

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0081

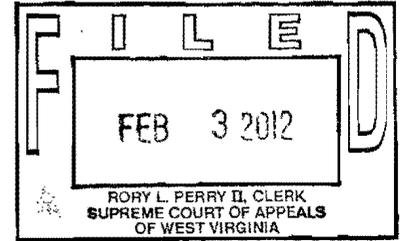
ARACOMA COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC., and
SPARTAN MINING COMPANY, INC.,

Petitioners,

v.

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.



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

**BRIEF OF PETITIONERS ARACOMA COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC., AND SPARTAN MINING COMPANY, INC.**

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ASSIGNMENTS OF ERROR

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

The lower court erred in answering “No” to this question. Following the 1983 amendments to Section 23-4-2 of the West Virginia Code, a deliberate intent action between an employee and his or her employer is no longer a common law tort. Instead, it is a purely statutory cause of action within the Workers’ Compensation Act. As a result, an employer can no longer have joint tort liability with a third-party tortfeasor giving rise to a claim for common law contribution against the employer. Moreover, the Workers’ Compensation Act contains no express provisions permitting a third-party tortfeasor to assert a statutory deliberate intent cause of action seeking contribution from a plaintiff’s employer, and no such cause of action can be implied.

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?

For the same reasons set forth above, the lower court erred in answering “Yes” to this question.

STATEMENT OF THE CASE

The plaintiff below, Dustin Dotson, worked as a coal miner from 1988 to 2011. [A0014]. During a portion of this time, Mr. Dotson was employed by petitioners Aracoma Coal Company, Inc., Independence Coal Company, Inc., and Spartan Mining Company, Inc. (collectively “Petitioners). [*Id.*].

During his coal mine employment, Mr. Dotson utilized respirators manufactured by respondent Mine Safety Appliances Company (“MSA”) for protection against respirable dust. [A0012-17]. Mr. Dotson alleges, however, that MSA’s respirators contained hidden defects that allowed submicron dust particles to leak into his breathing zone. [*Id.*]. As a result, on May 23, 2011, Mr. Dotson filed a Complaint against MSA in the Circuit Court of Mingo County, West Virginia. [A0012]. Mr. Dotson asserted causes of action for strict products liability and negligence. [A0012-17].

On July 20, 2011, pursuant to Rule 14 of the West Virginia Rules of Civil Procedure, MSA filed a Third-Party Complaint against several parties, including Petitioners. [A0036]. Count I of the Third-Party Complaint, titled “W. VA. CODE § 23-4-2 DELIBERATE INTENT CONTRIBUTION,” asserted a statutory deliberate intent cause of action against Petitioners and sought contribution for any amounts that Mr. Dotson may recover against MSA on his tort claims. [A0050-55].

On September 1, 2011, Petitioners filed a motion to dismiss the Third-Party Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, arguing that following the 1983 amendments to Section 23-4-2 of the Code, they were immune from MSA’s contribution claim. [A0073-86]. On November 23, 2011, the lower court denied Petitioners’ motion to dismiss. [A0138].

On December 9, 2011, the lower court certified to this Court two questions concerning whether, following the 1983 amendments to Section 23-4-2, an alleged third-party tortfeasor such as MSA may still seek contribution from a plaintiff's employers such as Petitioners. [A0174].

SUMMARY OF ARGUMENT

The two certified questions are interrelated and pertain to the same issue: following the 1983 amendments to Section 23-4-2 of the West Virginia Code, may a third-party tortfeasor implead the plaintiff's employer and assert a deliberate intent cause of action for contribution? The clear answer is no.

Prior to 1983, a deliberate intent cause of action was a common law tort. As a result, in *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982), the Court held that because the Workers' Compensation Act contained an express exception to employer immunity in the common law tort area, a third-party tortfeasor could implead an employer seeking contribution for deliberate intent conduct:

Where the Workmen's Compensation Act provides an express exception from immunity against suits by an employee in a tort area, it follows that a suit grounded on this exception would enable a third party to maintain an action in contribution.

Id. at syl. pt. 7. However, in 1983, the Legislature made sweeping amendments to Section 23-4-2 of the Code that removed deliberate intention from the common law and replaced it with a direct statutory cause of action between an employee and his or her employer:

W. Va. Code § 23-4-2(c) (1991) represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the workers' compensation system.

