

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.

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

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ARGUMENT

The legal question presented is whether, following the 1983 amendments to Section 23-4-2, a third-party tortfeasor may implead the plaintiff's employer and assert a deliberate intent cause of action for contribution. Answering this question requires a straightforward, two-step analysis.

Any rights of a third-party tortfeasor to implead a plaintiff's employer and assert a contribution cause of action based on deliberate intent conduct must come from at least one of two places: the common law or by statute. As was set forth in Part I of Petitioners' opening brief, deliberate intention is no longer a common law tort exception to an employer's workers' compensation immunity. As a result, there can be no right of contribution grounded in common liability in tort. Next, as was set forth in Part II of Petitioners' opening brief, the Workers' Compensation Act provides no rights of contribution in favor of third-party tortfeasors. To the contrary, the Act expressly reserves the privilege of bringing a statutory deliberate intent cause of action to a specifically defined class of beneficiaries, such as the employee, widow, widower, child, or dependent of the employee.

In its response brief, respondent Mine Safety Appliances Company ("MSA") fails to address how a contribution claim in favor of a third-party, common law tortfeasor does not violate the broad immunity Section 23-2-6 of the Code provides against common law damages. MSA fails to address how it is somehow a statutory beneficiary of Section 23-4-2 that has standing to pursue a deliberate intent cause of action. MSA's argument and analysis is essentially one of "just because." Just because common law contribution claims were previously allowed against employers, that must still be the case.

Permitting third-parties sued under common law tort theories to assert a statutory deliberate intent cause of action for contribution cannot be reconciled with the express language of Sections 23-2-6 and 23-4-2 of the Code or the Court's holdings in *Sydenstricker* and *National Fruit*.

I. EMPLOYERS ARE IMMUNE FROM CONTRIBUTION ACTIONS BASED ON COMMON LIABILITY IN TORT.

MSA argues that the 1983 amendments to Section 23-4-2 could not have affected the rights of third-party tortfeasors to pursue contribution claims for deliberate intent because the Legislature could not do so by silence. In making this argument, MSA ignores the Legislature's express statutory language and this Court's holdings regarding the same.

With the 1983 amendments to Section 23-4-2, the Legislature expressly removed deliberate intention from the common law tort system. W. Va. Code § 23-4-2(d)(1) (2005). The Legislature declared its intent that any exceptions to an employer's workers' compensation immunity must be "expressly provided" in the Workers' Compensation Act. *Id.* Contrary to MSA's legislative silence argument, this Court has repeatedly recognized that the Legislature's intent behind the 1983 amendments was clear and the changes sweeping.

In *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S.E.2d 138 (1996), the Court stated that the 1983 amendments "revised the entire body of law applicable" to deliberate intention:

The firestorm that struck after *Mandolidis* was patent . . . The result of all of the public's agitation over the definition of deliberate intention as contained in *Mandolidis* and the resulting forecast of economic doom for West Virginia forced the Legislature to revise 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 141-42, 475 S.E.2d at 141-42 (citation omitted). The Court held that the common law tort of deliberate intent had been “supersede[d]” in favor a direct, statutory cause of action by an employee against his or her employer. *Id.* at 139, 473 S.E.2d at 139; *see also id.* at syl. pt. 2 (The 1983 amendments “represent[] 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”). Likewise, in *Bias v. Eastern Assoc. Coal Corp.*, 220 W. Va. 190, 640 S.E.2d 540 (2006), this Court recognized that the 1983 amendments were sweeping:

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) . . . 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.”

Id. at 196, 640 S.E.2d at 546.

As Petitioners’ predicted in their opening brief, MSA argues that Petitioners seek to have this Court overrule *Sydenstricker v. Unipunch Products, Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982). To the contrary, *Sydenstricker* supports Petitioners’ argument.

Prior to 1983 when *Sydenstricker* was decided, case law interpreted Section 23-4-2 as merely preserving for the employee a common law cause of action. *See Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 175, 475 S.E.2d 172, 175 (1996) (“In *Bell*, we noted that for some seventy years since the enactment of the West Virginia Workers’ Compensation Act, our case law interpreted the deliberate intention statute, W.Va.Code 23-4-2, as merely preserving for the employee a common law cause of action.”). *Sydenstricker* recognized that, as a general rule, employers were immune from third-party contribution claims grounded in common liability in tort. Syl. pt. 6, *Sydenstricker*, 169 W. Va. at 440, 288 S.E.2d at 511. *Sydenstricker* only

permitted a third-party contribution claim against the employer because, at that time, Section 23-4-2 of the Code was considered as preserving a common law tort exception to an employer's workers' compensation immunity. *See id.* at syl. pt. 7. Now, however, the Workers' Compensation Act does not provide a common law tort exception to employer immunity. There is only a direct, statutory cause of action for deliberate intention, a privilege that the Workers' Compensation Act expressly reserves to employees and other specifically defined beneficiaries. As a result, pursuant to *Sydenstricker*, an employer is immune from contribution causes of action grounded in common liability in tort. *See id.* at syl. pt. 6.

