

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

GINA YOUNG, Administratrix of the Estate of
RICHARD YOUNG, JR.,

Petitioner,

VS.

CASE NO. 12-0835

JAMES RAY BROWNING

Respondent.

PETITIONER'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

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28 U. S. C. A, § 1447

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CERTIFIED QUESTION

1. 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?

Because this case involves the review of a certified question, the standard of review the Court should employ is de novo. "The appellate standard of review of questions of law answered and certified by a circuit court is de novo." *Martino v. Barnett*, 595 S.E.2d 65, 68 (W. Va. 2004) (quoting Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W. Va. 1996) and Syl. Pt. 2, *Keplinger v. Virginia Elec. and Power Co.*, 537 S.E.2d 632 (W. Va. 2000).

STATEMENT OF CASE

Petitioner originally filed her complaint in Boone County Circuit Court. See Appendix pg. 1. Respondent filed a Notice of Removal to the District Court For the Southern District of West Virginia based on fraudulent joinder. See Appendix pg. 17. Plaintiff filed a Memorandum In Support to Remand pursuant to the provisions of 28 U. S. C. A, § 1447. See Appendix pg. 27. Judge Goodwin Certified the question set out above to this Court. See Appendix pg. 57.

Apogee Coal Company and Patriot Coal Corporation both filed bankruptcy after Judge Goodwin certified the question, staying the case against those defendants. See Appendix pg. 67. Judge Goodwin denied respondent's motion to stay the case against the non-bankrupt defendant, James Ray Browning. See Appendix pg. 73. Petitioner files this brief solely against James Ray Browning in order to obtain a ruling on the certified question.

STATEMENT OF THE FACTS

In this case, Richard Young Jr. was killed while working as an employee of Apogee Coal Company LLC at the Guyan Mine in Logan County, West Virginia. On May 14, 2011, Richard Young Jr. was directed by his supervisor, respondent Browning, to perform maintenance on a fuel tank on a Caterpillar 992G end loader (hereinafter 992G). Respondent James Ray Browning is a resident of Logan County, West Virginia, and worked as a maintenance supervisor for Apogee at all times relevant to the complaint. See Appendix pgs. 1-4.

In order to gain access to the fuel tank, the counter weight had to be removed from the 992G. The counter weight weighs approximately 11,685 pounds and is attached to the back of the 992G, suspended approximately 3-4 feet above the ground. See Appendix pg. 1-4.

Prior to May 14, 2011, Mr. Young had never removed a counter weight from a 992G.

Mr. Young did not receive any instruction, training, or guidance on how to remove or block the counter weight on May 14, 2011, or at any time prior to that in his career. Respondent Browning, who was responsible for training or instructing mechanics at Guyan, including Mr. Young, for all new tasks or assignments, was unfamiliar with the proper procedures on how to properly remove or block a counter weight. See Appendix pgs. 1-10.

Due to a lack of proper training, instruction and proper guidance, Mr. Young placed himself directly underneath the 11,685 pound counterweight, with no blocking in place, and removed approximately 14 of the 16 bolts that connected the counter weight to the 992G. Upon information and belief, before or during the removal of the 15th bolt, the counter weight fell on top of and killed Richard Young Jr.. See Appendix pgs. 1-10.

Plaintiff asserted in her complaint a deliberate intent claim against respondent James Browning as well as Apogee, claiming *inter alia* that both Browning and Apogee knew that Mr. Young was not properly trained but nevertheless exposed him to the dangers inherent in the removal of the counterweight. Plaintiff has asserted that Richard Young Jr. died as a direct and proximate result of such specific unsafe working conditions, making Apogee and defendant Browning liable to plaintiff for damages as set forth in § 55-7-6 of the West Virginia Code. See Appendix pgs. 1-17.

SUMMARY OF ARGUMENT

An employee can be sued in West Virginia for deliberate intention based on the factors set out in §23-4-2(d)(2)(ii) because employees lose their immunity when the employer loses its immunity based on rulings of this Court and relevant sections of the State Code. Those courts

that have held that (ii)¹ is not available against employees have, for the most part, based their ruling on the fact that the word “person” is missing from (ii). However, the word “person” is not necessary under (ii) because once the employer loses immunity so does the employee. The legislature granted immunity to all employers under §23-2-6 if employers pay workers compensation. §23-2-6a extends that same immunity to employees. Immunity can not be extended to the employee if the employer loses its immunity.

Furthermore, The introductory language in (d)(2)² uses both “employer” or “person.” If “person” was only to apply to (i) the legislature would not have used “person” in the introductory language. Also, (d)(2) and 23-2-6a both state that employees’ immunity is lost if the employee acts with “deliberate intention.” Deliberate intention can be satisfied by either method set out in (d)(2) (i) or (ii). Even though (ii) does not use the word “person,” the language in 23-2-6a allows for “deliberate intention” to be met under (ii).

§23-4-2(c) illustrates that the lack of the word “person” is insignificant in (ii) because §23-4-2(c) gives the employee a cause of action against an employer and “person” is nowhere to be found in §23-4-2(c). Even though no cause of action is specifically mentioned against a “person,” under §23-4-2(c), no one would argue that you cannot bring a cause of action against a person based on the language in (i).

It will create bad public policy in West Virginia if this Court sides with respondent because giving Employees/Supervisors immunity under (ii) will create a more dangerous work

¹§ 23-4-2(d)(2)(ii) is sometimes referred to herein as (ii). § 23-4-2(d)(2)(i) is sometimes referred to as (i).

²Whenever (d)(2) is used herein it shall mean the provisions of § 23-4-2(d)(2).

environment for all West Virginia employees. If the threat of suit is gone as to supervisors/employees, production will be favored over safety in any employment where the supervisor's salary or continued employment is based on production. Ruling against petitioner will allow corporations to hide assets by transferring the assets to upper level employees who are immune from future suits. It would allow supervisors the ability to sue for their culpable conduct but be immune at the same time, and force most deliberate intent plaintiffs out of West Virginia state court. Finally, defendants will remove the majority of deliberate intent cases out of West Virginia State Courts, because almost all deliberate intent cases involve allegations of type (ii) deliberate intent. Most larger corporations and other business entities claim residency outside the state of West Virginia under the "nerve center" test, even if the bulk of their actual business activities occur within the state. If type (ii) deliberate intent is restricted to employers, diversity will usually exist in these suits, particularly in suits against larger employers, allowing for removal to federal courts. If immunity is extended to officers, managers, agents, representatives or employees of contributing employers for type (ii) deliberate intent actions, not only will the human beings who set the policies for business activities be personally protected from their wrongdoing, but in most cases plaintiffs will no longer have local forums in which to try their cases. This will prejudice West Virginia plaintiffs greatly by removing state circuit courts as an option.

