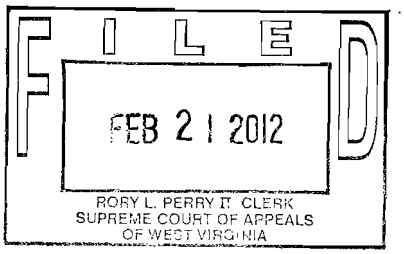
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0081



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

PETITIONERS,

v.

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

RESPONDENTS.

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

BRIEF OF RESPONDENT,
MINE SAFETY APPLIANCES COMPANY

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STATEMENT OF THE CASE

On May 23, 2011, Plaintiff Dustin Dotson ("Dotson") initiated the underlying action in the Circuit Court of Mingo County against Respondent Mine Safety Appliances Company ("MSA") and certain distributors or suppliers of MSA's products. In his Complaint, Dotson alleged that in the course of his work as a coal miner for various coal companies, he wore a respirator manufactured by MSA "for protection against harmful dust" generated as part of the coal mining process. [A0014-15]. According to Dotson, MSA's respirators were defective and failed to protect him from the hazards of coal dust in that they allowed invisible, sub-micron particles of dust to penetrate the respirator's filter and enter his lungs, causing him to develop coal worker's pneumoconiosis (commonly known as "black lung").[1] [*Id.*] Based on these allegations, Dotson seeks damages from MSA on both strict liability and negligence theories. [A0015-0019]. MSA denies Dotson's allegations. [A0023-0033].[2]

On July 20, 2011, MSA filed a third-party complaint seeking, among other things, contribution with respect to Dotson's alleged injuries from certain of Doston's employers, Aracoma Coal Company, Inc., Independence Coal Company, Inc. and Spartan Mining Company, Inc. (collectively referred to as "Aracoma"), as well as the manufacturer of some of the continuous mining machines that Dotson used as a miner.[3] [A0036-0062]. In its third party complaint, MSA alleged that as Dotson's employer, Aracoma was at all times subject to

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[1] Dotson does not allege that he wore MSA's respirators the entirety of the time that he was in an underground mine. Rather, Dotson has alleged in subsequent discovery that he wore an MSA respirator while operating continuous mining machines or roof bolting machines, but would remove his respirator when he reached what he termed "clean air," away from the mining face at the first open cross-cut in the mine.

[2] MSA's "Dustfoe" model respirators were repeatedly tested by the Bureau of Mines and the National Institute for Occupational Safety and Health ("NIOSH") pursuant to Bureau of Mines Schedule 21A, 21B and the Mine Safety and Health Administration/National Institute for Occupational Safety and Health ("MSHA/NIOSH") 30 C.F.R. Part 11, Subpart K. MSA's respirators passed each series of tests and were approved as permissible respirators for protection against coal dust.

[3] Because the Aracoma entities are subsidiaries of A.T. Massey Coal Company, MSA asserted claims against various Massey entities as well.

the jurisdiction of the United States Department of Labor's Bureau of Mines, the Mine Safety and Health Administration ("MSHA") and the West Virginia Offices of Miners Health Safety & Training ("WVOMHST"), and was responsible for ensuring compliance with all applicable coal mining rules and regulations promulgated by the Bureau of Mines, MSHA and WVOMHST. Specifically, state and federal law compelled Aracoma to discharge the following obligations at each of its mine sites where Dotson worked:

- To maintain respirable dust levels below a certain respirable dust standard established by federal law, a standard that was specifically calculated to prevent lung disease (30 C.F.R. 70, Subpart B – Dust Standards §§ 70.100 *et seq.*);
- To utilize environmental controls pursuant to a ventilation control plan approved by MSHA (30 C.F.R. 75, Subpart D – Ventilation, §§ 300 *et seq.*); and
- To ensure that respirable dust levels were maintained below the applicable standard, and to monitor respirable dust levels through regular sampling and submission of samples to MSHA (30 C.F.R. 70, Subpart C – Sampling Procedures, §§ 201 *et seq.*).

With respect to the use of respirators, federal law provides that respirators cannot be used as a substitute for the environmental ventilation controls mandated by MSHA, and were/are required to be made available to mine employees only when the mine is in violation of respirable dust standards. *See* 30 C.F.R. § 70.300. If a mine operator such as Aracoma supplies its employees with respirators for use at these or other times, federal regulations require the use of approved respirators that have been "selected, fitted, used, and maintained in accordance with the provisions of the American National Standards Institute's Practices for Respiratory Protection ANSI Z88.2-1969." *See* 30 C.F.R. §72.710 (recodified and redesignated from 30 C.F.R. §§ 11.2-1 and 11.4). Under ANSI Z88.2-1969, a mine operator making respirators available to its employees must establish and maintain a respiratory program that includes:

1) Written standard operating procedures governing the selection and use of respirators;

2) Instruction and training on the proper use of respirators and their limitations;

3) Appropriate surveillance of work area conditions and degree of employee exposure;

4) Regular inspection and evaluation to determine the effectiveness of the program; and

5) Appropriate fit testing of the respirator for each individual and use.

ANSI Z88.2-1969, Section 3.5 and 7.5

MSA's third party complaint sets forth in specific detail how the Aracoma entities' conduct violated state and federal mining regulations.[4] None of the Aracoma entities had any form of written respiratory protection program, or made any effort to conform to the requirements of 30 C.F.R. §72.710 or ANSI Z88.2-1969. Moreover, between 1998 and 2011 when Dotson worked as a miner, mine foreman and mine superintendent for the Aracoma entities, hundreds of violations were issued to his employers specifically related to improper ventilation and excessive coal dust levels in the mines where he worked. [A0042-0047] As MSA alleged in its complaint, Aracoma "had actual knowledge of the existence of the 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." [A0055]. MSA further alleged that Aracoma's conduct constituted deliberate intent under W.Va. Code §

[4] While objectively verifiable, given the procedural posture of this case on certified question from the Circuit Court's denial of Aracoma's Motion to Dismiss pursuant to W.Va. R. Civ. P. 12(b)(6), each of MSA's allegations must be accepted as true for purposes of this appeal. *Conrad v. ARA Szabo*, 198 W.Va. 362, 369-70, 480 S.E.2d 801, 08-09 (1996).

