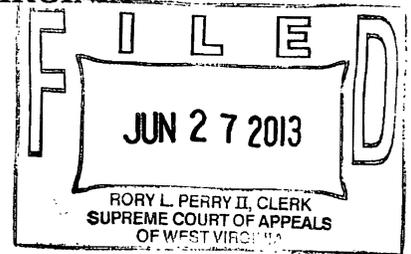


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 13-0159

KIMBERLY LANDIS and ALVA NELSON,
as parents and guardians of A.N., a minor,
Plaintiffs-Below
Petitioners



v.

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-Below
Respondents

Honorable John P. Bailey, United States District Judge
United States District Court For The Northern District of West Virginia
Civil Action No. 2:11-CV-00101

BRIEF OF DEFENDANTS/RESPONDENTS, C.K.S. PACKAGING, INC.,
PACKAGING SERVICE COMPANY, INC., and
STULL TECHNOLOGIES, INC. ON CERTIFIED QUESTIONS

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CERTIFIED QUESTIONS

This matter is before this Honorable Court pursuant to questions certified to it by the United States District Court for the Northern District of West Virginia pursuant to Rule 17(b) of the Revised Rules of Appellate Procedure. The questions certified for resolution are as follows:

1. Whether the parental immunity doctrine precludes defendants from asserting well-established product liability defenses of product misuse and superseding intervening causation, in order to demonstrate lack of defect and foreseeability in a child's product liability action?
2. Whether 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. Whether allegedly negligent parents should be included as a nonparty for the allocation of fault, even though parental immunity would still bar recovery of the damages allocated to the parents?
4. Whether parental immunity should have continued viability in this jurisdiction?

STATEMENT OF CASE

A. Nature of the Proceedings

Petitioners Alva Nelson and Kimberly Landis ("the Parents"), on behalf of themselves and their son A.N., (collectively "Plaintiffs") filed this negligence and products-liability action against Jarden Corporation ("Jarden"), Hearthmark, LLC, d/b/a Jarden Home Brands ("Hearthmark"), Wal-Mart Stores, Inc. ("Wal-Mart"), C.K.S. Packaging, Inc. ("CKS"), Packaging Service Company, Inc. ("PSC"), Stull Technologies, Inc. ("Stull") (collectively "Defendants") for injuries sustained when A.N., then seven years old, used a combustible gel product named Diamond Brand Natural Fire Starter Gel ("fire-starter"). (JA 00650.)

Defendants filed counterclaims and affirmative defenses, including comparative negligence, against the Parents. Plaintiffs sought to strike Defendants' contribution claims and comparative negligence defenses against the Parents and to bar Defendants from asserting

traditional defenses such as product misuse or lack of causation. Plaintiffs assert that the parental immunity doctrine bars a defendant from asserting that a third party is responsible for the plaintiff's injuries if the third party is a parent of a plaintiff. After considering the parties' arguments on the issues, the district court certified the foregoing questions to this Court.

B. Factual Background

Plaintiffs' "Statement of Facts" actually is a statement of their allegations. No facts have been determined. Plaintiffs raised parental immunity at the outset and moved to certify during discovery. The record to evaluate the scope, relevance, and viability of any claims has not been fully developed. What follows is a statement of facts upon which the parties generally agree.

A.N. was injured on February 28, 2010. (JA 000794.) A fire had been burning all day in the downstairs family room. (JA 000795-797.) That evening, while the family was upstairs, seven- year-old A.N. asked his mother for permission to roast marshmallows in the downstairs fireplace. (*Id.*) He was not wearing clothes. (JA 000797.) A.N.'s mother gave permission. (JA 000796-98.) A.N. went downstairs unsupervised to use the fireplace. (*Id.*)

A bottle of Diamond Natural Fire Starter Gel (the "fire-starter") was sitting on or right next to the fireplace hearth. (JA 000791-792, 001053-1055.) The fire-starter is an ethanol-based gel used to start fires in wood pellet stoves.¹ (JA 000617.) The front label of the fire-starter warns, "DANGER! FLAMMABLE VAPORS." (*Id.*) In red capital letters against a yellow background, the label commands, "KEEP OUT OF REACH OF CHILDREN." (*Id.*) The directions for use state that the fire-starter should be closed and removed from the immediate

¹ Contrary to Plaintiff's assertions the fire-starter is not "highly volatile," "incendiary," "explosive," or like "napalm." The product is flammable, as it must be to perform its intended function of starting fires. Hundreds of thousands of bottles of fire-starter have been sold. There are no reports of anyone, other than A.N., being injured when using the product to start a fire.

area before the wood or pellet stove is lit. (*Id.*) The directions instruct that the fire-starter should be stored away from heat and flame because “vapors are flammable.” (*Id.*)

A.N.’s mother testified that she read and understood the warning label. (JA 000791-792.) A.N.’s father testified that he knew the fire-starter was flammable, “very dangerous” and should not be stored near heat. (JA 001050, 001053, 001055.) Nonetheless, the Parents stored the fire-starter next to the fireplace or on its hearth, within easy reach of A.N. (JA 000791-792, 001053, 001055.) And, although the fire-starter stated “KEEP OUT OF REACH OF CHILDREN,” A.N.’s mother let him use the fire-starter. (JA 000815-816.)

C. Procedural History

Plaintiffs filed this action in December 2011. (JA 000001-17.) Defendants asserted contribution counterclaims and comparative negligence defenses against Parents. (*See, e.g.*, JA 000018-35.) Defendants also raised the defenses of product misuse and superseding cause. (*Id.*) Plaintiffs moved to strike Stull’s comparative negligence defense and asserted that the parental immunity doctrine bars all Defendants “from arguing that the negligence of A.N.’s parents caused or contributed to their child’s injuries.” (JA 000073.) Defendants filed oppositions. (*See, e.g.*, JA 000149-160.)

The district court denied Plaintiffs’ motion. The court reasoned that, since 1968, this Court has narrowed the parental immunity doctrine each time it was considered. (JA 000243.) Given that history, the district court was “reluctan[t] to predict the continued vitality of the parental immunity doctrine in West Virginia.” (JA 000248.) The court invited the parties to seek certification following discovery on whether an insurance exception may apply. (*Id.*)

Parents subsequently dismissed their individual claims against Defendants, and the court ordered that the Defendants’ counterclaims be treated as third-party complaints. (JA 000283-

286, 000339-340.) After completing some discovery, Plaintiffs moved for certification, and the district court certified the questions herein to this Court. (JA 000352-356, 000649-667.)

SUMMARY OF ARGUMENT

This case has nothing to do with the parental immunity doctrine. That doctrine merely prevents a child from suing his or her parents for negligence. With respect to Question One, Plaintiffs attempt to expand this narrow doctrine into a broad evidentiary rule barring introduction of a parent's conduct whenever a child is party to a lawsuit. Contrary to Plaintiffs' strained argument, evidence regarding foreseeability, product misuse, and superseding, intervening cause is admissible in products liability cases, even if that evidence relates to a parent's conduct. Not surprisingly, no court has ever adopted Plaintiffs' novel theory.

With respect to Question Two, Plaintiffs assert that parental immunity bars contribution claims against negligent third parties who happen to be a plaintiff's parents and precludes the jury from considering a parent's negligence when determining comparative fault. These arguments also fail. Courts have long held that the purpose of parental immunity is not furthered by denying contribution, and equity requires contribution from negligent parents.

With respect to Question Three, Plaintiffs arguments fail because, in determining fault, a jury must consider the conduct of all persons whose negligence contributed to the accident, whether or not those persons are parties to the action.

The Court need not answer Question Four because the parental immunity doctrine is inapplicable. However, if the it elects to answer the question, the Court should abolish the doctrine. The West Virginia Constitution, Article III, section 17 secures to "every person," including children, the right to a remedy for personal injuries. Parental immunity does not promote family harmony but undermines it by forcing children to bear losses caused by their parents. As a result, the doctrine has been widely discredited and is no longer the majority rule.

STATEMENT REGARDING ORAL ARGUMENT

Respondents agree that oral argument is appropriate.

ARGUMENT

A. Standard of Review

The Court reviews *de novo* the legal issues presented in a certified question. *E.g.*, *Osborne v. United States*, 211 W. Va. 667, 670, 567 S.E.2d 677, 680 (2007). The Court is bound by and considers only those facts asserted in the district court's certification order. *E.g.*, *L.H. Jones Equip. Co. v. Swenson Spreader LLC*, 224 W. Va. 570, 573 n.3, 687 S.E.2d 353, 356 n.3 (2009); *King v. Lens Creek Ltd. P'ship*, 199 W. Va. 136, 143, 483 S.E.2d 265, 272 (1996).

B. **CERTIFIED QUESTION ONE: The Parental Immunity Doctrine Does Not Preclude Defendants From Asserting Well-Established Product Liability Defenses Of Product Misuse And Superseding Intervening Causation.**

It is not surprising that Plaintiffs addressed last Certified Question One. (Petitioners' Br. at 1 n.1) There simply is no West Virginia law supporting their proposition that the parental immunity doctrine precludes the introduction of highly relevant evidence. In fact, none of the cases cited by Plaintiffs in Section E of their brief even mentions the parental immunity doctrine. (Petitioners' Br. 33-40).

