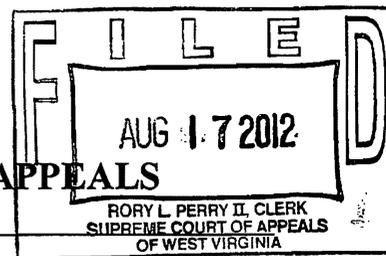


BRIEF FILED
WITH MOTION

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



CASE NO.: 12-0835

GINA YOUNG, ADMINISTRATRIX OF THE ESTATE OF RICHARD YOUNG, JR.,

Petitioner,

vs.

**APOGEE COAL COMPANY LLC, PATRIOT COAL CORPORATION and
JAMES RAY BROWNING,**

Respondents.

**PROPOSED AMICI BRIEF OF THE WEST VIRGINIA ASSOCIATION FOR JUSTICE
AND KENNETH M. PERDUE AS PRESIDENT OF THE WEST VIRGINIA LABOR
FEDERATION, AFL-CIO, IN SUPPORT OF GINA YOUNG, ADMINISTRATRIX
OF THE ESTATE OF RICHARD YOUNG, JR.**

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DATE: August 17, 2012

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I. INTRODUCTION OF AMICUS CURIAE¹

The issue presented in the matter *sub judice* concerns a certified question from the United States District Court for the Southern District of West Virginia inquiring as follows:

Does the ‘deliberate intention’ exception to the exclusivity of Workers[’] Compensation benefits outlined in West Virginia Code § 23-4-2(d)(2)(ii) apply to ‘persons’ (supervisors and co-employees) as well as employers?

The Amici submitting this brief, the West Virginia Association for Justice and Kenneth M. Perdue as President of The West Virginia Labor Federation, AFL-CIO, both have an interest in workers’ safety which is directly implicated by the determination of this issue.

The West Virginia Association for Justice is a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent West Virginia citizens and their families who are injured and/or harmed by the wrongful conduct of others. The resolution of this issue impacts the rights of injured workers represented by members of the West Virginia Association for Justice.

Kenneth M. Perdue is President of the AFL-CIO. The West Virginia Labor Federation, AFL-CIO, is a federation of 406 local unions, over 60 districts, and 13 central bodies from 58 national and international labor unions representing 123,000 West Virginia active and retired working men and women from every walk of life. The West Virginia AFL-CIO is affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with a total membership in excess of 13 million active working men and women. The West Virginia AFL-CIO works to assist in the development of jurisprudence establishing standards for workplace safety for all workers in West Virginia. The issues presented in this case are important issues to the AFL-CIO and its

¹ Counsel for the Petitioner did not author or make monetary contributions specifically intended to fund the preparation or submission of this Brief.

members since the issues affect or may affect many AFL-CIO members and their spouses.

II. OPERATIVE FACTS ON THE UNDERLYING MATTER

A recitation of the operative fact and procedural history of this case is not necessary for the purposes of this amicus brief. The West Virginia Association for Justice and Kenneth M. Perdue as President of the West Virginia Labor Federation, AFL-CIO, incorporate and reference the operative facts as recited in the Brief of the Petitioner.

III. DISCUSSION AND ARGUMENT

A. The statutory framework of West Virginia Code § 23-4-2

West Virginia law provides employers and agents of employers certain immunities from civil actions by injured workers, provided that the employer complies with the provisions of West Virginia workers' compensation law. Specifically, employers and their agents are immune from suit, "absent deliberate intention," if the employer complies with the provisions of West Virginia workers' compensation law as set forth in W. Va. Code § 23-2-6. Immunity may be lost if "the employer or person against whom liability is asserted acted with 'deliberate intention.'" W.Va. Code § 23-4-2(d)(2). West Virginia Code § 23-4-2(d)(2)(i)-(ii) outlines the manner in which "deliberate intention" can be established, providing that:

The immunity from suit provided under this section and under sections six and six-a, article two of this chapter may be lost **only if the employer or person against whom liability is asserted** acted with "deliberate intention". This requirement may be satisfied **only if**:²

(i) It is proved that the employer or person against whom liability is asserted acted

² This clause is referred to hereinafter as the "immunity abrogation clause."

with a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (A) Conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

- (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
- (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
- (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
- (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless intentionally thereafter exposed an employee to the specific unsafe working condition; and
- (E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

(Emphasis added). Hence, an “employer or the person against whom liability is asserted” is immune from suit against an injured worker unless the worker can establish “deliberate intention” through one of two modes outlined in the statutory framework.

