

**BRIEF FILED  
WITH MOTION**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

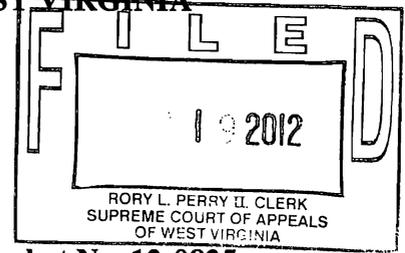
**Gina Young, Administratrix of  
the Estate of Richard Young, Jr.,**

**Petitioner,**

**v.**

**Apogee Coal Company, LLC,  
Patriot Coal Corporation and  
James Ray Browning,**

**Respondents.**



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

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**RESPONDENTS' CORRECTED BRIEF**

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### **CERTIFIED QUESTION**

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? This Court should answer this Certified Question in the negative because under the plain language of the statute, individual employees are not subject to liability under subsection (ii) even if the employer is stripped of immunity.

### **STATEMENT OF THE FACTS**

Respondent, James Ray Browning, is employed by Apogee Coal Company LLC as a maintenance supervisor. Appendix pg. 2. Mr. Browning was the decedent, Richard Young, Jr.’s, immediate supervisor. On May 14, 2011, Mr. Young was tasked with removing a counterweight from a Caterpillar 992G end loader, a task he had performed before. Working alone, Mr. Young began to remove the counterweight without “blocking” it against movement, when the weight unexpectedly fell, fatally injuring him. Appendix pg. 2-4. According to witness statements taken during the subsequent MSHA investigation, Mr. Young’s co-workers told him to make sure the counterweight was “blocked against motion” prior to the accident. Mr. Young failed to do so.

On March 30, 2012, the Petitioner filed suit against Mr. Browning, Apogee Coal Company LLC and Patriot Coal Corporation (together, “Respondents”). The Complaint asserts, among other things, a “deliberate intent” cause of action pursuant to West Virginia Code Section 23-4-2(d)(2)(ii) against Mr. Browning. On April 27, 2012, the Defendants removed the case to United States District Court for the Southern District of West Virginia based upon diversity of citizenship jurisdiction under 28 U.S.C. § 1332, asserting that the Mr. Browning, the only non-diverse defendant, had been fraudulently joined because no cause of action exists against an

individual employee under 23-4-2(d)(2)(ii). On July 3, 2012, the District Court certified that issue to this Court. On July 13, 2012, the Defendants filed a “Notice of Automatic Stay” pursuant to bankruptcy filings by defendants Patriot Coal Corporation and Apogee Coal Company LLC. On July 16, 2012, the District Court ordered the Defendants to show cause as to why the proceeding should be stayed as against Mr. Browning. The Defendants argued that, even though Mr. Browning had not personally filed bankruptcy, the matter should be stayed since his employer, Apogee Coal Company LLC, was the real party defendant and that a judgment against Mr. Browning would in effect be a judgment against the debtor/defendant. It is the Petitioner’s position that it should be able to prosecute its case against Mr. Browning individually and proceed without the corporate defendants. On July 26, 2012, the District Court denied the Defendants’ motion stating that, if this Court determines that 23-4-2(d)(2)(ii) does not apply to individual employees, Mr. Browning would be dismissed from the case and the case would then be stayed in its entirety. The Petitioner now seeks to hold Mr. Browning personally liable.

**SUMMARY OF THE ARGUMENT**

The Petitioner asks this Court to resolve the Certified Question by ruling that immunity afforded an “employee” under West Virginia Code Section 23-2-6a is automatically dissolved whenever the immunity for the “Employer” is stripped away, and thus, an individual employee may be properly named as a defendant in a civil “deliberate intent” action brought pursuant to 23-4-2(d)(2)(ii). This position is untenable because the plain language of the statute does not allow for such an action.

The question before this Court is one of basic statutory interpretation. The plain language of the statute is clear and unambiguous. The Petitioner asks this Court to ignore the

clear and unambiguous language of the statute, and to adopt an erroneous interpretation of the same based upon several public policy arguments. Public policy, however, cannot overcome the plain language of the statute itself. The meaning of 23-4-2(d) as set forth by the Respondent is not only unambiguous but also supported by the legislative history of the statute. This Court should interpret it according to controlling precedent and case law governing statutory interpretation when examining West Virginia's Workers' Compensation Act. Upon review, the only conclusion is that individual employees are not subject to liability under 23-4-2(d)(2)(ii).

Section 23-2-6a offers tort immunity to employees of employers in good standing with the West Virginia Workers' Compensation Fund. The West Virginia Legislature enacted 23-2-6a to broaden the scope of the tort immunity previously afforded West Virginia employers to their employees. Practically, this act was an *expansion of immunity, not liability*. When 23-2-6a was enacted in 1949, Section (ii) deliberate intent claims, like that at issue here, did not yet exist. Petitioner contends that the immunity afforded to an employer under 23-2-6 is equal to the immunity afforded to the employee under 23-2-6a, and that when immunity for one is lost, so is that for the other. In support of this position, Petitioner relies upon *Bennett v. Buckner*, 150 W. Va. 648, 149 S.E.2d 201 (1966). The Court issued the *Bennett* decision in 1966, long before the seminal *Mandolidis v. Elkins Industries*, 161 W. Va. 695, 246 S.E.2d 907 (1978), decision and the subsequent 1983 Amendments to the deliberate intent statute under which Petitioner now asserts her claim. The remaining cases cited by Petitioner, *Deller v. Naymick*, 176 W. Va. 108, 342 S.E.2d 73 (1985), and *Redden v. McClung*, 192 W. Va. 102, 450 S.E.2d 799 (1994), are similarly inapplicable. Yet these cases do not address the certified question before this Court: Can an individual employee be a party defendant to a deliberate intent claim brought under West Virginia Code Section 23-4-2(d)(2)(ii)?

Should this Court adopt the interpretation of the statute advanced by Petitioner, it would effectively broaden the scope of the statute, and create something akin to a “reverse *respondeat superior*” doctrine. 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.

