

11-0397

PLEADING FILED
WITH MOTION

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KATY ADDAIR, Administratrix of the
Estate of Gary Addair; DAVID FARLEY;
DEBORAH STOLLINGS; et al.,

Plaintiffs/Petitioners,

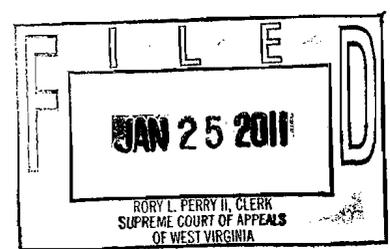
v.

Appeal No. 10-091
Civil Action No. 04-C-252
Circuit Court of Wyoming County, West Virginia

LITWAR PROCESSING COMPANY, LLC;
VIRGINIA CREWS COAL COMPANY; et al.,

Defendants/Respondents.

**RESPONSE BY DEFENDANT/RESPONDENT NOONE ASSOCIATES,
INC., TO PLAINTIFFS/PETITIONERS' PETITION FOR APPEAL**



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**RESPONSE BY DEFENDANT/RESPONDENT NOONE ASSOCIATES,
INC., TO PLAINTIFFS/PETITIONERS' PETITION FOR APPEAL**

I. KIND OF PROCEEDING AND NATURE OF RULING

On December 6, 2010, plaintiffs/petitioners¹ filed a Petition for Appeal² to this Honorable Court seeking an appeal of the Order Granting Defendants' Motions for Summary Judgment Dismissing the Deliberate Intent Cause of Action Claim on August 4, 2010³ (hereinafter "S. J. Order")⁴, by the Honorable Jack Alsop⁵, Presiding Special Judge in the underlying civil action, *Addair, et als. v. Litwar Processing, Inc., et als.*, Civil Action No. 04-C-252, Circuit Court of Wyoming County, West Virginia (hereinafter "underlying civil action"). Pursuant to that Order, the Circuit Court of Wyoming County (hereinafter "Circuit Court") granted summary judgment to defendant/

¹ The following plaintiffs in the underlying civil action are the petitioners: Terry Martin; Steven Hylton; Katy Addair, Administratrix of the Estate of Gary Addair; Larry Hatfield; James Jones; Kenneth King; Bobby Maynard; Clarence McCoy; Mitchell McDerment; Carl McPeake; Roger Muncy; and, William Weese. With the exception of plaintiffs Bobby Maynard, James Jones, and Carl McPeake, the petitioners will hereinafter be collectively referred to as "the petitioners". However, Terry Martin and Steven Hylton are the only plaintiffs who asserted claims against defendant/respondent Noone Associates, Inc.; therefore, this Response only addresses their deliberate intent claims.

² Rule 3 of the West Virginia Rules of Appellate Procedure requires that responses to the Petition for Appeal be filed within thirty (30) days of the date of the filing of the Petition for Appeal. However, pursuant to a Motion to Extend Time to File a Response to Plaintiffs/Petitioners' Petition for Appeal, this Court, by Order dated January 4, 2011, extended the time for Noone to file a response to the Petition for Appeal until January 25, 2011. [See Ex. 1].

³ The Revised Rules of Appellate Procedure are not applicable to the Petition for Appeal. The Revised Rules were approved by Order dated October 19, 2010. Rule 1(d) of the Revised Rules provides as follows: "These rules shall be applicable to all certified questions and appeals arising from rulings, orders or judgments entered on or after December 1, 2010, and to original jurisdiction proceedings in the Supreme Court of Appeals filed on or after December 1, 2010."

⁴ Judge Alsop signed the Order on July 27, 2010, and the Circuit Clerk entered the Order on August 4, 2010.

⁵ The Honorable John S. Hrko originally presided over this civil action in the Circuit Court of Wyoming County, West Virginia. Upon his retirement at the end of 2009, the Honorable Warren R. McGraw was elected as the Circuit Court Judge in Wyoming County. Judge McGraw was disqualified from presiding over this civil action because his son had acted as co-counsel for the plaintiffs. Eventually, by Order entered on April 7, 2009, acting Chief Justice Robin Jean Davis assigned this civil action to Judge Alsop, Judge of the Fourteenth Judicial Circuit.

respondent Noone Associates, Inc. (hereinafter "Noone")⁶ on the deliberate intent causes of action asserted by plaintiffs Terry Martin (hereinafter "Martin") and Steven Hylton (hereinafter "Hylton") against Noone, their former employer, in the underlying civil action. [See Petrs.' Designation of R., Doc. No. 1].

Prior to instituting the underlying civil action, Martin and Hylton filed workers' compensation claims based on the same allegations they made in the underlying civil action: injuries as a result of exposure to chemicals while working in coal testing or float-sink labs. In their workers' compensation claims, both Martin and Hylton clearly had a full opportunity to litigate the issue of whether they sustained a work-related injury before the Workers' Compensation Office of Judges. Ultimately, in each claim, the final ruling was that no work-related injury had resulted from their employment in float-sink labs.