Those courts that have ruled that type (ii) causes of action are not available against officers and employees have cited public policy reasons for so ruling that are not significant and partially incorrect. These courts have noted that it is employers who normally pay the bills when supervisors are sued. While this may often be the case, immunity in type (ii) claims would allow

the corporate officers to structure businesses to ensure that corporate assets and profits flow through to officers and stockholders freeing the profits and assets from claims brought by injured workers. Not only will a ruling that officers/employees are immune from (ii) suits make West Virginia less safe, it will lead to carefully funded judgement-proof corporations, both large and small.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Judge Goodwin stated the following in his Order Certifying Issue to West Virginia Supreme Court of Appeals:

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

Judge Goodwin's Order also discusses a split of authority among Federal and State Courts on the issue.

Since the case before The Court is a certified question involving inconsistencies or conflicts among the decisions of lower tribunals, a case involving issues of first impression, and a case involving issues of fundamental public importance, it seems to fit almost all the requirements of a Rule 20 argument.

Petitioner moves that this case be orally argued in front of the Court Under Rule 20.

ARGUMENT

I. An Employee's Immunity Is Abrogated Once "Deliberate Intention" Is Satisfied under § 23-4-2(d)(2)(i) or (ii) Based on the Introductory Language in (d)(2) and the Language in 23-2-6a Because Employee and Employer Immunity Is Identical and Extended from §23-2-6 to 23-2-6a

Numerous State Circuit Courts Judges and Federal District Court Judges in West Virginia

have agreed with petitioner and ruled that §23-4-2(d)(2)(ii) either abrogates immunity of supervisors/employees or find that there is a possibility that a court would read the statute to reach such a result.³ Other Courts in West Virginia have sided with respondent on the issue creating a split of authority.⁴

Generally, the Courts that choose to side with petitioner's position follow logic that is similar to the decision in *Weekly v. Olin Corporation*, 681 F.Supp. 346 (N.D.W.Va.1987). In *Weekly*, the defendant argued that the plaintiff could not bring a cause of action against an employee under §23-4-2(c)(2)(ii)⁵ because the language within that section only referred to "employer." *Id.* at 351-2. In rejecting this argument, the Court found more persuasive the introductory language of §23-4-2(c)(2) which contains both the words "person" and "employer" and governs the application of all parts of §23-4-2, including both subsections §23-4-2(c)(2)(i) and §23-4-2(c)(2)(ii). *Id.* at 352.

In order to fully understand petitioner's position that a deliberate intent action can be

³Bledsoe 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)

⁴Akins 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 section23-4-2(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.

⁵The statute has been amended since *Weekly*. The relevant section is now 23-4-2(d)(2) instead of §23-4-2(c)(2)

maintained against an employee under (ii) it is necessary to review W. Va. Code § 23-4-2 (d)(2) as well as § 23-2-6 and § 23-2-6a.

§ 23-4-2(d)(2) states in part:

(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.
(Emphasis Added)

The introductory language of §23-4-2 (d)(2) clearly states that the immunity under this section and under §23-2-6 and §23-2-6a 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) plainly provides two alternative methods for proving deliberate intention against either the “employer or person”: the method under subsection (i) “or” the method under subsection (ii).

In pertinent part, W. Va. Code §23-2-6 and §23-2-6a state respectively:

Any employer subject to this chapter who subscribes and pays into the Worker's Compensation Fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of an employee
-W. Va. Code §23-2-6

The immunity from liability set out in the preceding section [§23-2-6] 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 injury with deliberate intention.
-W. Va. Code §23-2-6a.

§23-2-6a states that an employee's immunity can be lost if he acts with deliberate intention. §23-2-6a does not limit this loss of immunity to §23-4-2(d)(2)(i), but rather makes no distinction between the two methods, (i) or (ii). Similarly, the introductory language in §23-4-2(d)(2) makes no distinction, and states that “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"” by satisfying (i) *or* (ii) (emphasis added). All that is necessary, therefore, to lose the immunity

afforded under § 23-2-6a is a showing of deliberate intention. According to § 23-4-2(d)(2) this showing can be made by satisfying the elements set out in § 23-4-2(d)(2)(ii). It is axiomatic that these two statutes must be read in a fashion to give effect to all of their terms, if possible. “[N]o part of a statute is to be treated as meaningless and we must give significance and effect to every section, clause, word or part of a statute” *Mitchell v. City of Wheeling*, 202 W.Va. 85, 88, 502 S.E.2d 182, 185 (1998) (citing *State v. General Daniel Morgan Post No. 548*, 144 W.Va. 137, 107 S.E.2d 353 (1959); *Wilson v. Hix*, 136 W.Va. 59, 65 S.E.2d 717 (1951)).

This Court has held that the language in section 6a stating that the “immunity from liability set out in the preceding section shall extend to” is referring to the immunity for employers set out in §23-2-6. *Bennett v. Buckner*, 150 W. Va. 648, 654 (W.Va. 1966). In *Bennett*, The Court went on to opine the following regarding identical immunity for employees and employers:

It is obvious 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*, at 654.

The language in *Bennet*, makes it clear that this Court has held that the immunity granted under §23-2-6 and §23-2-6a is identical. If employees/officers/agents are granted immunity from (ii) actions where employers are denied immunity for the same cause of action, employees would have a greater degree of immunity than employers. Not only would such a ruling contradict the express language of §23-2-6a, whereby the immunity from liability set out in §23-2-6 is extended to employees, but it would also reverse this Court’s ruling in *Bennett*.

In *Henderson v. Meredith Lumber Company, Incorporated*, 190 W.Va. 292,297,438 S.E.2d 324, 329 (1993), this Court opined the following regarding knowledge of the legislature

when drafting statutes:

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 that 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. In accord *Cary v. Riss*, 189 W.Va. 608, 614, 433 S.E.2d 546, 552 (1993); Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983), superseded by statute on another point as stated in, *State ex rel. Hagg v. Spillers*, 181 W.Va. 387, 382 S.E.2d 581 (1989). See also Syl. Pts. 2, 3 and 4, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984).