The language of the statute is clear on its face. However, important public policy considerations also support preserving individual employee immunity from suit under Section (ii). There is no denying that West Virginia employers need the most qualified people in supervisory positions throughout its industries. These supervisors are the section foremen in mines, drillers on gas rigs and the crew leaders at construction sites. In nearly every instance, these individuals have risen through the ranks of labor and have assumed safety responsibility for their co-workers. In most cases, these workers are not paid significantly more than the men and women they supervise. The Respondent in this suit, Mr. Browning, is a coal miner, who also happens to be a supervisor. The strategic naming of Mr. Brown to a lawsuit in order to defeat diversity jurisdiction and, therefore, removal to federal court, will affect him for the rest of his life. For instance, if he needs to refinance the mortgage on his home, he may be asked whether there are any pending suits or judgments against him personally. Exhibiting indifference to them, plaintiffs and their counsel typically name individuals like Mr. Brown with no intention of pursuing the deliberate intent claim against them. To date, counsel for Respondent has access to over 350 deliberate intent case files. In none of those files is there a single instance of a plaintiff actually collecting or even seeking to collect a judgment from an individual supervisor. In fact,

in most instances the employee or supervisor named in the suit as a defendant is dismissed before trial or after the time to remove the matter to federal court has passed.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, Respondent requests that this Court schedule this matter for oral argument on the basis that the case involves an issue of first impression and involves inconsistencies and conflicts among the courts.

### **ARGUMENT IN RESPONSE TO PETITIONER'S BRIEF**

#### **I. Overview of West Virginia's Workers' Compensation Act.**

The West Virginia workers' compensation system was created by the Legislature in 1913 "to provide a method of compensation for employees that may be injured, or the dependents of those killed in the course of their employment . . . and to define and fix the rights of employees and employers . . . ." Davis, Robin Jean & Palmer Jr., Louis J, *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform*, 107 W. Va. L. Rev. 43, 59 (2004) (quoting 1913 W. Va. Acts Ch. 10). In short, it is a "no-fault system of compensability for work-related injuries" designed to replace the existing common-law system whereby injured employees could sue their employers for negligence, but were often stifled by the common-law defenses of assumption of the risk, contributory negligence, and the fellow-servant doctrine.<sup>1</sup> *Id.* at 53-58. While the costs of the workers' compensation system are unilaterally born by employers, employees surrender their common-law rights to sue their employers for work-related injuries in exchange for the assured

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<sup>1</sup> Of particular note here, the fellow-servant doctrine barred injured employees from suing their employers for injuries sustained due to the negligence of co-employees. Davis, Robin Jean & Palmer Jr., Louis J, *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform*, 107 W. Va. L. Rev. 43, 57-58 (2004).

benefits. Lex K. Larson & Arthur K. Larson, *Workers Compensation Law: Cases, Materials and Text* §§ 1.01-.04 (3d Ed. 2000).

**A. Employer immunity under W. Va. Code § 23-2-6 and extension of immunity to employees under W. Va. Code § 23-2-6a.**

In exchange for the creation of the no-fault compensation system, the Legislature granted employers who participate in the system immunity from suits “in damages at common law or by statute for the injury or death of any employee, however occurring.” 1913 W. Va. Acts Ch. 10 § 22; W. Va. Code § 23-2-6. 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. 1913 W. Va. Acts Ch. 10 § 28; *see also Maynard v. Island Creek Coal Co.*, 115 W. Va. 249, 175 S.E. 70 (1934). Section 23-2-6, the immunity it grants from a common-law suit for damages, and the provision for a statutory cause of action where the employer acts with deliberate intention, has remained virtually unchanged since the enactment of the statute. *See e.g., McVey v. C & P Tel. Co.*, 103 W. Va. 519, 138 S.E. 97 (1927) (finding immunity from negligence suit of injured employee for employer who complied with provisions of the statute) *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996) (“It is clear that worker’s compensation is the exclusive remedy when an employee is negligently injured in the workplace.”).

In 1933, the Supreme Court of Appeals of West Virginia extended the immunity to employees of covered employers, so long as the employees were acting “in furtherance of the employer’s business, under express authority of the employer, and not unlawfully, wantonly or maliciously.” *Hinkleman v. Wheeling Steel Corp.*, 114 W. Va. 269, 270, 171 S.E. 538, 539

(1933). However, the Supreme Court of Appeals later overruled *Hinkleman* and allowed an injured employee to sue a co-employee for negligence. *Tawney v. Kirkhart*, 130 W. Va. 550, 44 S.E.2d 634 (1947). In the very next legislative session, the Legislature abrogated the *Tawney* ruling by expressly extending immunity from suit 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.” 1949 W. Va. Acts Ch. 136; W. Va. Code § 23-2-6a. This statute has not been amended since its enactment. In 1966, the Court interpreted that section to “extend the same immunity and to accord an immunity identical with that of the employer to additional persons, including fellow employees.” *Bennett v. Buckner*, 150 W. Va. 648, 654, 149 S.E.2d 201, 205 (1966). 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.

**B. The “deliberate intent” exception to workers’ compensation immunity**

West Virginia’s original “deliberate intent” statute states, in relevant part, that:

If injury or death result to any 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 chapter, and shall also have cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable under this chapter.

W. Va. Code § 23-4-2 (1913). Most jurisdictions understand the “deliberate intention” exception to tort immunity to mean that employers will not lose immunity for injuries caused by anything

less than a “conscious and deliberate intent directed to the purpose of inflicting an injury.” 2 Arthur K. Larson & Lex K. Larson, *Larson’s Workers’ Compensation Desk Edition* § 103.3. Indeed, as early as 1936, the West Virginia Supreme Court interpreted the “deliberate intention” exception to require a showing of “specific intent on the part of the employer to produce the injury,” an approach consistent with a majority of jurisdictions. *Allen v. Raleigh-Wyoming Mining Co.*, 117 W. Va. 631, 186 S.E. 612 (1936). The requirement of specific intent and the rule that “[n]either gross negligence nor wanton misconduct are such to constitute deliberate intention” remained the law in West Virginia for over forty years. Syl. pt. 2, *Eisnaugle v. Booth*, 159 W. Va. 779, 226 S.E.2d 259 (1976). This interpretation of “deliberate intention” represents the state of law from the inception of the Workers’ Compensation Act and original grant of immunity to employers and through the extension of that immunity to employees who did not act with “deliberate intention,” until the interpretation was altered by the West Virginia Supreme Court of Appeals in 1978.

**C. The common law expansion of the definition of “deliberate intent” and subsequent legislative action.**

In 1978, the West Virginia Supreme Court of Appeals for the first time interpreted “the phrase ‘deliberate intent to produce such injury or death’ . . . to mean that an employer loses immunity from common law actions where such employer’s conduct constitutes an intentional tort or willful, wanton, and reckless misconduct . . . , and that the conduct removing the immunity bar must be undertaken with a knowledge and an appreciation of the high degree of risk of physical harm to another created thereby.” *Mandolidis v. Elkins Indus.*, 161 W. Va. 695, 706, 246 S.E.2d 907, 914 (1978).

