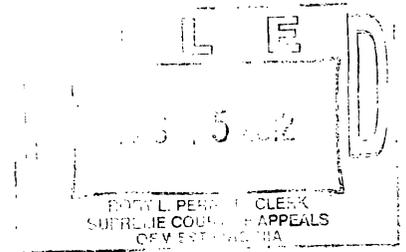


No. 12-0850



In the

**Supreme Court of Appeals  
of West Virginia**

DELORICE BRAGG, as Administratrix of the Estate of Don Israel Bragg, and  
FREDA HATFIELD, as Administratrix of the Estate of Ellery Hatfield,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

---

**BRIEF OF PETITIONERS**

---

On Certified Question from the United States Court of  
Appeals for the Fourth Circuit, No. 11-1342

---

Bruce E. Stanley (WVSB No. 5434)

*\*Counsel of Record*

bstanley@reedsmith.com

REED SMITH LLP

225 Fifth Avenue, Suite 1200

Pittsburgh, PA 15222

Telephone: (412) 288-3131

Facsimile: (412) 288-3063

*Counsel for Petitioners*

## TABLE OF CONTENTS

	Page
ASSIGNMENTS OF ERROR.....	1
PRELIMINARY STATEMENT .....	1
STATEMENT OF THE CASE .....	3
A.    A Fire Caused By A Host Of Safety Violations And Equipment Malfunctions Breaks Out At The Alma Mine #1, Killing Miners—And Petitioners’ Husbands—Don Bragg And Ellery Hatfield.....	3
B.    Following An Internal Investigation, MSHA Issues A Report Finding That Its Negligence In Overseeing The Safety And Regulatory Compliance Of The Alma Mine Left The Mine In A “Shock[ing]” And “Deplorable” Condition And Caused The Fire That Killed Mr. Bragg And Mr. Hatfield .....	4
C.    Petitioners Sue The Government In Federal Court Under The Federal Tort Claims Act And The Fourth Circuit Certifies The Question Of Whether Private Mine Inspectors Who Act Negligently And Are Partially At Fault For A Fatal Fire Are Liable Under West Virginia Negligence Law For The Wrongful Deaths Of Miners .....	7
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	9
SUMMARY OF ARGUMENT .....	9
ARGUMENT.....	10
I.    Standard Of Review.....	10
II.   Under This Court’s Settled Foreseeability And Public Policy Analysis For Determining The Existence Of A Tort Duty Of Care, Private Mine Inspectors Owe A Duty To Miners And Thus Are Liable For A Miner’s Wrongful Death Resulting From Negligent Inspections.....	11
A.    In Determining Whether A Private Actor Owes A Tort Duty Of Care, This Court Considers The Foreseeability Of The Harm, The Appropriate Level Of Condemnation And Deterrence For The Conduct At Issue, And Public Policy Considerations.....	11
1.    Foreseeability—The “Ultimate Test Of The Existence Of A Duty” Of Care .....	12

2.	Moral Condemnation And Deterrence .....	13
3.	Public Policy .....	14
B.	Under This Court’s Settled Foreseeability And Public Policy Analysis, Private Mine Inspectors Owe A Duty Of Care To Miners And Are Liable For Negligent Mine Inspections That Cause The Wrongful Deaths Of Miners.....	17
C.	This Court Has Applied Its Foreseeability And Public Policy Analysis In Determining Whether A Duty Of Care Exists Across A Broad Spectrum Of Fact Patterns For A Broad Spectrum Of Conduct, And It Should Apply That Same Analysis Here .....	20
III.	Under This Court’s “Special Relationships” Doctrine, Private Mine Inspectors Owe A Duty To Miners And Thus Are Liable For A Miner’s Wrongful Death Resulting From Negligent Inspections.....	24
IV.	Even If, As The Government Has Argued, Private Mine Inspectors’ Liability For Miners’ Wrongful Deaths Should Be Governed By Section 324A Of The Restatement (Second) Of Torts, Liability Plainly Would Arise Under That Provision Here .....	27
	CONCLUSION.....	37

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page(s)</b>
<i>Aikens v. Debow</i> , 208 W. Va. 486, 541 S.E.2d 576 (2000) .....	<i>passim</i>
<i>Appley Bros. v. U.S.</i> , 164 F.3d 1164 (8th Cir. 1999) .....	31
<i>Barnson v. U.S.</i> , 531 F. Supp. 614 (D. Utah 1982) .....	31
<i>Barr v. NCB Mgmt. Servs., Inc.</i> , 227 W. Va. 507, 711 S.E.2d 577 (2011) .....	10
<i>Blaine v. Chesapeake &amp; O.R.R. Co.</i> , 9 W. Va. 252 (1876) .....	13
<i>Bower v. Westinghouse Elec. Corp.</i> , 206 W. Va. 133, 522 S.E.2d 424 (1999) .....	10
<i>Bragg v. U.S.</i> , 2012 WL 2899317 (4th Cir. July 17, 2012) .....	<i>passim</i>
<i>Bragg v. U.S.</i> , 767 F. Supp. 2d 617 (S.D. W. Va. 2011) .....	8, 26, 28
<i>Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.</i> , 369 F.3d 385 (4th Cir. 2004) .....	28
<i>Burlington N. &amp; Santa Fe Ry. Co. v. Vaughn</i> , 509 F.3d 1085 (9th Cir. 2007) .....	28
<i>Canipe v. Nat'l Loss Control Serv. Corp.</i> , 736 F.2d 1055 (5th Cir. 1984) .....	30-31, 34, 36
<i>Cantwell v. Allegheny County</i> , 483 A.2d 1350 (Pa. 1984) .....	29
<i>Carcieri v. Salazar</i> , 555 U.S. 379 (2009) .....	35
<i>Consolidation Coal Co. v. Lay</i> , 177 W. Va. 526, 354 S.E.2d 820 (1987) .....	<i>passim</i>
<i>County of Allegheny v. Am. Civ. Liberties Union, Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989) .....	22, 26
<i>Fleming v. U.S.</i> , 69 F. Supp. 2d 837 (W.D. Va. 1999) .....	30
<i>Gaines v. Excel Indus., Inc.</i> , 667 F. Supp. 569 (M.D. Tenn. 1987) .....	30, 31, 33, 34

<i>Glascoek v. City Nat'l Bank of W. Va.</i> , 213 W. Va. 61, 576 S.E.2d 540 (2002) .....	11, 25, 26, 27
<i>Hannah v. Heeter</i> , 213 W. Va. 704, 584 S.E.2d 560 (2003) .....	13, 20
<i>Hornbeck Offshore Transp., LLC v. United States</i> , 569 F.3d 506 (D.C. Cir. 2009).....	28
<i>In re Flood Litig.</i> , 216 W. Va. 534, 607 S.E.2d 863 (2004) .....	20
<i>Int'l Union, United Mine Workers v. Kleppe</i> , 532 F.2d 1403 (D.C. Cir. 1976).....	15
<i>Iodice v. U.S.</i> , 289 F.3d 270 (4th Cir. 2002).....	28
<i>Irving v. U.S.</i> , 942 F. Supp. 1483 (D.N.H. 1996), <i>rev'd en banc on other grounds by</i> 162 F.3d 154 (1st Cir. 1998) .....	<i>passim</i>
<i>Jackson v. Putnam County Bd. of Educ.</i> , 221 W. Va. 170, 653 S.E.2d 632 (2007) .....	23
<i>Johnson v. Abbe Eng'g Co.</i> , 749 F.2d 1131 (5th Cir. 1984).....	30, 32, 34, 35
<i>Kohr v. Johns-Manville Corp.</i> , 534 F. Supp. 256 (E.D. Pa. 1982).....	36
<i>Lockhart v. Airco Heating &amp; Cooling, Inc.</i> , 211 W. Va. 609, 567 S.E.2d 619 (2002) .....	20
<i>Louk v. Isuzu Motors, Inc.</i> , 198 W. Va. 250, 479 S.E.2d 911 (W. Va. 1996).....	20
<i>Mallet v. Pickens</i> , 206 W. Va. 145, 522 S.E.2d 436 (1999) .....	<i>passim</i>
<i>Marks v. Nambil Realty Co.</i> , 157 N.E. 129 (N.Y. 1927) .....	33
<i>Mills v. Quality Supplier Trucking, Inc.</i> , 203 W. Va. 621, 510 S.E.2d 280 (2005) .....	17, 20
<i>Palsgraf v. Long Island R. Co.</i> , 248 N.Y. 339 (1928).....	12
<i>Paul v. Nat'l Life</i> , 177 W. Va. 427, 352 S.E.2d 550 (1986) .....	17
<i>Persinger v. Carmazzi</i> , 190 W. Va. 683, 441 S.E.2d 646 (1994) .....	3

<i>Rawson v. United Steelworkers of Am.</i> , 726 P.2d 742 (Idaho 1986), rev'd on other grounds by <i>United Steelworkers of Am., AFL-CIO-CLC v. Rawson</i> , 495 U.S. 362 (1990).....	30, 33
<i>Robertson v. LeMaster</i> , 171 W. Va. 607, 301 S.E.2d 563 (1983) .....	12, 21-22
<i>Seminole Tribe of Fla. v. Florida</i> , 517 U.S. 44 (1996) .....	22, 26
<i>Sewell v. Gregory</i> , 179 W. Va. 585, 371 S.E.2d 82 (1988) .....	<i>passim</i>
<i>Sheridan v. NGK Metals Corp.</i> , 609 F.3d 239 (3d Cir. 2010) .....	32
<i>Smith v. Universal Underwriters Ins. Co.</i> , 752 F.2d 1535 (11th Cir. 1985) .....	30, 35
<i>Smoot v. Am. Elec. Power</i> , 222 W. Va. 735, 671 S.E.2d 740 (2008) .....	12, 13, 17, 20
<i>State ex rel. Frazier v. Hrko</i> , 203 W. Va. 652, 510 S.E.2d 486 (1998) .....	11
<i>State ex rel. Perry v. Miller</i> , 171 W. Va. 509, 300 S.E.2d 622 (1983) .....	2
<i>State v. Gibson</i> , 226 W. Va. 568, 703 S.E.2d 539 (2010) .....	35
<i>State v. Proctor</i> , 227 W. Va. 352, 709 S.E.2d 549 (2011) .....	22, 28
<i>Strahin v. Cleavenger</i> , 216 W. Va. 175, 603 S.E.2d 197 (2004) .....	13
<i>U.S. v. Olson</i> , 546 U.S. 43 (2005) .....	1
<i>U.S. v. Ramirez</i> , 557 F.3d 200 (5th Cir. 2009) .....	28
<i>United Mine Workers of Am. v. Faerber</i> , 179 W. Va. 65, 365 S.E.2d 345 (1986) .....	15
<i>United Scottish Ins. Co. v. U.S.</i> , 614 F.2d 188 (9th Cir. 1979), rev'd on other grounds sub nom. by <i>U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense</i> , 467 U.S. 797 (1984) .....	32
<i>United Scottish Ins. Co. v. U.S.</i> , 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds sub nom. by <i>U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense</i> , 467 U.S. 797 (1984) .....	31

