

FINDINGS OF FACT

1. On June 27, 2008, Plaintiff Kenneth Goldsborough was injured while operating a remote controlled continuous miner while working in an underground coal mine in Philippi, WV. (Bucyrus Ex. A,¹ p. 1). The continuous miner involved in the accident was a 25M-2 Series miner manufactured by DBT Inc., a predecessor company to Bucyrus. (*Id.*; Brief in Support of Bucyrus Defendants' Motion for Summary Judgment, p. 3 n. 1).
2. On the day of the accident, there were two such continuous miners located in the section of mine in which the accident occurred. (Bucyrus Ex. F, Hess Depo. pp. 25-26). At the time of the accident, the two continuous miners were 164 feet apart with no direct view of each other. (Bucyrus Ex. K., Expert Technical Report of Neil Shirk, p. 14, ¶ 15).
3. Mr. Goldsborough contends that his accident occurred when the continuous miner that he had been operating spontaneously and inadvertently moved while its motors were allegedly shut off, pinning Mr. Goldsborough between the continuous miner and the coal rib. (Bucyrus Ex. A, MSHA Report p. 2; Bucyrus Ex. C, Goldsborough Depo. pp. 230-241).
4. Mr. Jason Nealis was working approximately 50-75 feet from Mr. Goldsborough at the time of the accident and was the first person to attend to Mr. Goldsborough after the accident. (*Id.* at 64). Mr. Nealis testified that the continuous miner's motors were not shut off at the time of the accident because he heard Mr. Goldsborough operating the continuous miner up until the very moment the accident occurred. (*Id.* at 48-51).
5. Within hours of the accident, federal investigators from the Mine Safety and Health Administration ("MNSA") and state investigators from the West Virginia Office of Miners' Health Safety and Training ("WVOMHST") were at the mine inspecting the accident scene, interviewing co-workers and investigating the accident. (Bucyrus Ex. A).
6. The remote controlled continuous miner at issue employed a "teach-learn" technology that works as a safeguard to ensure that only one transmitter will be able to control the movement and functions of a continuous miner. (Bucyrus Ex. K., Expert Technical Report of Neil Shirk, p. 16, ¶ 23). The teach-learn process is carried out by physically connecting a specific transmitter to a specific continuous miner when using a transmitter for the first time with a continuous miner, which ensures that the transmitter will be able to control the movement and functions of only that specific continuous miner. *Id.*
7. During MSHA's accident investigation on the day of the accident, investigators and mine personnel confirmed that the transmitter for the second continuous miner that was underground at the time of the accident controlled only the second continuous miner, and could not control the continuous miner involved in the accident. (Bucyrus Ex. G., Stemple Depo., pp. 129-132). During the investigation, these individuals also confirmed that the transmitter for the second continuous miner had already been through the teach-learn process with the second continuous miner. *Id.*

¹ The Exhibits referenced herein are the Exhibits submitted with the Bucyrus Defendants' Motion for Summary Judgment.

8. As part of its investigation, MSHA took possession of, investigated, inspected and tested the remote control components from the continuous miner at issue. (Bucyrus Ex. H, MSHA Investigative Report). After its investigation of the remote control components, MSHA issued a written report concluding:

“Performance testing of the remote control system showed that it functioned as designed. There was no evidence, either through performance testing or from information stored on the data storage card, to indicate that a malfunction of the remote control system of the machine contributed to the accident.”

(*Id.*).

9. MSHA concluded that Mr. Goldsborough’s accident occurred because of operator error in that Mr. Goldsborough was operating the continuous miner in a prohibited red zone, which is an “area[] established around mobile equipment that present[s] a pinch point hazard.” (Bucyrus Ex. A, MSHA Report p. 5). MSHA’s report states:

“The accident occurred because the continuous miner operator was in a known hazardous location between the continuous miner and the mine rib while operating the mining machine.”

(*Id.*).

10. After completing its investigation, WVOMHST reached the same conclusion:

“The injured was operating the radio remote continuous miner when he was caught between the cable handler and the coal rib resulting in crushing injuries to his left leg and thigh.”

(Ex. A, WVOMHST Mine Accident, Injury and Illness Report).

11. One of Bucyrus’s liability experts, Clyde Reed, interpreted data that was recovered from the subject continuous miner’s on-board memory card. (Bucyrus Ex. K, Defendants’ Liability Expert Disclosures pp. 2-3). Based on the review of the voltage data that was captured on the memory card, the continuous miner’s motor was running continuously in the minute-and-a-half prior to the accident, and Mr. Goldsborough did not power off the continuous miner prior to his accident, as he claimed. (*Id.*). The data further reveals that the left and right trams of the miner were both being activated at the time of the accident, which is consistent with Mr. Goldsborough trammings the miner from the prohibited red zone in the moments before his accident. (*Id.*). Mr. Reed’s conclusions are un rebutted.
12. In this lawsuit, Mr. Goldsborough has asserted a strict product liability claim, a negligence claim and a breach of warranty claim against Bucyrus based on an allegation that “the continuous miner moved, without any action by Kenneth Goldsborough, and crushed him against the mine rib causing him severe and permanent injury.” (Complaint, ¶ 10). Mrs. Goldsborough has asserted a loss of consortium claim. (Complaint, ¶ 31).
13. Plaintiffs claim that the continuous miner at issue was defective in two ways: i) it’s remote transmitter was not protected from the ingress of water, moisture and dust and ii) it’s remote transmitter operated on the same radio frequency as the transmitter for the second continuous miner that was underground at the time of Mr. Goldsborough’s

accident.² (Plaintiffs' Response to the Bucyrus Defendants' Motion for Summary Judgment, p. 1-2). In an effort to prove liability, Plaintiffs rely on the expert testimony of Dr. Roy Nutter.

CONCLUSIONS OF LAW

14. Before the Court is Bucyrus's Motion for Summary Judgment seeking dismissal of Plaintiffs' claims against Bucyrus. After considering the issues, which have been thoroughly briefed by the parties, the Court GRANTS Bucyrus's Motion.