23-4-2, and was a direct and proximate result of the injuries for which he sought compensation in his Complaint against MSA. [*Id.*][5]

On September 1, 2011, Aracoma filed its Motion to Dismiss MSA's Third-Party Complaint under W.Va. R. Civ. P. 12(b)(6). Instead of challenging the sufficiency of MSA's factual allegations, Aracoma argued that even if it had engaged in conduct that violated W.Va. Code § 23-4-2, the West Virginia Legislature's 1983 amendments to that provision gave it complete and absolute immunity from contribution claims. After a hearing on the merits, on November 23, 2011, Senior Judge Chafin rejected Aracoma's contentions and denied the motion to dismiss. [A0138-0155]

[5] At the time that Dotson began working for the Aracoma entities in 1998, there was no indication from any source (including chest x-rays) that Dotson had developed any degree of black lung. Evidence and symptoms of coal workers' pneumoconiosis did not begin to appear until after years of work for the Aracoma entities.

SUMMARY OF ARGUMENT

The Circuit Court answered the Certified Questions correctly because MSA has a right to seek contribution from the Petitioners for their deliberate conduct which contributed to Mr. Dotson's claimed damages. As parties who potentially share common liability to Mr. Dotson, the right of contribution exists between MSA and Aracoma to ameliorate the potential harshness of one party paying more than its proportionate share under joint and several liability. West Virginia's commitment to contribution, the text of W.Va. Code §23-4-2 and this Court's interpretations of the 1983 Amendments to the Workers' Compensation Act require that MSA be permitted to maintain its claims for contribution against Aracoma.

In this case, Aracoma asks this Court to interpret W. Va. Code § 23-4-2 to give them broad immunity from contribution claims that might be asserted against them, regardless of the form through which the claim is asserted (i.e. by way of cross-claim or third-party claim), and more importantly, regardless of the level of culpability with which they might have acted. Ignoring, as they must, the myriad of cases that have recognized the continued validity of *Sydenstricker v. Unipunch Products Inc.,* 169 W.Va. 440, 288 S.E.2d 511 (1982) after 1983 and have expressly permitted third-party contribution claims against employers to stand, the mine operators argue that contribution by its nature and origin cannot apply to post-1983 deliberate intent since such claims are organically based in the Workers' Compensation statute, not common law tort. Absent language in the statute expressly allowing contribution claims, Aracoma reasons that such claims cannot exist. If accepted by this Court, Aracoma's interpretation of W.Va. Code §23-4-2 would eliminate any right of contribution that third parties might have against employers, completely immunizing them from damages unless the employee chooses to sue and collect his damages from his employer.

Aracoma's arguments should be rejected as a matter of law for three primary reasons. First, immunizing employers who have acted with deliberate intent from contribution claims runs counter to West Virginia's long-standing commitment to contribution as a necessary element of its system of joint and several liability. Contribution has been a fundamental part of West Virginia's jurisprudence since statehood, and rests on the sound notion that a party sued for alleged wrongdoing can limit his liability in proportion to the harm that it might have caused by joining others who have also caused harm to the plaintiff. The right of contribution is not limited to specific types of claims such as tort claims, but can arise based on any theory of liability that the plaintiff could have asserted against a party potentially responsible for his injuries. *Board of Education of McDowell County v. Zando, Martin, & Milstead*, 182 W.Va. 597, 603, 390 S.E.2d at 802 (1990). In other words, MSA's right to seek contribution from Aracoma is derivative of Dotson's right to seek recovery for his injuries from Aracoma, regardless of whether Dotson's potential claim against Aracoma is characterized as sounding in statute or tort. Because an injured employee has long had the right to recover from his employer where the employer has acted with deliberate intent, West Virginia law has long given third parties the right to seek contribution from employers. *Sydenstricker v. Unipunch Products, Inc.*, 169 W.Va. 440, 288 S.E.2d 511 (1982). Creating a special "employer" immunity for contribution claims would be fundamentally contrary to West Virginia joint and several liability and contribution law, and would require that this Court overrule both *Board of Education of McDowell County* and *Sydenstricker.*

Second, nothing contained in the 1983 amendments to the Workers' Compensation Act warrants giving employers broad immunity from contribution claims. The 1983 amendments were limited to changing and heightening the standard that an employee (and by extension a

third party seeking contribution) must prove to establish deliberate intent. Even after the 1983 amendments, W.Va. Code §23-4-2(c) makes clear that if deliberate intent under the statute is proven, an employer is liable for deliberately caused harm as if the Act did not exist. Although Aracoma argues that immunity from contribution claims should be inferred from the 1983 amendments, basic rules of statutory construction make clear that fundamental common law rights such as contribution can be extinguished, and existing precedent such as *Sydenstricker* overruled, only through express legislative action (which clearly has not occurred).

Aracoma's reliance on *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 475 S.E.2d 138 (1996), in support of its statutory arguments is misplaced and ignores this Court's subsequent decision *Erie v. Stage Show Pizza*, 210 W.Va. 63, 553 S.E.2d 257 (W.Va. 2001). Although *Bell* recognized that the 1983 amendments created a statutory scheme that must be met to establish deliberate intent, *Erie* rejected any notion that a post-1983 deliberate intent claim was purely statutory. Consistent with the text of the 1983 Amendments, this Court in *Erie* expressly held that upon proof of the statutory elements for deliberate intent, an employer becomes subject to common law damages as if the Act did not exist. Employer immunity against contribution claims is therefore clearly not mandated by the 1983 amendments to the Act, and would be contrary to well-settled West Virginia law.

