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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0081

ARACOMA COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC., and
SPARTAN MINING COMPANY, INC.,

Petitioners,

v.

(Circuit Court of Mingo County
Civil Action No. 11-C-316)

MINE SAFETY APPLIANCES COMPANY and
DUSTIN DOTSON and KIMBERLY DOTSON,
individually and as guardian and next friend of
Sierra Dotson, an infant, and Kyle Dotson, an infant,

Respondents.

**AMICUS CURIAE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
IN SUPPORT OF RESPONDENT MINE SAFETY APPLIANCES COMPANY**

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TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT 1

II. UNDISPUTED POINTS OF FACT AND LAW 1

- A. The Employer Mines Do Not Dispute That The Complaint Sufficiently Alleges A Deliberate Intent Cause Of Action 1
- B. The Employer Mines Do Not Dispute Several Key West Virginia Legal Principles Demonstrating That Their Argument Is Faulty 3

III. ARGUMENT 6

- A. The 1983 Amendments to the Act Did Not Eliminate Third-Party Contribution Claims Against Employers 6
- B. The Court Should Not Create an Employer Exception to Accepted Contribution Principles 9
- C. It Would Be Fundamentally Unfair to Eliminate A Third Party's Contribution Claim Against an Employer 14

IV. CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Barnett v. Eagle Helicopters, Inc.,
848 P.2d 419 (Idaho 1993).....13

Bell v. Vecellio & Grogan, Inc.,
197 W. Va. 138, 475 S.E.2d 138 (1996).....8

Board of Education of McDowell County v. Zando, Martin & Milsteadm Inc.,
182 W. Va. 597, 390 S.E.2d 796 (1990)..... passim

Brown v. Genesis Healthcare Corp.,
--- S.E.2d ----, 2011 WL 2611327 (W. Va. 2011).....3

Dunlap v. Friedman's, Inc.,
213 W.Va. 394, 582 S.E.2d 841 (2003).....8

Goodwin v. Hale,
198 W. Va. 554, 482 S.E.2d 171 (1996).....5

Harsh Intern, Inc. v. Monfort Indus., Inc.,
662 N.W.2d 574 (Neb. 2003).....13

Lambertson v. Cincinnati Welding Corp.,
257 N.W.2d 679 (Minn. 1977).....13

Leonard v. Johns-Manville Sales Corp.,
305 S.E.2d 528 (N.C. 1983).....13

Mandolidis v. Elkins Indus., Inc.,
161 W. Va. 695, 246 S.E.2d 907 (1978).....3

Mulder v. Acme-Cleveland Corp.,
290 N.W.2d 276 (Wis. 1980).....12

National Fruit Products Co., Inc. v. Baltimore & Ohio R.R. Co.,
174 W. Va. 759, 329 S.E.2d 125 (1985).....11, 12, 14

Pack v. Van Meter,
177 W. Va. 485, 354 S.E.2d 581 (W. Va. 1986).....15

Sitzes v. Anchor Motor Freight, Inc.,
169 W. Va. 698, 289 S.E.2d 679 (1982).....10

State ex rel. Abraham Linc Corp. v. Bedell,
216 W. Va. 99, 602 S.E.2d 542 (W. Va. 2004) 14

State v. Muntzing,
146 W. Va. 349, 120 S.E.2d 260 (W. Va. 1961) 9

State v. V.E. Whitehurst & Sons, Inc.,
636 So.2d 101 (Fla. Dist. Ct. App. 1994) 13

Sydenstricker v. Unipunch Prods.,
169 W. Va. 440, 288 S.E.2d 511 (1982) ..... passim

Van Dyke v. Columbia Mach., Inc.,
246 F. Supp. 2d 191 (W.D.N.Y. 2003) 13

Witt v. Jackson,
366 P.2d 641 (Cal. 1961) 13

STATUTES

W. Va. Code § 23-4-2 ..... passim

W. Va. Code § 55-7-6 10

W. Va. Senate Bill No. 403 8

30 C.F.R. 70.300 ..... 2, 16

SECONDARY SOURCES

CJS Statutes § 510 8

Larson's Workers' Compensation Law § 103.01 12

Larson's Workers' Compensation Law § 121.03 (2011) 13

INTEREST OF THE PRODUCT LIABILITY COUNCIL

PLAC is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. A list of the corporate membership of PLAC is attached as Exhibit A to this brief.