When the legislature drafted 23-4-2 (d)(i) and (ii), it was known that the The West Virginia Supreme Court of Appeals has held that the immunity granted under §23-2-6 and §23-2-6a is identical. At the time of enactment of the 1983 Revision of W. Va. Code § 23-4-2, the scope of immunity provided to employers and employees was equal. Accordingly, if the legislature did not intend for the immunity to employers and employees to remain identical when it passed the 1983 Revision of W. Va. Code § 23-4-2, then it would not have cited two statutory provisions therein (§23-2-6 and §23-2-6a) which this Court had already recognized provided equal immunity to both employers and employees. In addition to being equal, the immunity under §23-2-6 and §23-2-6a is serial or tandem in nature.

As shown in §23-2-6, the Workers Compensation system is designed to protect employers from suit if they pay workers comp premiums. However, if the employers fail to pay premiums, the employers do not enjoy the immunity. By its explicit terms §23-2-6a clearly ‘extends’ to employees the same immunity granted to employers under §23-2-6. If the employer fails to pay premiums, employees do not get immunity “extended” to them. As the Court observed in Syllabus point one of *Spangler v. Fisher*, 152 W.Va. 141, 159 S.E.2d 903, (1968):

By reason of the provisions of Sections 6 and 6a, Article 2, Chapter 23, of Code, 1931, as amended, *an employee of a subscriber* to the workmen's compensation fund who negligently causes the death of a fellow employee during the course of their employment and while acting in furtherance of the employer's business, is not liable to respond in damages in an action for wrongful death instituted and prosecuted pursuant to the provisions of Code, 1931, Sections 5 and 6, Article 7, Chapter 55, Code, 1931, as amended.

(Emphasis supplied).

Clearly, the immunity is not available to the employee under 23-2-6a unless the employer is a subscriber to the fund. The immunity under §23-2-6 and §23-2-6a is serial in nature. In *Redden v. McClung*, 192 W.Va. 102, 450 S.E.2d 799, (1994) it was said that §23-2-6 and §23-2-6a “*acting in tandem*, grant an employee, acting in furtherance of his employer's business, immunity from actions for non-intentional torts inflicted on co-employees who are also acting in the course of the employer's business.” (Emphasis supplied). When things act in tandem, they act together, and each depends on the other; you cannot have one without the other. Immunity under §23-2-6a only exists when there is immunity from the cause of action under §23-2-6. Where there is immunity to the employer under §23-2-6, §23-2-6a extends the immunity to “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.” But when there is no immunity under §23-2-6, there is no immunity to extend under §23-2-6a.

Insofar as plaintiff knows, this case does not involve a failure to pay premiums. It involves an analysis of what immunity is lost to the officer/employee when the employer loses immunity because of establishment of a (ii) deliberate intent case. The process of understanding the loss of immunity begins with a factual analysis of the cause of action. It must be remembered that §23-4-2(d)(2) establishes when immunity is lost by employers and employees. §23-4-2(d)(2)

does not create a cause of action, even though the cause of action is coextensive with the loss of immunity. By its terms, it only deals with the subject of the loss of immunity. Clearly, immunity flows in tandem first through the employer and then, by virtue of § 23-2-6a, the employer's immunity is *extended* to the employee. If the employer lacks immunity for a cause of action, so too does an employee. The immunity is extended from employer to officer, and is the same for both. Because the employee is the agent of the employer, where a plaintiff can establish evidence of type (ii) factors against a single officer or employee, loss of immunity always extends vicariously to the employer. Under §23-4-2 the converse is true; where a plaintiff can establish the (ii) factors as to the employer, the immunity that would otherwise be extended to the officer from the employer is lost to the employee. Where a plaintiff can offer proof of all (ii) factors the employer loses its immunity and there is no immunity to extend to the employee as to that same cause of action involving proof of identical (ii) factors.

As noted above, the legislature is presumed to have been cognizant of the serial or tandem nature of employer/employee immunity when it enacted §23-4-2(d)(2). When the legislature enacted §23-4-2(d)(2)(ii) it realized that where the plaintiff established proof of the existence of those elements set out in §23-4-2(d)(2)(ii), resulting in loss of immunity to the employer, then *ipso facto* the employee's officers, managers, agents, representative and employees lose immunity as to that claim.

Where the employer fails to pay premiums the employer loses immunity for all causes of action. See 23-2-6. Under 23-2-6a, whatever immunity the employer loses is extended to the employee/officer. The exact same immunity that the employer has is extended to the employee. Where the employer loses its immunity because of deliberate intent, the identical loss of

immunity extends to the employee/officer under 23-2-6a, but only for a case based on the same (ii) factors that caused the employer to lose its immunity. This is so because the immunity that is afforded the employer and employee must be equal. The immunity that has been lost to the employer extends with the same parameters to the employee. In practice, because the immunity must be identical, the employee against whom the cause of action is asserted will often be the human being who is guilty of the conduct that vicariously caused the employer to lose its immunity.

If it can be shown that the employer has lost its immunity because all the provisions of §23-4-2(d)(2)(ii) are established as to an employer, thereby eliminating the immunity of the employer, there is no immunity to extend to the employee. As shown in *Henderson*, the legislature knew that the word “extend” was used in §23-2-6a, when it drafted (ii). The legislature was also aware of the *Bennett* ruling. Therefore, there was no need to put the word “person” in (ii). The immunity is not *extended* to the employee if the employer has its immunity abrogated by violating (ii). Indeed, there is not immunity to extend. The legislature knew that if the employer violated (ii) immunity was abrogated to both employers and employees. Putting the word “person” in (ii) was simply not necessary.

What causes of action are allowed against the officer if immunity has been lost to the employer where plaintiff has offered evidence as to all (ii) factors against the employer? Because the loss of immunity is the same as to both, the only cause of action that is available against the officer is the cause of action that results from the same facts that caused the employer to lose its immunity. In other words, the cause of action against both the employer and employee is coextensive with the loss of immunity that results from application of the § 23-4-2(d)(2)(ii)

factors.

