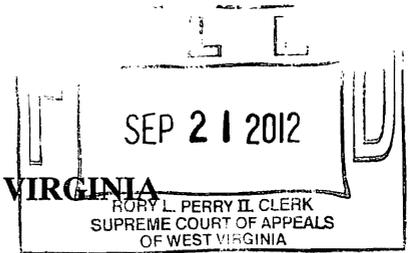


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

Petitioner,

v.

Docket No. 12-0835  
(2:12-CV-01324)

JAMES RAY BROWNING,

Respondent.

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**PETITIONER'S REPLY BRIEF**

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## ARGUMENT

### **I. *A Reading of § 23-4-2(d)(2) As Enacted Extinguishes Immunity to Officers Where Existence of Type (ii) Factor Are Shown Against the Employer***

Respondent says, "The language of the statute is clear on its face." See Brief, p. 4. In Section II of respondent's brief the respondent laboriously argues that the statute is so clear that no interpretation is required. But an analysis of what the statute says leads to a conclusion that what the statute says on its face clearly supports the construction advocated by petitioner.

#### **A. *Weekly Held That under § 23-4-2(d)(2) Employees Lose Immunity from Type (ii) Claims When Type (ii) Claims Are Made out Against Employers***

The competing positions are summed up by the court in in *Weekly v. Olin Corporation*, 681 F.Supp. 346 (N.D.W.Va.1987) as follows:

Defendants argue that as a matter of West Virginia law, it is impossible for the second alternative method of proof — the five aforementioned statutory elements — to apply to plaintiff's claim against Robert Higgins because Higgins is an individual co-worker rather than an employer. In support of that argument, defendants rely on the text of subsections (A) and (B) of section 23-4-2(c)(2)(ii). While subsection 23-4-2(c)(2)(i) applies to "such employer or person" and outlines the subjective intention either of them must form to incur liability, subsection 23-4-2(c)(2)(ii) uses only the word "employer," and at no place couples the word "employer" with the word "person". See §§ 23-4-2(c)(2)(ii)(B)-(D), supra. Based on that distinction, defendants argue that the legislature did not intend subsection 23-4-2(c)(2)(ii) to apply to the type of claim which plaintiff is stating in this case against defendant Higgins. Defendants' interpretation is supported by other statutory language which refers to "employers" and "employees" but not to persons. See W.Va.Code § 23-4-2(c)(1).

While defendants' construction of the statute is far from frivolous, plaintiff's counterinterpretation is more plausible. Plaintiff relies on the fact that the introductory language of section 23-4-2(c)(2), which governs the application of all parts of section 23-4-2 and thus of both subsections 23-4-2(c)(2)(i) and 23-4-2(c)(2)(ii), speaks of "the employer or person"(emphasis added).[12] After so noting, plaintiff argues that the two subsections merely represent two alternative methods of proving liability against either one or both of the employer and co-worker. Plaintiff's interpretation 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 respect to the burden of proof than did his employer.

The *Weekly* Court recognized that there were at least two non-frivolous constructions that can be made of the statute. But the construction of the statute favored by the court in *Weekly* involves application of the statute as written, rather than interpretation of the statute.

***B. Analysis of § 23-4-2(d)(2) as it Is Written***

Consider first the opening provision of § 23-4-2(d)(2):

(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:

Reading the above provision as it is set out, and reading the phrase "person against whom liability is asserted" to mean employee<sup>1</sup>, we learn that the immunity from suit that is provided to employers and employees by virtue of §§23-4-2, 23-2-6 *and* 23-2-6a may be lost if the employer "or" the employee acted with deliberate intent. Because the conjunctive "and" separates §23-2-6 from §23-2-6a, we know that immunity to the employer under §23-2-6 *and* immunity to the employee under §23-2-6a are *both* lost whenever deliberate intent is

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<sup>1</sup> Who else other than employee could be referred to by the use of the words "person against whom liability is asserted"?

established.<sup>2</sup> The statute goes on to say that this requirement, that is, the requirement of deliberate intent, may be satisfied by proof of either clause (i), which sets out what petitioner has referred to as a punch-in-the-nose situation, “or” by proof of the five factors that are set out in (ii). In *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984) the court noted that, “We have traditionally held that where the disjunctive “or” is used, it ordinarily connotes an alternative between the two clauses it connects.” Leaving out intervening verbiage, § 23-4-2(d)(2) says that immunity may be lost to employees (and employers) by proof of type (i) factors *or*, meaning alternatively, by proof of type (ii) factors. As written, § 23-4-2(d)(2) says that §23-2-6a immunity can be lost to an employee by proof of type (ii) factors.