1. **The parental immunity doctrine is an immunity from suit that is inapplicable here.**

The general rule is that a party is liable for his torts. *See, e.g., Lee v. Comer*, 159 W. Va. 585, 589, 224 S.E.2d 721, 723 (1976). The parental immunity doctrine is an exception to that rule. *See, e.g., id.; Freeland v. Freeland*, 152 W. Va. 332, 339, 162 S.E.2d 922, 927 (1968), *overruled on other grounds by Lee*, 159 W. Va. 585, 224 S.E.2d 721. The doctrine prevents an unemancipated child from suing a parent for personal injuries caused by the parent's negligence. *E.g., Lee*, 159 W. Va. at 588, 224 S.E.2d at 722.

The parental immunity doctrine is a narrow exception to liability. Because liability is the rule, this Court has been reluctant to expand the doctrine. In fact, as discussed in Part E below, this Court has consistently narrowed the doctrine. As the district court noted, “since 1968, each time [this Court] has been confronted with a parental immunity issue, another exception to the rule has been carved out.” (JA 000657.)

The Court has applied the doctrine only to prohibit a child from suing his parents for negligence. The Court has never applied the doctrine to bar defenses or admission of evidence. Because A.N. is not suing his Parents for negligence, the doctrine has no application here.

2. The parental immunity doctrine does not bar a defendant from asserting defenses.

A.N. alleges claims for negligence and products liability. Defendants asserted the general defense of product misuse and the affirmative defense of intervening cause. The doctrine has no application to defenses to the claim of a plaintiff who happens to be a child.²

A plaintiff must show that a product is defective such that it is not reasonably safe for its intended use and that the defect caused the plaintiff’s injuries. *See, e.g., In re State Public Bldg. Asbestos Litig.*, 193 W. Va. 119, 128, 454 S.E.2d 413, 422 (1994). Where, as here, a plaintiff relies on circumstantial evidence, he must establish that there was no abnormal use of the product. *See, e.g., Beatty v. Ford Motor Co.*, 212 W. Va. 471, 475, 574 S.E.2d 803, 807 (2002). A plaintiff must show that there was no abnormal use by “reasonably eliminat[ing] other causes [of the defect] such as the handling or misuse of the product by others than the manufacturer.” *Bennett v. Asco Servs., Inc.*, 218 W. Va. 41, 48-49, 621 S.E.2d 710, 717-18 (2005) (quotation marks omitted); *see also Beatty*, 212 W. Va. at 475, 574 S.E.2d at 807.

² Plaintiffs confusingly refer to product misuse and evidence of parental conduct as “affirmative defenses.” As explained in Part B.2, product misuse is relevant to whether a plaintiff has established causation. Thus, the defense of product misuse is a general defense. *See, e.g., Keeler Brass Co. v. Cont’l Brass Co.*, 862 F.2d 1063, 1066 (4th Cir. 1988) (a defense that negates an element of plaintiff’s prima facie case is not an affirmative defense).

A defendant may be “absolve[d] ... from liability, in whole or in part,” if a third party misused the product. *Restatement (Third) of Torts: Products Liability* § 15, cmt. B; *see also id.* § 16(b) (providing that defendant’s liability is limited or negated where evidence shows “the harm ... would have resulted from other causes in the absence of the product defect”). The defendant may prevail by showing that the plaintiff or a third-party misused the product. *See, e.g., Bennett*, 218 W. Va. at 48-49; *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 889, 253 S.E.2d 666, 683 (1979).

Similarly, with respect to a negligence claim, a defendant may assert product misuse to prove that the defendant did not cause plaintiff’s injuries. *See, e.g., Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 719, 568 S.E.2d 19, 26 (2002). In addition, a defendant whose conduct contributed to injury may nonetheless defeat liability by establishing an intervening cause of the plaintiff’s injuries. *See, e.g., Washington v. B&O Railroad Co.*, 17 W. Va. 190 (1880); *see also Wehner v. Weinstein*, 191 W. Va. 149, 151, 444 S.E.2d 27, 29 (1994). Thus, a defendant may prevail by showing “a third person d[id] some act which [wa]s the immediate cause of the injury.” *Fawcett v. Pittsburg, Cincinnati & St. Louis Ry. Co.*, 24 W. Va. 755 (1880); *see also Costoplos v. Piedmont Aviation, Inc.*, 184 W. Va. 72, 74, 399 S.E.2d 654, 656 (1990).

These defenses have long been recognized by this Court. No decision by this Court has held that the parental immunity doctrine precludes a defendant from introducing evidence that a parent’s conduct caused a child’s injuries, that the parents misused the product, or that the parents’ use or the risk that it posed was unforeseeable.

To Defendants’ knowledge, no court in any jurisdiction has held that the parental immunity doctrine bars traditional causation defenses. The doctrine has no application to claims against persons or entities who are not plaintiff’s parents. This is no surprise because the

doctrine is a parental immunity from suit not a ban on defenses. Accordingly, Defendants respectfully request that the Court hold that the parental immunity doctrine does not preclude Defendants from asserting well-established product liability defenses of product misuse and superseding, intervening causation in order to demonstrate lack of defect and foreseeability.

3. Plaintiffs arguments for applying the parental immunity doctrine to traditional causation defenses exceed the scope of the certified question and fail on the merits.

Plaintiffs do not dispute that Defendants may assert defenses. Instead, Plaintiffs erroneously argue that the Parents' conduct is inadmissible to prove these defenses.

a. Plaintiffs' arguments exceed the scope of the certified question.

Plaintiffs' evidentiary argument exceeds the scope of the certified question. This Court may decline to consider arguments that exceed the scope of a certified question. *See, e.g., King*, 199 W. Va. at 143, 483 S.E.2d at 272. The first certified question asks whether the parental immunity doctrine bars Defendants from asserting traditional causation defenses. The question does not ask whether the evidence Defendants intend to offer in support of those defenses is relevant and admissible. The district court has not ruled upon the relevancy or admissibility of any evidence, but the district court's reference to "well-established product liability defenses" implies that the court considers the Parents' conduct to be relevant to liability.

Further, any ruling on the relevancy or admissibility of the Parents' conduct would be an advisory opinion on federal evidentiary law because federal law governs the admissibility of evidence in a federal action. *E.g., United States v. Clyburn*, 24 F.3d 613, 616 (4th Cir. 1994) ("[E]vidence admissible under federal law cannot be excluded because it would be inadmissible under state law."). This Court will not answer a certified question if it results in an advisory opinion. *Advance Stores Co. v. Recht*, --- W. Va. ---, 740 S.E.2d 59, 64 (2013).

Plaintiffs are arguing that relevant evidence on traditional defenses is inadmissible. That argument is beyond the scope of the Certified Questions and implicates questions of federal law.

b. Third-party conduct is relevant to product misuse and causation.

Plaintiffs' relevancy argument also fails. A third party's product use is relevant to establishing defect or lack thereof. To establish a prima facie case, a plaintiff must show that the product was not misused or materially altered. *See Morningstar*, 162 W. Va. at 889, 253 S.E.2d at 683. To meet this burden, a plaintiff must eliminate other causes of the alleged defect "such as the handling or misuse of the product by others than the manufacturer." *Bennett*, 218 W. Va. at 48-49, 621 S.E.2d at 717-18 (emphasis added). A defendant may prevail by showing that the defect resulted from the plaintiff's or a third-party's misuse of the product. *See, e.g., id.* A seller is not liable when its product is misused. *Morningstar*, 162 W. Va. at 889, 253 S.E.2d at 683.

For example, in *Beatty*, this Court held that the plaintiff failed to establish a prima facie case because he did not show that the allegedly defective vehicle "was used properly during its lifetime." 212 W. Va. at 475, 574 S.E.2d at 807. The Court examined any and all uses of the product, not merely the injured party's use at the time of the accident. Other courts concur that third-party use is relevant to product misuse. *See, e.g., Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167-68 (4th Cir. 1988) (third party misused paint intended for use by professional painters by permitting nonprofessionals to use the paint); *Laney v. Coleman Co.*, 758 F.2d 1299, 1302, 1305-06 (8th Cir. 1985) (evidence that parents misused a fuel can by storing it within reach of children was admissible to prove product misuse and lack of foreseeability in products liability claim brought by children); *Nichols v. Steelcase, Inc.*, 2005 WL 1862422, at *8 (S.D.W. Va. 2005) (considering whether plaintiff or a third party misused the allegedly defective product); *Simpson v. Standard Container Co.*, 72 Md. App. 199, 206 (1986)

(holding that child's claim failed where third party misused gasoline can by storing it "in an area which allowed two unsupervised four-year-olds access to the can").

Moreover, courts across the country have long held that, although parental conduct is not imputable to the child, the conduct may be relevant to whether a third person is liable for the child's injuries on products liability claims. *See, e.g., Akins v. Cty. of Sonoma*, 430 P.2d 57, 64 (Cal. 1967) (holding parental conduct admissible to show superseding cause and lack of causation and foreseeability); *Grant v. District of Columbia*, 597 A.2d 366, 369 (D.C. 1991) (holding parents' conduct admissible to prove superseding cause even though parents could not be liable for their conduct); *Caroline v. Reicher*, 269 Md. 125, 129-131 (1973) (same).

For example, in *Akins*, a minor child sued defendants for injuries he sustained when, at age two, he fell to a concrete floor from the top row of the bleachers where he was seated or standing a few feet from his parents. *See* 430 P.2d at 59. Plaintiff sought to bar all evidence of his parents' conduct in supervising him. *See id.* at 64. The California Supreme Court held that, "while it is true that the negligence, if any, of parents is not imputable to the child in an action by the latter for injuries, such negligence may nevertheless be relevant in determining whether a third person is liable for such injuries." *Id.* The court reasoned that the parents' conduct was relevant to foreseeability and causation. *See id.* at 64-66.

