



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

**KIMBERLY LANDIS and ALVA NELSON,
as parents and guardians of A. N., a minor,**

Plaintiffs,

v.

Supreme Court Docket No. 13-0159

**JARDEN CORPORATION, HEARTHMARK, LLC
d/b/a JARDEN HOME BRANDS, WAL-MART
STORES, INC., C.K.S. PACKAGING, INC.,
PACKAGING SERVICE COMPANY, INC., and
STULL TECHNOLOGIES, INC.**

Defendants/Third-Party Plaintiffs,

v.

**KIMBERLY LANDIS and ALVA NELSON,
In their individual capacities,**

Third-Party Defendants.

**PETITIONERS' REPLY BRIEF ON CERTIFIED QUESTIONS POSED BY
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT WEST VIRGINIA
Civil Action No.: 2:11-CV-00101
Honorable John P. Bailey, Presiding**

Dino S. Colombo, Esq. (WVSB #5066)
Travis T. Mohler, Esq. (WVSB #10579)
Colombo Law
1054 Maple Drive
Morgantown, West Virginia 26505
*Counsel on behalf of Petitioners – Plaintiff,
A.N., a minor and Third-Party Defendants
Kimberly Landis and Alva Nelson*

TABLE OF CONTENTS

I. ARGUMENT	1
A. CERTIFIED QUESTION NUMBER ONE – IN A CHILD’S PRODUCT LIABILITY ACTION, DEFENDANTS MAY NOT RELY UPON CONDUCT OF THE PARENTS IN ASSERTING THE PRODUCT LIABILITY DEFENSES OF PRODUCT MISUSE AND SUPERSEDING, INTERVENING CAUSATION	1
<i>i. The Respondents Cite to Inapplicable and Irrelevant Case Law to Support Their Unsupportable Claim that the Conduct of Third-Parties is Relevant to the Issue of Product Misuse in the Present Case.....</i>	<i>1</i>
<i>ii. The Respondents Efforts to Blame the Parents for A.N. ’s Injuries Are an Impermissible and Veiled Attempt to Impute the Parents’ Negligence, If Any, Upon A.N. 7</i>	
B. CERTIFIED QUESTION NUMBER TWO – THE PARENTAL IMMUNITY DOCTRINE BARS THE DEFENDANTS FROM ASSERTING A CLAIM FOR COMPARATIVE CONTRIBUTION AGAINST THE PARENTS BECAUSE CONTRIBUTION IS A DERIVATIVE CLAIM THAT MAY ONLY BE BROUGHT ON A THEORY THAT A.N. COULD HAVE PURSUED HIMSELF.....	11
C. CERTIFIED QUESTION NUMBER THREE - UNDER WELL-ESTABLISHED WEST VIRGINIA LAW, DEFENDANTS IN A CIVIL ACTION ARE PROHIBITED FROM COMPARING THEIR RELATIVE FAULT WITH THAT OF A NON-PARTY (I.E. THE PARENTS OF A.N.)	13
D. CERTIFIED QUESTION NUMBER FOUR - THIS COURT SHOULD REAFFIRM THE STATE OF WEST VIRGINIA’S CONTINUED ADHERENCE TO THE PARENTAL IMMUNITY DOCTRINE	15
II. CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases

<i>Almli v. Santora</i> , 154 Mich.App. 60, 397 N.W.2d 216 (Mich.App. 1986)	12
<i>Alveromagiros v. Hechinger Co.</i> , 993 F.2d 417 (4 th Cir. 1993)	10
<i>American Tobacco Co. v. Harrison</i> , 27 S.E.2d 181 (Va.1943)	9, 10
<i>Anderson v. Chrysler</i> , 184 W.Va. 641, 403 S.E.2d 189 (1991).....	2, 3
<i>Baughn v. Honda Motor Co., Ltd.</i> , 105 Wash.2d 118, 712 P.2d 293 (Wash. 1986)	12
<i>Beatty v. Ford Motor Company</i> , 212 W.Va. 471 (2002).....	3, 4
<i>Bennett v. Asco Services, Inc.</i> , 218 W.Va. 41, 621 S.E.2d 710 (2005).....	3, 4
<i>Bradley v. Appalachian Power Co.</i> , 163 W. Va. 332, 256 S.E.2d 879 (1979).....	13
<i>Cole v. Fairchild</i> , 198 W.Va. 736,482 S.E.2d 913 (1996).	16
<i>Dicken v. Liverpool Coal and Salt Co.</i> , 41 W.Va. 511, 23 S.E. 582 (1895)	8, 9
<i>Doe by Connolly v. Holt</i> , 332 N.C. 90 (N.C. 1992).....	12
<i>Grant v. Mays</i> , 129 S.E.2d 10 (Va. 1963).....	9
<i>Halcomb v. Smith</i> , 230 W.Va. 258, 737 S.E.2d 286 (2012)	15
<i>Jacobsen v. Schroder</i> , 117 Idaho 442, 788 P.2d 843 (1990)	12
<i>Kelley v. Rival Mfg. Co.</i> , 704 F.Supp. 1039 (W.D. Okla. 1989)	5, 6, 7
<i>Lee by Schlosser v. Mowett Sales Co., Inc.</i> , 31 N.C. 489, 342 S.E.2d 882 (N.C. 1986)	12
<i>Marsh v. Riley</i> , 118 W.Va. 52, 188 S.E. 748 (1936)	8, 9
<i>Miller v. Warren</i> , 182 W.Va. 560, 390 S.E.2d 207 (1990).....	8, 10
<i>Morningstar v. Black and Decker Mfg. Co.</i> , 162 W.Va. 857, 253 S.E.2d 666, (1979).....	1, 2, 10
<i>Norfolk & W.R. Co. v. Groseclose’s Adm’r</i> , 13 S.E. 454 (Va. 1891).....	10
<i>Paris v. Dance</i> , 194 P.3d 404 (Colo. Ct. App. 2008)	14
<i>Pino v. Szuch</i> , 185 W.Va. 476, 408 S.E.2d 55 (1991).....	9
<i>Qura v. D.R. McClain & Son</i> , 97 F.3d 1448 (4th Cir. 1996).....	8, 9, 10, 11
<i>Rock v. Oster Corp.</i> , 810 F. Supp. 665 (D. Md. 1991).....	5, 7
<i>Rogers v. Johnson & Johnson Products, Inc.</i> , 523 Pa. 176, 565 A.2d 751 (1989).....	2
<i>Shelton v. Mullins</i> , 147 S.E.2d 754 (Va.1966).....	9
<i>Shoemake v. Fogel, Ltd.</i> , 826 S.W.2d 933 (Tex 1992).....	12
<i>Sias v. Wal-Mart Stores, Inc.</i> , 137 F.Supp.2d 699 (S.D.W.Va. 2001).....	12, 16
<i>Sitzes v. Anchor Motor Freight, Inc.</i> , 169 W.Va. 698, 289 S.E.2d 679 (1982).....	14

Sydenstricker v. Unipunch Products, Inc., 169 W.Va. 440, 288 S.E.2d 511 (1982)..... 11, 13
Van Buskirk v. West Bend Co., 100 F. Supp. 2d 281, 282 (E.D. Pa. 1999)..... 5, 6
Zellmer v. Zellmer, 164 Wash.2d 147, 188 P.3d 497 (Wash. 2008)..... 16

Statutes

W.Va. Code § 55-7-24 (2005) 14

I. ARGUMENT

A. Certified Question Number One – In a Child’s Product Liability Action, Defendants May Not Rely Upon Conduct of the Parents in Asserting the Product Liability Defenses of Product Misuse and Superseding, Intervening Causation

i. The Respondents Cite to Inapplicable and Irrelevant Case Law to Support Their Unsupportable Claim that the Conduct of Third-Parties is Relevant to the Issue of Product Misuse in the Present Case

Defendants, apparently knowing and conceding the conduct of A.N.’s parents cannot be imputed to A.N., in their haste to advance the defense of lack of parental supervision seek to show product misuse on the part of the non-party parents of A.N. despite the fact that they were not using the product when A.N. was injured. In their respective briefs, the Respondents/Defendants maintain that the Parents’ alleged negligent supervision of A.N. is relevant to establish the defenses of product misuse and superseding, intervening causation in this product liability case. In essence, the Respondents are claiming that even if A.N. can meet his burden of proof, because he is a child, he must get around additional defenses against his parents.

Like all other product liability actions, A.N. must show that the Diamond[®] Natural Fire Starter Gel was “defective in the sense that it is not reasonably safe for its intended use.” Syl. Pt. 4, *Morningstar v. Black and Decker Mfg. Co.*, 162 W.Va. 857, 888, 253 S.E.2d 666, 682 (1979). “The question of what is an intended use of a product carries with it the concept of all those uses a reasonably prudent person might make of the product, having in mind its characteristics, warnings and labels.” *Id.*, at 889, syl pt. 6. “The issue of appropriate use of the product has as a counterpart the defense of abnormal use, which may at times carry companion defenses of contributory negligence and assumption of risk *on the part of the user.*” *Id.* (emphasis added). “Once it can be shown that the product was defective when it left the manufacturer and that the

defect proximately caused the plaintiff's injury, a recovery is warranted absent some conduct *on the part of the plaintiff that may bar his recovery.*" *Id.*, at 883.

The Respondents, however, argue that A.N. should not only be held to the proof required by *Morningstar*, but that, because he is a child, he must also prove his parents were not guilty of negligent supervision for leaving the product within the reach of a child. Under *Morningstar*, A.N. is only required to demonstrate that (1) the Diamond[®] Natural Fire Starter Gel is defective in the sense that it is not reasonably safe for its intended and reasonably foreseeable uses, (2) it was reasonably foreseeable that someone would use the product to start a fire in a fireplace, and (3) the defective condition of the product was the proximate cause of his injuries. *Id.*, at 883, 889. The Respondents claim that even if A.N. can prove each of the above elements, he still must take the additional step of proving that his parents' supervision of him was not negligent where they stored the product within the reach of children. In other words, if the Respondents cannot demonstrate that A.N.'s use of the product was unforeseeable or negligent, they want to assert additional defenses against the Parents. There is no support in the law for such a contention.