A. Standard for Summary Judgment

15. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Smith v. Apex Pipeline Services, Inc.*, 2013 WL 1395885 at 4 (W. Va. April 4, 2013) (quoting Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 133 S.E.2d 770 (W. Va. 1963)); Syllabus Point 1, *Andrick v. Town of Buckhannon*, 421 S.E.2d 247 (W. Va. 1992). In considering a motion for summary judgment, a reviewing court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Smith*, 2013 WL 1395885 at 4 (citing *Painter v. Peavy*, 451 S.E.2d 755, 756 (W. Va. 1994)). The Court keeps this standard in mind in addressing the parties' arguments.

B. Plaintiffs Cannot Establish Any of Their Claims Against Bucyrus Through Use of Circumstantial Evidence.

16. In *Morningstar v. Black and Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979) the Supreme Court of Appeals of West Virginia established the general test for a strict products liability action: "In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use." *Id.* at Syllabus Point 4. A plaintiff must prove not only the existence of a product defect, but that the defect proximately caused the plaintiff's injury. *Id.* at 680.

17. In their response to Bucyrus's Motion for Summary Judgment, Plaintiffs concede that they cannot determine which of the two alleged product defects caused Mr. Goldsborough's injury. (Plaintiffs' Response to the Bucyrus Defendants' Motion for Summary Judgment, p. 2). Under West Virginia law, however, there are certain

² In their liability disclosure of expert witnesses, Plaintiffs identified a third alleged product defect: the continuous miner was defective because it was not equipped with mechanical or electrical parking brakes. However, Plaintiffs' sole product liability expert, Dr. Roy Nutter, testified that the absence of brakes on the continuous miner is not a defect. (Plaintiffs' Ex. F, Nutter Depo. p. 150) ("I would not say [the subject continuous miner] was defective because it did not have a parking brake, that's correct."). Plaintiffs made clear in their response to Bucyrus's Motion for Summary Judgment that they are only asserting the two product defect theories related to the remote transmitter that are identified above.

circumstances in which a plaintiff need not identify the specific defect that caused the loss, but instead may prove the claim through circumstantial evidence. *Beatty v. Ford Motor Co.*, 574 S.E.2d 803, 807 (W. Va. 2002).

18. In order to make out a *prima facie* case of strict products liability through the use of circumstantial evidence, a plaintiff must prove the following: “a malfunction in the product occurred that would not ordinarily happen in the absence of a defect” and “there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.” *Id.*
19. This Court recognizes that to succeed at the summary judgment stage a plaintiff seeking to prove a strict products liability claim through circumstantial evidence does not have “to conclusively eliminate all possible contributing causes other than a defect for an accident.” *Bennett v. Asco Services, Inc.*, 621 S.E.2d 710, 718 (W.Va. 2005). A plaintiff must, however, “submit evidence that has the capacity to sway the outcome of the litigation, and from which a jury could fairly conclude that *the most likely explanation* of the accident involves the causal contribution of a product defect.” *Id.* (emphasis added). A plaintiff must be able to “eliminate those causes which would prevent a jury from finding that it was more probable than not that” the product at issue was defective. *Id.* at 719. This is what Plaintiffs cannot do.
20. With respect to Plaintiffs’ first alleged product defect theory – that a foreign substance infiltrated the transmitter of the allegedly powered-down continuous miner and activated the continuous miner’s motors in the proper sequence thereby causing the continuous miner to move and injure Mr. Goldsborough - Plaintiffs’ sole product liability expert cannot opine that such a defect is the most likely explanation of the accident.

Q. [Counsel for Bucyrus] Okay. So then the presence of water would have had to cause a short circuit to turn the pump motor on; correct?

A. [Plaintiffs’ product liability expert] Part one.

Q. Okay.

A. Correct.

Q. And then the presence of water would have caused an additional short circuit to activate the tram motors; correct?

A. Correct.

Q. Okay. And then the water would have had to turn off the tram motors and then turned off the pump motor; correct?

A. That’s correct.

Q. And is that the scenario you believe occurred in this case?

A. *I have never said it occurred. I have said it possibly could have occurred.*

* * *

Q. And is it probable that it occurred in that sequence?

A. *All we could say is it could.* Is it probable it would occur in any sequence? Is it probable that it turned on something else and off? It could. Did it happen here? Show me the insides of this machine at that point in time and we'd know a lot more. *We just don't know.*

(Plaintiffs' Ex. F, Nutter Depo. pp. 181-82) (emphasis added).

21. Concerning Plaintiffs' second alleged product defect theory – that the remote transmitter at issue operated on the same radio frequency as the transmitter for the second continuous miner that was underground and the transmitter for the second continuous miner caused the accident – Plaintiffs' sole product liability expert again cannot opine that such an alleged defect was the most likely cause of Mr. Goldsborough's accident.
22. In fact, during his deposition, Dr. Nutter conceded that he could not even opine that a single frequency transmitter was a defective design. Dr. Nutter admitted that he was aware that the remote transmitter at issue employed a "teach-learn" technology that was created as a safeguard so that only one machine could be controlled by a single remote. He then conceded that he did not know enough about the teach-learn technology at issue to opine that use of a single transmitter frequency is a defective design:

Q. [Counsel for Bucyrus] Are you familiar with the teach-learn process?

A. [Plaintiffs' product liability expert] I'm familiar enough to know they do it. I haven't dug in to see exactly what they're doing when they do it.

Q. You have not investigated the specifics of the teach-learn process; correct?

A. No. I in fact have looked for the specifics on it. And didn't find much in our documentation.

Q. Is it your opinion that a system utilizing teach-learn and runs on a single frequency is a defective design?

A. Runs on a single frequency.

Q. Utilizing teach learn is that a defective design in you opinion?

A. Again, I don't know enough about teach learn to answer that question.

(*Id.* at pp. 204-207).

23. The lack of evidence that a product defect was the most likely explanation of Mr. Goldsborough's accident must be viewed in light of the substantial evidence that Mr. Goldsborough's accident was caused, not by a product defect, but by his own operator error.
24. First, Mr. Goldsborough's co-worker, Mr. Nealis, was the only individual that heard the accident occur. Mr. Nealis testified that the continuous miner's motors were not shut off

immediately prior to the accident, but rather that he heard Mr. Goldsborough operating the continuous miner up until the very moment the accident occurred.