Finally, immunizing employers from contribution claims is fundamentally unfair and bad policy. Third parties like MSA would be forced to bear damage obligations to injured plaintiffs disproportionate to their actual liability. Unlike employers who receive a benefit in terms of decreased liability under the Act, third parties recieve no such benefit, but would nonetheless be forced to pay damages for harm they did not cause. Given the proof

differences between deliberate intent and other common law claims such as negligence or strict liability, an injured employee has little incentive to sue his employer in cases of alleged joint harm, leaving the third party entirely responsible for all of plaintiff's damages even if the employer's deliberate conduct caused the vast majority of those damages. Application of this rule would not only lead to absurd results, but would remove an otherwise strong economic incentive for employers to comply with workplace safety rules.

STATEMENT REGARDING ORAL ARGUMENTAND DECISION

Respondent Mine Safety Appliances ("MSA") believes that oral argument is appropriate pursuant to W.Va. R. App. P. 18. Because the issues presented in connection with the certified questions present a narrow issue of law which requires no more than the application of 30 years of settled law, Rule 19 argument in this matter is appropriate. Although resolution through formal opinion would be helpful in terms of future citation should the issue arise in the Circuit Courts in the future, MSA believes that this case can also be appropriately resolved through Memorandum Decision since no alteration of West Virginia law is required for this Court to affirm the Circuit Court's answers to the certified questions.

ARGUMENT

This Court should not reverse the more than 30 years of precedent which permits a party outside of the employer-employee relationship to assert a claim for contribution against an employer whose deliberate conduct injured an employee. Since statehood, joint and several liability, and the companion principal of inchoate contribution have been fundamental cornerstones of West Virginia jurisprudence. As West Virginia law has evolved, this Court has not limited the contribution remedy in the application of joint and several liability, but has necessarily expanded it to ameliorate the harsh results that would otherwise result. This Court has rejected attempts to limit the scope of contribution based on claim "labels," instead holding that regardless of source of liability, all parties who have a common obligation to an injured plaintiff can be liable in contribution to one another. *Sydenstricker* represents a reasoned application of this approach, allowing third parties such as MSA to seek contribution from employers through proof of deliberate intent. Under *Board of Education* and *Sydenstricker*, Aracoma is subject to properly plead contribution claims regardless of whether it sounds in statute or tort.

Aracoma's arguments notwithstanding, nothing in the 1983 amendments to the Act evidences legislative intent to create a broad and sweeping exception to otherwise settled contribution law and comprehensively overrule *Sydenstricker*. While Aracoma argues that this Court can accept its arguments without even addressing *Sydenstricker*, basic principles of statutory construction and common sense belie that contention. The 1983 amendments did not address the relationship between employers and third parties, but were intended to remove disputes between employers and employees in which employees cannot meet the increased standard of proof from the common law tort system.

I. CONTRIBUTION AGAINST EMPLOYERS FOR DELIBERATE CONDUCT HAS LONG BEEN A FUNDAMENTAL AND NECESSARY PART OF WEST VIRGINIA LAW.

Without any reference to principles of West Virginia contribution law, Aracoma argues that a post-1983 cause of action for deliberate intent is purely statutory and therefore beyond the reach of common law apportionment through contribution. That argument ignores the derivative nature of contribution in West Virginia. If Aracoma breached a duty that it owed to Dotson under the deliberate intent statute, MSA is entitled to seek contribution from Aracoma regardless of the substantive basis for Aracoma's duty.

The right to contribution is a companion principle to the doctrine of joint and several liability "which permits a plaintiff to recover the entire judgment from any joint judgment debtor." *Bd. of Educ. of McDowell County v. Zando, Martin, & Milstead,* 182 W.Va. 597, 603, 390 S.E.2d at 802 (1990). As this Court has explained:

> This jurisdiction is committed to the concept of joint and several liability among tortfeasors. A plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault. Our adoption of a modified rule for contributory negligence in *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (1979), did not change our adherence to joint and several liability.

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

In West Virginia, contribution in cases of joint liability is a creature of both statute and the common law. Judgment creditors have had a statutory right of contribution since 1872. *See* W.Va. Code § 55-7-13; *Haynes v. City of Nitro*, 161 W.Va. 230, 234, 240 S.E.2d 544, 547 (1977). The right of common law inchoate contribution among those owing a joint obligation to an injured party dates back even further:

> Following an examination of the historical underpinnings of contribution in *Haynes*, we proceeded to determine that an inchoate right of contribution exists as between joint

> tortfeasors. . . . The significance of the Haynes decision is our recognition that the statutory right of contribution, which arises pursuant to West Virginia Code § 55-7-13 upon the entry of a joint judgment, did not extinguish the general right of contribution among joint tortfeasors that preexisted the statutory enactment.

Charleston Area Medical Center, Inc., v. Parke-Davis, 217 W.Va. 15, 20, 614 S.E.2d. 14, 20 (2005). Common law contribution has existed in West Virginia since statehood. *Haynes*, 161 W.Va. 230, 235, 240 S.E.2d. 544, 549 ("Such was the law in Virginia before the State of West Virginia was formed. *Thweatt's Adm'r v. Jones*, 1 Rand., Va. 328, 10 Am. Dec. 538[6]. Such has been the law of West Virginia since the formation of the state.").

A. Contribution is Fundamentally Based on Joint Obligation to a Plaintiff

The right of inchoate contribution in West Virginia arises from a joint obligation to a plaintiff. The fundamental purpose of inchoate contribution is to enable all parties who might have contributed to the plaintiff's alleged injuries to be brought into one suit, and liability apportioned reasonably among them. *Board of Educ. of McDowell County*, 182 W.Va. 603, 390 S.E.2d at 802. As this Court explained in *Board of Education,* "[t]he touchstone of the right to inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages?" *Id., Sheetz v. Bowles Rice McDavid Graff & Love PLLC*, 209 W.Va. 318, 329, 547 S.E.2d 256, 267 (2001). Inchoate contribution law has been extensively developed and expanded by this Court over the years with the intent of "reducing . . . unfairness in tort law," and "moderat[ing] the inequity which existed in our law that enabled a plaintiff to cast the entire responsibility for an accident on one of several joint tortfeasors by deciding to sue only him." *Charleston Area Med. Cent., Inc. v. Parke-Davis*, 217 W.Va. at 22, 614 S.E.2d at 22 (*citing*

[6] Also published at 22 Va. 328 (1823).