In support of their argument that conduct of third-parties is relevant to establish product misuse, the Respondents mistakenly rely upon a trilogy of West Virginia cases which are limited to the "malfunction theory" of strict products liability – not relevant here. The "malfunction theory" of strict products liability was adopted by this State in *Anderson v. Chrysler*, 184 W.Va. 641, 403 S.E.2d 189 (1991). In *Anderson*, this Court noted that "[i]n most instances the plaintiff will produce direct evidence of the product's defective condition." *Anderson*, 184 W.Va. at 645 (quoting *Rogers v. Johnson & Johnson Products, Inc.*, 523 Pa. 176, 181, 565 A.2d 751, 754 (1989)). The court in *Anderson* recognized, however, that "[i]n some instances . . . the plaintiff

may not be able to prove the precise nature of the defect in which case reliance may be had on the ‘malfunction’ theory of product liability.” *Id.* The “malfunction theory” provides that “[a] plaintiff is not required to establish a strict products liability cause of action by identifying the specific defect that caused the loss, but instead may permit a jury to infer the existence of a defect by circumstantial evidence.” This Court held in Syllabus Point 3 of *Anderson* that:

Circumstantial evidence may be sufficient to make a *prima facie* case in a strict liability action, even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect. Moreover, the plaintiff must show there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.

Syl. Pt. 3, *Anderson*, 184 W. Va. 641.

The trilogy of cases relied upon by the Respondents – *Anderson*, *Beatty*, and *Bennett* – all involve application of the “malfunction theory” of products liability wherein, unlike the present case, the plaintiffs were unable to identify the specific product defect and, therefore, were forced to rely upon circumstantial evidence to show that the product would not have malfunctioned in the absence of a defect. *See, e.g. Anderson*, 184 W.Va. 641, *Beatty v. Ford Motor Company*, 212 W.Va. 471 (2002), and *Bennett v. Asco Services, Inc.*, 218 W.Va. 41, 621 S.E.2d 710 (2005).

The Respondents claim that they should be permitted to introduce the conduct of third parties (i.e., the Parents) because pursuant to *Anderson*, if the plaintiff proceeds under the “malfunction theory”, she will need to show that there was no other “reasonable secondary cause for the malfunction” including “the handling or misuse of the product by others than the manufacturer” *Bennett*, 218 W.Va. at 48-49. The “malfunction theory” is essentially the doctrine of *Res Ipsa Loquitur* only in the context of strict products liability – it clearly does not apply in this case.

In *Beatty*, the plaintiff was driving a Ford van when he lost control of the vehicle and was injured in a wreck. *Beatty*, 212 W.Va. at 473-74. Upon exiting the van the plaintiff noticed that

the “drag link,” a mechanism which controls the steering of the van, was severely damaged. *Id.* The plaintiff could not identify any specific defect in the “drag link,” but claimed that a “drag link” would not break absent a defect. *Id.* The court, applying the “malfunction theory,” held that the plaintiff would have to present evidence that ruled out, for instance, that the “broken drag link happened as a result of some other cause – such as fracturing in the collision.” *Id.*, at 475. The Court further held, under the “malfunction theory,” that “[w]hile there is no evidence to show that the van was being used abnormally at the time of the collision, there is also no evidence to show the vehicle was used properly during its lifetime.” *Id.* The Respondents rely upon this Court’s statements in *Beatty* for the proposition that the conduct of third-parties is relevant to the defense of misuse – such reliance is misplaced.

In *Bennett*, the plaintiffs claimed that a defect in a Toyota Corolla caused a fire in their garage, and that a defect in a home fire alarm system permitted the fire to spread and destroy their home. *Bennett*, 218 W.Va. at 45. After the fire, the plaintiffs’ insurers destroyed the vehicle and alarm system; requiring them to prove their case under Anderson’s “malfunction theory” of product liability. *Id.* The Respondents know, or should know, that the holdings in these cases are limited to instances in which the plaintiff proceeds under the “malfunction theory” of strict products liability. Nonetheless, they rely exclusively on this trilogy of cases for the proposition that West Virginia law allows a defendant to rely upon third party conduct to demonstrate their defense of product misuse.

In this case, however, the plaintiff has identified the specific defects which rendered the Diamond® Natural Starter Gel not reasonably safe and will introduce *direct* evidence of the product’s defective condition. Therefore, the “malfunction theory” is inapplicable and A.N. need not eliminate other causes such as the handling or misuse of the product by others. Nonetheless,

the Respondents continue to cite the Court to these “malfunction theory” cases to support their insupportable position that third-party conduct (including individuals not using the product at the time of the injury) is relevant to establish the defense of product misuse.