25. Next, two independent government investigative agencies investigated this accident and both concluded that Mr. Goldsborough's accident occurred because he was operating the continuous miner from a prohibited area. (MSHA: "The accident occurred because the continuous miner operator was in a known hazardous location between the continuous miner and the mine rib while operating the mining machine.") (WVOMHST: conditions contributing to accident included that Plaintiff "was operating the radio remote continuous miner when he was caught between the cable handler and the coal rib").
26. Finally, a Bucyrus expert witness, Clyde Reed, reviewed data that was saved in the continuous miner at issue and concluded that the data did not support Mr. Goldsborough's version of how his accident occurred. Rather, it showed that the continuous miner's motor was running at the time of the accident and contained data that was consistent with Mr. Goldsborough trammng the miner from the prohibited red zone in the moments before his accident. Mr. Reed's conclusions are un rebutted.
27. Plaintiffs have not identified any evidence that would eliminate operator error as the probable cause of the accident. In fact, even Plaintiffs' own product liability expert concedes that he could not rule out operator error as the cause of Mr. Goldsborough's accident. (Plaintiffs' Ex. F, Nutter Depo. p. 213).
28. Given that Plaintiffs cannot prove that there were product defects and that such defects are the most likely explanation of the accident, any jury verdict reaching such an opinion on these complex technical issues would be improperly based on speculation. *Beatty*, 574 S.E.2d at 808. Plaintiffs, who have the burden of proof, cannot establish a product defect through circumstantial evidence.
29. With respect to Plaintiffs' negligence claim against Bucyrus, the Court recognizes that under the rule of *res ipsa loquitur*, the mere fact that a damage-causing event occurred may, under certain circumstances, suffice for liability. "Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff." *Beatty*, 574 S.E.2d 803, 808.
30. For the same reasons that Plaintiffs cannot prove the strict product liability claim through circumstantial evidence, Plaintiffs have failed to show a genuine question of material fact regarding whether Bucyrus was negligent through the application of *res ipsa loquitur*. The undisputed evidence could not lead a jury to find that Bucyrus was negligent in designing a defective product, that Mr. Goldsborough's accident would not normally have occurred in the absence of negligence or that such negligence was the legal cause of Mr. Goldsborough's accident. Moreover, Plaintiffs cannot eliminate other reasonably probable causes of Mr. Goldsborough's accident, including operator error, a cause that is strongly supported by un rebutted evidence.

C. **Plaintiffs' Concede that They Cannot Prove a Product Defect Caused Mr. Goldsborough's Accident by Direct Evidence.**

31. Given that Plaintiffs cannot prove their strict product liability or negligence claims through circumstantial evidence, the Court now examines whether the evidence is sufficient for Plaintiffs to prove by direct evidence that a specific product defect or negligent act was the legal cause of Plaintiffs' injuries. It is not. Plaintiffs, themselves, concede that they cannot state with certainty the cause of Mr. Goldsborough's injuries. (Plaintiffs' Response to the Bucyrus Defendants' Motion for Summary Judgment, p. 2).
32. Likewise, Plaintiffs' sole product liability expert cannot identify a specific product defect that caused Mr. Goldsborough's accident, and he concedes that he cannot rule out Mr. Goldsborough's own error as causing the accident. (Plaintiffs' Ex. F, Nutter Depo. pp. 211-12). Given that Plaintiffs are unable to prove by direct evidence that a specific product defect or negligent act caused their injuries, a jury verdict in their favor could only be based on improper speculation.
33. For this same reason, Bucyrus is entitled to judgment on Plaintiffs' breach of warranty claims against Bucyrus. A plaintiff has the burden of proving that a breach of warranty was the legal cause of the plaintiff's damages. *E.g. Tolley v. Carboline Co.*, 617 S.E.2d 508, 512 (W. Va. 2005). Plaintiffs cannot prove that any alleged breach of warranty was the legal cause of Mr. Goldsborough's accident and, therefore, cannot satisfy this burden.

D. **Absence of Evidence of Feasible Alternative Design Also Defeats Plaintiffs' Products Liability Design Defect Claim**

34. For the reasons discussed, Plaintiffs' claims against Bucyrus cannot survive summary judgment and the Court's analysis could end here. However, the Court recognizes that Plaintiffs' product liability claim is legally insufficient for additional reasons. Pursuant to *Morningstar*, Plaintiffs must establish a feasible alternative design that eliminates the alleged product defect without impairing the product's utility as an essential element of a defective design products liability claim under West Virginia law. *Morningstar*, 253 S.E.2d at 667; *Church v. Wesson*, 385 S.E.2d 393 (W. Va. 1989).
35. In this case, Plaintiffs' product liability claim against Bucyrus fails for the additional and independent reason that there is no evidence of a feasible alternative design that addresses any of the product design defects Plaintiffs allege.
36. Regarding whether Plaintiffs' sole product liability expert has designed a transmitter that, in his opinion, would withstand water, moisture, or dust ingress (Plaintiffs' first product defect theory), Dr. Nutter testified: "No but I certainly thought about it." (*Id.* at 195). Dr. Nutter did not identify any feasible alternative design other than the hypothetical design that he claims to have considered.
37. In addition, as noted above, Dr. Nutter testified that he was unfamiliar with the teach/learn technology used in the continuous miner at issue and, therefore, could not evaluate whether the single-frequency transmitter design was defective (Plaintiffs' second product defect theory). (*Id.* at pp. 206-07). In addition to Dr. Nutter's inability to

opine that the transmitter design with a single frequency was defective, he was unable to identify a feasible alternative transmitter design that employs multiple frequencies:

- Q. [Counsel for Bucyrus] Do you know if any other manufacturers of remote controlled continuous miners utilize multiple frequencies as opposed to single frequencies?
- A. [Plaintiffs' product liability expert] I do not know.
- Q. Have you done anything to investigate that?
- A. I have not.
- Q. Have you discussed the potential for running remotes on multiple frequencies with any manufacturers of remote control systems?
- A. I have not.
- Q. How about MSHA?
- A. Definitely not.

(*Id.* at 207-08).

