

PLEADING FILED
WITH MOTION

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

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

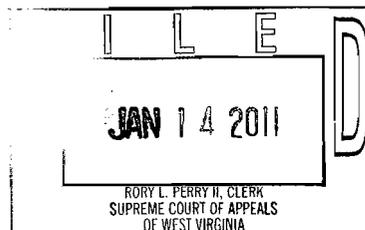
Petitioners/Plaintiffs,

v.

Docket Number: *11-0397*

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

Respondents/Defendants.



From the Circuit Court of Wyoming County, West Virginia
Civil Action No. 04-C-252

**RESPONSE OF STANDARD LABORATORIES, INC.
TO PETITION FOR APPEAL**

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I. KIND OF PROCEEDING AND NATURE OF RULING

Petitioners ask this Court to overturn summary judgment properly granted to Standard Laboratories, Inc. (“Standard Laboratories”) in the Circuit Court of Wyoming County on August 4, 2010.¹ In that order, Judge Jack Alsop² dismissed the deliberate intent claims brought by Larry Hatfield (“Hatfield”), Kenneth King (“King”), and Mitchell McDerment (“McDerment”) (collectively the “Petitioners”) against their former employer Standard Laboratories.³

Hatfield, King, and McDerment had previously filed and lost workers’ compensation claims based on the same allegations raised in this case: exposure to chemicals used while working in coal testing or “float sink” laboratories owned by Standard Laboratories. In each underlying workers’ compensation claim, Hatfield, King, and McDerment had a full opportunity to litigate before the Workers’ Compensation Office of Judges whether a compensable injury occurred resulting from their employment. Ultimately, in each case, an

¹ Initially, it must be noted that although the Petition for Appeal references this Court’s revised rules of appellate procedure effective December 1, 2010, the new rules do not apply to this case as the order which is the subject of this appeal is dated August 4, 2010. The Revised Rules of Appellate Procedure approved by order dated October 19, 2010, provide in Rule 1(d) that, barring an order entered on motion of this Court: “These rules shall be applicable to all certified questions and appeals arising from rulings, orders or judgments entered on or after December 1, 2010.”

² Judge John S. Hrko originally presided over this case. At his retirement, the Honorable Warren R. McGraw was elected to assume Judge Hrko’s cases, but Judge McGraw was subsequently disqualified from presiding because his son was one of the then counsel of record for the plaintiffs. Acting Chief Justice Robin Jean Davis assigned the case on March 26, 2009, to the Honorable James O. Holliday, Senior Status Judge. Judge Holliday subsequently requested that he be relieved of this assignment, and by order entered on April 7, 2009, Acting Chief Justice Davis ordered that the Honorable Jack Alsop, Judge of the Fourteenth Judicial Circuit, be assigned to preside over the case.

³ The putative class in this litigation consisted of employees of coal testing laboratories who sought damages from their former or current employers under a number of theories, including deliberate intent to injure, and who sought damages from chemical distributors and manufacturers under products liability and other theories. On March 27, 2008, Judge John S. Hrko denied class certification on the deliberate intent claims. This Response only addresses the dismissal of Defendant Standard Laboratories in the cases filed by Petitioners Hatfield, King, and McDerment.

Administrative Law Judge ruled that no compensable injury resulted from exposure to float sink chemicals, and each of these three employees either lost or withdrew his appeal.

In a deliberate intent civil action brought under West Virginia Code § 23-4-2(d)(2)(ii), summary judgment is mandated if the employee is unable to prove even one of the five requirements of the statute. *See* W. Va. Code § 23-4-2(d)(2)(iii)(B). The final element of the five part deliberate intent test requires an employee to show that he or she “suffered serious compensable injury or compensable death...” W. Va. Code § 23-4-2(d)(2)(ii)(E). The Circuit Court of Wyoming County found that Hatfield, King, and McDerment were unable to prove the fifth essential statutory element of a deliberate intent cause of action, as none had proven a compensable injury in his workers’ compensation claim. Therefore, applying West Virginia’s law of collateral estoppel, Judge Alsop ruled that the final orders by the Workers’ Compensation Office of Judges precluded these three plaintiffs from re-litigating whether their exposure to float sink chemicals resulted in a compensable injury because that issue was previously decided. Unable to prove a compensable injury as a matter of law, summary judgment was granted as to the deliberate intent claims filed by Hatfield, King, and McDerment against Standard Laboratories.

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). Although summary judgments are reviewed *de novo* pursuant to *Painter v. Peavey*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994), the only essential fact in the Wyoming County Circuit Court’s decision at issue -- that the Petitioners did not suffer injuries which were ruled compensable in the workers’ compensation system -- is

undisputed. Therefore, the only question before this Court is whether the Circuit Court properly applied West Virginia law regarding collateral estoppel to these undisputed facts.

Although Petitioners raise several novel factual arguments in their Petition for Appeal, Petitioners **never** disputed the fact that Hatfield's, King's, and McDerment's workers' compensation claims were denied because they each were found to have no compensable injury resulting from work-related exposure to float sink chemicals. Nor does the Petition deny Hatfield, King, and McDerment received an opportunity to litigate that issue in their previous workers' compensation claims. Accordingly, summary judgment was proper.

II. STATEMENT OF FACTS

The only facts essential to this Court's review of the Wyoming County Circuit Court's granting summary judgment in the claims of Hatfield, King, and McDerment are undisputed:

- 1) On October 14, 2003, Hatfield's workers' compensation claim alleging that he incurred compensable injuries as a result of exposure to float sink chemicals in the course of and resulting from his employment with Standard Laboratories was denied by the Workers' Compensation Commission following a review of the information presented with and in response to the application, and the gathering of the Commission's own independent medical evidence. Hatfield's lawyer, Thomas Basile, who also represents all of the Petitioners in this subsequently filed civil action, filed a protest. Following four years of litigation before the Workers' Compensation Office of Judges, on November 30, 2007, Administrative Law Judge Martha Hill entered a nine-page order that affirmed the decision rejecting

the claim, finding the evidence in the record (which was listed in a four page attachment to the order) had not established Hatfield had a medical condition related to exposure to chemicals on the job. *See* documents Nos. 52 through 56 of Petitioners' Designation of the Record.