Similarly, federal courts have held that evidence of parental conduct is admissible in strict liability cases to prove lack of causation. For example, in *Van Buskirk v. West Bend Co.*, an infant sued a manufacturer for design defect after he was injured when a home fryer of hot oil fell on him. *See* 100 F. Supp. 2d 281, 284, 282-83 (E.D. Pa. 1999). The court held that the infant's injuries were not caused by a design defect but by the mother's decision to leave the infant unsupervised in the vicinity of hot oil. *See id.* at 288-89. The court reasoned that, given

the mother's conduct, the correction of the alleged defects in the fryer would not have prevented the infant's injuries. *See id.*; *see also Rock v. Oster Corp.*, 810 F. Supp. 665, 667 (D. Md. 1991) (holding that products liability defendant was not liable where parents failed to supervise toddler and left him in vicinity of fondue pot filled with hot oil). Likewise, in *Kelley v. Rival Mfg. Co.*, the court held that a toddler's injuries were not caused by a manufacturing defect but were caused by "the parents' inattention and lack of supervision" in leaving the child in the vicinity of a slow-cooker filled with hot beans. 704 F. Supp. 1039, 1044 (W.D. Okla. 1989). The court reasoned that the child's injuries would have occurred regardless of the alleged defects. *See id.*

As in the foregoing cases, here, the Parents' conduct is relevant to determining whether defendants may be liable to A.N. Plaintiffs must show that the product had a defect, that the product's use was reasonably foreseeable, and that each Defendant's conduct caused A.N.'s injuries. In establishing defect, Plaintiffs must also show that there was no abnormal use. The record contains undisputed evidence that the Parents misused the fire-starter and that their use was not foreseeable. A.N.'s mother admitted ignoring the fire-starter's warnings and directions, and the Parents misused the fire-starter by placing it near a fire within a child's reach and by permitting a child to use the fire-starter. (JA 000791-92, 000815-816, 001053-1055.)

Defendants could not reasonably foresee that Parents would ignore the fire-starter's warnings, would knowingly place a highly combustible material near an open fire, understanding that the material could ignite, and would permit a child to use the fire-starter. Because defendants could not reasonably anticipate the Parents' intervening conduct, defendants could not reasonably foresee A.N.'s use. Defendants have a right to introduce evidence establishing that Plaintiffs cannot prove the product was defective and the use foreseeable.

In addition, Defendants can introduce evidence that their conduct was not the “but for” cause of the injury. Like the defendants in *Van Buskirk*, *Rock*, and *Kelley*, here, Defendants may prevail by showing that correction of the alleged defect would not have prevented A.N.’s injuries because of the Parents’ conduct. Similar to the *Rock* and *Kelley* defendants, Defendants may argue that common sense dictates that a child is likely to be injured if left alone to pour combustible material into a fire. If the accident would have occurred regardless of Defendants’ conduct, Defendants cannot be the “but for” cause of the injuries.

Moreover, the Parents’ conduct is relevant to superseding causation. A defendant’s showing of an intervening cause negates proximate causation. *See, e.g., Sydenstricker v. Mohan*, 217 W. Va. 552, 559, 618 S.E.2d 561, 568 (2005). An intervening cause “severs the causal connection between [a defendant’s] original improper action and the [plaintiff’s] damages.” *Id.* An intervening cause “can be established only through the introduction of evidence by a defendant that shows the negligence of another party or a nonparty.” *Id.*

The Court has held that a defendant has the right to introduce evidence that a third party’s negligence constitutes an intervening cause even if the third party is protected from liability for that negligence. In *Mohan*, the plaintiff sued two defendants for medical malpractice and settled with one before trial. *See id.* at 556, 618 S.E.2d at 565. After settling, the plaintiff argued that the non-settling defendant was barred from introducing evidence of the settling defendant’s negligence. *See id.* at 556-58, 618 S.E.2d at 565-67. The plaintiff asserted that the evidence was inadmissible because the settlement destroyed the non-settling defendant’s right of contribution from the settling defendant. *See id.* at 557 & n.9, 618 S.E.2d at 566 & n.9. The court rejected this argument. *See id.* at 558-59, 618 S.E.2d at 567-68.

The court held that a defendant has the right to assert the defense of intervening cause and may be proven “only through the introduction of evidence by a defendant that shows the negligence of another party or a nonparty.” *Id.* at 559, 618 S.E.2d at 568. Therefore, the court ruled that, for the non-settling defendant to establish the defense of intervening cause, “he **had to be allowed to introduce evidence** of [the settling defendant’s] negligence.” *Id.* (emphasis added). The court reasoned that denying the non-settling defendant the right to introduce evidence of the settling defendant’s conduct would deny the right to a defense. *See id.* The court stated that evidence inadmissible under one theory may be admissible under another. *Id.* The court reasoned that “evidence that is admissible as to one party or for one purpose may not be excluded merely because it is not admissible for another party or for another purpose.” *Id.*; *see also Sears, Roebuck & Co. v. Huang*, 652 A.2d 568, 569-70 (Del. 1995) (holding that the parental immunity doctrine does not bar a defendant from asserting that the parents’ negligent supervision was a supervening cause of the child’s injury).

Like the defendant in *Mohan*, here, Defendants have the right to assert the defense of intervening cause. Plaintiffs cannot defeat that right by arguing that the evidence of the Parents’ conduct is inadmissible because A.N. cannot pursue a liability claim against his Parents. The parental immunity doctrine may bar admission of the Parents’ conduct to prove their liability to A.N., but Defendants would not be offering the evidence for that purpose. Under *Mohan*, Defendants have the right to introduce evidence of the Parents’ conduct to prove lack of causation even if that evidence is inadmissible for other purposes.

c. Plaintiffs’ other arguments fail on the merits.

Plaintiffs’ arguments also are contradictory and illogical. Plaintiffs appear to argue that evidence of the Parents’ conduct is not relevant and offer various rationales in support of that novel theory. In direct contradiction, however, Plaintiffs repeatedly concede that the Parents’

conduct is admissible to demonstrate intervening cause. (See Petitioners' Br. at 33-34, 39.) That concession should end the issue. Even so, Defendants address those arguments.

First, Plaintiffs claim—without citing any authority—that the only relevant misuse is A.N.'s misuse at the time of the accident and that third-party misuse is irrelevant. (*Id.* at 33-35.) Plaintiffs baldly assert that the Parents' misuse “has no bearing” on product misuse. (*Id.* at 34.) Plaintiffs' assertion is plainly wrong. Indeed, Plaintiffs undercut their argument by conceding that third-party misuse is relevant to show a third party caused the injury. (*Id.* at 33-34.)

In any event, as discussed above, this Court and courts across the country have held that third-party conduct is relevant to product misuse and causation. Both *Beatty* and *Bennett* hold that product misuse “by others” is relevant in a products liability case. *Bennett*, 218 W. Va. at 48-49 (emphasis added); see also *Beatty*, 212 W. Va. at 473, 475.

Second, Plaintiffs assert that the negligence of a parent cannot be imputed to a child. (See *id.* at 35-38.) This argument is a red herring. The case law Plaintiffs cite is inapposite. Those cases pertain to the largely discredited “doctrine of imputed negligence,” which rested on the theory that a principal is responsible for the conduct of his agent. See, e.g., *Denver City Tramway Co. v. Brown*, 57 Colo. 484, 493 (1914); *Neff v. City of Cameron*, 213 Mo. 350, 111 S.W. 1139, 1140 (1908); see also *Erie Indem. Co. v. Kerns*, 179 W. Va. 305, 308, 367 S.E.2d 774, 777 (1988); *Restatement (Second) of Torts* § 485.³ Thus, if plaintiff's agent was negligent, that negligence was treated as plaintiff's negligence. See *id.*; see also *Cleghorn v. Thomas*, 58 Tenn. App. 481, 490 (1968) (relying on *Nichols v. Nash Hous. Auth.*, 187 Tenn. 683, 690-91

³ The West Virginia and South Carolina cases cited by Plaintiffs pertain to imputing a parent's negligence to the child for purposes of determining whether the child was contributorily or comparatively negligent. See, e.g., *Miller v. Warren*, 182 W. Va. 560, 562-63, 390 S.E.2d 207, 209-10 (1990); *Marsh v. Riley*, 118 W. Va. 52, 188 S.E. 748, 750 (1936); *Dicken v. Liverpool Salt & Coal*, 41 W. Va. 511, 23 S.E. 582, 584 (1895); *Daniel v. Timmons*, 216 S.C. 539, 542-43 (1950). Defendants do not seek to have the Parents' negligence imputed to A.N.

(1949).⁴ As applied to suits by children, the doctrine assumed “that the parent was the child’s agent.” *Id.* The cases cited by Plaintiffs rejected the theory that parents are the agents of their children. *See, e.g., Am. Tobacco Co. v. Harrison*, 181 Va. 800, 809 (1943); *Tugman v. Riverside & Dan River Cotton Mills*, 144 Va. 473, 481 (1926); *Neff*, 111 S.W. at 1141.

The doctrine of imputed negligence is, however, distinct from the issues of product misuse and causation. There is a difference between making a plaintiff responsible for a third party’s negligence and refusing to make a defendant responsible for a third party’s conduct. The cases cited by Plaintiffs recognize that distinction by holding that parental conduct may be used to establish intervening causation even though the conduct may not be imputed to the child. *See, e.g., Barksdale v. Wilkowsky*, 419 Md. 649, 656 (2011); *Caroline*, 269 Md. at 130. Those holdings comport with the cases discussed in Part B.3.b, holding that a parent’s conduct, though not imputable to the child, is relevant to whether defendant is responsible for the child’s injuries.