The Respondents further seek to persuade this court by citing to a line of disanalagous cases which they claim stand for the proposition that the conduct of the parents is admissible in strict liability cases brought by children who were injured by an allegedly defective product to show that the parents’ misuse – as opposed to a defect in the product – was the cause of the child’s injuries. See *Van Buskirk v. West Bend Co.*, 100 F. Supp. 2d 281, 282 (E.D. Pa. 1999), *Kelley v. Rival Mfg. Co.*, 704 F.Supp. 1039, 1041 (W.D. Okla. 1989); *Rock v. Oster Corp.*, 810 F. Supp. 665, 667 (D. Md. 1991).

What the defendants seem to miss from the points raised in Petitioners’ initial brief is precisely what distinguishes the facts of each of these cases from the facts in the case at bar – . the parents in the three cases cited by Respondents were the actual users of the products at the time their infant, bystander children were injured. In the present case, Perhaps, upon realizing this, and that A.N. was the only individual using the product at the time he was injured – A.N.’s parents were on an entirely different floor of the family’s home when the incident occurred, the Respondents try to expand the meaning of product use/misuse to include the parents’ purchase and prior use of the product at any time - whether months, weeks or days before the subject incident occurred. This is why the Respondents, apparently in their own attempts to advance an evidentiary basis for their assertions on these certified questions, reiterate over and over again the testimony of A.N.’s parents concerning the product’s warnings and their storage of the product under a table near the fireplace. Not once do they consider or acknowledge A.N.’s actual use of the product at the time it exploded onto him, burning him severely. Instead, the Respondents

focus on the conduct of the parents in an attempt to expand the meaning of use/misuse because they know and understand that A.N. was using the product for precisely its intended and foreseeable use – to start a fire.

For example, in *Van Buskirk v. West Bend Co.*, 100 F. Supp. 2d 281, 282 (E.D. Pa. 1999), the parent (not the 6 ½ month-old bystander child) was using a deep fryer to cook lunch for herself when the deep fryer tipped over and spilled hot oil onto the child. There, the mother's conduct was admissible because she was the user of the product, not her child who was merely a bystander that was injured. *Id.* at 284-85. Citing to Restatement (Second) of Torts, Section 402A, the court likened the situation to that of a “casual bystander, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile.” *Id.*

Respondents rely heavily on the holding in *Van Buskirk* to advance their position that parental conduct is admissible in strict liability cases to prove causation. They conveniently do not address, however, the reasoning behind the court's decision to permit consideration of the parent's conduct where the injured child was merely a bystander who was injured while the mother was herself using the product. *Van Buskirk*, 100 F.Supp. 2d at 284-85.

In *Kelley v. Rival Mfg. Co.*, 704 F.Supp.1039, 1041 (W.D. Okla. 1989), another case relied upon by the Respondents; the parent (not the 11-month old child) was using a slow-cooker crock-pot to serve dinner when the pot fell from the table when the child, who was using an infant walker, somehow disturbed the table causing the hot contents of the pot to fall onto him and causing his injuries. The *Kelley* Court found there was no design defect in the product when it left the factory, and even if there was a design defect, it did not make the crock-pot unreasonably dangerous. *Id.*, at 1043. Furthermore, the Court found that the parents' lack of

supervision over their child *while the Parents were using the product* was the proximate cause of the incident, rather than any defect in the product itself. *Id.*, at 1044-45. This is yet another decision relied upon by the Respondents where the injured child was neither using the allegedly defective product nor was the child capable of using the product given his age.

In *Rock v. Oster Corp.*, 810 F. Supp. 665, 667 (D. Md. 1991), the parents were using a fondue pot filled with hot oil when their two-year old child went around the wet bar where the pot was placed, became entangled in the cord, and the pot tipped over onto him and he was burned. Again, the Court found that it was the father's inattentiveness *while using the product*, as opposed to any design defect or unreasonable danger associated with the product that caused the child's injuries. Of course, in that case and under those facts, the father's conduct was considered because he was the user of the product at the time of the injury.

The Respondents mistakenly assert that A.N.'s parents permitted him to go to the basement to use the fire gel on the night the incident occurred. However, they know there is absolutely no evidence of that in the record. The parents of A.N. permitted A.N. to go to the basement to roast a marshmallow, and they were under the belief the fire was still burning as it had been throughout the evening. It was A.N., not his parents, who decided on his own to use the fire gel to start a fire in the fireplace that evening. And, unlike the cases cited by the Respondents, where the children were mere bystanders while their parents' used the products, A.N. was the sole user of the product at the time he was injured. The Parents' previous use of the product in the months and weeks prior to the incident is irrelevant to the defense of product misuse – i.e., whether A.N. used the product in a reasonably foreseeable manner.