Then, when we read (ii), we see that (ii) factors may be established by proving that the employer had knowledge of the dangerous condition and exposed the injured employee to the danger. So, applying the statute as it is written, we arrive at the conclusion that the employee loses §23-2-6a immunity because of the actions of the employer. This seems unfair until we start to consider what immunity has been lost to the employee. Again, the only immunity that is lost to the employer or the employee is immunity for a cause of action based on the violation of the five factors that is pled in the complaint. Immunity is retained as to every other cause of action. So, where the employee has lost immunity because of proof that the employer committed the (ii) factors, the only cause of action that is available against the

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<sup>2</sup>“‘And’ is a conjunction connecting words or phrases, expressing the idea that the latter is to be added to or taken along with the first; in its conjunctive sense the word “and” is used to conjoin words, clauses or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which proceeds, and its use implies that the connected elements must be grammatically coordinate, as where the elements preceding and succeeding the word ‘and’ refer to the same subject matter. *Black’s Law Dictionary* 79 (5th ed.1979). *Ooten v. Faerber*, 181 W. Va. 592, 597, 383 S.E.2d 774, 779 (1989)

employee is a suit based on the same five factors. By simply applying the statute as written, violation by the employer of (ii) factors leads to a lifting of the employee's immunity shield for a cause of action based on the same type (ii) deliberate intent cause of action that was asserted against the employer. For everything else the employee remains immune.

The foregoing analysis of the statute simply applies the statute as written. It assumes no additional words in any statute. Nothing has to be interpreted. There is no unjust result. As the respondent noted in his brief at page 11, where the language of the statute is clear, courts are simply to apply the statute. (“We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.) *Appalachian Power Co. v. State Tax Dept. of W. Virginia*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995)

Yet respondent discounts this application of the statute, favoring an analysis of the statute that does not apply the statute as written, but instead relies solely on the absence of the words “person against whom liability is asserted” in (ii). As noted above, the statute supports petitioner's position as it is written, and the absence in (ii) of the words “person against whom liability is asserted” does not in any way interfere with the bringing of a (ii) deliberate intent claim against an employee or officer who has committed the same offense that caused the employer to lose immunity, much less signal in some oblique way the elimination of all (ii) claims as to employees or officers.

***C. The Actions That May Be Brought Against Officers/employees When Immunity Is Lost Because of Establishment of Type (ii) Claims Against the Employer***

When the employee has lost immunity because of proof of (ii) factors, what suit may

be brought against the employee? Obviously, a suit against the *employee* alleging only that the *employer* violated the five factors would go nowhere fast. It would not set out a cause of action against the employee, and would be dismissed via motion for judgment on the pleadings.

But a suit against the employee that alleged that the *employer* violated the same five factors that the employer violated would survive a motion for judgment on the pleadings. Immunity would be stripped from the employee by application of the doctrine arising from the language of §23-2-6a that the employer's immunity extends in equal measure to the employee, a doctrine that is set out in the case law and discussed herein and in petitioner's initial brief. A cause of action asserting that the defendant employee knew about the dangerous condition, but nevertheless exposed the plaintiff employee to the danger, resulting in injury to the plaintiff employee, would certainly set out a viable cause of action against the defendant employee that would survive a motion for judgment on the pleadings. Such a case would also survive a motion for summary judgment, assuming that the plaintiff employee could offer proof that the employer violated the (ii) factors, thereby stripping immunity from the defendant employee for that claim, and could also prove that the employee violated the same five factors, thereby committing a tort for which the defendant employee is not immune. Again, this would occur almost exclusively in those cases where the violation of the five factors by the defendant employee gave rise to vicarious liability to the defendant employer under the doctrine of *respondeat superior*.

On page 16 of respondent's brief it is argued that it is illogical to suggest that "immunity is necessarily granted and dissolved in the same manner." Respondent makes this

argument - that immunity is not granted and dissolved in the same manner - in spite of the fact that this Court has repeatedly held that the immunity is equal as between employer and employee. It is hard to see how immunity could be lost to the employer, but retained by the employee and still have equal immunity for both. In any event, to support the contention that immunity is lost unequally, respondent says the following:

Proof of deliberate intent does not open the floodgates entirely to allow for negligence suits (or any other type of suit) against offending employers whose immunity has been stripped by a finding of liability. Brief, at 4.