Defendants do not seek to have the Parents’ negligence imputed to A.N. Defendants are merely asserting that a third party may be the cause of a plaintiff’s injuries. Plaintiffs seek to call this black letter law into question by focusing on the Parents’ status. However, the defense does not turn on the third party’s relationship to a plaintiff. If the Parents were instead neighbors, there would be no doubt that Defendants could proffer evidence that the neighbors let A.N. use the fire-starter unsupervised and stored the fire-starter within reach of children and next to a burning fire. That the third parties are A.N.’s parents rather than his neighbors is a distinction without a difference. Plaintiffs do not cite a single case holding that a defendant may be held liable for an injury caused by an independent third party.

⁴ In *Cleghorn*, the court did not consider whether the parents’ conduct was admissible as an intervening cause or whether, in a products liability case, a parents’ conduct could be relevant to product misuse. *See id.*

Third, Plaintiffs argue that the Parents' conduct in letting A.N. use the fire-starter is irrelevant because A.N. acted as an adult would have. (See Petitioners' Br. at 38-40.) Plaintiffs assert that A.N.'s status as a child is irrelevant. (See *id.* at 39.) This is a new theory that Plaintiffs have crafted in hopes of excluding the Parents' conduct. Plaintiffs cannot have it both ways. If A.N. acted as an adult, as Plaintiffs now allege, the rebuttable presumption against comparative negligence fails, and Defendants are entitled to a ruling that, as a matter of law, A.N. can be responsible for contributory negligence.⁵ A.N. either acted as an adult or he did not. He cannot be an adult for purposes of misuse and causation but a child for purposes of comparative negligence. If he acted as an adult, he had "sufficient mental capacity to comprehend and avoid danger," and Plaintiffs should bear the burden of proving that A.N. was not negligent. *See id.* Regardless, the Parents engaged in other relevant product misuse, such as storing the fire-starter near a burning fire, and that conduct is relevant to establishing misuse and third-party causation.

The parental immunity doctrine prohibits an unemancipated minor from suing his parents for negligence. The doctrine has no bearing on evidence supporting defenses that may be asserted to products liability claims. Moreover, it is well-established that third-party conduct, such as the Parents' conduct, may be used to establish product misuse and lack of causation. For these reasons, the Court should answer the first certified question "yes."

C. CERTIFIED QUESTION TWO: The Parental Immunity Doctrine Does Not Bar Defendants From Asserting Their Independent Rights Of Contribution And Indemnity.

Numerous courts have held that the parental immunity doctrine also does not apply to a defendant's claims for contribution from a plaintiff child's parents.

⁵ Under West Virginia law, there is a rebuttable presumption that children between 7 and 14 may be negligent, and the defendant has the burden to prove that the child had the capacity to be contributorily negligent. *See, e.g., Pino v. Szuch*, 185 W. Va. 476, 478-79, 408 S.E.2d 55, 57-58 (1991).

1. Contribution does not affect parental immunity.

Courts have reasoned that the purpose of parental immunity is not furthered by denying contribution. *See, e.g., Hartigan v. Beery*, 128 Ill. App. 3d 195, 198-99 (1984). For example, in *Hartigan*, the court reasoned that the justification for parental immunity “can be found *only* in a reluctance to create litigation and strife between members of the family unit.” 128 Ill. App. 3d at 199. The court concluded that permitting contribution would not affect the ban on “intrafamilial disputes.” *Id.* Accordingly, the court held that the parental immunity doctrine could not be used “to insulate the parents from a contribution action.” *Id.*

This Court has held that parental immunity “does not apply when the reason for the rule fails.” *Lusk v. Lusk*, 113 W. Va. 17, 166 S.E. 538, 538 (1932). The doctrine “should not be extended . . . to parties and to situations where [it] should not in logic and common sense apply, and where the public policy enunciated would not be promoted.” *Chase v. Greyhound Lines, Inc.*, 156 W. Va. 444, 455-56, 195 S.E.2d 810, 817 (1973), *overruled on other grounds by Lee*, 159 W. Va. 585, 224 S.E.2d 721. The purpose of the doctrine is “the preservation of family harmony.” *Freeland*, 152 W. Va. at 338, 162 S.E.2d at 926. Where no family disharmony will result, there is “no reason for applying the rule.” *Id.*

Defendants assert that the Parents acted negligently by, among other things, ignoring the fire-starter’s warnings and storing the fire-starter near a heat source within the reach of any individual (child or adult). This conduct does not involve family harmony, parental discipline, or control of children. Therefore, there is no reason for applying parental immunity in this case. *See id.* Moreover, there is no reason to believe that permitting contribution will encourage intra-family litigation. Defendants’ contribution and indemnity claims have been pending since the Parents filed this action, asserting claims for A.N. and themselves. A.N. has never expressed any intent to sue his Parents on the facts alleged in Defendants’ claims. Because the Parents control

A.N.'s litigation, the Plaintiffs act as one unit and, thus, it is highly unlikely—indeed speculative—that A.N. would sue his Parents.

2. Equity requires contribution.

Courts also have reasoned that equity requires contribution. *See, e.g., Perchell v. District of Columbia*, 444 F.2d 997, 998 (D.C. Cir. 1971); *Purwin v. Robertson Enters., Inc.*, 506 A.2d 1152, 1155-56 (Me. 1986); *Bishop v. Nielsen*, 632 P.2d 864, 868 (Utah 1981); *Shor v. Paoli*, 353 So.2d 825, 826 (Fla. 1977); *Zarella v. Miller*, 100 R.I. 545, 549 (1966), *cited in Denies v. Conway*, 1975 WL 174129 (R.I. Super. Ct. 1975); *Bedell v. Reagan*, 159 Me. 292, 297-300 (1963); *Puller v. Puller*, 380 Pa. 219, 221 (1955), *cited in Restifo v. McDonald*, 426 Pa. 5 (1967). “[C]ontribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done.” *Puller*, 380 Pa. at 221. Denying contribution based on parental immunity would unfairly result in a “windfall” to the parent. *Shor*, 353 So.2d at 826.

Courts reason that it would be an “unconscionable and unjustifiable hardship” to require a defendant to be wholly responsible for a child’s damages merely because the joint tortfeasor fortuitously happened to be the child’s parent. *Bishop*, 632 P.2d at 868 (quotation marks omitted); *see also Perchell*, 444 F.2d at 998 (denying contribution would “creat[e] an inequity”); *Purwin*, 506 A.2d at 1156 (equity requires contribution despite immunity). Denying contribution would “inflict injustice upon outsiders and deprive them of their legal rights” by making them wholly responsible for an injury that they did not wholly cause. *Bedell*, 159 Me. at 297. Equity outweighs the “speculative harm” that contribution claims will encourage intra-family litigation. *Larson v. Buschkamp*, 105 Ill. App. 3d 965, 970 (1982).

Leading commentators agree.

If the purpose of contribution is to make the wrongdoers share the financial burden of their wrong, then the primary element of contribution should be the participation of the wrongdoers in acts

or omissions that are considered tortious and that result in injury to a third person. The fact that one of the tortfeasors has a personal defense if he were to be sued by the injured party would seem to be irrelevant.

3 Harper & James, *The Law of Torts* § 10.2, at 47-50 (1986); *see also* Stuart M. Speiser, *The American Law of Torts* § 3:22, at 458-59 (1983) (listing states allowing contribution despite immunity). There is an “obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two [tortfeasors] were equally, unintentionally responsible, to be shouldered onto one alone ... while the latter goes scot free.” William Prosser, *Law of Torts* § 47, at 275 (1964).

This Court too has held that contribution is an equitable doctrine. *See, e.g., Sydenstricker v. Unipunch Prods., Inc.*, 169 W. Va. 440, 441, 288 S.E.2d 511, 513 (1982). The doctrine is “bottomed and fixed on general principles of justice.” *Centr. Banking & Sec. Co. v. U.S. Fid. & Guar. Co.*, 73 W. Va. 197, 80 S.E. 121, 125 (1913) (quotation marks omitted). For that reason, courts enforce contribution to do “natural justice and equity.” *Id.*

Contribution arises “from liability for a joint wrong committed by two or more parties against the plaintiff.” *Bd. of Educ. of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 602, 390 S.E.2d 796, 801 (1990). Permitting contribution ensures “that those who have contributed to the plaintiff’s damages share in that responsibility.” *Id.* at 603, 390 S.E.2d at 802; *see also Unipunch*, 169 W. Va. at 441, 288 S.E.2d at 513 (holding that contribution arises when one person “is forced to pay more than his *pro tanto* share of the obligation”). It would be “unfair” to have a defendant shoulder the entire obligation and “not be able to obtain contribution from any of his fellow wrongdoers.” *Sitzes v. Anchor Motor Freight, Inc.*, 169 W. Va. 698, 708, 289 S.E.2d 679, 686 (1982). “[A] wrongdoer should not escape his liability on the fortuitous event that another paid the entire joint judgment.” *Id.*

Here, the Parents ignored the fire-starter's warnings and stored it near an open-hearth fireplace within reach of children. Assuming Defendants were liable, denying them contribution rights would unfairly force them to pay the Parents' share of A.N.'s damages. It would also hand the Parents an windfall by giving them, in Plaintiffs' words, a "free pass" for their wrongdoing.

