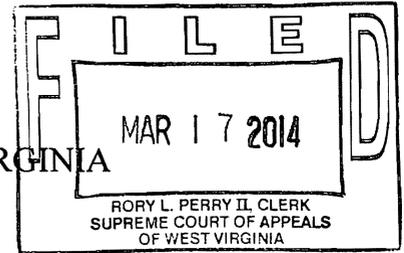


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



KENNETH GOLDSBOROUGH and
MARY GOLDSBOROUGH,

Plaintiffs below, Petitioners,

v.

Docket No. 13-1323
(Kanawha County Circuit Court
Civil Action No. 10-C-1170)

BUCYRUS INTERNATIONAL, INC.,
BURCYRUS AMERICA, INC.,
BUCYRUS MINING EQUIPMENT, INC.,
and STRUCTURED MINING, INC.,

Defendants below, Respondents.

PETITIONERS' APPEAL BRIEF

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred by misapprehending and misapplying the malfunction theory of product liability, articulated by this Court in *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991).
- B. The trial court erred by adding elements to the *prima facie* case for strict liability in tort based on a defective product that have not been adopted by this Court.
- C. The trial court erred by construing disputed questions of fact against the petitioners in contradiction of well established standards for summary judgment.

II. STATEMENT OF THE CASE

A. Procedural History

Petitioners Kenneth and Mary Goldsborough, plaintiffs below, filed this case against respondents Bucyrus International, Inc., Bucyrus America, Inc., Bucyrus Mining Equipment, Inc. (“Bucyrus”), and Structured Mining, Inc. (“Structured”), defendants below, in the Circuit Court of Kanawha County on June 28, 2010, asserting claims of strict liability in tort regarding manufacturer and seller, negligence and breach of warranty.¹ (App. 1347). After the close of discovery, respondents filed their respective motions for summary judgment, (App. 0035, 0651), to which the petitioners filed timely responses in opposition, (App. 0608, 0665), and the respondents filed replies. (App. 0630, 0684). The trial court conducted a hearing on May 15, 2013, allowing limited argument on only respondent Bucyrus’s motion. Transcript of Hearing Held on May 15, 2013 (“Hearing Transcript”) (App. 1186). Subsequent to the hearing and with leave of the trial court, the petitioners

¹ WolfRun Mining Company, Hunter Ridge, ICG, Inc. and ICG, LLC, were also named of defendants in this case but are not parties to this appeal.

filed a Response to a limited issue raised in the reply filed by the Bucyrus Respondents and also a Surreply to Structured's Reply. (App. 0646, 0693).

At the request of the trial court, the parties submitted proposed orders regarding the summary judgment motions. (App. 1377, 1391, 1414, 1431). On November 15, 2013, the trial court entered the orders submitted by respondents Bucyrus and Structured, adopting the respondents' proposed orders *in toto*, and granting each respondent's motion for summary judgment. (App. 0001, 0013).

Petitioners filed their Notice of Appeal on December 18, 2013. Respondents served a motion to dismiss the appeal as untimely on January 7, 2014. Petitioners served a Response to that motion combined with a motion to enlarge the time for the filing of the notice of appeal for good cause shown on January 13, 2014. This Court granted the motion for enlargement of time and denied the motion to dismiss the appeal on January 23, 2014. The petitioners now timely perfect their appeal by filing this Petition, in accordance with this Court's January 23, 2014 Scheduling Order.

B. Statement of the Facts²

Kenneth Goldsborough worked in underground coal mines for approximately 35 years, beginning in 1973. Goldsborough depo., 30:12-25 (App. 0703). For many of these years he operated continuous miners – large, powerful machines that travel on metal tracks, similar to a military tank or bulldozer, and cut coal with rotating drums equipped with replaceable metal bits. *Id.* at 43:1-21 (App. 0704). The continuous miner Mr. Goldsborough was operating at the Wolf Run Mining Company's Sentinel mine on June 27, 2008 – model 25M-2 manufactured by Bucyrus (previously

² Except as otherwise noted, petitioners presented these facts to the trial court in their Responses to the respondents' motions for summary judgment. *See* Plaintiffs' Response to the Bucyrus Defendants' Motion for Summary Judgment, Facts, 2-11 (App. 0609-18); Plaintiffs' Response to Defendant, Structured Mining Systems, Inc.'s Motion for Summary Judgment, Facts, 1-9 (App. 0665-673).

known as DBT), serial number 34-2151 (the “2151 miner”) – was purchased by ICG for Wolf Run’s use. It was controlled wirelessly via a TX-944 remote control system manufactured by defendant Structured Mining (d.b.a. Cervis) exclusively for and in cooperation with Bucyrus.³

At the time of his injury, Mr. Goldsborough had worked for approximately two (2) years at Sentinel where he usually operated continuous miners manufactured by Joy, a Bucyrus competitor, on a different section of the mine. *Id.* at 56:9-19 (App. 0705); 56:22-57:1 (App. 0705-06); 80:11-25 (App. 0707). However, Mr. Goldsborough had also previously operated the DBT continuous miners at ICG’s Stoney River mine in Mount Storm, West Virginia. Goldsborough depo., 386:22-389:3 (App. 0722). He testified that, while working with the machines at that mine, the boom of the continuous miner – the mechanism extending from the back of the machine that unloads coal into a shuttle car – would move by itself, and the water sprays would come on without command. *Id.* at 437:23-22 (App. 0724).