No, proof of type (ii) deliberate intent by an employer does not allow for negligence suits against the employer. But is a negligence claim available against the officer where the immunity is lost to the employer as a result of establishment of type (ii) factors against the employer? No. The immunity is the same for the officer and employer. The immunity that has been lost has to be the same for both. The employee has lost immunity, but only as to a claim that is made out by establishing the same (ii) factors that were established against the employer. A contention that an officer is not immune against negligence cases would run afoul of the idea that the scope of immunity is equal for officer and employer. A contention that a negligence claim can be brought against an officer where the employer has lost immunity by violation of type (ii) factors, would necessarily involve a contention that the officer has lost his immunity not only from causes of action brought under (ii), but also from negligence causes of action, causing the officer to lose more immunity than the employer, who has only lost its immunity for the cause of action insofar as the plaintiff can show the employer is responsible for the (ii) factors. In such a situation, the immunity would be

unequal. The employer would have lost its immunity only for (ii) deliberate intent cases, whereas the employee would have lost his or her immunity not only for deliberate intent cases, but for negligence cases as well. There is nothing in petitioner's argument that requires or suggests that a loss of immunity to the employer due to proof of type (ii) factors results in loss of all immunity to an employee. Only equal immunity is lost.

If one employee knew about the dangerous situation and a different employee ordered the plaintiff to work in spite of the situation, the employer would lose immunity, but neither of the employees would lose their individual immunity, because to take immunity from either would mean that the immunity extended from the employer to the employee would be less than the immunity provided the employer.

**II. *If Petitioner's Is Position Adopted, It Does Not Allow Liability Against an Innocent Employee, Nor Give Rise To A Reverse Respondeat Superior Doctrine***

Respondent furnishes the following interpretation of petitioner's position:

In essence, the "knowledge of the existence of the specific unsafe working condition" of the employer would be imputed to the employee for the purposes of establishing the required elements of a 23-4-2(d)(2) (ii) claim. As a result, every co-employee would be subject to liability if a plaintiff were to prove the elements of a 23-4-2(d)(2)(ii) against the employer.

Respondent's brief, p. 4.

***A. There Is No Loss of Immunity to Innocent Employees.***

While it is true that petitioner believes that the statute as written causes employees to lose immunity where a plaintiff establishes type (ii) claims against employers, it is not the petitioner's position that "every co-employee" would be liable when the employer loses its immunity. Loss of immunity and liability are two different things.

As is shown herein, application of the statute as written does result in loss of immunity to employees where it is shown that the employer has committed (ii) factors. But the loss of immunity as to the officer/employee is only for the same claim for which the employer lost immunity.

Moreover, under the prior decisions of this Court, *Bennett v. Buckner*, 150 W. Va. 648, 654 (W.Va. 1966); *Redden v. McClung*, 192 W.Va. 102, 450 S.E.2d 799, (1994); *Deller v. Naymick*, 176 W.Va. 108, 342 S.E.2d 73, W.Va.,1985; and *Jones v. Laird Found., Inc.*, 156 W. Va. 479, 489, 195 S.E.2d 821, 828 (1973), it is clear that employee immunity is lost only to the extent that employer immunity is lost.<sup>3</sup> Where (ii) factors are established against an employer, the employee loses immunity, but, like his employer, he does not lose all immunity. He only loses immunity to the same claim for which his employer lost immunity; otherwise the loss of immunity would be unequal.

***B. How Trial Courts Would Approach the Question of Officer/employee Immunity***

When considering a type (ii) deliberate intent case brought by an injured worker against both his employer and an officer or manager of the employer, the court where the case is brought would first consider whether the complaint set out a claim sufficient to plead a case under (ii) against the employer. If the complaint pleads a sufficient claim against the employer under (ii), then, because 23-4-2(d)(2) provides that immunity is lost to the employee when the type (ii) five factors are established, immunity goes away for the same claim for

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<sup>3</sup>While respondent argues that these cases are somehow “not applicable here”, (Brief, 18) these are the only cases extant that deal with the issue of the immunity relationship between employers and employees. These cases set out how the Court has dealt with the issue. If these cases are not “applicable” precedent, it is difficult to see what would be..

employees. But if the complaint did *not* set out that the employee was guilty of violating the same five factors that the complaint alleges were violated by an employer, the claim against the employee should be dismissed in response to the employee's motion for judgment on the pleading claiming that the employee retains immunity for the claim. Where a complaint sets out that both employer and employee violated the same type (ii) factors, the plaintiff avoids judgment on the pleadings. But if a defendant employee filed a motion for summary judgment with proof by affidavit or otherwise that the employee did not violate the same five factors as the employer, the plaintiff would be required to offer proof of violation of the five factors by the employee in order to prevent summary judgment in favor of the employee based upon retention of immunity by the employee.

