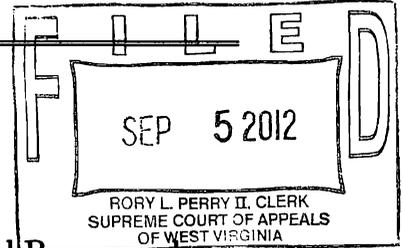

IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA



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

Plaintiffs-Petitioners,

v.

UNITED STATES of AMERICA,

Defendants-Respondents.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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RESPONSE TO ASSIGNMENTS OF ERROR

As plaintiffs note, the assignments of error in this case are embodied in the certified question of West Virginia law:

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. United States, 2012 WL 2899317, at *1 (4th Cir. July 17, 2012).

The question arises in this litigation because the Federal Tort Claims Act ("FTCA") makes the United States liable to the extent that a private person would be liable in similar circumstances under the law of the state in which the allegedly tortious act occurred. 28 U.S.C. § 1346(b)(1). Plaintiffs are the widows of miners who died in a tragic mine fire at the Aracoma Coal Company's Alma Mine. Following the fire, Aracoma Coal and several Aracoma supervisors at the mine plead guilty to federal charges of criminal negligence. The company also settled separate tort claims brought against it by the same plaintiffs in this suit.

Plaintiffs' suit against the United States alleges that inspectors of the federal Mine Safety and Health Administration ("MSHA") should have detected unsafe conditions in the Alma Mine, and that failure to do so contributed to the circumstances that led to their husbands' deaths.

Federal courts have frequently addressed attempts to hold federal inspectors responsible for failing to prevent the harm caused by private entities. In similar cases

under the FTCA, federal courts have applied the principles of the “special relationship” doctrine and the “Good Samaritan” doctrine that have been accepted by a majority of states and the Restatement (Second) of Torts (1965).¹ The Good Samaritan doctrine recognizes that a gratuitous undertaking to provide assistance may result in tort liability to third parties. The actionable duty arises, however, only if a defendant increases the risk of harm, assumes the duty of another, or induces objectively reasonable reliance. The federal district court in this case concluded that West Virginia law requires similar allegations as a predicate to establishing a cause of action for failure to prevent harm caused by others, under either the Good Samaritan doctrine or the special relationship doctrine. Applying its understanding of West Virginia law, the district court concluded that plaintiffs’ allegations do not state a claim.

In their appeal to the Fourth Circuit, plaintiffs have argued that West Virginia law imposes liability without regard to the existence of a special relationship and without regard to whether a defendant has actually increased the risk of harm. They argue that this Court determines the existence of a tort duty based solely on “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.” Pet. Br. 11.

¹ The term “Restatement” used throughout the remainder of this brief refers to the Restatement (Second) of Torts.

They have argued that the district court committed an error of law because West Virginia has never recognized the elements set out in the Restatement as requirements for tort liability. Pet. Br. 2.

For the reasons set out below, we respectfully submit that under West Virginia law, as under the law of an overwhelming number of states, an actionable duty exists only if there is a special relationship between the plaintiff and defendant, or if the defendant's conduct independently increases or creates the risk of harm or induces reasonable reliance. We ask the Court to clarify those principles so that the Fourth Circuit can apply them to the circumstances of this case.

STATEMENT OF THE CASE

I. Statutory Background

The Federal Tort Claims Act waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their employment “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1). Congress vested the federal district courts with exclusive jurisdiction to hear such tort claims, *id.*, and provided that the United States shall be liable “in the same manner and to the same extent as a private individual under like circumstances,” 28 U.S.C. § 2674. The FTCA contains several exceptions to this limited waiver of sovereign immunity, *see* 28 U.S.C. § 2680(a)–(n); 28 U.S.C.

§ 1346(b)(1) (incorporating “the provisions of chapter 171,” *i.e.*, 28 U.S.C. § 2671 *et seq.*), and this limited waiver is to be narrowly construed, *Dolan v. U.S. Postal Service*, 546 U.S. 481, 492 (2006); *Berkman v. United States*, 957 F.2d 108, 113 (4th Cir. 1992).

The Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 801 *et seq.*, establishes a comprehensive scheme designed to promote the health and safety of miners and improve working conditions in mines. Pursuant to the Mine Act, the Secretary of Labor, through the Mine Safety and Health Administration, promulgates health and safety standards for coal and other mines. *See* 30 U.S.C. § 811(a).

The Mine Act places responsibility for compliance with health and safety regulations upon the mine operator. The statute provides that “the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines.” 30 U.S.C. § 801(e). Under the Mine Act, MSHA is to perform “frequent inspections and investigations in coal or other mines each year” for several purposes, including to determine whether an imminent danger exists and whether the mine operator and miners are complying with the Act. 30 U.S.C. § 813(a). MSHA is required to make inspections of each underground mine “in its entirety at least four times a year.” *Id.*

The Mine Act also provides that if MSHA “believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or

safety standard, rule, order, or regulation promulgated pursuant to this Act,” it shall “with reasonable promptness, issue a citation to the operator.” 30 U.S.C. § 814(a).

II. Factual Background and Prior Proceedings

Plaintiffs Delorice Bragg and Freda Hatfield are the widows of two miners, Don Israel Bragg and Ellery Hatfield, who died in the mine at Aracoma Coal Company’s (“Aracoma”) Alma Mine on January 19, 2006. JA 5–6.² Bragg and Hatfield died of suffocation and carbon monoxide intoxication when they were unable to evacuate the mine during the fire. JA 10–11. Plaintiffs’ complaint alleges that various failings of the safety and evacuation systems of the mine, and the insufficient training of the miners, contributed to their deaths. JA 8–11. Plaintiffs brought suit against Aracoma, and its claims Aracoma have been settled. *See Bragg et al. v. Aracoma Coal Co.*, No. 06-C-372 (W. Va. Circuit Court, Logan County).

As plaintiffs note, MSHA was conducting a full and complete inspection of the Aracoma mine at the time of the fatal fire. JA 13. Following the fire, MSHA determined that the mine failed to comply with a significant number of MSHA requirements and issued appropriate citations for the violations. JA 13. Aracoma and several Aracoma supervisors pled guilty to federal charges of criminal negligence in connection with the disaster, and Aracoma paid a multimillion dollar civil and criminal fine for its conduct. *United States v. Aracoma Coal Co.*, No. 08-cr-00286 (S.D.W.Va.);

² “JA” refers to the Fourth Circuit Joint Appendix, which includes relevant documents from the district court record.