B. West Virginia Code § 23-4-2(d)(2)(ii) is independently applicable to agents of the employer.

The immunity abrogation clause of West Virginia Code § 23-4-2(d)(2) provides that part (ii) is applicable to “the employer or person against whom liability is asserted.” “A cardinal rule of

statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Syl. Pt. 3, Meadows v. Wal-Mart Stores, Inc., 207 W.Va. 203, 530 S.E.2d 676 (W.Va. 1999). “In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.” Syl. Pt. 2, Smith v. State Workmen's Compensation Commissioner, 159 W. Va. 108, 219 S.E.2d 361 (W.Va. 1975).

As it exists today, “deliberate intention” is a concept of statutory creation whose definition is borne out of the elements that must be proven to establish it. W.Va. Code § 23-2-6a provides that “[t]he immunity from liability set out in the preceding section shall extend to every *officer, manager, agent, representative or employee of such employer* when he is acting in furtherance of the employer’s business and *does not inflict an injury with deliberate intention.*” (Emphasis added). The immunity abrogation clause of West Virginia Code § 23-4-2(d)(2) makes clear that parts (i) and (ii) remove immunity from suit against the “employer or³ person against whom liability is asserted” where it is proven that such person or employer acted with “deliberate intention.” “Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the framework. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.” Syl. Pt. 1, in part, State ex rel. Holbert v. Robinson, 134 W.Va. 524, 59 S.E.2d 884 (W.Va. 1950).

Parts (i) and (ii) are separate modes by which an injured worker may establish “deliberate intention” and these parts, by application, define “deliberate intention” as the term is used in the

³ “Or” is disjunctive and creates two distinct alternatives. Antosz (Jantosz) v. State Compensation Com’r, 130 W.Va. 260, 265, 43 S.E.2d 397, 400-01 (W.Va. 1947).

statutory framework. The immunity language of W.Va. Code § 23-2-6a, in connection with the immunity abrogation clause of West Virginia Code § 23-4-2(d)(2), supports the conclusion that part (ii) applies to persons other than the employer because “deliberate intention” can only be defined by the application of the elements set forth therein. If our legislature wanted to define “deliberate intention” differently for agents of the employer, it would have indicated so in the immunity provision for agents of the employer or the immunity abrogation clause of the statute in question. Essentially, Respondents’ argument is one that allows a legislative omission to rise above a clear legislative declaration.

West Virginia Code § 23-4-2(d)(2)(ii) provides for a cause of action against agents of an employer as evidenced by the statutory framework. While part (ii) utilizes the term “the employer” when describing subparts (B) and (D) of West Virginia Code § 23-4-2(d)(2)(ii), such references must be viewed within the context of the immunity abrogation clause which provides the explicit paradigm through which the subparts must be examined. West Virginia Code § 23-4-2(d)(2)(ii) applies to agents of the employer whom liability attaches pursuant to the language of the statutory framework. Such an approach has been followed by many circuit courts and federal courts throughout West Virginia. See Bledsoe v. Brooks Run Mining Co., LLC, 2011 WL 5360042, 3 (S.D.W.Va. Nov. 4, 2011); Williams v. Harsco Corp., 2011 WL 3035272, (N.D.W.Va. July 22, 2011); Hoffman v. Consolidation Coal, 2010 WL 4968266 (N.D.W.Va. Dec. 01, 2010); Anderson v. Am Electric Power Svc. Corp., Civil Action No. 06–C–770 (Kanawha C. W.Va. Cir. Apr. 10, 2007); Knight v. Baker Material Handling Corp., Civil Action No. 01–C–39–1 (Harrison C. W. Va. Cir. Ct. Sept. 26, 2001); Weekly v. Olin Corp., 681 F.Supp. 346 (N.D.W.Va.1987); Burch v. Monarch Rubber Co., Civil Action No. 2:06–cv–760 (S.D.W.Va. Dec. 8, 2006); Goudy v. McElroy

Coal Co., 2010 WL 4179254 (N.D.W.Va. Oct. 20, 2010).