***C. Every Employee Does Not Lose Immunity from Type (ii) Claims When Type (ii) Claims Are Established Against an Employer***

Accordingly, when respondent says that under petitioner's theory "every co-employee would be subject to liability if a plaintiff were to prove the elements of a 23-4-2(d)(2)(ii) against the employer", (Brief, 4) respondent misrepresents petitioner's theory. As petitioner interprets the relevant statutes and opinions of this Court, an employee would only lose immunity and thereby be subjected to the risk of being held liable where a plaintiff pleads and is able to offer proof that the employee lost his immunity by being guilty of the same five factors that caused the employer to lose its immunity.

***D. Petitioner Does Not Advocate a Reverse Respondeat Superior Doctrine***

While every co-worker may be said to lose immunity when the employer does, the loss is only effective where the co-workers violate the same five factors that were violated by the

employer, and it is only such co-workers who are “subject to liability”. This understanding of petitioner’s position should clear up another of respondent’s claim - that adoption of the position advocated by petitioner would lead to a “reverse *respondeat superior*” doctrine.

At pages 19-20 of Respondent’s brief respondent says:

The Petitioner essentially asks this Court to make supervisors responsible for acts of their employers. In essence, the Petitioner is advocating for a reverse *respondeat superior* doctrine, in which supervisors would be charged with knowledge of their employers and, in turn, lose their immunity under Section 6a and become liable under Section (ii).

In *Zirkle v. Winkler*, 214 W. Va. 19, 21, 585 S.E.2d 19, 21 (2003) the court discussed the doctrine of *respondeat superior* as follows:

The doctrine of *respondeat superior* has a longstanding basis in Anglo-American law. Syllabus Points 3 and 4 (in part) of *O'Dell v. Universal Credit Co.*, 118 W.Va. 678, 191 S.E. 568 (1937) state the doctrine as follows:

The legal relationship of master and servant is commonly understood to arise when one person subordinately serves another, both consenting thereto.... The master is answerable to a stranger for the negligent act of a person employed by the [master or] master's authorized agent, if the act is within the scope of the person's employment.

The doctrine of *respondeat superior* holds an employer liable for its employee’s torts committed within the scope of the employee’s employment. Under the doctrine, the employer may be held liable even if the employer has done nothing wrong. The employer is vicariously liable because his employee harms a third person while the employer is acting for the employer.

Logically, a doctrine of reverse *respondeat superior*, if such a doctrine existed, would hold the employee liable for torts committed by an employer even when the employee has

done nothing wrong. Regardless of the employee's complete innocence, the employee would be held vicariously liable for the torts of the employer. Respondent says that petitioner advocates such a position. Petitioner does not. Under the interpretation advocated by the petitioner no innocent employee would lose immunity to any claim that could be brought against them. Because the loss of immunity is equal as to employees and employers, and because of the plain wording of the statute, employees would only lose the immunity that their employer had lost, and could only be held liable on the same claim that is asserted against their employer, and only then if the employee has engaged in conduct that leads to the establishment of the same factors that were established against the employer under (ii).

***III. The Failure To Add The Word "Person" to 23-4-2(c) In 1983 When The Legislature Amended the Statute Cause All of Respondent's Arguments to Fail.***

All arguments of the respondent are centered on the fact that the word "person" is not included in (ii). However, when you apply the exact same logic that respondent relies on to 23-4-2(c), respondent's argument fails.

***A. If the Legislature Had Been Applying "the Express Mention of One Thing Implies the Exclusion of Another" Logic to this Statute, Then the Legislature Would Have Added the Word Person to 23-4-2(c) When They Amended the Statute in 1983.***

Respondent spends considerable time in the brief attaching significance to how "person" is mentioned in section (i), but not in section (ii). The respondent relies heavily on "[T]he familiar maxim *expressio unius est exclusio alterius* [means] the express mention of one thing implies the exclusion of another." Syl. pt. 3, *Manchin v. Dunfèe*, 174 W. Va. 532, 327 S.E.2d 710 (1984). In fact, respondent's entire argument relies on the absence of the word person in (ii).