United States v. Hagy, No. 10-cr-00101 (S.D.W.Va.); *United States v. Ellis*, No. 10-cr-00101 (S.D.W.Va.); *United States v. Plumley*, No. 10-cr-00103 (S.D.W.Va.); *United States v. Shadd*, No. 10-cr-00104 (S.D.W.Va.).

In this action against the United States under the FTCA, plaintiffs allege that MSHA would have discovered Aracoma's negligence if MSHA had "exercise[d] reasonable care in carrying out its inspection and enforcement activities." JA 21. The district court dismissed plaintiffs' claims for lack of subject matter jurisdiction. JA 213–44. The court explained that the FTCA waives sovereign immunity for torts "in the same manner and to the same extent as a private individual under like circumstances." JA 219 (quoting 28 U.S.C. § 2674). Thus, "[e]ven if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons." JA 220 (quoting *Ayala v. United States*, 49 F.3d 607, 610 (10th Cir. 1995)).

The district court examined three theories of liability proposed by plaintiffs and held that none identified an actionable duty under West Virginia law. The court first rejected plaintiffs' contention that MSHA had "voluntarily assumed" a duty to plaintiffs. The court explained that, under principles of assumed duty discussed in *Wingrove v. Home Land Co.*, 196 S.E. 563 (W. Va. 1938), "an individual undertakes a legal duty if he 'affirmatively either made, or caused to be made, a change in the conditions which change created or increased the risk of harm.'" JA 226–29 (quoting

Myers v. United States, 17 F.3d 890, 892 (6th Cir. 1994)). The court concluded that plaintiffs had not alleged these prerequisites for an assumed duty. JA 231–32.

Second, the court rejected plaintiffs' contention that MSHA could be held liable for all injuries resulting from Aracoma's negligence that might foreseeably have been avoided if MSHA had conducted its inspections non-negligently. The district court noted that West Virginia's general negligence law incorporates public policy considerations, JA 232–33, and that, regardless of foreseeability of risk and even assuming the negligence of MSHA, "overriding public policy concerns," including those stated in the Mine Act itself, counsel "against imposing a legal duty upon the MSHA inspectors." JA 233–34.

Third, the court rejected plaintiffs' contention that MSHA had a "special relationship" with plaintiffs' husbands under West Virginia law that would give rise to an actionable duty for tort damages. The district court noted that the special relationship doctrine is limited and generally involves very close economic or professional relationships. JA 235–39. Because MSHA's relationship with the miners bore no resemblance to those recognized in West Virginia cases, the district court held that a West Virginia court would not find a "special relationship" here. JA 239.

The district court therefore dismissed plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(1), holding that a West Virginia court would not impose a duty on a private person similarly situated to MSHA in this case, and that plaintiffs' claims

therefore did not fall within the FTCA's waiver of sovereign immunity. JA 241–42.

Plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit. JA 245–47. Following briefing and argument, the Fourth Circuit certified the following question 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. United States, 2012 WL 2899317, at *1 (4th Cir. July 17, 2012).

SUMMARY OF ARGUMENT

Subject to several exceptions, the Federal Tort Claims Act waives the sovereign immunity of the United States to the extent that a private person in similar circumstances would be liable under the law of the state in which the allegedly tortious act or omission occurs. The threshold question in this suit, therefore, is the extent to which a private person gratuitously performing mine safety inspections would be liable for the injuries caused by the negligence of mine operators.

The district court in this case and a prior district court in a different case, *Gunnells v. United States*, 514 F. Supp. 754, 758–59 (S.D.W.Va. 1981) (Staker, J.), concluded that West Virginia, like all other states, does not make a defendant liable for the tortious acts of another merely because he undertakes to prevent such harm and fails to do so. It is not sufficient that the defendant's efforts are allegedly negligent or that the harms he seeks to prevent are foreseeable. In the absence of a

special relationship, liability can only be imposed when the defendant's efforts must expose the plaintiff to new or increased risks. Plaintiffs, however, have argued that this Court imposes liability without regard to the considerations noted in the Restatement. It is sufficient, in their view, that the harm to be prevented is foreseeable and severe. *See* Pet. Br. 2, 11.

The Fourth Circuit has asked this Court to clarify the rule of law applicable in West Virginia. For the reasons set out below and those identified by the district court in this case, we ask that the Court clarify that the liability imposed under West Virginia law in these circumstances is not broader than that described in the Restatement and to return the case to the Fourth Circuit to apply that rule of law in this case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In its order of July 19, 2012, this Court ordered that “this matter be scheduled for oral argument on Wednesday, October 17, 2012.”

ARGUMENT

- I. This Court Should Hold That a Duty to Protect Others Only Arises in Limited Circumstances.**
 - A. The Good Samaritan Principles Set Out in the Restatement Reflect the Broadest Recognized View of Liability for Failure to Prevent Harms Caused by Another.**

The Federal Tort Claims Act makes the United States liable for tort damages only where a private person in like circumstances would be liable to the claimant under the law of the place where the alleged misconduct occurred. 28 U.S.C.

§§ 1346(b), 2674. The statute thus does not create tort liabilities beyond those recognized by state law. Instead, it “serves to convey jurisdiction when the alleged breach of duty is tortious under state law, or when the Government has breached a duty under federal law that is analogous to a duty of care recognized by state law.” *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 969 (4th Cir. 1992) (emphasis omitted); *see also Kerns v. United States*, 585 F.3d 187, 194 (4th Cir. 2009) (“An action under the FTCA may only be maintained if the Government would be liable as an individual under the law of the state where the negligent act occurred.”). It is also not relevant whether state law would impose an actionable duty on state government employees in similar circumstances. *United States v. Olson*, 546 U.S. 43, 46 (2005) (involving a claim of negligent mine inspection). Instead, a plaintiff must allege conduct that would expose a private person in similar circumstances to tort damages.

Accordingly, the relevant threshold question in this litigation is whether and when West Virginia would impose tort liability on a private person who gratuitously performs mine safety inspections in similar circumstances. Because the conduct of federal safety inspectors, including mine inspectors, often has no direct analogy in the conduct of private inspectors, federal courts considering FTCA claims similar to those presented here have looked to the common law principles, recognized by the relevant state courts, that address liability for a defendant’s failure to prevent harms to a plaintiff that are inflicted by a third party.