- ii. **The Respondents Efforts to Blame the Parents for A.N.'s Injuries Are an Impermissible and Veiled Attempt to Impute the Parents' Negligence, If Any, Upon A.N.**

Apparently resigned to the fact that A.N. was using the product in a reasonably foreseeable manner – to start a fire – the Respondents have focused almost exclusively on the Parents’ supervision of A.N. – as opposed to A.N.’s actual use of the product – in an attempt to shift or impute the Parent’s alleged negligence upon A.N. to diminish or defeat his recovery. It has been the law in West Virginia for more than a century, however, that the negligence of a parent cannot be imputed to the child. *See e.g., Dicken v. Liverpool Coal and Salt Co.*, 41 W.Va. 511, 23 S.E. 582 (1895); *Marsh v. Riley*, 118 W.Va. 52, 188 S.E. 748 (1936); *Miller v. Warren*, 182 W.Va. 560, 390 S.E.2d 207 (1990). The Respondents apparently concede this point; yet they carefully phrase their allegations in an attempt to claim that they are not seeking to impute the Parents’ negligence upon A.N. There should be no doubt; that is exactly what the Respondents are attempting to accomplish.

The Respondents argue that the Parents’ failure to place their defective product outside the reach of A.N. was a product misuse and superseding, intervening cause which defeats A.N.’s claim even if A.N. can establish that the product was defective and he used the defective product in a reasonably foreseeable manner. This argument is directly refuted by the Fourth Circuit case of *Qura v. D.R. McClain & Son*, 97 F.3d 1448 (4th Cir. 1996), an instructive case applying Virginia law which is identical to the law of this State.

In *Qura*, a four year old boy injured his hand in a pizza dough roller in the kitchen of a pizza parlor owned and run by his parents. *Qura*, 97 F.3d 1448, at *1. On the day of the injury, Jane Qura, the injured boy’s mother, had her son at work with her. *Id.* The boy had been given a roll of pizza dough to play with. *Id.* He then dragged a chair into the kitchen from the restaurant area and placed it near the dough roller contrary to his mother’s order. *Id.* The mother removed the boy from the chair once, but distracted by work, she turned her back and the son climbed

back on the chair to use the dough roller. *Id.* The young boy had seen his parents operate the machine before and had done so himself under his father's supervision on previous occasions. *Id.* While Michael was using the dough roller, his left hand was caught in the rollers resulting in severe injuries. *Id.*

The mother filed a lawsuit on her son's behalf alleging that his injuries were caused by a defect in the machine. *Id.* The company filed a third-party action against the mother seeking indemnification based upon her alleged negligent supervision of her son. *Id.* Subsequently, the company moved for summary judgment alleging that the mother's negligence was the proximate cause of her son's injury because her negligence had intervened and superseded any alleged negligent design. *Id.*

Virginia law, like West Virginia, however, precludes the mother's "failure to properly supervise her son from acting as an intervening proximate cause in a lawsuit by the son against the manufacturer of the machine." *Id.*, at *2. Like West Virginia, Virginia law provides that a child under the age of seven cannot be contributorily negligent. *Id.*, citing *Grant v. Mays*, 129 S.E.2d 10, 12 (Va. 1963); *see accord Pino v. Szuch*, 185 W.Va. 476, 478-79, 408 S.E.2d 55, 57-58 (1991) (Under West Virginia law, there is a rebuttable presumption that children between the ages of 7 and 14 cannot be contributorily negligent). Also like West Virginia, "Virginia has a long-standing principle that the negligence of a parent cannot be imputed to the child in order to defeat the child's claim for damages against a negligent defendant". *Id.*, citing *Shelton v. Mullins*, 147 S.E.2d 754, 756-57 (Va. 1966); *American Tobacco Co. v. Harrison*, 27 S.E.2d 181, 185 (Va. 1943); *see accord, Dicken*, 41 W.Va. 511, *Marsh*, 118 W.Va. 52, and *Miller*, 182 W.Va. 560. The Virginia courts have interpreted the principle of disallowing imputation of the parents' negligence to the child as disallowing the parents' alleged negligent supervision from acting as a

proximate cause of the accident. *Id.* The Court has explained that “the parents’ negligence is no defense, because it is regarded, not as a proximate, but as a remote cause of the injury.” *Qura*, 97 F.3d, at *3, citing *American Tobacco*, 27 S.E.2d 181 and *Norfolk & W.R. Co. v. Groseclose’s Adm’r*, 13 S.E. 454, 455 (Va. 1891). Based upon this precedent, the Fourth Circuit held that the mother’s alleged negligent supervision of her son could not be a superseding, intervening cause of his injury.