- 2) On December 13, 2004, King's workers' compensation claim alleging that he had incurred compensable injuries as a result of exposure to float sink chemicals in the course of and resulting from his employment with Standard Laboratories was denied by the Workers' Compensation Commission following a review of the information submitted by the parties and the Commission's own evidence. King's lawyer, Thomas Basile, filed a protest. In a nine-page order dated May 3, 2007, Administrative Law Judge Charles Moredock affirmed the decision by the Commission which had rejected the claim, finding the "voluminous evidence" in the record (also listed in a four-page attachment to the order) failed to establish a medical condition related to King's exposure to chemicals at his work place. *See* documents Nos. 57 through 59 of Petitioners' Designation of the Record.
- 3) On November 4, 2004, McDerment's workers' compensation claim alleging that he incurred compensable injuries as a result of exposure to float sink chemicals in the course of and resulting from his employment with Standard Laboratories was denied by the Workers' Compensation Commission based upon a review of information submitted by the employee and the employer, and independent evidence gathered. Thomas Basile filed a protest as McDerment's lawyer. In a twenty-one page order dated May 9, 2007, Deputy Chief Administrative Law Judge Henry Haslebacher affirmed the decision by the Commission which had

rejected the claim, finding the evidence of record (again listed in a four-page attachment to the order) established conclusively that McDerment had not suffered an injury or disease caused by exposure to harmful amounts of the chemicals. *See* documents Nos. 47 through 51 of Petitioners' Designation of the Record.

The outcomes of these workers' compensation claims are undisputed.

On September 3, 2004, a putative class action was filed alleging, among other causes of action, that the defendant/employers who operated coal testing laboratories deliberately intended to injure their plaintiff/employees. Products liability counts were also included in the complaint against manufacturers and distributors of the chemicals used in those laboratories. No Standard Laboratories employees were named in the original complaint, but on April 2, 2007, Judge John Hrko granted leave for the plaintiffs to file a third amended complaint which added Hatfield, King, and McDerment as named plaintiffs. On March 27, 2008, Judge Hrko denied class certification of the deliberate intent claims pending against the defendant/employers, and those claims survived only as individual claims by individual plaintiffs against individual employer defendants.

Several employer defendants subsequently filed Motions for Summary Judgment based in part on the doctrine of collateral estoppel. The first of these motions was filed by Virginia Crews Coal Company, and contained a legal argument regarding collateral estoppel which is presently before this Court. Other defendants joined in the Virginia Crews Coal Company motion, including Standard Laboratories. Although the Petition for Appeal incorrectly states otherwise, Standard Laboratories' Joinder Motion attached the relevant self-authenticated

and self-identified documents from the workers' compensation claims of Hatfield, King and McDerment. *See* documents Nos. 46 through 59 of Petitioners' Designation of the Record. Because the legal arguments were identical, and the facts were not in dispute, Standard Laboratories' motion joined in and therefore did not repeat verbatim the legal arguments previously made by Virginia Crews Coal Company. Standard Laboratories also responded in its reply to the legal arguments raised in the Petitioners' response to the Motion for Summary Judgment.⁴

All of the parties with interest in the Motion for Summary Judgment filed supporting briefs, and the Circuit Court heard oral argument. On August 4, 2010, Judge Jack Alsop granted summary judgment, ruling that collateral estoppel prevents Petitioners from re-litigating the final decisions of the workers' compensation system on the compensability of the alleged work-related injuries. *See* document No. 1 of Petitioners' Designation of the Record (hereinafter "August 4, 2010 Order" or "the order").⁵ However, the Court included in the order, through clerical or similarly inadvertent error, summary judgment on behalf of three plaintiff/employees who were not the subject of the motions filed by any of the employer/defendants: James Jones, Bobby Maynard, and Carl McPeake, employees of Westmoreland Coal Company and Buffalo Mining Company.

Counsel for Westmoreland Coal Company and Buffalo Mining Company prepared and sent to Petitioners' counsel a proposed order addressing the issue and has attempted to have this clerical error corrected, but Petitioners' counsel apparently have refused to

⁴ Standard Laboratories' Reply in support of its Joinder Motion for Summary Judgment was not included in Petitioners' designation of the record, but is attached as Exhibit 1.

⁵ The August 4, 2010 Order was signed by Judge Alsop on July 27, 2010, but entered by the Clerk on August 4, 2010.

cooperate. *See* Response to Plaintiffs' Rule 60 Motion for Relief from Portions of the Court's Collateral Estoppel Order filed on December 15, 2010, Exhibit 2. Rather than signing the proposed order, Petitioners' counsel have not responded and instead filed the instant appeal, including the clerical error as one of their substantive arguments in an attempt to place the validity of the Circuit Court's other rulings into question.