A deliberate intent cause of action is provided for in West Virginia Code § 23-4-2 as the statutory exception to the workers' compensation immunity normally afforded employers for work-related injuries and requires, as one of the requisite elements of such a claim, that the employee demonstrate that he sustained a work-related injury. *See* W. Va. Code § 23-4-2(d)(2)(ii)(E). That code section further provides as follows regarding the dismissal of a deliberate intent cause of action when the employee cannot prove all of the requisite elements of the claim:

[T]he court shall dismiss the action upon motion for summary judgment if it finds, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) do not exist . . ."

See W. Va. Code § 23-4-2(d)(iii)(B).

⁶ The Order also granted summary judgment to other employer defendants.

The Circuit Court properly found that Martin and Hylton are not able to prove the work-related injury component of their deliberate intent claims as it was conclusively established in their workers' compensation claims that they did not sustain a work-related injury. In so doing, the Circuit Court appropriately determined that West Virginia's law on collateral estoppel applies to the final decisions in Martin and Hylton's workers' compensation claims and precludes them from re-litigating that issue as having been previously decided. As a result of Martin and Hylton's inability to establish that they sustained work-related injuries, that being a necessary element of their deliberate intent claims, and the preclusive effect of the prior determinations in that regard, the Circuit Court granted Noone summary judgment as a matter of law and dismissed Martin and Hylton's deliberate intent claims. Specifically, the Court found as follows:

Plaintiffs can not prove one of the required elements of the deliberate intent claim because of the preclusive effect of collateral estoppel. Since the Plaintiffs are precluded from retrying the issue of injury, they can not maintain their deliberate intent cause of action because they are unable to prove an injury as required under W.Va. Code § 23-4-2(d)(i) or §23-4-2(d)(ii)(E). As such, summary judgment in favor of the Defendants is appropriate.

[S. J. Order at 2].

It is accordingly **ADJUDGED** and **ORDERED** that the **DEFENDANTS' MOTIONS for SUMMARY JUDGMENT is GRANTED** and as such, the deliberate intent claims by the **Plaintiffs Roger Muncy, Katy Addair (Administratrix for Gary Addair), Larry Hatfield, William Weese, Mitchell McDerment, Kenneth King, Steven Hylton, Clarence McCoy, Bobby Maynard, James Jones, Carl MePeake [sic], and Terry Martin** are dismissed as a part of this action.

[S. J. Order at 19].

II. STATEMENT OF FACTS

The only facts pertinent to this Court's review of the S. J. Order granting summary judgment to Noone on Martin and Hylton's deliberate intent claims are undisputed as set forth below.

Noone operated a float-sink lab at two different locations in Beckley, Raleigh County, West Virginia, over a period of approximately fourteen (14) years from in or about 1980 until in or about 1994. Float-sink testing is the process by which coal is tested to determine its marketability. Certain chemicals are utilized in that process, the most significant of which is perchloroethylene.

Martin was employed by Noone from in or about April 1984, through in or about September 1993. Hylton was employed by Noone from in or about August 1987, until in or about September 1988.

By a May 19, 2003, Report of Occupational Injury, Martin filed a workers' compensation claim against Noone alleging a work-related injury as a result of his exposure to float-sink chemicals while employed by Noone. The West Virginia Workers' Compensation Commission rejected/denied the compensability of Martin's claim by Claim Decision dated December 6, 2004, finding that "[t]he disability complained of was not due to an injury received in the course of and resulting from employment." Martin protested the Commission Decision to the Workers' Compensation Office of Judges, which resulted in a Decision dated February 26, 2007, reversing the Commission Decision and ruling Martin's claim compensable. However, the West Virginia Insurance Commission appealed the Office of Judges Decision to the Workers' Compensation Board of Review, which issued an Order dated February 27, 2008, reversing the Office of Judges Decision and reinstating the Commission Decision

denying Martin's claim because he did not sustain a work-related injury. Martin filed a Petition for Appeal of the Board of Review Order in this Court, which issued an Order dated August 24, 2009, refusing Martin's Petition for Appeal and thereby upholding the Board of Review Order and Commission Decision. [See Petrs.' Designation of R., Doc. Nos. 65-69].

By a May 19, 2003, Report of Occupational Injury, Hylton filed a workers' compensation claim against Precision Testing Laboratory, Inc., for which Hylton worked from in or about December 1995, until in or about July 1996, and from in or about May 1997, until in or about August 1999; that period being after his employment with Noone from 1987 until 1988. Hylton alleged a work-related injury as a result of his exposure to float-sink chemicals. The West Virginia Workers' Compensation Division denied and rejected the compensability of Hylton's claim by Protestable Claims Decision dated October 1, 2003, finding that "there is no direct causal connection between your work and your alleged condition. Furthermore, your alleged condition cannot be fairly traceable to your employment as the proximate cause, and your alleged condition is independent of the employment relationship." Hylton protested the Division Decision to the Workers' Compensation Office of Judges, which resulted in a Decision dated December 6, 2006, affirming the Division Decision and finding that "[t]he weighted evidence of record does not establish a causal connection between the claimant's alleged illness and his chemical exposure in the workplace." Hylton appealed the Office of Judges Decision to the Workers' Compensation Board of Review, which issued an Order dated August 31, 2007, affirming the Office of Judges Decision and thereby upholding the Division Decision denying Hylton's claim. Hylton filed a Petition for Appeal of the Board of Review Order with this Court, which issued an Order dated June 22, 2009, refusing Hylton's Petition for Appeal and thereby upholding

the Board of Review Order, Office of Judges Decision, and Division Decision, all rejecting Hylton's claim. [See Petrs.' Designation of R., Doc. Nos. 73-77].