1. Unintended Movement and Injury.

On June 27, 2008, Kenneth Goldsborough was not scheduled to operate the 2151 miner on the No. 1 section. However, he was sent to the section because there was no other miner operators available. Goldsborough depo., 154:17-155:12-14 (App. 0711-12). On the No. 1 section that day, he mined coal with one of the Bucyrus miners in one entry while section foreman Eric Hess repositioned the second miner in another entry to get it set up for Mr. Goldsborough to mine coal in that entry. Hess depo., 88:15-21 (App. 1066).

At sometime around 12:30 p.m., Mr. Goldsborough had finished mining coal in the No. 3

³ Because of various corporate mergers and purchases, the Bucyrus continuous miners are referred to in some documents as “DBT” miners. Bucyrus was purchased by Caterpillar Global Mining subsequent to the filing of this action.

entry of the section. A ventilation curtain hung along the left side of the entry, across the crosscut, and into the entry on the opposite side of the crosscut. Jason Nealis and Steve Braham were sitting by a bolting machine in the crosscut, behind the ventilation curtain which blocked their view of Mr. Goldsborough. Nealis depo., 29:8-30:4 (App. 1070-71). They were waiting for Mr. Goldsborough to inform them that he had finished mining the entry and that the continuous miner was out of the way to allow them to enter and install roof bolts. *Id.* at 22:19-23:6 (App. 1069).

Once he finished both runs of the cut, Mr. Goldsborough stood in the crosscut, away from the mining machine, and began to back the 2151 miner out of the entry. As he did so, however, the left side of the cutter or ripper head became caught on the ventilation curtain. Goldsborough depo., 223:16-25 (App. 0713). Realizing that he would tear the curtain down if he continued backing up, Mr. Goldsborough pressed the button on the transmitter that shut down power to the miner's hydraulic pump, cutter heads, and tram motors. *Id.* He then walked between the miner and the right wall or rib of the entry, around the front of the miner and across to the left side of the cutter head, where he reached up and flipped the ventilation curtain off of the cutter head. *Id.* at 232:22-25 (App. 0714). He then returned on the path he had traveled, past the cutter head, along the right side of the 2151 miner next to the coal rib. *Id.* at 235:21-236:20 (App. 0716). Just as he reached the corner of the continuous miner, he felt the machine strike him. *Id.* at 241:9-25 (App. 0717). The metal cable handler that protruded from the rear corner of the miner struck him straight on in the inner part of his left thigh, crushing the outside of his thigh into the rib and snapping his femur. *Id.* The transmitter box, which he was wearing on a strap around his neck, swung around and was trapped between the body of the miner and Mr. Goldsborough's abdomen. Nealis depo., 26:5-7 (App. 1069). Mr. Goldsborough remembers only hearing his bone snap, feeling a crunching sensation, saying

goodbye to his family, and then losing consciousness. Goldsborough depo., 248:3-8 (App. 0718).

Mr. Goldsborough did regain consciousness, although he cannot say how long it was after being pinned. *Id.* at 250:24-251:1(App. 0718-19). He yelled for help and Mr. Nealis and Mr. Braham heard his cries. *Id.*; Nealis depo, 30:2-11 (App. 1070). Mr. Nealis was the first to come through the ventilation curtain and see Mr. Goldsborough trapped against the rib. *Id.* Mr. Nealis testified that the machine was not running when he arrived on the scene. *Id.* at 50:17-20 (App. 1072). Mr. Braham ran to get Eric Hess. Braham depo, 46:9-15 (App. 1062). Mr. Hess testified that just before he heard Mr. Braham's calls, he had been operating the second continuous miner with a TX-944 transmitter and had just stopped it to move the electrical cable out of the way. Hess depo., 53:17-21 (App. 1065). When Mr. Braham told him that Mr. Goldsborough was pinned, he turned off the transmitter he had been using, set it down, and ran to the scene. *Id.*, 49:22-50:2 (App. 1064). The crew, realizing they could not use the pinned transmitter to move the continuous miner, quickly brought a scoop to the scene, hooked a chain between the machines, and used the scoop to pull the continuous miner just far enough from the rib to free Mr. Goldsborough. Maxwell depo., 38:17-39:17 (App. 1075). Mr. Goldsborough was life flighted to WVU Hospitals where they were able to save his life and his leg. He remains in pain every day, due to the initial injuries as well as the numerous surgeries he has had to undergo, and is limited in his mobility. Mr. Goldsborough also has a permanent ileostomy because of the damage to his bowels. *See* Life Care Plan and Vocational Evaluation of Kenneth Goldsborough (App. 1084-1101) (summarizing medical records).