Bell v. Vecellio & Grogan, Inc., 197 W. Va. 138, 475 S.E.2d 138 (1996). Because there is no longer any common law tort exception to the employer immunity provided by the Workers' Compensation Act and an employer's liability is solely statutory, an employer cannot have joint tort liability with a third-party giving rise to a right of contribution. As a result, as the vast majority of courts have held, employers are immune from contribution actions by third-party tortfeasors.

Moreover, the Workers' Compensation Act provides no express or implied rights of contribution in favor of third-party tortfeasors. The Legislature has been very clear that the workers' compensation immunity provided in Section 23-2-6 may only be lost "as expressly provided in this chapter." W. Va. Code § 23-4-2(d)(1). The Workers' Compensation Act contains no provisions expressly providing for contribution in favor of third-party tortfeasors and, in accordance with Legislature's clear instructions, no right or cause of action can be implied. *See Bias v. Eastern Assoc. Coal Corp.*, 220 W. Va. 190, 196, 640 S.E.2d 540, 546 (2006) ("Our Legislature has thus instructed the Court that we are not to read into the immunity provision of W. Va. Code § 23-2-6 an exception not 'expressly provided [by the legislature] in this chapter.'").

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents a legal issue of first impression. The issue is also one of fundamental public importance as it concerns ensuring employers receive the proper scope of immunity provided to them by the Workers' Compensation Act. Accordingly, Petitioners would submit that Rule 20 oral argument is appropriate and should be set in accordance with the Court's prior determination that this matter be expedited.

ARGUMENT

This matter arises out of two certified questions from the Circuit Court of Mingo County. “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

I. FOLLOWING THE 1983 AMENDMENTS TO SECTION 23-4-2, AN EMPLOYER IS IMMUNE FROM CONTRIBUTION CLAIMS BY THIRD-PARTY TORTFEASORS.¹

A. Pre-1983: *Mandolidis, Sydenstricker*, and the Common Law Concept of Deliberate Intention.

The Workers' Compensation Act has long provided employers immunity from common law liability arising out of the work-related injury or death of an employee:

Any employer subject to this chapter who subscribes and pays into the workers' compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default in the payment of the premiums or direct payments and has complied fully with all other provisions of this chapter.

W. Va. Code § 23-2-6 (2003) (emphasis added). Other than the non-payment of workers' compensation premiums, the only exception to the general immunity provided under Section 23-2-6 was a deliberate intent cause of action pursuant to Section 23-4-2 of the Code.

From the early 1900s to 1983, Section 23-4-2 remained largely unchanged and did not exist in the form we know it today. The only language in the statute was as follows:

¹ As an initial matter, it is important to point out that the issue presented here involves claims of common law contribution by third-party tortfeasors. This case does not involve any claim of express contractual indemnification. Petitioners are in no way contending that if an employer contractually agreed to indemnify a third-party for any tort claims arising out of an employee's injury, such an employer would still have immunity. To the contrary, most courts hold that employers waive their immunity by entering into such express indemnity agreements.

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

W. Va. Code § 23-4-2 (1969). During this time, a deliberate intent action was not a statutory cause of action, but was considered a common law tort action outside of the Workers' Compensation Act. In *Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978), the Court held as follows:

Under W. Va. § 23-4-2 an employer is subject to a common law tort action for damages or for wrongful death where such employer commits an intentional tort or engages in wilful, wanton, and reckless misconduct

Id. at syl. pt. 1 (emphasis added).

In *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982), the issue arose as to whether a third party could pursue a common law claim for contribution from a plaintiff's employer under Section 23-4-2. The Court first recognized that where the right of contribution was ground in common tort liability, the employer's workers' compensation immunity barred such third-party contribution suits:

Where the right of contribution is initially grounded in common liability in tort, courts have held that a joint tortfeasor employer is immune from a third-party contribution suit because he is initially immune from tort liability to his injured employee by virtue of the workmen's compensation statutory bar of such tort actions.

Id. at syl. pt. 6. The Court next recognized, however, that if the Workers' Compensation Act provided a common law tort exception to the employer's immunity, a third-party tortfeasor could pursue a claim for contribution against the plaintiff's employer:

Where the Workmen's Compensation Act provides an express exception from immunity against suits by an employee in a tort

area, it follows that a suit grounded on this exception would enable a third party to maintain an action in contribution.