3. Immunity does not negate liability.

"Liability" refers to "culpability." *See, e.g., Bishop*, 632 P.2d at 866; *Zarella*, 100 R.I. at 547-48; *Walker v. Milton*, 263 La. 555, 560 (1972). A parent who commits a wrong is culpable for that wrong. "[I]mmunity from suit should not be confused with ... culpability for the wrong." *Bishop*, 632 P.2d at 867 (quotation marks omitted). "Liability" refers to "the existence of a cause of action rather than the right to enforce the same." *Id.* at 866-67 (quotation marks omitted); *see also Zarella*, 100 R.I. at 547-48 (accord). Thus, parental immunity does not destroy any causes of action but "operate[s] only as a procedural bar to an action." *Walker*, 263 La. at 560. Consequently, liability remains and contribution is permissible. *See id.*

Consistent with these holdings, this Court has held that a parent's wrongdoing "does not cease to be an unlawful act, by reason of [parental] immunity." *Smith v. Smith*, 116 W. Va. 230, 179 S.E. 812, 812 (1935); *see also Freeland*, 152 W. Va. at 337, 162 S.E.2d at 926 (same). Immunity does not destroy the cause of action against the parent for his tort—immunity merely "privilege[s]" the parent from suit on that wrong when the plaintiff is an unemancipated minor. *Lusk*, 113 W.Va. 17, 166 S.E. at 538-39. Thus, the Defendants' contribution claims arise "from liability for a joint wrong." *Zando*, 182 W. Va. at 602, 390 S.E.2d at 801. The Parents' liability arises from, among other things, their wrongdoing in ignoring the fire-starter's warnings and storing the fire-starter near a fireplace within reach of children. That A.N. cannot recover on a cause of action against his Parents does not negate their wrongdoing. They remain culpable.

4. Plaintiffs' case law is unpersuasive.

Plaintiffs argue: (1) contribution claims are barred in workers' compensation cases; (2) some jurisdictions have barred contribution claims in instances where the parent may have parental immunity from a child's suit; and (3) a judge in the Southern District of West Virginia denied a contribution claim against a parent. These arguments are unpersuasive.

First, Plaintiffs cite *Sydenstricker v. Unipunch Prods., Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982), a workers' compensation case, for the proposition that parental immunity bars contribution claims. (Petitioners' Br. at 20-22.) Plaintiffs assert that, because contribution claims are denied against an employer who has compensated its employee, contribution claims should also be denied against parents who have **not** compensated their child for his injuries. (*See id.*) But workers compensation immunity differs from parental immunity.

West Virginia's Workers' Compensation Act established a comprehensive scheme providing an injured employee compensation for work-related injuries without any showing of employer negligence. *See* W. Va. Code § 23-1-1 *et seq.* The Workers' Compensation Act abrogated an employee's cause of action against an employer and, in exchange, gave the employee the right to recover under the Act. *Makarenko v. Scott*, 132 W. Va. 430, 440, 55 S.E.2d 88, 93 (1949), *overruled on other grounds by Jones v. Laird Found., Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973). The Workers' Compensation Act "remove[d] from the common law tort system all disputes" between employer and employees for work-related injuries unless "expressly" preserved in the Act. W. Va. Code § 23-4-2(d)(1). The Act "preserves a common law right of action" against the employer only when the employer deliberately intended to injure the employee. *Delp v. Itmann Coal Co.*, 176 W. Va. 252, 255, 342 S.E.2d 219, 222 (1986); *see also O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 603, 425 S.E.2d 551, 558 (1992) (same).

The employer must “pay[] into the workers’ compensation fund” for or “make direct payments of compensation” to injured employees. W. Va. Code § 23-2-6.

Denying contribution for employers covered by the Workers’ Compensation Act comports with the statutory text and is equitable. Because the Act removes the employee’s cause of action, no common law liability can arise in the first instance. Thus, there can be no “common liability” between employer and a third party. Also, because the employer compensates the employee for his or her injuries, there is no inequity in denying contribution.

In contrast, parental immunity is not a comprehensive statutory scheme designed to streamline resolution of disputes between parents and children. *See, e.g., Cacchillo v. H. Leach Machinery Co.*, 111 R.I. 593, 595-97 (1973) (distinguishing workers’ compensation immunity from spousal immunity, and holding that the latter does not bar contribution claims); *Deines v. Conway*, 1975 WL 174129, at *3-4 (R.I. Super. Ct. 1975) (same as to parental immunity). Parental immunity does not abrogate the child’s cause of action but rather gives the parent immunity. Thus, liability remains, and the parent can have a “common liability” with a third party. The parent never compensates the child for his or her injuries. Consequently, the equity present in the workers’ compensation scheme is absent. Denying contribution against an employer does equity because the employer pays for the injuries. But, denying contribution against a parent creates inequity by requiring a third party to pay for injuries the parent inflicted. As a result, denying contribution allows the parent—unlike the employer—to get a “free pass.” (Petitioners’ Br. at 38.) For these reasons, workers’ compensation cases do not control.

Second, Plaintiffs argue that parental immunity should be extended to third party claims because other jurisdictions have held that the parental immunity doctrine prohibits any

contribution claim against a parent. Plaintiffs cite cases from several states but do not acknowledge the body of contrary case law, which are discussed *supra* and *infra*.

Further, Plaintiffs' cases are inapposite. In the South Dakota case, the court held that the state does not recognize parental immunity. *See Brunner v. Lear-Siegler, Inc.*, 770 F. Supp. 517, 522 (D.S.D. 1991). The court denied the contribution claim not because of parental immunity but because South Dakota does not recognize a claim for negligent supervision. *See id.* at 523. The New York case is inapposite because contrary case law exists. *See Smith v. Hub Mfg., Inc.*, 634 F. Supp. 1505, 1510-11 (N.D.N.Y. 1986) (permitting contribution claim based on intervening state case law). The Texas case holds that the parental immunity doctrine bars a defendant from asserting a claim for a parent's negligent supervision in a wrongful death suit. *See Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 935 (Tex. 1992). That holding conflicts with this Court's case law, which holds that parental negligence may be considered in wrongful death suits. *See, e.g., Cole v. Fairchild*, 198 W. Va. 736, 749-52, 482 S.E.2d 913, 926-29 (1996).

The Delaware case supports Defendants' position. There, the Supreme Court of Delaware held that the parental immunity doctrine does not bar a defendant from asserting that the parents' negligent supervision was a supervening cause of the child's injury. *See Huang*, 652 A.2d at 569-70. The trial court held that evidence of parental negligence was inadmissible because parental immunity barred contribution claims. *See id.* at 571. The appellate court reversed this holding and held that parental negligence was relevant to causation. *Id.* at 569-70.

Also, the Connecticut, Delaware, Idaho, Michigan, South Dakota and Texas cases are inapposite because the courts' holdings were limited to parental negligence that "involves **only** negligent supervision of the child." *Shoemake*, 826 S.W.2d at 935 (emphasis added); *see also Crotta v. Home Depot, Inc.*, 249 Conn. 634, 640 (1991) (considering claim for negligent

supervision); *Huang*, 652 A.2d at 569-70; *Jacobsen v. Schroder*, 117 Idaho 442, 443 (1990) (same); *Brunner*, 770 F. Supp. at 523 (same); *Almli v. Santora*, 154 Mich. App. 60, 62-65 (1986) (same). Here, Defendants allege conduct unrelated to parental supervision. For example, Defendants allege that the Parents ignored the fire-starter's warnings and stored the fire-starter near an open heat source. This conduct has nothing to do with supervision of a child.

Perhaps realizing these deficiencies, Plaintiffs discuss only the Connecticut case, but even that case is not persuasive. That case considered contribution claims for negligent parental supervision. As noted, Defendants' contribution claim relies upon conduct that has nothing to do with parental supervision. Moreover, in reaching its decision, the Connecticut court did not consider, much less discuss, the myriad of cases holding that intra-family immunity does not bar contribution. *See* Part C.1, *supra*, at 17-18 (discussing cases holding that intra-family immunity does not bar contribution). Instead of considering the case law, the court relied upon treatises stating that contribution should not be permitted against a third party with immunity. *See Crotta*, 249 Conn. at 640. For these reasons, the Connecticut case is not persuasive.⁶

Last, Plaintiffs assert that parental immunity bars contribution claims because one federal court judge reached that conclusion—ignoring that, here, Chief Judge Bailey would reach the opposite result. (Petitioners' Br. at 23). In *Sias v. Wal-Mart Stores, Inc.*, 137 F. Supp. 2d 699 (S.D.W. Va. 2001), the court concluded that it was bound to dismiss defendant's contribution claim under this Court's decision in *Cole v. Fairchild*, 198 W. Va. 736, 482 S.E.2d 913 (1996).

⁶ Plaintiffs remaining cases are not persuasive. The North Carolina and Washington cases simply assert that parental immunity bars contribution claims without any explanation or rationale. *See Connolly v. Holt*, 332 N.C. 90, 96 (1992); *Baughn v. Honda Motor Co.*, 105 Wash. 2d 118, 119 (1986).

See 137 F. Supp. 2d at 701-02.⁷ But *Cole* had nothing to do with contribution, and the district court did not explain why *Cole* dictated dismissal of the contribution claim.

In *Cole*, this Court held that the comparative negligence rule applies to permit consideration of the parents' negligence in a wrongful death action brought against a third-party tortfeasor. *See* 198 W. Va. at 749-52, 482 S.E.2d at 926-29. The Court held that the parental immunity doctrine did not bar the defense because the claim was brought by the child's estate and the parents were the beneficiaries of that estate. *See id.* The Court did not consider whether parental immunity bars claims for contribution. In relying upon *Cole* to deny contribution, the district court perplexingly stated that parental immunity "precludes ... the derivative defensive assertion of contributory negligence against a parent for injuries to the child." *Sias*, 137 F. Supp. at 702. The court appears to have confused contributory negligence and contribution. The defendants were asserting a contribution claim against the parents not a contributory negligence defense against the child. *See id.* Because the *Sias* court misinterpreted *Cole* and confused contributory negligence with contribution, this Court should disregard the decision.