It is a basic principle of American tort law, common to all jurisdictions, that “the fact that [an] actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.” Restatement (Second) of Torts § 314 (1965). Thus American tort law generally does not recognize a duty to aid others merely because it is foreseeable that harm will otherwise occur. As the Restatement explains, this rule originates in the distinction between “action and inaction” or “‘misfeasance’ and ‘non-feasance.’” *Id.* Liability for “non-feasance,” such as a failure to successfully inspect a mine and aid the miners who work there, “is still largely confined to situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.” *Id.*

Applying these basic principles, American courts have recognized certain limited circumstances in which a person may, through affirmative acts, assume a duty where none would otherwise exist. Restatement §§ 314–324A. The Restatement principles regarding assumed duty, set out at Restatement § 323 and § 324A, are regarded as the most liberal formulation of assumed duty principles, and have been adopted by the vast majority of state courts. *See Myers v. United States*, 17 F.3d 890, 902 (6th Cir. 1994). The principles of assumed duty liability recognized by the Restatement, often referred to as the “good Samaritan” doctrine, provide:

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 [perform] 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.

Restatement § 324A; *see also* Restatement § 323 (establishing same conditions for duties owed towards an individual, as opposed to a third party, for whom one has agreed, gratuitously or otherwise, to render services). These principles are “frequently called the ‘good Samaritan’ doctrine even though the duty may be undertaken gratuitously or for consideration.” *Wilson v. Rebsamen Ins.*, 957 S.W.2d 678, 681 n.2 (Ark. 1997). This Court has routinely looked to the Restatement in determining questions of tort law.³

³ *See, e.g., Robrbaugh v. Wal-Mart Stores*, 212 W. Va. 358, 364, 572 S.E.2d 881, 887 (2002) (describing adoption of the four types of invasion of privacy enumerated in the Restatement (Second) of Torts §§ 652A–652E (1977)); *Bowers v. Wurzburg*, 207 W. Va. 28, 35, 528 S.E.2d 475, 482 (1999) (adopting rules regarding landowner liability in Restatement (Second) of Torts § 379A, 837 (1977)); *Sipple v. Starr*, 205 W. Va. 717, 724, 520 S.E.2d 884, 891 (1999) (adopting rules regarding employer liability for harm done by a contractor in Restatement (Second) of Torts § 411 (1965)); *Huffman v. Appalachian Power Co.*, 187 W. Va. 1, 5, 415 S.E.2d 145, 149 (1991) (adopting rules regarding liability of a possessor of property to trespassers in Restatement (Second) of Torts § 333 (1965)); *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983) (citing Restatement (Second) Torts § 321 (1965)); *Peneschi v. National Steel Corp.*, 170 W. Va. 511, 516, 295 S.E.2d 1, 6 (1982) (adopting the doctrine of strict liability for abnormally dangerous activity as articulated in Restatement (Second) of Torts §§ 519–520 (1976)).

The Restatement also recognizes certain categories of “special relationships” that create a duty to protect a plaintiff from harm caused by others such as the duty assumed by a common carrier to its passengers, an innkeeper to his guests, and a possessor of land to his invitees, and the duty assumed by an individual who voluntarily takes custody of another and therefore deprives him of normal opportunities for protection. Restatement § 314A. Other Restatement provisions, not directly applicable to the analysis here, similarly establish guidelines for the limited circumstances when one owes a duty to protect others, and make clear that these are exceptions to the general rule of American tort law. *See, e.g.*, Restatement §§ 319–320, 324 (describing duties owed by one who has custody of another or takes charge of another); Restatement § 321 (describing duty to act when prior act has created dangerous situation); Restatement § 322 (describing duty owed to aid another harmed by an actor’s conduct).

It is our understanding that the courts of 44 states have adopted or applied the principles in Restatement § 323, § 324A, or both to assumed duty cases.⁴ Many of

⁴ *See Beasley v. MacDonald Eng’g Co.*, 249 So. 2d 844, 847-48 (Ala. 1970) (applying § 324A to duty to conduct safety engineering); *Anderson v. PPCT Mgmt. Sys., Inc.*, 145 P.3d 503, 511 (Alaska 2006) (applying § 323 and § 324A for duty to conduct training program for non-employees with care); *Papastathis v. Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (applying § 324A to duty to conduct inspection); *Wilson v. Rebsamen Ins., Inc.*, 957 S.W.2d 678, 695–96 (Ark. 1997) (applying § 324A to duty to conduct safety inspection); *Artiglio v. Corning, Inc.*, 957 P.2d 1313, 1317 (Cal. 1998) (describing § 324A as “long recognized” to be the law in California and applying § 324A to duty to conduct safety research); *Decaire v. Pub. Serv. Co.*, 479 P.2d 964, 966-67 (Colo. 1971)

(adopting § 324A and applying it to property inspection); *Gazo v. Stamford*, 765 A.2d 505, 510 (Conn. 2001) (adopting § 324A(b) in premises liability case where ice and snow removal service was performed for consideration and in a commercial context and leaving open whether there would be any such duty when service was performed gratuitously); *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (applying § 323 to duty of university to prevent hazing); *Archbishop Coleman F. Carroll High Sch., Inc. v. Maynoldi*, 30 So. 3d 533, 541 (Fla. Dist. Ct. App. 2010) (discussing Florida Supreme Court’s “undertaker’s doctrine” which requires reliance or increase risk of harm for assumption of duty, explaining that it is essentially the same as § 323 and § 324A, and applying it to duty of school to protect students from underage drinking and driving at afterschool party); *Huggins v. Aetna Cas. & Sur. Co.*, 264 S.E.2d 191, 192 (Ga. 1980) (adopting rule § 324A, emphasizing requirement of reliance, and applying to duty of insurance company to conduct property inspection); *Lurgio v. Commonwealth Edison Co.*, 394 Ill. App. 3d 957, 966 (Ill. App. Ct. 2009) (noting that Illinois Supreme Court had adopted § 323 and applying it to duty of power company to inspect downed power line); *Light v. NIPSCO Industries, Inc.*, 747 N.E.2d 73, 76 (Ind. Ct. App. 2001) (noting that Indiana courts have adopted § 324A, emphasizing the need for reasonable reliance to establish a duty, and applying it to a duty of a gas company to connect a gas line); *Thompson v. Bohlken*, 312 N.W.2d 501, 507 (Iowa 1981) (adopting § 324A expressly and applying it to duty of insurance company to conduct workplace safety inspection); *Schmeck v. Shawnee*, 651 P.2d 585, 597 (Kan. 1982) (noting that the principles in § 324A have long been reflected in opinions of the Kansas Supreme Court and applying it to duty of city to prevent traffic lights from failing) *superseded on other grounds by* K.S.A. 75-6101 *et seq.*; *Louisville Gas & Elec. Co. v. Roberson*, 212 S.W.3d 107, 111 (Ky. 2006) (applying § 324A to duty by to maintain street lamps); *Mundy v. Dep’t of Health & Human Res.*, 620 So. 2d 811, 813–14 (La. 1993) (citing § 324A in determining duty of private hospital to prevent criminal conduct on its premises); *Clinical Perfusionists v. St. Paul Fire & Marine Ins. Co.*, 650 A.2d 285, 293 (Md. 1994) (applying § 324A to cases where there has been physical harm and reserving decision on whether such a duty exists for purely economic losses); *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 (Mass. 1983) (applying § 323 to duty of colleges to protect students from criminal conduct); *Ray v. Transamerica Ins. Co.*, 208 N.W.2d 610, 615 (Mich. Ct. App. 1973) (applying § 324A to duty of employer to provide employee with safe workplace); *Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567, 570–71 (Minn. 1979) (applying § 324A to duty of private corporation to extinguish fire); *Hartford Steam Boiler Inspection & Ins. Co. v. Cooper*, 341 So. 2d 665, 668 (Miss. 1977) (applying principles of § 324A, including need for reasonable reliance, to duty to inspect a boiler); *Kraus v. Hy-Vee, Inc.*, 147 S.W.3d 907, 924 (Mo. Ct. App. 2004) (applying § 324A to duty of private defendant to install traffic lights and re-stripe road); *Lokey v.*