38. The Court grants Bucyrus's Motion for Summary Judgment with respect to Plaintiffs' product liability claim for the additional and independent reason that there is no evidence of a feasible alternative design that addresses any of the product defects alleged by Plaintiffs.

E. Bucyrus is Entitled to Judgment as a Matter of Law Under the Risk-Utility Test

39. Bucyrus is entitled to summary judgment on Plaintiff's product liability claim against it for a third reason, which is the Plaintiffs have not presented sufficient evidence under the *Morningstar* seven-factor risk/utility analysis to prove a product defect.
40. *Morningstar* requires a risk/utility analysis of a product's design to determine if the product meets the standards that a reasonably prudent manufacturer would hold, having in mind the "general state of the art of the manufacturing process . . . as it relates to economic costs, at the time the product was made." *Morningstar*, 253 S.E.2d at 667.
41. Specifically, the *Morningstar* Court recognized the seven-factor risk/utility test adopted by the New Jersey Supreme Court in *Cepeda v. Cumberland Engineering Co., Inc.*, 386 A.2d 816 (N.J. 1978), *overruled on other grounds*, *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 177, 406 A.2d 140, 153 (1979), which calls upon a court to weigh the following considerations in determining whether a product is defective:
- 1) The usefulness and desirability of the product – its utility to the user and to the public as a whole;
 - 2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury;
 - 3) The availability of a substitute product which would meet the same need and not be as unsafe;

- 4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
- 5) The user's ability to avoid danger by the exercise of care in the use of the product;
- 6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions;
- 7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Morningstar, 253 S.E.2d at 681-82 (quoting *Cepeda*, 386 A.2d at 826-27).

42. Having reviewed the record evidence, this Court is of the opinion that there is insufficient evidence relevant to the risk/utility analysis for Plaintiffs to satisfy their burden of proving a product defect. Accordingly, the Court grants Bucyrus's Motion for Summary Judgment with respect to Plaintiffs' product liability claim for this additional and independent reason.

F. Mrs. Goldsborough's Loss of Consortium Claim

43. Mrs. Goldsborough's loss of consortium claim is derivative of Mr. Goldsborough's underlying claims. Because the Court is granting judgment for Bucyrus with respect to all of Mr. Goldsborough's claims against Bucyrus, judgment is also granted with respect to Mrs. Goldsborough's derivative loss of consortium claim. *Councill v. Homner Laughlin China Co.*, 823 F. Supp. 2d 370, 385 (N.D.W.Va. 2011).

It is, therefore, ORDERED that Bucyrus's Motion for Summary Judgment is hereby GRANTED and judgment is entered in favor of the Bucyrus Defendants and against Plaintiffs as to all claims asserted by Plaintiffs against Bucyrus.

It is further ORDERED that the Circuit Clerk shall send certified copies of this Order to all counsel of record:

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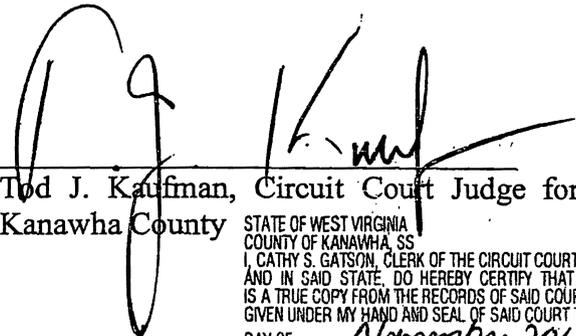
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ENTERED this

November 15, 2013


Todd J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19th
DAY OF November 2013
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA UHM

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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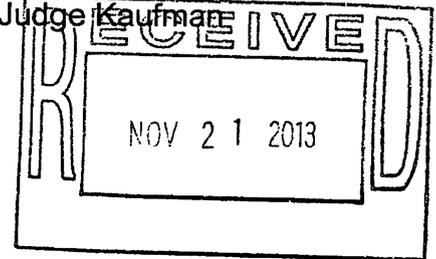
KENNETH GOLDSBOROUGH and
MARY GOLDSBOROUGH,

Plaintiffs,

v.

Civil Action No. 10-C-1170

Judge Kaufman



BUCYRUS INTERNATIONAL, INC., a corporation,
BUCYRUS AMERICA, INC., a corporation,
BUCYRUS MINING EQUIPMENT, INC., a corporation,
STRUCTURED MINING SYSTEMS, INC., a corporation,
WOLF RUN MINING COMPANY, a corporation,
HUNTER RIDGE COAL COMPANY, a corporation,
ICG, INC., a corporation, and ICG, LLC, a limited
liability company,

Defendants.

ORDER GRANTING DEFENDANT, STRUCTURED MINING SYSTEMS, INC.'S
MOTION FOR SUMMARY JUDGMENT

Before the Court is the Summary Judgment Motion of Defendant, Structured Mining Systems, Inc. (hereinafter "SMS"), seeking judgment as to all of Plaintiffs' claims against SMS. The Court, having reviewed the briefs submitted in support of and in opposition to the Motion, having reviewed the record evidence, and upon due consideration, hereby GRANTS SMS's Motion for Summary Judgment.

FINDINGS OF FACT

1. Plaintiffs seek the recovery of damages resulting from an injury sustained by Plaintiff Kenneth Goldsborough in the course of his employment by Wolf Run Mining Company. (Complaint ¶¶ 8-11). At the relevant time, Mr. Goldsborough was operating a remotely controlled continuous miner that incorporated a remote control system manufactured by SMS. (Complaint ¶ 4).

2. On June 27, 2008, Plaintiff Kenneth Goldsborough was injured while operating a remote controlled continuous miner while working in an underground coal mine in Philippi, WV. The continuous miner involved in the accident was a 25M-2 Series miner manufactured by DBT Inc., a predecessor company to Bucyrus.

3. On the day of the accident, there were two such continuous miners located in the section of mine in which the accident occurred. (Bucyrus Ex. F, Hess Depo. pp. 25-26). At the time of the accident, the two continuous miners were 164 feet apart with no direct view of each other. (Bucyrus Ex. K., Expert Technical Report of Neil Shirk, p. 14, ¶ 15).