Additionally, the Petition for Appeal includes a lengthy section titled "Work Environment Considerations." The unfounded allegations contained in this section are not relevant to the application of the doctrine of collateral estoppel, and should not be considered by this Court. This section of the Petition for Appeal misrepresents the Petitioners' working conditions. These allegations are irrelevant, and therefore Standard Laboratories has not addressed them. However, Standard Laboratories notes that the condition of Standard Laboratories' facilities is remarkably different from that described by Petitioners in their Petition for Appeal, as is clearly documented and referenced herein in the company's rebuttal in the three underlying workers' compensation claims.⁶

The facts necessary to determine this appeal are limited to the outcome of the workers' compensation claims, outcomes that were not disputed by the Petitioners in this litigation. The legal issue presented here is whether Hatfield, King, and McDerment, who exhausted their administrative remedies through a full and fair opportunity to litigate their claim

⁶ The description of working conditions submitted by Petitioners is not applicable to Standard Laboratories, as they allegedly describe working conditions present in the laboratories of other defendants. The few statements allegedly describing Standard Laboratories' facilities are inconsistent with the evidence and facts in this case, particularly the description of levels of exposure, which is based entirely on self-serving affidavits signed by the Petitioners which have no basis in fact and which contradict evidence submitted in their workers' compensation claims. Additionally, Plaintiffs rely heavily on the affidavit of Nicholas Cheremisinoff, an expert who (along with all of Plaintiffs' experts) was excluded by the Circuit Court. *See* February 17, 2010 Order of the Circuit Court of Wyoming County. Accordingly, a Motion to Strike is currently pending before the Circuit Court regarding the affidavits of Cheremisinoff. These issues are not relevant to the legal question before this Court and should not be considered.

in the claimant-friendly workers' compensation system and were unable to show a work-related compensable injury, may now re-litigate that same issue against the same party (their employer) in civil court.

III. ARGUMENT AND DISCUSSION OF LAW

A. THE CIRCUIT COURT OF WYOMING COUNTY CORRECTLY APPLIED THE ELEMENTS OF COLLATERAL ESTOPPEL TO PROHIBIT HATFIELD, KING, AND McDERMENT FROM RE-LITIGATING ISSUES PREVIOUSLY DECIDED IN WORKERS' COMPENSATION PROCEEDINGS.

Wyoming County Circuit Court Judge Jack Alsop accurately recited the law in West Virginia concerning collateral estoppel in the Order dated August 4, 2010, granting summary judgment:

[c]ollateral 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...; 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.

August 4, 2010 Order at p. 11, citing *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Additionally, the Wyoming County Circuit Court cited the three part test from *Vest v. Board of Educ. of Nicholas County*, 193 W. Va. 222, 485 S.E.2d 781 (1995), which governs when collateral estoppel is applied to an administrative agency's ruling:

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.

August 4, 2010 Order at p. 15.

The Petition for Appeal only disputes that elements one and four of the *Miller* test are met.⁷ Petitioners have never argued that the workers' compensation decisions are not final or that the parties are different. In addition, pursuant to *Vest*, there is no dispute that the workers' compensation decisions were rendered within the agencies' authority. August 4, 2010 Order at p. 15. Therefore, this Response will not address any of those undisputed elements and will only address the opportunity to litigate, the identity of the issues, and the substantially similar procedures, elements one and four of *Miller* and elements two and three of *Vest*.⁸

1. Hatfield, King, and McDerment “had a full and fair opportunity to litigate” in the workers’ compensation proceedings, and are estopped from re-litigating that issue.

Petitioners' argument that they “did not have a full and fair hearing” significantly omits a key word of the fourth element of the *Miller* test: “opportunity.” Petition for Appeal at p. 28. The *Miller* test only requires that the party against whom collateral estoppel is raised has an “opportunity to litigate,” not that every possible argument is pursued, or that every possible expert is retained. The Petition for Appeal reveals Petitioners' true intent: to re-litigate issues previously decided in their workers' compensation claims. Petitioners' counsel -- the same counsel in this case and in the workers' compensation claims -- admitted on the record that Hatfield, King, and McDerment, along with the other Petitioners, had the **opportunity** to litigate their claims of work-related injuries resulting from exposure to chemicals:

⁷ In oral argument before the Circuit Court, Plaintiffs/Petitioners attempted to argue that because the workers' compensation claims were denied due to a lack of evidence showing a compensable injury, the decisions were not final adjudication on the merits. See Exhibit 3, Transcript from February 19, 2010 hearing, p. 22, hereinafter “February 19, 2010 Transcript.” Petitioners have abandoned this argument in their Petition.

⁸ Element 2 of *Vest*, that the procedures used in the underlying administrative proceeding were “substantially similar” to those used in a civil proceeding, is addressed in the discussion of identity of the issues, section B1, *infra*.

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.

February 19, 2010 Transcript at 38. *Pro hac* counsel for the Petitioners in this action reiterated this admission as well during the hearing:

[b]ut here what you really have is, there was not a full and fair actual adjudication. There was the opportunity I don't think that there's any question that the opportunity existed....

February 19, 2010 Transcript at p. 27.

In addition to these admissions by Petitioners' counsel, West Virginia law applicable to and the procedures inherent in workers' compensation claims ensure claimants have an opportunity to litigate their claims. This opportunity is "full and fair" as required by *Miller*, and actually with respect to the Petitioners, may exceed the opportunity presented in civil litigation. Just as in civil litigation, workers' compensation claimants can choose or refuse to be represented by counsel, can conduct written discovery, can submit oral testimony, and are permitted to proffer opinions or information from doctors, toxicologists, and other expert witnesses. W. Va. Code § 23-1-13. Workers' compensation claim procedures are substantially similar to civil litigation⁹ and, in fact, where the procedures differ, the workers' compensation

⁹ 93 CSR 1, the Workers' Compensation Office of Judges Procedural Rule effective January 1, 2004, related to the Litigation of Protests in workers' compensation claims and provided: at Rule 3.6 that the parties were not bound by the statutory rules of evidence and that Administrative Law Judges would consider the relevant testimony and other timely evidence of the parties and witnesses; at Rule 3.7 that cross-examination of witnesses is permitted and hearings transcribed; at Rule 3.8 that reports of experts and other documentary evidence can be exchanged and considered by the Judge, and interrogatories served; at Rule 3.9 that witnesses can be produced and cross-examined, and subpoenas *duces tecum* served; and at Rule 3.12 that depositions can be scheduled in person and telephonically.