<i>Universal Underwriters Ins. Co. v. Smith</i> , 322 S.E.2d 269 (Ga. 1984) .....	35
<i>Westmoreland Coal Co. v. Federal Mine Safety &amp; Health Review Comm'n</i> , 606 F.2d 417 (4th Cir. 1979) .....	15
<i>White v. AAMG Const. Lending Ctr.</i> , 226 W. Va. 339, 700 S.E.2d 791 (2010) .....	25, 26
<i>Wilson v. Rebsamen Ins., Inc.</i> , 957 S.W.2d 687 (Ark. 1997) .....	29, 34
<i>Woodrum v. Johnson</i> , 210 W. Va. 762, 559 S.E.2d 908 (2001) .....	22, 26

**Statutes & Rules**

28 U.S.C. § 1346(b)(1) .....	1, 8
28 U.S.C. § 2674 .....	1, 8
30 U.S.C. § 801 .....	5
30 U.S.C. § 801(d) .....	34
30 U.S.C. § 801(e) .....	34, 35
W. Va. Code § 22-9-2(b) .....	1
W. Va. Code § 22A-1-1(b) .....	16
W. Va. Code § 22A-6-1(a)(1) .....	1, 2, 16, 18
W. Va. Code § 22A-7-2(a) .....	14
W. Va. Code § 22A-7-2(b) .....	16
W. Va. Code § 22A-7-2(e) .....	15
W. Va. Code § 22A-11-1 .....	16
W. Va. Rev. R. App. P. 20(b) .....	9

**Other Authorities**

Bur. of Bus. & Econ. Research, W. Va. Univ. and Ctr. for Bus. and Econ. Research, Marshall Univ., “ <i>The West Virginia Coal Economy 2008</i> ” (Feb. 2010) .....	14
C. Gregory Ruffennach, <i>Free Markets, Individual Liberties And Safe Coal Mines: A Post-Sago Perspective</i> , 111 W. VA. L. REV. 75 (2008) .....	35-36
Dan B. Dobbs, <i>The Law of Torts</i> (2000) .....	13
Ltr. from Sen. Durbin (D-IL) to Pres. Bush, Oct. 23, 2006 (available at <a href="http://votesmart.org/public-statement/220971/press-release-durbin-questions-appointment-of-new-mine-safety-chief">http://votesmart.org/public-statement/220971/press-release-durbin-questions-appointment-of-new-mine-safety-chief</a> ) (last visited Aug. 7, 2012) .....	37
RESTATEMENT (SECOND) OF TORTS § 324A .....	<i>passim</i>

RESTATEMENT (SECOND) OF TORTS § 324A cmt. d, illus. 2 .....	29
RESTATEMENT (SECOND) OF TORTS § 324A cmt. e, illus. 4 .....	29
RESTATEMENT (SECOND) OF TORTS § 324A(a).....	32, 33
RESTATEMENT (SECOND) OF TORTS § 324A(b) .....	34, 35
RESTATEMENT (SECOND) OF TORTS § 324A(c).....	35, 36
Website of W. Va. Office of Miners' Health, Safety and Training, available at <a href="http://www.wvminesafety.org/wvcoalfacts.htm">http://www.wvminesafety.org/wvcoalfacts.htm</a> (last visited August 2, 2012) .....	14
Wendy Cutright, <i>et al.</i> , <i>Funding MSHA: Are We Adequately Protecting  Our Nation's Miners</i> (Fall 2010).....	37

## ASSIGNMENTS OF ERROR

This case comes to the Court from the U.S. Court of Appeals for the Fourth Circuit on a certified question of West Virginia negligence law in a wrongful death case filed against the United States Government by the widows of two miners who died in a West Virginia mine fire in early 2006. The petitioner widows filed their wrongful death suit against the Government under the Federal Tort Claims Act, which requires plaintiffs to show that, under the law of the state where the tort occurred, private parties in “like circumstances” to those alleged against the Government would be liable for injuries caused by their negligence. 28 U.S.C. §§ 1346(b)(1), 2674; *U.S. v. Olson*, 546 U.S. 43, 44 (2005). Petitioners claim that the federal Mine Safety & Health Administration (MSHA) and its inspectors were negligent in carrying out their inspection and safety compliance duties at the mine in question, which proximately caused the fire that killed their husbands.

The assignments of error in this case are embodied in the following question of West Virginia negligence law that the Fourth Circuit certified to—and which was accepted for resolution by—this Court:

Whether a private party conducting inspections of a mine and mine operator for compliance with mine safety regulations is liable for the wrongful death of a miner resulting from the private party’s negligent inspection.

*Bragg v. U.S.*, 2012 WL 2899317, at \*1 (4th Cir. July 17, 2012) (*per curiam*).

This Court should answer this question in the affirmative.

## PRELIMINARY STATEMENT

As this Court has recognized, “[o]ur lawmakers have made clear that ‘[t]he highest priority and concern of this legislature and all in the coal mining industry must be the health and safety of the industry’s most valuable resource—the miner.’” *Consolidation Coal Co. v. Lay*, 177 W. Va. 526, 527-28, 354 S.E.2d 820, 821-22 (1987) (quoting W. Va. Code §§ 22-9-2(b); 22-

6-1(a)(1)). Thus, “[t]his Court continually has sought to interpret the law in light of that policy of making West Virginia’s mines as safe as is humanly possible.” *Id.* (citing *State ex rel. Perry v. Miller*, 171 W. Va. 509, 300 S.E.2d 622, 624 (1983)). A tort rule that requires private mine inspectors to exercise reasonable care and holds them liable to miners if they fall short of that standard undoubtedly carries out this critically important policy by deterring inspector negligence.

At the same time, it is clear that the deaths of miners resulting from safety hazards that could and should have been detected by private mine inspectors is a foreseeable outcome of inspector negligence. And there is little doubt that the additional public policy considerations this Court looks to in determining the existence of a duty—the likelihood of injury, the magnitude of the burden of guarding against it, the consequences of placing that burden on the defendant, and the severity of the victim’s injury—likewise support a mine inspector’s duty to miners to carry out its inspections with reasonable care.

There is, in fact, no material countervailing consideration that could or should foreclose the existence of the duty of care that Petitioners urge. While the Government has claimed, quite vigorously, that Section 324A of the Restatement (Second) of Torts forecloses liability for the culpable mine inspections here, that argument overreaches on multiple levels. First, this Court has never adopted the particular form of tort liability set forth in that Section, nor should it do so in circumstances where the Section would dictate an outcome that (a) manifestly compromises miner safety and (b) directly undermines West Virginia’s foundational negligence principles. Second, while it is certainly within this Court’s authority to adopt Section 324A in this context, if it does so, the result is the same—a mine inspector who fails to act reasonably in performing his or her assigned function, and thereby allows unlawful and unsafe conditions to persist in a mine

that cause a miner's death, is liable in the view of the Restatement's drafters, just as would be true under prevailing West Virginia law.

### STATEMENT OF THE CASE

The facts set forth in this Statement of the Case are taken from the Fourth Circuit's recitation of the facts in its decision certifying the private mine inspector negligence question to this Court. The Fourth Circuit's factual recitation is based principally on MSHA's own Internal Review, as well as Petitioners' allegations in their federal court complaint, which must be assumed as true. *See Persinger v. Carmazzi*, 190 W. Va. 683, 685, 441 S.E.2d 646, 648 (1994) (in answering questions of law certified by the Fourth Circuit, "we assume the findings of fact given us in the Fourth Circuit Certification Order are correct") (citation omitted); *Bragg*, 2012 WL 2899317, at \*1 (in appeal from dismissal for lack of subject matter jurisdiction, plaintiff's factual allegations must be taken as true).

**A. A Fire Caused By A Host Of Safety Violations And Equipment Malfunctions Breaks Out At The Alma Mine #1, Killing Miners—And Petitioners' Husbands—Don Bragg And Ellery Hatfield.**

"On January 19, 2006, an over accumulation of combustible coal dust in the [Aracoma Coal Company's Alma] Mine [# 1 in Logan County, West Virginia,] caused a deadly fire." *Bragg*, 2012 WL 2899317, at \*1. "Although attempts were made to extinguish the fire and contain the smoke, these attempts were stymied by inadequate safety measures including, for example: a fire hose rendered useless because 'the threads on the fire hose coupling did not match the threads on the outlet'; a lack of water because 'the main water valve had been closed at the source, cutting off water to the area where the fire had started'; inadequate ventilation controls and ventilation safety barriers that failed to warn the miners of the danger and allowed smoke to flow 'in the wrong direction, deeper into the mine . . . flooding the emergency escapeways'; and the absence of functioning CO detectors, as well as malfunctioning

communications equipment, that delayed warning the miners of the danger and delayed evacuation.” *Id.* (quoting Petitioners’ Complaint (“Compl.”), p. 5) (4th Cir. Joint App’x (“J.A.”) at 9).

Petitioners’ husbands, Don Israel Bragg and Ellery Hatfield, “together with ten other coal miners, were trapped in the underground blaze and smoke. Due to the faulty ventilation system, smoke from the fire flooded the escape route and reduced visibility. In the dark, the miners had difficulty finding a personnel door that was unmarked. Although the workers attempted to utilize breathing devices called Self-Contained Self-Rescuers to deal with the smoke, they lacked the training necessary to operate these devices. Ultimately, ten coal miners managed to escape from the Mine, but Bragg and Hatfield were killed by carbon monoxide intoxication.” *Bragg*, 2012 WL 2899317, at \*2.

**B. Following An Internal Investigation, MSHA Issues A Report Finding That Its Negligence In Overseeing The Safety And Regulatory Compliance Of The Alma Mine Left The Mine In A “Shock[ing]” And “Deplorable” Condition And Caused The Fire That Killed Mr. Bragg And Mr. Hatfield.**

After an extensive investigation, MSHA issued a 180-plus page report on the Alma Mine #1 and the conditions that led to the fire that killed Petitioners’ husbands. In the Preface of the report, MSHA observed starkly that its review “team members are unaware of a similar situation in which health and safety hazards were so prevalent, and conditions in the mine so deplorable, yet MSHA personnel at so many levels failed to follow established Agency policies and procedures which are designed to provide that coal mines will be fully and effectively inspected.” *See Internal Review of MSHA’s Actions at the Aracoma Alma Mine #1*, U.S. Dept. of Labor/Mine Safety & Health Admin., p. i (June 28, 2007) (hereafter “*MSHA Review*”) (J.A. 25). Indeed, MSHA noted that its team members “were shocked by the deplorable condition of the mine[,]” which reflected a “gross deviation from MSHA standards.” *Id.*, p. 5 (J.A. 32).