The Supreme Court Orders are the final decisions on the issue of compensability in Martin and Hylton's workers' compensation claims and establish as a matter of law that they did not sustain an injury as a result of their float-sink work for Noone.

On September 3, 2004, the underlying civil action was originally filed with the filing of a Class Action Complaint against certain employer defendants, including Noone, and certain manufacturing defendants. However, no plaintiff who had been employed by Noone was named in the original complaint. Subsequently, on July 13, 2005, a Second Amended Class Action Complaint was filed adding additional plaintiffs, including Martin. Finally, on or about April 11, 2007, the complaint was further amended with the filing of the Amended Class Action Complaint, the current operative pleading in the underlying civil action, adding Hylton as the only other plaintiff asserting a claim against Noone as his former employer. Judge Hrko, by an Amended Order to Correct Typographical Errors dated March 27, 2008, determined that the plaintiffs could not pursue deliberate intent claims against the employer defendants as a class action but must pursue individual deliberate intent claims on behalf of each plaintiff against each employer defendant. [See Petrs'. Designation of R., Doc. No. 2].

Several defendants eventually filed summary judgment motions, including Noone. [See Petrs.' Designation of R., Doc. Nos. 64-69; 72-77]⁷.

⁷ Noone also filed a Reply to Plaintiffs' Memorandum of Law in Opposition to Noone's Motion for Summary Judgment Against Plaintiff Terry Martin. [See Ex. 2].

III. ASSIGNMENTS OF ERROR

Martin and Hylton incorrectly maintain that the Circuit Court erred in granting summary judgment on their deliberate intent claims against Noone based on the application of the legal doctrine of collateral estoppel to the final decisions in their workers' compensation claims establishing that they did not sustain a work-related injury while employed by Noone. Because collateral estoppel precludes them from re-litigating the issue of whether they sustained a work-related injury, they cannot establish one of the requisite elements of their deliberate intent claims against Noone; therefore, the Circuit Court properly dismissed their deliberate intent claims.

Petitioners have asserted four (4) errors by the Circuit Court. Petitioners first take issue with those portions of the S. J. Order wherein the Circuit Court granted summary judgment against three (3) plaintiffs who were not included in any motion for summary judgment regarding the application of collateral estoppel: James Jones, Bobby Maynard, and Carl McPeake, employees of Westmoreland Coal Company and Buffalo Mining Company.

This error is not relevant to Noone and the Circuit Court's granting summary judgment with respect to the deliberate intent claims by Martin and Hylton against Noone and certainly does not justify this Court's reversal of the S. J. Order. Rather, it is nothing more than an inadvertent error. Plaintiffs' counsel recognized that fact in filing a Rule 60 Motion for Relief from Portions of the Court's Collateral Estoppel Order requesting that the Circuit Court amend the S. J. Order so that it does not apply to the aforementioned three (3) plaintiffs. [See Ex. 3]. Moreover, in an effort to correct this inadvertent error, counsel for defendants Westmoreland Coal Company and Buffalo Mining Company prepared and filed their Response to Plaintiffs' Rule 60

Motion for Relief from Portions of the Court's Collateral Estoppel Order agreeing with the relief requested by plaintiffs in their Rule 60 Motion. [See Ex. 4]. Along with the Response, counsel for those defendants provided a proposed order correcting the error. [See *id.*]. However, petitioners' counsel inexplicably chose not to cooperate and proceeded with the filing of the Petition for Appeal, which relies, in part, on this inadvertent error to justify this Court's reversal of the S. J. Order. Recently, on January 7, 2011, the Circuit Court resolved this issue by entering its Order Granting Plaintiffs' Rule 60 Motion for Relief from Portions of the Court's Collateral Estoppel Order, which Order was subsequently entered by the Wyoming County Circuit Clerk on or about January 14, 2011. [See Ex. 5]. That Order completely corrects petitioners' first assigned error in relieving plaintiffs Bobby Maynard, James Jones, and Carl McPeake from the effects of the S. J. Order. [See *id.*]. Therefore, this Court should disregard petitioners' first assigned error as it is now moot.