Id. at syl. pt. 7 (emphasis added). Because a deliberate intent action was considered a common law tort exception to workers' compensation immunity, it was held that "[t]he deliberate intent exception contained in [Section 23-4-2] permits a defendant to bring a third-party action in contribution against the employer of the injured plaintiff." *Id.* at syl. pt. 8.

Importantly, in its holding in *Sydenstricker*, the Court focused on the fact that a deliberate intent action was considered a common law tort outside of the Workers' Compensation Act:

We hold this because the underlying tort on which the third party seeks contribution is one not barred by our Workmen's Compensation Act.

This statutory language is designed to place the deliberate intent injury outside the protection of the Workmen's Compensation Act. It thereby permits the employer to be exposed to a claim of contribution on this tort theory.

Id. at 451-52, 288 S.E.2d at 518 (emphasis added).

B. The 1983 Amendments: Deliberate Intention Is No Longer a Common Law Tort, But a Statutory Cause of Action Within the Workers' Compensation Act.

In 1983, aware of the decisions in *Mandolidis* and *Sydenstricker*, the Legislature made significant amendments Section 23-4-2. The Legislature declared its express intent that deliberate intent actions were to be removed from the common law tort system and that the workers' compensation immunity provided to employers was only to be lost in those instances expressly set forth in the Act:

It is declared that enactment of this chapter and 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 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; that the immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the intent of the Legislature in providing immunity from common lawsuit was and is to protect those immunized from litigation outside the workers' compensation system except as expressly provided in this chapter; that, in 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; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

W. Va. Code § 23-4-2(d)(1) (2005) (emphasis added). It has been repeatedly recognized that the 1983 amendments were sweeping and effectively rewrote the law applicable to deliberate intention. *See, e.g., Bias v. Eastern Assoc. Coal Corp.*, 220 W. Va. 190, 196, 640 S.E.2d 540, 546 (2006) (“In 1983, the Legislature made perfectly clear its intent that the employer immunity provided by W. Va. Code § 23-2-6 was sweeping when it enacted what is now W. Va. Code § 23-4-2(d)(1) and (2).”)²

The language of the 1983 amendments to Section 23-4-2 made clear that the common law concept of deliberate intention was no more in West Virginia. Nonetheless, to the extent any doubt or question remained, this Court settled it in *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S.E.2d 138 (1996) when it was directly confronted with the issue:

We are now requested as a matter of first impression to decide whether the “deliberate intention” cause of action expressed within W. Va. Code § 23-4-2(c) (1991) is a part of the West Virginia workers' compensation statutory scheme, or whether it is a common law cause of action independent from the workers' compensation laws of this State.

Id. at 139, 475 S.E.2d at 139. First, the Court recognized that in all of the cases prior to 1983, deliberate intention was a vague, common law concept:

² Although there have been substantive amendments to Section 23-4-2 since 1983, the last being in 2005, none are pertinent for the issue presented herein. In other words, the relevant statutory language has not changed.

In all cases prior to the revision of W. Va. Code § 23-4-2 in May 1983, including *Mandolidis*, deliberate intention was an act defined under amorphous common law principles where the consequences were weighed in the mind beforehand, after prolonged meditation, with design and malignity of heart.

Id. at 141, 475 S.E.2d at 141 (emphasis added). The Court then recognized that with the 1983 amendments to Section 23-4-2, “the Legislature . . . revise[ed] the entire body of law applicable to the concept of the removal of the protective shield of immunity from an employer who acts with deliberate intention to injure an employee.” *Id.* at 142, 475 S.E.2d at 142. As the Court stated:

When the Legislature revised W. Va. Code § 23-4-2(c)(2)(i)-(ii) in 1983, in response to the outcry over the *Mandolidis* decision, it removed the common law definition of deliberate intention established in *Mandolidis* and placed the definition in a precise, controlled, predictable statutory environment.

Id. at 143, 475 S.E.2d at 143 (emphasis added). The Court’s ultimate holding was as follows:

W. Va. Code § 23-4-2(c) (1991) represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the workers' compensation system.

Id. at syl. pt. 2 (emphasis added); *see also id.* at 139, 475 S.E.2d at 139 (a “deliberate intention cause of action expressed within W. Va. Code § 23-4-2(c) (1991) supersedes a common law cause of action against an employer and is woven within the workers' compensation fabric in this State”).

C. Because the Workers’ Compensation Act No Longer Provides a Common Law Tort Exception To An Employers’ Immunity, Employers Are Immune From Contribution Claims By Third-Party Tortfeasors.