4. Mr. Goldsborough contends that his accident occurred when the continuous miner that he had been operating spontaneously and inadvertently moved while its motors were allegedly shut off, pinning Mr. Goldsborough between the continuous miner and the coal rib. (Bucyrus Ex. A, MSHA Report p. 2; Bucyrus Ex. C, Goldsborough Depo. pp. 230-241).

5. Mr. Jason Nealis was working approximately 50-75 feet from Mr. Goldsborough at the time of the accident and was the first person to attend to Mr. Goldsborough after the accident. (*Id.* at 64). Mr. Nealis testified that the continuous

miner's motors were not shut off at the time of the accident because he heard Mr. Goldsborough operating the continuous miner up until the very moment the accident occurred. (*Id.* at 48-51).

6. Within hours of the accident, federal investigators from the Mine Safety and Health Administration ("MHSa") and state investigators from the West Virginia Office of Miners' Health Safety and Training ("WVOMHST") were at the mine inspecting the accident scene, interviewing co-workers and investigating the accident.

7. The remote controlled continuous miner at issue employed a "teach-learn" technology that works as a safeguard to ensure that only one transmitter will be able to control the movement and functions of a continuous miner. (Bucyrus Ex. K., Expert Technical Report of Neil Shirk, p. 16, ¶ 23). The teach-learn process is carried out by physically connecting a specific transmitter to a specific continuous miner when using a transmitter for the first time with a continuous miner, which ensures that the transmitter will be able to control the movement and functions of only that specific continuous miner. *Id.*

8. During MSHA's accident investigation on the day of the accident, investigators and mine personnel confirmed that the transmitter for the second continuous miner that was underground at the time of the accident controlled only the second continuous miner, and could not control the continuous miner involved in the accident. (Bucyrus Ex. G., Stemple Depo., pp. 129-132). During the investigation, these individuals also confirmed that the transmitter for the second continuous miner had already been through the teach-learn process with the second continuous miner. *Id.*

9. As part of its investigation, MSHA took possession of, investigated, inspected and tested the remote control components from the continuous miner at issue. (Bucyrus Ex. H, MSHA Investigative Report). After its investigation of the remote control components, MSHA issued a written report concluding:

“Performance testing of the remote control system showed that it functioned as designed. There was no evidence, either through performance testing or from information stored on the data storage card, to indicate that a malfunction of the remote control system of the machine contributed to the accident.”

(*Id.*).

10. MSHA concluded that Mr. Goldsborough’s accident occurred because of operator error in that Mr. Goldsborough was operating the continuous miner in a prohibited red zone, which is an “area[] established around mobile equipment that present[s] a pinch point hazard.” (Bucyrus Ex. A, MSHA Report p. 5). MSHA’s report states:

“The accident occurred because the continuous miner operator was in a known hazardous location between the continuous miner and the mine rib while operating the mining machine.”

(*Id.*).

After completing its investigation, WVOMHST reached the same conclusion:

“The injured was operating the radio remote continuous miner when he was caught between the cable handler and the coal rib resulting in crushing injuries to his left leg and thigh.”

(Ex. A, WVOMHST Mine Accident, Injury and Illness Report).

11. One of Bucyrus’s liability experts, Clyde Reed, interpreted data that was recovered from the subject continuous miner’s on-board memory card. (Bucyrus Ex. K, Defendants’ Liability Expert Disclosures pp. 2-3). Based on the review of the voltage

data that was captured on the memory card, the continuous miner's motor was running continuously in the minute-and-a-half prior to the accident, and Mr. Goldsborough did not power off the continuous miner prior to his accident, as he claimed. (*Id.*) The data further reveals that the left and right trams of the miner were both being activated at the time of the accident, which is consistent with Mr. Goldsborough tramping the miner from the prohibited red zone in the moments before his accident. (*Id.*) Mr. Reed's conclusions are unrebutted.

12. Plaintiffs assert what they have identified as a product liability cause of action against SMS, however this cause of action is characterized in the Complaint as being based upon three theories of recovery, including strict liability (Complaint ¶¶ 13-17), negligence (Complaint ¶¶ 18-23), and breach of warranty (Complaint ¶¶ 24-29) based on an allegation that "the continuous miner moved, without any action by Kenneth Goldsborough, and crushed him against the mine rib causing him severe and permanent injury." (Complaint, ¶ 10). Mrs. Goldsborough has asserted a loss of consortium claim. (Complaint, ¶ 31).

13. Plaintiffs claim that the continuous miner at issue was defective in two ways: i) its remote transmitter was not protected from the ingress of water, moisture and dust and ii) its remote transmitter operated on the same radio frequency as the transmitter for the second continuous miner that was underground at the time of Mr. Goldsborough's accident. (Plaintiffs' Response to the SMS's Motion for Summary Judgment, p. 17). In an effort to prove liability, Plaintiffs rely on the expert testimony of Dr. Roy Nutter.

CONCLUSIONS OF LAW

Before the Court is SMS's Motion for Summary Judgment seeking dismissal of Plaintiffs' claims against SMS. After considering the issues, which have been thoroughly briefed by the parties, the Court GRANTS SMS's Motion.

Summary Judgment Standard

16. When a party makes a motion for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). The court's function at the summary judgment stage is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Painter v. Peavey*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). The court must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. *Id.* "Nevertheless, the party opposing summary judgment must satisfy the burden of proof by offering more a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.* (citation omitted).

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it

has a burden to prove. *Celotex Corp. v. Catrett*, 477 U.S. 317 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).” *Id.*

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no “genuine issue as to any material fact,” since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.

Celotex Corp., 477 U.S. 317, 322-23 (1986). “Therefore, while the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some ‘concrete evidence from which a reasonable ... [finder of fact] could return a verdict in ... [its] favor’ or other ‘significant probative evidence tending to support the complaint.’” *Painter*, 192 W.Va. at 193, 451 S.E.2d at 759 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

[O]nly “reasonable inferences” from the evidence need be considered by a court: [I]t is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture.” We need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences. Whether an inference is reasonable or not cannot be decided in a vacuum; it must be considered “in light of the competing inferences” to the contrary.