“MSHA’s investigation of the Mine fire revealed numerous violations of the Mine Safety and Health Act (“Mine Act”), 30 U.S.C. § 801, et. seq., by Aracoma Coal Company (“Aracoma Coal”) that contributed to the cause and severity of the fatal fire. MSHA’s investigation also revealed the inadequacies of its own previous inspections of the Mine. For example, by late 2005, MSHA inspectors issued 95 citations to Aracoma Coal for safety violations but failed to ‘identify and cite numerous violations that were in existence, neither did they require the mine operator to take corrective actions.’” *Bragg*, 2012 WL 2899317, at \*2 (quoting *Compl.*, p. 9, ¶ 50) (emphasis omitted) (J.A. 13).

“Likewise, MSHA personnel ‘failed to follow explicit Agency policy regarding Section 103(i) inspections [i.e., spot inspections]’ by failing to ‘undertake reasonable efforts to detect mine hazards’, through a ‘gross misallocation of inspector resources,’ and by exhibiting ‘a lack of initiative to appropriately conduct Section 103(i) inspections.’” *Bragg*, 2012 WL 2899317, at \*2 (quoting *Compl.*, p. 10, ¶ 53) (quoting *MSHA Review*, p. 25) (internal quotations and emphasis omitted)) (J.A. 14).

“Accordingly, MSHA determined that its own inspectors were at fault for failing to identify or rectify many obvious safety violations that contributed to the fire. In relation to training, MSHA concluded that its inspector ‘assigned to inspect the [Mine] did not determine whether the [atmospheric monitoring system] operator[, who ignored the CO alarms during the fire,] was adequately familiar with his duties and responsibilities, even though this determination was required of and understood by the inspector.’” *Bragg*, 2012 WL 2899317, at \*2 (quoting *Compl.*, p. 10, ¶ 54(a)) (quoting *MSHA Review*, p. 44) (internal quotations omitted)) (J.A. 14).

More specifically, the “MSHA investigation also revealed that ‘[a]n adequate inspection by MSHA [of the atmospheric monitoring system (‘AMS’)] would have identified the

deficiencies with the AMS, including the fact that no alarm unit had been installed.” *Bragg*, 2012 WL 2899317, at \*2 (quoting Compl., p. 11, ¶ 54(c)) (quoting *MSHA Review*, p. 52) (internal quotations omitted)) ( J.A. 15). For example, “[i]n relation to the ventilation controls, the MSHA investigation confirmed that its inspectors, ‘demonstrated a lack of initiative to identify basic violations . . . even though the unmarked doors and missing stoppings were obvious and easily identifiable . . . [such that] an adequate MSHA investigation . . . would have identified the missing stoppings.’” *Id.* (quoting Compl., p. 11, ¶ 54(b)) (quoting *MSHA Review*, pp. 47-48) (internal quotations omitted)) (J.A. 15). “The MSHA investigation also revealed that other contributing factors to the fire include[d] its ‘inadequate’ inspection of the conveyor belts and its ‘ineffective use of MSHA’s enforcement authority’ in issuing citations for accumulated coal dust.” *Id.* (quoting Compl., p. 12, ¶ 54(e)) (quoting *MSHA Review*, p. 104) (internal quotations omitted)) (J.A. 16).

Beyond these abject inspection failures, MSHA’s “internal report speculated that conflicts of interest may have contributed to its inspectors’ inadequate and ineffective inspection and enforcement of the Mine’s compliance with mine safety regulations:

The internal review team has concluded that mine inspectors neglected to issue citations in some situations in which citations were justified and that mine inspectors on occasion underestimated [Aracoma Coal’s] negligence and/or the gravity of the hazardous conditions when violations were cited.... The failure to propose more significant civil penalties likely interfered with the deterrent value that civil penalties are designed to have under the Mine Act.... [The internal review team believes that some of the identified deficiencies may have stemmed from the relationship that MSHA developed with Massey Energy Company representatives in early 2001.... [U]sing enforcement personnel in this manner to assist the Aracoma Coal Company with its compliance efforts may have created a conflict of interest that, over time, may have affected the level of scrutiny MSHA provided at [the Mine] during subsequent mine inspections.]”

*Bragg*, 2012 WL 2899317, at \*3 (quoting Compl., p. 13, ¶ 60) (quoting *MSHA Review*, pp. 40-41) (internal quotations and emphasis omitted)) (J.A. 17).

“In light of its extensive findings of inadequacy and ineffectiveness in its inspections, supervision and enforcement at the Mine, MSHA’s internal investigation” reached a number of conclusions. *Bragg*, 2012 WL 2899317, at \*3. **First**, it concluded that, in the year before the fire, “MSHA did not conduct inspections in a manner that permitted us to effectively identify hazardous conditions at the mine, and did not utilize the Mine Act to effectively enforce health and safety standards promulgated to provide miners with the protections afforded by the statute.” *Id.*; see also Compl., pp. 15-16, ¶ 66 (same) (quoting *MSHA Review*, p. 180) (J.A. 19-20).

**Second**, it concluded that “MSHA’s failure to more effectively enforce the Mine Act allowed significant hazards, many of which otherwise might have been identified and addressed, to continue in existence prior to the fatal fire.” *Bragg*, 2012 WL 2899317, at \*3; Compl., p. 16, ¶ 66 (same) (quoting *MSHA Review*, p. 180) (J.A. 20).

**Third**, it found that MSHA’s culpability for the fire permeated all levels of the Agency, including “all persons who directly or indirectly were responsible for administering the Mine Act at the [Mine], from the inspectors who conducted the mine inspections through the headquarters office personnel who ultimately were responsible for overseeing MSHA activities throughout the Nation.” *Bragg*, 2012 WL 2899317, at \*3; Compl., p. 16, ¶ 66 (same) (quoting *MSHA Review*, p. 180) (J.A. 20).

**C. Petitioners Sue The Government In Federal Court Under the Federal Tort Claims Act And The Fourth Circuit Certifies The Question Of Whether Private Mine Inspectors Who Act Negligently And Are Partially At Fault For A Fatal Fire Are Liable Under West Virginia Negligence Law For The Wrongful Deaths Of Miners.**

Petitioners sued the United States Government for the wrongful deaths of their husbands under the Federal Tort Claims Act (FTCA). The FTCA requires federal courts in negligence cases against the Government to determine whether a private party, in “like circumstances” to those alleged against the Government, would be liable under “local law”—*i.e.*, the law of the

state where the tort and injury occurred. See 28 U.S.C. §§ 1346, 2674. Petitioners claimed that under the applicable “local law”—West Virginia’s—private mine inspectors, situated like MSHA and its inspectors were in this case, would be liable for the wrongful deaths of Petitioners’ husbands. (J.A. 20-21, ¶¶ 67-79).

The Government moved to dismiss Petitioners’ complaint for lack of subject matter jurisdiction. (J.A. 210-12). It argued that a private party inspecting mines in “like circumstances” to those alleged here would not be liable under West Virginia law for the wrongful deaths of miners resulting from its negligent inspections. Memo. in Support of Gov’t Mot. to Dismiss, *Bragg v. U.S.*, Civ. A. No. 2:10-0683 (S.D. W. Va.), Dkt. No. 5, pp. 8-17 (filed June 25, 2010) (J.A. 2). The district court agreed and granted the Government’s motion, dismissing Petitioners’ complaint. *Bragg v. U.S.*, 767 F. Supp. 2d 617, 629 (S.D. W. Va. 2011) (J.A. 241-42).

On appeal to the Fourth Circuit, Petitioners and the Government disputed the scope of West Virginia law and whether private mine inspectors, in “like circumstances” to those alleged against the Government here, would be liable under that law for the wrongful deaths of miners resulting from negligent inspections. On July 17, 2012, following oral argument, the Fourth Circuit issued a decision certifying the following question of West Virginia negligence law to this Court:

Whether a private party conducting inspections of a mine and mine operator for compliance with mine safety regulations is liable for the wrongful death of a miner resulting from the private party’s negligent inspection.

*Bragg v. U.S.*, 2012 WL 2899317, at \*1.

By order dated July 19, 2012, this Court accepted the Fourth Circuit’s certified question and directed the parties to brief it.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In its July 19 order, the Court stated its “opinion that this matter be scheduled for oral argument on Wednesday, October 17, 2012, under Rule 20 of the Revised Rules of Appellate Procedure.” The Court also directed the Clerk to “furnish the parties and counsel of record with a Notice of Argument pursuant to Revised Rule 20(b), which will contain additional information regarding the time for argument.” *Id.* As of the filing of this brief, undersigned counsel has not yet received the Notice of Argument pursuant to Revised Rule 20(b).

## SUMMARY OF ARGUMENT

This Court has two established approaches to determining the existence of a tort duty of care: (a) its general negligence principles, which look to foreseeability of the harm, the need for moral condemnation and deterrence of the conduct at issue, and public policy; and (b) its special relationships doctrine, which likewise looks to the foreseeability of the harm, as well as the extent to which the injured party is “affected differently” from society in general. Under either approach, this Court should hold that a “private party conducting inspections of a mine and mine operator for compliance with mine safety regulations is liable for the wrongful death of a miner resulting from the private party’s negligent inspection.” *Bragg*, 2012 WL 2899317, at \*1.

Under this Court’s general negligence principles, private mine inspectors owe a duty of care to miners who die as a result of negligent inspections. At its very foundation, tort law is intended to express society’s condemnation for conduct that falls below what is ordinarily expected and unreasonably creates a foreseeable risk of harm. Here, the culpable party, MSHA, has admitted that its conduct fell well below what it should have been and that its inspectors failed to take reasonable steps that could have avoided the resulting fatalities. Particularly in the context of miner safety, West Virginia law does and should hold a private party liable for creating such an unacceptable and foreseeable risk of harm. To hold otherwise would provide an

immunity from liability in circumstances where West Virginia law can ill afford it. Recognition of a duty of care, by stark comparison, will serve the public good. Indeed, the Legislature and this Court both have emphatically stated West Virginia's strong public policy in favor of mine and miner safety, a policy furthered by recognizing mine inspector liability for negligence.