The second alleged error is that the Circuit Court granted summary judgment to Noone without Noone providing the necessary support entitling it to summary judgment. This alleged error is not only completely unmeritorious but totally contradicts the record in this case. The only pertinent facts, which are completely undisputed, are that Martin and Hylton filed and litigated workers' compensation claims, each resulting in a final decision by this Court establishing that there was no work-related injury as a result of working for Noone. Considering those undisputed facts, the Circuit Court then properly applied West Virginia law on collateral estoppel to those final workers' compensation decisions and correctly determined, as a matter of law, that Martin and Hylton cannot maintain their deliberate intent claims against Noone because they cannot re-litigate, and thus, cannot establish one of the requisite elements of their deliberate intent claims, that they sustained a work-related injury.

The third alleged error is that the Circuit Court incorrectly applied collateral estoppel to the final decisions in petitioners' workers' compensation claims. However, as correctly found by the Circuit Court, collateral estoppel is applicable to the final decisions in petitioners' workers' compensation claims pursuant to *State v. Miller*, 459 S.E.2d 114 (W. Va. 1995), and *Vest v. Bd. of Educ. of Nicholas County*, 485 S.E.2d 781 (W. Va. 1995), and precludes them from re-litigating the issue of whether they sustained a work-related injury in the underlying civil action; Martin and Hylton being required to prove a work-related injury to maintain their deliberate intent claims against Noone.

The fourth and final alleged error is that the Circuit Court failed to consider the exceptions to the application of collateral estoppel. However, the exceptions do not apply to preclude the application of collateral estoppel to the final decisions in Martin and Hylton's workers' compensation claims.

IV. ARGUMENT AND DISCUSSION OF LAW

A. Noone met its burden of proof entitling it to summary judgment.

Rule 56(c) of the West Virginia Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). This Court has also held as follows regarding summary judgment:

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

Syl. Pt. 3, Aetna Cas. and Surety Co. v. Fed. Ins. Co. of N.Y., 133 S.E.2d 770 (W. Va. 1963).

If there is no genuine issue as to any material fact summary judgment should be granted”

See id. at *Syl. Pt. 4.*

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995).

The granting of summary judgment is reviewed *de novo* pursuant to *Syl. Pt. 1, Painter v. Peavey*, 451 S.E.2d 755 (W. Va. 1955); however, the only facts pertinent to the Circuit Court’s decision is that Martin and Hylton did not sustain a work-related injury as conclusively established in their workers’ compensation claims. Therefore, there are clearly no factual issues. In its Motions for Summary Judgment, Noone properly set forth those facts and provided, as exhibits to its Motions, all of the relevant workers’ compensation documents establishing those facts. Furthermore, petitioners’ counsel has not disputed the fact that Martin and Hylton’s workers’ compensation claims conclusively established that neither of them sustained a work-related injury as a result of working in float-sink labs. Therefore, the only issue for the Circuit Court was applying the law of collateral estoppel and determining whether its application to the final workers’ compensation decisions precludes re-litigation of the issue of a work-related injury in the underlying civil action. The Circuit Court properly found that collateral estoppel does have that preclusive effect. Similarly, the only issue for review by this Court is whether the Circuit Court correctly applied the law on collateral estoppel to the final decisions in petitioners’ workers’ compensation claims as a matter of law because there are no factual issues.

B. The Circuit Court properly applied collateral estoppel.

The Circuit Court correctly set forth the law in West Virginia regarding the application of collateral estoppel:

Collateral estoppel is a legal doctrine in which a judgment in one case prevents a party to that suit from trying to litigate the same issue in another legal action. In effect, once decided, the parties are permanently bound by that ruling if collateral estoppel is applicable. Collateral estoppel is applicable to a prior proceeding when four conditions are met: 1) the issue previously decided is identical to the one presented in the action in question; 2) there is a final adjudication on the merits of the prior action; 3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue prior to the present action.

[See S. J. Order at 11 (citing *Miller*, 459 S.E.2d 114)].

The Circuit Court continued by referring to the test from *Vest* for applying collateral estoppel to quasi-judicial determinations of administrative agencies:

1) the prior decision must be rendered pursuant to the agency's adjudicatory authority; 2) the procedures employed by the agency must be substantially similar to those used in a court; and 3) the identity of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel.

[See S. J. Order at 14 (citing *Vest*, 485 S.E.2d 781)].

1. Martin and Hylton had a full and fair opportunity to litigate their claims.

The *Miller* test only requires that the party against whom collateral estoppel is raised has an opportunity to litigate. It does not provide for what petitioners are attempting to do: re-litigate an issue decided on a full and final basis in their workers' compensation claims because petitioners' *pro hac vice* counsel in the underlying civil action would have taken a different approach and/or presented other

arguments on the issue of whether there was a work-related injury. In fact, petitioners' counsel in the underlying civil action, who also represented them in their workers' compensation claims, confirmed that petitioners had the opportunity to litigate the issue of whether they sustained a work-related injury:

THE COURT: I mean, do you not agree that the claimant had the opportunity to litigate it, had the opportunity to appeal the decision to the Workers' Compensation Appeal Board, and had the opportunity to appeal that decision to the West Virginia Supreme Court of Appeals?