Some courts have reached the opposite conclusion, holding that W.Va. Code § 23-4-2(d)(2)(ii) does not create a cause of action against employer agents or persons. See Evans v. CDX Services, LLC, 528 F.Supp. 2d 599 (S.D.W.Va. 2007); Hager v. Cowin & Company Inc., 2011 WL 2175075 (S.D. W.Va. June 3, 2011); King v. Sears Roebuck & Company, 2011 WL 672065 (S.D.W.Va. February 14, 2011); Stover v. Matthews Trucking, Inc., 2011 WL 6141099 (S.D.W.Va. December 9, 2011); Adkins v. Consolidation Coal Co., 2012 WL 1309165 (S.D.W.Va. April 13, 2012); Furrow v. Arch Coal, Inc., et al., Civil Action No. 09-C-152 (Mingo C. W.Va. Cir. Oct. 7, 2009); Cartwright v. Superior Well Servs., Inc., 2011 WL 4528251 (S.D.W.Va. Sept. 28, 2011). However, these courts have not provided a coherent analysis of: the scope of the immunity abrogation clause; the legislative intention; or the overall immunity framework.

As Senior Status Judge Kaufman held in Weekly v. Olin Corporation, 681 F.Supp. 346 (N.D.W.Va. 1987), the most plausible construction of W.Va. Code § 23-4-2(d)(2)(ii)⁴ is to interpret it in a manner consistent with the immunity abrogation clause and the modes of proving “deliberate intention” outlined in the statute. As Judge Kaufman recognized, this approach is “consistent with West Virginia cases which hold that the scope of immunity afforded fellow employees under W.Va. Code section 23-2-6a (a section expressly cited in the amended legislation, see § 23-4-2(c)(2)), was intended by the legislature to be identical to that enjoyed by the employer. E.g., Bennett v. Bucker, 150 W.Va. 648, 149 S.E.2d 201, 205 (1966). The scope of immunity would cease to be identical if a co-worker, *i.e.*, a ‘person’ who is not an ‘employer,’ enjoyed greater statutory protection with

⁴ At the time of the Weekly decision, the statute in question was codified as W.Va. Code § 23-4-2(c).

respect to the burden of proof than did his employer.” Weekly v. Olin Corp., 681 F.Supp. 346, 352.

A court construing a statute must consider the “overarching design of statute.” Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573, 586, 466 S.E.2d 424, 466 (W.Va. 1995), quoting State ex. Re. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 777, 461 S.E.2d 516, 523 (W.Va. 1995). Significance and effect must be given to our legislature’s immunity abrogation clause. Immunity may be lost if “the employer or person against whom liability is asserted acted with ‘deliberate intention.’” W.Va. Code § 23-4-2(d)(2). W.Va. Code § 23-4-2(d)(2)(ii) is but one of two ways to prove “deliberate intention” against “the employer or person against whom liability is asserted.” The certified question must be answered in the affirmative, otherwise the legislative intent in the adoption of the immunity abrogation clause will be judicially nullified.

C. West Virginia mine safety regulations support a finding that West Virginia Code § 23-4-2(d)(2)(ii) applies to agents of the employer because mine safety regulations hold miners independently responsible for safety violations.

The application of W.Va. Code § 23-4-2(d)(2)(ii) to agents of the employer is consistent with the enforcement scheme of safety regulations like those applicable in this case. When drafting and amending W.Va. Code § 23-4-2, our legislature intended that it be analyzed within the context of the administrative safety regulations that protects workers and ensures safe workplaces. W.Va. Code § 23-4-2(b) contemplates the commission’s cooperation with the “Office of Miners’ Health, Safety and Training and the state division of labor in promoting general safety programs and in formulating rules to govern hazardous employment.” Similarly, W.Va. Code § 23-4-2(d)(ii)(C) provides that a jury may find that subpart (C) has been satisfied where an injured worker establishes a violation of “a violation of a state or federal safety statute, rule or regulation. . . .”