“The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation.” Syl.

pt. 4, *Sydenstricker*, 169 W. Va. at 452, 288 S.E.2d 518.³ “Integral to any recovery in contribution is a common obligation owed to an injured party by multiple tortfeasors.” *Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 217 W. Va. 15, 22, 614 S.E.2d 15, 22 (2005). “It is this common or joint liability to the plaintiff on the part of joint tortfeasors that gives rise to a cause of action for contribution.” *Sydenstricker*, 169 W. Va. at 448, 288 S.E.2d at 516. The law is clear that one tortfeasor can implead a joint tortfeasor on any tort theory of liability that could have been asserted by the plaintiff. *See Sydenstricker*, 169 W. Va. at 452, 288 S.E.2d 518 (“Our right of contribution before judgment is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff.”).

However, it is equally clear that following the 1983 amendments, a deliberate intent cause of action is no longer a common law tort exception to workers’ compensation immunity, but a direct statutory cause of action pursuant to the Workers’ Compensation Act. *See* syl. pt. 2, *Bell*, 197 W. Va. at 138, 475 S.E.2d at 138. Thus, a subscribing employer has no tort liability with respect to employee injuries. Likewise, a subscribing employer can have no common obligation, *i.e.*, joint tort liability, with a third-party tortfeasor that is a prerequisite to a contribution cause of action. As a result, a subscribing employer is immune from a contribution claim by a third-party tortfeasor.

While MSA may argue that Petitioners are seeking to have this Court overturn *Sydenstricker*, this is not the case. Prohibiting contribution claims by a third-party tortfeasor against a plaintiff’s employer is not only consistent with *Sydenstricker*, but mandated by its express holding. In syllabus point six of *Sydenstricker*, the Court expressly held that, as a general rule, employers were immune from contribution suits by third-party tortfeasors:

³ West Virginia provides for both statutory and inchoate contribution among joint tortfeasors. Section 55-7-13 of the West Virginia Code, titled “Contribution by joint-tortfeasors,” provides that when a judgment is entered against in favor of a plaintiff against joint tortfeasors, the defendant that pays the judgment may seek contribution from the other(s). *See* W. Va. Code § 55-7-13 (1923). With respect to inchoate contribution, it permits a defendant to implead and assert a contribution action against another joint tortfeasor prior to a judgment. *See Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 602, 390 S.E.2d 796, 801 (1990).

Where the right of contribution is initially grounded in common liability in tort, courts have held that a joint tortfeasor employer is immune from a third-party contribution suit because he is initially immune from tort liability to his injured employee by virtue of the workmen's compensation statutory bar of such tort actions.

Syl. pt. 6, *Sydenstricker*, 169 W. Va. at 440, 288 S.E.2d at 511. Next, in syllabus point 7, *Sydenstricker* was clear that its allowance of third-party common law contribution claims against the employer was conditioned on the Workers' Compensation Act expressly providing a common law tort exception to employer immunity:

Where the Workmen's Compensation Act provides an express exception from immunity against suits by an employee in a tort area, it follows that a suit grounded on this exception would enable a third party to maintain an action in contribution.

Id. at syl. pt. 7. Now, following the 1983 amendments, the Workers' Compensation Act no longer provides an express common law tort exception to employer immunity. Syllabus point six of *Sydenstricker* mandates that an employer is immune from a third-party tortfeasor's contribution claim.

Barring contribution by third-party tortfeasors against a plaintiff's employer is also consistent with the Court's holding in *National Fruit Product Co., Inc. v. Baltimore & Ohio R.R. Co.*, 174 W. Va. 759, 329 S.E.2d 125 (1985), where the Court recognized there is no common obligation between an employer's statutory obligations to employees under the Workers' Compensation Act and a third-party's obligations under tort law. In *National Fruit*, two of National Fruit's employees were seriously injured when the bulkhead door of a boxcar owned and operated by the railroad fell on them. *National Fruit*, as the employer, filed suit against the railroad, alleging the railroad was negligent and seeking to recover the amount of workers' compensation benefits National Fruit paid or payable to the injured employees. The Court held an employer had no cause of action to recover from the third-party tortfeasor because there was no commonality in their obligations to the injured employees:

The obligation or duty between the employer and the third party must be a common or coextensive obligation as it relates to the employee before indemnity can be implied based on that relationship. Here, the employer's liability is statutorily imposed and arises by virtue of the injuries suffered by its employees in the course of and resulting from their employment. The employer's liability is not based on any negligence, which is the predicate for third-party liability.