2. Investigation of the Accident and Loss of Critical Data.

Investigators from both the Miners Safety and Health Administration ("MSHA") and the West Virginia Office of Miners' Health Safety and Training ("WVOMHST") came to the mine the day of

the incident. MSHA Report of Investigation (App. 0073). After interviewing Mr. Goldsborough's coworkers, the investigators went underground to inspect the scene, take pictures and begin their site investigation. *Id.* at App. 1228. While there, investigators tried and failed to make the transmitter for the other continuous miner activate the 2151 miner. Stemple depo. 47:4-11 (App. 1252). But the investigators did nothing else to test or examine the two continuous miners or the components of the TX-944 remote control system at that time.

Both of the DBT 25M-2 continuous miners on the No. 1 Section that day were equipped with computer memory cards ("CF cards"). The CF cards are designed to record information from the continuous miners' computer system regarding voltages and currents present on the motors, as well as temperatures, settings and reported faults or errors. MSHA remote system report, 9-10 (App. 1119-20). These cards were contained within the computer display unit on the continuous miners. Both of the miners, their TX-944 remote control system components, including the transmitters, and CF cards sat unattended on the section from that Friday evening until Monday, June 30, 2008; nothing was physically done to prevent access to the incident scene, and anyone underground would have been able to access the machines. *See* Barry Elliot depo., 53:1-8 (App. 0881). On June 30th, three days after the incident, MSHA recovered the transmitter Mr. Goldsborough had been using and the CF card from the 2151 miner, but MSHA did not take any components from the remote control system on the other miner on the section or its CF card. Sentinel manager Barry Elliot refused to allow MSHA to recover any other components of the 2151 miner at that time. MSHA inspectors handwritten notes, 9 (App. 1111). However, the antenna, receiver, MCU computer and computer display unit from the 2151 miner were later recovered by MSHA. MSHA remote system report, 4 (App. 1114).

MSHA conducted a limited testing of some of the remote system components from the 2151 miner on August 12, 2008, with the assistance of Bucyrus employee Clyde Reed. *See* MSHA remote system report, 4 (App. 1114). However, “[a] detailed examination of the remote control components was not performed,” *id.* at 9 (App. 1119), and there is no evidence that the transmitter was opened and inspected internally for signs of damage, moisture or other problems. The testing done on that day was at Bucyrus’s facility utilizing a test panel. The components were not tested on the 2151 miner or on any other continuous miner. *Id.* Additionally, it was discovered at the August 12, 2008 testing that, although data was logged to the CF cards prior to and after the incident, voltage information as well as any entries in the “Errors” file was missing for the time period around Mr. Goldsborough’s injury. *Id.* at 10 (App. 1120). Yet, temperature values were logged during that time. *Id.* MSHA did not investigate the missing data further but noted that how the data came to be missing had not been explained. *Id.* at 11 (App. 1121). During the August 12, 2008, demonstration, Mr. Reed downloaded at least some of the contents of the CF card onto his laptop computer. Late in the course of discovery in this case, Bucyrus produced copies of the files from the imaged hard drive of that laptop which had been preserved after this litigation was filed. *See* Nutter depo at 98:2-12 (App. 1282) (discussing copying of data from CF card). However, Dr. Nutter noted that this information was, at best, incomplete, because it is missing the “error” codes that would be helpful in determining what was going on with the machine at the time that it moved and injured Mr. Goldsborough. *See id.* at 91:1-9 (App. 1280). Dr. Nutter also testified that if the actual CF card had been available, it would be likely that the reason data was missing could be determined. *See id.* at 98:18-101:3 (App. 1282) (discussing unreliability of metadata, including file creation and modification dates and actual record data, due to copying of files). The remote control components

and the CF card were returned by MSHA to Wolf Run after the testing.

The transmitter Mr. Goldsborough had been using on June 27 was later sent to Structured for repair. *See* TX-944 SN 168 History (App. 0840). The Structured employee examining the transmitter noted that there was evidence of water inside the case of the transmitter and corrosion in multiple locations. *Id.* (App. 0846). There was also a crack in the case, a bent switch, and other physical damage to the transmitter. *Id.* The transmitter was determined to be “beyond economical repair” and returned to Bucyrus. *Id.* (App. 0840).

Following Mr. Goldsborough’s injury, the 25M-2 continuous miners were not used again at the Sentinel mine. *See* Wolf Run 30(b)(7) depo., 32:3-6 (App. 0885). Bucyrus replaced the Structured TX-944 remote control system on these continuous miners with a substitute product manufactured by another company, Forced Potato. Bucyrus 30(b)(7) depo. (Reed), 176:23-177:24 (App. 1125). The miners were then shipped to an ICG mine in Illinois. Wolf Run 30(b)(7) depo., 32:3-6 (App. 0885). None of the TX-944 remote components present on either miner were available for inspection during this litigation as both the respondents and the coal companies disavowed any knowledge of their whereabouts.