procedures generally differ in favor of the claimant, providing greater opportunities than those available in civil litigation.¹⁰

The burden of proof required of a claimant in a worker's compensation claim 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 standard of preponderance of the evidence. The West Virginia Supreme Court has described the required burden of proof in civil litigation as follows: "[p]roof 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*, 165 W. Va. 689, 697 n. 4, 271 S.E.2d 335, 341 n. 4 (1980).¹¹ This "more likely than not" definition of preponderance is a higher standard than the statutorily decreed workers' compensation burden of proof. A workers' compensation claimant need not prove that the injury is "more likely than not" compensable, but only that it is equally likely to be compensable. West Virginia Code § 23-4-1g states that:

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. This lower standard allows a claimant to prevail in a workers' compensation claim by merely showing that his or her position on the compensability of an

¹⁰ In addition to showing that *Miller's* requirement that the identity of the issue is met, these similarities between the workers' compensation process and civil litigation also fulfill *Vest's* second requirement that the procedures used be "substantially similar." The Circuit Court of Wyoming County agreed. August 4, 2010 Order at p. 15-16.

¹¹ This standard has been consistently applied in deliberate intent cases. See, e.g., *Tolley v. Carboline Co.*, 217 W. Va. 158, 617 S.E.2d 508 (2005); *Goodwin v. Hale*, 198 W. Va. 554, 482 S.E.2d 171 (1996).

alleged injury is equally supported by the evidence as the employer's evidence against compensability. In a civil case, such a showing would result in a verdict for the employer. Therefore, the standard of proof favors the claimant in a workers' compensation proceeding.

In addition, the evidentiary standards and procedures in a workers' compensation claim are less stringent than in civil actions and allow the claimant to submit evidence in support of compensability in the administrative setting that would not be admissible in a deliberate intent case. W. Va. Code § 23-5-9.¹² In each of the Petitioners' workers' compensation claims, the Administrative Law Judge included a finding that the claimant was not required to prove the conditions he alleged were solely caused by his employment. *See* documents Nos. 47 through 59 of Petitioners' Designation of the Record. In contrast, deliberate intent requires a finding of proximate cause. The Administrative Law Judge also included a finding that the decision was based upon "a weighing of all the evidence" presented. Thus, despite the lower burden of proof, and despite the preference toward claimants resulting from the slightly different evidentiary standards and procedures in the workers' compensation system, in each of Hatfield's, King's, and McDerment's workers' compensation claims, the administrative body nevertheless found that the injuries alleged by these Standard Laboratories employees **not** compensable or work-related injuries. *See* documents Nos. 47 through 59 of Petitioners' Designation of the Record.

Nor does evidence exist that Hatfield, King, or McDerment were denied any procedural tool or avenue in their workers' compensation claims. *See* documents Nos. 47 through 59 of Petitioners' Designation of the Record. Documentation of the workers' compensation claims demonstrates that all three took advantage of the litigation and evidentiary

¹² "The office of judges is not bound by the usual common law or statutory rules of evidence." W. Va. Code § 23-5-9.

tools available to them in the workers' compensation system.¹³ Hatfield submitted as evidence considered by the Administrative Law Judge thirty-one (31) documents from medical experts, industry literature, relevant laws and government regulations, corporate documents, media articles, and chemical specific information. King introduced thirty-three (33) documents from a similarly broad range of sources, and McDerment introduced thirty-nine (39) different documents. *See* documents Nos. 47 through 59 of Petitioners' Designation of the Record. All three submitted extensive evidentiary support for their alleged injuries, clearly had the *opportunity* to litigate their claims, and took advantage of that opportunity. Obviously Petitioners were not pleased with the decision of the Administrative Law Judges and now request this Court to allow them a duplicate opportunity.

Admitting they cannot factually dispute that Hatfield, King, or McDerment had a full and fair opportunity to litigate their claims in the workers' compensation arena, Petitioners also cite cases they claim stand for the proposition that actual litigation, rather than opportunity to litigate, is the operative factor. Petition for Appeal at p. 28.

The only West Virginia case cited in support of the Petitioners' position, *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 517 S.E.2d 763 (1999), is inapposite to the issue of whether a workers' compensation decision has preclusive effect on a deliberate intent claim. Petitioners claim that *Wheeling-Pittsburgh* stands for the proposition that "actual full and fair litigation of an issue, rather than the simple opportunity to do so..." is required for collateral estoppel to apply. Petition for Appeal at p. 28. *Wheeling-Pittsburgh* says

¹³ Despite Petitioners' argument to the contrary, Petitioners' use of all the available procedures, discovery, and evidentiary tools is irrelevant, as the *opportunity* to litigate is the vital factor of the *Miller* test. However, any concerns the Court may have that these three litigants were unaware of the procedures available to them should be alleviated by a brief review of the extensive evidence submitted on behalf of Hatfield, King, or McDerment in their workers' compensation claims, as documented in the final orders by the Administrative Law Judges.

no such thing. In *Wheeling-Pittsburgh*, 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. *Wheeling-Pittsburgh*, 205 W. Va. at 297. However, in federally regulated grievances, employees are not even represented by attorneys, and no evidence existed in *Wheeling-Pittsburgh* showing that the procedures employed by the grievance board were even remotely similar to civil litigation. *Id.* The federally regulated grievance process is wholly different from a workers' compensation claim, where litigants have essentially all the tools of civil litigation, the benefit of less stringent evidentiary rules, and a lower burden of proof at their disposal. In *Wheeling-Pittsburgh*, the Court found that the grievance process was nothing like civil litigation. "[T]he description of the process employed at Level III -- the point at which Rowing terminated her participation in the grievance process -- fails to indicate anything approximating the formal trial-like procedures employed by [the Human Rights Commission]." *Id.* at fn. 11. This description contrasts with workers' compensation procedures, which allow testimony, written evidence, and include similar procedural tools available to a litigant in a deliberate intent case. Contrary to Petitioners' argument, *Wheeling-Pittsburgh* is not a rejection of *Miller's* opportunity requirement.