These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 925 briefs as amicus curiae in both state and federal courts, including this court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

No party to this appeal authored this brief in whole or in part or provided monetary contribution for the drafting of this brief. This brief was drafted and funded by PLAC.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

West Virginia has long held that employers which act with deliberate intent to injure employees have no immunity under the Worker's Compensation Act, because those employers are acting outside the scope of the Act. West Virginia also has a well-established policy to bring all potentially responsible parties into one lawsuit in order to resolve a dispute completely and efficiently. Accordingly, the Court has permitted third-party contribution claims against employers which acted with deliberate intent to injure employees.

The Legislature did not, and could not, overturn the Court's rule by silence – through enacting amendments in 1983 that never mentioned third parties or contribution claims. Strong policy reasons, including maintaining incentives on employers to act responsibly to protect employee safety and preventing unfairness to third parties, justify continuing to allow such third-party contribution claims against employers.

II. UNDISPUTED POINTS OF FACT AND LAW

Based upon the briefing of both the petitioners and the respondents, undisputed points of fact and law compel the conclusion that the Legislature did not eliminate a third party's right to seek contribution from an employer when the employer deliberately injured its employee. In order to assist the Court, PLAC briefly summarizes the facts and law that neither party disputes.

A. The Employer Mines Do Not Dispute That The Complaint Sufficiently Alleges A Deliberate Intent Cause Of Action.

In his Complaint against Mine Safety Appliances Company ("MSA"), Plaintiff Dustin Dotson alleged that MSA's respirators were defective and failed to protect him from exposure to coal dust. Complaint ¶¶ 18-19. Mr. Doston did not sue his employers, Aracoma Coal Company, Inc., Independent Coal Company, Inc., and Spartan Mining Company, Inc. (collectively "the

Employer Mines") for an injury caused by their deliberate intent under the West Virginia Worker's Compensation Act ("the Act").

During discovery, however, MSA learned of the Employer Mines' deliberate misconduct, leading MSA to file a third-party complaint against them. In the Third-Party Complaint, MSA alleges that the Employer Mines' breached their duties to:

- maintain proper respirable dust levels;
- adequately monitor the concentrations and levels of respirable dust;
- properly ventilate the working areas of their mines;
- establish or maintain a written respiratory protection program; and
- adequately train Mr. Dotson on the proper use of a respirator.

Third-Party Complaint ¶¶ 56-60.

MSA also alleged that the Employer Mines "had actual knowledge of the existence of and risks related to some or all of the unsafe working conditions" and "intentionally . . . exposed their employees, including Plaintiff Dustin Dotson, to these unsafe working conditions." *Id.* at ¶¶ 60-61. MSA then alleged that Mr. Dotson's injury was the direct and proximate cause of the unsafe working conditions created by the Employer Mines. *Id.* at ¶ 62.

The Third-Party Complaint explains that the Employer Mines were required to follow ventilation and coal dust safety standards developed by the West Virginia Office of Miners' Heath, Safety, and Training and the federal Mine Safety and Health Administration as well as commonly accepted safety practices for mine operators. *Id.* at ¶ 55. As the federal regulations make clear, respirators are not a substitute for a coal mine operator maintaining appropriate coal dust levels. 30 C.F.R. 70.300. As MSA details in its Third-Party Complaint, the Employer Mines were issued numerous safety violations for improper ventilation conditions and exceeding coal dust levels while Mr. Dotson worked in each mine. *Id.* at ¶¶ 31-36. The Third-Party

Complaint alleges that the Employers Mines' deliberate disregard of safety regulations and standards constitutes "deliberate intent."

For the purposes of this appeal, MSA's allegations must be accepted as true. *See Brown v. Genesis Healthcare Corp.*, --- S.E.2d ----, 2011 WL 2611327 (W. Va. 2011). The Employer Mines have not contested that MSA's allegations are insufficient to allege deliberate intent.

B. The Employer Mines Do Not Dispute Several Key West Virginia Legal Principles Demonstrating That Their Argument Is Faulty.