Breuner, 243 P.3d 384, 385 (Mont. 2010) (accepting principles of § 323 and § 324A and applying them in context of automobile signaling case); *Simon v. Omaha Public Power Dist.*, 202 N.W.2d 157, 169 (Neb. 1972) (noting that § 324A “affirm[s] the principles we announce here” and applying principles to duty to conduct safety inspection); *Wright v. Schum*, 781 P.2d 1142, 1144 (Nev. 1989) (applying § 324A(b) to duty of landlord to prevent tenant’s pit bull from escaping); *Williams v. O’Brien*, 669 A.2d 810, 813 (N.H. 1995) (citing § 324A in determining whether defendant motorist owed a duty for having signaled at another motorist to pass); *Carvalho v. Toll Bros. & Developers*, 651 A.2d 492, 498 (N.J. Super. Ct. App. Div. 1995) (citing § 324A and stating that “engineer may be subject to liability if its failure to exercise reasonable care under the circumstances increases the risk of harm to a third person”); *Miller v. Rivard*, 585 N.Y.S.2d 523, 527 (App. Div. 1992) (applying § 324A to duty to perform vasectomy); *Mynhardt v. Elon University*, 725 S.E.2d 632 (N.C. Ct. App. 2012) (stating that “the voluntary undertaking theory has been consistently recognized in North Carolina, although it is not always designated as such” and citing § 323); *Patch v. Sebelius*, 349 N.W.2d 637, 642 (N.D. 1984) (applying § 324A to duty of contractor to place warning signs on a roadway); *Douglass v. Salem Cmty. Hosp.*, 794 N.E.2d 107, 122 (Ohio Ct. App. 2003) (applying § 323 to duty of former supervisor in recommending employee to disclose information regarding possible criminal background); *Robinson v. Okla. Nephrology Associates, Inc.*, 154 P.3d 1250, 1255 (Okla. 2007) (noting that Oklahoma has adopted § 323); *Arney v. Baird*, 661 P.2d 1364, 1366 (Or. Ct. App. 1983) (applying § 323 to duty to assist motorist); *Cantwell v. Allegheny Cnty.*, 483 A.2d 1350, 1353 (Pa. 1984) (applying § 324A to duty of crime labs to criminals); *Madison v. Babcock Ctr., Inc.*, 638 S.E.2d 650, 657 (S.C. 2006) (applying § 324A to duty of private treatment center to care for and protect special needs patient); *Kuehl v. Horner Lumber Co.*, 678 N.W.2d 809, 813–14 (S.D. 2004) (“To determine whether a common law duty has been created it is necessary to consider Restatement (Second) of Torts 324A”); *Downs ex rel. Downs v. Bush*, 263 S.W.3d 812, 820 (Tenn. 2008) (applying § 323 to duty to care for seriously intoxicated individual); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837–38 (Tex. 2000) (applying § 324A to voluntary undertaking case involving helicopter crash); *Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068, 1077 (Utah 2002) (adopting § 324A and applying to duty to take care in installing and servicing of x-ray machine); *Kennery v. State*, 38 A.3d 35, 40 (Vt. 2011) (noting that § 324A has been formally adopted by Vermont); *Didato v. Strehler*, 554 S.E.2d 42, 48 (Va. 2001) (applying § 323 to duty of doctor to non-patient); *Folsom v. Burger King*, 958 P.2d 301, 311 (Wash. 1998) (noting that Washington has not explicitly adopted § 324A but then applying Restatement principle that “[i]f a rescuer fails to exercise such care and consequently increases the risk of harm to those he or she is trying to assist, the rescuer may be liable for physical damage caused”); *Am. Mut. Liability Ins. Co. v. St. Paul Fire & Marine*

these cases involve safety or property inspections similar to those at issue in this case, and explicitly require a showing of reliance or some kind of increased risk of harm. *See, e.g., Huggins*, 264 S.E.2d at 192 (applying requirement of reliance to property inspection claim); *Thompson*, 312 N.W.2d at 507 (applying requirements of increase of risk of harm and reliance to safety inspection claim). A small minority of jurisdictions has not formally accepted the Restatement principles; these courts have suggested or explicitly adopted a more restrictive theory of liability.⁵ Plaintiffs have cited to no

Ins. Co., 179 N.W.2d 864, 868 (Wis. 1970) (accepting § 324A); *Rice v. Collins Commc'n, Inc.*, 236 P.3d 1009, 1014 (Wyo. 2010) (noting that Wyoming has adopted § 324A in “Good Samaritan” context).

⁵ For example, in *Blake v. Public Service Co.*, 82 P.3d 960, 967 (N.M. Ct. App. 2003), the Court of Appeals of New Mexico explicitly refused to adopt Restatement § 324A. *Id.* at 967. The court then applied the Restatement principles to a claim by a plaintiff that a utility had failed to light a streetlight, holding that the utility owed no duty as there was no evidence that the utility had caused an “increase in the risk of harm is an increase relative to the risk that would have existed had [the utility] never provided the services in the first place.” *Id.* In *Bowling v. Jack B. Parson Cos.*, 793 P.2d 703, 705 (Idaho 1990), the Idaho Supreme Court declined to adopt § 324A as law in Idaho, and noted that a prior assumption of duty case, *Rawson v. United Steelworkers of America*, 726 P.2d 742 (1986), upon which plaintiffs rely in contending that they meet the requirements of § 323 or § 324A, Pet. Br. 30, 33, turned on the existence of a contract that imposed a duty on the union to conduct inspections. *Id.* at 705–06. *Bowling* left open whether Idaho would, in the absence of a contract, impose any such duty at all, and found none existed in that case. *Id.* at 706. Virginia has ruled similarly with respect to § 324A, though has also accepted § 323. *Baker v. Poolservice Co.*, 636 S.E.2d 360, 365 (Va. 2006) (noting that Virginia has not accepted § 324A, but then applying § 324A and finding that plaintiff had not met the burden); *Didato v. Strehler*, 554 S.E.2d 42, 48 (Va. 2001) (applying § 323).