Sitzes, 169 W.Va. at 710, 289 S.E.2d at 687, and *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 886 (1979)).

To exercise and preserve the right to inchoate contribution, West Virginia law requires that all parties potentially liable to the plaintiff for the alleged harm be joined in the same action brought by the injured party. *Charleston Area Med. Center, Inc.*, syl pt. 6, 217 W.Va. 15, 614 S.E.2d 15 (2005). The policy behind this requirement serves not only the fundamental purpose of inchoate contribution, but also judicial economy:

> The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also 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 results and unjust verdicts.

Ruckdeschel v. Falcon Drilling Co., 225 W.Va. 450, 693 S.E.2d 815, 822 (2010), *quoting Board of Educ.*, 182 W.Va. at 603-604, 390 S.E.2d at 802-803). For a party such as MSA to preserve its contribution rights under West Virginia law, it must either assert its right to contribution as a cross-claim pursuant to W.Va. R. Civ. P 13(g), or join potentially liable parties in the underlying action under W.Va. R. Civ. P. 14(a) if the Plaintiff does not elect to sue them. *Howell v. Luckey*, 205 W.Va. 445, 518 S.E.2d 873 (1999); *Charleston Area Med. Center, Inc.*, syl. pt. 6, 217 W.Va. 15, 614 S.E.2d 15 (2005) (inchoate right of contribution against a non-party can only be asserted by means of third-party impleader under Rule 14(a)).

B. Contribution Claims Are Derivative in Nature and Can be Based On Any Theory Of Liability That the Plaintiff Could Have Asserted Against a Potentially Responsible Party.

Another fundamental feature of inchoate contribution, and one important to the resolution of the certified questions, is the derivative nature of a claim for contribution. The

right of contribution before judgment can be asserted by one with a common obligation "on any theory that could have been asserted by the injured plaintiff." *Howell v. Luckey*, 205 W.Va. at 448, 518 S.E.2d at 876. In other words, contribution under West Virginia law is not a stand-alone right, but is derivative of the plaintiff's right to assert a claim against a potentially responsible party. As such, the answer to the question of whether a party such as MSA has the right to assert a contribution claim against a third party lies not in an examination of MSA's substantive rights, but in an examination of the rights of the injured party. Here, if Dotson could have sued Aracoma for his injuries but did not do so, MSA is entitled to derivatively assert Dotson's rights using contribution as the vehicle to do so to ensure that all potentially responsible parties are before the Court. *Cf. Sheetz*, 209 W.Va. at 329, 547 S.E.2d at 267 ("West Virginia jurisprudence favors the consideration, in a unitary trial, of all claims regarding liability and damages arising out of the same transaction, occurrence or nucleus of operative facts, and the joinder in such trial of all parties who may be responsible for the relief that is sought in the litigation").

Importantly, under West Virginia law, contribution is available against all potentially responsible parties who jointly cause harm to a plaintiff regardless of the respective source of substantive liability. In *Board of Educ. of McDowell County*, the injured party asserted a variety of tort and contract claims against various parties allegedly responsible for its damage. Even though the claims were not limited to tort claims, this Court unequivocally held that the right of contribution exists among parties owing a joint obligation to a plaintiff regardless of the source of the obligation. As this Court reasoned:

> [T]he 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. Where, as here, the plaintiff seeks damages

> for a breach of contractual obligations, the named defendant is entitled to assert claims for contribution against other parties liable to the plaintiff for the same injury even though the defendant was not a party to the contract between the plaintiff and the other parties. 3 See 18 Am. Jur. 2d Contribution § 10 (1985). The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages?

182 W.Va. at 603, 390 S.E.2d at 802 (emphasis added). To dispel any argument that the right of contribution exists only among those having potential liability to a plaintiff based on a common theory of liability, this Court made clear in Syllabus Pt. 8 that:

> Where there is a single indivisible loss arising from the actions of multiple parties who have contributed to the loss, the fact that different theories of liability have been asserted against them does not foreclose their right of contribution inter se or prevent them from obtaining a verdict credit for settlements made with the plaintiff by one or more of those jointly responsible.

Bd. of Educ. of McDowell County, *Id.*, at syl. pt. 8. This fundamental principal of West Virginia law was reaffirmed by this Court just last term. *Grant Thornton, LLP, v. Kutak Rock, LLP*, ___W.Va. ___, 719 S.E.2d 394, syl. pt. 2 (2011); *see also*, *Sheetz v. Bowles Rice McDavid Graff & Love*, 209 W.Va. 318, 329, 547 S.E.2d 256, 268 (*quoting with approval*, *Parler & Wobber v. Miles & Stockbridge*, 756 A.2d 526 (Md. 2000) ("Contribution rests on common liability not on joint negligence or joint tort. Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds.").

Fundamental to this Court's decision in *Board of Education* was this Court's landmark 1982 decision in *Sydenstricker*. Like the case at bar, *Sydenstricker* involved a claim by a product manufacturer who had been sued by an employee on various products liability theories for contribution against the employer. Like other contribution cases, the *Sydenstricker* Court emphasized that contribution arises from a "common obligation, either in contract or tort,"

169 W.Va. at 448, 288 S.E.2d at 516, (*citing Tenant v. Craig*, 156 W.Va. 632, 195 S.E.2d 727 (1973)), and "rests on [the defendants'] primary joint or common liability to the plaintiff." *Id.*, citing *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879, 886. As in *Board of Education*, this Court drew no formalistic distinction between the nature or theories of liability asserted against the parties, or the fact that claim against the employer would have to be one for deliberate intent as opposed to negligence or warranty. Rather, the Court chose to generically term all parties with common obligation "joint tortfeasors" to recognize the inherent right of contribution among them:

> 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.***

169 W.Va. at 450, 288 S.E.2d at 517-518 (emphasis added).

As in other contribution cases, the *Sydenstricker* Court focused on the derivative nature of contribution in determining whether the product manufacturer could bring the claim, and if so under what circumstances. Relying on the language of W.Va. Code § 23-4-2 (now §23-4-2(c)) which provides that the deliberate intent cause available to the employee is one that exists "as if this chapter had not been enacted," the *Sydenstricker* Court explained:

> This statutory language is designed to place the deliberate intent injury outside of 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. ***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.***

169 W.Va. at 451-452, 288 S.E.2d at 518. (emphasis added). As such, it is clear that *Sydenstricker's* recognition of the right of contribution that Aracoma now asks this Court to take away was not based on formalistic labels, but on its answer to the derivative question of

whether the employer had breached a duty to the plaintiff which caused or contributed to his damages. Since the right being asserted was no more than what could have been asserted by the plaintiff against the employer, contribution was proper and consistent with prior contribution case law.

This Court's analyses in *Board of Education* and *Sydenstricker* underscore Aracoma's misplaced reliance on *National Fruit Product, Co. v, B&O R.R. Co.*, 174 W.Va. 759, 329 S.E.2d.125 (1985). While Aracoma argues that *National Fruit* silently overruled *Sydenstricker* by holding that contribution actions by third parties against a plaintiff's employer are barred because of the lack of common obligation, that contention is patently wrong and misses the point of *National Fruit*. The issue before the Court in *National Fruit* was whether an employer could bring an indemnification or subrogation claim against a third-party to recover *workers' compensation benefits* paid to its employee *under the workers' compensation statute*. Contribution was not an issue. Given the fundamental differences between fault based liability and workers' compensation, the court held that the employer could not hold a third party liable for workers' compensation benefits. The Court reasoned that whether such benefits should be recoverable through a stand-alone action for indemnity or subrogation should be a legislative determination, particularly given that the third party received no benefit from the employer's mandatory payments made under the Act. *Id.*, 174 W.Va. at 760-764, 329 S.E.2d 127-129.

Sydenstricker and *Board of Education* are the controlling authority in this case, not *National Fruit*. *National Fruit* dealt with neither deliberate intent claims (which by their nature are outside of the immunity given to employers under the Act) nor contribution claims (which are derivative of the rights of others). Based on West Virginia's well-settled law of

contribution which has expressly and appropriately allowed the precise claims advanced by MSA in this case for almost 30 years, the Circuit Court correctly answered the certified questions.

The case law from other jurisdictions upon which Aracoma relies is equally irrelevant. West Virginia is in the minority of states that allow claims such as those for "deliberate intent" beyond the broad immunity typically given to employers. Those states that allow such claims vary widely in terms of the conduct that must be proven to establish such claims. Moreover, whether liability for joint harm is joint and several or apportioned also varies widely among jurisdictions making contribution law variable as well. Whether a third party is entitled to contribution from an employer acting with deliberate intent is uniquely a question of West Virginia law that has long been answered in the affirmative.

II. THE 1983 AMENDMENTS TO THE ACT DID NOT CHANGE WEST VIRGINIA CONTRIBUTION LAW OR IMMUNIZE EMPLOYERS FROM THEIR DELIBERATE CONDUCT.

A. As a Matter of Statutory Construction, the 1983 Amendments to the Act Did Not Eliminate Existing Contribution Rights or Immunize Employers From Contribution Claims.

Although Aracoma contends that the 1983 amendments to the Act represent a wholesale abandonment of prior deliberate intent law that replaced existing law with a statutory scheme that immunizes it from contribution claims, those amendments cannot be interpreted or applied to have silently abandoned *Sydenstricker* or to have abrogated MSA's right to contribution from an employer who has acted with deliberate intent. It is clear that § 23-4-2(d)(1) was passed for the purpose of defining the substantive standard of proof needed for recovery by an employee against her employer. Rather than defining the scope of employer liability under the statute as governed exclusively by its provisions, the Legislature left in place the explicit

language of current § 23-4-2(c) whereby an employer's liability for deliberate intent damages remains governed by commons law principles if deliberate intent is shown. Because nothing was included in the amendments expressly abrogating existing rights of contribution under *Sydenstricker*, as a matter of statutory construction, abrogation of such rights cannot be inferred.

Without question, the 1983 amendments to the Workers' Compensation Act were a response to this Court's decision in *Mandolidis v. Elkins Indus.*, 161 W.Va. 695, 246 S.E.2d 907 (1978). *See Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 141-142, 475 S.E.2d 138, 141-142. At the time of this Court's decision in *Mandolidis,* W.Va. Code § 23-4-2 (1969) provided that:

> If injury or death result to an employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, the widower, child, or dependent 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(c) (1969); *See, Bell,* 197 W.Va. at 141, n. 9 475 S.E. 2d at 141. Although this section does not expressly give third parties the right of contribution, given the derivative nature of contribution, this Court nonetheless held in *Sydenstricker* that such a right exists. Importantly, this particular section of the Act was not amended in 1983. In fact the current version of this subsection is effectively the same, but for stylistic edits, as the 1969 version.

The 1983 amendments to § 23-4-2 added new subsections (c)(1) and (2), which are now subsections (d)(1) and (2). New subsection (c)(1) included declarations of Legislative intent including:

> 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 herein expressly provided, . . .
>
> * * *
>
> that, in enacting the immunity provision 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 conceptand standard of willful, wanton, and reckless misconduct;

W.Va. Code § 23-4-2(d)(1) (2005), formerly §23-4-2(c)(1), (emphasis added). The Legislature made no statement whatsoever relative to third party actions, and included no language in the amendments granting them immunity against such actions. Rather, the Legislature's stated purpose was to address "disputes between or among employees and employers," by addressing the *Mandolidis* "problem" of the expanding liability for deliberate intent in West Virginia. To do so, the Legislature created a strict legislative standard that abrogated the "common law tort system concept" of willful, wanton, and reckless conduct as giving rise to liability as expressed in *Mandolidis* and replaced it with rigid statutory elements that an employee must prove to recover on a deliberate intent claim. *Id.* If such standard is met, the statute continued to allow an injured employee to recover damages in excess of statutory workers' compensation benefits "as if this chapter had not been amended" as had been permitted before the amendments.