Similarly, under this Court's settled special relationships doctrine, private mine inspectors owe a duty of care to miners who die as a result of negligent inspections. It is plainly foreseeable that miners may die due (in whole or in part) to negligent coal mine inspections. Equally plainly, miners are "affected differently" from society in general by a negligent inspection of the dangerous places where they work: mines.

It is clear, therefore, that under West Virginia's settled principles for determining the existence of a tort duty of care, a private mine inspector whose negligence causes a miner's death owes a duty and is liable to the deceased miner and his heirs.

## **ARGUMENT**

### **I. Standard Of Review**

"This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court." *Barr v. NCB Mgmt. Servs., Inc.*, 227 W. Va. 507, 510, 711 S.E.2d 577, 580 (2011) (quoting Syl. pt. 1, *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999)) (other citations omitted). "[T]he determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." *Aikens v. Debow*, 208 W. Va. 486, 491, 541 S.E.2d 576, 581 (2000).

**II. Under This Court's Settled Foreseeability And Public Policy Analysis For Determining The Existence Of A Tort Duty Of Care, Private Mine Inspectors Owe A Duty To The Miners Who Work There, And Thus Are Liable For A Miner's Wrongful Death Resulting From Negligent Inspections.**

The question certified by the Fourth Circuit stipulates that the private party's mine inspection is negligent, and that it caused a miner's wrongful death. *Bragg*, 2012 WL 2899317, at \*1 (referring to the "wrongful death of a miner resulting from the private party's negligent inspection").<sup>1</sup> Accordingly, in determining whether the private mine inspector's negligence establishes its liability to the deceased miner, the only issue this Court must resolve is whether that inspector owed a duty to the miner to perform its inspection non-negligently. *State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 657 n. 6, 510 S.E.2d 486, 491 n. 6 (1998) (elements of negligence are duty, breach, causation and injury). Application of this Court's settled duty principles demonstrates clearly that a private inspector of mines owes a duty of care to the miners who work there.

**A. In Determining Whether A Private Actor Owes A Tort Duty Of Care, This Court Considers The Foreseeability Of The Harm, The Appropriate Level Of Condemnation And Deterrence For The Conduct At Issue, And Public Policy Considerations.**

This Court's jurisprudence for determining whether a tort duty exists is both clear and settled: the Court considers the foreseeability of the harm, additional public policy considerations such as the likelihood and severity of injury from the negligent conduct, and the level of moral condemnation and deterrence proportionate to the negligent conduct. *See Glascock v. City Nat'l Bank of W. Va.*, 213 W. Va. 61, 65, 576 S.E.2d 540, 544 (2002) (noting that these "general tort principles [are] long established in West Virginia law and in harmony

---

<sup>1</sup> As discussed below (pp. 23-24, 32), the Fourth Circuit's certified question stipulates to the negligence of the private mine inspector, and the causal link between that negligence and the miner's death, because MSHA has admitted these facts in this case, and Mr. Bragg's and Mr. Hatfield's tragic deaths are, of course, undisputed.

with national trends”).

**1. Foreseeability—The “Ultimate Test Of The Existence Of A Duty” Of Care**

The Court long has held that the “ultimate test” and “dispositive” of the “existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised.” *Smoot v. Am. Elec. Power*, 222 W. Va. 735, 739, 671 S.E.2d 740, 744 (2008); *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581 (same); *Mallet v. Pickens*, 206 W. Va. 145, 155, 522 S.E.2d 436, 446 (1999) (same); *Sewell v. Gregory*, 179 W. Va. 585, 588, 371 S.E.2d 82, 85 (1988) (same); *Robertson v. LeMaster*, 171 W. Va. 607, 612, 301 S.E.2d 563, 568 (1983) (same). The central role of foreseeability in determining whether a duty exists traces its roots most famously to then-Chief Judge Cardozo’s opinion for the New York Court of Appeals in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928). See *Mallet*, 206 W. Va. at 155, 522 S.E.2d at 446 (reasoning that the Court’s rule that foreseeability determines the “existence of a duty” is “in accord with Justice Cardozo’s celebrated maxim: ‘The risk reasonably to be perceived defines the duty to be obeyed’”) (quoting *Palsgraf*, 248 N.Y. at 344).

The Court has cautioned that there must be limits placed on the use of foreseeability in order “to prevent the unfettered imposition of unlimited exposure to liability[,]” and therefore has recognized the “need to restrict the spatial concept of duty to something less than the limits of logical connection. . . .” *Aikens*, 208 W. Va. at 492, 541 S.E.2d at 582. Accordingly, the Court has made clear, the nature of the plaintiff’s claimed harm influences the foreseeability analysis: while liability is more limited for foreseeable harm to one’s property and economic losses, “[i]n the area of harm to one’s body, the reach of what is recoverable is very great.” *Id.* (citation omitted; emphasis added).

The foreseeability inquiry is straightforward—“would the ordinary man in the

defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" *Smoot*, 222 W. Va. at 739, 671 S.E.2d at 744 (citation omitted); *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581 (same). Thus, the court's task "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." *Strahin v. Cleavenger*, 216 W. Va. 175, 184, 603 S.E.2d 197, 206 (2004) (citation and internal quotations omitted). "The fundamental reasoning behind this test is that a defendant's 'liability to make reparation for an injury, by negligence, is founded upon an original moral duty, enjoined upon every person, so to conduct himself, or exercise his own rights, as not to injure another.'" *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581 (Starcher, J. concurring) (quoting Syl. Pt. 8, *Blaine v. Chesapeake & O.R.R. Co.*, 9 W. Va. 252 (1876)).

## 2. Moral Condemnation And Deterrence

The Court also looks to moral and deterrence considerations in determining whether conduct is actionable in negligence. The Court is "mindful that recognizing tortious conduct as actionable serves additional purposes beyond providing a remedy to the person injured by the tortious conduct." *Hannah v. Heeter*, 213 W. Va. 704, 710, 584 S.E.2d 560, 566 (2003). "[A]dditional foundations of tort law are morality and deterrence." *Id.* (citation omitted); *see also* Dan B. Dobbs, *The Law of Torts* 19 (2000) ("Courts and writers almost always recognize that another aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm."). Thus, in considering whether negligence is actionable in tort, the Court "will also consider the level of condemnation and deterrence that may be required as a sufficient response to the conduct at issue." *Hannah*, 213 W. Va. at 710, 584 S.E.2d at 566.

### 3. Public Policy

Finally, the Court considers public policy in determining whether a duty of care exists, and what its scope should be. *Mallet*, 206 W. Va. at 156, 522 S.E.2d at 447 n. 15 (“public policy and social considerations . . . are important factors in determining whether a duty will be held to exist in a particular situation”).

**The policy of keeping mines and miners safe.** The principal public policy implicated here is the State’s abiding policy of ensuring the safety of West Virginia’s mines and protecting the mining industry’s most valuable resource—miners. *See Consolidation Coal Co.*, 177 W. Va. at 527-28, 354 S.E.2d at 821-22. It is no mystery, as the West Virginia Legislature has expressly found, that the coal mining industry is the lifeblood of West Virginia’s economy, embedded deeply in the fabric of the State and its people. *See* W. Va. Code § 22A-7-2(a) (“The continued prosperity of the coal industry is of primary importance to the state of West Virginia”). According to the West Virginia Office of Miners’ Health, Safety and Training, approximately 30,000 people currently are employed in the mining industry, many of them miners. *See* Website of W. Va. Office of Miners’ Health, Safety and Training, available at <http://www.wvminesafety.org/wvcoalfacts.htm> (last visited August 2, 2012). The industry’s payroll is nearly \$2 billion and it pumps more than a half-billion tax dollars into West Virginia’s economy each year. *Id.*; Bur. of Bus. & Econ. Research, W. Va. Univ. and Ctr. for Bus. and Econ. Research, Marshall Univ., “*The West Virginia Coal Economy 2008*,” p. 6 (Feb. 2010). And its broader impact on the West Virginia economy is even greater. *See* “*The West Virginia Coal Economy 2008*,” p. 7 (noting that in 2008 alone, the “additional total economic impacts” of the coal industry in West Virginia included the creation of over 17,000 jobs and \$5.5 billion in “total business volume generated”).

The Legislature has made equally clear that the competitiveness of the West Virginia coal mining industry depends on the health and safety of the tens of thousands of miners who work in it. *See* W. Va. Code § 22A-7-2(e) (finding that “injuries result in the loss of life and serious injury to miners and are an impediment to the future growth of West Virginia’s coal industry”). It is no surprise, then, that this Court and the West Virginia Legislature have recognized the extraordinary importance of mine safety and carried out their respective judicial and legislative duties to protect the State’s miners. This Court has observed that, “[o]ur lawmakers have made clear that ‘[t]he highest priority and concern of this legislature and all in the coal mining industry must be the health and safety of the industry’s most valuable resource—the miner.’” *Consolidation Coal Co.*, 177 W. Va. at 527-28, 354 S.E.2d at 821-22 (citations omitted).

Accordingly, “[t]his Court continually has sought to interpret the law in light of that policy of making West Virginia’s mines as safe as is humanly possible.” *Id.* (citation omitted). And it has made clear that it “will not . . . ignore [miners’] loss of life and limb” given the “highest value” placed by the Legislature “on the health and safety of the miners.” *United Mine Workers of Am. v. Faerber*, 179 W. Va. 65, 70, 365 S.E.2d 345, 350 (1986). Thus, for example, this Court construes mine safety statutes broadly because as “remedial legislation, the mining health and safety statutes are to be viewed in the light most favorable to achieving the broad purpose of protecting the miner.” *Id.* at 69, 365 S.E.2d at 349 (citing *Int’l Union, United Mine Workers v. Kleppe*, 532 F.2d 1403, 1405-06 (D.C. Cir. 1976)); *see also id.* (such “legislation is to be interpreted liberally to effect the purpose of protecting the health and safety of the miner”) (citing *Westmoreland Coal Co. v. Fed. Mine Safety & Health Review Comm’n*, 606 F.2d 417, 419-20 (4th Cir. 1979)).

As noted, the Legislature also repeatedly has stressed the same policy of miner safety. It has expressly recognized the special need to ensure mine safety and the welfare of miners. *See* W. Va. Code §§ 22A-6-1(a)(1) (“find[ing] and declar[ing] that [t]he Legislature concurs with the congressional declaration made in the ‘Federal Coal Mine Health and Safety Act of 1969’ that ‘the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner’”), 22A-7-2(b) (same), and 22A-11-1 (same). And, it has enacted a wide array of statutes to accomplish the prime objective of miner safety. *See, e.g.*, W. Va. Code § 22A-1-1(b) (stating that the “division of health, safety and training . . . shall give prime consideration to the protection of the safety and health of persons employed within or at the mines of this state”); *see generally* W. Va. Code Chapter 22A.