We concur with the Fourth Circuit's analysis in *Crab Orchard* that in order for an implied indemnity claim to arise, there must be a common or coextensive obligation existing between the employer and the negligent third party as it relates to the injured employee. With an employer's obligation arising from the Workers' Compensation Act in which the injury need not arise from any negligence, there is no commonality of obligation with the negligent third party.

Id. at 763, 764, 329 S.E.2d at 129-30, 130-31 (emphasis added). Again, since an employer's obligation to an injured employee is now solely statutory arising under the Workers' Compensation Act, an employer can have no common obligation, *i.e.*, joint tort liability, with a third-party tortfeasor giving rise to a claim for contribution. Indeed, it would be an absurd result if, pursuant to *National Fruit*, an employer has no cause of action against a third-party tortfeasor to recover workers' compensation benefits paid, but a third-party tortfeasor can somehow seek contribution from an employer based upon its statutory obligations under the Workers' Compensation Act.

Simply put, allowing a third-party tortfeasor to seek contribution with respect to its tort liability to the plaintiff would run directly afoul to the employer's immunity from common law liability set forth in Section 23-2-6 of the Code. *See* W. Va. Code § 23-2-6 (a subscribing employer "is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring"); *Bias*, 220 W. Va. at 196, 640 S.E.2d at 546 ("W. Va. Code § 23-2-6 expressly provides employers with 'immunity from common lawsuit and 'litigation' for common-law claims . . ."). For example, in this matter, the plaintiff's claim against MSA is grounded in

common law tort. If successful on his claim, the plaintiff will recover full tort damages from MSA. To allow MSA to implead the plaintiff's employers under Rule 14 and seek contribution on any tort recovery the plaintiff may obtain against MSA is subjecting the employers to common law tort liability.⁴

D. The Vast Majority of Courts Hold That Third-Party Tortfeasors May Not Assert Contribution Claims Against a Plaintiff's Employer.

In *National Fruit*, the Court, again, held that, with respect to injured employees, there was no common obligation between employers, whose duties and liabilities are statutory, and third-party tortfeasors, whose duties and liabilities arise from common law tort. It is for this same reason that courts from other jurisdictions have nearly unanimously held employers are immune from contribution actions grounded in common law tort. See Joel E. Smith, Annotation, *Modern Status of Effect of State Workmen's Compensation Act On Right of Third-Person Tortfeasor to Contribution or Indemnity From Employer of Injured or Killed Workman*, 100 A.L.R.3d 350 (2012) (“[T]he nearly unanimous view has been that contribution is barred, the courts generally concluding that by reasons of the exclusive remedy provisions, there could be no common liability of the employer and the third person in tort so as to allow contribution.”).⁵

⁴ Rule 14 provides “a defendant party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.” W. Va. R. Civ. P. 14(a) (2012) (emphasis added). “What is important about this passage from the rule is that a defendant may only implead a third party if that third party will be derivatively liable to the defendant for all or part of the plaintiff's original claim. Derivative liability is central to the operation of Rule 14.” *Walker v. Option One Mortg. Corp.*, 220 W. Va. 660, 671, 649 S.E.2d 233, 244 (2007) (Davis, J., dissenting). “[A] third-party defendant's liability cannot simply be an independent or related claim but must be based upon plaintiff's claim against defendant. *Id.* at 672, 649 S.E.2d at 245 (internal quotations and citation omitted). Again, the plaintiff's claim against MSA is a common law tort claim. Because Petitioners are immune from tort liability, they cannot be liable to MSA for any part of the plaintiff's claim against it.

⁵ Some jurisdictions provide complete immunity from employer suit, statutory or otherwise. However, it is not just complete immunity jurisdictions that do not permit third-party contribution suits against employers. Such contribution claims are prohibited in jurisdictions with employer immunity exceptions. For example, Washington's workers' compensation statute contains a “deliberate intention” exception. It, however, like the vast majority of states, does not allow third-party contribution suits against an employer:

In the great majority of states that have enacted statutes creating a right of contribution among joint tortfeasors, the courts have interpreted the statutes as

For example, in *Harsh Intern, Inc. v. Monfort Indus., Inc.*, 662 N.W.2d 574 (Neb. 2003), in holding a third-party tortfeasor had no right to contribution against a plaintiff's employer, the court held:

[B]ecause of the exclusive remedy provision in § 48-148, an employer covered by the Act does not have a common liability with a third-party tort-feasor. A common liability is a necessary requirement for securing contribution. Further, the Act must be construed as specifically limiting the liability of the employer, not only to the employee, but as to third parties as well.