After the *Mandolidis* decision, the West Virginia Legislature amended section 23-4-2 in 1983 with the express purpose of adopting a more demanding standard for “deliberate intention” than the standard expressed in *Mandolidis*. The preamble to 23-4-2 now provides:

It is declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as expressly provided in this chapter and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or the fault of a coemployee; that the immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the intent of the Legislature in providing immunity from common lawsuit was and is to protect those immunized from litigation outside the workers' compensation system except as expressly provided in this chapter; that, in enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

W. Va. Code § 23-4-2(c)(1) (now W. Va. Code § 23-4-2(d)(1)). Deliberate intention actions are now governed by the revised 23-4-2(d)(2) which sets forth two alternative methods for proving “deliberate intent.” First, under 23-4-2(d)(2)(i) (or “Section (i)”) an employee can recover damages when:

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

....

The second, alternative, method of establishing deliberate intention is set forth in 23-4-2(c)(2)(ii) (or “Section (ii)”). Requiring a lesser showing of an actual intent to cause harm, this section contains five statutory elements that, if proven, establish that the employer nevertheless acted with “deliberate intention” to cause the injury. To recover against the employer, an employee must prove that:

(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 had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such 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 such employer, 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 work places, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in paragraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such unsafe working condition.

W. Va. Code § 23-4-2(c)(2)(ii) (1983). Since 1983, the Legislature has made additional revisions to the statute. However, none of these revisions have a substantial impact on the case at bar.<sup>2</sup>

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<sup>2</sup> The current version of the statute is cited throughout the brief unless stated otherwise.

**II. The plain language of W. Va. Code § 23-4-2 does not allow for a cause of action against co-employees or other individuals under the Section (ii) exception to immunity.**

West Virginia's "deliberate intent" statute allows for two avenues of recovery under Sections (i) and (ii). According to the plain text of the statute, an individual employee may only be held liable under Section (i)'s "deliberate intent" exception. This matter is one of pure statutory interpretation. "Interpreting a statute . . . presents a purely legal question subject to de novo review." Syl. pt. 1, *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995). When presented with such a question, a reviewing court must first examine the specific language at issue, taking into consideration the legislature's intent. *Griffith v. Frontier W. Va., Inc.*, 719 S.E.2d 747, 754 (W. Va. 2011); *Appalachian Power*, 195 W. Va. at 587, 466 S.E.2d at 438 ("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."); Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("The primary object in construing a statute is to ascertain and give effect to the intent of the legislature."). "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). A statute's silence on a salient point or a disagreement between the parties about the meaning of the statute does not, in and of itself, render the statute ambiguous. See *Griffith*, 719 S.E.2d 753-55; *Deller v. Naymick*, 176 W. Va. 108, 112, 342 S.E.2d 73, 77 (1985).

West Virginia Code 23-4-2(d)(2) specifies when immunity can be lost, and defines "deliberate intent, and states in part that:

The immunity from suit provided under this section and under sections six [§23-2-6] and six-a [§23-2-6a], article two of this

chapter may be lost only if the employer or person against whom liability is asserted acted with “deliberate intention.”

As discussed previously, “deliberate intent” must be proven pursuant to one of the two subsections of 23-4-2(d)(2), (i) or (ii). Sections (i) and (ii) are “two separate and distinct methods of proving deliberate intent.” *Sias v. W-P Coal Co.*, 185 W. Va. 569, 574, 408 S.E.2d 321, 326 (1991). *See also Tolliver v. Kroger*, 201 W. Va. 509, 521, 498 S.E.2d 702, 714 (1997) (stating that an employer’s immunity may be overcome by showing that the employer caused injury with *deliberate intention*, or alternatively under the five-part test in W. Va. Code § 23-4-2(c)(2)(ii)).

In other words, both employers and employees are afforded immunity from suit pursuant to 23-2-6 and 23-2-6a, respectively. Sections (i) and (ii) of 23-4-2(d)(2) delineate two exceptions to that immunity and offer avenues which permit a party to prove deliberate intent. First, under Section (i), immunity may be lost if:

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. It requires a showing of an actual, specific intent [.]

W. Va. Code § 23-4-2(d)(2)(i) (emphasis added). Thus, an employer may lose immunity if it acts with actual, specific intent. Likewise, a person or co-employee also loses his immunity if he injures an employee with actual, specific intent.

Additionally, an employer may lose its immunity if a plaintiff is able to prove the five-prong deliberate intent test contained in Section (ii). However, **only the employer** is mentioned in the language of the elements necessary for a Section (ii) claim. The statute clearly states:

(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 or risk and the strong probability of serious injury or death presented by the specific unsafe working condition

...

(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 . . . .

W. Va. Code § 23-4-2(d)(2)(ii) (emphasis added). Section (i) specifically states that an **employee** or an **employer** loses immunity if they act with “an actual, specific intent,” and section (ii) only mentions the **employer**. While both employers and employees are granted immunity pursuant to 23-2-6 and 23-2-6a, the ways in which the immunity is lost for each is separate and distinct.

Statutes must be read in context, and “two [related] 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 significant and effect to every section, clause, word or part of a statute[.]’” *Savilla v. Speedway Superamerica, LLC*, 219 W. Va. 758, 763, 639 S.E.2d 850, 855 (2006) (citations omitted). Because “person” is mentioned in Section (i), but not in Section (ii), an employee only loses his immunity if a plaintiff proves that he acted with “specific, actual intent.” “[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. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984). Had the legislature intended to narrow employee immunity under Section (ii), it would have explicitly included the term “person” or “employee” under Section (ii) as it did in Section (i).<sup>3</sup> The express mention of one thing implies the exclusion of another. Applying the well-reasoned principles governing statutory interpretation adopted by this Court and by

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<sup>3</sup> The distinction between the mention of “employer or person” under (i) and only “employer” under (ii) is underscored by the fact that both (i) and (ii) were added concurrently in 1983 as part of the Legislature’s response to *Mandolidis*. Petitioner argues that because the legislature was aware of *Bennett* when it drafted (ii), it understood that if “the employer violated (ii), immunity was abrogated to both employers and employees . . . [rendering] the word ‘person’ in (ii)” unnecessary. (Pet. Br. at 18.) That reasoning fails, however, because if it were true, there would have been no reason for the legislature to include “person” in (i) as it did.

giving meaning to the plain language of the section 23-4-2(d)(2), there can be no claim against the Mr. Browning under Section (ii).

