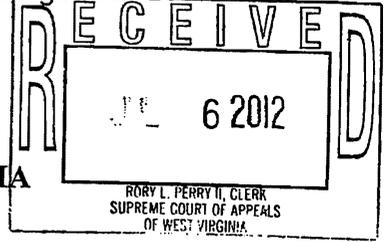


12-0835



**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

GINA YOUNG, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 2:12-cv-01324

APOGEE COAL COMPANY LLC, et al.,

Defendants.

ORDER CERTIFYING ISSUE TO WEST VIRGINIA SUPREME COURT OF APPEALS

Pending before the court is the plaintiffs' Motion to Remand this case to the Circuit Court of Boone County [Docket 5]. The motion has been fully briefed by both parties and is now ripe for decision.

I. Facts and Procedural History

This case arises out of an accident that resulted in the death of Richard Young, Jr. Young was an employee of defendant Apogee Coal Company LLC ("Apogee Coal") at the Guyan Mine in Logan County, West Virginia. On May 14, 2011, Young was instructed by his supervisor, the defendant James Browning, to remove the counterweight on a Caterpillar 992G end loader in order to gain access to the machine's fuel tank. (Compl. [Docket 1-1], at 6.) The 11,685 pound counterweight fell directly on top of Young and killed him. The plaintiffs allege that Young had never performed maintenance on this machine and had not received any training or instruction on how to properly remove the counterweight. (*Id.* at 7.)

The plaintiffs filed suit in the Circuit Court of Boone County, West Virginia, naming

Young's supervisor Browning, Apogee Coal, and Apogee Coal's holding company, Patriot Coal Corporation, as defendants. Apogee Coal is a Delaware limited liability corporation, James Browning is a resident of Logan County, West Virginia, and Young was a resident of Boone County, West Virginia. The complaint asserts claims against Apogee Coal and Browning under the "deliberate intention" exception to the exclusivity of Workers' Compensation benefits. W. VA. CODE § 23-4-2(d)(2)(ii).

The defendants removed the case to the Southern District of West Virginia, claiming that West Virginia Code § 23-4-2(d)(2)(ii) only applies to employers, not supervisors or co-employees, and that Browning should be dismissed under the doctrine of fraudulent joinder. The plaintiffs filed a Motion to Remand, arguing that Browning was not fraudulently joined and that complete diversity is lacking in this case. The plaintiffs assert that they have a "glimmer of hope" for their claim against Browning. Accordingly, the resolution of this dispute hinges on the meaning of West Virginia Code § 23-4-2(d)(2)(ii).

II. Issue Certified

A federal court may certify a question to the state judiciary for resolution of unsettled state law if the state has passed a certification procedure. 17A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4246 (2d ed. 1988). Pursuant to the Uniform Certification of Questions of Law Act, the Supreme Court of Appeals of West Virginia has the authority to "answer a question of law certified to it by any court of the United States . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state." W. VA. CODE § 51-1A-3.

Because the West Virginia Supreme Court of Appeals has not interpreted § 23-4-2(d)(2)(ii) and because interpretation of this statutory section is determinative of the plaintiffs' Motion to Remand, the court **ORDERS** the following question **CERTIFIED** to the West Virginia Supreme Court of Appeals:

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?

III. Discussion

A. Statutory Background

Generally, Workers' Compensation immunizes employers and co-employees acting within the scope of employment from suits arising out of "the injury or death of an employee, however occurring[.]" W. VA. CODE §§ 23-2-6, 6a. This immunity "may be lost only if the employer or person against whom liability is asserted acted with 'deliberate intention'." W. VA. CODE § 23-4-2(d)(2). Section 23-4-2(d)(2)(i)-(ii) provides the two ways in which "deliberate intention" may be established:

(2) 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:

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

W. VA. CODE § 23-4-2(d)(2)(i)-(ii) (emphasis added).

B. Standard for Fraudulent Joinder

The question certified to the West Virginia Supreme Court of Appeals arises in the context of a motion to remand. Federal diversity jurisdiction requires “complete diversity” of citizenship between the parties to a controversy. 28 U.S.C. § 1332. However, the judicially created “fraudulent joinder” doctrine provides an exception to the complete diversity requirement, allowing a district court to assume jurisdiction even if there are nondiverse defendants at the time

of removal. *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993). A finding of fraudulent joinder “permits a district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants, assume jurisdiction over a case, dismiss the nondiverse defendants, and thereby retain jurisdiction.” *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999). To show that a nondiverse defendant has been fraudulently joined, the removing party must establish either (1) that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or (2) that there has been outright fraud in the plaintiff’s pleading of jurisdictional facts. *Id.* at 464.

C. Arguments Against Fraudulent Joinder

In their Motion to Remand, the plaintiffs allege that there is at least a “glimmer of hope” that Browning may be held liable under subsection (ii). As support, the plaintiffs cite state and federal rulings that either abrogate immunity of supervisors and co-employees under subsection (ii) of § 23-4-2(d)(2) or find that there is a possibility that a court would read the statute to reach such a result. *See Bledsoe v. Brooks Run Mining Co., LLC*, No. 5:11-cv-464, 2011 WL 5360042 (S.D. W. Va. Nov. 4, 2011); *Williams v. Harsco Corp.*, No. 1:10-cv-206, 2011 WL 3035272 (N.D. W. Va. July 22, 2011); *Hoffman v. Consolidation Coal Co.*, No. 1:10-cv-83, 2010 WL 4968266 (N.D. W. Va. Dec. 1, 2010); *Anderson v. Am. Elec. Power Serv. Corp.*, No. 06-C-770 (Kanawha C. W. Va. Cir. Apr. 10, 2007); *Knight v. Baker Material Handling Corp.*, 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).