II. THE WORKERS' COMPENSATION ACT ITSELF DOES NOT PROVIDE A RIGHT OF CONTRIBUTION IN FAVOR OF THIRD PARTIES AGAINST EMPLOYERS.

There being no common law right to contribution in favor of a third-party tortfeasor such as MSA, the only remaining question is whether the Workers' Compensation Act itself provides a right to contribution.

Clearly, the Workers' Compensation Act provides no express right of contribution in deliberate intent causes of action in favor of a third-party tortfeasor. In fact, the Act specifically reserves the "privilege" of bringing a deliberate intent cause of action to "the employee, the widow, widower, child or dependent of the employee." W.Va. Code § 23-4-2(c). The question then becomes whether a right of contribution can be implied under the Workers' Compensation Act.

In *Cort v. Ash*, 422 U.S. 66 (1975), the United States Supreme Court set forth a series of factors to be considered in determining whether there is a private remedy implicit in a statute. Those factors include, first, is the plaintiff is a member of the class for whose special benefit the statute was enacted? *Id.* at 78. Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *Id.* Third, is it consistent with

the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *Id.* Subsequently, in *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980), this Court adopted the *Cort* test:

The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.

Id. at syl. pt. 1.

The *Cort* test has been used to determine whether statutory causes of action provide for contribution. For example, in *Northwest Airlines, Inc. v. Transport Workers Union of Am. AFL-CIO*, 451 U.S. 77 (1981), the employer was held liable to its female employees for backpay because collectively bargained wage differentials were found to violate the Equal Pay Act and Title VII of the Civil Rights Act. The employer sought contribution from labor unions that bore at least partial responsibility for the statutory violations. Thus, the question presented was whether these statutory causes of action provided a right to contribution. First, the Supreme Court noted that neither Title VII nor the Equal Pay Act expressly created a right of contribution in favor of employers. *Id.* at 91. The Supreme Court stated that “[t]his omission, although significant, is not dispositive if, among other things, the language of the statutes indicates that they were enacted for the special benefit of a class of which petitioner is a member.” *Id.* at 91-91. The Supreme Court concluded, however, that Congress did not intend for employers to derive special benefits from either Title VII or the Equal Pay Act. As the Supreme Court stated, “it cannot possibly be said that employers are members of the class for whose benefit either the

Equal Pay Act or Title VII was enacted.” *Id.* at 92. Thus, the Supreme Court concluded that neither Title VII nor the Equal Pay Act authorized employers to seek contribution from labor unions for the employer’s statutory liability.

In another example, in *Mathis v. United Homes, LLC*, 607 F. Supp. 2d 411 (E.D.N.Y. 2009), first-time homebuyers filed suit against real estate companies and mortgage lenders for statutory violations of the Fair Housing Act. The court held there was no right of contribution in a statutory cause of action pursuant to the FHA. As the court stated, “A consideration of the language of the FHA demonstrates that the UH Defendants and U.S. Bank are clearly not among the class which the statutes are intended to protect, but rather are the parties whose conduct the statutes are intended to regulate.” *Id.* at 421 (internal quotations and citation omitted).¹

Using the analysis of *Cort* as adopted in *Hurley*, there is clearly no implied right of contribution in favor of third-parties with respect to statutory deliberate intent causes of action. First, third-party tortfeasors such as MSA are clearly not a member of the class that the deliberate intent statute was designed to protect. A deliberate intent cause of action is a privilege reserved to employees and a limited class of other specifically defined beneficiaries. Second, the express legislative intent clearly indicates no right of contribution in favor of third parties should be implied. 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. 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

¹ Importantly, this is not a case of employers attempting to “have their cake and eat it too.” When a statutory cause of action does not provide for rights of contribution, there is no such right, period. Just as there is no right of a third-party tortfeasor to assert a deliberate intent action for contribution, an employer sued under a statutory deliberate intent cause of action likewise cannot implead a third-party for contribution.