Federal courts in West Virginia have addressed this precise issue, with most holding that no cause of action lies against an individual employee under Section (ii).<sup>4</sup> For example, in *Adkins v. Consolidation Coal Co*, No. 2:11-0285, 2012 U.S. Dist. LEXIS 52281, (S.D.W. Va. Apr. 13, 2012), the District Court held that there is no possibility of deliberate intent recovery against individuals under § 23-4-2(d)(2)(ii). *Id.* at \*18. In *Adkins*, Judge Copenhaver explained that the primary case relied upon by the Petitioner, *Weekly v. Olin Corp.*, 681 F.Supp 346 (N.D. W. Va. 1987), failed to take into account the two-tiered deliberate intention definition which is now found in 23-4-2(d)(2). The *Weekly* court instead relied upon *Bennett v. Buckner*, 150 W. Va. 648, 654, 149 S.E.2d 201, 205 (1966), a case decided prior to the adoption of the two-tiered system. The current statute clearly delineates that Section (i) is applicable to both the employer and the employee, while Section (ii) is applicable **only** to the employer. *Id.* at \*14. Judge Copenhaver stated the fact that the language under Section (i) specifically mentions both the “employer and person” while Section (ii) only mentions “employer” is a “stark and telling contrast.” *Id.* at \*16.

While the issue has not been directly addressed by the West Virginia Supreme Court, the circuit courts in this State have recognized that no cause of action against a co-employee exists under Section (ii). Notably, while sitting as a Circuit Judge in Kanawha County, Judge Irene Berger entered an order stating that “the plaintiffs’ claim against [the supervisor] as a fellow

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<sup>4</sup> The majority of decisions addressing this issue for the purpose of a motion to remand, especially decisions of the Southern District of West Virginia, have agreed with the Judge Johnston’s reasoning in *Evans v. CDX Servs*, 528 F. Supp. 2d 599 (S.D.W. Va. 2007). See, e.g., *Fincham v. Armstrong World Indus., Inc.*, No. 2:08-CV-101, 2008 U.S. Dist. LEXIS (N.D. W. Va. Nov. 7, 2008) (Bailey, J.); *Hager v. Cowin & Co.*, No. 2:10-cv-01138, 2011 U.S. Dist. LEXIS (S.D. W. Va. Feb. 14, 2011) (Johnston, J.); *Cartwright v. Superior Well Servs*, No. 1:11-cv-00298, 2011 U.S. Dist. LEXIS 111170 (S.D. W. Va. Sept. 28, 2011) (Faber, J.); *King v. Sears Roebuck & Co.*, No. 1:10-1024, 2011 U.S. Dist. LEXIS 14578 (S.D. W. Va. Feb. 14, 2011) (Faber, J.); *Adkins v. Consol. Coal Co.*, No. 2:11-0285, 2012 U.S. Dist. LEXIS 52281 (S.D. W. Va. Apr. 13, 2012) (Copenhaver, J.).

employee of the plaintiff and as section foreman for Argus Energy, is not cognizable because West Virginia Code § 23-4-2(d)(2)(ii) only provides for actions against employers and not co-employees.” See *Farley v. Argus Energy, LLC, et al.*, Civil Action No. 07-cv-2683 (Kanawha County Cir. Ct. June 5, 2008) (unpublished order). See Appendix pg. 54. In addition to finding that that plain language of the statute necessitated finding that Section (ii) applies only to employers, Judge Berger also stated that the elements that must be proven under Section (ii) would not make sense as applied to a co-employee, and stated as follows:

The Court finds that this ruling is consistent with the substance of the elements a plaintiff must prove to sustain a claim under 2(d)(2)(ii). It is the employer who has the responsibility to assure that a specific unsafe working condition does not exist in the workplace. It is the employer who can take steps to insure that no safety regulation, statute or industry standard is being violated in its workplace and, clearly, it is the employer who is in the best position to insure that its employees are not exposed to unsafe working conditions.

See Appendix pg. 55. Not only is the language in Section (ii) clear that it applies only to employers, the elements which must be proven by the plaintiff are also consistent with this reading.

**III. While the immunities afforded employers and employees under W. Va. Code § 23-2-6 and § 23-2-6a are coextensive, they are lost in different ways.**

Petitioner argues that the immunity granted to employers under 23-2-6 and extended to employees under 23-2-6a always exists in tandem, and that where employer immunity is abrogated, employee immunity is likewise abrogated by extension. Petitioner’s argument is flawed for multiple reasons. First, the statutory immunity under 23-2-6 is granted to employers who subscribe to the workers’ compensation system. It makes no mention of immunity being lost when an employer inflicts injury with deliberate intent – that cause of action is granted under 23-4-2(c). Thus, employee immunity under 23-2-6(a) is extended to every officer, manager,

agent, representative or employee of subscribing employers when those persons are acting in furtherance of the subscribing employer's business and do not inflict injury with deliberate intent. In short, employer immunity is lost under 23-4-2(c) when it inflicts injury with deliberate intent, and employee immunity is dissolved under 23-2-6(a) when he or she inflicts injury with deliberate intent – as deliberate intent is defined under 23-4-2(d). Had the Legislature wished to dissolve employee immunity when the employer acts with deliberate intent, it could have done so by stating as such under 23-2-6 or -6(a). Second, because the deliberate intent statute was expressly drafted to limit immunity, it is illogical to conclude that immunity is necessarily granted and dissolved in the same manner. Rather, the grant of immunity is broad and protects employers and employees except in narrowly defined situations, such as when one acts with deliberate intent. A suit for deliberate intent, however, is a statutory cause of action that, if proven, results in a judgment against the defendant. 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. Based upon the wording of the statute and the express intent of the legislature to extend immunity, Petitioner's suggestion that immunity is both extended and lost together is flawed.<sup>5</sup>

**A. Petitioner's reliance upon *Weekly v. Olin Corp.* is misplaced because it relies upon caselaw decided prior to the adoption of the two-tiered deliberate intent statute.**

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<sup>5</sup> Petitioner suggests that because proof of the five-factor test under (ii) imputes the knowledge and actions of officers and employees to the employer, "the loss of immunity always extends to the employer[, and] 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." (Pet. Br. at 17.) That argument is based on the logical fallacy that it is the *loss of immunity* that extends from the employee to the employer. In truth, however, the employer loses immunity under (ii) based on the knowledge and actions of officers and employees imputed to it under the doctrine of *respondeat superior* because those officers and employees are the agents of the employer acting within the scope and in furtherance of their employment---not because they themselves have lost immunity. Notably, there exists no "reverse-*respondeat superior*" doctrine which would impute the knowledge and actions of the employer to its employees.