Prior to 1983, the Act provided an exception to the liability immunity granted to employers. The statute stated:

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

W. Va. Code § 23-4-2 (c).

Since at least 1978, an employee could bring a common law tort action against the employer for damages or for wrongful death where the employer acted with deliberate intent to injury an employee. *See Mandolidis v. Elkins Indus., Inc.,* Syl. Pt. 1, 161 W. Va. 695, 246 S.E.2d 907 (1978). Deliberate intent was defined as an intentional tort or willful, wanton, and reckless misconduct. *Id.*

A few years later, in 1982, this Court held that a deliberate intent claim could be asserted not only by an injured employee, but also as a contribution claim by a third party sued by the injured employee. *See Sydenstricker v. Unipunch Prods.*, 169 W. Va. 440, 452, 288 S.E.2d 511,

519 (1982). In harmony with *Mandolidis*, the Court allowed a third party to assert a common law contribution claim against an employer which acted with deliberate intent.

In reaching this conclusion, the Court relied mainly on three reasons: (1) The language of W. Va. Code §23-4-2(c) was designed to place deliberate intent injury outside of the Act's protections. *See id.* at 451-52, 288 S.E.2d at 518. (2) An employer, which deliberately intended to injure its employee, is not immune from liability for that injury merely because the employee can sue a third party. *See id.* (3) The policy underlying contribution claims in West Virginia is to allow all parties liable to the injured plaintiff to be brought into the case in order to contribute to the verdict. *See id.*

In 1983, the Legislature amended the Act. The Legislature, however, did not amend or alter *any* of the language contained within W. Va. Code §23-4-2(c). Instead, the amendments sought to toughen the definition of "deliberate intent," so that the exception to employer immunity was limited to conduct that was more than willful, wanton, and reckless. The 1983 amendment stated:

> [I]n enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct;

W. Va. Code §23-4-2(d)(1).

The amendments focused on the cause of action and relationship between the employer and the employee, not between the employer and third parties. As the Legislature explained:

> It is declared that enactment of this chapter and the establishment of <u>the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation</u> to be received for injury or death to an employee except as expressly provided in this chapter and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a coemployee;

W. Va. Code, § 23-4-2(d)(1) (emphasis added). The amendments did not address the prevailing law permitting a third party to bring a contribution claim against an employer for deliberate intent.

After the 1983 amendments to the Act, third parties continued to bring contribution claims against employers who had acted with deliberate intent. And, the courts continued to uphold those actions. For example, in *Goodwin v. Hale*, 198 W. Va. 554, 556-557 n.7, 482 S.E.2d 171, 174 n.7 (1996), this Court rejected the argument that the exclusive remedy provisions in the Act barred a third party from bringing a contribution claim:

> [T]he deliberate intent exception contained in W.Va. Code § 23-4-2 (1994) does permit a defendant to bring a third-party action on a contribution theory against the employer of the injured plaintiff. However, the ultimate recovery can only be obtained . . . if the employer was guilty of a "deliberate intention" injury under W. Va. Code § 23-4-2(c)(2)(i) or (ii) (1994). (emphasis added)

The Employers do not address, or even acknowledge, the Court's ruling in *Goodwin* and thus it is undisputed. Of course, this Court's decision in *Sydenstricker* also still stands.

In short, it is undisputed that:

- the MSA has alleged facts sufficient to establish deliberate intent by the Employers;
- the Court has allowed third parties to bring common law contribution claims against an employer for deliberate intent;
- the Legislature did not change the operative language of the Act on which the Court relied in permitting such contribution claims by third parties, nor did the Legislature expressly address the rights of third parties to bring contribution claims; and

- since the Act was amended in 1983, the Court has continued to recognize a third party's right to bring a contribution claim against an employer for deliberate intent.

Based upon these undisputed facts and legal principles alone, the Employer Mines' argument fails.

III. ARGUMENT

This Court should not reverse over 30 years of precedent that allows a third party sued by an employee injured at work to bring a contribution claim against the employer for deliberate intent. First, the 1983 amendments to the Act did not eliminate through silence third-party contribution claims. Second, elimination of these third party contribution claims would create an unjustified exception to the equitable principles surrounding West Virginia's contribution law. Third, eliminating these third-party contribution claims would be fundamentally unfair to third-party product manufacturers which received no benefit of the bargain made between employees and employers through the Act, and would also remove a powerful economic incentive for employers to comply with workplace safety rules and regulations.