Like the Respondents, the defendant company in *Qura* also argued that it could not “be held liable for negligent design . . . even if the mother’s negligence cannot intervene as a proximate cause because [the son’s] use of the machine was an unforeseeable misuse.” *Id.* at *3. In other words, the company claimed that they should prevail simply because a child was the user of the product. Like West Virginia, a Virginia plaintiff must “demonstrate liability with a defect rendering the product unsafe . . . for its ordinary and foreseeable uses.” *Id.*, citing *Alveromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993); *see accord*, *Morningstar*, 188 W.Va. 888-89. The Fourth Circuit held that a product is not misused simply because it is being used by a child. Rather, the court noted that “the machine was being used for the purpose for which it was intended – to make pizza dough.” *Id.* In other words, for purposes of determining product misuse, the focus should be on the manner in which the individual used the product, not the age of the user. *See id.* In fact, the *Qura* court noted that the age and physical characteristics of the product’s user (i.e. a 4-year old child in that instance) had no bearing on alleged misuse as the Court indicated the incident could have occurred regardless of the person’s age. Nonetheless, if the defendant company can prove that the child did not use the product in a reasonably foreseeable fashion “then the company’s negligence was not a proximate cause.” *Id.*

If, however, the product was “used in the manner intended (i.e., to make pizza dough), then the company’s negligent design [and] failure to warn could be the proximate cause.” *Id.*

The Respondents’ continued insistence that the Parents’ negligent supervision was the cause of A.N.’s injuries is nothing more than a veiled attempt to impute the Parents’ negligence, if any, upon A.N. to defeat his claim for damages. If A.N. establishes that (1) the Diamond® Natural Fire Starter Gel was defective in the sense that it was not reasonably safe for its intended and reasonably foreseeable uses and (2) he used the product in a reasonably foreseeable fashion (to start a fire), he should not have to leap yet another hurdle that an adult plaintiff would not have to simply because he is a child. To hold otherwise, would be to impute the negligence of the Parents upon A.N. which is prohibited by prevailing West Virginia law. Therefore, this Court should hold that while it is not necessarily the parental immunity doctrine that precludes Respondents from asserting the product liability defenses of product misuse and intervening causation, they are nonetheless precluded from relying upon the alleged negligent supervision of the parents to establish such defenses.

B. Certified Question Number Two – The Parental Immunity Doctrine Bars the Defendants From Asserting a Claim for Comparative Contribution Against the Parents Because Contribution is a Derivative Claim That May Only Be Brought on a Theory that A.N. Could Have Pursued Himself

This issue has already been decided by this Court. The “right of contribution . . . is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff.” *Sydenstricker v. Unipunch Products, Inc.*, 169 W.Va. 440, 452, 288 S.E.2d 511, 518 (1982). “[T]he parental immunity doctrine in West Virginia prohibits a child from bringing a civil action against his or her parents”. *Lee v. Comer*, 159 W.Va. 585, 587-88, 224 S.E.2d 721 (1976). Because A.N. could not have asserted a claim

against his parents by operation of the parental immunity doctrine, the Respondents likewise do not have a claim for contribution.

In *Sias v. Wal-Mart Stores, Inc.*, 137 F.Supp.2d 699 (S.D.W.Va. 2001), Chief Judge Haden, applying West Virginia law, decided the very issue presently before the court – holding that where a child is injured by a product, the product liability defendant may not assert the negligence of the parents as a defense. Consistent with this Court’s holding in *Unipunch Products*, Chief Judge Haden found that “West Virginia recognizes parental immunity, which precludes both negligence actions brought by the parent’s child and the *derivative* defensive assertion of contributory negligence against a parent for injuries to the child.” *Sias*, 137 F.Supp.2d at 702. Not only is Chief Judge Haden’s decision consistent with established West Virginia law, it is also consistent with the majority consensus around the country: parental immunity prohibits contribution actions against parents stemming from injuries to their children.¹

The Respondents’ chief response to this Court’s clear holding in *Unipunch Products* is that several cases after that decision refer to contribution as a right which is vested in joint tortfeasor defendants. They are half correct. The right to contribution is vested in joint tortfeasor defendants. In fact, each of the defendants herein has exercised that right against one another. That right, however, is merely the right to bring in a third-party which the plaintiff

¹See, e.g. *Crotta v. Home Depot, Inc.*, 249 Conn. 634, 732 A.2d 767 (Conn. 1999); *Jacobsen v. Schroder*, 117 Idaho 442, 788 P.2d 843 (1990)(parent-child immunity for alleged negligent supervision prohibits third-party contribution claim); *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933 (Tex 1992)(doctrine of parental immunity bars claim for contribution for negligent supervision of child); *Holodook v. Spencer*, 36 N.Y.2d 35, 364 N.Y.S.2d 859, 324 N.E.2d 338 (1974)(New York); *Sears, Roebuck & Co. v. Huang*, 652 A.2d 568 (Del. 1995); *Doe by Connolly v. Holt*, 332 N.C. 90, 96 (1992); *Lee by Schlosser v. Mowett Sales Co., Inc.*, 31 N.C. 489, 342 S.E.2d 882 (N.C. 1986); *Brunner v. Hutchinson Div.*, 770 F.Supp. 517, 525 (D.S.D. 1991)(applying south Dakota law); *Baughn v. Honda Motor Co., Ltd.*, 105 Wash.2d 118, 712 P.2d 293 (Wash. 1986)(tortfeasor may not seek indemnity or contribution from parents on theory that parents’ negligent failure to supervise child was cause of injury); *Almli v. Santora*, 154 Mich.App. 60, 397 N.W.2d 216 (Mich.App. 1986)(defendants barred from obtaining contribution based on negligent supervision, even where damages were claimed by parents in their individual capacity).

could have sued, but chose not to. *Unipunch Products*, 169 W.Va. at 518, Syl. Pt. 6; *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 344, 256 S.E.2d 879, 886 (1979)(The right of contribution was created to prevent the plaintiff from “cast[ing]the entire responsibility for an accident on one of several joint tortfeasors by deciding to sue only him”). Here, the Parents are immune pursuant to the proper application of the parental immunity doctrine; A.N. could not have sued his Parents even if he was so inclined.