However, the respondent only applies this maxim where it is convenient for the argument. Predictably, respondent does not mention this saying when discussing 23-4-2(c).

In fact, respondent spends very little time at all in the brief addressing why “person” is not included in 23-4-2(c).<sup>4</sup> If respondent is correct in this case that the “express mention of one thing means the exclusion of another,” then the lack of person in (c), means that there is no cause of action against an employee for violating (i). Respondent does not even attempt to argue that a plaintiff cannot sue an employee for (i) claims.

The respondent claims that the legislature was focused on the word “person” when drafting (i) and (ii). Respondent argues that the legislature discloses its intent to not allow employees to lose their immunity for (ii) claims, simply by not including “person” in (ii). If the legislature was so focused on the inclusion/exclusion of the word person, then the legislature clearly would have added the word “person” to 23-4-2(c) in 1983 when they amended the statute. The legislature would have realized that the exclusion of “person” and inclusion of “employer” in 23-4-2(c) would prevent a plaintiff from bringing a cause of action against an employee for (i) claims. The fact that the legislature did not add person to (c) furthers petitioner’s position that the lack of “person” in (ii) is not significant. When the legislature drafted (ii) it was simply trying to define deliberate intention, not focusing on protecting culpable “persons” from being sued if they committed (ii) elements.

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<sup>4</sup>(c) 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. W. Va. Code Ann. § 23-4-2 (West)

***B. Because the Word “Person” is absent in 23-4-2(c), It Is Unclear Who Can Take In A Cause of Action Against the “Person” In (i) Claims And What the Plaintiff Can Recover, Which Contradicts Respondent’s Argument that the Statute is Unambiguous Due To Respondent’s Inclusion/Exclusion Theory.***

The respondent agrees that the statute allows a cause of action against an employee under (i), but respondent does not clearly explain how the cause of action is supposed to work or where it come from in the statute. The respondent discusses the language of 23-4-2(c) in its brief on page 6:

That immunity, however, could be lost “[i]f injury or death result to an employee from the deliberate intention of his employer to produce such injury or death, the employee, the widow, widower, child or dependent of the employee shall have the privilege to take under this act, and also have cause of action against the employer as if this act had not been enacted, for any excess of damages over the amount received or receivable under this act.”

On page 7 of Respondent’s brief, the respondent continues:

Thus, as of 1966, the law provided: (1) immunity from suit for employers who subscribed to the workers’ compensation fund and complied with the provisions of the act, per 23-2-6; (2) immunity from suit for employees of those employers when the employee was acting in furtherance of the employer’s business and did not inflict an injury with deliberate intention, per 23-2-6a; and (3) ***with a statutory cause of action against employers and employees who acted with “deliberate intention,” per 23-4-2.*** (Emphasis added.)

Respondent states there was a cause of action against employers ***and employees*** who acted with deliberate intent based on 23-4-2 in 1966. It is odd that respondent states that 23-4-2 gives a cause of action to a plaintiff against *employees* even though “person” was and is missing from that section. Respondent appears to be saying that the word “person” must be read into 23-4-2(c), because “person” simply is not there. If you do not read the word “employee” into this section, there is no cause of action against employees based on a pure reading of 23-4-2(c).

Petitioner agrees with what the respondent appears to be saying when respondent says there is a cause of action against employers and *employees* who acted with deliberate intent per 23-4-2. Clearly, there are causes of action against employees when they commit (i) claims. When these suits are brought, courts likely read the word “person” into 23-4-2(c) when trying to figure out who can take under the claim (widow, widower, child or dependent of the employee), what that person can sue for (excess damages), and if a cause of action exists. How else are these suits supposed to proceed, because as of now there is no guidance if 23-4-2(c) does not apply to suits against a “person?” These questions are not answered by 23-2-6a either.

Reading the word “person” into 23-4-2(d)(2)(ii) is exactly what respondent argues against. Of course, (ii) has the word “employer or person” in the introductory language of (ii) so it is even easier to make the argument that “person” should be read into (ii). Simply put, if “person” must be read into 23-4-2(c) in order for the statute to make sense, then it makes equal (or better) sense to read “person” into (ii), a viable interpretation for this Court to make. The word “person” need not be read into (ii) in order for petitioner to prevail, but the fact that the word is absent in 23-4-2(c) greatly detracts from the significance of the absence of the word in (ii).

