) the failure to monitor the TX-944 remote systems, particularly the transmitters, once they were in use and to correct the problems of water ingress into the transmitters which caused short-circuits of the electronic switches that control the continuous miners; (3) expert testimony regarding likely cause; and (4) Mr. Goldsborough's unchanging account of his injury. Petitioners' Brief, 38.

Similarly, *Mrotek v. Coal River Canoe Livery, Ltd.*, 214 W. Va. 490, 492, 590 S.E.2d 683, 685 (2003) (*per curium*), cited by the respondents at 21, is inapplicable to the present case. Like *Farley*, in *Mrotek*, a negligence case involving a skiing accident, no evidence was provided aside from the injury incurred by the plaintiff and plaintiff's friend's testimony that he returned a broken ski to the defendant. *Id.* at 492-93, 590 S.E.2d at 685-86. As this Court held in affirming the trial court's grant of summary judgment, "negligence will not be imputed or presumed. The bare fact of an injury standing alone, without supporting evidence, is not sufficient to justify an inference of negligence." *Id.* at 492, 590 S.E.2d at 685. However, this Court also went on to find that "negligence . . . is a jury question when the evidence is conflicting or the facts are such that a reasonable man may draw different conclusions from them." *Id.* (quoting *Burgess v. Jefferson*, 162 W. Va. 1, 3, 245 S.E.2d 626, 628 (1978)). Here, sufficient evidence is presented by the petitioners, including expert testimony, for a jury to reasonably find in the petitioners' favor.

**2. There are disputed facts regarding the warranty claims.**

Respondents' repeat their argument, at 22, that petitioners have not produced enough evidence to meet the requisite elements. However, the petitioners have produced sufficient circumstantial evidence to establish all required elements for a *prima facie* case of breach of warranty, including proximate cause, in order to proceed to a jury in this matter. As stated in Petitioners' Brief, 39, the petitioners have the burden to establish the elements for a breach of warranty claim and have provided enough evidence to survive summary judgment: (1) the seller at the time of the contracting had reason to know the particular purpose for which the goods were required; (2) the reliance by the plaintiff as buyer upon the skill or judgment of the seller to select suitable goods; and (3) that the goods were unfit for the particular purpose. *Jones, Inc. v. W. A.*

*Wiedebusch Plumbing & Heating Co.*, 157 W. Va. 257, 267, 201 S.E.2d 248, 254 (1973) (citing W. Va. Code § 46-2-315; *Garner v. S. & S. Livestock Dealers, Inc.*, 248 So. 2d 783 (Miss. 1971)). Petitioners are allowed to prove their claim through circumstantial evidence. *Id.* at 270-271, 201 S.E.2d at 255-256. For the reasons discussed in Petitioners' Brief, 18-27, petitioners have presented sufficient evidence to avoid summary judgment on their warranty claims.

#### IV. CONCLUSION

The trial court erred in granting summary judgment to these respondents by misapprehending the law regarding the showing these petitioners must make to withstand summary judgment, as discussed in Petitioners' Brief, and, as discussed in this Reply, the respondents have failed to present sufficient evidence or explanation for this Court to uphold the trial court's rulings. Therefore, this Court should overturn the grants of summary judgment to these respondents and remand this case for trial.

Respectfully submitted.  
Petitioners, by counsel.



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**CERTIFICATE OF SERVICE**

I, JANE E. PEAK, attorney for the plaintiffs, do hereby certify that service of the within and foregoing "Petitioners' Reply Brief" was made upon the party hereinbelow via first class mail, addressed as follows:

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