West Virginia mine safety regulations require that certain persons, including foremen, assistant foremen, fire bosses and other coal miners, act in a manner consistent with mine safety regulations. Specific obligations of designated individuals are outlined in statutes and administrative rules. See e.g. W.Va. Code St. R. § 56-2-19 (requiring pre-shift and onshift inspections by a “designated person” and discussing obligations of the mine foreman and assistant mine foreman); W.Va. Code § 22A-2-1 et seq. (outlining obligations of a mine foreman and certain personnel in the mine environment); W.Va. Code § 22A-2-20 through 23 (outlining the authority and duties of a fire boss); W.Va. Code § 22A-2-54 (discussing the duties of management and employees regarding mine safety compliance); W.Va. Code St. R. § 36-13-1 et seq. (same); W.Va. Code St. R. § 56-3-38 (same); W.Va. Code St. R. § 56-3-26 (discussing instruction and supervision); W.Va. Code St. R. § 36-21-4 (same); W.Va. Code St. R. § 36-6-8.2 (discussing long wall inspections by a “certified person designated by the mine foreman to supervise”); W.Va. Code St. R. § 36-24-6 (outlining the responsibility for record keeping).⁵

When mine safety regulations are violated, coal miners can be individually stripped of their certifications and individually fined. See W.Va. Code § 22A-1-31(a) (discussing withdrawal certifications); W.Va. Code St. R. § 56-3-22.1(a) (discussing withdrawal certifications); W.Va. Code § 22A-1-21(a)(3) (discussing fines for individual miners); W.Va. Code St. R. § 56-3-18.1(2) (discussing fines); W.Va. Code St. R. § 56-12-5 (discussing the assessment procedure for individuals). Hence, responsibility for compliance with mine safety regulations extends beyond the “employer” to particular individuals within the workplace.

⁵ This is not intended to be an exhaustive list but an example of the independent legal obligations placed upon particular individuals in the mine environment.

The application of W.Va. Code § 23-4-2(d)(2)(ii) to agents of the employer with statutory or supervisory obligations over the workplace is consistent with mine safety regulations. Mine safety regulations place direct safety obligations on specified individuals within the workplace. Failure to comply with safety regulations can result in the loss of certifications and individualized fines separate and distinct from fines issued to mine operators. Like W.Va. Code § 23-4-2(d)(2)(ii), mine safety regulations place a direct responsibility upon the employer and other persons charged with safety to protect workers from unsafe conditions under their control or direction. W.Va. Code § 23-4-2(d)(2)(ii) must be read in a manner congruent with mine safety regulations to deter known unsafe working conditions in West Virginia workplaces.

D. Our legislature sought to discourage unsafe working conditions by holding agents of the employer responsible for their personal conduct.

Workplace safety is a public policy concern in West Virginia.⁶ The most recent data indicates that in 2010 there were ninety-five (95) workplace fatalities in West Virginia. Brief Appendix Exhibit 1, at 1 (U.S. Bureau of Labor Statistics, U.S. Department of Labor, 2012). These numbers do not account for non-fatal incidents. See Brief Appendix Exhibit 2 (2010 nonfatal occupational injuries). In the coal mine work environment alone, the most-recent publicized tragedies of the Sago Mine Disaster (January 6, 2006) and the Upper Big Branch Mine Disaster (April 5, 2010), serve as stark reminder of the impetus of workplace safety. The West Virginia

⁶ West Virginia jurisprudence supports the concept of worker safety as a public policy goal in West Virginia. See generally W.Va. Code § 22A-1-1 et seq.; W.Va. Code § 23-3-1 et seq.; W.Va. Code § 23-3A-1 et seq.; Collins v. Elkay Mining Co., 179 W.Va. 549, 371 S.E.2d 46, ___ (W.Va. 1988) (recognizing cause of action for retaliatory discharge where employee was terminated for refusing to falsify safety reports concerning safety inspection at employee's plant in violation of West Virginia Mine Safety Act); Syl. Pt. 2, Twigg v. Hercules Corp., 185 W.Va. 155, 406 S.E.2d 52 (W.Va. 1990)(employee drug testing permissible where the employee's responsibilities involve public safety or the safety of others).