***IV. As a Matter of Fact, and By the Prior Precedent of This Court, the Public Policy of This State Will Be Furthered By Adoption of Petitioner’s Position***

Respondent says that public policy will not be furthered by allowing suits against officers/ managers, agents, representatives or employees who injure workers as a result of knowingly exposing them to dangerous, illegal conditions.

***A. There Is a Public Policy Favoring Workplace Safety***

First, let there be no doubt that promotion of workplace safety is the public policy of the State. Code § 21-3-1 sets out the following:

Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render employment and the place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees

In the specific context of coal mining, 22A-6-1 makes clear the public policy of the State insofar as mine safety is concerned:

(1) The Legislature concurs with the congressional declaration made in the “\*Federal Coal Mine Health and Safety Act of 1969”<sup>1</sup> that “the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource--the miner”;

...

Indeed, this Court has already decided whether or not it benefits public policy to hold officers and managers liable when they deliberately injure workers. In *Tawney v. Kirkhart*, this Court specifically held that it is against public policy to grant immunity to officers who *negligently* injure workers, let alone those who injure them in type (ii) deliberate intent situations. This Court held:

To hold that a coemployee is not liable for his own negligence would increase the hazard of employments and be contrary to public policy. 130 W. Va. 550, 563, 44 S.E.2d 634, 641 (1947)

While *Tawney* was decided when there was no statutory immunity for employees, it is still good law as to this Court’s view of the interests of public policy.

Respondent says that the disaster at Upper Big Branch does not demonstrate the

desirability of holding corporate officers, managers, and agents liable when they seriously injure or kill people by intentionally exposing workers to high risk, dangerous conditions that are in violation of law or well accepted standards, and likely to cause serious injury or death. Respondent says that criminal penalties, or the threat of losing job certification are plenty of deterrence against unsafe practices. Respondent's brief, 24, 25. But after the worst mine disaster in many years, in spite of an apparently motivated federal prosecution effort, there has been very little in terms of prosecution. One security chief and one superintendent have been charged criminally and pleaded guilty. Thirty months has passed since the disaster. There has been no state prosecution of anyone. The higher ranking people, those who financially benefitted most from the dangerous practices that were routinely carried out in order to increase profits, have thus far been untouched criminally.

Respondent says that the threat of civil liability will not deter officers, managers, and agents from intentionally exposing workers to dangerous or deadly workplace conditions, so we just as well not do it. In fact, respondent says that holding corporate officers, managers, and agents financially responsible when they injure workers by exposing them to dangerous conditions will be such a deterrence that businesses will be unable to convince people to take supervisory positions. Respondent never explains how this will work. Will supervisory candidates say to employers, "I can't take the foreman's job because I know the managers will want me to expose workers to known, illegal, dangerous conditions, and I can't take the chance on being sued"? Respondent apparently never considers that it may be a positive for workplace safety for a supervisor or middle level manager to advise his superiors that he or she is not going to take personal financial risk and expose workers to known, illegal,

dangerous conditions. Frankly, as this Court held in *Tawney*, it seems patently beneficial to the cause of workplace safety to encourage front line supervisors to worry that they may be held financially liable if they take risks and expose workers to dangerous bad or illegal practices. Perhaps they will refuse to do it.

Respondent also says that if officers are not immune to type (ii) deliberate intent actions, they may be required to note the fact of suit if they apply for a mortgage. Brief, 4. Leaving aside the idea that a recorded deed of trust would have priority over a subsequently entered judgment, when one balances the public policy consideration involving the inconvenience of revealing a suit that may result if immunity exists, against the enhancement in workplace safety if immunity does not exist, it is pretty clear where the public policy balance lies.<sup>5</sup>

But respondent says, “To hold individuals accountable for actions undertaken within the scope and in furtherance of their employment would completely undermine the fundamental purposes underlying corporate structures.” Brief, at 24. Presumably, if petitioner prevails, corporate officers would risk liability if they expose workers to known illegal, dangerous conditions, a situation that respondent opposes. In any event, respondent says that there are already sufficient options available that an injured worker can pursue. Respondent, cites *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 352 S.E.2d 93, 94 (1986), a consumer suit