3. The Continuous Miners’ History of Remote Control System Problems and the TX-944’s Defective Design.

The danger of unplanned movements of radio-controlled mining equipment is well known in the mining industry but it was a particular problem with the machines at issue here. Bucyrus and Structured were well aware of the problems with the DBT 25M-2 continuous miners utilizing the Structured TX-944 remote control system. In one incident documented in 2006 at Wolf Run’s Sycamore 2 mine, without any command, the hydraulic pump motor and rotating cutter heads of the

2151 miner suddenly powered on and began to operate. *See* Cervis Customer Repair Report (App. 0726). Upon inspection, Structured determined that the transmitter had been opened and its gasket incorrectly sealed. It also found that “[u]nintentional switch closures could have been caused by conduction through coal dust and moisture which was introduced to the pcb [printed circuit board] via improperly aligned gasket as mentioned above. As per DBT recommendations [*sic*], transmitter software was modified to to [*sic*] enhance security.” *Id.* Structured’s response to this problem, rather than to improve the transmitter’s watertightness or protection against moisture and dust, was to change the programming of the remote system. *See id.* (listing software changes).

Bucyrus, on the other hand, denies that the incident happened at all. Bucyrus technicians attempted to recreate the reported problem of unintended activation in June 2006 at the Sycamore 2 mine, but were unable to do so. *See* Bucyrus 30(b)(7) (Owens) depo., 29:8-34:1 (App. 0739-40). Under Bucyrus’s practice, if a reported incident cannot be reproduced, the company is of the opinion that it could not have occurred as the coal miners stated.

Q. [Petitioner’s counsel] We’ve gone over several other incidences here today regarding movement of the machine, complaints of movement of the machine, that Bucyrus was unable to duplicate, correct?

A. [Bucyrus 30(b)(7) designee Owens] Either Bucyrus or our supplier, Cervis.

Q. And so the presumption, then, is if you can’t re-create it, it didn’t really happen.

A. The presumption is to look at -- absorb the information that’s reported and conduct a proper root cause analysis. And at the end of the root cause analysis yielded that couldn’t have occurred.

Q. It could not have occurred?

A. Right.

Id. at 120:3-121:4 (App. 0762).

Water damage to the TX-944 transmitters was, in fact, a chronic problem. *See* Structured repair lists (App. 1128-1148). Both before and after Mr. Goldsborough’s injury, customers, including

Bucyrus, reported to Structured instances of, for instance, corroded circuit boards (*id.*, 17064, 9/5/2012 (App. 1128)); the need to fortify the transmitters against water ingress (*id.*, 10739, 4/8/2010 (App. 1128)); stuck switch errors caused by the entry of water (*id.*, 9931, 11/19/2009 (App. 1128)); the battery door allowing water ingress (*id.*, 13560, 6/10/2011 (App. 1129)); failure to fully power down with evidence of water inside the remote (*id.*, 5802, 3/19/2008 (App. 1130)); and leaking switch plates (*id.*, 6400, 6/16/2008 (App. 1130)). Structured Mining made several modifications to the TX-944 system and, during the timeframe of Mr. Goldsborough's injury was, in fact, making modifications to improve the transmitter so that it would meet international standards and gain approval in other countries. *See* Hearing Transcript, 13:1-18 (App. 1198).

Petitioners' expert witness, Dr. Roy Nutter, testified that the history of reported problems of water ingress supports his conclusion that water probably caused unintentional switch closures leading to the sudden movement Kenneth Goldsborough described. Plaintiffs' Response to Page 5 of Reply Brief in Further Support of the Bucyrus Defendants' Motion for Summary Judgment ("Plaintiffs' Response to Bucyrus Page 5") (App. 0646-47); Nutter depo, 181:3-182:13 (App. 1302-03).⁴ He examined photographs of the transmitter taken after the incident and explained, based on its condition, how the dust and water could enter through a crack or missing O-rings. *Id.* at 248:2-18 (App. 1319). He examined photographs of the transmitter taken after the incident and explained, based on its condition, how the dust and water could enter through the transmitter's switches, screw holes or cracks in the transmitter case. *See* Nutter depo at 248:2-18 (App. 1319), 193:1-3 (App.

⁴ The transcript of Dr. Nutter's deposition referenced in this brief is the court reporter's final, corrected version found at in the Appendix at App. 1257-1328. *See* Petitioners' Motion to Supplement the Record, filed contemporaneously with this brief, indicating that the parties agree to this supplementation. The draft transcript submitted to the trial court in connection with the motions for summary judgment is found in the Appendix at App. 0770-839.