In *Adkins v. Consolidated Coal Company*, 2012 WL 1309165 (S.D.W.Va.), the District Court held that “that employee immunity may be lost under section 23–4–2(d)(2)(i), but not under section 23–4–2(d)(2)(ii).” The court reached this conclusion largely because of the absence of the word “person” in (ii). But in *Adkins* the court fails to apprehend that where an employer loses immunity by proof of (ii) factors the employee/officer only loses immunity to the same extent the employer has. The court raises the following alarm:

Surely, the legislature did not intend, by the express language it used in section 23–4–2(d)(2)(ii), to withdraw immunity from an employee 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. Just as surely, the legislature did not intend to withdraw immunity from an employee simply because it was the employer who exposed a co-employee to the specific unsafe working condition. Such an unacceptable result is readily avoided by giving apt meaning to all parts of section 23–4–2(d)(2).

The alarm is false. Where a plaintiff establishes that an employer has lost its immunity by making a showing of the (ii) factors against the employer there is no immunity to extend to the employee as to the cause of action involving those same factors.

In *Adkins* the court raises the specter of an innocent employee being held accountable because the employer has lost its immunity under (ii), which would be an unjust and absurd result. In order to prevent such an unjust and absurd result, it is only necessary to interpret the statute the way it has been interpreted in the past. That is, that where the employer loses immunity the employer extends that same loss of immunity to the employee. The employee’s loss of immunity is only to the same extent that the employer has lost immunity.

In *Adkins*, the court does not believe that the immunity that applies to the employee and

employer is equal after the legislature amended the statute in 1983.

In *Adkins* the court acknowledges that the leading case that holds that a type (ii) deliberate intent case is available against employee/officers is *Weekly* discussed supra. The court discusses its reason for not following *Weekly* as follows:

The court in *Weekly* found its interpretation to be consistent with *Bennett v. Buckner*, 150 W.Va. 648, 149 S.E.2d 201, 205 (W.Va.1966). *Bennett* is the only case cited in *Weekly* for support of its view that the scope of immunity afforded fellow employees under section 23-2-6a was intended by the legislature to be identical to that enjoyed by the employer. *Bennett* did indeed hold that the purpose of the legislature in adding section 23-2-6a in 1949 was “to ‘extend’ the same immunity and to accord an immunity identical with that of the employer to additional persons, including fellow employees.” 149 S.E.2d at 205. Overlooked in *Weekly* is that the two-tiered deliberate intention definition now found in section 23-4-2(d)(2) was not enacted until 1983, and, thus, did not exist when *Bennett* was decided in 1966.

It appears that in *Adkins* the court bases its disagreement with *Weekly* on the idea that the court in *Weekly* failed to consider that the law expressed in *Bennett v. Buckner*, which was decided in 1966, was rendered inapplicable because the “two-tiered deliberate intention definition now found in section 23-4-2(d)(2) was not enacted until 1983, and, thus, did not exist when *Bennett* was decided in 1966.” Under this analysis, the West Virginia Supreme Court would realize that the 1983 legislative action overturned this Court’s finding in *Bennett v. Buckner*, leading inexorably to a conclusion that the immunity afforded to the employee/officer is no longer equal to the immunity afforded the employer. But in *Adkins* the court failed to consider that in *Deller v. Naymick*, 176 W.Va. 108, 342 S.E.2d 73, W.Va.,1985, decided *two years after* the enactment of the “two-tiered deliberate intention definition now found in section 23-4-2(d)(2)” the court said the following:

The immunity from tort liability provided by W.Va.Code, 23-2-6a [1949] to, among others, coemployees is the same as the immunity from tort liability provided by

W.Va.Code, 23-2-6 [1974] to an employer. See *Bennett v. Buckner*, 150 W.Va. 648, 654, 149 S.E.2d 201, 205 (1966).

Clearly, the enactment of “two-tiered deliberate intention definition now found in section 23–4–2(d)(2)” did not change this Court’s view that the immunity afforded an employee/officer is the same as the immunity afforded to the employer. In *Redden v. McClung*, 192 W.Va. 102, 450 S.E.2d 799, W.Va., 1994, a decision that was rendered eleven years after the legislature amended the statute in 1983, the court said:

It appears to this Court that two provisions of the Workers' Compensation Act, *acting in tandem*, grant an employee, acting in furtherance of his employer's business, immunity from actions for non-intentional torts inflicted on co-employees who are also acting in the course of the employer's business.
(Emphasis supplied.)

Clearly the enactment of the amendments to 23–4–2 in 1983 did not cause this Court to change its view that the immunity afforded the employee and the employer are the same. In *Adkins* the court considers neither *Deller v. Naymick* nor *Redden v. McClung*. Since the *Adkins* court’s disagreement with *Weekly* is premised solely on the *Weekly* court’s alleged failure to consider that the immunity equality between employer and employee/officer was abrogated by the 1983 amendments to 23–4–2, a view that considers neither *Deller v. Naymick* nor *Redden v. McClung* the decision in *Adkins* is suspect because it does not take into account this Court’s unaltered view that the employee’s immunity is equal to the employer.

II. If the Lack of the Word “Person” under (ii) creates immunity from suit against an Employee, Why Did the Legislature Leave out “Person” in §23-4-2(c), the Section That Creates a Cause of Action Against An “Employer”, When It Is Clear The Legislature Intended To Allow A Cause Of Action Against An Employee Under (i)?

It is predictable that respondent will argue that because the legislature failed to use the

word “person” in (ii) the legislature intended to make an employee immune from (ii) claims. In its removal, respondent argued a suit is only available against an employee when suit is brought under (i) because the word “person” is used in (i) in addition to “employer.” In fact, all the State and federal court decisions that agree with respondent find that there is a cause of action against an employee under (i), whether or not they believe there is a cause of action under (ii). In other words, it is uncontested that a cause of action is available against an employee under (i).

What has not been examined by the courts that have ruled on whether an employee has immunity under (ii) is the language in the statute that actually gives an employee a cause of action. While most Courts have focused on the language under (i) and (ii) to determine if there is a cause of action against the employee, the purpose of these sections is actually to show how “immunity.....may be lost.” The language in §23-4-2(d)(2) does not give an employee a cause of action. §23-4-2(d)(2) refers to how employees and employers may lose their immunity and also defines “deliberate intention” under (i) and (ii).