MR. BASILE: Yes.

[See Ex. 6 – Hrg. Transcr. 38:10-16 (Feb. 19, 2010)]. Petitioners' *pro hac vice* counsel in the underlying civil action also agreed that petitioners had the opportunity to litigate:

MR. WALSH: But here what you really have is, there was not a fully and fair actual adjudication. There was the opportunity.

THE COURT: Okay.

MR. WALSH: I don't think that there's any question that the opportunity existed

[See *id.* at 27:12-17].

Moreover, West Virginia workers' compensation laws and procedures ensure that claimants have a full and fair opportunity to litigate their claims, including whether they sustained a work-related injury, the basic question in any workers' compensation claim. The procedures are very similar to those available in a civil action, including the fact that workers' compensation claimants may be represented by counsel, conduct written discovery, provide and take deposition testimony, and rely on experts with varying specialties to name a few.⁸ Even in cases where the procedures

⁸ See W. Va. Code St. R. §§ 93-1-7.1-7.4 (2004) (providing that claimants have several procedural tools available to them in pursuing a workers' compensation claim, including interrogatories, documentary evidence, expert evaluations and reports, sworn statements, affidavits, stipulations, depositions, and

available in a workers' compensation proceeding differ from those in a civil action, they favor the claimant. *See* W. Va. Code § 23-1-15 ("The commissioner shall not be bound by the usual common-law or statutory rules of evidence"); *Casdorph v. W. Va. Off. Ins. Commr.*, 690 S.E.2d 102 (W. Va. 2009) (citing *Morris v. Consolidation Coal Co.*, 429 S.E.2d 648, 651 (W. Va. 1994); *Thacker v. Workers' Comp. Div.*, 531 S.E.2d 66, 69 (W. Va. 1999)) (recognizing that neither the Rules of Civil Procedure nor Evidence strictly apply to workers' compensation claims).

Furthermore, a claimant's burden of proof is also less than the burden of proof a plaintiff carries in a deliberate intent civil action. A deliberate intent plaintiff must prove his or her case by the traditional preponderance of the evidence standard. This Court has explained that standard as follows: "Proof by a preponderance of the evidence requires only that a party satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence." *Hovermale v. Berkeley Springs Moose Lodge No. 1483*, 271 S.E.2d 335, 341, n. 4 (W. Va. 1980).⁹ That preponderance standard is further heightened in a deliberate intent claim, which requires proof of the five statutory elements in West Virginia Code § 23-4-2(d)(2)(ii). A claimant in a workers' compensation claim is only required to produce evidence that is at least equal in evidentiary weight to that produced by the employer:

[R]esolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the

cross-examination); those being the same procedural tools still available to claimants in pursuing workers' compensation claims. *See* W. Va. C.S.R. §§ 93-1-7.1-7.4 (2008).

⁹ This standard has been consistently applied in deliberate intent cases. *See, e.g., Tolley v. Carboline Co.*, 617 S.E.2d 508 (W. Va. 2005); *Goodwin v. Hale*, 482 S.E.2d 171 (W. Va. 1996).

issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. **If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.**

W. Va. Code § 23-4-1g (emphasis added).¹⁰ Therefore, the burden of proof in a workers' compensation claim certainly favors the claimant with a deliberate intent claim imposing a much higher burden upon a plaintiff. Nevertheless, despite a lower burden of proof and the fact that West Virginia evidentiary and procedural rules do not strictly apply in litigating workers' compensation claims, the final decision in Martin and Hylton's workers' compensation claims established that they did not sustain a work-related injury.

There is also no evidence that either Martin or Hylton were denied any of the procedural tools available to them in proving that they sustained a work-related injury.¹¹ In fact, they had the opportunity to litigate their claims, and each submitted extensive evidence supporting their claim. [See Petrs.' Designation of R., Doc. Nos. 67 and 75]. Obviously, having lost their workers' compensation claims, Martin and Hylton are dissatisfied and are asking this Court to allow them to re-litigate the issue of whether they sustained a work-related injury, which is precisely the course of action for which collateral estoppel was developed to preclude.

¹⁰ See also, e.g., *Powell v. State Workmen's Compen. Commr.*, 273 S.E.2d 832 (W. Va. 1980) ("W. Va. Code s 23-4-1 does not require a claimant to prove that the conditions of his employment were the exclusive or sole cause of the disease nor does it require the claimant to show that the disease is peculiar to one industry, work environment, or occupation.").

¹¹ Petitioners' counsel's contention that he would have submitted other evidence is not sufficient to overcome the application of collateral estoppel and can be best described as "Monday Morning Quarterbacking".