1305). He suggested a stronger material such as billet aluminum. *Id.* at 53:8-9 (App. 1270).

Dr. Nutter discussed how water most likely caused unintended movement in Bucyrus miners equipped with the TX-944 remote control system by explaining that when water enters electronic components, it can create connections between open switches (essentially, switches in an “off” state) and trick a computer into thinking that the user actually turned the switch on. Nutter depo., 179:1-182:13 (App. 1302-03). When this happens, a command is sent to the machine, *e.g.*, to turn a motor on, move a component or otherwise operate, just as if the user had pushed the button or switch that is connected to the short-circuited component. *Id.* Dr. Nutter testified that Structured’s attempts to fix this problem by changing the remote system software “boggles [his] mind. You can’t stop water shorts with software. You can patch around it . . . But it’s not a real fix.” *Id.* at 170:5-13 (App. 1300). Simply put, a software fix may make this problem less likely to occur, but it does nothing to resolve the actual problem of water, moisture and dust ingress into the transmitter.

Dr. Nutter also testified that because the TX-944 transmitter was not sufficiently designed for an underground coal mine environment, water would predictably enter the transmitters through insufficiently sealed switches, entry points for screws and cracks in the plastic case. *See, e.g., id.* at 192:3-194:14 (App. 1305-06). He testified that he would not expect the remotes, as designed and built, to survive more than a month underground due to the “poor design of the environmental containment of that box.” *Id.* at 198:19-199:2 (App. 1307). This conclusion is supported by records demonstrating that the very transmitter Mr. Goldsborough was using on June 27, 2008, had actually been in for repairs – replacements of switches and seals, among other things – in both April and May 2008. *See* Cervis Customer Repair Report (App. 0840); Nutter depo., 263:21-272:4 (App. 1323-25) (reviewing TX-944 SN 168 History (App. 0840)). Dr. Nutter noted that Structured discovered

evidence of water inside the transmitter after Kenneth Goldsborough's injury. *Id.* at 272:1-5 (App. 1325).

Dr. Nutter further testified that the TX-944 transmitters were unsafe because they were designed to all operate on one frequency, creating the possibility that one remote could interfere with or accidentally operate a continuous miner other than the one to which it was paired. *See* Plaintiffs' Response to Defendant, Structured Mining Systems, Inc.'s Motion for Summary Judgment ("Plaintiffs' Response to Structured"), 14 (App. 0678). Dr. Nutter testified that "multiple frequencies would be safer[.]" *Id.* at 205:1 (App. 1308). He referred to separate frequencies as "just another insurance policy," *i.e.*, an extra level of safety that one can never have too much of when human lives are at stake. *Id.* at 206:15-16 (App. 1309). With regard to Structured's "teach-learn" procedure for linking a transmitter with a continuous miner, Dr. Nutter testified that such technologies can fail and that in this case the codes used to "sync" a transmitter presumably became aligned, allowing a TX-944 transmitter to operate a miner other than the one with which it was paired through the teach-learn process. *Id.* at 206:17-208:6 (App. 1309). He also noted that, on the day before the incident, the Errors file on the 2151 miner's CF card had recorded 21 errors with the teach-learn process. *Id.* at 209:1-3 (App. 1309). Dr. Nutter testified that, to the extent a conclusion could be drawn from the "recovered" data produced from Clyde Reed's laptop, it indicated that it is more probable that Mr. Goldsborough's injury occurred after the machine was shut down, as Mr. Goldsborough testified, rather than by the respondents' theory that Mr. Goldsborough never deactivated the machine but instead drove it into himself. *See* Nutter depo. at 238-21:239:2 (App. 1317).

III. SUMMARY OF ARGUMENT

This appeal presents an important question of whether an injured coal miner is entitled to have a jury decide his strict liability case regarding defective product design where significant evidence supporting his claims has been lost by one of the respondents or the employer, impeding his ability to prove his claim even under the malfunction theory in *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991). In this case, petitioners' well-qualified expert reviewed the design of the mining machines' remote control system, the lengthy history of problems particularly with the transmitters, and information regarding the specific transmitter the petitioner was using when he was injured and concluded that not only was the product unsafe for its intended use but also that reasonable engineering changes could have prevented the malfunctions that likely caused the petitioner's injuries.