This Court’s and the Legislature’s emphatic public policy of protecting West Virginia’s miners and keeping its mines safe informs this Court’s analysis of the certified question here. Limiting the liability of private mine inspectors—or immunizing them from liability entirely—for the wrongful deaths of miners resulting from the inspectors’ negligence would directly contravene West Virginia’s clear policy of protecting mines and miners’ safety. That would especially be the case in circumstances where, as in this case, the negligence was so excessive and enabled the “shock[ing]” and “deplorable” conditions that led to the tragic deaths of two coal miners.

**The likelihood of injury, the magnitude of the burden of guarding against it, the consequences of placing that burden on the defendant, and the severity of the injury.** *See Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581; *Mallet*, 206 W. Va. at 156, 522 S.E.2d at 447; *Sewell*, 179 W. Va. at 588, 371 S.E.2d at 85. The Court also examines these policy considerations, which give it flexibility in fashioning tort duties that properly balance the need to

compensate victims, deter wrongdoing, and accomplish the other purposes of the tort system, on the one hand, while protecting against limitless liability for defendants, on the other.

**The “strong public policy of this State that persons injured by the negligence of another should be able to recover in tort.”** *Mills v. Quality Supplier Trucking, Inc.*, 203 W. Va. 621, 623, 510 S.E.2d 280, 282 (2005) (quoting *Paul v. Nat’l Life*, 177 W. Va. 427, 433-34, 352 S.E.2d 550, 556 (1986)). As the Court pointed out in *Mills*, this policy has caused it, for example, to abolish interspousal, charitable, and certain parent tort immunities, and to adopt the doctrine of comparative negligence (as opposed to the recovery-limiting doctrine of contributory negligence). *Id.* (citations omitted).

**B. Under This Court’s Settled Foreseeability And Public Policy Analysis, Private Mine Inspectors Owe A Duty Of Care To Miners And Are Liable For Negligent Mine Inspections That Cause The Wrongful Deaths Of Miners.**

Application of the analytical framework set forth above to the certified question here produces a clear answer: a private party conducting inspections of a mine and operator for compliance with mine safety regulations owes a duty to, and is liable for the wrongful death of, a miner resulting from the private party’s negligent inspection.

**FORESEEABILITY.** First, there is little doubt that an “ordinary man” in a private mine inspector’s position, retained to inspect a mine for purposes of determining its compliance with safety regulations, would “anticipate” that if the mine was not compliant with safety regulations—and the inspector failed to detect these instances of non-compliance and apprise the mine operator of them—then safety hazards could persist and result in the deaths of the miners who worked there. *Smoot*, 222 W. Va. at 739, 671 S.E.2d at 744; *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581; *Mallet*, 206 W. Va. at 155, 522 S.E.2d at 446; *Sewell*, 179 W. Va. at 588, 371 S.E.2d at 85.

**APPROPRIATE LEVEL OF CONDEMNATION AND DETERRENCE.** Second, tort law’s

acknowledged purposes of condemning and deterring tortious conduct, especially where, as here, that conduct causes the loss of life, reinforce the need to impose liability on private mine inspectors for negligent inspections that cause the wrongful death of miners. Death is the gravest possible consequence of negligent conduct, and it cries out for judicial recourse—through the imposition both of compensatory and punitive damages (in the civil context), as well as criminal punishment in the form of fines, penalties, and imprisonment. It follows that negligent mine inspections that cause a miner’s wrongful death warrant the strongest moral condemnation the State and this Court can provide. For the same reasons, moreover, the need for deterrence is at its zenith when it comes to negligence that causes another’s death. Allowing a jury to impose liability on a private mine inspector whose negligent inspections lead to the deaths of miners will provide at least some of the condemnation and deterrence that are proportionate to the harmfulness of the conduct and the severity of the injury that results from it.

**PUBLIC POLICY.** Third, public policy considerations likewise support holding a private mine inspector liable in these circumstances.

The “policy of making West Virginia’s mines as safe as is humanly possible.” The principal policy consideration in this case implicates the Court’s acknowledged duty to “interpret the law in light of that policy of making West Virginia’s mines as safe as is humanly possible.” *Consolidation Coal Co.*, 177 W. Va. at 527-28, 354 S.E.2d at 821-22 (citation omitted); *see also* W. Va. Code § 22A-6-1(a)(1) (“find[ing] and declar[ing] that . . . ‘the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner’”). As discussed above, that policy plainly is furthered by a tort rule that holds private mine inspectors responsible for their negligence resulting in a miner’s wrongful death.

**The likelihood of injury, the magnitude of the burden of guarding against it, the**

**consequences of placing that burden on the defendant, and the severity of injury.** Each of these policy considerations provides additional support for imposing a duty on a private mine inspector to miners. If a private mine inspector improperly inspects a mine and thus fails to detect safety hazards, that failure increases substantially the likelihood that miners will be injured by those undetected hazards.

At the same time, placing part of the burden of guarding against the proliferation of safety hazards in mines on private mine inspectors—whose very job it is to detect those hazards and bring them to the attention of those who can eliminate them—is entirely sensible. It may be that the scope of a private inspector’s duty should be limited to (a) doing their jobs honestly and without bias in favor of the mine operator, (b) conducting inspections in a manner reasonably calculated to uncover safety hazards and mine regulatory violations, and (c) bringing the existence of those hazards and violations to the attention of the mine operator and, perhaps, the miners themselves. Imposing a duty so limited in scope—but which plainly was violated in the instant case—would help to minimize the magnitude of the burden on inspectors while better ensuring that operators carry out their statutory obligation to maintain mine safety.

Similarly, the severity of injury that can result from a private mine inspector’s negligence clearly supports the imposition of tort liability on the inspector. As this case shows, negligent mine inspections can lead to fatal consequences—the death of miners—as well as severe physical and emotional injuries. These extreme forms of injury increase the need for a strong tort rule that incentivizes mine inspectors to do their job with reasonable care.

**The “strong public policy of this State that persons injured by the negligence of another should be able to recover in tort.”** Another relevant policy consideration involves the State’s strong policy “that persons injured by the negligence of another should be able to

recover in tort.” *Mills*, 203 W. Va. at 623, 510 S.E.2d at 282 (citation and internal quotations omitted). Where, as here, a private party’s negligent mine inspection causes the wrongful death of miners, the miners’ families surely “should be able to recover in tort” from the negligent inspectors.

Accordingly, applying this Court’s settled foreseeability and public policy analysis for determining negligence liability under West Virginia law to the Fourth Circuit’s certified question, it is clear that a “private party conducting inspections of a mine and mine operator for compliance with mine safety regulations *is liable* for the wrongful death of a miner resulting from the private party’s negligent inspection.” *Bragg*, 2012 WL 2899317, at \*1 (emphasis added).

**C. This Court Has Applied Its Foreseeability And Public Policy Analysis In Determining Whether A Duty Of Care Exists Across A Broad Spectrum Of Fact Patterns For A Broad Spectrum Of Conduct, And It Should Apply That Same Analysis Here.**

The application of this Court’s settled foreseeability and public policy analysis to the certified question is consistent with the Court’s application of that same analysis in a wide variety of circumstances. To cite just some of the many examples, this Court has applied its foreseeability and public policy analysis when determining *whether*:

- A utility company that failed to place “guy markers” on “guy wires” that anchor a utility pole to the ground owed a duty to a bicyclist who sustained a severe leg injury when he crashed into the unmarked wires. *Smoot*, 222 W. Va. at 738-39, 671 S.E.2d at 743-44 (finding a duty).
- Coal companies, timbering companies, landowners, lessors, railroads, and gas companies, who were involved in the extraction of natural resources which caused flooding, owed a duty to those whose property was damaged by the floods. *In re Flood Litig.*, 216 W. Va. 534, 543-44, 607 S.E.2d 863, 872-73 (2004) (finding a duty).
- A non-party to a lawsuit, who spoliates evidence relevant to that lawsuit, owed a duty to the parties to the lawsuit. *Hannah*, 213 W. Va. at 712, 584 S.E.2d at 568 (finding a duty).

- A heating contractor owed a duty to a homeowner who died from pneumonia caused by the extreme cold in her house while the contractor was installing a new heating system. *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 613-14, 567 S.E.2d 619, 623-24 (2002) (finding no duty because contractor could not “have reasonably foreseen that exposing [plaintiff’s decedent] to cold air while installing a heating system in his home was going to cause him to contract pneumonia and die” and because “it is apparent that an onerous burden would be placed upon all contractors . . . if they could be held tortiously liable for the existing health problems of their customers even though they performed their work in a reasonable manner”).
- A truck driver (and his employer) who struck a bridge, which in turn caused the bridge’s closure and caused economic losses to a nearby motel and restaurant, owed a duty to the motel and restaurant operators for those losses. *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581 (finding a duty could exist and liability imposed for economic losses if there was (a) associated physical harm to the defendant’s person or property, (b) a contractual relationship with the tortfeasor, or (c) a special relationship with the tortfeasor, which “may be proven through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff”).
- A property owner who failed to exercise reasonable care to keep its property safe owed a duty to a licensee who was injured as a result. *Mallet*, 206 W. Va. at 156-57, 522 S.E.2d at 447-48 (abolishing distinctions between licensees and invitees which permitted the Court “to see the [important] question of foreseeability, face to face[,]” a question the distinctions previously forced it to see only “through a glass, darkly”).
- A designer of access routes to a Wal-Mart store, whose negligent access design allegedly caused the car accident that killed plaintiff’s spouse, owed a duty to plaintiff’s spouse. *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 260, 479 S.E.2d 911, 921 (W. Va. 1996) (finding a duty and holding that “[c]ertainly, one who designs an access road to lead from a business location to a major highway and proposes to encroach on the public way by means of that access must foresee that the invitees of that business will use the access and depend upon its design” and that persons using the access route “may be seriously injured, maimed, or killed as a result of deficiencies in the design which render it unsafe”).
- A home builder, whose negligent construction of the house plaintiffs purchased from later owners led to flooding and property damage, owed a duty to plaintiff purchasers. *Sewell*, 179 W. Va. at 588, 371 S.E.2d at 85 (finding a duty and holding that the builder “foresaw that there would be subsequent purchasers when he constructed the house”).
- An employer who sent his employee home after requiring him to work more than 26 hours straight hours owed a duty to persons injured in car accident caused by employee, who had fallen asleep at the wheel. *Robertson*, 171 W.

Va. at 612-13, 301 S.E.2d at 568-69 (finding a duty where employer “could have reasonably foreseen that its exhausted employee . . . would pose a risk of harm to other motorists”).