Petitioners' counsel maintains that actual litigation of the workers' compensation claims is the operative factor. In support of that, petitioners' counsel cites *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 517 S.E.2d 763 (W. Va. 1999). However, their reliance on that case is misguided because it does not support their argument. In that case, this Court examined whether collateral estoppel could apply to an employee's federal Level III grievance proceeding and whether a ruling from that proceeding had preclusive effect in a human rights claim. *Id.* at 297. However, in the type of grievance proceeding at issue, employees are not even represented by counsel, and no evidence existed in that case demonstrating that the procedures employed by the grievance board were even remotely similar to civil litigation. *Id.* This Court found the grievance process was nothing like civil litigation, which is not the case in workers' compensation claims wherein the procedures more closely resemble civil litigation. Consequently, contrary to petitioners' counsel's assertion, *Wheeling-Pittsburgh* does not constitute an abandonment of the *Miller* opportunity to litigate requirement.

Petitioners' counsel also cites two cases from other jurisdictions: *Cunningham v. Prime Mover, Inc.*, 567 N.W.2d 178 (Neb. 1997) and *Gudmundson v. Del Ozone*, 232 P.3d 1059 (Utah 2010).¹² However, neither of those cases involve deliberate intent claims against an employer but present claims against third-party product manufacturers. They address asserting findings as to a lack of causation in a workers' compensation proceeding in a subsequent products liability action. In both cases, the respective courts ultimately decided that collateral estoppel could not be extended to products liability claims against third-party manufacturers and cited public policy

¹² Although not expressly advocated, petitioners' counsel is, in effect, arguing that *Miller* be overturned in favor of the adoption of a standard requiring actual litigation for collateral estoppel to apply.

concerns which are inapplicable to Martin and Hylton's deliberate intent claims against Noone, their former employer pursuant to the West Virginia deliberate intent statute.

However, petitioners fail to cite a recent decision by the Honorable Irene Keeley in the United States District Court for the Northern District of West Virginia in the case of *Corley v. Eastern Associated Coal Corp.*, 2009 WL 723120 (N.D. W. Va. 2009). In that case, a deliberate intent claim was filed by a deceased employee's widow after the underlying workers' compensation claim was dismissed because of a failure to file the claim within the required period of time. Judge Keeley held that because the appeals process in the workers' compensation system rejected the claim on jurisdictional grounds and did not address compensability, the civil action could proceed with no violation of res judicata or collateral estoppel. However, Judge Keeley also concluded that the failure to substantively prove a work-related injury in an underlying workers' compensation claim precludes the filing of a deliberate intent civil case. She stated as follows:

[H]ad the Office of Judges reviewed the claim in full and denied it on the basis that decedent's death was not compensable, this court would readily agree that such a decision would preclude the plaintiff from re-litigating the issue here.

Id. at 7 (emphasis added).

The Corley case provides clear support for this Court to find that Martin and Hylton are precluded from re-litigating the issue of whether they suffered work-related injuries in a deliberate intent civil action against Noone; that issue having been decided against them in their workers' compensation claims.

2. **The issues are identical.**

In the Petition for Appeal, petitioners argue that because they alleged some different symptoms in their deliberate intent claims than they did in their workers' compensation claims, their "injuries" are different and therefore, the issues in the workers' compensation claims are not identical to the issues in the underlying civil action. However, they are not alleging a different injury from that litigated in the workers' compensation claims, injury as a result of exposure to float-sink chemicals. Rather, they are alleging new symptoms from the same injury, exposure, in an effort to have this Court conclude that collateral estoppel does not apply to the final decisions in the workers' compensation claims. That argument is procedurally and substantively defective.

Petitioners failed to properly preserve the record in the underlying civil action by raising this argument in the proceedings before the Circuit Court. Nowhere in the briefs were changes in the medical complaints or symptoms alleged in response to the summary judgment motions. Thus, petitioners should be precluded from raising this argument on appeal. *See Covington v. Smith*, 582 S.E.2d 756, 764 n. 8 (W. Va. 2003) (casual mention of an issue is insufficient to preserve the issue on appeal); *Tiernan v. Charleston Area Med. Ctr.*, 506 S.E.2d 578, 583 n. 10 (W. Va. 1998) (assignments of error not argued in the brief are waived).

Even if this Court allows petitioners to argue that the issues are not identical, there is still no merit to petitioners' argument. The workers' compensation claims filed by Martin and Hylton resulted in final decisions establishing that they did not sustain a work-related injury as a result of exposure to float-sink chemicals while working in float-sink labs. In their deliberate intent claims, they are making the exact

same claim of injury in alleging that Noone is liable for injuries they sustained as a result of exposure to float-sink chemicals while working in Noone's lab. This satisfies the identical issue requirement in *Miller* as that case does not require that the exact same symptoms be present or that every fact be presented in the same way in litigating the issue the second time. *See Miller*, 459 S.E.2d 114.