Rhode Island continues to explicitly apply a more restrictive rule. In *Gushlaw v. Milner*, 42 A.3d 1245 (R.I. 2012), the Rhode Island Supreme Court referred to the principles in § 323 and § 324A as “relaxed,” imposed more stringent requirements for duty to be assumed, and held that a motorist who transports an intoxicated passenger

case that applies a more liberal formulation of the assumed duty rule than the Restatement, and we are aware of none.

The federal courts, in FTCA actions alleging negligence by federal mine inspectors (and other federal safety inspectors), have thus overwhelmingly concluded that common law principles of Good Samaritan liability provide the appropriate private-person analogy in a case of this kind, in which the inspectors are alleged to have negligently failed to prevent injuries caused by mine operators or other entities. *See, e.g., Ayala v. United States*, 49 F.3d 607 (10th Cir. 1995) (holding that Good Samaritan principles provide the appropriate private person analogy in an FTCA action challenging alleged negligence of federal inspectors); *Myers v. United States*, 17 F.3d 890, 892 (6th Cir. 1994) (same); *see also Fla. Auto Auction of Orlando, Inc. v. United States*, 74 F.3d 498, 504 (4th Cir. 1996) (holding that Good Samaritan principles provide the appropriate factual analogue in FTCA actions challenging negligence in the federal inspection of automobile titles).

to the passenger's own car owes no duty to those injured by the passenger. *Id.* at 1259.

Of the jurisdictions cited above as accepting the Restatement in some circumstances, at least two have held aside whether they would be accepted in others. *See Gazo*, 765 A.2d at 510 (adopting § 324A(b) in commercial context and leaving open whether there would be any such duty when service was performed gratuitously); *Clinical Perfusionists*, 650 A.2d at 293 (applying § 324A to cases where there has been physical harm and reserving decision on whether such a duty exists for purely economic losses).

B. The Principles Underlying West Virginia Law on the Duty to Protect Others from Harm Governs this Court's Answer to the Fourth Circuit, and Suggests Adoption of the Restatement.

The district court in this case held that West Virginia law is in accord with the tort principles adopted by other states. A prior district court held, in a similar case, that West Virginia law imposes no general affirmative duty to act on those inspecting mines. *Gunnells v. United States*, 514 F. Supp. 754, 759 (S.D.W.Va. 1981) (Staker, J.).

Plaintiffs, however, have argued that West Virginia imposes liability for failure to detect the mine operator's negligence without regard to whether the inspectors have a special relationship with plaintiffs or whether the inspectors' gratuitous efforts increased their risk of injury or induced reasonable reliance. Plaintiffs argue that, in contrast to other jurisdictions, this Court determines the existence of a tort duty based solely on "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." Pet. Br. 11. They argue that "this Court has never adopted the particular form of tort liability set forth in [Restatement § 324A]" and that the principles in that provision "manifestly compromise[] miner safety" and "directly undermine[] West Virginia's foundational negligence principles." Pet. Br. 2. In plaintiffs' view the "special relationship" doctrine is merely an alternative, independent basis for imposing a duty. Pet. Br. 24–27.

This Court has not explicitly accepted or rejected the assumed duty principles set out in the Restatement, but it has never suggested that West Virginia applies a *broader* rule of liability than that contemplated by the Good Samaritan doctrine.

In a recent memorandum disposition, *Milborn v. West Virginia Department of Agriculture*, No. 11-1130, 2012 WL 3104303 (W. Va. June 22, 2012) (memorandum disposition), this Court rejected an “assumed duty” claim based on Restatement § 323 that urged that the defendant landowner had failed to erect a fence that would have avoided injury to the plaintiff by keeping him off his land. *Id.* at *1. Citing Restatement § 323, the plaintiff argued that the defendant had indicated that it would build the fence and had not done so. *Id.* at *3. This Court noted that its decisions had mentioned Restatement § 323 only “in footnotes in opinions in medical malpractice cases,” but appeared to assume the applicability of Restatement principles in concluding that the plaintiff had nevertheless failed to identify an actionable tort duty. *Id.* at *3.

Although this Court has not made clear whether it would adopt the broad view of liability adopted by the Restatement, its cases have long applied the fundamental principles of Good Samaritan law that one who gratuitously offers assistance may be subject to liability only if his conduct makes matters worse or induces reasonable, detrimental reliance. For example, in *Wingrove v. Home Land Co.*, 120 W. Va. 100, 196 S.E. 563 (1938), the plaintiff had leased a gas station from a land company pursuant to

a lease which placed the responsibility for repairs and maintenance on the operator. Nevertheless, during the term of the lease, the land company voluntarily performed repairs to the gas storage tanks that left a depression in the concrete above the tanks. 120 W. Va. at 102, 196 S.E. at 564–65. The land company indicated it would fix this dangerous condition in the concrete, but did not do so in a timely manner, and plaintiff's decedent was injured as a result of the depression. *Id.* This Court noted that, under the terms of the lease, the land company was not responsible for the repairs or any dangerous condition that existed had they not been completed. *Id.* 120 W. Va. at 104, 196 S.E. at 565. The Court held, nonetheless, that the land company was liable for undertaking the repairs in a negligent fashion because it had affirmatively changed the condition of the premises and had created the dangerous condition itself. *Id.* 120 W. Va. at 105, 196 S.E. at 565 (“We hold that, having voluntarily assumed to repair the filling station and having allowed a condition to be created from which patrons of the station might be injured, through its failure to complete the repairs, the lessor became liable for injuries sustained by persons lawfully on the premises.”). In other words, although the land company had no duty to fix the tanks, it was under a duty not to make the situation worse than it had been previously, and was responsible for injuries caused by the dangerous situation. *See also* JA 227 (district court opinion) (“[*Wingrove*] held that the defendant was responsible for curing the hazardous condition that *it created*. The court reads *Wingrove* to reflect an

analogous principle in the Restatement's Good Samaritan provisions—that is, an individual undertakes a legal duty if he 'affirmatively either made, or caused to be made, a change in the conditions which change created or increased the risk of harm.'" (quoting *Myers v. United States*, 17 F.3d 890, 892 (6th Cir. 1994)).