In sum, the parental immunity doctrine does not apply to claims brought by third parties against a child's parents. And, as numerous courts have held, denying contribution would be inequitable and would not further the goals of parental immunity. For these reasons, the Court should answer the second certified question "no."

⁷ Contrary to Plaintiffs' assertion, the district court did not rely on—or even cite—*Sydenstricker v. Unipunch Prods., Inc.*, 169 W. Va. 440, 288 S.E.2d 511 (1982) (addressing workers' compensation claim system).

D. CERTIFIED QUESTION THREE: The Parental Immunity Doctrine Does Not Preclude Allegedly Negligent Parents From Being Included As Nonparties For The Allocation Of Fault Even If Parental Immunity Bars Recovery Of The Damages Allocated To The Parent.

West Virginia law is clear: a plaintiff's comparative fault must be ascertained in relation to **all** persons whose negligence contributed to the accident, whether or not those persons are parties to the action. *See Bowman v. Barnes*, 168 W. Va. 111, 112, 282 S.E.2d 613, 615 (1981).

In *Bowman*, this Court considered whether allocation of fault should include the negligence of unsued tortfeasors or only the negligence of parties. *Id.* at 120-21, 282 S.E.2d at 619. The Court noted that there may be situations where a tortfeasor cannot be sued because, for example, he or she "has the benefit of some immunity." *Id.* at 123, 282 S.E.2d at 620. The Court concluded that it would "unfair" to preclude the jury from considering the absent tortfeasor's conduct. *Id.* For that reason, the Court held that a plaintiff's comparative fault "must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation." *Id.* at 112, 282 S.E.2d at 615.

Plaintiffs admit that *Bowman* controls. (*See* Petitioners' Br. at 28-29.) That admission resolves the issue. The Parents must be included for purposes of determining comparative fault.

How the jury form for determining comparative fault should be drafted—whether it should have one line for each person's fault or a single line for the Parents' and Defendants' combined fault—exceeds the scope of the certified question. Moreover, how the jury form is drafted has no effect on Plaintiffs because they have brought products liability claims. Under W. Va. Code § 55-7-24, products liability tortfeasors are jointly liable for all damages regardless of their individual percentages of fault. *See* § 55-7-24(b)(4), (d)(4). Thus, any Defendant allocated fault will be liable to A.N. for the entire verdict regardless of whether any fault was allocated to the Parents. The Court should answer the third certified question "yes."

E. CERTIFIED QUESTION FOUR: The Court Need Not Answer This Question But, If It Does, The Parental Immunity Doctrine Should Be Abolished Or Limited.

The Court need not answer Question Four because, as discussed above, the parental immunity doctrine is inapplicable. However, if the it elects to answer the question, the Court should abolish parental immunity, a judicially created doctrine that denies injured children the right to compensation for harm that their parents caused. The Court should hold that a parent is not immune from tort liability to his or her child solely because of their relationship. At a minimum, the Court should hold that parental immunity is limited to conduct involving an exercise of ordinary parental discretion.

Parental immunity violates the West Virginia Constitution and basic fairness by denying minor children a remedy for injuries suffered at their parents' hands. Article III, section 17 secures to "every person," including children, the right to a remedy for personal injury done to him or her. Denying children a remedy against their parents violates this constitutional right.

In addition, parental immunity does not preserve family harmony but rather undermines it by forcing children to bear the burden of their injuries. The better rule is to permit children to sue for their injuries but to protect parental authority by recognizing parental discretion in the fulfillment of parental duties.

Although the parental immunity doctrine once was the majority rule, the doctrine has been widely discredited and is no longer the majority rule. The doctrine has always been on tenuous ground in West Virginia. "[E]ach time [this Court] has been confronted with a parental immunity issue, another exception to the rule has been carved out." (JA 000657.)

Alternatively, the Court could hold that a parent is immune from liability for conduct solely involving the exercise of ordinary parental discretion.

1. The rationale of parental immunity has long been questioned.

Parental immunity is a judicially created doctrine of questionable pedigree. In 1891, the Supreme Court of Mississippi created the doctrine out of wholecloth. *See Hewlett v. George*, 68 Miss. 703 (1891). Citing no authority, the court held that the preservation of domestic tranquility “forbid to the minor child a right ... to civil redress for personal injuries suffered at the hands of the parent.” *Id.* at 887. The court reasoned that the criminal laws would provide the child all the needed redress. *See id.* Following *Hewlett*, courts across the country quickly adopted the doctrine, premising the immunity on the need for family harmony and parental control over their children. *See* Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 *Fordham L. Rev.* 489, 494 & n.40 (1982) (collecting cases).

West Virginia first recognized parental immunity in 1931 when the Court held that a daughter could not sue her father for injuries she sustained while riding in an automobile driven by him. *See Securo v. Securo*, 110 W. Va. 1, 156 S.E. 750, 750 (1931). Relying on *Hewlett*, the Court held that society had a “very vital interest” preserving family harmony by “not permitting families to be torn asunder by suits for damages by petulant, insolent, or ungrateful children against their parents for real or fancied grievances.” *Id.* at 751. The Court held that it was “better” that a parent’s wrong go unpunished and a child’s injuries uncompensated “than that family life ... be subjected to the disrupting effects of such suits.” *Id.* The Court did not consider the West Virginia Constitution or the common-law notions of equity and justice.

As quickly as the doctrine was created, the Court began limiting it. The next year, the Court held that parental immunity does not apply when a child’s claim is covered by insurance. *See Lusk*, 113 W.Va. 17, 166 S.E. at 538. Following *Lusk*, years passed without this Court hearing a parental immunity issue. In the 1960s, however, the doctrine fell into disrepute across the United States, and parties began challenging the doctrine regularly. *See, e.g., Denton v.*

Glaskox, 614 So.2d 906, 909 (Miss. 1992) (detailing the doctrine’s fall). In considering those challenges, this Court consistently narrowed the scope of parental immunity. *See Cole*, 198 W. Va. at 749-50, 482 S.E.2d at 926-27 (doctrine does not apply to wrongful death claims); *Courtney v. Courtney*, 186 W. Va. 597, 606, 413 S.E.2d 418, 427 (1991) (doctrine does not apply to intentional torts); *Lee*, 159 W. Va. at 588-93, 224 S.E.2d at 722-25 (doctrine does not apply to injuries arising from automobile accidents); *Freeland*, 152 W. Va. at 333-39, 162 S.E.2d at 924-27 (holding that the doctrine does not apply between daughter-in-law and father-in-law). As the district court noted, since 1968, “each time [the Court] has been confronted with a parental immunity issue, another exception to the rule has been carved out.” (JA 000657.)

The Court should not continue its pattern of chipping away at the doctrine. Instead, the Court should abolish the doctrine and protect the weakest in society by affirming the right of children to obtain redress for their injuries.

2. Parental immunity violates the West Virginia Constitution and common law principles of justice.

Parental immunity should be abrogated because it unconstitutionally and unjustly deprives a child of his right to redress for his injuries. The West Virginia Constitution expressly gives children a right to a remedy for their personal injuries:

The courts of this state shall be open, and **every person, for an injury done to him, in his person**, property or reputation, **shall have remedy** by due course of law; and justice shall be administered without sale, denial or delay.

W. Va. Const., Art. III, § 17 (1872) (emphasis added); *see also* U.S. Const., amend. 14 (“[N]o state shall ... deny to any person within its jurisdiction the equal protection of the laws”).

Moreover, it is “a general and indisputable rule” that a legal right demands a remedy. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 163 (1803) (quotation marks omitted). This Court and the Supreme Court of the United States have long recognized that:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.

Id., quoted by *G.M. McCrossin, Inc. v. W.V. Bd. of Regents*, 177 W. Va. 539, 542, 355 S.E.2d 32, 35 (1987). “It is incompatible with this concept to deprive a wrongfully injured party of a remedy merely because the wrongdoer wears the shield of [parental] immunity.” *O’Neil v. City of Parkersburg*, 160 W. Va. 694, 697, 237 S.E.2d 504, 506 (1977). For every wrong, there is a remedy. *Gardner v. Buckeye Sav. & Loan Co.*, 108 W. Va. 673, 680, 152 S.E. 530, 533 (1930).

The general rule in West Virginia is that a party is liable for his torts. *See, e.g., Lee*, 159 W. Va. at 589, 224 S.E.2d at 723. As this Court has repeatedly recognized, a child has a cause of action for injuries inflicted by his parents. *See Smith*, 116 W. Va. 230, 179 S.E. at 812 (parent’s wrongdoing “does not cease to be an unlawful act, by reason of [parental] immunity”); *Freeland*, 152 W. Va. at 337, 162 S.E.2d at 926 (same). Parental immunity does not destroy the cause of action against the parent for his tort—immunity merely “privilege[s]” the parent from suit on that wrong when the plaintiff is an unemancipated minor. *Lusk*, 113 W.Va. 17, 166 S.E. at 538-39 (“the commission of a civil wrong on the child by the parent” remains despite immunity).