A. The 1983 Amendments to the Act Did Not Eliminate Third-Party Contribution Claims Against Employers.

The Employer Mines' assertion that the Legislature, through the 1983 amendments to the Act, eliminated by silence a third party's right to bring a contribution claim against an employer which acted with deliberate intent is faulty for three reasons.[1]

First, the Employer Mines argue that, after the 1983 amendments, the operative language of W. Va. Code § 23-4-2(c) does not provide for contribution claims because it states that "the

[1] PLAC also agrees with the arguments made in Respondents' Brief regarding the 1983 amendments to the Worker's Compensation Act.

employee, the widow, widower, child or dependent of the employee has the privilege" to bring a deliberate intent action against the employer. Because third parties are not listed, the Employer Mines argue that a contribution claim cannot be read into the statute. The Employer Mines, however, fail to mention that this language of the Act was *unchanged* by the 1983 amendments. In 1982, this Court in *Sydenstricker* allowed a common law contribution claim for third parties with this identical statutory language in place. 69 W. Va. at 452, 288 S.E.2d at 519. This language was not a hindrance in 1982 for a third-party contribution claim, and it is still not a hindrance today.

Moreover, the Court, in initially allowing the third-party contribution claim, primarily relied not upon the language of W. Va. Code § 23-4-2(c) cited by the Employer Mines, but rather the later language which states that "[the employee, et al.] shall also have a cause of action against the employer as if this chapter had not been enacted." The Court reasoned that this language was designed to place the deliberate intent injury outside of the immunity granted to employers. *Sydenstricker*, 69 W. Va. at 451-52, 288 S.E.2d at 518. Furthermore, the Court did not permit this contribution claim because of specific statutory language, but instead to fulfill the equitable principles underlying contribution claims. *See id.* The Court recognized the important policy of ensuring that all parties who may be jointly liable to the plaintiff be brought into one case. *See id.* The 1983 amendments to the statute did not alter this policy goal.

Second, the Employer Mines assert that the Legislature silently eliminated third-party contribution claims because the 1983 amendments to the Act added certain language:

> It is declared that enactment of this chapter and <u>the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees</u> regarding the compensation to be received for injury or death to an employee except as expressly provided in this chapter and to establish a system which

> compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a coemployee . . .

W. Va. Code § 23-4-2(d)(1).

But, this new language actually cuts against the Employer Mines' argument. The Legislature states its intention to remove all disputes *between only employees and employers* from the common law tort system. The Legislature, in this amendment, says nothing about eliminating or removing from the common law disputes between employers and third parties for contribution. Third parties are never mentioned. The Employer Mines would have the Court add language not found in the Act. *See Dunlap v. Friedman's, Inc.*, 213 W.Va. 394, 398, 582 S.E.2d 841, 845 (2003) ("[C]ourts may not find ambiguity in statutory language which laymen are readily able to comprehend; nor is it permissible to create an obscurity or uncertainty in a statute by reading in an additional word or words."). The only appropriate conclusion is that the Legislature did not intend to address existing third-party contribution rights, only claims by employees and employers.

Moreover, as the amendments make clear and as this Court has explained, the genesis for the 1983 amendments to the Act was not to eliminate third-party contribution claims, but rather to narrow the standard that an employee must meet to prove deliberate intent. *See Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 142, 475 S.E.2d 138, 142 (1996) (reasoning that the Legislature amended the Act in 1983 due to public pressure that the Court's definition of "deliberate intent" was too easily met). Furthermore, had the Legislature intended to eliminate third-party contribution claims, six senators in 2011 would not have sponsored a bill that would curtail the ability to bring a contribution claim to cases in which the employee first asserts a deliberate intent claim against an employer. *See* 2011 W. Va. Senate Bill No. 403. This bill eventually died in committee.