The trial court improperly took this case from the jury by entering summary judgment. It erred both in its interpretation of the elements of a *prima facie* case for strict liability based on defective design and in its factual findings. The trial court failed to properly apply the standard for proving a defective design based on the malfunction theory as recognized by this Court in *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991). Similarly, the trial court erred by imposing a requirement that the petitioners provide, on summary judgment, specific evidence related to a risk/utility "test" and feasible alternative designs, neither of which have been adopted by this Court as elements of a *prima facie* case. Nonetheless, petitioners' evidence on these matters, including expert testimony and respondents' own documents, preclude summary judgment under any standard because it is clear the respondents had the ability to modify the product transmitters to eliminate or reduce the problems that made them unsafe. Finally, the trial court neglected to consider probative

evidence supporting plaintiffs' claims and improperly resolved inferences and questions of fact against the petitioners, the non-moving party. Despite petitioner being the only eyewitness to the incident that caused his injury and his consistent statements over the years regarding what occurred, respondents speculate that petitioner caused his own injuries by driving a massive mining machine into himself. The trial court viewed the evidence in the light most favorable to the respondents and credited their theory in order to reach its conclusion. As a result, the trial court incorrectly held that the petitioners could not prevail on claims based on negligence and breach of warranty.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners request the Court set this case for oral argument under Rule 20 of the Revised Rules of Appellate Procedure. Although the trial court's errors arise under clear precedents of this Court, this appeal presents issues of fundamental public importance regarding whether a worker injured by a defective product may prevail in a strict liability case where the critical evidence is not available for testing because it has been lost by one of the respondents or the employer and no exemplars are available for testing, hampering petitioners' expert's ability to state with certainty which defect caused the injury.

V. ARGUMENT

A. Standard of Review

This Court reviews a trial court's grant of Rule 56 of summary judgment *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "In reviewing summary judgment, this Court will apply the same test that the circuit court should have used initially, and must determine whether '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.'" *Bennett v. ASCO Servs.*, 218 W. Va. 41, 46,

621 S.E.2d 710, 715 (2005) (quoting Syl. Pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)).

Roughly stated, a “genuine issue” for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed “material” facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). As the trial court should have done, this 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*, 192 W. Va. at 192, 451 S.E.2d at 758 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). Therefore, this Court “must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.” *Id.* (citations omitted). However, the opposing party must present “more than a mere ‘scintilla of evidence’” in order to survive summary judgment “and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor. *Id.* at 192-193, 451 S.E.2d at 758-759 (quoting *Anderson*, 477 U.S. at 252). As demonstrated *infra*, petitioners have met this burden.

B. Discussion

In this strict liability in tort case regarding defective product design, the trial court’s orders granting summary judgment to both Bucyrus and Structured are incorrect as a matter of law because the orders misapply the law regarding the showing these petitioners must make to withstand summary judgment and construe material questions of fact against the nonmoving parties, *i.e.*, the petitioners.

1. **The Law Regarding Strict Liability in Tort for Defective Products is Well Established in West Virginia.**

A claim for “strict liability in tort” regarding a product liability claim against a manufacturer was first recognized by this Court in the 1979 case of *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979). In *Morningstar*, the Court answered certified questions from the United States District Court for the Southern District of West Virginia and established the test for a *prima facie* case of liability for a manufacturer and/or seller: “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 Syl. Pt. 4. Further, “[t]he 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.” *Id.* This strict liability 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.” *Id.* at Syl. Pt. 3.

Twelve years later, in *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991), this Court adopted the “malfunction theory” to address situations in which the precise nature of the defective condition of the product cannot be determined. *Anderson* dealt with a claim for, *inter alia*, strict liability in tort after a car which had previous repairs for electrical problems caught fire soon after being repaired by the dealership. *Id.* at 643, 403 S.E.2d at 191. In overturning the trial court’s grant of a directed verdict to the defendants, this Court found that the Andersons could prove their *prima facie* case even without being able to pinpoint the defect in the car if the circumstantial evidence was sufficient.

Circumstantial evidence may be sufficient to make a prima facie case in a strict liability action, even though the precise nature of the defect cannot be identified, [1] so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect. Moreover, [2] the plaintiff must show there was neither [a] abnormal use of the product nor [b] a reasonable secondary cause for the malfunction.

Id. at Syl. Pt. 3.

In 2005, this Court clarified the showing required to establish the second part of the *Anderson* malfunction theory test in *Bennett v. ASCO Servs.*, 218 W. Va. 41, 49, 621 S.E.2d 710, 718 (2005), explaining that a plaintiff does not have to decisively eliminate all possibilities of other contributing causes. “Instead, [to survive summary judgment] a plaintiff is only required to 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. at 48, 621 S.E.2d at 717 (emphasis added). In *Bennett*, the plaintiffs filed strict liability in tort claims against, *inter alia*, a car manufacturer and the manufacturer and installer of a home fire alarm system. *Id.* at 45-46, 621 S.E.2d at 714-715. The plaintiffs asserted that a defect in their car caused a fire to start under the hood while the vehicle was parked in their garage and a defect in the fire alarm system caused the system not to alert them to the fire, leading to the total loss of their home. *Id.* Because their insurance companies had destroyed the relevant evidence, it was not available for testing.⁵ Finding that the plaintiffs had not met the second part of the malfunction theory test from *Anderson*, the trial court granted summary judgment to the car and fire alarm system defendants. *Id.* at 46, 621 S.E.2d at 715. On appeal, this Court explained that, under the *Anderson* malfunction test:

“a plaintiff makes a submissible case of proof that the accident was caused by some unspecified defect and that no other cause is likely. . . . **The plaintiff is not required**

⁵ The plaintiffs also asserted spoliation claims against their insurance companies. *Id.*

to eliminate with certainty all other possible causes of the accident. It is sufficient if the evidence reasonably eliminates other causes such as the handling or misuse of the product by others than the manufacturer, thus permitting the fact finder to find that it was more probably [*sic*] than not that the product was defective.”