To find, as Aracoma asserts, that the 1983 amendments silently overruled *Sydenstricker,* completely abrogated existing contributions rights, and granted categorical immunity with respect to deliberate intent claims would be contrary to well-settled principles of statutory construction and basic common sense. Because inchoate contribution has existed since statehood, the West Virginia Constitution guarantees its continued existence "until

altered or repealed by the legislature." W.Va. Const. Art. VIII, Sec. 13 Since statutes which deny or infringe rights provided by the common law are to be strictly construed, *Woodrum v. Johnson*, 210 W.Va. 762, 775 n. 10, 559 S.E.2d 908, 921(2001) ("It must be acknowledged that a statute in derogation of the common law must be strictly construed."); *City of Fairmont v. Retail, Wholesale, and Dept. Store Union*, 166 W.Va. 1, 16, 283 S.E.2d 589, 597 (W.Va. 1980) ("Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms."); *State ex rel. Keller v. Grymes*, 65 W.Va. 451, 456, 64 S.E. 728, 730 (1909) ("Statutes changing the common law are strictly construed, and it is not further abrogated than the language of the statute clearly and necessarily requires."), an abrogation of MSA's existing right of contribution cannot be implied. Unless expressly abrogated by statute (which clearly has not occurred), it continues unimpaired.

Moreover, a statute must be "read in the context of the general system of law which the Legislature intended it to be a part." *Community Antenna Serv., Inc., v. Charter Communications VI, LLC*, ___W.Va. ___, 712 S.E.2d 504, 513-514 (W.Va. 2011). As this Court reasoned:

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Id. As such, this Court has recognized that the Legislature cannot silently supersede, overturn or overrule a judicial ruling, but that it must do so expressly. *See, State v. Muntzing*, syl. pt. 3, 146 W.Va. 349, 120 S.E.2d 260 (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 is familiar with such prior construction and intended the reenacted statute to have effect in accordance with such judicial construction.").

The Legislature's amendments to the Workers' Compensation Act in 1983 did not foreclose or eliminate claims for contribution by third parties against employers who are accused of harming plaintiffs through their deliberate conduct, and did not silently overrule *Sydenstricker*. Third-party claims for contribution against employers for their deliberate conduct contributing to a plaintiff's injuries existed prior to 1983, and remain valid to this day. As a matter of legislative action and intent, the Legislature did nothing to impair a third party's right to seek contribution, but simply changed the standard under which the plaintiff (and derivatively third parties) could prove deliberate intent. Under established rules of statutory construction, Aracoma's strained interpretation fails as a matter of law.[7]

B. As *Erie v. Stage Show Pizza* Makes Clear, this Court's Interpretation of W.Va. § 23-4-2 In *Bell v. Vecillio & Grogan, Inc.* Does Not Foreclose Contribution Claims Against an Employer.

Recognizing, as it must, that the 1983 amendments to W.Va. Code § 23-4-2 do not expressly foreclose contribution claims against employers, Aracoma argues that this Court's decision in *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 475 S.E.2d 138 (1996) must be read as doing so. According to Aracoma, the 1983 amendments to the Act categorically removed all aspects of a deliberate intent cause of action from the common law, including the damages that can be recovered if deliberate intent under the statute is proven. As its reasoning

[7] Had the legislature fully abrogated existing contribution rights in 1983, there would be no need for new legislation to accomplish this goal. Nonetheless, in 2011 six senators sponsored a bill that, if enacted, would have eliminated MSA"s right of contribution against Aracoma. *See* 2011 W.Va. Senate Bill No. 403 [A0127-1033]. Similar bills are currently pending in both the House and the Senate. *See* 2012 W.Va. House Bill 4479; 2012 Senate Bill 458.

goes, since deliberate intent damages are no different than workers' compensation benefits, and any claim for deliberate intent damages is no different than a claim for no-fault benefits, all claims against employers for benefits are solely statutory and any right of contribution cannot exist unless it is expressly allowed by W.Va. Code §23-4-2. Putting aside the shortcomings of these arguments discussed above, Aracoma's reading of *Bell* is misplaced and was soundly rejected by this Court in *Erie v. Stage Show Pizza*, 210 W.Va. 63, 553 S.E.2d 257 (2001).

Bell did not address the concept of contribution, and nothing in the *Bell* opinion holds that contribution clams against employers were eliminated by the 1983 Amendments to the Act. Rather, *Bell* held that an employee of a West Virginia employer, injured while temporarily working in Maryland, could bring a deliberate intention action under the Act in West Virginia. By defining the deliberate intent action under the Act as part of the "statutory scheme" of the Act, the Court permitted a deliberate intent action by the injured employee to go forward. 210 W.Va. at 139-140, 475 S.E.2d at 139-140. If the Court had found that the deliberate intent action was purely based on the common law, choice of law provisions would have prohibited the deliberate intent claim by the injured employee under Maryland law. *Id.* Importantly, the Court recognized that a deliberate intent cause action is *defined* by the 1983 statutory scheme, not created by it. Discussing the 1983 statutory amendments 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 intent established in *Mandolidis* and placed the

> definition in a precise, controlled, predictable statutory environment (note 11)[8].
>
> When we consider the specific language of W.Va. Code 23-4-2(c)(2)(i)-(ii), we cannot believe that the Legislature intended for the old common law ***definition*** of deliberate intention to continue.

197 W.Va. at 143, 475 S.E.2d at 143 (emphasis added). The *Bell* Court recognized the intent of the 1983 amendments was to create a legislative standard for recovery for deliberate intent by removing the common law standard of recovery and replacing it with a precise, legislative standard.