Third, this Court has long held that the Legislature cannot supersede a judicial ruling through silence. *See State v. Muntzing*, Syl. Pt. 3, 146 W. Va. 349, 120 S.E.2d 260 (W. Va. 1961) ("When a statute has been construed by this Court and it is thereafter reenacted by the legislature in the same or substantially the same terms, there is a presumption that the legislature was familiar with such prior construction and intended the reenacted statute to have effect in accordance with such judicial construction."). The Legislature is well aware that it cannot silently, or even implicitly, eliminate a well-established cause of action, such as a third-party contribution claim. *See* CJS Statutes § 510 (2011) (citing *Muntzing* and stating that "[i]n arriving at the legislative intent, the language of an amendment must be construed in the light of previous decisions by courts of last resort construing the original act since it is presumed that the legislature had that judicial construction in mind when it adopted the amendment").

In sum, the 1983 amendments to the Act in no way eliminated a third party's right to bring a contribution claim against an employer which acted with deliberate intent.

B. <u>The Court Should Not Create an Employer Exception to Accepted Contribution Principles.</u>

This Court has repeatedly stated that the "doctrine of contribution has its roots in equitable principles." *Bd. of Educ. of McDowell County v. Zando, Martin & Milsteadm Inc.*, 182 W. Va. 597, 602, 390 S.E.2d 796, 801 (1990) (citation omitted). This right of contribution "arises from liability for a joint wrong committed by two or more parties against the plaintiff." *Id.* Its fundamental purpose is to "enable all parties who have contributed to the plaintiff's injuries to be brought into one suit." *Id.* at 603, 390 S.E.2d 802. This purpose "furthers one of the primary goals of any system of justice – to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts." *Id.*

The Employer Mines wish to create a special exception to those long-standing equitable principles of contribution claims. In direct conflict with West Virginia precedent, the Employer Mines seek to limit contribution claims to only a common law tort claim or to joint tortfeasors. But, contribution claims are not limited just to claims between joint tortfeasors and are not only applied to common law tort claims. "[T]he right of inchoate contribution is not confined only to cases of joint negligence. Instead, [as this Court has held,] it arises under *any theory of liability* which results in a common obligation to the plaintiff." *See id.* (emphasis added)

Under the Act, an employee is permitted to bring a liability claim against an employer which acts with deliberate intent. W. Va. Code, § 23-4-2(c). A third party is entitled under the long-standing principles of equity to bring a contribution claim on any theory of liability that a plaintiff could have asserted, regardless of whether the plaintiff's underlying liability theory initially sounded in common law tort or in statutory rights. *See Bd. of Educ. of McDowell County*, 182 W. Va. at 602, 390 S.E.2d at 802 (concluding that a defendant may bring a contribution claim based upon an alleged breach of contract committed by a third party against the plaintiff); *see also Sitzes v. Anchor Motor Freight, Inc.*, 169 W. Va. 698, 715, 289 S.E.2d 679, 689 (1982) (recognizing defendant's right to contribution in plaintiff's wrongful death suit filed pursuant to W. Va. Code § 55-7-6). The only requirement is that the third-party's liability claim involve an action committed against the plaintiff that contributed to the plaintiff's injuries. *See Bd. of Educ. of McDowell County*, 182 W. Va. at 603, 390 S.E.2d at 802.

West Virginia, unlike some other states, does not draw any formulaic distinction for the purposes of contribution claims when the employer's obligations are statutory and the third party's obligations are tort-based. The purpose behind contribution claims in West Virginia is the equitable apportionment of a common burden among those who allegedly injured the

plaintiff. *See Bd. of Educ. of McDowell County*, 182 W. Va. at 603, 390 S.E.2d at 802. That common burden for an injury arises regardless of the legal basis for a person's liability. Consequently, West Virginia does not allow a wrongdoer to avoid a contribution claim on such an outmoded, technical argument as the Employer Mines make. Moreover, it would be particularly inequitable to insulate an employer from contribution claims when it acted with deliberate intent and when, as MSA alleges here, the employer is responsible for the lion's share of damages in a civil suit. The Employer Mines would have this Court stand equity on its head.