As pointed out by Judge Copenhaver in the previously discussed *Adkins v. Consolidated Coal Co.* decision, there are only two published opinions which address whether a supervisor may be sued under Section (ii), *Weekly v. Olin Corp.*, 681 F. Supp. 346, 352 (N.D. W. Va. 1987) (Kaufman, J.) (concluding that § 23-4-2(d)(2)(ii) applies to co-employees), and *Evans v. CDX Servs., LLC*, 528 F. Supp.2d 599, 605 (S.D.W. Va. 2007) (Johnston, J.) (holding that “co-employees are not subject to suit under § 23-4-2(d)(2)(ii) because that subsection only provides for actions against employers”). *Adkins v. Consolidation Coal Co.*, No. 2:11-0285, 2012 U.S. Dist. LEXIS 52281, \*12-13 (S.D. W. Va. Apr. 13, 2012) (Copenhaver, J.). Adopting the reasoning of the *Weekly* court, the Petitioner cites only one case, *Bennett v. Buckner*, 150 W. Va. 648, 652, 149 S.E.2d 201, 205 (1966), for the proposition that the scope of immunity afforded fellow employees under 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.” *Adkins*, at 14 (citing *Bennett*, 150 W. Va at 652, 149 S.E.2d at 205). As emphasized in *Adkins*, the two-tiered deliberate intention definition now found in 23-4-2(d)(2) was not enacted until 1983, 17 years after the *Bennett* decision. *Id.* at 14.

Under *Bennett*, 23-2-6a expands immunities enjoyed by employers to employees. However, the *Bennett* decision did not expand or contract immunity or liability relating to 23-2-4(d)(2)(ii), since it was decided prior to *Mandolidis* and the 1983 Amendments. It is clear from the history and timing alone that the *Bennett* Court did not set out to impose liability onto employees by its decision in 1966. Instead, it merely interpreted 23-2-6a, which was promulgated in response to *Tawney*, as a bar to suits against co-employees when the co-employees were acting in furtherance of the employer's business and did not inflict an injury with deliberate intention. *Bennett*, 150 W. Va. at 649, 149 S.E.2d at 202.

Based upon this logic, Judge Copenhaver turned to the language of the statute itself to determine whether supervisors may be sued under Section (ii), in which he agreed with the only other published decision on the issue, *Evans v. CDX Servs., LLC*, 528 F. Supp. 2d 599, 605 (S.D. W. Va. 2007) (Johnston, J.), which held that Section (ii) did not subject supervisors to suit. This Court need not overrule *Bennett*, because that case was correct in that the immunity afforded to the employee under 23-2-6a is coextensive with that afforded to the employer under 23-2-6. However, through its enactment of the two-tiered deliberate intent system, the Legislature has set forth different avenues in which an employer and employee may lose those immunities.

**B. Petitioner’s reliance upon *Deller v. Naymick* and *Redden v. McClung* is misplaced since neither case addresses whether an individual employee may be sued under W. Va. Code § 23-4-2(d)(2)(ii).**

The Petitioner cites *Deller v. Naymick*, 176 W. Va. 108, 342 S.E.2d 73 (1985), and *Redden v. McClung*, 192 W. Va. 102, 450 S.E.2d 799 (1994), cases decided after the 1983 Amendments, in an attempt to persuade this Court that the *Adkins* decision was incorrect. However, the issues addressed in those cases are not applicable here. For example, the *Deller* decision only addressed whether a company physician was considered a covered employee in order to bring him under the immunity afforded by 23-2-6a.<sup>6</sup> *Deller v. Naymick*, 176 W. Va. 108, 110, 342 S.E.2d 73, 75 (1985). The issue was not whether the physician could be sued under Section (ii). The *Deller* case provides no guidance as to whether an individual such as Mr. Browning may be sued under Section (ii).

The Petitioner also cites *Redden v. McClung*, 192 W. Va. 102, 450 S.E.2d 799, a case that addressed only whether the individual defendant was “actually acting in the course of and as a

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<sup>6</sup> The certified question in *Deller* was: 1) Is a full-time, salaried doctor employed by a subscriber to the Workers’ Compensation Fund or by a self-insured employer subject to a co-employee’s medical malpractice action, because of the “dual capacity” doctrine, despite the provisions of W. Va. 23-2-6a [1949]; 2) Is the immunity from tort liability provided by W. Va. Code, 23-2-6a [1949] inapplicable to the extent that the doctor employed by a subscriber to the Workers’ Compensation Fund or by a self-insured employer is covered by liability insurance.

result of his employment” at the time of an accident in order to bring him under the immunity provision of 23-2-6a. *Id.* Like *Deller*, the *Redden* case is inapplicable to the question before this Court.

**C. The West Virginia Supreme Court endorses Respondent’s interpretation of the statutory language of W. Va. Code § 23-4-2 in *Roberts v. Consolidation Coal Co.***

More instructive than either *Redden* or *Deller* is *Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 539 S.E.2d 478 (2000), a case in which this Court noted that “deliberate intention” under Section (ii) is chargeable *solely to an employer* and not to an employee. *Id.* at 235 (citing W. Va. Code § 23-4-2) (emphasis added). In *Roberts*, the Court examined whether an employer may argue the employee’s contributory negligence as a defense in a deliberate intent suit. The Court held, pursuant to 23-4-2(a), that only “a self-inflicted injury or the intoxication of [an injured] employee” may act as a bar to recovery. *Id.* at 234. The Court went on further to clarify that “[a] ‘self-inflicted injury,’ such as would bar recovery, is an *intentionally*-inflicted injury.” *Id.* at 235 (emphasis in original). Further, it “cannot be equated with conduct committed with ‘deliberate intention’ *per se*, as that term is used in reference to an employee’s claim against his/her employer.” *Id.* The Court noted that “[t]his is so because the Legislature, in no uncertain terms, construes ‘deliberate intention’ to be chargeable solely to an employer and not to an employee.” *Id.* (citing W. Va. Code § 23-4-2) (emphasis added). This Court should follow its prior interpretation of the statute here.

**D. If W. Va. Code § 23-4-2(d)(2)(ii) permits a cause of action against the employee, it would lead to an absurd result, as employees would be charged with the knowledge of the employer.**

The Legislature did not intend to impose liability against co-employees or supervisors when it enacted either 23-2-6a or 23-4-2(d)(2)(ii). 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 the knowledge of their employers and, in turn, lose their immunity under Section 6a and become liable under Section (ii). Absent from in the entire text of 23-4-2(d)(2)(ii) is the word “person” or any other term or language which could arguably be construed as a way to impose liability onto a supervisor.