These and numerous other decisions of this Court illustrate the flexibility of the Court’s foreseeability and public policy analysis to deal with the wide variety of negligent conduct that causes harm and for which remedies are sought in this State’s courts. And indeed, *stare decisis* directs the Court to apply the same analysis to the certified question here. *Stare decisis* “promotes certainty, stability and uniformity in the law [and] should be deviated from only when urgent reason requires deviation. . . .” *State v. Proctor*, 227 W. Va. 352, 361 n. 16, 709 S.E.2d 549, 558 n. 16 (2011) (citations omitted). It strongly supports that this Court apply here the same foreseeability and public policy analysis it applied in the diverse cases discussed above, because that analysis constituted the Court’s “explication of the governing rules of law” and it was “necessary” to the results reached there. *Woodrum v. Johnson*, 210 W. Va. 762, 766-67, 559 S.E.2d 908, 912-13 (2001) (discussing scope of *stare decisis* doctrine) (quoting *County of Allegheny v. Am. Civ. Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996)). And there is no conceivable “urgent reason”—or any reason at all—for the Court to “deviat[e]” from its settled precedents in resolving whether private mine inspectors can be liable for miners’ wrongful deaths resulting from the inspectors’ negligent inspections of mines.

For one thing, there is no stated public policy—whether statutory or otherwise—suggesting that private mine inspectors should receive special treatment, much less some immunity from negligence liability to miners who die as a result of the inspectors’ negligence. To the contrary, as discussed above, requiring private mine inspectors to act with reasonable care

in the performance of their chosen profession will foster West Virginia's paramount public policy of ensuring mine safety and protecting the miners who work there.

Nor is there any reason to fear that applying this Court's settled foreseeability and public policy analysis, and imposing liability on private mine inspectors for negligent inspections that cause a miner's wrongful death where the analysis leads to that conclusion, will result in limitless liability for inspectors. This Court's precedents demonstrate its sensitivity to this possibility and its acknowledgment of the "obligation . . . to draw a line beyond which the law will not extend its protection in tort, and to declare, as a matter of law, that no duty exists beyond that court-created line." *Aikens*, 208 W. Va. at 502, 541 S.E.2d at 592.

The Court, therefore, is careful to ensure that before liability is established, all elements of negligence have been proven—including breach of the duty of care and proximate causation—whether by undisputed facts at summary judgment or following a fair trial. See *Jackson v. Putnam County Bd. of Educ.*, 221 W. Va. 170, 180, 653 S.E.2d 632, 642 (2007); *Aikens*, 208 W. Va. at 502, 541 S.E.2d at 592 ("accept[ing] the wise admonition that '[t]here would be no bounds to actions and litigious intricacies, if the ill effects of the negligences of men could be followed down the chain of results to the final effect'") (citation omitted).

In this regard, it is again important to highlight that the Fourth Circuit's certified question assumes that the remaining elements of negligence—namely breach of the duty of care, proximate causation, and injury—are established: it describes the mine inspections at issue as "negligent" and assumes that the negligent inspections "result[]" in a miner's wrongful death. The Fourth Circuit presumably did so because the Government conceded breach and proximate causation in MSHA's own report on the Alma Mine and the January 2006 fire that killed Petitioners' husbands. *Bragg*, 2012 WL 2899317, at \*2 (noting that "MSHA determined that its

own inspectors were at fault for failing to identify or rectify many obvious safety violations that contributed to the fire”); *see also MSHA Review*, p. 180 (J.A. 207).

In future negligence suits against private mine inspectors under West Virginia law, however, plaintiffs obviously will be required to prove the elements of breach, proximate cause, and injury, and mine inspectors obviously will be able to offer proof that their inspections met the standard of care, and that any deviation from the standard of care did not proximately cause a miner’s injury or death. Mine inspectors also will have a variety of additional options for limiting their tort liability to miners. They will, of course, be entitled to assert the same affirmative defenses and liability-shifting mechanisms available to any other tort defendant, including superseding cause, comparative negligence, and cross-claims for common law or contractual contribution and indemnity against third-party defendants—such as the mine operator itself—seeking to shift some or all of the blame to those defendants. And, as indicated, they will also be able, in conjunction with their initial retention to inspect a mine, to negotiate for contractual indemnity from the mine operators who hire them. Any concerns about limitless liability accordingly are unfounded, and certainly not sufficient to counter the strong public policies that support the imposition of liability on private mine inspectors for their negligence.

For the foregoing reasons, this Court should apply its settled foreseeability and public policy analysis and hold that a private mine inspector who inspects a mine and mine operator for compliance with mine safety regulations is liable for the wrongful death of a miner resulting from the private party’s negligent inspection.

**III. Under This Court’s “Special Relationships” Doctrine, Private Mine Inspectors Owe A Duty To Miners And Thus Are Liable For A Miner’s Wrongful Death Resulting From Negligent Inspections.**

Independently, private mine inspectors also owe a duty, and are liable for their negligent inspections, to miners by virtue of this Court’s “special relationship” doctrine. *See Aikens*, 208

W. Va. at 499, 541 S.E.2d at 589. Although the Court generally has applied that doctrine to cases involving solely economic losses, it has never limited the doctrine to economic loss-only cases, and the requirements to establish it plainly are met by the certified question here.

In *Aikens*, this Court considered whether, in the *absence* of physical harm to the victim or privity between the parties, one could recover for economic losses resulting from another's negligence. The Court held that it could where there was a "special relationship" between the victim and the tortfeasor. The Court outlined clearly the inquiry for determining whether a special relationship arises in a given case, explaining that the existence of such a relationship

will be determined largely by the extent to which the particular plaintiff is *affected differently from society in general*. It may be evident from the *defendant's knowledge or specific reason to know of the potential consequences of the wrongdoing*, the *persons likely to be injured*, and the *damages likely to be suffered*. Such special relationship may be proven through evidence of *foreseeability* of the nature of the harm to be suffered by the particular plaintiff or an identifiable class and can arise from contractual privity or other close nexus.

*Aikens*, 208 W. Va. at 499, 541 S.E.2d at 589 (emphases added).

Thus, in West Virginia, a special relationship exists where (a) the plaintiff will be affected differently by the defendant's actions than will members of society generally and (b) the consequences of those actions—including who is likely to be injured and in what way—are foreseeable to the defendant. *Id.*; see also *White v. AAMG Const. Lending Ctr.*, 226 W. Va. 339, 347-48, 700 S.E.2d 791, 799-800 (2010) (analyzing whether the plaintiff "was affected differently from society in general" and if the defendant "had a specific reason to know of any tort damages or consequences likely to be suffered by the plaintiff"); *Glascock*, 213 W. Va. at 66, 576 S.E.2d at 545 (analyzing the facts in the case to look not for an "interest to 'society in general,' but ... to the [plaintiffs]" and to look for defendant's "reason to know of the 'potential consequences of the wrongdoing'" before basing its holding on the foreseeability of the defendant's actions).

The U.S. district court refused to apply the “special relationships” analysis this Court set forth in *Aikens*, *Glascok*, and *White* because, in its view, this Court had only applied that analysis in cases with dissimilar facts involving purely economic losses. *Bragg*, 767 F. Supp. 2d at 627-28 (J.A. 235-36). But not one of the Court’s decisions in those cases purported to confine the applicability of the “special relationship” analysis to the precise facts at issue there. To the contrary: in *Aikens*, this Court took pains *not* to limit its definition to particular cases, stating that “[a]ny attempt by this Court to more specifically define the parameters of circumstances which may be held to establish a ‘special relationship’ would create more confusion than clarity.”<sup>2</sup> *Aikens*, 208 W. Va. at 500, 541 S.E.2d at 590; *see also White*, 226 W. Va. at 347, 700 S.E.2d at 799 (reasoning that “the existence of a special relationship between two parties ‘will differ depending upon the facts of each relationship’”) (citation omitted); *Glascok*, 213 W. Va. at 67, 576 S.E.2d at 546 (“whether or not such a special relationship exists must be determined on a case-by-case basis”).

Moreover, the Court’s “special relationships” decisions are binding in future cases not only as to their outcomes and the particular facts involved—rather, “their explication of the governing rules of law” that are “necessary to th[e] result[s]” reached are binding as well. *Woodrum*, 210 W. Va. at 766-67, 559 S.E.2d at 912-13 (quoting *County of Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring in part and dissenting in part); *Seminole Tribe of Fla.*, 517 U.S. at 67). The Court’s “special relationships” analysis plainly was “necessary” to the results in *Aikens*, *Glascok* and *White*, and it represents the Court’s “explication” of “governing rules of law” applicable to future cases in which such a relationship might be deemed to arise.

---

<sup>2</sup> Moreover, if anything, the “special relationship” analysis this Court has applied in cases involving solely economic loss should be applied more expansively where, as here, the special relationship arises in connection with physical harm and death.

Application of the Court's "governing rules of law" of special relationships demonstrates the existence of a special relationship between private mine inspectors and miners. As discussed above, there is no question that a private mine inspector reasonably can foresee that if it performs its inspections of a mine negligently and fails to detect and apprise the mine operator of safety hazards, the miners who work at that mine may suffer harm or, as in this case, even death. *See, e.g., Glascock*, 213 W. Va. at 66, 576 S.E.2d at 545 (concluding that "it was eminently foreseeable to the [defendant] bank that withholding the information [revealed by an inspection of plaintiff's home under construction] from the [plaintiffs] could cause the [plaintiffs] harm").

Additionally, there is little doubt that miners stand to be "affected differently from society in general" by a private mine inspector's negligent inspection of the mine in which they work: miners can be injured or killed if a negligent inspection allows a safety hazard to persist, but a negligent inspection rarely will impact those who do not work at the mine (other than the family members of miners who are injured or killed as a result of the negligent inspection, like Delorice Bragg and Freda Hatfield). Thus, given the readily foreseeable risks to a section of society that would be uniquely affected by the consequences of those risks, mine inspectors have a special relationship with miners, and therefore can be held liable when their negligent inspections result in a miner's death.

**IV. Even If, As The Government Has Argued, Private Mine Inspectors' Liability For Miners' Wrongful Deaths Should Be Governed By Section 324A Of The Restatement (Second) Of Torts, Liability Plainly Would Arise Under That Provision Here.**

In the U.S. district court and the Fourth Circuit, the Government argued that Section 324A of the Restatement (Second) of Torts governs the liability of a private mine inspector in these circumstances. Memo. in Support of Gov't Mot. to Dismiss, *Bragg v. U.S.*, Civ. A. No. 2:10-0683 (S.D. W. Va.), Dkt. No. 5, pp. 10-18 (filed June 25, 2010) (J.A. 2); Br. of Appellee,

*Bragg v. U.S.*, No. 11-1342 (4th Cir.), Dkt. No. 19, pp. 13-22 (filed Sept. 6, 2011). Because Plaintiffs anticipate that the Government will assert a similar argument in this Court, they address its applicability here.