Petitioners also cite two cases from other jurisdictions: *Cunningham v. Prime Mover*, 252 Neb. 899, 567 N.W.2d 178 (1997), and *Gudmundson v. Del Ozone*, 656 Utah Adv. Rep. 45, 232 P.3d 1059 (2010). Neither of these cases involves a deliberate intent cause of action, or any cause of action, against an employer. *Id.* Both involve claims against third party product manufacturers and an attempt to use findings of a lack of causation in a workers'

compensation proceeding in a subsequent products liability action. *Id.* In both cases,¹⁴ the respective courts ultimately decided that collateral estoppel could not be extended to products liability claims against third party manufacturers, and cite public policy concerns which are inapplicable to a deliberate intent claim against a claimant's employer who was a party in the underlying workers' compensation case. *Id.* Although public policy grounds may exist to prevent product manufacturers from using workers' compensation decisions to preclude products liability cases, those public policy grounds are irrelevant to the question before this Court. Neither case stands for the proposition, as claimed by the Petitioners, that a claim must *actually* be fully litigated as opposed to the *opportunity* to litigate. These cases are not instructive or relevant to the analysis of the legal questions before this Court, and are inconsistent with West Virginia's established precedent regarding collateral estoppel.

Petitioners also fail to cite a recent decision by Judge Irene Keeley in the Northern District of West Virginia reviewing precisely the **same issue** raised in the instant case. Judge Keeley's statements directly contradict Petitioners' argument, concluding 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. In *Corley v. Eastern Associated Coal Corp.*, 2009 WL 723120 (N.D. W. Va. 2009), a deliberate intent civil action was filed by the deceased employee's widow after her underlying workers' compensation case was dismissed because of a failure to file within the statute of limitations. The District Court held that because the appeals process in the workers' compensation system rejected the claim on jurisdictional grounds and did

¹⁴ Although Petitioners do not specifically state that they wish *Miller* be overturned, by citing these foreign authorities, Petitioners apparently argue that *Miller's* requirement of an "opportunity to litigate" be replaced with "actual full and fair litigation," which would require this Court to overturn *Miller* as the holding in that case clearly only requires opportunity to litigate.

not address compensability, the civil action could proceed with no violation of *res judicata* or collateral estoppel. However, the Court further stated that:

had 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.**

Corley at p. 7. (emphasis added).

Therefore, the *Corley* Court clearly signals support for a finding in the instant case that these Petitioners are precluded from re-litigating the issue of whether they suffered work-related injuries in a deliberate intent civil action against Standard Laboratories because that issue has already been decided in the negative following the litigation of their workers' compensation cases. Similarly, Hatfield, King, and McDerment "had a full and fair opportunity to litigate" in the workers' compensation proceedings, which fulfills the fourth element of the *Miller* test, and estops them from re-litigating that issue in circuit court.

- 2. The issue decided in the underlying workers' compensation claims filed by Hatfield, King, and McDerment is identical to the issue in the subsequently filed deliberate intent claims, and therefore Petitioners are estopped from re-litigating that issue.**

In the Petition for Appeal, Petitioners argue that because Hatfield, King, and McDerment currently allege some different symptoms in their deliberate intent claims than they did in their workers' compensation claims, their "injury" is different and therefore, the issues are not identical and collateral estoppel cannot apply. Petition for Appeal at p. 33. Petitioners do not allege a different injury, only different symptoms resulting from the same alleged injury,

which they claim should bar the application of collateral estoppel. Petition for Appeal at p. 33. This argument fails both substantively and procedurally.

First, Petitioners failed to properly preserve the record by raising this argument in the proceedings before the Circuit Court of Wyoming County. Nowhere in the briefs below were changes in the medical complaints or symptoms by Hatfield, King, and McDerment referenced. Therefore, Standard Laboratories had no opportunity to respond and the Petitioners cannot raise this argument on appeal. *Covington v. Smith*, 213 W. Va. 309, 317 n. 8, 582 S.E.2d 756, 764 n. 8 (2003) (casual mention of an issue is insufficient to preserve the issue on appeal); *Tiernan v. Charleston Area Medical Center*, 203 W. Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) (assignments of error not argued in the brief are waived).

Even if this Court were to ignore its well-established precedent prohibiting previously unraised arguments to be heard on appeal, Petitioners' argument nevertheless fails. The well articulated and fully analyzed decisions by the Administrative Law Judges in the workers' compensation claims filed by these Petitioners determined that Hatfield, King, and McDerment did not have a compensable injury resulting from exposure to chemicals used at Standard Laboratories. *See* documents Nos. 47 through 59 of Petitioners' Designation of the Record. To prove element (E) of a deliberate intent claim, those same Petitioners' must show that they each suffered a serious compensable injury. W. Va. Code § 23-4-2(d)(2)(ii)(E). Whether Hatfield, King, and McDerment suffered compensable injuries resulting from exposure to chemicals in the course of and resulting from their employment at Standard Laboratories is identical to the issue each Petitioner already litigated in the workers' compensation system. The *Miller* test does not require that the same exact symptoms be present, or that every fact be

presented in the same way in the second attempt to litigate the issue. *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

The *Miller* Court 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.” *Miller* at 12, 123. Under the *Miller* test, the legal issue, not each and every fact underlying the entirety of the case, including symptoms of injuries, is reviewed to determine the application of collateral estoppel. *Id.* A requirement that two claims present identical symptoms (rather than merely the same legal issue) would lead to absurd results.¹⁵ The fact that the same attorney, now supported by additional counsel, hopes to present the evidence differently, make different arguments, or talk about different symptoms, does not change the fact that the same legal issue -- the existence of a compensable injury related to exposure to chemicals used in the float sink process -- is being litigated in this civil action as was litigated in the prior workers’ compensation claims.