As noted above, Section (ii)(B) requires that the **employer** have “actual knowledge” of the specific unsafe working condition and the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition (which is required under (ii)(A)). Nowhere in (ii)(B) is any requirement that a specific supervisor or co-employee possess “actual knowledge.” In essence, if the Petitioner is correct, and there is a cause of action against a supervisor under Section (ii), then any plaintiff could sue a supervisor under Section (ii), and satisfy (ii)(B) against that particular supervisor merely by proving that the **employer** had actual knowledge. Likewise, the same problem would exist under (ii)(D), in that plaintiff could sue a supervisor under (ii) and satisfy (ii)(D) by showing that the **employer** “. . . intentionally thereafter exposed an employee to the specific unsafe working condition . . . .”

Judge Copenhaver recognized that allowing plaintiffs to sue supervisors under (ii) would create this type of reverse *respondeat superior* when he succinctly explained:

Surely, the legislature did not intend, by the express language it used in [(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 . . . .

*Adkins*, 2012 U.S. Dist. LEXIS 52281, at \*\*17-18 (emphasis in original). Judge Copenhaver avoided this absurd result by giving meaning to all parts of 23-4-2(d)(2). *Id.* at \*18.

**IV. The Legislature did not mention “person” under W. Va. Code § 23-4-2(c) because the cause of action against the employee is derived from W. Va. Code § 23-2-6a.**

The Petitioner makes much of the fact that the Legislature omitted the word “person” under 23-4-2(c). However, an examination of the immunity-granting and immunity-dissolving provisions explains why the word “person” is absent from 23-4-2(c). Prior to the 1983 Amendments, subscribing employers enjoyed immunity under 23-2-6. However, that section does not reference “deliberate intention.” The deliberate intent exception was found in 23-4-2, which provides for a cause of action against an employer who caused injury with deliberate intention. That provision remains intact today as 23-4-2(c). On the other hand, 23-2-6a provides *both* immunity for employees of subscribing employers *and* an exception where those employees could lose immunity if they caused an injury with “deliberate intent.” Thus, Petitioner is correct that 23-4-2(d)(2) does not create a cause of action. The exception allowing for a deliberate intent cause of action against employers is found under 23-4-2(c), while the exception allowing for a deliberate intent cause of action against employees is found under 23-2-6a. The language added in 1983 under what is now 23-4-2(d)(2) is merely a definition prescribing how “deliberate intention” may be proven.

**V. Public policy weighs in favor of this Court holding that W. Va. Code § 23-4-2(d)(2)(ii) applies only to the employer, and not employees.**

If this Court rules that supervisors and co-employees may be sued under Section (ii), it would have a chilling effect on an employer’s ability to hire and retain the most qualified supervisors. Additionally, ruling that plaintiffs do not have a cause of action against supervisors

and co-employees would not affect the rights of West Virginia litigants to sue their employers under Section (ii) and recover when the statutory criteria have been met

**A. Exposing individuals to personal liability under Section (ii) would have a chilling effect on the Employer's ability to recruit and promote the most competent supervisors.**

One of the public policy reasons for holding that supervisors are immune from suit under Section (ii) is the need for skilled and competent supervisors in West Virginia's industrialized work force. Front line supervisors are the primary tool for employee safety. Permitting supervisors to be liable under Section (ii) claims would have a chilling effect on the employer's ability to recruit the most qualified individuals in the workforce to serve as supervisors. These supervisors are almost always promoted from inside the employer's work force. As noted above, the supervisors that are almost always sued in these types of cases are the ground level supervisors. By serving as supervisors, they typically accept more responsibility, work longer hours, and sometimes are paid only slightly more than the employees they supervise. These supervisors are sued under Section (ii) already, largely in an effort to include a West Virginia resident as a defendant. Even though they are usually dismissed before the suit proceeds to trial, they still have to report these suits. Petitioner argues that she should be able to recover against supervisors **and co-employees** pursuant to Section (ii).<sup>7</sup> The Legislature, however, did not intend for co-employees and supervisors to be subject to strict liability.

**B. Petitioner and other plaintiffs will essentially have the same cause of action and remedy which they have had up to this point.**

If this Court does not permit the Petitioner to sue Mr. Browning under Section (ii), this ruling will have little effect on the ability of plaintiffs to recover under West Virginia deliberate

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<sup>7</sup> Although the case at bar involves a supervisor, Petitioner's argument that the immunity in W. Va. Code § 23-2-6a is abrogated whenever the Employer loses its immunity would have the effect of removing the immunity from co-employees as well.

intent law. As noted above, the undersigned counsel has access to the files of over 350 deliberate intent cases. In none of those cases has the plaintiff even attempted to recover damages from the supervisor. It is a hollow argument that if this Court sides with the Respondent, it would somehow damage the rights of West Virginia citizens to recover under the deliberate intent statute. Federal courts would, and currently do, apply West Virginia statutory law and the law of this Court in cases that are removed pursuant to diversity jurisdiction

**VI. The public policy concerns raised by the Petitioner are unfounded and do not weigh in favor of exposing individual co-workers to liability under W. Va. Code § 23-4-2(d)(2)(ii).**

**A. Exposing co-employees to liability under W. Va. Code § 23-4-2(d)(2)(ii) would not result in a more dangerous work environment.**

The Petitioner makes much of the theory that allowing for employee immunity will cause supervisors to disregard employee safety in favor of meeting production goals and allow culpable individuals who set corporate policy and make corporate decisions to escape retribution for their conduct. That theory, however, disregards traditional notions of corporate liability and ignores countervailing policy reasons that similarly discourage unsafe conduct in the work environment.

First and foremost, making employees – especially front-line supervisors and managers,<sup>8</sup> who generally make little more than the colleagues they supervise and are most likely to be named in deliberate intent suits based on their involvement with workplace incidents – liable under (ii) for actions they undertake in the scope of their employment would discourage quality people from pursuing supervisory positions. Generally, it is incumbent upon those same front-

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<sup>8</sup> While the example most often cited by Petitioner is that of the culpable front-line supervisor or manager, (ii) mentions only “employer” action which, if given the interpretation urged by Petitioner, would not limit liability to only culpable front-line supervisors or managers, but would rather extend liability to all employees, regardless of fault.

line supervisors and managers to enforce safety regulations<sup>9</sup> and oversee the welfare of their subordinates. However, exposing those individuals to liability under (ii) would deter quality people from pursuing such positions. Even if the individuals are later dismissed as plaintiffs pursue the deep pockets of the employer,<sup>10</sup> there are severe adverse consequences to a person's credit rating and reputation when named in a lawsuit. Thus, stripping employee immunity would create a disincentive to quality people pursuing supervisory positions where they would be in the best position to enforce safety regulations and look out for the welfare of their co-workers.