Id. at 48-49, 621 S.E.2d at 717-18 (quoting 2 Am.L.Prod.Liab. 3d § 31:26 (footnotes omitted)) (emphasis added). Applying the malfunction theory, this Court overturned the summary judgment rulings, finding that the plaintiffs had presented sufficient evidence to raise genuine issues of material fact regarding the existence of defects in the car and in the alarm system, despite the lack of physical evidence to test. *Id.* at 49-50, 621 S.E.2d at 718-719.

Thus, it is clear that, in West Virginia, a plaintiff may prove a claim of strict liability in tort against a manufacturer and/or seller through circumstantial evidence where the precise defect cannot be determined because of a lack of evidence to test. The orders entered by the trial court in the present case misapply both this well established law and the standard under which summary judgment motions are to be considered by construing genuine issues of disputed facts against the petitioners.

2. The Trial Court Erred by Misapprehending and Misapplying the Malfunction Theory of Product Liability, Articulated by this Court in *Anderson V. Chrysler Corp.*, 184 W. Va. 641, 403 S.e.2d 189 (1991).

The trial court’s orders granting summary judgment to the respondents misapply the malfunction theory test from *Anderson* by ignoring this Court’s clarification of the showing these petitioners must make to withstand summary judgment, as explained by this Court in *Bennett, supra*. Quoting *Bennett*, the trial court’s orders note, “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. [218 W. Va. at 50, 621 S.E.2d] at 719.” Bucyrus Order, ¶ 19 (App. 0005); Structured Order, ¶ 23 (App. 0023). The orders go on to find that the petitioners have not met this

burden for several reasons. Yet, as demonstrated below, petitioners have presented sufficient evidence from which a jury could reasonably conclude that a product defect is the most likely cause of Mr. Goldsborough's injury.

a. A jury is likely to be swayed by Mr. Goldsborough's compelling and consistent description of the events leading to his injury.

Mr. Goldsborough is the only eyewitness to what happened when he was injured. He has been consistent in his explanation that he was injured when the continuous miner that he had shut down moved suddenly, without his giving it a command through the remote control system, and pinned him against the mine rib, crushing his left leg and abdomen. Mr. Goldsborough testified at his deposition that he was backing the continuous miner out of the entry after he finished cutting coal when he noticed the ventilation curtain was snagged on the machine's cutting heads. Plaintiffs' Response to Bucyrus, 7 (App. 0614); Goldsborough depo, 223:16-25 (App. 0161). He shut the motors on the continuous miner off with the button on the transmitter, walked around the miner and flipped the curtain off the heads. Plaintiffs' Response to Bucyrus, 7 (App. 0614); Goldsborough depo, 224:1-4, 233:1-234:9 (App. 0161, 0163); photos of transmitter (App. 1109-1110).

Mr. Goldsborough then walked back across the front and down the right side of the continuous miner and, just as he was almost to the back end and was taking a step, the miner suddenly moved and pinned him to the right mine rib. Plaintiffs' Response to Bucyrus, 7 (App. 0614); Goldsborough depo., 241:9-25 (App. 165). The miner's cable handler hit the inside of his left thigh, crushing the outside of his thigh into the rib. Goldsborough depo, 250:2-20, 303:19-304:1 (App. 0167, 0181); photo of cable handler (App. 1106). The transmitter, which had been hanging at his left side, swung around as he was pushed into the mine rib and became pinned between the deck

of the miner and Mr. Goldsborough's abdomen. Goldsborough depo, 239:14-244:19 (App. 0165-66). Mr. Goldsborough's testimony regarding the events leading to his injury is compelling. For example, when he was questioned about whether he caused the continuous miner to move, Mr. Goldsborough's response was adamant.

Q. [Bucyrus counsel] Can you swear you didn't touch something on the control unit that would have caused the miner to move?

A. [Goldsborough] Yes, sir.

Q. And you're sure, under oath, sitting here today, that you were not operating the miner trying to slew it at the time that you got caught between the rib and the miner?

A. I'm positive. I am positive.

Q. So all the investigating authorities are wrong.

A. They wasn't there. When I walked around, moved the curtain, walked back, like I said, it was just lights out. I had the remote here (indicating). It was dangling. I was walking. It just banged. I mean, lights out. And then when I come to, I just, hey, I'm alive, and then I screamed.