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<sup>5</sup>While discussing the burden that will result to officers and managers if petitioner’s position is adopted, respondent’s brief says counsel for respondent “has access to over 350 deliberate intent files.” Brief, 4. Then, respondent says that respondent’s counsel has performed certain analysis of these case files and has reached certain conclusions. This leads to some problems for petitioner. Petitioner has no knowledge of how the files were collected and assembled. Petitioner knows literally nothing about the files other than the representations that are made in the brief. This makes it impossible for petitioner to question the data in the files or the conclusions drawn from the data. This puts petitioner to a significant disadvantage, to say the least. It is like arguing with a secret plan to end the war. Petitioner maintains that arguments based on the secret files should be discarded by the Court.

against a corporate mobile home dealer and its owners. Respondent says that *Laya* shows that an injured worker, or his estate's representative, can simply pierce the corporate veil and recover against the errant officer or manager. It is probably true that in a consumer case such a suit is possible. But the plaintiff would have to show both prongs of the test set out in *Laya*, an inequitable result if the veil is not pierced, *and* facts supporting a single factual identity between the corporation and its *shareholders*. Piercing the corporate veil would not affect officer and managers who are not shareholders or owners. Most importantly, if respondent's position is applied, had the suit in *Laya* been a workplace injury that met the type (ii) requirements rather than a consumer action, corporate officers, agents and managers would unquestionably move to dismiss because they are immune from suit under §23-2-6a.

### CONCLUSION

The question presented here is whether or not suit can be brought against officers, agents and managers of employers when: (1) they have actual knowledge that a dangerous condition exists in the workplace that poses a high degree of risk *and* actual knowledge of the strong *probability* that it will cause injury or death, and; (2) the dangerous condition is in violation of law or of a commonly accepted and well-known safety standard within the industry, and; (3) knowing all the foregoing, the officer/manager *intentionally* exposes the employee to the unsafe condition, and; (4) as a direct and proximate result the employee suffers serious injury or death. Is it seriously contended that the legislature was cognizant of what it was doing would actually grant immunity from suit to a person who did this? If the legislature so intended, would it not make its intention clear, instead of disguising the grant of immunity in a statute that, when read literally, goes the other way?

To the injured worker, workplace injuries cause disability, pain, and loss of the pleasure of living. He loses the pride of being employed. In most cases, he loses income. Often the loss of income extends over his lifetime. Sometimes workers are killed. Sometimes, as we are seemingly continually and repeatedly reminded, multiple workers are killed.

When workers are injured, their families endure the mental pain of seeing a breadwinner cope with the effects of the injury. They must adjust to the deprivation or elimination of income. Where their family member is killed they not only are deprived of income, they must endure grief and loss. These effects often reverberate down through the generations.

Worker injuries or deaths cause loss of productivity and expense to businesses and society as a whole. We all pay the bill.

Because of all of the costs, both personal and financial, and because it is the decent thing to do, the West Virginia Legislature has established a public policy favoring workplace safety. It is incumbent upon this Court to interpret the intent of the legislature to further such a public policy. There is no substantial argument opposing the idea that holding officers and managers of employers financially liable will provide an incentive to not expose workers to dangerous conditions. Also, there is the fact that allowing suits against transgressing officers/managers furthers the cause of justice and, in some cases, provides an avenue for financial recovery.

Most employers recognize that a safe workplace benefits the bottom line. Most employers have officers and managers who want to do the right thing for their workers and

keep them safe. But anybody who has ever worked in heavy industry knows that some employers do not do the right thing. Sometimes they have made a calculation that taking chances with worker safety benefits the bottom line. Incredibly enough, some ignore safety out of misguided machismo, or the idea that safety practices interfere with “gettin’ it done”. These attitudes come from the top down. Risk of financial loss may very well put a damper on them.

Respondent’s arguments are based on a purported plain reading of the statute that instead goes the other way, an *expressio unius est exclusio alterius* that does not make sense when applied to the statute as a whole, a public policy argument that is clearly weak, and distortion of petitioner’s position.

The certified question of the District Court should be answered in the affirmative.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

Docket No. 12-0835  
(2:12-CV-01324)

JAMES RAY BROWNING,

Respondent.

**CERTIFICATE OF SERVICE**

I, Timothy R. Conaway, counsel for petitioner, do hereby certify that on the 21st day of September, 2012, I served the foregoing **PETITIONER'S REPLY BRIEF** upon the following individuals, by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to them at the following addresses:

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