In other cases, liability for failing to protect a plaintiff has been premised on the type of special relationship described in Restatement § 314A. In these cases, this Court has applied the special relationship doctrine to claims by plaintiffs that a defendant should have affirmatively taken some act to protect the plaintiff from a harm that the defendant did not create. *See, e.g., Glascock v. City Nat'l Bank*, 213 W. Va. 61, 65–66, 576 S.E.2d 540, 544–45 (2002) (holding that a special relationship exists between a lender bank and borrower property owner such that the bank had a duty to affirmatively disclose an unfavorable inspection report to the property owner); *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 400, 549 S.E.2d 266, 273 (2001) (holding that a special relationship exists between design professionals and contractors in construction bids such that the design professional owed a duty to disclose certain information to the contractor). Though this Court has “not delineated a clear, black-letter rule for when a special relationship does or does not exist,” *White v. AAMG Constr. Lending Ctr.*, 226 W. Va. 339, 347, 700 S.E.2d 791, 799 (2010), it has emphasized that reliance is a requirement for a special relationship to exist. In both *Glascock* and *Eastern Steel*, this Court found that a special relationship

existed because it was reasonably foreseeable to the defendants that the borrowers and contractors, respectively, would rely on them. *Glascok*, 213 W. Va. at 65–66, 576 S.E.2d at 544–45; *E. Steel Constructors, Inc.*, 209 W. Va. at 400, 549 S.E.2d at 273.

Further, in *Miller v. Whitworth*, 193 W. Va. 262, 266, 455 S.E.2d 821, 825 (1995), a case particularly relevant to plaintiffs’ claims here, the Court applied the relevant principles of assumed liability doctrine to determine the extent to which a landlord was responsible to its tenant for injuries caused by the criminal activities of a third party. The Court explained that landlords have no special relationship with their tenants under West Virginia law. *Id.* They thus have no general duty to take actions to prevent harm by third parties merely because such harm is foreseeable. Instead, the duty to protect “can only arise when the landlord could reasonably foresee that his own actions or omissions have *unreasonably created or increased the risk of injury* from the intentional criminal activity.” *Id.* (emphasis added); see also *Strahin v. Cleavenger*, 216 W. Va. 175, 184, 603 S.E.2d 197, 206 (2004) (noting that *Miller* applies to premises liability cases in general); *Estate of Hough by & Through LeMaster v. Estate of Hough by & Through Berkeley County Sheriff*, 205 W. Va. 537, 545, 519 S.E.2d 640, 648 (1999) (relying on *Miller* and finding that plaintiff had sufficiently alleged that the defendant had increased the risk of harm or induced reasonable reliance).

Like the plaintiff in *Miller*, plaintiffs here base their claim on a duty to prevent the criminal conduct of a third party—in this case, the mine operator. As in *Miller*,

the plaintiffs here must demonstrate either the existence of a special relationship or that the mine inspectors' alleged omissions made the risk of injury from Aracoma's criminal conduct greater than would have been the case if the federal government did not gratuitously perform mine inspections.

Plaintiffs fail to come to grips with the holdings of these cases, and identify no case that imposes a tort duty to protect another from a foreseeable harm without a finding of a special relationship, a creation of the risk of harm itself by the defendant, reasonable reliance by the plaintiff on the defendant, or a similar pre-condition for duty. They rely instead on the general proposition that “[t]he ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised.” *Aikens v. Debow*, 208 W. Va. 486, 491, 541 S.E.2d 576, 581 (2000) (quoting *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988)); see Pet. Br. 11–17.

The decisions on which plaintiffs rely do not address circumstances such as those presented here, in which a plaintiff's injury resulted from the negligent or criminal conduct of a third party. Instead, they address liability for harms caused by acts of commission. As applied to acts of commission, the “foreseeability” standard reflects the “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 503, 541 S.E.2d at 593 (Starcher, J., concurring) (quoting *Blaine v. Chesapeake & O.R.R. Co.*, 9 W. Va. 252 (1876)) (emphasis added). As the Court explained in *Aikens*, “[t]he

obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct[.]” *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581 (quoting 2 F. Harper & F. James, *The Law of Torts* § 18.2 (1956)) (emphasis added).

Robertson v. LeMaster, 171 W. Va. 607, 301 S.E.2d 563 (1983), also relied on by plaintiffs, Pet. Br. 21–22, illustrates the circumstances in which liability can result from an affirmative act that foreseeably increased the risks to third parties. In *Robertson*, the defendant employer required its employee to work for 27 consecutive hours and then took him to his car so he could drive 50 miles to his home. *Id.* 171 W. Va. at 608–09, 301 S.E.2d at 564–65. The employee fell asleep at the wheel while driving home and struck the plaintiffs’ car. *Id.* This Court explained that the issue presented was “whether the [employer’s] conduct prior to the accident created a foreseeable risk of harm.” *Id.* The Court noted that “[i]t is well established that one who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.” *Id.* 171 W. Va. at 611, 301 S.E.2d at 567 (citing Restatement (Second) Torts § 321 (1965)). Thus, the issue raised in the case was not whether the employer had a general duty to protect the plaintiff from foreseeable harms caused by the employee—it plainly did not. Instead, the issue raised was whether “requiring LeMaster to work over 27 hours and then setting him

loose upon the highway without providing alternate transportation or rest facilities to its exhausted employee created an unreasonable risk of harm to others that was foreseeable.” *Id.*

Robertson reflects this Court’s acceptance of the Restatement principle that there is no general duty to prevent harm caused by others; instead, to be liable for harm caused by others, one must have either created or increased the risk of harm. Similarly, none of the other cases on which plaintiffs rely, Pet. Br. 20–22, involves a defendant’s failure to protect the plaintiff from the negligence of a third party. *See, e.g., Aikens*, 208 W. Va. at 489, 541 S.E.2d at 579 (involving plaintiff business owner who lost revenues when a highway overpass, which provided access to plaintiff’s restaurant, was closed for 19 days for repairs after being damaged by defendant’s truck); *Sewell*, 179 W. Va. at 586, 371 S.E.2d at 83 (involving suit by home buyer against builder for negligent construction after home was damaged in a flood). Instead, most of these cases involve the distinct problem in tort law of ascertaining the extent to which a defendant is liable for the the remote consequences of negligent *action*. *See* 57A Am. Jur. 2d Negligence § 88 (“[T]he law imposes upon every person who undertakes the performance of an act which, it is apparent, if not done carefully will be dangerous to other persons or the property of other persons the duty to exercise his or her senses and intelligence to avoid injury.”); *see also Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928). In contrast, the Good Samaritan or “assumed

duty” doctrines address the circumstances presented here, in which plaintiffs’ harm was indisputably caused by the mine operator’s negligence and where the allegation is simply that the United States should have detected and prevented that negligence in enforcing federal law. *See generally* 57A Am. Jur. 2d Negligence §§ 104–105, 109.