W.Va.Code § 23-2-6 an exception not ‘expressly provided [by the legislature] in this chapter.’”). Third, allowing third-party tortfeasors to seek assert statutory deliberate intent actions for contribution is not consistent with the underlying purposes of the Workers’ Compensation Act. The Legislature specifically intended that an employee’s benefits and privilege under the Workers’ Compensation Act be separate and independent of his or her right to seek damages from a third-party tortfeasor. *See* W.Va. Code § 23-2A-1 (2009) (“Where a compensable injury or death is caused, in whole or in part, by the act or omission of a third party, the injured worker or, if he or she is deceased or physically or mentally incompetent, his or her dependents or personal representative are entitled to compensation under the provisions of this chapter, and shall not by having received compensation be precluded from making claim against the third party.”).

At the end of the day, MSA is not trying to assert MSA’s rights to contribution. A statutory deliberate intent cause of action is a privilege the Workers’ Compensation Act grants to Mr. Dotson, not MSA. Mr. Dotson does not believe his employers injured him with deliberate intent. Nonetheless, MSA is attempting to directly exercise Mr. Dotson’s rights and privileges for him, which is not permissible.

III. MSA MISCONSTRUES THE LAW OF CONTRIBUTION.

In making its argument that it has a right to assert a statutory deliberate intent cause of action for contribution, MSA misconstrues the body of law regarding contribution and impleader. Contribution and impleader have never been recognized as broadly as MSA would propose.

“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. “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.

This Court has recognized that, among joint tortfeasors, contribution can be had on any theory of liability that could have been asserted by the injured plaintiff. *See id.* at 450, 288 S.E.2d at 517 (“The fact that the various tort claims asserted by the plaintiff involve different theories or causes of action does not prevent the defendants from being joint tortfeasors so long as their actions resulted in common liability to the plaintiff.”); *id.* 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.”). For example, in *Sydenstricker*, the fact that the original defendant was sued on a common law products liability theory did not preclude a claim of contribution against the employer based upon the common law tort of deliberate intent.

Contribution has always been recognized as a right to those jointly liable in contract or tort. However, contribution and third-party impleader have never been recognized as a ground to step into the shoes of a plaintiff and assert a direct, statutory cause of action on his or her behalf, which is exactly what MSA seeks to do here. *See, e.g., Walker v. Option One Mortg. Corp.*, 220 W. Va. 660, 671, 649 S.E.2d 233, 244 (2007) (Davis, J., dissenting) (“What is important about [Rule 14] 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.”); *McCain v. Clearview Dodge Sales, Inc.*, 575 F.2d 848, 850 (5th Cir. 1978) (“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.”).

As pointed out in Petitioners’ opening brief, one can see the absurdities created by MSA’s broad interpretation of contribution. Would a 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? Would a lender sued for common law fraud be able to step into the plaintiff’s shoes and assert a statutory cause of action under the Fair Housing Act on her behalf? Under MSA’s interpretation, this would apparently be the case. Again, however, such a broad interpretation of contribution and impleader has never been recognized.

IV. MSA’S RELIANCE UPON *ERIE V. STAGE SHOW PIZZA* AND *GOODWIN V. HALE* IS MISPLACED.

MSA argues that the Court’s holding in *Erie v. Stage Show Pizza, JTS, Inc.*, 210 W.Va. 63, 553 S.E.2d 257 (2001) was somehow a recognition that Section 23-4-2 of the Code still allows for contribution claims by third-party tortfeasors against a plaintiff’s employer. In doing so, MSA ignores the actual holding of *Erie* and the context in which it was decided.

In *Erie*, the issue was one of insurance coverage. An employee suffered an on-the-job injury while working for Stage Show Pizza. *Id.* at 66, 553 S.E.2d at 260. The employee subsequently filed suit against Stage Show Pizza. Due to Stage Show Pizza’s failure to pay workers’ compensation premiums, the employee asserted a common law negligence action. *Id.*

In an alternative count, the employee asserted a deliberate intent cause of action pursuant to Section 23-4-2 of the Code. *Id.* Stage Show Pizza sought insurance coverage from Erie, which had issued Stage Show Pizza a commercial general liability policy that also contained an employers' liability "stop gap" endorsement. *Id.* However, the employers' liability endorsement contained an exclusion stating it did not cover "any obligation for which you . . . may become liable under any workers' compensation . . . law." *Id.* Erie filed a declaratory judgment action, arguing that, as a result of this exclusion, it had no duty to defend and/or indemnify Stage Show Pizza. The Court held that a provision excluding coverage for an obligation of the insured under any workers' compensation law refers to the fixed, no-fault benefits the Workers' Compensation Act provides to injured employees:

An insurance policy provision excluding coverage for "an obligation of an employer under any workers' compensation law" means that coverage will not be available for an obligation that is imposed under a workers' compensation act that allows an employee to receive fixed benefits, without regard to the fault of any party, for a work-related injury.