That judicially created privilege directly conflicts with the West Virginia Constitution and common law. In direct contravention of Article III, Section 17, parental immunity denies children a remedy for personal injuries inflicted by their parents. Parental immunity “prejudices” children by denying them “the same right to protection and to legal redress for wrongs done them as others enjoy.” *Lee*, 159 W. Va. at 585, 224 S.E.2d at 721. In this way, children are denied the “very essence of civil liberty.” *Marbury*, 5 U.S. at 163.

In addition, as this Court and courts across the country have concluded, “contemporary conditions and modern concepts of fairness” dictate that a child have a remedy for injuries inflicted by his parents. *Lee*, 159 W. Va. at 590, 224 S.E.2d at 723. In *Lee*, this Court described,

at length, the inherent unfairness of the doctrine. *See* 159 W. Va. 585, 224 S.E.2d 721. The Court affirmed that children “enjoy the same right to protection and to legal redress for wrongs done them as others enjoy,” but acknowledged that parental immunity “in one sweep disqualified ... injured minors” from enforcing those rights. *Id.* at 585, 588, 224 S.E.2d at 721-22. For that reason, the Court stated, in dicta, that “we are of the firm opinion that it [parental immunity] should be abrogated in this State.” *Id.* at 593, 224 S.E.2d at 725.

When the Court created parental immunity, the Court relied on decisions from other jurisdictions. The Court did not consider the West Virginia Constitution or common law. A judicially created doctrine must comport with the Constitution and common law. Parental immunity does not. Therefore, this Court must abrogate the doctrine and affirm the child’s constitutional right to a remedy.

3. Parental immunity does not preserve family harmony.

Parental immunity also should be abolished because it does not further its purpose to preserve family harmony. Recognizing the doctrine’s inherent injustice, this Court has consistently held that parental immunity must be narrowly construed. Parental immunity “does not apply where the reason for the rule fails.” *Lusk*, 113 W.Va. 17, 166 S.E. at 538. The doctrine “should not be extended . . . to parties and to situations where [it] should not in logic and common sense apply, and where the public policy enunciated would not be promoted.” *Chase*, 156 W. Va. at 455-56, 195 S.E.2d 810, 817. Thus, where no family disharmony will result, there is “no reason for applying the rule.” *Lusk*, 113 W.Va. 17, 166 S.E. at 538.

Permitting suits between child and parents will not disrupt family harmony. In most cases, the child’s suit is “brought at the instance of, or with the approval of, the parent.” *Lee*, 159 W. Va. at 592, 224 S.E.2d at 724. In such instances, there is no disharmony because parents and child act as one. Even where parents oppose the suit, the suit does not disrupt harmony—the

parents destroyed the family harmony when they injured their child. Numerous courts and commentators agree that it is the injury, not the suit, that causes disharmony. *See, e.g., Petersen v. City & County of Honolulu*, 51 Haw. 484, 486 (1969); *Cates v. Cates*, 156 Ill.2d 76, 100, 103 (1993); *Falco v. Pados*, 444 Pa. 372, 380 (1971); Prosser, *supra*, § 116, at 887. It is “improbable” that a child would file suit against his parent “where there is not already discord in the family.” *Nocktonick v. Nocktonick*, 227 Kan. 758, 762 (1980).

Parental immunity cannot preserve family harmony that does not exist. *See Lee*, 159 W. Va. at 592, 224 S.E.2d at 724. To restore harmony, the parent must right his or her wrong. *See Lusk*, 113 W.Va. 17, 166 S.E. at 538. A suit will not disrupt family harmony but rather may restore it by doing equity between child and parent. *See, e.g., Cates*, 156 Ill.2d at 103 (“If the injury has disharmonized the family, an action can potentially relieve it.”).

For example, in *Lusk*, the Court held that the doctrine did not apply to a suit by a daughter against her father for injuries she suffered from his alleged negligent operation of a school bus where insurance covered her claim. *See* 113 W.Va. 17, 166 S.E. at 538. The Court stated that parental immunity should not be exalted “above ordinary common sense,” and thus parental immunity should not apply when “the reason for the rule fails.” *Id.*

The Court noted that parental harmony is preserved where “[a] wrong is righted instead of ‘privileged.’” *Id.* at 539. Permitting suit would compensate the daughter for injuries arising from her father’s tortious conduct, and thereby lead her to “honor [him] for attempting to provide compensation against her misfortune.” *Id.* For these reasons, the Court held that permitting suit between parent and child assures family harmony rather than disrupting it. *See id.*

Several months later, the Court again held that parental immunity is the exception and does not apply where “the reasons for the ... rule do not exist.” *Freeland*, 152 W. Va. at 339,

162 S.E.2d at 927. In *Freeland*, a woman sued her father-in-law for injuries she sustained while riding in his vehicle. *See id.* at 333; 162 S.E.2d at 924. The Court held that the parties' families were separate and, consequently, permitting suit would not affect family harmony or parental discipline and control. *See id.* at 339, 162 S.E.2d at 927. The Court reiterated "[t]he general rule is that one is liable for his tortious act, immunity from such liability being the exception." *Id.*

In 1976, the Court again rejected application of parental immunity to exempt parents from liability. In *Lee*, the Court held that parental immunity does not apply to any claims for injuries arising from vehicular accidents, regardless of insurance. *See* 159 W. Va. at 589-90, 224 S.E.2d at 723. The Court reasoned that family harmony "is not a proper justification to deprive a child of [his] rights" to recover for personal injuries. *Id.* at 589, 224 S.E.2d at 723. Moreover, the Court noted that personal injury suits between parents and children are frequently friendly suits to recover insurance. *See id.* at 592, 224 S.E.2d at 724. Where the suit is not friendly, it is "very evident that family tranquillity [sic] was nonexistent prior to the suit." *Id.*

Family harmony either exists or it does not. Filing suit has no effect on family harmony. If the parents file suit on behalf of their child, family harmony exists regardless of the suit against the parents. If the child files suit against his parents' wishes, family harmony did not exist in the first instance. In any event, family harmony "is not a proper justification to deprive a child of [his] rights" to redress. *Id.* at 589. For these reasons, the doctrine should be abolished.

4. The majority of states have abolished or strictly limited the parental immunity doctrine.

That parental immunity should be abolished is evident from the number of jurisdictions that already have done so. Contrary to Plaintiffs' assertions, parental immunity is no longer the majority rule. As the district court rightly noted, the definite trend among the United States has been to abolish or strictly limit the parental immunity doctrine. (JA 000653.) Today, the

majority rule is that a parent may be liable to his or her child for injuries caused by the parent's negligence. *See, e.g., Denton*, 614 So.2d at 909-10 & n.6 (collecting cases). Twenty-two states and the District of Columbia have abolished⁸ or declined to adopt⁹ parental immunity. Twelve states have abrogated the doctrine except as to conduct involving the ordinary exercise of parental authority or discretion.¹⁰ And, the highest courts of three states, including West Virginia, have questioned the continuing viability of the doctrine.¹¹

Legal scholars "have almost universally condemned the doctrine." *Id.* at 909; *see, e.g., Comment, The Parental Tort Immunity Doctrine: Is It a Defensible Defense*, 30 U. Rich. L. Rev. 575, 575 n.1 (1996) (collecting scholarship). Commentators have noted that the doctrine conflicts with the common law, which entitled the child "to the enforcement of his own choses in action, including those in tort." Prosser, *supra*, at 885; *see, e.g., Mahnke v. Moore*, 197 Md. 61, 64-65 (1951) (nothing in the case law "suggest[s] that at common law a child could not sue a parent for a personal tort."); *Dunlap v. Dunlap*, 150 A. 905, 906 (N.H. 1930) (same).

⁸ *Broadbent v. Broadbent*, 184 Ariz. 74, 80-82 (1995); *Gibson v. Gibson*, 3 Cal.3d 914, 921-22 (1971); *Bentley v. Bentley*, 172 S.W.3d 375, 378 (Ky. 2005); *Flagg v. Flagg*, 458 A.2d 748, 749 (Me. 1983); *Stamboulis v. Stamboulis*, 401 Mass. 762, 764-65 (1988); *Anderson v. Stream*, 295 N.W.2d 595, 601 (Minn. 1980); *Hartman v. Hartman*, 821 S.W.2d 852, 855-58 (Mo. 1991); *Bonte v. Bonte*, 136 N.H. 286, 289 (1992); *Guess v. Gulf Ins. Co.*, 96 N.M. 27, 29 (1981); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 439 (1969); *Kirchner v. Crystal*, 15 Ohio St.3d 326, 326 (1984); *Winn v. Gilroy*, 296 Ore. 718, 731-34 (1984); *Falco v. Pados*, 444 Pa. 372, 379 (1971); *Elam v. Elam*, 275 S.C. 132, 137 (1980).

⁹ *Myers v. Robertson*, 891 P.2d 199, 203-04 (Alaska 1995); *Rousey v. Rousey*, 528 A.2d 416, 416 (D.C. 1987); *Petersen v. City & County of Honolulu*, 51 Haw. 484, 486-87 (1969); *Transamerica Ins. Co. v. Royle*, 202 Mont. 173, 177-80 (1983); *Rupert v. Steinne*, 90 Nev. 397, 404-05 (1974); *Nuelle v. Wells*, 154 N.W.2d 364, 365-67 (N.D. 1967); *Brunner v. Lear-Siegler, Inc.*, 770 F. Supp. 517, 522 (D.S.D. 1991); *Bishop v. Nielsen*, 632 P.2d 864, 865 (Utah 1981); *Wood v. Wood*, 135 Vt. 119, 121-22 (1977).

