

12-0081

IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

DUSTIN DOTSON, and
KIMBERLY DOTSON, individually
and as guardian and next friend of
SIERRA DOTSON, an infant, and
KYLIE DOTSON, an infant,

ADMITTED TO RECORD
OCT 09 9 AM 11 40
MINGO COUNTY
CIRCUIT CLERK

Plaintiffs,

v.

Civil Action No. 11-C-316
(Judge Robert Chafin)

MINE SAFETY APPLIANCES COMPANY,
PERSINGER SUPPLY COMPANY,
RALEIGH MINE AND INDUSTRIAL SUPPLY, INC.,
AND EASTERN STATES MINE SUPPLY CO.

Defendants.

AND

MINE SAFETY APPLIANCES COMPANY,

Third-Party Plaintiff,

v.

ARACOMA COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
SPARTAN MINING COMPANY, INC.,
MASSEY ENERGY COMPANY,
A.T. MASSEY COAL COMPANY, INC.,
DON L. BLANKENSHIP, ALPHA NATURAL
RESOURCES, SERVICES LLC, ALPHA NATURAL
RESOURCES, INC., JOY MANUFACTURING
COMPANY, and JOY TECHNOLOGIES, INC.

Third-Party Defendants.

ORDER CERTIFYING QUESTIONS OF LAW TO THE SUPREME COURT OF
APPEALS OF WEST VIRGINIA

On a previous day, came the Defendant/Third-Party Plaintiff, Mine Safety Appliances Company ("MSA"), by and through its counsel, J.H. Mahaney and J. David Bolen, and Third-Party Defendant, Aracoma Coal Company, Inc., Independence Coal Company, and Spartan Mining Company, Inc., (Employer Defendants) by and through their counsel, Jon L. Anderson,

for a hearing on the Employer Defendants' Motion to Dismiss MSA's Third Party-Complaint in the above-styled civil action. The Court, upon review of the filings by MSA and the Employer Defendants, the hearing of oral argument by counsel, and being otherwise sufficiently advised, denied the Employer Defendants' Motion to Dismiss. *See Order Denying Aracoma Coal Company, Inc., Independence Coal Company, Inc., and Spartan Mining Company, Inc.'s Motion to Dismiss Third-party Complaint of Mine Safety Appliances Company*, previously entered by this Court and incorporated herein by reference.

Specifically, the Employer Defendants moved for dismissal arguing, in part, that due to certain changes to the West Virginia Workers Compensation Act in 1983, MSA is prohibited from seeking contribution, under a deliberate intent theory, against the former employers of the Plaintiff. *See* W. Va. Code § 23-4-2, *et seq.* MSA disputed the Employer Defendants' interpretation of West Virginia law and asserted that a third-party, such as MSA, has a right to bring a contribution claim against a plaintiff's employer for deliberate intent conduct and that the West Virginia legislature did not amend the Workers Compensation statute to preclude third-party deliberate intent claims. The Court found that the Employer Defendants' position is inconsistent with West Virginia law as it has been the law of the State of West Virginia since 1982 that a defendant may bring a contribution claim based upon on a deliberate intent theory against the employer of an injured plaintiff. *See Sydenstricker v. Unipunch Products*, 169 W. Va. 440, 452, 288 S.E.2d 511, 519 (1982). *See also, Goodwin v. Hale*, 482 S.E.2d 171 (W. Va. 1996); *Kirkhart v. PPG Indus.*, 2006 U.S. Dist. LEXIS 89974, *26-27 (N.D.W.Va.2006) (December 12, 2006) (unpublished), and *West v. American Electric Power Company, Inc.*, 2010 U.S. Dist. LEXIS 105932 (S.D. W. Va. Oct. 4, 2010).

Following such denial, counsel for the Employer Defendants orally requested that the Court certify the issues raised in their Motion to Dismiss to the Supreme Court of Appeals of West Virginia for further clarification. The Court upon review of the pleadings of the parties as well as the arguments of counsel believes that the question presented by the Employer Defendants in their Motion to Dismiss is appropriate for certification. Specifically, the Court notes that Section 58-5-2 of the West Virginia Code provides as follows:

Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the supreme court of appeals.

W.Va. Code § 58-5-2 (2007).

The Court finds that the issues presented by the Employer Defendants are novel in that the Supreme Court of Appeals has not issued any decisions directly addressing the viability of third-party deliberate intent claims following the 1983 amendments to the Workers' Compensation Act. In addition, without certification, the only mechanism available to the Employer Defendants to obtain appellate review on these issues is to allow this matter to proceed to verdict. Further, the Court notes that issues presented herein are central to this case and demonstrate pure issues of law. Accordingly the Court certifies the following questions:

Certified Question 1: Did the West Virginia Legislature intend by enacting the 1983 amendments to W. Va. Code § 23-4-2, eliminate third-party deliberate intent actions for contribution?

Answer: No.

Certified Question 2: Does a third-party, such as MSA, have a right to bring a contribution claim against a plaintiff's employer for deliberate intent conduct?

Answer: Yes

The Court also notes that the Plaintiffs, by their counsel, object to any stay of this matter pending the resolution of the certified questions due to the medical condition of the Plaintiff, Dustin Dotson. The Court is sympathetic to the Plaintiffs' desire to move this matter along in the most efficient manner possible and to keep the current trial date, due to the potential health problems of the Plaintiff, to the extent possible. The Court is mindful of West Virginia's public policy regarding trial dates and the need to ensure that the plaintiff is available for trial. Allowing discovery to continue between the parties will not unduly burden or prejudice any party to this matter. Accordingly the Court ^{→ finds that exigent circumstances exist and therefore} denies any stay in this matter and directs the parties to continue with discovery and trial preparation while the certified questions are pending.

The respective objections of the parties are hereby noted and preserved.

The Clerk is directed to send a copy of this Order to all counsel of record, addressed as follows:

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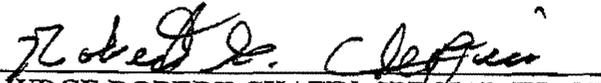
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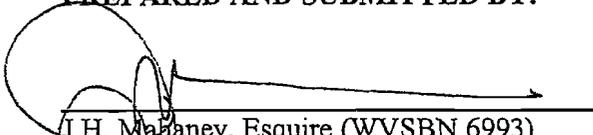
ENTER: this the 9th day of December 2011.


JUDGE ROBERT CHAFIN, SPECIAL JUDGE

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CIRCUIT CLERK, MINGO COUNTY, W.VA.

PREPARED AND SUBMITTED BY:


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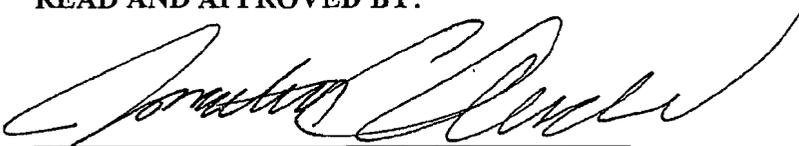
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