Turning to the issue of holding the proper entities accountable for actionable conduct, Petitioner notes that most employer defendants in deliberate intent cases are corporations who can act only through their officers, agents and employees. While that theory may overlook small, family-owned businesses that are also governed by the statute, it targets the very policies underlying corporate structures. Corporations are, as Petitioner notes, legal fictions designed to limit personal liability for entrepreneurial ventures and, in turn, encourage business development. 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.

Petitioner uses the example of Upper Big Branch purportedly to demonstrate how employee immunity for Section (ii) claims may lead to unsafe working conditions. That

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<sup>9</sup> An employer's incentive to create and enforce a safe workplace environment is not undermined by providing employees immunity from (ii) suits. Rather, because the employer is always at risk of (ii) liability, the employer always has a strong incentive to make and enforce safe workplace policies and regulations and to ensure that employees are abiding by them.

<sup>10</sup> If, as Petitioner contends, companies being sued will be "stuck with the bill of the lawsuit regardless of the outcome," (Pet. Br. at 26), then this case is not really about properly interpreting the deliberate intent statute to give effect to the intent of the legislature, holding the proper entities accountable for their actionable conduct, or even locating deep-pocketed defendants who can satisfy a large damages award; it is about plaintiffs' ability to name as defendants West Virginia employees to defeat diversity. That desire is belied in Petitioner's assertion that the only benefit to employers is "that complete diversity may be created." (*Id.*)

example, however, is more appropriately used to demonstrate how sufficiently egregious conduct may give rise to criminal liability, which creates a far more effective deterrent than stripping immunity for Section (ii) claims. The statutory and regulatory penalties imposed on supervisors substantially deter any intentional or unreasonable failure to follow safety regulations. First, supervisors face harsh criminal penalties for failures to follow federal safety regulations. For purposes of the Mine Act, 30 U.S.C. § 801, *et seq.*, an individual employed as a mine supervisor or foreman is an “agent”<sup>11</sup> of the operator subject to all penalties and responsibilities which apply to this designation. Specifically, where a supervisor is complicit in a violation of the Mine Act, the supervisor faces liability including up to \$50,000 in civil penalties and five years in prison.<sup>12</sup> 30 U.S.C. § 820(c) (adopting criminal penalties found in 30 U.S.C. § 820(a), (d)). Additionally, if a supervisor makes false statements or representations in records, reports, or in regards to any equipment, the operator also faces fines of up to \$10,000 in civil penalties and five years in prison. Second, where a supervisor neglects or fails to perform duties and responsibilities as set forth in state regulations, the supervisor may be temporarily or permanently stripped of their certifications. W. Va. Code § 22A-1-31. Essentially, a supervisor may be stripped of their livelihood for violations. Considering the overwhelming penalties, both civil and criminal, imposed upon supervisors for violations of state and federal regulations, the deterrence value of any additional civil penalties pursuant to the deliberate intent statute is, at most, minimal.

And while the MSHA report on the Upper Big Branch explosion may have indicated that upper level managers may have been partially at fault, it is the front-line supervisors and managers typically overseeing injured workers and having knowledge of working conditions

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<sup>11</sup> As defined, an “agent” means any person charged with responsibility for the operation of all or part of a coal or other mine or the supervision of the miners in a coal or other mine[.]” 30 U.S.C. § 802(e).

<sup>12</sup> As promulgated, “any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure to refusal shall be subject to the same civil penalties, fines, and imprisonment . . . .” 30 U.S.C. § 820(c).

who will likely feel the brunt of potential liability under Section (ii) if their immunity is stripped, since directors and officers are otherwise often immune from civil liability by virtue of their place within the corporate structure. In short, the lesson from Upper Big Branch is not that employee immunity could potentially lead to officers and upper level managers run amok, but that officers and upper level managers who engage in sufficiently egregious conduct will face far more severe consequences than those contemplated under Section (ii).

**B. Holding that supervisors are not subject to suit under W. Va. Code § 23-4-2(d)(2)(ii) would not foreclose parties from recovering from the employer, as there are other remedies available if the employer attempts to conceal assets in the accounts of its supervisors.**

Petitioner suggests that a particular danger of shielding employees from liability under (ii) is that employers will “use the employee immunity to hide assets if the employer is sued.” This argument neglects a well-settled equitable principle that guards against such behavior, which is the doctrine of “piercing the corporate veil.”

Petitioner recognizes that an employer who hides corporate assets in the personal accounts of its employees is but a “sham corporation.” West Virginia law allows plaintiffs to overcome these “sham corporations” where there is (1) “such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist” and (2) “an inequitable result would occur if the acts are treated as those of the corporation alone.” Syl. Pt. 3, *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 352 S.E.2d 93 (1986). When deciding whether to pierce the corporate veil, courts may consider the “commingling of funds and other assets of the corporation with those of the individual shareholders;” “diversion of the corporation’s funds or assets to non-corporate uses;” “failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;” “absence of separately held corporate assets;” and “diversion of corporate assets from the corporation by or to a stockholder

or other person or entity to the detriment of creditors.” *Id.* at 98-99. Under these factors, then, an employer who attempts to shield itself from liability by diverting funds to its officers and shareholders would likely be unsuccessful because a plaintiff could pierce the corporate veil and recover any assets that were illegitimately transferred. In addition, both employers and any employees who accept diverted funds would likely subject themselves to substantial civil and criminal liability for tax evasion, fraud or embezzlement.