Next, the Employer Mines mischaracterize the Court's decision in *National Fruit Products Co., Inc. v. Baltimore & Ohio R.R. Co.*, 174 W. Va. 759, 329 S.E.2d 125 (1985). *National Fruit* in no way decided, or even discussed, the viability of *contribution claims* between third parties and employers. *See National Fruit*, 174 W.Va. at 760-64, 329 S.E.2d at 127-29. Rather, that case addressed whether an employer could bring *an indemnification or subrogation cause of action* against a third party to recover paid worker's compensation benefits. *See id.* In *National Fruit*, the Court concluded that a no-fault or negligent employer could not bring an indemnification or subrogation cause of action because (1) the Legislature is in a better position to determine if, as part of the employer's benefit of the bargain in the Act, the employer should be allowed subrogation rights and the Legislature has not provided that right, and (2) a third party cannot be subjected to indemnification claims because it receives no benefit from employer's mandatory payments under the Act. *See id.*

The Court's decision in *National Fruit* is irrelevant to whether a third party can assert contribution claims against an employer for two reasons. First, although the Court in *Sydenstricker* rejected a third party's ability to bring an indemnification cause of action against an employer, it allowed a contribution claim, because contribution claims have different

underlying principles and policy concerns than indemnification causes of action. *See id.* at 764, 329 S.E.2d 130.

Second, the Court in *National Fruit* was not dealing with a case in which the employee or a third party has alleged deliberate intent, which takes the action outside of the immunity and benefit of the bargain provided to employers under the Act. Rather, *National Fruit* dealt with a case where the employer, which was allegedly without fault, simply wanted to re-coup the employee benefits it had paid. *See id.* at 760, 329 S.E.2d at 127. As the Court explained, this type of indemnification claim contradicts the statutory framework for employers, which must pay into the fund regardless of whether they committed any negligent acts. *See id.* at 763, 329 S.E.2d at 130.

Next, the Employer Mines rely upon an ALR article and cases outside of West Virginia to claim that the vast majority of courts have determined that a third party cannot bring a contribution claim against an employer. Because the ALR article did not address "deliberate intent" actions, it is disingenuous to state that the vast majority of courts have concluded that a third party cannot bring a contribution action against an employer for deliberate intent. Few state statutes carve out exceptions to an employer's broad immunity like the West Virginia Act does. Arthur Larson and Lex K. Larson, 6 *Larson's Workers' Compensation Law* § 103.01 at n.5 (2011) (listing fifteen states that have adopted statutory exceptions to the exclusivity of the workers' compensation remedy). And some states that deny contribution rely on the archaic notion, which West Virginia has rejected, that the employer is not jointly liable for the employee's injury because its liability derives from a statute. *See, e.g.*, *Mulder v. Acme-Cleveland Corp.*, 290 N.W.2d 276 (Wis. 1980).

Moreover, the courts, in addressing this complex issue, have found a variety of approaches to deal with whether a third party can sue an employer. *See, e.g.*, Arthur Larson and Lex K. Larson, 7 *Larson's Workers' Compensation Law* § 121.03 (2011) (collecting cases on the various approaches adopted by states). Although some courts have concluded that there is no right to contribution, *see e.g.*, *Harsh Intern, Inc. v. Monfort Indus., Inc.*, 662 N.W.2d 574, 579 (Neb. 2003), others have determined that a third party may pursue a contribution claim against an employer for the amount not to exceed the employer's total worker's compensation liability to the employee, *see e.g.*, *Barnett v. Eagle Helicopters, Inc.*, 848 P.2d 419, 422 (Idaho 1993); *Leonard v. Johns-Manville Sales Corp.*, 305 S.E.2d 528, 535 (N.C. 1983); *Lambertson v. Cincinnati Welding Corp.*, 257 N.W.2d 679, 689 (Minn. 1977); *Witt v. Jackson*, 366 P.2d 641, 650 (Cal. 1961).

Moreover, other courts, like West Virginia, have allowed the third party to bring a contribution action against an employer. *See e.g.*, *Van Dyke v. Columbia Mach., Inc.*, 246 F. Supp. 2d 191, 196 (W.D.N.Y. 2003) (allowing contribution claims when the employee has suffered a "grave injury"); *State v. V.E. Whitehurst & Sons, Inc.*, 636 So.2d 101, 105 (Fla. Dist. Ct. App. 1994) (reasoning that a defendant's contribution action could withstand a motion to dismiss if the third-party complaint alleged facts indicating the employer's "deliberate intent").