B. PETITIONERS FAILED TO RAISE EXCEPTIONS TO THE APPLICATION OF COLLATERAL ESTOPPEL ON THE RECORD BELOW AND THEREFORE FAILED TO PRESERVE THOSE ISSUES FOR APPEAL.

In their Petition for Appeal, Petitioners raise for the first time the argument that certain exceptions to collateral estoppel prohibit the Court from applying that doctrine here. Petitioners failed to raise these arguments before the Circuit Court of Wyoming County, and

¹⁵ Adoption of Petitioners’ argument that different symptoms equal a different issue and therefore no estoppel effect may apply, will have an immensely adverse effect on West Virginia’s tort system. For example, a plaintiff in an automobile accident could sue a driver claiming his or her back pain resulted from the accident, lose the case, and then bring another civil action claiming that shoulder pain and head pain are now at issue. The argument that the previous adverse decision has no preclusive effect because of the new alleged symptom would not only be contrary to the spirit of collateral estoppel, but would drastically increase the number of deliberate intent lawsuits filed in West Virginia.

therefore, Petitioners cannot raise these arguments on appeal. *Covington v. Smith*, 213 W. Va. 309, 317 n. 8, 582 S.E.2d 756, 764 n. 8 (2003) (casual mention of an issue is insufficient to preserve the issue on appeal); *Tiernan v. Charleston Area Medical Center*, 203 W. Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) (assignments of error not argued in the brief are waived).

Once again, Petitioners not only raise arguments never made below, but also which would fail even if they were properly preserved for appeal. First, Petitioners argue that the “additional evidence” exception prohibits the application of collateral estoppel. Petition for Appeal at p. 38. Petitioners fail to cite any new evidence. Instead, they merely present new interpretations of old evidence by the Petitioners’ new experts, and new affidavits from the Petitioners themselves presenting the same facts known to them at the time of their workers’ compensation cases. No precedent exists holding that presenting the same evidence differently or having new experts interpret the same evidence in a different way constitutes “additional evidence” such that collateral estoppel cannot apply. If all that were required to defeat collateral estoppel is new lawyers, new affidavits, and new experts reinterpreting the same basic facts, no case would ever be lost, but would merely be postponed until the party could find a different attorney willing to take the case and present it differently. New interpretations of the same facts merely reveal Petitioners’ true motive: to re-litigate previously decided issues.

Second, Petitioners argue that the “role of fraud” in the workers’ compensation proceedings prohibits the application of the doctrine of collateral estoppel. Petition for Appeal at p. 44. As a legal basis for this argument, Petitioners cite *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996). Interestingly, the *Persinger* decision does not contain any reference to estoppel, much less a discussion of collateral estoppel. *Id.* *Persinger* addressed 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?

Persinger v. Peabody Coal Co., 196 W. Va. 707, 474 S.E.2d 887 (1996). These questions have nothing to do with the application of collateral estoppel. In fact, there was no allegation of fraudulent filings by Standard Laboratories in this civil action or in the workers' compensation cases previously filed by Hatfield, King, and McDerment.¹⁶ Petitioners' claim that *Persinger* stands for the proposition that fraud prevents the application of collateral estoppel in this case is false and unsupported by the facts or the legal precedent relevant to this case.¹⁷

D. STRONG PUBLIC POLICY REASONS EXIST TO APPLY THIS COURT'S PRECEDENT REGARDING COLLATERAL ESTOPPEL TO PROHIBIT DELIBERATE INTENT CASES WHERE A FULL AND FINAL ADJUDICATION OF THE WORKERS' COMPENSATION SYSTEM FOUND THAT NO COMPENSABLE INJURY EXISTS.

Strong public policy reasons exist to apply collateral estoppel to workers' compensation system findings of compensability. Deliberate intent claims only allow an employee to recover sums "for any excess" in addition to that collected from their workers' compensation claims. By allowing deliberate intent claims where the workers' compensation

¹⁶ Petitioners cannot bring *Persinger* type fraud claims in the present case because the statute of limitations on such a claim has already run.

¹⁷ This Response does not address the irrelevant factual issue of whether Dr. Ronald Gots' testimony is fraudulent, as that issue was never raised before the Circuit Court of Wyoming County. The West Virginia Supreme Court has held that it does not consider arguments not preserved before the Circuit Court. See *Covington* and *Tiernan*, *supra*.

system affirmatively found no compensable injury existed, this Court would deprive employers of their bargained-for benefit of an offset for workers' compensation benefits.

The West Virginia Legislature has been explicit regarding the kinds of damages a plaintiff may recover in deliberate intent cases filed pursuant to West Virginia Code § 23-4-2:

(c) If injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter and has a cause of action against the employer, as if this chapter had not been enacted, for any **excess of damages over the amount received or receivable** under this chapter.

W. Va. Code § 23-4-2 (c) (2003) (emphasis added). Permitting Petitioners to maintain deliberate intent cases based upon alleged work-related injuries previously found not compensable would deprive employers of a fair and accurate method to calculate the offset to which they are entitled under the law. This denial would unequivocally thwart the clear language of the statute and the will of the Legislature regarding the measure of damages in this statutory cause of action -- how does an employer prove what would have been "received or receivable" in a rejected workers' compensation claim?