Petitioner also makes much of the idea that plaintiffs should be free to seek out deep-pocket defendants regardless of whether that deep pocket belongs to the employer or a co-employee.<sup>13</sup> While the injured plaintiff who is unable to recover a judgment because a defendant corporation is bankrupt certainly presents a sympathetic case, the plight is not so great to allow the exception to swallow the rule and permit an injured plaintiff to recover against any deep pocket, regardless of liability and regardless of the plain language of the statute. Allowing employees to be sued under Section (ii) would produce just such an absurd result because the five elements of Section (ii) are required to be proved only as to the *employer*, not as to each individual named defendant. Thus, under Petitioner’s theory, a plaintiff who proves each of the five elements as to the employer would be permitted to collect a judgment against *any* co-employee, regardless of that employee’s involvement in the acts that satisfy those five elements. Surely the Legislature – in a statute expressly enacted to limit deliberate intent liability – could not have intended to allow such a broad-sweeping result. Petitioner presents the valid concern

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<sup>13</sup> In making this argument, Plaintiff refers to *Adkins v. Consolidation Coal Co.*, Civil Action No. 2:11-0285, 2012 U.S. Dist. LEXIS 52281 (S.D.W. Va. April 13, 2012), maintaining that the court gave as its “rationale for finding that corporate officers and employees should be immune from (ii) type actions” the fact that “the employer is customarily liable for the grievous acts of his employees committed in the course and scope of their employment; and . . . it is the employer who is near always the lone source of funds.” (Pet. Br. at 32 (quoting *Adkins*)). A close reading of *Adkins*, however, reveals that the court’s stated rationale for its holding is that employee immunity under (ii) “harmonize[s] all parts [of the statute] and faithfully appl[ies] the language the legislature adopted.” 2012 U.S. Dist. LEXIS 52281 at \*17. The language quoted by Petitioner is merely the court’s estimation of the legislature’s intent in granting that immunity.

that individuals who are liable for the deliberate injury or death of an employee will escape judgment. That concern, however, is squarely addressed by Section (i), which expressly allows for suit against persons who harm employees with specific intent. Petitioner, though, wants to extend that liability where individuals set policies or make decisions within the context of the workplace that result in injury or death. As discussed throughout, the statute simply does not provide for that type of liability. Rather, it draws a distinction between liability for individuals acting as individuals (when their acts, such as punching a co-worker, give rise to liability under (i)) and individuals acting as agents of the employer/corporation (when their acts, such as setting a dangerous policy, give rise to liability under (ii)). The distinction is a necessary one because, as noted above, employers and corporations cannot act except through their agents. An individual must have actual knowledge of a specific unsafe working condition and an individual must expose the employee to that condition. But the Legislature did not provide for individual liability for those acts; it provided only for employer liability because the acts of having knowledge of and exposing an employee to a specific unsafe working condition are, by definition, acts performed by an individual as an agent of the employer/corporation. The individual is not acting as an individual when he sets a dangerous policy, or becomes aware of and exposes an employee to a specific unsafe working condition. Instead, he is acting as an agent of the corporation, and it is the employer who should be held liable under Section (ii).

Lastly, there are other deterrents to prevent co-employees and supervisors from deliberately injuring employees. For example, MSHA has the power to permanently revoke a miner's card, leaving the supervisor unemployable in the mining industry. Likewise, because employers are charged with the knowledge of their supervisors under Section (ii) claims,

employers have an incentive to correct any behavior by their supervisors that would result in the employer being liable under Section (ii).

**C. The argument that this Court should not apply the statute as written because it would force most plaintiffs into federal courts is without merit.**

The Petitioner's final contention is that employee immunity from Section (ii) suits would cause a majority of deliberate intent cases to be removed from West Virginia state courts into federal courts.<sup>14</sup> Petitioner reveals that the true intent of plaintiffs who join supervisors as defendants is not to hold the proper entities accountable for their culpable conduct, but rather to defeat diversity. But to allow individual employees, even supervisors and managers and those who may or may not have anything to do with the incidents giving rise to the suit, to be hauled into cases that disrupt their lives and negatively impact their good name and ability to obtain credit solely to allow a plaintiff to prosecute his case in state court instead of federal court would negatively impact the lives of the very people the workers' compensation statute is designed, in part, to protect.

The Court would exact no injustice by requiring a West Virginia plaintiff to pursue his case in federal district court instead of a local county court if the other requirements of diversity jurisdiction are met. Congress created diversity jurisdiction to "protect nonresidents from the local prejudices of state courts." 14B *Fed. Practice and Procedure* § 3721 p.289. The practice of naming individual supervisors solely to defeat diversity of citizenship undermines this important judicial policy. By allowing nonresident defendants to remove cases to federal court where complete diversity exists, the resident plaintiff maintains his right to a convenient in-state forum and the nonresident defendant enjoys an equal right to avoid local prejudices.

**CONCLUSION**

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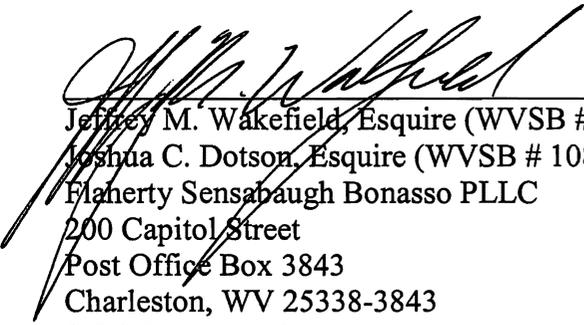
<sup>14</sup> Contrary to Petitioner's assertion, the undersigned counsel suspects that the majority of deliberate intent cases filed in the future would not be removable to federal court.

This Court should answer the Certified Question in the negative. Although the immunities afforded to employers and employees under West Virginia Code Sections 23-2-6 and 23-2-6a are the same, our Legislature has explicitly set forth different avenues in which those immunities are lost, pursuant to Sections (i) and (ii) of 23-4-2(d). The *Weekly* decision heavily relied upon by the Petitioner did not properly consider that the *Bennett* decision was decided before West Virginia adopted a two-tiered definition of deliberate intention. Ruling that supervisors and co-employees are subject to suit under Section (ii) would permit plaintiffs to make out a cause of action against the employer, and in turn, impute strict liability onto supervisors and co-employees because Section (ii) only mentions the **employer**. Additionally, siding with the Petitioner would not adversely affect the right of injured parties in West Virginia because their cause of action against the employer would remain.

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)**

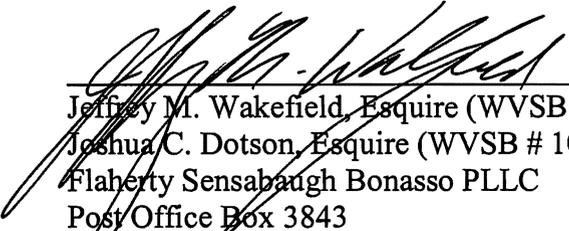
**Apogee Coal Company, LLC,  
Patriot Coal Corporation and  
James Ray Browning,**

**Respondents.**

CERTIFICATE OF SERVICE

The undersigned counsel for Respondents, Apogee Coal Company, LLC, Patriot Coal Corporation and James Ray Browning, do hereby certify that the foregoing ***“Respondents’ Corrected Brief”*** has been served upon the parties of record this 18th day of September, 2012, by facsimile at (304) 369-0122:

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