This Court has referred to (i) and (ii) in language that suggests that §23-4-2(d)(2) created causes of action. The Court said the following in *Bell vs Vecellio & Grogan, Inc.*, 197 W.Va. 138, 475 S.E.2d 138 (1996):

As we previously noted, if the deliberate intention cause of action expressed in W. Va.Code 23-4-2(c)(2)(i)-(ii) is blended within the West Virginia workers' compensation scheme, then all employees covered by the West Virginia Workers' Compensation Act, including the appellant, are subject to every provision of the workers' compensation chapter and are entitled to all benefits and privileges under the Act, including the right to file a direct deliberate intention cause of action against an employer pursuant to W. Va.Code 23-4-2(c)(2)(i)-(ii).

However, more precisely, §23-4-2(d)(2) *allows* a cause of action to be brought when lack of immunity is shown by §23-4-2(d)(2) (i) or (ii). A cause of action actually appears to be

statutorily created in favor of an injured employee or his heirs against *employers* by virtue of § 23-4-2(c), which states as follows:

If injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter and ***has a cause of action against the employer***, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter, whether filed or not. (Emphasis added)

Clearly, §23-4-2(c) statutorily creates a cause of action against employers in deliberate intention actions. The cause of action is created by § 23-4-2(c), not §23-4-2(d)(2)(i) and (ii), which only set out the conditions under which immunity is vitiated. While an injured employee must satisfy elements in (i) and (ii) to get by immunity, the cause of action arises out of §23-4-2(c).

The key word that is missing in (c) is “person.” Does the fact that the word “person” is not included in (c) mean that no cause of action exists against a “person” or employee who is not an employer? Clearly, an employee that has deliberately injured a fellow employee under (i) should be allowed to bring a cause of action against that culpable employee. Any other result would be absurd. Certainly, the legislature intended for a cause of action to exist against a person that deliberately injures someone under (i). §23-4-2(d)(2)(i) specifically removes immunity from both the employer and a “person against whom liability is asserted.” Who is this person against whom liability is asserted if not the same “officer, manager, agent, representative or employee of such employer” who is afforded immunity under § 23-2-6a. Clearly, the legislature recognized a cause of action existed against these officers, managers, etc. Why else afford them immunity? However, the word “person” is nowhere to be found in §23-4-2(c).

While it is clear that the legislature meant to allow a cause of action free from immunity in §23-4-2(d)(2)(i), they did not add the word “person” to § 23-4-2(c).

Respondents are likely to center their argument around the fact that §23-4-2(d)(2)(ii) does not contain the word “person”, therefore the (ii) cause of action is not available against employees. But §23-4-2(c) does not create a cause of action against a person, even though it is clear by a reading of (i) that a cause of action against a person may not be afforded immunity. Clearly the absence of the word “person” in § 23-4-2(c) does not mean that the legislature did not intend to allow a cause of action against a person that intentionally injures another in the workplace. The absence of the word “person” in § 23-4-2(c) does not have great significance. It is clear that there is a cause of action for intentional torts like a punch-in-the-nose case, even though § 23-4-2(c) only legislatively sets out a cause of action against employers. In light of this, the absence of the word person in §23-4-2(d)(2)(ii) does not appear to have great significance. In fact, as is shown above, it was unnecessary to include the word “person” (ii) because of the tandem nature of immunity. Just as the lack of the word person in 23-4-2(c) does not prevent a cause of action against an employee, the lack of the word person in (ii) does not make employees immune from suit under (ii).

III. Granting Employees/Supervisors Immunity Under (ii) Will Create a More Dangerous Work Environment for All West Virginia Employees, Allow Corporations to Protect Assets In Immune Personal Employee Accounts In Future Suits, Allow Supervisors The Ability to Sue For Their Culpable Conduct But Be Immune At The Same Time, And Force Most Deliberate Intent Plaintiffs Out of West Virginia State Court

While petitioner believes the language of the relevant statutes and case law discussed supra allow an employee to be sued under (ii), it is clear that many learned judges have disagreed

on the subject. Therefore, it is hard to say that the relevant statutes are free from ambiguity. This Court has stated the following regarding ambiguity:

Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.' Syl. pt., *Crocket v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970)." Syllabus Point 4, *Syncor International Corp. v. Palmer*, 208 W.Va. 658, 542 S.E.2d 384 (2001). Syl. pt. 4, *Charter Communs. VI, PLLC v. Community Antenna Serv., Inc.*, 211 W.Va. 71 561 S.E.2d 793 (2002).

If the Court finds that the relevant statutes are ambiguous, thereby requiring interpretation, it is clear that West Virginia public policy would be weakened by a ruling in favor of respondent. Certainly, the legislature would not have intended to create bad public policy for our state.

If it is West Virginia public policy to provide for safety in the workplace, this goal will be damaged tremendously if the Court sides with respondent. There are many reasons why the legislature did not intend to give immunity to employees whose actions meet the elements of (ii), and almost no legitimate justifications give these culpable employees a pass.

A. Immunity for Employees under (ii) Will Create More Dangerous Work Environments in West Virginia

Allowing supervisors/employees to be sued when they have acted with deliberate intention under (ii) will lead to safer work environments. If this Court finds that the culpable employees/supervisors are immune under (ii), supervisors will have less incentive to enforce safety rules because they have no fear of paying damages or facing suit. For instance, if a supervisor gets a bonus for meeting certain production goals, he may be hesitant to strictly enforce safety rules/regulations that conflict with production. By granting those supervisors immunity, there is no deterrent. As has been recently demonstrated in the coal mine industry, it

is difficult to hold such supervisors criminally liable, even where the employer's safety measures are abhorrent, and the harm caused is catastrophic. Basically, the only real weapon available in West Virginia against supervisors/employees who value production over safety is the threat of suit.

Letting culpable supervisors off the hook by providing them with immunity for (ii) violations does not benefit any company in West Virginia, including the company being sued, if the company is stuck with the bill of the lawsuit regardless of the outcome. Why would employers, who would be liable for culpable supervisors actions under (ii), benefit by giving the supervisors that got them in trouble a pass? Would not the employers want such supervisors to at least have the threat of facing suit in order to encourage safety? The only real benefits to the employer if the culpable supervisor is immune are that immune supervisors are more easily encouraged to promote production over safety, and that complete diversity may be created, thereby restricting the forum to federal court.