Id. at syl. pt. 4. The Court went on to hold that, for purposes of insurance coverage, because a deliberate intent cause of action pursuant to Section 23-4-2 does not impose fixed benefits without regard to fault, a deliberate intent action is not an obligation arising under a workers' compensation law:

A finding that an employer is liable pursuant to the deliberate intent provisions of *W. Va. Code*, 23-4-2 [1994] does not impose upon the employer a statutory obligation to pay fixed benefits, without regard to the fault of any party, for work-related injuries, and is therefore not an obligation of an employer under a workers' compensation law for purposes of insurance coverage.

Id. at syl. pt. 6 (emphasis added).

Erie involved a simple interpretation of an insurance exclusion. Under well-

established law, exclusionary language is “strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” *Id.* at syl. pt. 2 (quoting syl. pt. 5, *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 737, 356 S.E.2d 488 (1987)). With this principle in mind, the Court focused on the term “obligation.” When an on-the-job injury occurs, the Workers’ Compensation Act obligates an employer to provide fixed benefits without regard to fault. In contrast, a statutory deliberate intent cause of action is not a mandatory “obligation.” An employee may only recover if he or she can prove the specific statutory elements. As a result, the Court held that deliberate intent damages were not an “obligation” of an employer under a workers’ compensation law. *See id.* at syl. pt. 6.

MSA seeks to take *Erie* out of the insurance context in which it was decided and broadly apply it to the issue presented here. *Erie* does not stand for the proposition that deliberate intention is now to be considered a common law tort. Nowhere does *Erie* state that a third-party tortfeasor is entitled to pursue a statutory deliberate intent claim on behalf of an injured employee. *Erie* simply held that, for purposes of insurance coverage, a deliberate intent action pursuant to Section 23-4-2 is not an “obligation” under a workers’ compensation law.

Lastly, in a proposed *amicus curiae* brief filed by the Products Liability Advisory Counsel (“PLAC”), it argues that *Goodwin v. Hale*, 198 W.Va. 554, 482 S.E.2d 171 (1996) disposes of the issue presented herein. PLAC argues that in *Goodwin*, the Court “ruled” that employers were not immune from contribution actions by third-party tortfeasors. PLAC uses the term “ruling” loosely.

In *Goodwin*, the plaintiff, an employee of a housing subcontractor, filed suit against the general contractor after he fell and was injured while carrying a load of shingles. For reasons unclear, despite the fact that the general contractor was not the plaintiff’s employer, the

trial court instructed the jury on the statutory deliberate intent standard. It was on this ground that the Court reversed and remanded the judgment below. *Id.* at 558, 482 S.E.2d at 175.

What PLAC refers to as the Court's "ruling" is found in footnote 7 of the *Goodwin* opinion. In Part I of the opinion, in setting forth the procedural history and facts of the case, the Court noted that the general contractor had filed a third-party complaint against the subcontractor, alleging the subcontractor had a duty to indemnify it pursuant to an express indemnity agreement. The Court then noted that the subcontractor had responded, contending the express indemnity claim was barred by its workers' compensation immunity. It was at this point that footnote 7 was placed, which stated:

We need not decide the merits of this contention; however, we are constrained to offer our comment that the 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 in the third-party action if the employer was guilty of a "deliberate intention" injury under W. Va.Code 23-4-2(c)(2)(i) or (ii) (1994). *See Sydenstricker v. Unipunch Products, Inc.*, 169 W.Va. 440, 288 S.E.2d 511 (1982). Of course, *Sydenstricker* applies to a contribution, as opposed to an express indemnity theory of recovery.

Id. at 557 n.7, 482 S.E.2d at 174 n.7. As footnote 7 expressly states, the subcontractor's immunity defense to the general contractor's third-party complaint was unnecessary to the decision in the case. Moreover, the third-party complaint was based, not upon contribution, by an express indemnity agreement.

This Court has repeatedly recognized that "language in a footnote generally should be considered obiter dicta which, by definition, is language unnecessary to the decision in the case and therefore not precedential." *State ex rel. Med. Assurance of W.Va., Inc., v. Recht*, 213 W.Va. 457, 471, 583 S.E.2d 80, 94 (2003); *see also In re Kanawha Valley Bank*, 144 W.Va. 346,

382-83, 109 S.E.2d 649, 669 (1959) (“Obiter dicta or strong expressions in an opinion, where such language was not necessary to a decision of the case, will not establish a precedent.”). For PLAC to refer to footnote 7 of *Goodwin* as the Court’s “ruling” is blatantly inaccurate.