Thus, even if collateral estoppel did not bar the instant deliberate intent case, the practical implications of a lack of offset should ensure that bar. Otherwise, plaintiffs whose workers' compensation claims are rejected could then file deliberate intent claims. This would eliminate the right of employers to accurately prove the offset mandated by the Legislature and secured by timely premium payments to fund the workers' compensation system. Employers like Standard Laboratories would therefore be placed in a legal "Catch-22" where their civil liability increases when an alleged injury is **not** found work-related in the workers'

compensation claim because they are deprived of the statutorily mandated offset. The Circuit Court of Wyoming County agreed with this important public policy consideration, finding that:

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 result would place employers in a difficult position; either choose not to defend the workers' compensation claim or defend the workers' 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.

August 4, 2010 Order at pp. 18-19.

This practical problem related to the potential loss of statutory offsets for employers is but one example of many illogical and unfair results from the adoption of the Petitioners' argument. Another example, identified by Judge Alsop in the proceedings below, is that the 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.

February 19, 2010 Transcript at p. 29. These examples are but small indications of the problems the adoption of Petitioners' argument would present for the workers' compensation system and for deliberate intent litigation.

The workers' compensation system is the exclusive remedy for injured employees, with deliberate intent to injure the only exception for employers in good standing:

The right of the injured employee to workmen's compensation has been substituted in lieu of his cause of action against the negligent employer and this remedy of compensation is an exclusive remedy. This blanket rule bears one exception. An employer's immunity from tort liability is lost only when the employer acted with deliberate intention.

Gaus v. Consol, 294 F.Supp. 2d 815 (N.D. W. Va. 2002), citing W. Va. Code § 23-4-1, *et seq.* West Virginia Code § 23-2-6 expressly grants immunity to employers who have paid their premiums, stating that employers are “not liable to respond in damages at common law or by statute for the injury or death of any employee” W. Va. Code § 23-2-6. West Virginia Code § 23-4-2(d)(1) specifically provides that “the enactment of this chapter . . . is intended to remove from the common law tort system **all disputes** between or among employers and employees regarding the compensation to be received for injury or death to an employee except as expressly provided in this chapter” W. Va. Code § 23-4-2(d)(1) (emphasis added).

As demonstrated by the statutory language, the deliberate intent statute is intended to be a narrow exception to the broad immunity to suit provided by the workers' compensation system. The legislature did not intend for deliberate intent cases to be an alternative to workers' compensation claims, where a loss in workers' compensation litigation allows a retrial before a circuit judge. A finding consistent with Petitioners' arguments, holding that non-compensable

injuries are subject to later deliberate intent claims, would eviscerate every employer's statutory immunity. This immunity is a key provision of the workers' compensation mandate that the employer provide benefits for work-related injuries, regardless of the employer's fault in causing that injury. A finding consistent with the Petitioners' argument would mean that employers must maintain workers' compensation insurance and pay benefits for all of their employees injured on the job, even if the employer had no fault in causing that injury, but nevertheless would be subject to suit under higher deliberate intent to injure civil action theories. Thus, there would be the inherently unfair and absurd legal result that when the more liberal workers' compensation system rules that an alleged injury is not work-related, nevertheless the employer can be found to have deliberately intended to cause the non-existent or unproven injury.

In addition, when the workers' compensation system was created, it was a bargained for exchange whereby employees gained the benefits of a no-fault system of recovery for workplace injuries even if the employer were not at fault in causing those injuries, and employers gained immunity from civil suit by agreeing to pay the mandated benefits. The only exceptions to this bargain permitted by statute are the employer's failure to pay required premiums, and the public policy protections against an employee's deliberately self-inflicting the injury or the employer's subjectively weighing the cost and deliberately and intentionally causing the injury. A finding consistent with Petitioners' arguments would essentially eliminate the benefit of this statutory bargain for the employers. Allowing employees to re-litigate failed workers' compensation claims in a civil action alleging deliberate intent to injure, thereby undermining the very basis of the workers' compensation system adopted by the West Virginia Legislature in 1913, is contrary to the public policy interests of the State of West Virginia.

E. STANDARD LABORATORIES MET THE BURDEN OF PROOF REQUIRED TO OBTAIN SUMMARY JUDGMENT.

The Petition for Appeal argues that Standard Laboratories' Joinder in the Motion for Summary Judgment filed by Defendant Virginia Crews Coal Company was procedurally deficient, and therefore summary judgment against Hatfield, King, and McDerment was inappropriate.

Petitioners' argument that Standard Laboratories did not meet its burden to provide legal arguments is a red herring. Standard Laboratories' legal argument was the same as the legal argument presented by Virginia Crews Coal Company and other employer defendants: the doctrine of collateral estoppel applies because compensability is an essential element to prove a deliberate intent claim, and the employer defendants are entitled to summary judgment when an employee's worker's compensation claim was held non-compensable. Standard Laboratories joined that argument and incorporated the legal arguments and authorities from Virginia Crews Coal Company's Motion and Memorandum, while attaching the factually supportive workers' compensation records, including final orders, to the Joinder Motion. Petitioners essentially argue that because Standard Laboratories chose to join in Virginia Crews Coal Company's motion rather than repeat the same legal arguments verbatim, summary judgment cannot be granted. Such an argument requires similarly situated parties to flood a court with duplicative legal arguments when incorporating by reference recently submitted material would be equally appropriate.

When Petitioners first raised this argument, Standard Laboratories replied by doing just what Petitioners asked -- repeating legal arguments already raised. *See* Exhibit 1, Reply in Support of Standard Laboratories Joinder Motion for Summary Judgment. This

prompted Petitioners to complain that Standard Laboratories was making arguments not raised in its Motion, despite the fact that Standard Laboratories' Joinder incorporated by reference all of the legal arguments in Virginia Crews Coal's Motion for Summary Judgment, and the reply largely restated those arguments and responded to arguments raised by the Petitioners. Incorporation of legal arguments by reference is a commonly accepted procedural practice in West Virginia, and Petitioners' position otherwise is merely an attempt to distract this Court from the genuine legal issues in this matter.