In the modern workplace the employer is often a corporation or some corporate-like structure such as an LLC. Here, for example, defendant Patriot is a corporation and defendant Apogee is an LLC. Business entities like LLCs and corporations only operate through their officers, agents and employees. Neither an LLC nor a corporation is a sentient being. Such entities are constructed only of paper. They have neither intentions nor guilt. They cannot be made to see the error of their ways. They do not respond to incentives or deterrents. Only their officers, agents, and employees can act for these entities. Anything such entities do or refrain from doing emanates from agents, employees and officers. Clearly, these business entities cannot form deliberate intent.

Of course, this case is about who can be sued in what has been referred to as a deliberate intent case. It is the position of the respondent that only those entities that have no ability to form intent can be sued in a deliberate intent case. It is the position of the respondent that flesh and blood agents, officers and employees, who can form deliberate intent, and who create the conditions that result in death or serious injury in the workplace, cannot be sued in a deliberate intent action. It is the position of respondent that entities who cannot form deliberate intent can be sued for deliberately causing injury, but all those who can form deliberate intent may not be sued.

In *Adkins*, the court supported its reasoning by two public policy considerations. First, the Court speculates that, “The legislature may well have done so in order to protect supervisors and other employees, acting without specific intent, from suit where the employer, also without specific intent, is deemed to have inflicted injury under (d)(2)(ii)” If the legislature so intended, it certainly did a good job of disguising its intent. It would have been very easy to clearly specify that officers, managers, agents, representatives or employees are immune from claims brought under (ii). Instead, if the legislature did intend such a result, it so obscured its intent that there is a well documented split of authority on the question that lead to this certified question.

Why would the legislature grant immunity to officers, managers, agents, representatives or employees? What public policy considerations would have guided the legislature? In arriving at the public policy surrounding the issue, we should first consider who gets immunity under 23-2-6a. The statute extends immunity to “every officer, manager, agent, representative or employee of such employer.” Clearly it is not only lower level workers who get immunity. Corporate officers get immunity. The president of the corporation gets immunity. Any

“manager” gets immunity. “Agents” of the employer get immunity. Clearly, the individuals who make the policy for an employer corporation get immunity. It is the position of the Respondents that these individuals should be personally liable only if they commit the relatively rare (i) type punch-in-the-nose type offense, but they should be immune for the much more common deaths or injuries that result when officers/employees expose employees to liability when they know that conditions are unlawfully unsafe or unsafe under recognized standards.

A real life example of how officers of a corporation create dangerous workplace conditions is the horrible explosion at Upper Big Branch. The day-to-day operation of the Upper Big Branch Mine was closely controlled by Don Blankenship, and other officers of Massey Energy.⁶ Before the disaster, Mr. Blankenship issued a memo on October 19, 2005 to all Massey operations that cleared up where he stood on the balance between production and safety. In the memo he said the following:

If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal (i.e., – build overcasts, do construction jobs, or whatever) you need to ignore them and run coal. This memo is necessary only because we seem not to understand that coal pays the bills"⁷

It was real flesh and blood officers, managers and foremen at Upper Big Branch and up the corporate chain who instilled the culture and took the actions that led to the disaster. This is well documented in the United States Department of Labor Mine Safety and Health

⁶See United Mine Workers of America Report on the Upper Big Branch Mine Disaster, Pages 73 & 80, on the web at: <http://www.umwa.org/files/documents/134334-Upper-Big-Branch.pdf>.

⁷Report to the Governor of Governor’s Independent Panel’s Investigation of Upper Big Branch, page 106, page 16, on the web at <http://online.wsj.com/public/resources/documents/wvamine0519.pdf>.

Administration Coal Mine Safety and Health Report of Investigation Fatal Underground Mine

Explosion, April 5, 2010⁸ The report chronicles many problems at the Mine that led to the explosions. Consider the following findings from the report:

Miners were routinely intimidated by *Massey and PCC managers* who created a culture in which production trumped all other concerns. Foremen were required to regularly report their production status to PCC and Massey management, as well as “downtime” reports for when production stopped. *Id.*, at 59.

A purchasing agent testified that *mine management* would threaten to fire foreman when they called out and reported that they were down because of insufficient ventilation, “He would say we was stupid, that the guys are stupid, call up there and fire them. He wanted them in the coal in a few minutes.” The purchasing agent further testified when asked about *managements’* attitude when unusual problems such as water shutting down the longwall for a couple of weeks, “...tell them guys to get the coal, we got to get running. It got to the point where I’d reach for the phone---we got caller ID. I’d reach for the phone and my hand would shake.I was at the end of my rope almost.” *Id.*

Page 60 In addition, testimony established that *upper management* at PCC threatened foremen and miners who took time to make needed safety corrections. An employee testified that *upper management* threatened to fire crews when they stopped production and that *Massey CEO Don Blankenship himself* pressured management to immediately resume production. A foreman testified that he heard *Mine Superintendent Everett Hager* yell at victim Edward “Dean” Jones, a Section Foreman on HG 22, who had stopped production to fix ventilation problems. Hager relayed that *President Chris Blanchard* stated that “if you don’t start running coal up there, I’m going to bring the whole crew outside and get rid of every one of you.” Another foreman testified that Hager threatened to fire him for stopping production and working on ventilation. *Id.*, at 60

Dispatchers testified that they regularly called foremen and miners on the radio or mine phone to alert them of MSHA inspectors’ presence. Several dispatchers stated that *upper management* had instructed them to give advance notice of inspectors to miners; if a dispatcher failed to do so, there would be consequences. *Id.*

PCC would also make ventilation changes in advance of the inspector’s arrival on the section, redirecting air and sending it to the section where the inspector was headed. A

⁸ The Report may be accessed on the web at:
<http://www.msha.gov/Fatals/2010/UBB/FTL10c0331noappx.pdf>

foreman testified that *mine managers* would call out for more air on the section where the inspector was headed, although miners only had a short time to make changes and the work was sometimes “chaos.” *Id.*, at 61.

Don Blankenship left Massey Energy after the explosion. He took with him a “golden parachute” worth tens of millions of dollars.⁹ Would the legislature really have intentionally made Don Blankenship and his fellow managers of Upper Big Branch immune for their actions?

The death here occurred at a mining operation. In the coalfields it is common to see a web of subsidiaries and outside contractors operate coal mines. We see individual subsidiary entities operating mines where the coal is leased to another entity, with different entities furnishing machinery, engineering, training, and employees. In these situations the coal is typically sold by a separate entity devoted to coal sales. The money never comes back to the entity or entities that are actually mining the coal. The expenses of the actual coal mining entities are simply paid by a separate entity into the account of the mining entity and are disbursed to creditors from there. A major reason, if not the sole reason, for weaving this web of entities is to protect solid assets and profits from claims of injured people should something go wrong.