Therefore, as is discussed more fully in Petitioners’ principal brief, the parental immunity doctrine operates to preclude any claim for comparative contribution against the Parents of A.N., and the second certified question should be answered, “yes”.

C. Certified Question Number Three - Under Well-Established West Virginia Law, Defendants in a Civil Action are Prohibited from Comparing Their Relative Fault with that of a Non-Party (i.e. the parents of A.N.)

While the Petitioners rely and stand upon their original brief on Certified Question Number Three and would point out that Respondents appear to have conceded this issue given the limited argument on this Certified Question in each of their briefs, Petitioners will nevertheless reiterate and summarize their position.

Under West Virginia law, the defendants are not permitted to compare their relative fault against the parents because the parents are not parties to this litigation by operation of the parental immunity doctrine. As discussed in the Petitioners’ initial brief, the Respondents’ claims of contribution against the parents are barred by operation of the parental immunity doctrine. The Respondents are only permitted to compare their relative degrees of fault among those parties against which they have a viable claim for comparative contribution. *See Unipunch Products, Inc.*, 288 S.E.2d 511, 518-19 (1982); *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982). Comparative Contribution is not mandatory and can only be

asserted through filing a viable claim for contribution upon any theory or cause of action available to the plaintiff. *Id.*

This comparative contribution procedure for allocation of each defendant's separate degree of fault is also consistent with West Virginia's joint and several liability statute. W.Va. Code § 55-7-24 The joint and several liability statute provides that "[i]n any cause of action involving the tortious conduct of more than one defendant, the trial court shall: (1) instruct the jury to determine . . . the proportionate fault of *each of the parties in the litigation at the time the verdict is rendered.*" W.Va. Code § 55-7-24(a)(1)(emphasis added). The parents, immune from liability due to the parental immunity doctrine, should not be parties in the litigation at the time the verdict is rendered. Thus, the jury will not be instructed to determine the parents' proportionate fault.

Furthermore, a review of *Paris v. Dance*, 194 P.3d 404 (Colo. Ct. App. 2008), the sole case which was cited in the district court's order certifying these questions (See JA 661), shows the case is entirely contrary to the law in West Virginia as it is simply a case involving the application of a Colorado statute which explicitly permits an immune parent to be designated as a non-party at fault.

Unlike Colorado, the West Virginia legislature has not abolished the doctrine of joint and several liability. To the contrary, "[t]his jurisdiction is committed to the concept of joint and several liability among tortfeasors." *See Sitzes*, 169 W.Va. at 684. Moreover, the West Virginia legislature has codified a statute stating that the allocation of damages shall only be among "each of the parties in the litigation at the time the verdict is rendered." W.Va. Code § 55-7-24(a)(1) (2005).

Additionally, as recently as 2012 in *Halcomb v. Smith*, 230 W.Va. 258, 737 S.E.2d 286, 288 n. 1 (2012), this Court upheld the trial court's refusal to instruct a jury to assess the proportionate fault of a non-party driver involved in a motor-vehicle collision. Citing West Virginia's allocation of fault statute, this Court stated, "[i]t is clear that, when the jury's verdict was rendered, Mr. Withrow was not a party to any litigation involving the plaintiff," and thus, allocation of fault to the non-party driver was not permitted. *Id.* For this Court to include the parents as nonparties for the allocation of fault among the defendants, it would have to go against decades of West Virginia law adhering to the joint and several liability of joint tortfeasors and the collective wisdom of the West Virginia legislature. Therefore, the answer to the third certified question must be "no," as West Virginia law does not permit the inclusion of non-parties for the allocation of fault among joint tortfeasors.

D. Certified Question Number Four - This Court Should Reaffirm the State of West Virginia's Continued Adherence to the Parental Immunity Doctrine

The Respondents, in their briefs, seem to argue the parental immunity doctrine has no application to the facts presented in the instant action, but devote approximately one quarter of their respective briefs arguing why this Court should completely abolish the parental immunity doctrine in West Virginia. In addition to arguing the unconstitutionality of the parental immunity doctrine in support of their positions, the Respondents also seem to argue that societal changes, public policy, and equitable principles require this Court to abolish the doctrine in this state.