Petitioners' argument that Standard Laboratories failed to meet its factual burden to obtain summary judgment is similarly flawed. The only factual requirement related to summary judgment is that "there is no genuine issue as to any material fact..." *Williams v. Precision Coil Co.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995). No factual material must be submitted at all if none of the material factual issues are in genuine dispute. In this case, Petitioners have not disputed that the workers' compensation decisions held Hatfield, King, and McDerment had no compensable injuries related to their alleged exposure to coal float sink chemicals. Standard Laboratories attached to its Joinder Motion all of the applicable workers' compensation documents, and Petitioners did not dispute the truth or accuracy of those documents, instead arguing that the documents were not provided in an "admissible form" and complained that the documents were provided "without any identification..." *See* Plaintiffs' Response to Joinder Motion for Summary Judgment of Standard Laboratories. The Wyoming County Circuit Court saw through this diversionary tactic, and during oral argument asked the Petitioners:

THE COURT: [D]o you dispute that workers' compensation claims were filed in regard to these three individuals, that they were denied by the

Workers' Compensation Commission on the basis of the compensability, and that those orders have become final orders and they were litigated before the Workers' Compensation Board? Do you deny those things?

MR. WALSH: Your Honor, I do not deny that they were filed and that a decision has been made.

February 19, 2010 Transcript at p. 21.

When faced with a question which clearly identified that there was no genuine issue of material fact regarding the findings forming the basis for the application of collateral estoppel, Petitioners' counsel did not dispute the facts relied upon by Standard Laboratories. Accordingly, Petitioners' argument that Standard Laboratories failed to meet its factual burden regarding summary judgment is unsupported by the record.

IV. CONCLUSION

Under old English law, if the Crown disliked the outcome of a legal proceeding, it forced the case to be tried again in a different court, with a different jury, or before a different judge. The founding fathers of the United States of America recognized the tyranny of this practice. They believed that the fairness of a legal system necessarily depends on its finality. To ensure the American system of government would not endure the capriciousness of a system with no finality, the founding fathers wrote protections into the Constitution. The Fifth Amendment to the United States Constitution insures that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. U.S. Const. amend. V. The Seventh Amendment to the United States Constitution says that no fact tried by a jury shall be otherwise re-examined in any Court. U.S. Const. amend. VII. These fundamental principles recognize that

without finality, there can be no certainty as to the outcome of any legal process, and without certainty, no fairness.

Throughout the history of the American judiciary, judges have recognized these same considerations, and the common law doctrine of collateral estoppel evolved to provide finality and fairness in litigation to issues not otherwise constitutionally protected. West Virginia, like many other states, recognized that without some doctrine guaranteeing finality, judgments would be meaningless and uncertain, and adopted the doctrine of collateral estoppel. Petitioners now request this Court to eviscerate that doctrine by ignoring or overturning West Virginia's well-established precedent in this area, so that they can re-litigate previously decided issues.

Larry Hatfield protested the rejection of his workers' compensation claim filed for exposure to chemicals. Despite four years of litigation before the Workers' Compensation Office of Judges, Hatfield failed to show that he incurred compensable injuries in the course of his employment. Kenneth King filed a similar workers' compensation claim which was also rejected by the Workers' Compensation Commission. King protested and litigated that decision, but an Administrative Law Judge affirmed the Commission's denial by finding that the "voluminous evidence" in the record did not show a compensable injury as a result of exposure to float sink chemicals. Mitchell McDerment litigated the rejection of his workers' compensation claim as well, and likewise lost before the Office of Judges. His claim resulted in a twenty-one page order stating that McDerment had no compensable injury. Notably, some of the plaintiffs in the litigation below proved their workers' compensation claims against their employers, but Hatfield, King, and McDerment did not. Now these Petitioners bring the present

appeal, asking this Court to ignore the opportunity given to them within the workers' compensation system, and ignore the finality of the workers' compensation decisions.

Judge Alsop correctly applied the collateral estoppel test articulated in *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), and properly granted summary judgment. To hold otherwise is not only unsupported by the facts and the law relevant to this case, but also would undermine the compromise which is the fundamental premise upon which the West Virginia workers' compensation system was based. Such a ruling would hold that Standard Laboratories may have intentionally and deliberately caused an injury that was proven in a prior similar judicial proceeding not to exist. Therefore, this Court should reject the Petition for Appeal, and should refuse to further review the summary judgment awarded in the Circuit Court of Wyoming County to Standard Laboratories, Inc.

Respectfully submitted,

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

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

Plaintiffs,

v.

Docket Number: _____
Wyoming County Civil Action No. 04-C-252

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

Defendants.

CERTIFICATE OF SERVICE

I, Thomas M. Hancock, do hereby certify that I have caused copies of the hereto attached RESPONSE OF STANDARD LABORATORIES, INC. TO PETITION FOR APPEAL and MOTION TO EXCEED PAGE LIMIT to be served upon:

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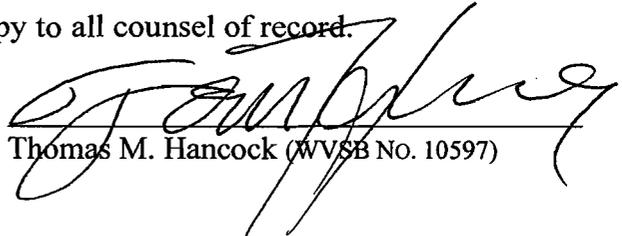
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by placing the same in the regular United States Mail, postage prepaid, on this 14th day of
January, 2010, and also by separate electronic copy to all counsel of record.


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EXHIBITS

ON

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CLERK'S OFFICE