Id. at 579. In *Hagemann ex rel. Estate of Hagemann v. NJS Eng'r Inc.*, 632 N.W.2d 840 (S.D. 2001), the court held:

As a matter of law, Sims is not a joint tortfeasor . . . This Court made it abundantly clear that contribution only arises when there is joint or several *liability* rather than the presence of joint or concurring negligence. SDCL 62-3-2 immunizes Sims from suit, and, as such, he cannot be held liable as a joint tortfeasor no matter his degree or percentage of negligence.

Id. at 843 (internal quotations and citations omitted). Likewise, in *Mulder v. Acme-Cleveland Corp.*, 290 N.W.2d 276 (Wis. 1980), the court held:

[W]here a negligent third party is held liable to an injured worker, it cannot require contribution from an employer even though the employer was substantially more at fault than the third party. This result is premised on the reasoning that, because an employee cannot bring a tort action against his employer, there is no common liability; and the employer cannot be impleaded for contribution as a joint tortfeasor. Because the employer's liability is determined by statute, which makes that liability exclusive, and not by principles of common law negligence, this court has reasoned that the common liability between third parties and the employer requisite for a joint tortfeasor status is absent.

encompassing no right to contribution from employers. While some courts have extended the right of contribution to permit actions against employers, most courts have reasoned that since an employer cannot be jointly and severally liable for injuries to employees, no right of contribution arises. Our present holding aligns us with the majority of states.

Glass v. Stahl Spec. Co., 652 P.2d 948, 952 (Wash. 1982) (citations omitted).

Id. at 278 (citations omitted).⁶

In sum, *Sydenstricker* recognized a third-party tortfeasor could seek contribution from the employer when the Workers' Compensation Act expressly provided a common law tort exception to employer immunity. The tort "loophole" that existed at the time of *Sydenstricker* closed in 1983. Now, *Sydenstricker*, *National Fruit*, and the express language of Section 23-2-6 of the Code all tell us that subscribing employers are immune from contribution actions by third-party tortfeasors arising out of the work-related injury or death of an employee.

II. THE WORKERS' COMPENSATION ACT CONTAINS NO EXPRESS OR IMPLIED RIGHT OF CONTRIBUTION IN FAVOR OF THIRD-PARTY TORTFEASORS.

Given that the Workers' Compensation Act provides employers immunity against common law suit, a third-party tortfeasor could only pursue a cause of action for contribution against a plaintiff's employer if permitted by the Workers' Compensation Act, which is not the case.

A. The Workers' Compensation Act Does Not Expressly Provide For Contribution In Favor of Third-Party Tortfeasors.

The Legislature has been very clear that the workers' compensation immunity provided in Section 23-2-6 may only be lost "as expressly provided in this chapter." W. Va. Code § 23-4-2(d)(1) (emphasis added); *see also Bias*, 220 W. Va. at 196, 640 S.E.2d at 546 ("Our Legislature has thus instructed the Court that we are not to read into the immunity provision of W.

⁶ *See also McPherson v. Cleveland Punch & Shear Co.*, 816 F.2d 249 (6th Cir. 1987) (applying Ohio law); *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 134, 135 (Iowa 1984) ("[A]n employer's liability to an employee is . . . governed exclusively by statute under our Workers' Compensation Act . . . [T]he right of contribution in Iowa is conditioned on the existence of common liability. Since no common liability exists between a third-party tortfeasor and an employer by virtue of our Workers' Compensation Act, our answer to certified question one is no."); *Heckart v. Viking Exploration, Inc.*, 673 F.2d 309, 314 (10th Cir. 1982) ("Because under Wyoming's Worker's Compensation Act the employer was never jointly or severally liable in tort for its employee's injury, we think Wyoming would not recognize a third party's right to contribution from the employer for the employee's injury."); *Cachillo v. Leach Machinery*, 305 A.2d 541, 543 (R.I. 1973) ("If the plaintiff has no right of action against Universal, then the employer is not a joint tort-feasor against whom contribution can be claimed . . . [W]here one of the defendants is immune from suit, the choice of defendants for any of these reasons is impossible, and the primary basis for contribution no longer exists. The fact that an employer is allowed to avoid further liability may seem unfair to some, but the unfairness lies not in the law of contribution, but in the policy underlying the Workmen's Compensation Act, which provides strict liability and specialized benefits for all injuries to insured employees.").