These opinions largely rely on language in the Workers’ Compensation statute that treats employers and supervisors or co-employees identically. First, the introductory language in § 23-4-2(d)(2) refers to both “employers and persons.” Some courts have concluded that this

suggests that the means of establishing “deliberate intention” described in subsections (i) and (ii) are intended to apply equally to employers and supervisors or co-employees. Furthermore, the stem of subsection (ii) contains no reference to either employers or persons. And the word “employer” is only used in three of the five sub-elements of subsection (ii). W. VA. CODE § 23-4-2(d)(2)(ii)(B), (C), (D). Another provision in the Workers’ Compensation statute—West Virginia Code § 23-2-6a—states that “[t]he immunity from liability set out in [§ 23-2-6, covering employers,] shall extend to every officer, manager, agent, representative or employee of such employer when he . . . does not inflict an injury with deliberate intention.” This section does not recognize the two different ways in which deliberate intention can be established under § 23-4-2(d)(2). Like the introductory provision of § 23-4-2(d)(2), some courts have maintained that this indicates that supervisors’ and co-employees’ immunity is abrogated if a plaintiff can prove deliberate intention under either subsection (i) or (ii).

Finally, courts finding either that § 23-4-2(d)(2)(ii) applies to persons or that there is a “glimmer of hope” that it could be applied to persons have cited the West Virginia Supreme Court of Appeals’ (“WVSCA”) decision *Bennett v. Buckner*, 150 W. Va. 648, 654 (1966). In that decision, the WVSCA stated “that the purpose of the legislature was to ‘extend’ the same immunity and to accord an immunity identical with that of the employer to additional persons, including fellow employees.” *Bennett*, 150 W. Va. at 654. Even though this observation was made in 1966, before the two-tiered definition of “deliberate intention” contained in § 23-4-2(d)(2) was enacted in 1983, these opinions rely on this precedent to establish that the intent of the legislature is to maintain identical immunity for employers and supervisors or co-employees.

D. Arguments for Fraudulent Joinder

The defendants do not allege that there was outright fraud in the plaintiffs' pleading, but instead argue that there is no possibility that the plaintiffs can establish a claim against Browning under § 23-4-2(d)(2)(ii). The defendants assert that subsection (ii) applies only to employers and not to supervisors or co-employees. In support of their argument, the defendants contrast the use of "employer or person" in the introductory provision of § 23-4-2(d)(2) and subsection (i) with the use of "the employer" throughout subsection (ii). They argue that this difference should be seen as intentional because "significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Foster Found. v. Gainer*, 228 W. Va. 99, 717 S.E.2d 883, 886 (2011) (quoting *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 206 syl. pt. 3 (1999)). The defendants also cite recent rulings from the Southern District of West Virginia in support of their argument. See *Adkins v. Consolidation Coal Co.*, No. 2:11-cv-0285, 2012 WL 1309165, at *6-7 (S.D. W. Va. Apr. 13, 2012) (concluding "that employee immunity may be lost under section 23-4-2(d)(2)(i), but not under section 23-4-2(d)(2)(ii)"); *Evans v. CDX Servs., LLC*, 528 F. Supp. 2d. 599, 605 (S.D. W. Va. 2007) (holding that "co-employees are not subject to suit under § 23-4-2(d)(2)(ii) because that subsection provides for actions against employers"); see also *Hager v. Cowin & Co., Inc.*, No. 2:10-cv-1138, 2011 WL 2175075 (S.D. W. Va. June 3, 2011); *Furrow v. Arch Coal, Inc.*, No. 09-C-152 (Mingo C. W. Va. Cir. Oct. 7, 2009).

In *Adkins v. Consolidation Coal Co.*, Judge Copenhaver highlighted a result that is reached if subsection (ii) is applied to supervisors and co-employees. Supervisors and co-employees would lose their immunity "simply because the *employer* had actual knowledge of the existence of the specific unsafe working condition and the *employer* had actual knowledge of the high degree of

risk and the strong probability of serious injury or death presented by the specific unsafe working condition.” *Adkins*, 2012 WL 1309165 at *6. Furthermore, Judge Copenhaver reasoned that reading subsection (ii) as abrogating only employer immunity makes sense because employers are “customarily liable for the grievous acts of [their] employees . . . and . . . it is the employer who is near always the lone source of funds to redress a deliberate intent workplace injury.” *Id.*

VI. Conclusion

For the reasons discussed above, it is hereby **ORDERED** that the question stated above be **CERTIFIED** to the West Virginia Supreme Court of Appeals. It is further **ORDERED** that this action is **STAYED** pending final action of the West Virginia Supreme Court of Appeals.

As required under West Virginia Code § 51-1A-6, this court acknowledges that the receiving court may reformulate the question presented in this Order. The Clerk is **ORDERED** to forward this order to the Clerk of the West Virginia Supreme Court of Appeals. The names and address of counsel of record for all parties are as follows:

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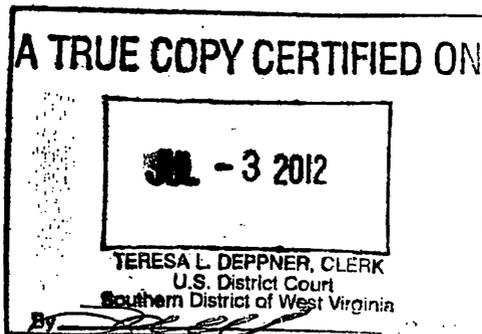
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The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented parties.

ENTER: July 3, 2012



Joseph R. Goodwin
Joseph R. Goodwin, Chief Judge