Office of Miner's Health, Safety & Training reports that in 2011 alone, there were six (6) fatal mine incidents. Appendix Exhibit 3 (W.Va. M.H.S.&T. Fatal Mining Accidents and Investigative Reports 1997-2012). One of the six workplace fatalities in 2011 was Mr. Richard Young, Jr., the decedent in this action.

Assuming arguendo this Honorable Court finds that the statutory framework is ambiguous, it must still find that West Virginia Code § 23-4-2(d)(2)(ii) exudes a cause of action against employer agents because such a finding furthers the legislature's intent to discourage unsafe working conditions and protect workers from known unsafe working conditions. As reflected by the statutory scheme, our legislature sought to hold employers and other persons liable where they act with "deliberate intention." W.Va. Code § 23-4-2(d). This evidences the legislature's intent to deter employers and their agents from permitting known unsafe working conditions to exist in the workplace. See Emily A. Spieler, Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries, 31 Hous. L. Rev. 119, 213 (1994)(recognizing the lack of workplace injury prevention in the no-fault workers' compensation model).⁷

W.Va. Code § 23-4-2(d) is remedial in nature as it seeks to correct or improve safety conditions in West Virginia workplaces. See Syl., Vandall v. State Compensation Com'r, 110 W.Va. 61, 158 S.E. 499 (W.Va. 1931)("the Workmen's Compensation Law, being remedial, should be liberally construed."). It must be liberally construed to give effect to the intent of the legislature

⁷ While application of the deliberate intent cause of action to supervisors and co-employees provides important safety incentives, it also has jurisdictional implications. As the Certification Order here illustrates, the presence of the culpable supervisors and co-employees makes it more likely that the courts of this State rather than the federal courts will be able determine the parameters of the duties on employers and supervisors to protect workers in this State. This Court is in the best position to balance the important interests of immunity, safety and compensation.

to protect workers from unsafe conditions. W.Va. Code § 23-4-2(d) must be construed to protect workers from unsafe working conditions. The safety of West Virginia workers requires that the certified question be answered in the affirmative.

IV. CONCLUSION

This amicus adopts and endorses the legal arguments as they have been stated by the Petitioner. The workers' compensation statutory scheme provides that employers and other persons, which includes employer agents, are not immune from liability where certain statutory conditions are proven by an injured worker. When considering the language of the relevant remedial statute, the legislative intent, and matters of public policy, West Virginia Code § 23-4-2(d)(2)(ii) must be found applicable to agents of the employer.

For these reasons the Amici urge that this Court answer the certified question in the affirmative.



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

GINA YOUNG, ADMINISTRATRIX OF
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Respondents.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **PROPOSED AMICI BRIEF OF THE WEST VIRGINIA ASSOCIATION FOR JUSTICE AND KENNETH M. PERDUE AS PRESIDENT OF THE WEST VIRGINIA LABOR FEDERATION, AFL-CIO, IN SUPPORT OF GINA YOUNG, ADMINISTRATRIX OF THE ESTATE OF RICHARD YOUNG, JR.** has been served upon counsel of record by depositing a true and exact copy thereof, via facsimile, hand delivery, email and/or United States mail, postage prepaid and properly addressed on this 17th day of **AUGUST, 2012**, as follows:

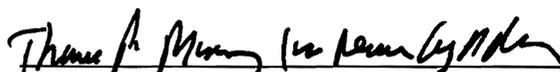
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*Kenneth M. Perdue as President of The West
Virginia Labor Federation, AFL-CIO*

Date: August 17, 2012