Williams v. Precision Coil, 194 W.Va. 52, 60, 459 S.E.2d 329, 337, n.10 (1995) (quoting *Ford Motor Co. v. McDavid*, 259 F.2d 261,266 (4th Cir. 1958)). “The evidence [submitted by the nonmoving party] must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a ‘trialworthy’ issue. A ‘trialworthy’ issue requires not only a ‘genuine’ issue but also an issue that involves a

'material' fact." *Id.* "[T]he term 'material' means a fact that has the capacity to sway the outcome of the litigation under the applicable law. If the facts on which the nonmoving party relies are not material or if the evidence 'is not significantly probative' brevis disposition becomes appropriate." *Id.*, n.13.

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." The essence of the inquiry the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."

Williams, 194 W.Va. at 61, 459 S.E.2d at 338 (quoting *Anderson*, 477 U.S. 242, 247-48, 251-52 (1986)).

Plaintiffs cannot prevail on any claim based upon an alleged defect of the TX 944 remote control as the expert testimony offered on that point does not meet the applicable legal standard.

17. The strict liability cause of action relieves a plaintiff of the need to prove certain elements of a typical negligence claim. Proof of a product defect is, in effect, substituted for proof of duty and breach.

The cause of action covered by the term "strict liability in tort" is designed to **relieve the plaintiff from proving that the manufacturer was negligent** in some particular fashion during the manufacturing process and to **permit proof of the defective condition of the product** as the principal basis of liability.

Morningstar v. Black and Decker Mfg. Co., 161 W.Va. 857, 253 S.E.2d 666 (1979), Syl. pt. 3 (emphasis added). Even if it is assumed, for the sake of argument, that Plaintiffs may, as a matter of law, assert cognizable claims that might be characterized as negligence or breach of warranty, such claims, as set forth in the Complaint, also rely

upon proof of a product defect for which SMS is responsible. Proof of product defect requires evidence of the relevant characteristics of a properly designed product.

In this jurisdiction the general test for establishing strict liability in tort is **whether the involved product is defective in the sense that it is not reasonably safe** for its intended use. The standard of **reasonable safeness is determined** not by the particular manufacturer, but **by what a reasonably prudent manufacturer's standards should have been** at the time the product was made.

The term "unsafe" imparts a standard that **the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.**

Morningstar, 161 W.Va. at 857-58, 253 S.E.2d at 667, Syl. pts 4-5. At no point does Dr. Nutter's testimony approach the evidentiary standard required by *Morningstar*.

18. The substance of Dr. Nutter's opinions may be accurately characterized as follows: 1) "The entry of water into an electronic device can cause it to malfunction and, based upon my understanding and belief that water has entered other similar TX 944 remote control transmitters at various unspecified times under unspecified conditions, it is probable that the remote control system at issue here malfunctioned due to the entry of water," and, 2) "Where two remote control systems operate by transmitting and receiving on a single radio frequency, one such system may exhibit a control malfunction due to its receiving signals from the wrong transmitter, therefore, as all TX 944 remote control systems utilize a single radio frequency and as a second such system was present in the mine when the incident at issue occurred, it is probable that the remote control system at issue here malfunctioned due to interference from the second TX 944 transmitter." Were these only summaries of Dr. Nutter's opinions, and

subject to further explanation by reference to other factual details and a thorough analysis by Dr. Nutter of all relevant factors, it might be possible for Plaintiffs to present a *prima facie* case for product defect under *Morningstar*, but these characterizations include all the facts and analysis upon which Dr. Nutter relies. This is insufficient as a matter of law. *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E. 2d 171 (1995), Syl. pt. 2.

19. Dr. Nutter was not aware of any specific relevant details of the TX 944 system's design, nor was he able to present any testimony as to the details of a reasonably safe alternate design. Thus, Dr. Nutter did not present any testimony relevant to understanding what a "reasonably prudent manufacturer would accomplish in regard to the safety of the product[.]" Absent some relevant understanding of what a reasonably safe design would include, and how the details of such a design differ from the corresponding design elements of the TX 944 system, there is simply no evidentiary basis for a jury to conclude that the TX 944 was not reasonably safe. There is thus no evidentiary basis sufficient to show that the TX 944 was defective.

**Plaintiffs' Cannot Establish Any of Their Claims Against
SMS Through Use of Circumstantial Evidence.**

20. In *Morningstar v. Black and Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979) the Supreme Court of Appeals of West Virginia established the general test for a strict products liability action: "In this jurisdiction the general test for establishing strict liability in tort is whether the involved product is defective in the sense that it is not reasonably safe for its intended use." *Id.* at Syllabus Point 4. A plaintiff must prove not only the existence of a product defect, but that the defect proximately caused the plaintiff's injury. *Id.* at 680.

21. In their response to Bucyrus's Motion for Summary Judgment, Plaintiffs concede that they cannot determine which of the two alleged product defects caused Mr. Goldsborough's injury. (Plaintiffs' Response to the Bucyrus Defendants' Motion for Summary Judgment, p. 2). Under West Virginia law, however, there are certain circumstances in which a plaintiff need not identify the specific defect that caused the loss, but instead may prove the claim through circumstantial evidence. *Beatty v. Ford Motor Co.*, 574 S.E.2d 803, 807 (W. Va. 2002).

22. In order to make out a *prima facie* case of strict products liability through the use of circumstantial evidence, a plaintiff must prove the following: "a malfunction in the product occurred that would not ordinarily happen in the absence of a defect" and "there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction." *Id.*

23. This Court recognizes that to succeed at the summary judgment stage a plaintiff seeking to prove a strict products liability claim through circumstantial evidence does not have "to conclusively eliminate all possible contributing causes other than a defect for an accident." *Bennett v. Asco Services, Inc.*, 621 S.E.2d 710, 718 (W.Va. 2005). A plaintiff must, however, "submit evidence that has the capacity to sway the outcome of the litigation, and from which a jury could fairly conclude that *the most likely explanation* of the accident involves the causal contribution of a product defect." *Id.* (emphasis added). A plaintiff must be able to "eliminate those causes which would prevent a jury from finding that it was more probable than not that" the product at issue was defective. *Id.* at 719. This is what Plaintiffs cannot do.