V. HOLDING THAT EMPLOYERS ARE IMMUNE FROM CONTRIBUTION CLAIMS BY THIRD-PARTY TORTFEASORS DOES NOT RESULT IN UNFAIR OR ABSURD RESULTS.

MSA argues that not allowing third-party tortfeasors to seek contribution from a plaintiff’s employer will lead to unfair and absurd results. This is simply not the case.

The Workers’ Compensation Act is a complex scheme of entirely statutory creation. *See, e.g., State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W.Va. 525, 540, 514 S.E.2d 176, 191 (1999) (“[W]e repeatedly have held, and we have reiterated in this decision, that workers’ compensation is a statutory creature, created and refined by the Legislature.”); *Cart v. Gen. Elec. Co.*, 203 W.Va. 59, 63, 506 S.E.2d 96, 100 (1998) (“[W]e have consistently recognized that the workers compensation scheme and the immunity generated thereby are statutory creations. We have consequently deferred to the Legislature in the formulation of the intricacies of the workers compensation system.”). Thus, the legal question presented is not governed by what one may or may not consider “fair.” To the contrary, it is one of statutory interpretation concerning the rights and/or obligations the Legislature intended to create under the Workers’ Compensation Act.

For example, in *National Fruit Product Co., Inc. v. Baltimore & Ohio R.R. Co.*, 174 W. Va. 759, 329 S.E.2d 125 (1985), the employer was obligated to pay workers’ compensation benefits to two employees who had been injured by the negligence of the railroad. The employer argued that, based upon considerations of equity and fairness, the Court should imply a cause of action on behalf of the employer against the third-party tortfeasor. *See id.* at 763, 329 S.E.2d at 130. The Court declined to do so and the employer was left with no remedy

against the third-party. *See id.* at 765, 329 S.E.2d at 132 (“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.”).

Simply put, anyone can look at the workers' compensation system and find what they perceive to be a potential “unfairness.” An employer may consider it unfair that it is responsible for the entire amount of workers' compensation benefits when an employee is injured by the negligence of a third-party tortfeasor. On the other hand, a third-party may consider it unfair when it is responsible for the entire amount of tort damages to an injured employee. However, this is workers' compensation statutory system the Legislature has chosen and under which we operate. Indeed, as was stated in Petitioners' opening brief, courts have been nearly unanimous in holding that employers are immune from contribution actions grounded in common law tort. In so holding, courts have rejected the same “fairness” arguments MSA is advancing here. *See, e.g., Cachillo v. Leach Machinery*, 305 A.2d 541, 543 (R.I. 1973) (“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.”).

Lastly, and importantly, MSA is not being deprived of any defenses in the plaintiff's claim against it. At trial, MSA is free to put on evidence that its respirators were not defective. Even if defective, MSA can put on evidence that the acts and/or omissions of the plaintiff's employers were the actual cause of the plaintiff's injuries. *See Sydenstricker v. Mohan*, 217 W.Va. 552, 559, 618 S.E.2d 561, 568 (2005) (holding that evidence concerning the negligence and/or fault of a non-party is admissible to prove the defense of intervening cause).

The trier of fact will then make the determination whether MSA's respirators were defective and, if so, whether the defect was a proximate cause of the plaintiff's injuries. If the jury answers these questions in the negative, there will be no recovery against MSA. If the jury answers in the affirmative, then, just as in every other jurisdiction, MSA will be liable in tort for damages. There is nothing archaic or patently unfair about this result. It is, again, the rule in nearly every jurisdiction throughout the United States.

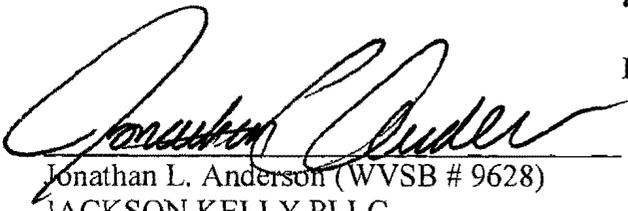
CONCLUSION

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.

Respectfully submitted,

**ARACOMA COAL COMPANY, INC.,
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By Counsel



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CERTIFICATE OF SERVICE

I, Jon L. Anderson, counsel for Petitioners, do hereby certify that service of the foregoing *Reply Brief of Petitioners Aracoma Coal Company, Inc., Independence Coal Company, Inc., and Spartan Mining Company, Inc.* has been made upon counsel of record this the 1st day of March, 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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