C. The Principles of Assumed Duty Liability Recognized in this Court’s Decisions and the Restatement Reflect Policy Considerations Underlying American Tort Law.

The principles reflected in this Court’s decisions and in the Restatement reflect a balancing of policy considerations that do not need to be reassessed on a case by case basis. In any event, plaintiffs’ attempted reliance of policy concerns is seriously misplaced.

The Restatement rules are supported by two principal policy determinations. First, the fundamental premise of American tort law is that a person generally has no duty to protect others from foreseeable harm caused by third parties absent a special relationship. Second, as the name of the “Good Samaritan” doctrine suggests, the Restatement principles encourage socially beneficial activity. A bystander attempting to provide aid to a stranger is not liable for providing that aid negligently unless his intervention makes matters worse. Under plaintiffs’ rule, few would be willing or able to offer assistance gratuitously.

Plaintiffs’ public policy argument is thus directly at odds with the longstanding principles that underlie the Good Samaritan and assumed duty doctrines. Plaintiffs

may believe that these considerations have no application here because the defendant is the United States rather than a private inspector volunteering his services. But the Federal Tort Claims Act requires the federal courts to apply the law that a state would apply to a private person in similar circumstances. Plaintiffs cannot ask this Court to disregard the policy considerations that apply to private parties under the Good Samaritan and assumed duty doctrines.

Moreover, although plaintiffs' misunderstanding of the federal scheme is not directly relevant to the question of West Virginia law certified to this Court, that misunderstanding permeates their policy discussion. As plaintiffs note, the safety of miners is an important policy concern both of West Virginia, *see Consolidation Coal Co. v. Lay*, 177 W. Va. 526, 527–28, 354 S.E.2d 820, 821–22 (1987), and the United States, *see* 30 U.S.C. § 801. The federal regime of safety inspections explicitly makes the mine operators—not the mine inspectors—responsible for the safety of their mines. 30 U.S.C. § 801(e). West Virginia law also states that the coal operator has primary responsibility to prevent injuries and deaths resulting from dangers in the mine. W. Va. Code, 22A-2-25(c) (1985); *United Mine Workers of America, et al v. Kenneth Faerber, Commissioner of the West Virginia Department of Energy, et al.*, 365 S.E.2d 345, 347 (1986)

The policy arguments urged by plaintiffs parallel those rejected by the United States Court of Appeals for the Tenth Circuit in *Ayala v. United States*, 49 F.3d 607 (10th Cir. 1995), in which the plaintiffs alleged that MSHA had provided negligent

technical assistance to the mine operator that allegedly contributed to the deaths of 15 miners. *Id.* at 609–10. The Tenth Circuit emphasized that “mine operators retain the primary responsibility for safety in their mines,” *id.* at 612 (citing 30 U.S.C. § 801(e)), and that imposing a general duty of care onto MSHA for safety in the nation’s mines would “in effect, shift the responsibility for safety away from operators and onto MSHA,” *id.* The court declared that, “we do not think that MSHA substitutes itself for the mine operator when it provides technical assistance to operators.” *Id.* That holding, and the policy analysis it implicates, applies with full force here. The mine operator retains the duty to ensure that the mine is safe, and, unless a mine inspector affirmatively makes the situation worse than it would have been otherwise, an injured miner’s remedy should be compensation from the mine. An alternative rule of law would render any private inspector fearful of unlimited liability. And while the question certified to this Court is limited to mine inspections, the principle of law would apply with equal force to numerous other private inspections or to any circumstance where an individual provides—or fails to provide—aid to another.

II. Plaintiffs’ Arguments Regarding the Application of Doctrine to This Case Are Not Properly Before the Court and Are, in Any Event, Incorrect.

In responding to the certification from the Fourth Circuit, this Court need not determine whether a mine inspector might ever owe an actionable duty to miners. Nor need this Court apply the law of West Virginia to the circumstances of this case;

that is the responsibility of the federal court. *See Iodice v. United States*, 289 F.3d 270, 275 (4th Cir. 2002) (explaining that task of federal court in FTCA case is to apply state law); *see also Fla. Auto Auction of Orlando, Inc. v. United States*, 74 F.3d 498, 504 (4th Cir. 1996) (applying state Good Samaritan duty rules to inspection of automobile titles); *Ayala v. United States*, 49 F.3d 607 (10th Cir. 1995) (applying state Good Samaritan duty rules to mine inspection claims); *Myers v. United States*, 17 F.3d 890, 892 (6th Cir. 1994) (same); *Howell v. United States*, 932 F.2d 915, 918 (11th Cir. 1991) (applying Good Samaritan duty rules to federal inspection of airplanes).

Plaintiffs themselves accept that it is the responsibility of the Fourth Circuit to apply West Virginia law to the circumstances of this case, noting that “[i]n 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.” Pet. Br. 28 n.3. More accurately, that is the procedure to be followed whatever standard is adopted by this Court.

Although plaintiffs appear to recognize this fact, they argue at some length that an actionable duty would exist in this case under the various rules of law that they propose. *See* Pet. Br. 17–20 (applying proposed foreseeability rule); Pet. Br. 24–27 (applying special relationship analysis); Pet. Br. 27–37 (applying Restatement 324A).

Although these contentions are not properly before the Court, we respond briefly to plaintiffs' case-specific contentions.

A. The United States Owed No Duty of Care under Restatement § 323 or § 324A.

Under the most liberal versions of the assumed duty doctrine, plaintiffs must allege that MSHA (a) increased the risk of harm to the miners beyond what it would have been had MSHA not acted at all; (b) took on a duty owed to the miners by some third person; or (c) induced actual, reasonable reliance by the miners that caused them to forgo other remedies or protections. Restatement § 324A. Plaintiffs' allegations parallel similar claims involving MSHA inspections that the federal Sixth and Tenth Circuits concluded failed to state a violation of an actionable duty. *Ayala*, 49 F.3d at 614; *Myers*, 17 F.3d at 903.

With respect to the first condition, it is common ground that the circumstances that caused the fire and inadequate escape conditions at the Aracoma mine resulted from the conduct and negligence of the mine operator. JA 7–13. Plaintiffs do not claim that MSHA caused these conditions; they assert only that it might have forced the mine operator to remedy its own failures. JA 13–20.