¹⁰ *Ascuitto v. Farricielli*, 244 Conn. 692, 705-09 (1998); *Sears, Roebuck & Co. v. Huang*, 652 A.2d 568, 572 (Del. 1995); *Farmers Ins. Group v. Reed*, 109 Idaho 849, 851 (1985); *Cates v. Cates*, 156 Ill.2d 76, 105-08 (1993); *Griffith v. Smith*, 340 N.W.2d 255, 256 (Iowa 1983); *Bonin v. Vannaman*, 261 Kan. 199, 238 (1996); *Plumley v. Klein*, 388 Mich. 1, 8 (1972); *Foldi v. Jeffries*, 93 N.J. 533, 546-49 (1983); *Broadwell v. Holmes*, 871 S.W.2d 471, 476-77 (Tenn. 1994); *Jilani v. Jilani*, 767 S.W.2d 671, 672 (Tex. 1988); *Zellmer v. Zellmer*, 164 Wash.2d 147, 161 (2008); *Goller v. White*, 20 Wis.2d 402, 413 (1963).

¹¹ *Denton v. Glascox*, 614 So.2d 906, 909-12 (Miss. 1992); *Silva v. Silva*, 446 A.2d 1013, 1014-16 (R.I. 1982); *Lee v. Comer*, 159 W. Va. 585, 588-93, 224 S.E.2d 721, 722-25 (1976).

Dean Prosser pointed out that the doctrine rests on the dubious theory that “an uncompensated tort makes for peace in the family and respect for the parent.” *Id.* at 887. Others have reasoned that “it is the injury itself which is the disruptive act” that destroys family harmony. *Falco*, 444 Pa. at 380. Immunity does not deny the tort; immunity merely bars recovery. *See, e.g., Freeland*, 152 W. Va. at 337, 162 S.E.2d at 926; *Smith*, 116 W. Va. 230, 179 S.E. at 812; *Hollister, supra*, at 502 (citing cases). Consequently, the child’s loss and the resulting family conflict “exist[] regardless of the immunity.” *Id.* The immunity merely insures that the injured child, rather than the tortfeasor parent, bears the loss. *See id.*

Almost as quickly as it was created, the doctrine has been rejected. Beginning in the 1960’s, courts began to abolish or strictly limit the doctrine. In 1963, in *Goller v. White*, the Wisconsin Supreme Court abrogated the doctrine except where the alleged negligent act involves (1) “an exercise of parental authority over the child” or (2) “an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.” 20 Wis.2d 402, 413 (1963). The court abolished the doctrine as to all other torts, including those for simple negligence. *See id.*; *see also* 1 Harper & James, *supra*, § 8.11, at 650 (advocating abolishing the doctrine “where the reasonableness of family discipline is not involved”).

The exceptions are granted to the parent “not because he is a parent” but because society demands that he fulfill certain obligations toward his children. *Lemmen v. Servais*, 39 Wis.2d 75, 79 (1968). The purpose of the exceptions is to “enable[e] the parents to discharge the duties which society exacts” of parents. *Id.* Thus, to fall with an exception, the alleged negligent conduct must be “parental in nature” **and** must also be an exercise of parental authority or

parental discretion with regard to a legal duty exacted of parents, such as the duty to feed and shelter one's children. *Cole v. Sears Roebuck & Co.*, 47 Wis.2d 629, 634-35 (1970).

A few years later, in *Gibson v. Gibson*, the Supreme Court of California abolished parental immunity completely. *See* 3 Cal.3d 914, 916 (1971). The court noted that, since its creation, the doctrine had become “riddled with exceptions and seriously undermined by recent decisions.” *Id.*; *see also id.* at 918 (citing cases) The court noted that the exceptions reflected “growing judicial distaste for a rule of law which in one sweep disqualified an entire class of injured minors” from compensation for their injuries. *Id.*

The court rejected the theory that the doctrine was essential to preserve family harmony and protect parental authority. *See id.* at 919. As to family harmony, the court reasoned that parents did not have immunity from property actions, and there was no reason to presume that family harmony is “more endangered by tort actions than by property actions.” *Id.* (quotation marks omitted). The court concluded that “[i]t would be anomalous for us to give greater protection to property rights than to personal rights.” *Id.* at 919 n.7. Similarly, the court reasoned that the law does not bar suits between other family members, such as brothers and sisters, even though such suits pose the same speculative threat to family harmony. *See id.* at 919. The court noted that an uncompensated tort is “no more apt to promote or preserve peace” in the family than is an action between other family members for the same tort. *Id.*

As to threats to parental authority, the court reasoned that the “possibility” that some cases may involve the exercise of parental authority could not justify “a blanket rule of immunity.” *Id.* at 920. The court acknowledged that, in many actions, the alleged negligence will have nothing to do with parental authority over children and thus cannot threaten that authority. *See id.* The court rejected the *Goller* standard because it gave the parent “carte

blanche to act negligently toward his child” within the sphere of parental discipline and care. *See id.* at 921. The court found “intolerable” the notion that a parent “may act negligently with impunity” as long as his conduct fell within the *Goller* exceptions. *See id.*

The court stated that, although a parent has the right and the duty to exercise authority over his minor children, this right and duty “must be exercised within reasonable limits.” *Id.* A parent must act as “an ordinarily reasonable and prudent parent” would have under the circumstances. *Id.* A parent who fails to act reasonably is responsible for the consequences of his actions. *See id.* Accordingly, the court held that a minor child may sue his parent for negligence. *See id.* at 923. The court noted that, “[b]y our decision today we join 10 other states which have already abolished parental tort immunity.” *Id.* at 923.

Thereafter, in 1979, the American Law Institute officially rejected parental immunity. The *Restatement (Second) of Torts* provides that “[a] parent or child is not immune from tort liability to the other solely by reason of that relationship.” § 895G(1). Comment c notes that none of the justifications for immunity outweigh “the more urgent desirability of compensating the injured person, and particularly a child, for genuine harm that may cripple him for life and ruin his future.” § 895G, cmt. c. The *Restatement* also provides that “[r]epudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.” *Id.* § 895G(2). In accordance with *Goller* and *Gibson*, this provision acknowledges that parents have special obligations requiring the exercise of parental discipline and discretion. *Id.*, cmt. k. Comment k notes that the reasonable-parent standard “recognize[s] the existence of that discretion” and thus requires “that the conduct be palpably unreasonable in order to impose liability.” *Id.*; see 2 Harper & James, *supra*, § 8.11 (advocating “reasonable prudent parent” standard).

The majority rule is to permit parents to be sued by their children. *See* Part E.4 at 33-34 & nn. 9-10 (listing the 23 jurisdictions that have wholly abrogated or declined to adopt parental immunity); *see also id.* at 34 & n.11 (listing the 12 jurisdictions that have abrogated parental immunity except for acts involving the ordinary exercise of parental authority or discretion).

West Virginia should follow the majority rule and abolish parental immunity. In *Securo*, the Court adopted the doctrine based on the majority rule. *See* 110 W. Va. 1, 156 S.E. at 750. In subsequent cases, the Court cited the majority rule as justification for narrowing the doctrine. *See, e.g., Courtney*, 186 W. Va. at 606, 413 S.E.2d at 427; *Groves v. Groves*, 152 W. Va. 1, 8, 158 S.E.2d 710, 714 (1968), *abrogated by Lee*, 159 W. Va. 585, 224 S.E.2d 721.

For example, in *Lee*, the Court held that parental immunity does not apply to automobile accidents because the “landslide trend” among jurisdictions is to abolish parental immunity. *Id.* at 591, 224 S.E.2d at 724. Although limiting its holding to automobile accident, the Court went on to state its “firm opinion” that parental immunity “should be abrogated in this State.” *Id.* at 593, 224 S.E.2d at 725. In reaching that opinion, the Court considered the opinions of other jurisdictions and concluded that:

In recent years the application of this doctrine has begun to recede as rapidly as it had once spread. There has been a definite trend throughout our courts toward the abrogation or limitation of such doctrine.

Id. at 588, 224 S.E.2d at 722. Like the majority of jurisdictions, this Court should conclude that parental immunity has run its course.

Parental immunity conflicts with the West Virginia Constitution and common law by denying a child the right to redress for injuries inflicted by his parents. Courts and commentators agree that the doctrine unfairly denies children a remedy while doing nothing to further family harmony. Although immunity does protect parental discretion, it is not necessary and harms

children by permitting parents to commit torts with impunity. As *Gibson* recognized, parental discretion can be protected by properly defining a parent's duty to his child.

For these reasons, this Court should abolish the parental immunity doctrine. To protect parental discretion, however, the Court should adopt the *Gibson* and Restatement standards and hold that, for conduct related to parenting, a parent does not violate his duty by acting as a reasonably prudent parent would under the circumstances. Alternatively, the Court could adopt the *Goller* standard and hold that immunity is abrogated except where the alleged tortious act involves the exercise of parental discipline or ordinary parental discretion with respect to the provision of food, clothing, housing, healthcare, and other care.

CONCLUSION

For the reasons stated, this Court should conclude that the parental immunity doctrine does not preclude a defendant from raising traditional causation defenses that turn, from asserting a contribution claim against parents, or from seeking allocation involving parents. In addition, the Court should follow the majority rule and abolish the parental immunity doctrine. Therefore, the Court should answer the first, second, and third certified questions "no" and the fourth certified question "yes."

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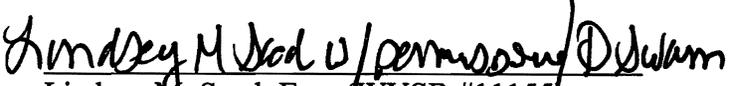
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