The division and creation of business entities to protect assets and profits from liability extends far beyond the coal business. Often corporate and corporate-like entities are simply shells that money flows through. Money is scooped out by officers and employees through salaries and bonuses. Profits pass through to stockholder and members. They often have no real assets. The tools of production are often leased, or are encumbered with liens. All of this is

⁹Report to the Governor of Governor’s Independent Panel’s Investigation of Upper Big Branch, page 106, footnote one. See also <http://abcnews.go.com/Blotter/golden-parachute-don-blankenship-massey-energy/story?id=12333677>

designed to keep assets and profits out of the producing corporations and thereby protect the assets and profits from claims of outsiders, including employees injured in the course of production.

We should understand that these machinations have occurred in West Virginia, where it has been widely thought, at least since *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907, W.Va.,1978, that there is a cause of action against employees of employers who act with deliberate intent. One hopes that the prospect that a corporate employee might incur personal liability if he or she intentionally exposes employees to dangerous situations deterred, at least to some extent, corporate officers from putting employees at risk in order to increase earnings. It is not hard to see what is likely to happen if it is established that there is no recourse against officers, managers, agents, representatives and employees if they subject an employee to known dangerous conditions and injury or death results. Bad as the safety record is, it can always get worse.

B. Immunity for Employees under (ii) Allow Corporations to Hide Assets In Personal Accounts In Future Suits

Often large corporate employers do foot the bills for deliberate intent claims filed against their employees, that is not always the case. If the Court agrees with respondent, it will allow business entities to use the employee immunity to hide assets if the employer is sued. Certainly smaller companies will structure their businesses to have less assets if they know their upper level employees cannot be sued. Defendants in deliberate intent actions are not always large corporations. Smaller businesses with only five employees could make themselves judgement proof if they structured their assets correctly, and kept most of the money in the personal bank

accounts of the employees/upper level supervisors that would be immune from suit under (ii). Employee immunity for culpable supervisors would allow sham corporations to run dangerous outfits, and when faced with a suit, simply file for bankruptcy.

In *Adkins* the court gave the following rationale for finding that corporate officers and employees should be immune from (ii) type actions:

Further, the employer is customarily liable for the grievous acts of his employees committed in the course and scope of their employment; and, as between the employer and its offending employee, it is the employer who is near always the lone source of funds to redress a deliberate intent workplace injury-for which the employer remains responsible under both (d)(2)(i) and (d)(2)(ii).

It is hard to say what the court means when it says the employer is “customarily liable”. If, when the court used the word “customarily” it meant “usually”, the court is usually right. But what is customary does not necessarily give rise to legal principles. And, when the court says that “ between the employer and its offending employee, it is the employer who is near always the lone source of funds to redress a deliberate intent workplace injury”, the court may again be right. But the fact that “most often” the employer is the sole source of funds does not mean that plaintiffs should be precluded from recovery when the exception occurs, and the source of funds is someone other than the employer. An exception exists where corporate profits and resources are dissipated on massive pay outs to officers as in the above example of Don Blankenship.

Well-healed upper level officers and directors, who often are insured, and who, again, often set the policy that results in death or injury to an employee, are other common exceptions. This case, where the employer has filed for bankruptcy, is a poster child for exceptions. Here, because of the bankruptcy of the employer, we know that recovery is at the very least postponed against the employer. We do not know, at this point, whether there is an insurance policy that

will provide a source of recovery against the non-bankrupt individual employee or officer.

The court system and the lawyers who represent plaintiffs are very good at finding sources of recovery. It can be expected that plaintiffs will not waste time trying to recover from defendants who are judgment proof. All the incentives are against it. Plaintiffs will find the deep pockets who are liable and proceed against them. Plaintiffs will proceed against officers who have taken the profits of the corporation and converted the profits to their personal estate. Plaintiffs will proceed against employees or officers who have insurance coverage. In virtually all cases, plaintiffs will not proceed to trial against employees who do not have assets to meet a jury verdict. Plaintiffs are cognizant that there is a chance of jury sympathy for individual lower level defendants that can act to lower joint and several verdicts. This consideration in and of itself will lead to dismissal or non-joinder of low level judgment proof defendants.

Moreover, there is little precedent that holds that lack of resources renders an individual immune from civil action. The fact that the employer is usually the deep pocket should not not as a matter of law prevent plaintiffs from seeking recovery from defendants. Where officers and employees appear to be liable for the deliberate injury or death of an employee they must be joined so that plaintiffs can have an opportunity for discovery focused on the details of the liability and the ability of the officer or employee to meet a judgment against them.

Even if it is the employer who is near always the lone source of funds to redress a deliberate intent workplace injury, if the officer/employee loses immunity at least culpable supervisors will face the possibility of liability. Just having the fear of a lawsuit will encourage safety and prevent hiding assets through immune employees.

C. Immunity for Employees under (ii) Will Allow Supervisors The Ability to Sue For Their Culpable Conduct But Be Immune At The Same Time.

If the employee receives immunity even when the employer does not under 23-4-2(d)(ii), a situation would be created where a supervisor could sue for his injury, but be immune from suit at the same time.

For instance, in the Upper Big Branch mine explosion, had an upper level supervisor known of the lack of rock dusting, bad ventilation, and other violations listed in the various reports, and nevertheless exposed employees to these dangerous conditions, the supervisor would have met all five factors of (ii) if these employees were injured or killed. If this same supervisor was also killed or injured in the same accident, he could sue Massey/Alpha, but could not be sued by the employees he supervised and exposed to these conditions. If the Court sides with petitioner, this same supervisor would be immune from a suit brought by the employees he supervised and injured/killed through deliberate intention under (ii). The injured/deceased employees and their relatives could not touch the supervisor that exposed them to the dangerous conditions even if he had as much or more money than Don Blankenship. This would be the case even if that supervisor brought his own suit against the employer under (ii). This result would be absurd.

This is specifically why the legislature used the word 'extend' and why this Court has said the employer/employee immunity is identical. The legislature certainly did not intent to allow an employee to use a sword and shield at the same time.