The Court in *Miller* determined that the issues litigated were different because "the issue of whether an individual was terminated wrongfully for patient abuse is not the same issue as whether an individual committed a criminal act of battery. *See id.* at 123. Under *Miller*, the legal issue, not each and every fact, including symptoms of injuries, is reviewed to determine whether it is appropriate to apply collateral estoppel. *See id.* A requirement that two claims present identical symptoms (rather than merely the same legal issue) would lead to absurd results. This Court should not abandon the law on collateral estoppel simply because petitioners' counsel, now supported by additional counsel, wants to present petitioners' claims differently in an effort to obtain better results. That is precisely the kind of abuse of the legal system for which collateral estoppel is designed to preclude.¹³

3. The Circuit Court properly applied collateral estoppel to Hylton's claim.

Petitioners argue that because Noone was not a party to and did not participate in Hylton's workers' compensation claim, collateral estoppel cannot be applied to the final decision in his workers' compensation claim as pertains to his deliberate intent cause of action against Noone. This argument lacks merit.

¹³ Adoption of petitioners' argument that alleging different symptoms equals a different issue and precludes the application of collateral estoppel would be significantly detrimental to West Virginia tort law. It would be so easy to circumvent the application of collateral estoppel that it would become a legal doctrine in theory with almost no chance of ever being applied. That would also result in duplicative lawsuits, including deliberate intent claims.

What petitioners ignore is the fact that Hylton filed his workers' compensation claim against Precision Testing Laboratory, Inc., an employer for whom he worked after his employment with Noone. There is no requirement in the law on collateral estoppel that all of the parties in the prior proceeding must have been identical to the parties in the second proceeding for collateral estoppel to apply. *See Rowe v. Grapevine Corp.*, 527 S.E.2d 814, 812 (W. Va. 1999) ("A claim is barred by res judicata when the prior action involves identical claims and the same parties or their privies. Collateral estoppel, however, does not always require that the parties be the same. Instead, collateral estoppel requires identical issues raised in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment."). The only requirement in this regard for collateral estoppel to apply is that the party against whom collateral estoppel is being asserted, *i.e.* Hylton, not necessarily the party asserting it, *i.e.* Noone, had a prior opportunity to litigate the issue, which Hylton did in his workers' compensation claim. *See Syl. Pt. 8, Conley v. Spillers*, 301 S.E.2d 216 (W. Va. 1983) ("A fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim.

It was entirely appropriate for Noone to have asserted collateral estoppel against Hylton and for the Circuit Court to have found that collateral estoppel precludes Hylton from re-litigating the issue of whether he sustained a work-related injury as a result of exposure to float-sink chemicals while employed by Noone. He had already litigated the issue of whether he sustained a work-related injury in his workers' compensation claim against Precision Testing Laboratory, Inc., an employer for whom he worked after Noone. The important consideration is that he could not establish an

injury, neither as the result of his employment with Precision Testing Laboratory, Inc, nor certainly not as a result of his employment with Noone; him having worked for Noone prior to his employment with Precision Testing Laboratory, Inc. Therefore, the Circuit Court properly applied collateral estoppel to the final decision in Hylton's workers' compensation claim as pertains to his deliberate intent claim against Noone.

C. The exceptions to the application of collateral estoppel do not apply.

Petitioners argue that certain exceptions to collateral estoppel apply to preclude its application. First, they argue that the "additional evidence" exception discussed in the *Tolley* case applies to prohibit the application of collateral estoppel. However, petitioners have not submitted any new evidence. Specifically with regard to Hylton's deliberate intent claim, nothing has been provided. Similarly, with respect to Martin's claim, no new evidence has been provided. All petitioners' counsel have done is provided new interpretations of old evidence. They submitted Martin's Affidavit, [see Petrs.' Designation of R., Doc. No. 70], and the affidavit of Nicholas Cheremisinoff, Ph.D., [see Petrs.' Designation of R., Doc. No. 71]. However, there is no authority supporting petitioners' argument that presenting the same evidence differently or having new experts interpret evidence which was available during the prior proceeding differently constitutes "additional evidence" to preclude the application of collateral estoppel nor can petitioners' argument be deemed sufficient to qualify for the forgiveness afforded by the "additional evidence" exception in *Tolley*. If this Court adopts petitioners' argument as to what constitutes "additional evidence", collateral estoppel would never apply because a different attorney will always find new ways of presenting evidence. Ultimately, petitioners' argument as to alleged "additional evidence" only reveals petitioners' counsel's true intent, which is to re-litigate an issue

which has been fully and finally decided in the prior workers' compensation proceedings establishing that there was no work-related injury.

Additionally, petitioners should not even be permitted to rely on Dr. Cheremisinoff, including his Affidavit, because the Circuit Court previously excluded all of the plaintiffs' fact and expert witnesses by its Order Regarding January 6, 2010 Hearing. [see Ex. 7]. That Order contains the following specific ruling in this regard:

As a sanction for the failure to make the November 1, 2009, expert witness disclosures, it is **ORDERED** that plaintiffs shall not be entitled to offer against any party at trial any expert witnesses in an individual case on the merits. This sanction includes exclusion of expert witnesses in the claims asserted against the employer defendants pursuant to W. Va. Code § 23-4-2 and against the remaining defendants for any individual product liability claims.

[*Id.* at 13-14.]¹⁴.