In short, looking at the kaleidoscope of divergent approaches in other states is neither helpful nor appropriate. For the past 30 years, this Court has permitted third-party contribution claims against employers which acted with deliberate intent. *See Sydenstricker*, 169 W. Va. at 451-52, 288 S.E.2d at 518. And, West Virginia chose this approach based upon its own long-standing equitable principles underlying the importance of contribution claims. *See Bd. of Educ. of McDowell County*, 182 W. Va. at 603, 390 S.E.2d at 802 (concluding that "the right of

inchoate contribution is not confined only to cases of joint negligence. Instead, it arises under *any theory of liability* which results in a common obligation to the plaintiff." (emphasis added)). The Employer Mines offer no good reason to overturn this long-established rule and policy.

C. It Would Be Fundamentally Unfair to Eliminate A Third Party's Contribution Claim Against an Employer.

To eliminate a third party's ability to bring a contribution claim against an employer which acted with deliberate intent would be fundamentally unfair for four reasons. First, the Act creates an equation that roughly balances the sacrifices by and benefits to both employers and employees, not third parties. *See State ex rel. Abraham Linc Corp. v. Bedell*, 216 W. Va. 99, 103 n.7, 602 S.E.2d 542, 546 n.7 (W. Va. 2004). The philosophy behind the Act "has commonly been described as a *quid pro quo* on both sides: in return for the purchase of insurance against job-related injuries, the employer receives tort immunity; in return for giving up the right to sue the employer, the employee receives swift and sure benefits." *Id.* Noticeably absent from this worker's compensation bargain is any mention of third parties, such as product manufacturers. *See National Fruit*, 174 W.Va. at 762, 329 S.E.2d at 129 ("[T]he third party tort-feasor receives no benefit by the employer's payment under the [Worker's Compensation] Act.").

But, despite this fact, an employee is entitled to bring a cause of action against a third party for workplace injuries. If an employee takes advantage of this right – simply because it may be easier to prove strict liability than deliberate intent – it would be fundamentally unfair to limit a third party's ability to bring a contribution claim against an employer, which may be mostly responsible for the injury.[2] The Legislature did not include third party interests as a

[2] It is not known why Mr. Dotson did not bring a deliberate intent claim. But one can easily think of circumstances where an employee might be intimidated about bringing such a claim against his employer, his attorney did not thoroughly investigate the possibility of such a claim, or the passage of time might make such facts

variable when formulating the state's worker's compensation scheme. *See* W. Va. Code §23-4-2(d)(1). As a result, third parties, unlike employers, receive no benefits in exchange for the purported sacrifice of their claims against employers.[3]

Second, it is further unfair to prohibit a third party from bringing a contribution claim against an employer which has acted with deliberate intent. When an employer acts with deliberate intent, it forfeits any protections or immunities that it received from the *quid pro quo* bargain of the Act. *See Sydenstricker*, 169 W. Va. at 451-52, 288 S.E.2d at 518 (reasoning that the language of W. Va. Code §23-4-2(c) was designed to place deliberate intent injury outside of the protections of the Act). As a result, such an employer is cast into the tort law arena like any other tortfeasor. The old saying that "money talks" has particular force here; the financial consequences to an employer which decided to disregard safety rules and to jeopardize employee safety should not be silenced.

Third, eliminating a third party's right to contribution when the employer acted with deliberate intent would remove a strong economic incentive for an employer to abide by workplace safety rules and standards. An employer has a central role for preventing many workplace product-related injuries. Safety-conscious employers select safe workplace products, determine and implement the sorts of safety guards or other protective devices that are necessary to place on the product, train and supervise employees, maintain equipment, and communicate

(continued...)

difficult to find in the case of a latent injury. Regardless of the reason, a third party should not be prohibited from investigating and bringing such a claim.