Va. Code § 23-2-6 an exception not ‘expressly provided [by the legislature] in this chapter.’”). Clearly, there is no express provision in the Workers’ Compensation Act providing for contribution in favor of third-party tortfeasors.

In fact, the Workers’ Compensation Act grants the “privilege” of bringing a deliberate intent cause of action to only a specifically defined class of beneficiaries. *See id.* § 23-4-2(c) (“If injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter and has a cause of action against the employer”) (emphasis added). In *Savilla v. Speedway SuperAmerica, LLC*, 219 W. Va. 758, 639 S.E.2d 850 (2006), the Court interpreted this language. Applying the maxim of *expressio unius est exclusio alterius*, the Court stated that Section 23-4-2(c)'s identification of specific classes of individuals given the privilege of maintaining a deliberate intent action implied that those not specifically identified could not:

Applying this principle in the instant case, W. Va. Code 23-4-2(c) 's express mention of certain persons who have a cause of action against an employer for deliberate intention wrongful death damages implies the exclusion of other persons who are not mentioned in the statute.

Id. at 762, 639 S.E.2d at 854.⁷ Likewise, in *Bell*, the Court recognized that a deliberate intent cause of action was a benefit and privilege accorded to employees under the Workers’ Compensation Act:

[A]ll employees covered by the West Virginia Workers' Compensation Act are subject to every provision of the workers' compensation chapter and are entitled to all benefits and privileges under the Workers' Compensation Act, including the right to file a

⁷ *Savilla* was subsequently modified in *Murphy v. Eastern Am. Energy Corp.*, 224 W. Va. 95, 680 S.E.2d 110 (2009), where the court held that in the event of the on-the-job death of an employee, the term “employee” in Section 23-4-2(c) also includes the employee’s estate. However, as reflected in *Murphy*, the basic premise of *Savilla* remains good law: that only the specific class of individuals set forth in Section 23-4-2(c) can maintain a deliberate intent cause of action against an employer arising out of injury or death to an employee.

direct deliberate intention cause of action against an employer pursuant to W. Va. Code § 23-4-2(c)(2)(i)-(ii) (1991).

Syl. pt. 3, *Bell*, 197 W. Va. at 138, 475 S.E.2d at 138.

In this case, the plaintiff, Mr. Dotson, has not brought a deliberate intent cause of action against his former employers. Mr. Dotson, the employee to whom the Workers' Compensation Act grants the privilege of bringing a deliberate intent action, does not believe his employers injured him with deliberate intent. Instead, MSA has brought a deliberate intent action against Mr. Dotson's former employers in its own right. However, MSA is not the "employee, the widow, widower, child or dependent of the employee." W. Va. Code § 23-4-2(c).⁸

B. No Implied Cause of Action For Contribution Can Be Read Into the Workers' Compensation Act.

Just as the Workers' Compensation Act does not expressly provide for contribution in favor of third-party tortfeasors, no such cause of action can be implied.

⁸ Again, Rule 14 is concerned with derivative liability. The third-party plaintiff asserts a third-party defendant is or may be liable "for all or part of the plaintiff's claim against the third-party plaintiff." W. Va. R. Civ. P. 14(a). Rule 14 impleader is not a proper basis for a defendant to "step into the shoes" of the plaintiff and attempt to assert direct liability claims on the plaintiff's behalf. For example, in *McCain v. Clearview Dodge Sales, Inc.*, 575 F.2d 848 (5th Cir. 1978), the plaintiff asserted a statutory cause of action against a car dealership pursuant to the Consumer Credit Protection Act. The defendant then filed a third-party complaint against the lender that providing financing, alleging it was liable to the plaintiff under the Act. The court dismissed the third-party complaint:

It is clear in this case that the plaintiff would have a direct cause of action against the third-party defendant in this case, 15 U.S.C. § 1640 and 1602(f) and (h), but the Consumer Credit Protection Act does not provide a cause of action in which one joint creditor may sue another for contribution or indemnity. We find, therefore, the district court properly dismissed the third-party complaint for failure to state a cause of action.