Petitioners also argue that the "role of fraud" in the workers' compensation proceedings prohibits the application of the doctrine of collateral estoppel, which argument is addressed to petitioners' criticisms of Dr. Ronald Gots. In support of that argument, petitioners cite *Persinger v. Peabody Coal Co.*, 474 S.E.2d 887 (W. Va. 1996). However, their reliance on that case is misguided because that case did not address nor even mention collateral estoppel but dealt with the following certified questions:

May an employee, who has filed a workers' compensation claim and who has been awarded benefits by the West Virginia Workers' Compensation Fund, maintain a cause of action against his employer for damages as a result of the employer knowingly filing a false and/or misleading statement with the Fund in opposition to the employee's claim?

If such a cause of action for fraud is available, what damages are available to the employee?

¹⁴ This Court has affirmed that ruling by the Circuit Court.

Id. Those issues have nothing to do with collateral estoppel. Moreover, there was certainly no allegations of fraudulent filings by Noone in the underlying civil action. Therefore, petitioners' argument in this regard is totally incorrect.¹⁵

D. Public policy favors applying collateral estoppel.

Deliberate intent was created as the statutory exception to the immunity normally afforded employers for work-related injuries. *See* W. Va. Code §§ 23-2-6; 23-4-2. A deliberate intent claim only allows an employee to recover sums "for any excess" over and above that collected from their workers' compensation claims. W. Va. Code § 23-4-2. By allowing deliberate intent claims where the workers' compensation system found no compensable injury existed, this Court would deprive employers of their bargained-for benefit of an offset for workers' compensation benefits. That would clearly contradict the language of the deliberate intent statute and the will of the West Virginia Legislature. Moreover, the determination of whether there was a work-related injury is the province of the West Virginia workers' compensation system. To allow, as part of deliberate intent claims, plaintiffs to re-litigate the issue of whether there was a work-related injury would render the workers' compensation system seemingly meaningless and would result in inconsistent decisions on that issue.

The Circuit Court also recognized public policy considerations favoring the application of collateral estoppel to final decisions in workers' compensation claims:

If an employee is permitted to maintain a deliberate intent claim after the workers' compensation claims were denied based on a lack of compensable injury, an employer would potentially be subject to greater liability. This would place employers in a difficult position; either choose not to defend the workers' compensation claim or defend the workers'

¹⁵ This Response does not further address the irrelevant issue of whether Dr. Ronald Gots' testimony is fraudulent as that issue was never raised before the Circuit Court.

compensation claim and risk greater liability exposure on behalf of the employers. This Court finds that such an interpretation would be contrary to the legislative intent of the workers' compensation laws.

[See S. J. Order at 18-19].

Another policy consideration cited by the Circuit Court is that accepting petitioners' argument would actually discourage workers' compensation claimants from fully adjudicating their claims since doing so would prevent them from re-litigating that claim in circuit court later:

THE COURT: So what you're telling me is, is that for the individual who goes before the Workers' Compensation Board, who, through his counsel, aggressively pursues his claim, leaves every -- turns every stone, leaves no evidence that's available unrepresented, and fully litigates that case and loses, that I will apply collateral estoppel preclusion to him, but for the individual who just files a claim and does nothing and loses, that I'm going to let him litigate it again.

MR. WALSH: Bluntly put, yes, Your Honor.

[See Ex. 6 at 29].

The West Virginia Legislature enacted the deliberate intent statute as an exception to employer liability for work-related injuries. It was not intended to be an alternative to workers' compensation claims where a loss in a workers' compensation claim allows the issues in that claim, including whether there was a work-related injury, that being the most basic question in both workers' compensation and deliberate intent claims, to be re-litigated in a civil action. That would basically eliminate every employer's immunity from suit for work-related injuries. Such an atrocious abuse of the West Virginia legal system was not condoned by the Circuit Court and should not be by this Court.

V. CONCLUSION

The Circuit Court properly applied the doctrine of collateral estoppel to the final decisions in Martin and Hylton's workers' compensation claims. Those final decisions establish that they did not sustain a work-related injury during their employment with Noone. Because there are no issues of fact and collateral estoppel precludes Martin and Hylton from re-litigating the issue of whether they sustained a work-related injury while employed by Noone as one of the necessary elements of their deliberate intent claims against Noone in the underlying civil action as a matter of law, this Court should reject the Petition for Appeal and thereby uphold the Circuit Court's decision granting Noone summary judgment and dismissing Martin and Hylton's deliberate intent claims.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Jerad K. Horne, attorney for defendant/respondent Noone Associates, Inc., hereby certify that on the 24th day of January, 2011, I served the preceding RESPONSE and APPENDIX upon all counsel of record with courtesy copies to the following *pro hac vice* counsel of record in the underlying civil action who have not been admitted *pro hac vice* before the Supreme Court of Appeals of West Virginia by depositing true copies thereof into the United States mail, postage prepaid, in envelopes addressed to those attorneys as follows and upon the *pro se* defendant by depositing a true copy thereof into the United States mail, postage prepaid, in an envelope addressed to that defendant as follows:

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EXHIBITS

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