24. With respect to Plaintiffs' first alleged product defect theory – that a foreign substance infiltrated the transmitter of the allegedly powered-down continuous miner and activated the continuous miner's motors in the proper sequence thereby causing the continuous miner to move and injure Mr. Goldsborough - Plaintiffs' sole product liability expert cannot opine that such a defect is the most likely explanation of the accident.

Q. [Counsel for Bucyrus] Okay. So then the presence of water would have had to cause a short circuit to turn the pump motor on; correct?

A. [Plaintiffs' product liability expert] Part one.

Q. Okay.

A. Correct.

Q. And then the presence of water would have caused an additional short circuit to activate the tram motors; correct?

A. Correct.

Q. Okay. And then the water would have had to turn off the tram motors and then turned off the pump motor; correct?

A. That's correct.

Q. And is that the scenario you believe occurred in this case?

A. *I have never said it occurred. I have said it possibly could have occurred.*

Q. And is it probable that it occurred in that sequence?

A. *All we could say is it could.* Is it probable it would occur in any sequence? Is it probable that it turned on something else and off? It could. Did it happen here? Show me the insides of this machine at that point in time and we'd know a lot more. *We just don't know.*(Plaintiffs' Ex. F, Nutter Depo. pp. 181-82) (emphasis added).

25. Concerning Plaintiffs' second alleged product defect theory – that the remote transmitter at issue operated on the same radio frequency as the transmitter for the second continuous miner that was underground and the transmitter for the second continuous miner caused the accident – Plaintiffs' sole product liability expert again cannot opine that such an alleged defect was the most likely cause of Mr. Goldsborough's accident.

26. In fact, during his deposition, Dr. Nutter conceded that he could not even opine that a single frequency transmitter was a defective design. Dr. Nutter admitted that he was aware that the remote transmitter at issue employed a "teach-learn" technology that was created as a safeguard so that only one machine could be controlled by a single remote. He then conceded that he did not know enough about the teach-learn technology at issue to opine that use of a single transmitter frequency is a defective design:

Q. [Counsel for Bucyrus] Are you familiar with the teach-learn process?

A. [Plaintiffs' product liability expert] I'm familiar enough to know they do it. I haven't dug in to see exactly what they're doing when they do it.

Q. You have not investigated the specifics of the teach-learn process; correct?

A. No. I in fact have looked for the specifics on it. And didn't find much in our documentation.

Q. Is it your opinion that a system utilizing teach-learn and runs on a single frequency is a defective design?

A. Runs on a single frequency.

Q. Utilizing teach learn is that a defective design in your opinion?

A. Again, I don't know enough about teach learn to answer that question.

(*Id.* at pp. 204-207).

27. The lack of evidence that a product defect was the most likely explanation of Mr. Goldsborough's accident must be viewed in light of the substantial evidence that Mr. Goldsborough's accident was caused, not by a product defect, but by his own operator error.

28. First, Mr. Goldsborough's co-worker, Mr. Nealis, was the only individual that heard the accident occur. Mr. Nealis testified that the continuous miner's motors were not shut off immediately prior to the accident, but rather that he heard Mr. Goldsborough operating the continuous miner up until the very moment the accident occurred.

29. Next, two independent government investigative agencies investigated this accident and both concluded that Mr. Goldsborough's accident occurred because he was operating the continuous miner from a prohibited area. (MSHA: "The accident occurred because the continuous miner operator was in a known hazardous location between the continuous miner and the mine rib while operating the mining machine.") (WVOMHST: conditions contributing to accident included that Plaintiff "was operating the radio remote continuous miner when he was caught between the cable handler and the coal rib").

30. Finally, a Bucyrus expert witness, Clyde Reed, reviewed data that was saved in the continuous miner at issue and concluded that the data did not support Mr.

Goldsborough's version of how his accident occurred. Rather, it showed that the continuous miner's motor was running at the time of the accident and contained data that was consistent with Mr. Goldsborough tramping the miner from the prohibited red zone in the moments before his accident. Mr. Reed's conclusions are unrebutted.

31. Plaintiffs have not identified any evidence that would eliminate operator error as the probable cause of the accident. In fact, even Plaintiffs' own product liability expert concedes that he could not rule out operator error as the cause of Mr. Goldsborough's accident. (Plaintiffs' Ex. F, Nutter Depo. p. 213).

32. Given that Plaintiffs cannot prove that there were product defects and that such defects are the most likely explanation of the accident, any jury verdict reaching such an opinion on these complex technical issues would be improperly based on speculation. *Beatty*, 574 S.E.2d at 808. Plaintiffs, who have the burden of proof, cannot establish a product defect through circumstantial evidence.

33. With respect to Plaintiffs' negligence claim against SMS, the Court recognizes that under the rule of *res ipsa loquitur*, the mere fact that a damage-causing event occurred may, under certain circumstances, suffice for liability. "Pursuant to the evidentiary rule of *res ipsa loquitur*, it may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff." *Beatty*, 574 S.E.2d 803, 808.

34. For the same reasons that Plaintiffs cannot prove the strict product liability claim through circumstantial evidence, Plaintiffs have failed to show a genuine question of material fact regarding whether SMS was negligent through the application of *res ipsa loquitur*. The undisputed evidence could not lead a jury to find that SMS was negligent in designing a defective product, that Mr. Goldsborough's accident would not normally have occurred in the absence of negligence or that such negligence was the legal cause of Mr. Goldsborough's accident. Moreover, Plaintiffs cannot eliminate other reasonably probable causes of Mr. Goldsborough's accident, including operator error, a cause that is strongly supported by un rebutted evidence.

**Plaintiffs Concede that They Cannot Prove A Product Defect Caused
Mr. Goldsborough's Accident by Direct Evidence.**

35. Given that Plaintiffs cannot prove their strict product liability or negligence claims through circumstantial evidence, the Court now examines whether the evidence is sufficient for Plaintiffs to prove by direct evidence that a specific product defect or negligent act was the legal cause of Plaintiffs' injuries. It is not. Plaintiffs, themselves, concede that they cannot state with certainty the cause of Mr. Goldsborough's injuries. (Plaintiffs' Response to the Bucyrus Defendants' Motion for Summary Judgment, p. 2).