While Petitioners acknowledge there has been a trend toward creating specific exceptions to the absolute immunity afforded parents by the parental immunity doctrine in situations where the policy concerns underlying the doctrine (i.e., preservation of family harmony) no longer exist

(i.e. intentional act committed by parent on a child, negligence of a parent in contributing to the death of a child and then seeking damages for the death, or negligent operation of a motor vehicle by a parent where a child is injured but liability insurance covers the loss), the doctrine continues to be recognized in the majority of jurisdictions, including West Virginia. As the Supreme Court of Washington has pointed out as recently as 2008, “the overwhelming majority of jurisdictions hold parents are not liable for negligent supervision of their child” *Zellmer v. Zellmer*, 164 Wash.2d 147, 157, 188 P.3d 497, 501 (Wash. 2008). Therefore, this State’s continued adherence to the doctrine should be reaffirmed in this product liability action where the defendants’ assertions of negligent parental supervision, if permitted to be advanced in spite of the protections afforded the parents by the parental immunity doctrine, would erode the longstanding law of this state and would allow the courts to stand in judgment of the day-to-day exercise of parental discretion, control and authority over a parent’s upbringing of his child.

As noted in Petitioners’ initial brief, like the majority of other jurisdictions, West Virginia has recognized that “the real purpose behind the doctrine ‘is simply to avoid undue judicial interference with parental discretion. The discharge of parental responsibilities . . . entails countless matters of personal private choice.’” *Cole v. Fairchild*, 198 W.Va. 736, 482 S.E.2d 913 (1996). And, as recognized by the U.S. District Court for the Southern District of West Virginia as recently as 2001 in *Sias v. Wal-Mart Stores, Inc.*, 137 F.Supp.2d 699 (S.D.W.Va. 2001), although this Court has carved out limited exceptions, it has made it clear as recently as 1996 that, “although there may be some exceptions, the parental immunity doctrine remains a viable concept in West Virginia.” *Cole*, 198 W.Va. at 749, 482 S.E.2d at 926 (*citing Courtney*, 186 W.Va. at 606, 413 S.E.2d at 427).

This Court should therefore answer the fourth certified question in the affirmative.

II. CONCLUSION

For the reasons stated herein, petitioners respectfully request an order from this Court answering the certified questions as follows:

1. Yes. The parental immunity doctrine precludes defendants from relying upon the Parents conduct and/or negligent supervision as a defense against A.N. in this product liability action.

2. Yes. The parental immunity doctrine bars defendants from asserting their independent rights of contribution and indemnity and/or from allocating fault against parents who were allegedly negligent.

3. No. A.N.'s parents may not be included on any verdict form as non-parties for the allocation of fault.

4. Yes. The parental immunity doctrine should have continued viability in West Virginia.

Respectfully submitted this 17th day of July, 2013,


Dino S. Colombo (WVSB # 5066)
Travis T. Mohler (WVSB #10579)
Colombo Law
1054 Maple Drive
Morgantown, WV 26505
Phone: (304) 599-4229
Fax: (304) 599-3861
dinoc@ColomboLawWV.com
travism@ColomboLawWV.com
Counsel for Petitioners

(WVSB # 4819)

CERTIFICATE OF SERVICE

I, Dino S. Colombo, hereby certify that on this 17th day of July, 2013, I served the foregoing Petitioner's Brief upon all counsel of record via electronic mail and by placing true, copies thereof with the United States Postal Service, postage pre-paid and addressed as follows:

P. Joseph Craycraft, Esquire
Edward A. Smallwood, Esquire
Swartz Campbell, LLC
1233 Main Street, Suite 1000
Wheeling, WV 26003
Counsel for Defendant CKS

Thomas Mannion, Esquire
Andrew D. Byrd, Esquire
Mannion & Gray Co., LPA
122 Capitol Street, Suite 100
Charleston, WV 25301
***Counsel for Packaging Services Co.,
Packaging, Inc. Inc.***

Stephen R. Brooks, Esquire
Lindsey M. Saad, Esquire
Alonzo D. Washington, Esquire
Flaherty Sensabaugh Bonasso, PLLC
48 Donley Street, Suite 501
Morgantown, WV 26508
Counsel for Stull Technologies, Inc.

Robert Hayes, Esquire
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103
***Counsel for Hearthmark, LLC d/b/a
Jarden Home Brands, and Wal-Mart
Stores, Inc***

Larry W. Blalock, Esquire
Jennifer Z. Cain, Esquire
Jackson Kelly, PLLC
1144 Market Street
Wheeling, WV 26003
Counsel for Jarden Corporation,

*Hearthmark, LLC d/b/a Jarden Home Brands,
and Wal-Mart Stores, Inc.*

Thomas T. Locke, Esquire
Rhett E. Petcher, Esquire
Seyfarth Shaw, LLP
975 F Street, N.W.
Washington, DC 20004
Counsel for C.K.S. Packaging, Inc.

Dino S. Colombo/By Brent P. Copelan
Dino S. Colombo (WVSB #5066) (WVSB No.
4819)