As a preliminary matter, and as discussed above, this Court has a settled approach to adjudicating negligence claims under West Virginia law that has served this Court and the State of West Virginia well, and which should govern here. *See supra* pp. 11-27. At the same time, this Court has never cited, much less adopted, Section 324A of the Restatement in its 47 years of existence. And the Government has not propounded any basis, much less an “urgent reason” (*Proctor*, 227 W. Va. at 361 n. 16, 709 S.E.2d at 558 n. 16), for this Court to deviate from its settled duty jurisprudence and *stare decisis*—or, indeed, for this Court to displace that jurisprudence altogether—and none is apparent.<sup>3</sup>

In the unlikely event this Court adopts Section 324A of the Restatement or otherwise

---

<sup>3</sup> For all of these reasons—and because the U.S. district court declined to address Section 324A (*Bragg*, 767 F. Supp. 2d at 622)—Petitioners did not, in their opening brief in the Fourth Circuit, cite Section 324A or discuss how private mine inspectors would be liable for negligence under its provisions. When the Government argued the applicability of Section 324A in its answering brief in the Fourth Circuit, however, this squarely presented that issue to the Circuit. *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1093 n. 3 (9th Cir. 2007) (considering issue discussed in appellant’s reply brief where issue had “been joined” by appellee when appellee raised the issue in its answering brief) (citation omitted); *see also U.S. v. Ramirez*, 557 F.3d 200, 203 (5th Cir. 2009) (same). Petitioners accordingly were entitled to respond to the applicability of Section 324A in their Fourth Circuit reply brief, and they did so. *See Reply Br. of Appellants, Bragg v. U.S.*, No. 11-1342 (4th Cir.), Dkt. No. 23, pp. 18-25 (filed Oct. 7, 2011). And, since the applicability of Section 324A concerns the scope of Congress’s waiver of the Government’s sovereign immunity under the FTCA—an issue of the federal courts’ subject matter jurisdiction (*Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 512 (D.C. Cir. 2009))—the Fourth Circuit would be obligated to consider the issue in any event. *Brickwood Contractors, Inc. v. Datanet Eng’g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (*en banc*) (“[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review”) (citation omitted); *Hornbeck Offshore*, 569 F.3d at 512.

In the unlikely event this Court decides that private mine inspectors’ liability under West Virginia must be determined under Section 324A, the Fourth Circuit, on receipt of this Court’s decision, will then need to consider the Government’s liability under that provision on the facts of this case. *Iodice v. U.S.*, 289 F.3d 270, 275 (4th Cir. 2002) (in FTCA negligence case governed by the law of the state where the tort occurred, court of appeals “must rule as the [relevant state] courts would, treating decisions of the Supreme Court of [that state] as binding”).

applies its criteria, the answer to the certified question is no different from the one set forth above: private mine inspectors are liable for the wrongful death of a miner resulting from the inspectors' negligent inspection of the mine where the miner died.<sup>4</sup> That is no surprise given that § 324A is built on the same foundation of foreseeability that underpins this Court's established duty of care analysis. *See, e.g., Wilson v. Rebsamen Ins., Inc.*, 957 S.W.2d 678, 681 (Ark. 1997) (noting that Section 324A ties duty in the inspection context to whether "it is reasonably foreseeable that if the inspections are done improperly" a third party "will be injured"); *Cantwell v. Allegheny County*, 483 A.2d 1350, 54 (Pa. 1984) (explaining that Section 324A "essentially" embodies a "foreseeability" requirement); *Irving v. U.S.*, 942 F. Supp. 1483, 1503 n. 23 (D.N.H. 1996) (same), *rev'd en banc on other grounds by* 162 F.3d 154 (1st Cir. 1998). In fact, the plain text of Section 324A expressly requires a showing of foreseeability in the form of the defendant's "recogni[tion]" that its services were "necessary to the protection of a third person or his things. . . ." RESTATEMENT § 324A. And, as shown below, courts applying Section 324A and its animating foreseeability principle frequently have found duties of care in the inspection context.

---

<sup>4</sup> In fact, there is no apparent difference between the circumstances presented by the certified question and two of the Section 324A illustrations for when liability arises under the provision:

The A Telephone Company employs B to inspect its telephone poles. B negligently inspects and approves a pole adjoining the public highway. Because of its defective condition the pole falls upon and injures a traveler upon the highway. B is subject to liability to the traveler.

*See* RESTATEMENT (SECOND) OF TORTS § 324A cmt. d, illus. 2.

A Company employs B Company to inspect the elevator in its office building. B Company sends a workman, who makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a proper inspection would have disclosed, the elevator falls and injures C, a workman employed by A Company. B Company is subject to liability to C.

*Id.* cmt. e, illus. 4.

Section 324A of the Restatement provides as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

As noted, numerous courts applying Section 324A have found safety inspectors—including mine safety inspectors—liable or potentially liable for negligent inspections. *See, e.g., Fleming v. U.S.*, 69 F. Supp. 2d 837, 842 (W.D. Va. 1999) (mine inspector could be held liable for negligent inspection that allegedly led to mine explosion killing and injuring numerous miners) (Virginia law); *Irving*, 942 F. Supp. at 1503-04 (safety inspector of factory could be held liable for employee's severe neurological damage when she was pulled by her hair into machine) (New Hampshire law); *Gaines v. Excel Indus., Inc.*, 667 F. Supp. 569, 572 & n. 3 (M.D. Tenn. 1987) (parent corporation that performed safety inspections of subsidiary's plant could be held liable for employees' injuries from stamp presses) (Tennessee law); *Rawson v. United Steelworkers of Am.*, 726 P.2d 742, 750 (Idaho 1986) (miners' union could be held liable for negligent inspection of a mine that led to mine fire that killed miners) (Idaho law), *rev'd on other grounds by United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362 (1990); *Smith v. Universal Underwriters Ins. Co.*, 752 F.2d 1535, 1537 (11th Cir. 1985) (insurance company that inspected workplace could be held liable to employee injured by defective air hose) (Georgia law); *Johnson v. Abbe Eng'g Co.*, 749 F.2d 1131, 1133 (5th Cir. 1984) (affirming jury verdict against parent corporation that inspected subsidiary's mill where plaintiffs were severely burned by solvent explosion) (Texas law); *Canipe v. Nat'l Loss Control Serv. Corp.*, 736 F.2d 1055,

1064 (5th Cir. 1984) (safety inspector of plant potentially liable where employee's arm was amputated by one of plant's machines) (Tennessee law); *United Scottish Ins. v. U.S.*, 692 F.2d 1209, 1211 (9th Cir. 1982) (safety inspector of aircraft that crashed could be held liable for deaths and injuries of passengers) (California law), *rev'd on other grounds sub nom. by U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984); *Barnson v. U.S.*, 531 F. Supp. 614, 620-21 (D. Utah 1982) (mine inspector and monitor of workers' health could be liable for injuries resulting from miners' exposure to uranium radiation) (Utah law).

Like the defendants in these cases, a "private party conducting inspections of a mine and mine operator for compliance with mine safety regulations[,]” whose negligent inspections cause a miner's wrongful death, would be liable under Section 324A as well. *Bragg*, 2012 WL 2899317, at \*1.

**First**, the private mine inspections clearly would constitute "services to another which [the private party inspector] should recognize as necessary for the protection of" third parties (*see* REST. § 324A)—the miners who work at the inspected mine. *See, e.g., Appley Bros. v. U.S.*, 164 F.3d 1164, 1174 (8th Cir. 1999) (holding that inspection of grain warehouses was "for the purpose of protecting the interests of the farmers who stored grain" there); *Irving*, 942 F. Supp. at 1503-04 (holding that inspection of factory was undertaken "to assist accident prevention by additional inspections and advice rendered to the company primarily charged with the duty' to ensure workplace safety") (citation omitted); *Gaines*, 667 F. Supp. at 572 & n. 3 (parent corporation that undertook safety inspections of one of its subsidiary's manufacturing plants satisfied requirement that undertaking was necessary for the protection of the subsidiary's employees at that plant).

**Second**, a third-party miner's wrongful death "resulting from the private party's negligent

inspection” obviously meets the “physical harm” and causation elements of Section 324A. *See* REST. § 324A (requiring a showing of “physical harm resulting” from negligence). Indeed, because the Fourth Circuit’s certified question involves a private mine inspector’s negligent mine inspection that causes a miner’s wrongful death, this Court need not consider Section 324A’s lettered subsections, which set forth “three *causation* requirements. . . .” *Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 263 (3d Cir. 2010) (citation and internal quotations omitted; emphasis added); *see also Johnson*, 749 F.2d at 1133 (stating that the lettered subsections enumerate the grounds for proving “proximate cause”); *United Scottish Ins. Co. v. U.S.*, 614 F.2d 188, 195-96 (9th Cir. 1979) (same), *rev’d on other grounds sub nom. by S.A. Empresa Viacao*, 467 U.S. 797. Because the certified question already assumes causation—and properly so, given MSHA’s clear admissions of negligence and causation, and Petitioners’ allegation of reliance on MSHA’s inspections (J.A. 21, ¶ 74)—Section 324A’s lettered subsections are irrelevant to resolving the question before this Court.

*Third*, even if Section 324A’s lettered subsections were considered—and they shouldn’t be—they are satisfied here. (Because they are set forth in the disjunctive, only one of Section 324A’s lettered subsections must be satisfied to establish liability under that provision. *See Johnson*, 749 F.2d at 1133.)

**Increased risk of harm (Section 324A(a)).** First, a private mine inspector’s failure to exercise reasonable care in carrying out an inspection, identifying safety hazards, and communicating the existence of those hazards to the mine operator, plainly “increases the risk of . . . harm” from those hazards to miners. “An inspector’s failure to act with due care in carrying out a safety inspection can fairly be said to increase the risk of harm by ‘cloak[ing] the defect, dull[ing] the call to vigilance, and so aggravat[ing] the danger.’” *Irving*, 942 F. Supp. at

1504 (quoting *Marks v. Nambil Realty Co.*, 157 N.E. 129, 130 (N.Y. 1927) (Cardozo, C.J.) (internal citation and quotations omitted)); see also *Gaines*, 667 F. Supp. at 572 (safety inspector’s failure to detect hazard and act to remedy it increases the risk of harm insofar as failure would allow a “deteriorating” condition to worsen and “might also lull the person primarily responsible for safety into a sense that minimum standards were being met [and] result in less diligent safety monitoring by the primary actor”).