36. Likewise, Plaintiffs' sole product liability expert cannot identify a specific product defect that caused Mr. Goldsborough's accident, and he concedes that he cannot rule out Mr. Goldsborough's own error as causing the accident. (Plaintiffs' Ex. F, Nutter Depo. pp. 211-12). Given that Plaintiffs are unable to prove by direct evidence that a specific product defect or negligent act caused their injuries, a jury verdict in their favor could only be based on improper speculation.

37. For this same reason, SMS is entitled to judgment on Plaintiffs' breach of warranty claims against SMS. A plaintiff has the burden of proving that a breach of warranty was the legal cause of the plaintiff's damages. *E.g. Tolley v. Carboline Co.*, 617 S.E.2d 508, 512 (W. Va. 2005). Plaintiffs cannot prove that any alleged breach of warranty was the legal cause of Mr. Goldsborough's accident and, therefore, cannot satisfy this burden.

**Absence of Evidence of Feasible Alternative Design
Also Defeats Plaintiffs' Products Liability Design Defect Claim**

38. For the reasons discussed, Plaintiffs' claims against SMS cannot survive summary judgment and the Court's analysis could end here. However, the Court recognizes that Plaintiffs' product liability claim is legally insufficient for additional reasons. Pursuant to *Morningstar*, Plaintiffs must establish a feasible alternative design that eliminates the alleged product defect without impairing the product's utility as an essential element of a defective design products liability claim under West Virginia law. *Morningstar*, 253 S.E.2d at 667; *Church v. Wesson*, 385 S.E.2d 393 (W. Va. 1989).

39. In this case, Plaintiffs' product liability claim against SMS fails for the additional and independent reason that there is no evidence of a feasible alternative design that addresses any of the product design defects Plaintiffs allege.

40. Regarding whether Plaintiffs' sole product liability expert has designed a transmitter that, in his opinion, would withstand water, moisture, or dust ingress (Plaintiffs' first product defect theory), Dr. Nutter testified: "No but I certainly thought about it." (*Id.* at 195). Dr. Nutter did not identify any feasible alternative design other than the hypothetical design that he claims to have considered.

41. In addition, as noted above, Dr. Nutter testified that he was unfamiliar with the teach/learn technology used in the continuous miner at issue and, therefore, could not evaluate whether the single-frequency transmitter design was defective (Plaintiffs' second product defect theory). (*Id.* at pp. 206-07). In addition to Dr. Nutter's inability to opine that the transmitter design with a single frequency was defective, he was unable to identify a feasible alternative transmitter design that employs multiple frequencies:

Q. [Counsel for Bucyrus] Do you know if any other manufacturers of remote controlled continuous miners utilize multiple frequencies as opposed to single frequencies?

A. [Plaintiffs' product liability expert] I do not know.

Q. Have you done anything to investigate that?

A. I have not.

Q. Have you discussed the potential for running remotes on multiple frequencies with any manufacturers of remote control systems?

A. I have not.

Q. How about MSHA?

A. Definitely not.

(*Id.* at 207-08).

42. The Court grants SMS's Motion for Summary Judgment with respect to Plaintiffs' product liability claim for the additional and independent reason that there is no evidence of a feasible alternative design that addresses any of the product defects alleged by Plaintiffs.

SMS is Entitled to Judgment as a Matter of Law Under the Risk-Utility Test

43. SMS is entitled to summary judgment on Plaintiff's product liability claim against it for a third reason, which is the Plaintiffs have not presented sufficient

evidence under the *Morningstar* seven-factor risk/utility analysis to prove a product defect.

44. *Morningstar* requires a risk/utility analysis of a product's design to determine if the product meets the standards that a reasonably prudent manufacturer would hold, having in mind the "general state of the art of the manufacturing process . . . as it relates to economic costs, at the time the product was made." *Morningstar*, 253 S.E.2d at 667.

45. Specifically, the *Morningstar* Court recognized the seven-factor risk/utility test adopted by the New Jersey Supreme Court in *Cepeda v. Cumberland Engineering Co., Inc.*, 386 A.2d 816 (N.J. 1978), *overruled on other grounds*, *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 177, 406 A.2d 140, 153 (1979), which calls upon a court to weigh the following considerations in determining whether a product is defective:

- 1) The usefulness and desirability of the product – its utility to the user and to the public as a whole;
- 2) The safety aspects of the product – the likelihood that it will cause injury, and the probable seriousness of the injury;
- 3) The availability of a substitute product which would meet the same need and not be as unsafe;
- 4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
- 5) The user's ability to avoid danger by the exercise of care in the use of the product;
- 6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions;
- 7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Morningstar, 253 S.E.2d at 681-82 (quoting *Cepeda*, 386 A.2d at 826-27).

46. Having reviewed the record evidence, this Court is of the opinion that there is insufficient evidence relevant to the risk/utility analysis for Plaintiffs to satisfy their burden of proving a product defect. Accordingly, the Court grants SMS's Motion for Summary Judgment with respect to Plaintiffs' product liability claim for this additional and independent reason.

Mrs. Goldsborough's Loss of Consortium Claim

47. Mrs. Goldsborough's loss of consortium claim is derivative of Mr. Goldsborough's underlying claims. Because the Court is granting judgment for SMS with respect to all of Mr. Goldsborough's claims against SMS, judgment is also granted with respect to Mrs. Goldsborough's derivative loss of consortium claim. *Council v. Homner Laughlin China Co.*, 823 F. Supp. 2d 370, 385 (N.D.W.Va. 2011).

It is, therefore, ORDERED that SMS's Motion for Summary Judgment is hereby GRANTED and judgment is entered in favor of Defendant SMS and against Plaintiffs as to all claims asserted by Plaintiffs against SMS.

It is further ORDERED that the Circuit Clerk shall send certified copies of this Order to all counsel of record.

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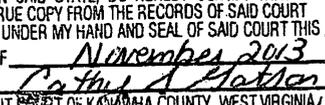
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ENTERED this 15 day of November, 2013.



Tod J. Kaufman, Circuit Court Judge for
Kanawha County

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 19th
DAY OF November 2013
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 

PREPARED AND APPROVED BY:

 (WVSB# 12064)

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