Five years after *Bell*, and eighteen years after the 1983 amendments to the Act, this Court expressly rejected the contention that Aracoma now advances, holding that damages awarded against an employer under W.Va. Code § 23-4-2 are not damages for which an employer "may become liable under any workers' compensation" law, but are common law damages. *Erie v. Stage Show Pizza,* 210 W.Va. 63, 73-74, 553 S.E.2d 257, 267-268. In *Erie*, an injured employee brought suit against his employer for, among other things, deliberate intent damages under W.Va. Code § 23-4-2. The employer's insurer sought a declaratory judgment that it had no obligation to reimburse the employer for any damages that the employer might become obligated to pay based on a policy provision excluding any liability for amounts for which the employer "may become liable under any workers' compensation . . . law." *Id.,* 210 W.Va. at 66, 553 S.E.2d at 260. As Aracoma does here, the insurer argued after the 1983 amendments to the Act, deliberate intent damages were purely statutory and by definition had to arise under workers' compensation law.

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[8] The *Bell* Court noted in note 11: "[T]he amended version of W.Va. Code 23-4-2 explicitly states that its purpose is to create a legislative standard, as embodied in subsections (c)(1)-(2)."

In rejecting the insurer's contention, the Court emphasized the language of § 23-4-2(c) providing that deliberate intent causes of action exist "as if this chapter had not been enacted" remained unchanged through the 1983 amendments. 210 S.E.2d at 72, 533 S.E.2d at 266. Rather than creating a new, completely statutory cause of action for deliberate intent actions in 1983, the Court held that the 1983 amendments redefined the conduct necessary to prove deliberate intent:

> By enacting the deliberate intention statute, in W.Va. Code, 23-4-2(c) the Legislature specifically stated that it "intended to create a legislative standard for loss of that immunity" established in W.Va. Code, 23-2-6. To accomplish this goal, the Legislature set forth "more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct," standards of conduct used in the statute to determine if an employer has acted with deliberate intention. W.Va. Code, 23-4-2(c). By creating a specific standard under the statute, the Legislature sought to "promote prompt judicial resolution of the question of whether a suit . . . is or is not prohibited by the immunity" created in W.Va. Code, 23-2-6

Id. Moreover, the *Erie* Court rejected the insurers contention (advanced by Aracoma in this case) that the *Bell* decision should be read as a "wholesale abandonment of the common law concept of a deliberate intention action" which created a solely statutory cause of action under the Act. As the Court reasoned:

> Erie argues, that under *Bell*, this Court conclusively ruled that a deliberate intention cause of action is a purely direct statutory cause of action express within the worker's compensation system – and therefore argues that any liability imposed against a policyholder as a result of a deliberate intention lawsuit is liability arising entirely under a workers' compensation law.
>
> The appellant, however, argues that an employer subjected to a deliberate intent action under *Bell* does not become subject to a statutory sanction, but instead becomes liable for common law damages over and beyond any workers' compensation benefits received by an employee, "as if [the Workers' Compensation Act] had never been enacted[.]" In other words, while the deliberate intention statute specifies the evidence necessary to extinguish an employer's immunity under the Workers' Compensation Act, the statute only exposes an employee to an obligation under the common law, namely,

> damages for any injuries proximately caused by the employer's conduct. As a deliberate intent cause of action results in damages which are not "workers' compensation benefits," the appellant argues that the Erie policy should be construed to find coverage for his deliberate intent cause of action. ***We agree.***

210 S.E.2d at 73, 533 S.E.2d at 267 (emphasis added).

Not only are Aracoma's arguments contrary to fundamental principles of contribution law and statutory construction, they have been soundly rejected by this Court. The 1983 amendments did no more than define the conduct that must be proven to prevail on a deliberate intent claim. If proven, the employer loses its immunity under the Act and is subject to common law damages. For this very reason, this Court in *Sydenstricker* held that employers are subject to common law contribution claims if deliberate intent can be shown. To the extent that there was any doubt as to whether Aracoma's current arguments had merit in the wake of *Bell*, they were laid to rest by this Court in *Erie.*[9]

C. Contribution Claims Against Employers for Deliberate Intent Have Remained Viable After 1983

Although Aracoma argues that it has been the law in West Virginia since 1983 that contribution claims for deliberate intent by third parties have been prohibited, such claims have continued to be recognized as viable. In 1996, in *Goodwin v. Hale*, 198 W.Va. 554, 482 S.E.2d 171 (1996), a defendant sued by an injured employee brought a third party action

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[9] The *Erie* Court's analysis as to the nature of the liability to which § 23-4-2 exposes employers has been repeated by this Court and respected commentators over the past decade. See, e.g., *Ryan v. Clonch Indus., Inc.*, 219 W.Va. 664, 674, 639 S.E.2d 756, 766 (2006) ("[u]nquestionably, the Legislature intended by operation of W.Va. Code § 23-4-2[] to pierce the immunity from tort liability granted to employers under our workers' compensation system when all five elements enumerated therein have been established"); *Riffle v. C.J. Hughes Constr. Co.*, 226 W.Va. 581, 584 n.2, 703 S.E.2d 552, 555 n.2 (2010) ("[a]s a general matter, West Virginia's workers' compensation laws provide statutory immunity for employers from tort actions brought by their employees[,] [which] can [be] overcome" through demonstration of the elements for showing deliberate intention contained in § 23-4-2); *W. Va. Employers' Mut. Ins. Co. v. Summit Point Raceway Assocs., Inc.*, ___ W.Va. ____, 719 S.E.2d 830, 837 n.10 (W.Va. 2011) (same); The Honorable Robin Jean Davis & Louis J. Palmer, Jr., *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform*, 107 W.Va. L. Rev. 43, 62 (2004) ("[u]nder the Acts an employer is liable to an employee for a common law tort action for a deliberate intention injury").

against the employer alleging that the employer was liable for contribution as it had acted with deliberate intent. Although the case was ultimately decided on other grounds, this Court noted without difficulty that "the deliberate intent exception contained in W.Va. Code 23-4-2 (1994) does permit a defendant to bring a third party action against the employer of the injured plaintiff." 198 W.Va. 554, 556 at n. 5, 482 S.E.2d 171, 174. Importantly, *Goodwin* was decided only six months after *Bell*, and was authored by the same Justice of this Court (Judge Recht). This Court did not interpret *Bell* as foreclosing contribution claims against employers based on deliberate intent, but recognized *Sydenstricker's* continued viability in its immediate wake. *See also Helmick v. Potomac Edison Co.,* 185 W.Va. 269, 406 S.E.2d 700 (1991) (allowing a claim for deliberate intent contribution to proceed after 1983 amendments).