[3] This is particularly true in light of the fact that a third party is not allowed a set-off from any verdict of the amount of the worker compensation benefits received, even when the employer may have acted with deliberate intent. *See, e.g.*, *Pack v. Van Meter*, 177 W. Va. 485, 488, 354 S.E.2d 581, 584 (W. Va. 1986) ("[T]he amount of workers' compensation benefits should not have been injected into this case nor offset from the jury's verdict . . . .").

warnings and instructions. In short, it is important to keep some economic disincentives on employers when they consider whether to take safety shortcuts and ignore the rules.

Finally, the Court should not overlook the unfairness to the third parties. If they can prove that an employer acted with deliberate intent, then the employer is entirely or almost entirely responsible for the employee's injury in comparison to a third-party. For example, a manufacturer can be strictly liable for a defective product judged not to have adequate warnings. Acting with deliberate intent, an employer, however, may decide not to provide its employees with any warnings or instructions needed to use the product safely, or the employer may tell the employee to ignore the warnings or instructions because following them would slow down production. The employee is then injured by the product because the employee listened to his employer and did not follow the necessary warnings or instructions. If the manufacturer cannot bring a contribution claim when the employer has acted with such deliberate intent, the manufacturer, under joint and several liability, may be forced to pay a large damages award, even if its fault compared to the employer's conduct is quite small or non-existent. That is both unfair and contrary to West Virginia policy. *See Bd. of Educ. of McDowell County*, 182 W. Va. at 603, 390 S.E.2d at 802 (reasoning that contribution claims further "one of the primary goals of any system of justice – to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts").

This is especially true for manufacturers of respirators, like MSA. As the federal regulations make clear, the mine operator has a non-delegable duty to ensure that coal dust levels within their mines meet the federal regulations. *See* 30 C.F.R. 70.300. Respirators, like the ones made by MSA, are not to be used as substitutes for a mine operator's failure to abide by safety standards. *See id.* Respirators provide supplemental protection; safe, ventilation and coal dust

levels are the primary means for safeguarding employee health. As a result, it would be fundamentally unfair for a respirator manufacturer, like MSA, to be forbidden from bringing a contribution claim against a mine operator which chose to violate state and federal regulations and to expose its employees to harmful coal dust levels.

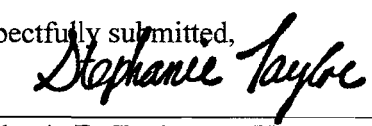
In sum, the gross unfairness that would befall a third party, which was not part of the *quid pro quo* calculus of the Act, dictates, too, that the Court should reaffirm its long-standing conclusion that a third party can bring contribution claims against an employer which acted with deliberate intent.

IV. CONCLUSION

For the foregoing reasons, the Product Liability Advisory Council, Inc. respectfully requests this Court to uphold its long-standing precedent that a third party can bring a contribution claim against an employer which acted with deliberate intent.

Dated: February 21, 2012

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0081

ARACOMA COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC., and
SPARTAN MINING COMPANY, INC.,

Petitioners,

v.

(Circuit Court of Mingo County
Civil Action No. 11-C-316)

MINE SAFETY APPLIANCES COMPANY and
DUSTIN DOTSON and KIMBERLY DOTSON,
individually and as guardian and next friend of
Sierra Dotson, an infant, and Kyle Dotson, an infant,

Respondents.

CERTIFICATE OF SERVICE

I, Stephanie D. Taylor, do hereby certify that I have served the foregoing Amicus Curiae Brief of the Product Liability Advisory Council, Inc., by UPS Overnight Mail, this 21st day of February, 2012:

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EXHIBIT A

Corporate Members of the Product Liability Advisory Council

as of 2/15/2012

Total: 100

3M
Altec, Inc.
Altria Client Services Inc.
Astec Industries
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
BP America Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler Group LLC
Cirrus Design Corporation
CLAAS of America Inc.
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
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Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.
Engineered Controls International, LLC
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
FMC Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.

Corporate Members of the Product Liability Advisory Council

as of 2/15/2012

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PACCAR Inc.

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Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

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Schindler Elevator Corporation

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Shell Oil Company

The Sherwin-Williams Company

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St. Jude Medical, Inc.

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Thor Industries, Inc.

TK Holdings Inc.

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Vermeer Manufacturing Company

The Viking Corporation

Volkswagen Group of America, Inc.

Volvo Cars of North America, Inc.

Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.