With respect to the second condition, plaintiffs do not claim that MSHA took on any duties owed to the miners by the mine, and no such claim would be tenable. As the Sixth Circuit declared in *Myers*, “Congress intended that the primary duty of ensuring safety would be on the mine owners and the miners. The inspections

performed by MSHA are for the purpose of ensuring that [the mine] and the miners comply with their duties, not for the purpose of relieving them of those duties.” 17 F.3d at 903 (citation omitted).

With respect to the third condition—reasonable reliance—plaintiffs do not allege that MSHA’s actions caused them “to forgo other remedies or precautions against the risk.” *Id.* (quoting Restatement § 324A cmt. e.); *see also Fla. Auto Auction of Orlando, Inc.*, 74 F.3d at 505 (holding that plaintiffs had not demonstrated that they had “genuinely relied” on the actions of customs officials); *Howell*, 932 F.2d at 919 n.5 (holding that a plaintiff must show “physical manifestations of reliance”); *Patentas v. United States*, 687 F.2d 707, 717 (3d Cir. 1982) (finding no reliance where plaintiffs failed to show that Coast Guard’s inspections caused them to forgo other precautions against the risk of explosion). Plaintiffs’ complaint mentions reliance in one paragraph, and offers only the conclusory statement that they relied on MSHA to complete its inspection duties non-negligently. JA 21. This does not suffice to plead actual, detrimental reliance, and neither in their complaint nor in subsequent filings have plaintiffs identified any actions they might have pursued in the absence of MSHA’s inspections.

Further, even if plaintiffs had adequately alleged reliance, that reliance would not be reasonable. Given the ever-changing nature of the mine, the Mine Act explicitly emphasizes that responsibility for safety is on the mine and the miners

themselves, not on MSHA. 30 U.S.C. § 801(e). As the Sixth Circuit has held, “[i]n light of the clear Congressional purpose to ensure that the primary responsibility for safety remains with the mine owners and miners, such reliance—even had it occurred—would have been manifestly unreasonable and unjustified.” *Myers*, 17 F.3d at 904; *see also Pate v. Oakwood Mobile Homes, Inc.*, 734 F.3d 1081, 1084 (11th Cir. 2004) (“The [Occupational Safety and Health] Act places ultimate responsibility on the employer in ensuring compliance with safety regulations, not OSHA. [Plaintiff’s] employers would not be justified in relying on OSHA’s omissions in their failing to abate a known hazard.”); *Ayala v. United States*, 49 F.3d 607, 609–10 (10th Cir. 1995) (holding that justifiable reliance by miners is precluded by 30 U.S.C. § 801(e)); *Raymer v. United States*, 660 F.2d 1136, 1143 (6th Cir. 1981) (same).

This federal statement sets the terms of the relationship between the mine, the miners, and the federal government, and makes clear that the United States is not assuming the duty of safety in the mine. If this Court were to address the application of West Virginia law to the circumstances of this case, it should follow the federal courts that have resolved this issue and hold that the United States did not, in undertaking to provide mine safety inspections, create an actionable tort duty.

B. The United States Did Not Have a Special Relationship with Plaintiffs’ Husbands under West Virginia Law.

Plaintiffs also fail to demonstrate that MSHA had a “special relationship” with their husbands giving rise to a duty under West Virginia law. Pet. Br. 24–27. As

explained above, the “special relationship” doctrine is part of the Restatement’s rules governing special duties to act, and is consistent with the principles in Restatement § 323 and § 324A. West Virginia applies Restatement (Second) of Torts § 314A (1965) on special relationships. *Miller v. Whitworth*, 455 S.E.2d 821, 825 (W. Va. 1995).

MSHA’s relationship with mine operators or miners does not fall within, nor is it similar to, any of the narrow categories recognized by this Court or the Restatement. Beyond the categories of special relationships established by the Restatement, this Court has not extended special relationship status to full classes of defendants. *See White v. AAMG Constr. Lending Ctr.*, 226 W. Va. 339, 347, 700 S.E.2d 791, 799 (2010). Where it has extended special relationship status in limited circumstances, it has required evidence of repeated interactions engendering actual, reasonable, and detrimental reliance to establish a special relationship. *See discussion supra*; *see also Walker v. Meadows*, 206 W. Va. 78, 83–84, 521 S.E.2d 801, 806–07 (1999) (discussing requirement of reliance in context of special relationships under the public duty doctrine); *Wolfe v. Wheeling*, 182 W. Va. 253, 257, 387 S.E.2d 307, 311 (1989) (same). As discussed, plaintiffs’ husbands could not have reasonably relied on MSHA’s inspection and regulatory duties to insure the safety of the mine.

Finally, to the extent plaintiffs’ argument rests on MSHA’s duties under federal law, the existence of federal regulatory duties cannot, however, be the basis for an actionable duty under the FTCA. *See, e.g., Williams v. United States*, 242 F.3d 169, 173

(4th Cir. 2001); *Art Metal—U.S.A., Inc. v. United States*, 753 F.2d 1151, 1157 (D.C. Cir. 1985) (“We begin our analysis with the well-established principle that the violation of a federal statute or regulation by government officials does not of itself create a cause of action under the FTCA.”). As the court observed in *Myers*, this argument “if successful, would provide a means of making the government liable as an insurer for every private party’s violation of a federal regulatory scheme,” by creating a special relationship between every federal regulatory agency and those who are regulated or are beneficiaries of its regulation. *Myers*, 17 F.3d at 901.

C. The United States Did Not Owe a Duty under General Foreseeability and Policy Principles.

Even under plaintiffs’ view of the law—that, in every case, duty must be determined *de novo* by a balancing of foreseeability and policy considerations—the United States would not owe a duty of care here. As explained above, strong considerations of both state and federal policy—embodied in the federal Mine Act and in West Virginia law—counsel against imposing a general duty on mine inspectors, private or government, to the miners in the mines they inspect. *See* discussion *supra*. Such duties should be imposed only in limited circumstances when the terms of the Restatement have been met, and the particular inspectors in question have induced reasonable, actual reliance.

CONCLUSION

For the foregoing reasons, we respectfully ask that this Court clarify that under West Virginia law, consistent with the principles recognized in the Restatement, a defendant is not liable in tort for failing to prevent the harm caused by another unless a special relationship exists between the plaintiff and defendant or the defendant's conduct independently increases or creates the risk of harm. The Court should return this case to the Fourth Circuit for application of those principles.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 5, 2012, I filed the original and ten copies of this brief with this Court. I further certify that a copy of this brief was served by U.S. first class mail on:

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