D. Adopting the Position of the Respondent Will Force Most Deliberate Intent Plaintiffs Out of West Virginia State Courts

If the Court adopts respondents argument, a great majority of deliberate intent cases will

be removed from the State Courts in West Virginia. It is no secret that most defendants remove cases to federal court whenever possible. A high percentage of corporations incorporate in another state for various reasons, but one of them is to create diversity that gives rise to federal jurisdiction. It is also clear that plaintiffs often join supervisors to destroy complete diversity. There is no impediment to a plaintiff bringing a real claim against a supervisor if the effect is to eliminate diversity. Plaintiffs control who they join and certainly have the right to prefer a local state circuit court that is more convenient and allows them a local jury. If the Court finds that a culpable employee cannot be sued, complete diversity will almost always be present, except for suits against local small businesses. While (i) claims would still likely be decided in state court, those cases are extremely rare. Where they do exist, the damages do not approach the catastrophic damages that sometimes occur in type (ii) cases. Almost all deliberate intent cases are brought under (ii). The ruling in this case will largely decide whether type (ii) deliberate intent cases are tried in state circuit courts and reviewed by this Court.

A ruling against petitioner will prejudice all future plaintiffs in type (ii) deliberate intent cases. Injured plaintiffs should be allowed to litigate their claims in any state circuit court that has proper venue. For instance, the plaintiff that is injured in Mingo, Logan or Boone County should not be forced to drive to Charleston (Southern District) every time there is a hearing. The same goes for witnesses that live in the area, and family members that are affected by the injured or deceased employee.

The circuit courts in West Virginia have dealt with (ii) claims against employees for decades. Clearly, these courts are more than capable of handling these cases. The only openly disclosed public policy reason supporting respondent appears to be that the employee being sued

usually does not pay the bill anyway. The unstated reason is that businesses do not want to be in state court. Some do not want to be before local juries because they are aware of the well deserved reputation they have earned in the community. Petitioner's public policy reasons to allow these suits seem far weightier than respondents. As previously discussed, allowing employees to be sued under (ii) will motivate officers/employees to be safer and avoid injuring employees by exposing them to known dangerous conditions. It will also prevent employers from hiding their assets behind immune employees.

CONCLUSION

This Court should answer the Certified Question the following way: Yes, the "deliberate intention" exception to the exclusivity of Workers Compensation benefits outlined in West Virginia Code § 23-4-2(d)(2)(ii) applies to "persons"(supervisors and co-employees) as well as employers. Employer and Employee immunity is identical based on the language in 23-2-6a and case law from this Court, and employees lose their immunity when the employer loses its immunity. Since Employees lose their immunity when a plaintiff meets all five (ii) factors against the employer under (ii), the word "person" is not necessary in (ii). You cannot extend immunity to an employee under 23-2-6a from 23-2-6 if the employer has lost immunity as to that cause of action. You cannot extend something if the original source is not there.

Furthermore, the introductory language in (d)(2) uses the word "person." If "person" was only to apply to (i) the legislature would not have used "person" in the introductory language. Also, (d)(2) and 23-2-6a both state that employees' immunity is lost if the employee acts with "deliberate intention." Deliberate intention can be satisfied by either method set out in (d)(2) (i) or (ii). Even though (ii) does not use the word "person," the language in 6a allows for "deliberate

intention” to be met under (ii). Also, §23-4-2(c) illustrates that the lack of the word “person” is insignificant in (ii) because §23-4-2(c) gives the employee a cause of action against an “employer” and “person” is nowhere to be found in §23-4-2(c). Even though no cause of action is specifically mentioned against a “person,” under §23-4-2(c), no one would argue that you cannot bring a cause of action against a person based on the language in (i).

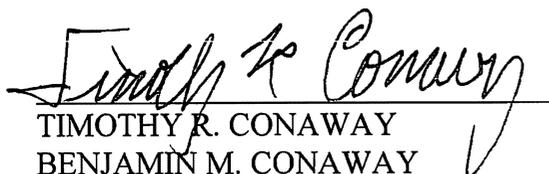
Most importantly, it will create bad public policy in West Virginia if The Court sides with respondent. By giving Employees/Supervisors immunity under (ii) it will create a more dangerous work environment for all of West Virginia. If the threat of suit is gone to supervisors/employees, production will be favored over safety in any employment where the supervisor’s salary is based on production. Here in West Virginia we have industries, coal, timber, and others, that are very dangerous to workers even if the highest level of attention is given to worker safety. We have too many graphic examples of what happens when proper attention is not given. It is hoped that we have learned something.

Ruling against petitioner will also allow corporations to hide assets in immune personal employee accounts to future suits. It will also cut off potential sources of recovery for injured workers and their families. It would additionally allow supervisors the ability to sue for their culpable conduct but be immune at the same time, and force most deliberate intent plaintiffs out of West Virginia state courts. Finally, finding that employees are immune from type (ii) cases will remove the majority of deliberate intent cases out of West Virginia State Courts. This will prejudice West Virginia plaintiffs greatly by removing state circuit courts as an option.

Respondent’s public policy reasons for ruling against petitioner are not significant and partially incorrect. Respondent’s main concern is that employers normally pay the bills when

supervisors are sued. While this may normally be the case, a ruling against petitioner would sometimes allow culpable well-healed upper level management employee to escape with a golden parachute. Employers will attempt to hide large assets in immune employee accounts if respondent is successful. Not only will a ruling in respondent's favor make West Virginia less safe, but it will lead to carefully funded judgement proof corporations, both large and small.

Therefore, the correct ruling based on the language of the Workers Compensation statutes, and the ruling that will lead to safer West Virginia working environments, is that employees are not immune based on §23-4-2(d)(2)(ii) and a cause of action exists against those employees.

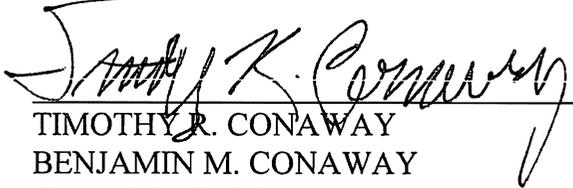


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CERTIFICATE OF SERVICE

This is to hereby certify that on this the 17th day of August, 2012, the undersigned have served a true and exact copy of the foregoing “**PETITIONER’S BRIEF IN SUPPORT OF CERTIFIED QUESTION**” and “**APPENDIX RECORD**” via United States Mail, postage properly paid, upon the following:

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