Id. at 850. Here, MSA is attempting to step into the plaintiff's shoes and assert a direct statutory cause of action on his behalf, one which the plaintiff does not believe exists under the facts. MSA's broad view of impleader has never been recognized, as it would lead to absurd results. For example, assume an employee had been injured by a third-party tortfeasor and files suit. Although the injured employee does not believe so, the third-party tortfeasor believes the injured employee's damages have been increased because her employer did make reasonable workplace accommodations. Would that third-party tortfeasor be entitled to step into the employee's shoes and assert a direct, statutory cause of action on her behalf for a violation of the West Virginia Human Rights Act? MSA apparently believes this to be the case. Again, however, Rule 14 impleader has never been recognized allow this.

The Court has been very clear that any rights and/or obligations created by the Act must be expressed. For example, in *Bias*, the issue was whether a plaintiff could bring a common law cause of action for “mental-mental” injuries because such claims were not covered under the Workers’ Compensation Act. In disallowing such a claim, the Court stated:

Our Legislature has thus instructed the Court that we are not to read into the immunity provision of W. Va. Code § 23-2-6 an exception not “expressly provided [by the legislature] in this chapter.”

If we were to answer the question in the affirmative, this Court would improperly exercise a legislative function by reading into W. Va. Code § 23-2-6 an exception to the sweeping immunity provided which the Legislature chose not to provide therein.

Bias, 220 W. Va. at 196, 640 S.E.2d at 546, 547. Likewise, in *National Fruit*, the employer argued that the Court should judicially recognize a cause of action in favor of an employer to recover workers’ compensation benefits paid to employees. The Court declined to do so, holding this was a matter for the Legislature to address:

Finally, *National Fruit* argues that we should judicially recognize a cause of action for an employer against a negligent third party to recover workers’ compensation benefit payments, but we decline to do so.

The rights and obligations of employers, employees, and third parties are so intertwined that to resolve the problem presented in this case would require a detailed consideration of a number of issues other than those involving the employer/third-party relationship.

We have traditionally stated that our workers’ compensation system is entirely a statutory creature and for this reason we feel that judicial intrusion into the statutory framework, particularly on so complex an issue, is unwarranted.

National Fruit Product Co., 174 W. Va. at 765, 329 S.E.2d at 132; *see also Glass v. Stahl Spec. Co.*, 652 P.2d 948, 953 (Wash. 1982) (“We have previously indicated the question of whether a third party should be entitled to contribution from employers is a matter strictly for the Legislature. That body is far better equipped to evaluate the public policy implications of such a rule than are we.”) (citation omitted).

As previously stated, *National Fruit* highlights the absurdity that would be created if contribution in favor of third-party tortfeasors were permissible. Under the Workers’ Compensation Act, an employer has no statutory cause of action against a third-party tortfeasor to recover workers’ compensation benefits paid to injured employees. An employer is not permitted to “stand in the shoes” of its injured employee and pursue a tort claim on his or her behalf. Thus, if an injured employee does not pursue a cause of action against the tortfeasor, the employer shoulders the entire burden.⁹ However, in this case, MSA wants to step into the shoes of Mr. Dotson and pursue a statutory deliberate intent action under the Workers’ Compensation Act against his employers. This would result in the Workers’ Compensation Act being a “one-way street” that is more favorable to third-party tortfeasors than the employers it was designed to protect.

CONCLUSION

For the above reasons, the lower court erred in holding that, following the 1983 amendments to Section 23-4-2 of the Code, a third-party tortfeasor may implead the plaintiff’s employers and seek contribution. Petitioners respectfully request that the Court answer “Yes” to the lower court’s first certified question and “No” to the second.

⁹ Even if the employee does file suit against the third-party tortfeasor, an employer is only granted a limited subrogation lien against the employee for the amount of benefits actually paid at the time of judgment or settlement. *See* W. Va. Code § 23-2A-1. An employer has no direct rights against a third-party tortfeasor.

Respectfully submitted,

**ARACOMA COAL COMPANY, INC.,
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CERTIFICATE OF SERVICE

I, Jon L. Anderson, counsel for Petitioners, do hereby certify that service of the foregoing *Brief of Petitioners Aracoma Coal Company, Inc., Independence Coal Company, Inc., and Spartan Mining Company, Inc.* and *Joint Appendix* has been made upon counsel of record this the 3rd day of February, 2012, by mailing a true and exact copy via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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