Applying West Virginia law, both the United States District Court's for the Northern and Southern Districts of West Virginia have reached the same result. In *West v. American Electric Power Company, Inc.*, Judge Goodwin of the United States District Court for the Southern District of West Virginia held that "[p]ursuant to [§23-4-2], joint tortfeasor employers are immune from third-party contribution suits where they would be immune to a suit filed by the employee, but ... employers do not enjoy immunity where the employee could press the claim against the employer." *West v. American Electric Power Company, Inc.*, 2010 U.S. Dist. LEXIS 105932 (S.D. W. Va. Oct. 4, 2010) (unpublished) (*citing Sydenstricker*). [A0115-0118]. In *Kirkhart v. PPG Indus.*, 2006 U.S. Dist. LEXIS 89974, *26-27 (N.D.W.Va., Dec. 12, 2006) (unpublished), Judge Stamp reached the same conclusion. *Id.* ("[Likewise, the "deliberate intention" exception to an employer's immunity under the Workers' Compensation Act can also be utilized by third-party claimants."). [A0119-0126].

III. ARACOMA'S INTERPRETATION OF THE 1983 AMENDMENTS TO THE ACT WILL LEAD TO UNFAIR AND ABSURD RESULTS

Based on the fallacious premise that *National Fruit* prohibits employers from asserting contribution claims against other potentially responsible third parties, Aracoma argues that it would be fundamentally unfair for this Court to allow contribution claims against employers based upon deliberate intent. However, that argument is absurd, and does nothing more than create a straw man for Aracoma to knock over. *National Fruit* does not prohibit, or even address contribution claims, and Aracoma cites to no case where contribution claims by employers in deliberate intent cases have been disallowed. Under long-standing contribution law, if a third party is potentially liable to the plaintiff for the damages sought in the deliberate intent case, employers (like third parties) are free to assert contribution claims against them.

Depriving third parties of the right to seek contribution from an employer who has acted with deliberate intent in causing injury would be fundamentally unfair. Under West Virginia's system of joint and several liability, a responsible defendant can become liable for damages far in excess of its proportionate share of responsibility for such damages. Although the effect of this was ameliorated somewhat in 2005 by the enactment of W.Va. Code § 55-7-24, in many cases such as strict liability a defendant remains responsible for all of a plaintiff's damages if it caused any portion of them. By its nature, contribution is intended to allow a defendant who has become liable for more than its proportionate share of harm to recover proportionately from other responsible parties. Categorically removing that right with respect to employers upsets the equitable balance contribution provides to joint and several liability, exposing defendants to liability for harm disproportionate to what they may have caused.

The differences between a deliberate intent cause of action and one for negligence or strict liability underscore the unfairness of such a rule. Without question, as the Legislature intended in enacting the 1983 amendments to the Act, proving deliberate intent under the Act is far from simple and requires proof of a heightened degree of culpability. In stark contrast, a plaintiff's burden of proof against an entity such as MSA on negligence or strict liability claims is significantly less than that required for deliberate intent. As the procedural posture of this case demonstrates, as a practical matter, a plaintiff who may have been harmed by the conduct of both an employer and a third party has little incentive to sue both, particularly in cases such as strict products liability excepted from the provisions of W.Va. Code § 55-7-24. Without contribution, the ultimate liability to the plaintiff for joint harm will not be based on apportionment relative to degree of fault, but to the plaintiff's choice of whom he will sue. Even in rare cases in which a plaintiff sues both his employer and a third party, Aracoma's contention that employers are categorically immune from all forms of contribution would absurdly preclude the third party from asserting a cross-claim for contribution pursuant to W.Va. R. Civ. P. 13(g) against the employer co-defendant. In such a case, if the third party is found 1% at fault for the plaintiff's harm, the plaintiff would be entitled to collect the entirety of the judgment from the third party but the third party would have no right of contribution against the 99% at fault employer defendant. The Legislature clearly did not intend such an absurd result, and this Court should not adopt of rule of law that would allow such a result.

Finally, immunizing employers from contribution claims runs counter to the civil justice system's interest in providing economic incentives for employers to comply with workplace safety rules and regulations. Under the balance struck by the Legislature in W.Va.

Code §23-4-2, an employer who acts with deliberate intent as defined by that statute loses its immunity under the Act and becomes liable to an injured employee for common law damages. Employers therefore have an economic incentive to comply with workplace rules and regulations to avoid employee injuries, and avoid deliberate intent claims. Immunizing employers from contribution claims in cases of jointly caused harm, and leaving their ultimate liability for such harm to the whim of whom the plaintiff chooses to sue, or from whom the plaintiff chooses to collect, runs counter to this balance and to promoting workplace safety.

CONCLUSION

For the foregoing reasons, Respondent Mine Safety Appliances respectfully requests that this Court affirm the long-standing and principled law of this State that employers are subject to claims of contribution where the employer has acted with deliberate intent by affirming the Circuit's Court's responses to the Certified Questions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the forgoing ***"Brief of Respondent, Mine Safety Appliances Company,"*** on all designated parties and their counsel of record by depositing true copies thereof in the regular manner in the United States mail, postage prepaid, and via facsimile at Huntington, West Virginia on the 21th day of February 2012, addressed as follows:

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