The operative question under Section 324A(a) is whether negligent mine inspections “resulted in [miners] being subjected to increased hazards or potential for death on the date of the fire and explosion than would otherwise have been the situation had the inspections been performed without negligence.” *Rawson*, 726 P.2d at 747, 765 (holding that union mine inspector “owed the (minimal) duty to its [miner] members to exercise due care in inspecting and in reporting the findings of its inspection”).<sup>5</sup> Here, where we assume that the negligent inspections caused the miners’ wrongful death, *Bragg*, 2012 WL 2899317, at \*1, Section 324A(a)’s “increased risk of harm” criterion plainly is satisfied because non-negligent inspections would have lessened the direct risk of physical harm to the miners.

---

<sup>5</sup> Before the Fourth Circuit, the Government, citing a case applying Tennessee law, claimed that a negligent inspection can only “increase the risk of harm” for Section 324A(a) purposes where an inspector “intermeddles in a situation and makes it worse. . . .” Brief of Appellee, *Bragg v. U.S.*, No. 11-1342 (4th Cir.), Dkt. No. 19, p. 14 (filed Sept. 6, 2011) (citation and internal quotations omitted). When pressed at oral argument on this point, counsel for the Government said that an example of this intermeddling in the inspection context would be where the “inspector lights the fire” that kills miners. See Audio of Oral Argument, May 17, 2012, approximately the 29-minute mark, *Bragg v. U.S.*, No. 11-1342 (4th Cir.), available at <http://www.ca4.uscourts.gov/OAarchive/OAList.asp> (last visited Aug. 7, 2012). Surely, however, this is not the only sort of conduct that would support the imposition of liability on a private mine inspector for negligence that causes a miner’s death under Section 324A(a)’s increased risk of harm provision. And at a minimum, it ignores the facts of this case—that, armed with affirmative knowledge of defective and dangerous conditions as a result of certain of the inspections that were made, the inspectors nevertheless chose to ignore the dangers they discovered. Put simply, having figuratively seen the fire lighted and being presented with the opportunity to extinguish it, MSHA’s inspectors chose instead to say nothing, do nothing, and walk away.

**Undertaking of duty owed by mine operator to miners (Section 324A(b)).**

Independently, a private party's mine inspection, at the request of the mine operator, constitutes the undertaking of the mine operator's federal statutory duty to its miners to keep the mine safe. The federal Mine Act provides that mine operators have "primary responsibility to prevent the existence" of "unsafe and unhealthful conditions and practices" in their mines. 30 U.S.C. § 801(d), (e). When, as contemplated by the certified question, a private inspector undertakes to "conduct[] inspections of a mine and mine operator for compliance with mine safety regulations[,] the inspector "has undertaken to perform" at least part of the mine operator's Section 801(e) "duty" to its miners to prevent the existence of unsafe and unhealthful conditions and practices. *See, e.g., Johnson*, 749 F.2d at 1133-34 (finding § 324A(b) satisfied where evidence showed that safety inspector had various duties relating to "safety practice and procedures" at the facility where the plaintiffs were injured); *Canipe*, 736 F.2d at 1062-63 ("Subsection (b) comes into play as long as the party who owes the plaintiff a duty of care has delegated to the defendant any particular part of that duty."); *Wilson*, 957 S.W.2d at 681-82 (holding that independent safety consultant hired by company to conduct safety inspections of its facility undertook company's duty to maintain safety of facility under Section 324A(b)); *Gaines*, 667 F. Supp. at 573 (finding Section 324A(b) satisfied so long as safety inspector undertook its role "primarily for the benefit of" third parties, which presented a factual question).

Section 324A(b)'s undertaking of a duty requirement likewise is supported by the fact that (1) the mine inspection company contemplated by the certified question here likely "holds itself out as an expert in [inspection] services and [ ] provides those services for a fee[.]" and (2) the mine operator presumptively "hired the [mine inspector] defendant specifically to find work hazards." *Canipe*, 736 F.2d at 1064 (concluding that these facts—regarding "the nature of

the [inspector] defendant’s business and of its contractual relationship with” the employer of the person injured—support a finding under Section 324A(b) that a duty was undertaken).

It is true, as the Government has argued, that mine operators bear “primary responsibility” for their mines’ safety under federal law. *See* 30 U.S.C. § 801(e). But there is no indication that that responsibility is non-delegable to third parties such as private inspectors. Indeed, Section 801(e)’s use of the term “primary”—as opposed to “sole” or “exclusive”—expressly indicates that others may share that duty, including where a mine operator delegates it. *See State v. Gibson*, 226 W. Va. 568, 571, 703 S.E.2d 539, 542 (2010) (“courts must presume that a legislature says in a statute what it means and means in a statute what it says there”) (citation and internal quotations omitted); *Carcieri v. Salazar*, 555 U.S. 379, 392 (2009) (same).

**Reliance of mine operator or miner on inspection (Section 324A(c)).** Finally, where, as contemplated by the certified question, a miner’s “wrongful death result[s] from the private party’s negligent inspection[,]” it follows that the “harm is suffered because of reliance of the [mine operator] or the [miner] upon the [inspector’s] undertaking” of the safety inspection. *See* REST. § 324A(c).

The case law is clear that in the tort context, reliance on a safety compliance inspection arises “where the fact of inspection is known to the third person but the defect is unknown” and where the third person engages in “business as usual in the belief that any necessary precautions would be taken or called to the user’s attention.” *Smith*, 752 F.2d at 1537 (quoting *Universal Underwriters Ins. Co. v. Smith*, 322 S.E.2d 269, 271-73 (Ga. 1984)) (applying Georgia law). In other words, knowledge of the inspections “lull[s]” third parties such as mine operators and miners “into a false sense of security” (*Johnson*, 749 F.2d at 1133-34), “dull[ing] the[ir] call to vigilance” (*Irving*, 942 F. Supp. at 1504 (citations omitted)); *cf.* C. Gregory Ruffennach, *Free*

*Markets, Individual Liberties And Safe Coal Mines: A Post-Sago Perspective*, 111 W. VA. L. REV. 75, 99-100 (2008) (concluding that (1) the “lulling effect of [mine] inspections by government can be expected to be greater since the government . . . is perceived as unbiased” and (2) “[b]ecause a miner might see a federal inspector one out of every three days, it is certainly reasonable for a miner to be lulled into a false sense of security”).

Section 324A(c)’s reliance criterion likewise is supported by the fact that (1) the mine inspection company contemplated by the certified question here likely “holds itself out as an expert in [inspection] services and [ ] provides those services for a fee[.]” and (2) the mine operator presumptively “hired the [mine inspector] defendant specifically to find work hazards.” *Canipe*, 736 F.2d at 1064 (concluding that these facts—regarding “the nature of the [inspector] defendant’s business and of its contractual relationship with” the employer of a person injured—would support a finding under Section 324A(c) that there was reliance on the inspector’s undertaking).

Moreover, as comment e to Section 324A explains, “[w]here the reliance of the other, or of the third person, has induced him to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk.” In a given case, it is conceivable that the mine operator—in reliance on a private mine inspector’s proper inspection of the mine—would “forgo other remedies or precautions against” a risk that it reasonably expected the inspector to detect and bring to the operator’s attention. *Kohr v. Johns-Manville Corp.*, 534 F. Supp. 256, 259 (E.D. Pa. 1982) (denying summary judgment for insurance company that performed inspections of a third party’s asbestos plant where there was evidence that had the company received all of the third party’s safety studies, it may have “increased its safety procedures”).

Additionally, and as was true in this case, when miners are aware that safety inspections are being undertaken, they rely on those inspections to detect any mine hazards and to see that they are remedied by the operator. Petitioners have expressly pleaded reliance on MSHA's inspections, *see* J.A. 21 ¶ 74, which follows from MSHA's long-established and well-known role in ensuring the safety of miners. *See also* Ltr. from Sen. Durbin (D-IL) to Pres. Bush, Oct. 23, 2006 (referring "to the thousands of miners who rely on MSHA to help keep them safe in a difficult and dangerous occupation that is vital to the American economy") (available at <http://votesmart.org/public-statement/220971/press-release-durbin-questions-appointment-of-new-mine-safety-chief>) (last visited Aug. 7, 2012); Wendy Cutright, *et al.*, *Funding MSHA: Are We Adequately Protecting Our Nation's Miners*, at 2 (Fall 2010) ("MSHA protects the health and safety of more than 2,100 coal mines and 12,700 metal and nonmetal mines. The 352,595 workers at these mines rely on MSHA to carry out their mission as supported by law. Without MSHA oversight, there is no one advocating for the workers to make sure they leave alive each day.") (available at <http://publicadmin.wvu.edu/r/download/80164>) (last visited Aug. 7, 2012). This common-sense conclusion—that miners who know that mine safety inspections are being conducted rely on those inspections for their safety—could only be denied if logic were suspended, something this Court will not do in shaping its common law of negligence.

### CONCLUSION

The Court should answer in the affirmative the question of West Virginia law certified to it by the Fourth Circuit: "Whether a private party conducting inspections of a mine and mine operator for compliance with mine safety regulations is liable for the wrongful death of a miner resulting from the private party's negligent inspection." In so doing, the Court should specify that its affirmative response is based either on: (a) the Court's settled negligence principles, which direct courts first to consider the foreseeability of the harm from the actor's negligence,

and then to consider both the need for moral condemnation and deterrence of the negligent conduct, as well as public policy considerations such as West Virginia's express concern for the safety of its miners; or (b) the Court's settled "special relationships doctrine, which likewise focuses on foreseeability as well as the extent to which the injured party is "affected differently" from society in general. The application of these legal principles demonstrates clearly that private mine inspectors owe miners a duty to carry out their inspections with reasonable care, and are liable when their failure to do so results in a miner's wrongful death.

Dated: August 15, 2012

REED SMITH LLP

By: 

Bruce E. Stanley (WVSB No. 5434)

\*Counsel of Record

bstanley@reedsmith.com

225 Fifth Avenue, Suite 1200

Pittsburgh, Pennsylvania 15222

Telephone: (412) 288-3131

Facsimile: (412) 288-3063

*Counsel for Petitioners*

**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2012, I caused the foregoing Brief of Petitioners to be served by U.S. first class mail on the following counsel for Respondent United States of America:

R. Booth Goodwin II  
Fred B. Westfall, Jr.  
Office of the United States Attorney  
Southern District of West Virginia  
300 Virginia Street, East, Suite 4000  
P.O. Box 1713  
Charleston, WV 25326-1713

Benjamin Seth Kingsley  
United States Department of Justice  
Civil Division, Appellate Staff  
Room 7261  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0000

Dated: August 15, 2012

  
\_\_\_\_\_  
Bruce E. Stanley (WVSB No. 5434)