Goldsborough depo, 306:11-307:3 (App. 0181-82).

To the extent any reliable conclusion can be drawn from the "recovered" data regarding the miner that day, *see* discussion, *supra* at 7, 12, Dr. Nutter's testimony further corroborates Mr. Goldsborough's account. Dr. Nutter testified, rebutting the respondents' expert, that the "recovered" data, to the extent it is reliable, is consistent with Mr. Goldsborough's testimony that the injury occurred after the machine had been deactivated by the remote. Nutter depo. at 238-21:239:2 (App. 1317). This evidence is likely to sway a jury.

b. Petitioners' expert's opinions meet the requisite level of certainty.

As presented to the trial court, the petitioners asserted two theories regarding the product defects that likely caused the sudden movement of the continuous miner: (1) water in the transmitter that closed electronic switches, sending commands to the miner allowing it to move; and (2) because all of the transmitters for the TX-944 remote control systems were designed to operate on the same

frequency, a transmitter could interfere with or accidentally operate a continuous miner other than the one to which it was paired. *See* Plaintiffs' Response to Bucyrus, 3-5, 10, 14-15, 17-18 (App. 0610-12, 617, 0621-22, 0624-25); Plaintiffs' Response to Structured, 4, 8-9, 13-14, 16 (App. 0668, 0672-73, 0677-78, 0680). Petitioners supported these theories with expert testimony as well as evidence from the respondents' own documents.

Petitioners' expert Dr. Nutter testified at his deposition that the TX-944 transmitter was not properly designed to withstand the harsh environment at the working face of an underground coal mine. The area is wet and dirty and, as designed, moisture and dust would enter the transmitter through the switches and other areas. Plaintiffs' Response to Bucyrus, 5 (App. 0612); Plaintiffs' Response to Structured, 4 (App. 0668); Nutter depo., 197:9-199:2 (App. 1306-07). As Dr. Nutter explained, water inside the transmitter creates connections between open electronic switches, closing the switches so that they send an electronic signal to the computer. Having received a signal from the short-circuited switch, the computer sends a command to the machine to turn a motor on, move a component, or otherwise operate, just as though the human miner had pushed the button or moved the switch that is connected to the short-circuited electronic switch. Plaintiffs' Response to Bucyrus, 5 (App. 0612); Plaintiffs' Response to Structured, 4 (App. 0668); Nutter depo., 179:4-182:13 (App. 1302-03). Dr. Nutter's opinion that water in the transmitter Mr. Goldsborough was using caused the incident is supported by documents from both of the respondents.

For example, the Structured repair report for the transmitter Mr. Goldsborough was using that day states there is "evidence of water inside [the] case." Plaintiffs' Response to Bucyrus, 5, 10 (App. 0612, 0617); Plaintiffs' Response to Structured, 9 (App. 0673) (citing Structured History for TX-944 sn 168 (App. 0846)). Also, in a 2006 incident, the hydraulic pump motor and rotating cutter heads

of this same continuous miner came on without a command from the operator. Cervis Repair Report, 6/30/06 (App. 0726). The incident was reported to Bucyrus, Bucyrus 30(b)(7) (Owens) depo., 29:8-34:1 (App. 0739-41), but it was Structured that found evidence of moisture in the transmitter being used at the time and who surmised that “[u]nintentional switch closures could have been caused by conduction through coal dust and moisture which was introduced to the pcb [printed circuit board] via improperly aligned gasket as mentioned above.” Cervis Repair Report, 6/30/06 (App. 0726); Plaintiffs’ Response to Bucyrus, 3-4 (App. 0610-11); Plaintiffs’ Response to Structured, 3 (App. 667).⁶ Similarly, in 2010, Bucyrus and Structured received reports that water in a TX-944 transmitter was causing a continuous miner to move by itself. Customer Issue # 37618 (App. 1175). Additional support for Dr. Nutter’s opinion is found in a chart provided by Structured listing numerous instances of water having been in transmitters sent in for repair. *See* Structured repair lists (App. 1128-1148). Problems reported in this list include other instances of unintentional switch closures caused by water both before and after Mr. Goldsborough’s injury. *Id.*

Dr. Nutter’s second product defect theory is the respondents’ poor design decision to have all of the TX-944 remote control systems operate on a single frequency because, if any malfunctions occur, one transmitter can cause the wrong machine to run. Plaintiffs’ Response to Bucyrus, 15 (App. 0622); Plaintiffs’ Response to Structured, 14 (App. 0678); Nutter depo., 202:3-203:12 (App. 1308). At the time of Mr. Goldsborough’s injury, the transmitter he had and the other transmitter on the section, which was in use at the time, were within the tested operational range of each other. Plaintiffs’ Response to Bucyrus, 15 (App. 0622); Plaintiffs’ Response to Structured, 14 (App. 0678);

⁶ The respondents’ fix for this untended movement issue was to modify the software for the remote system’s computer to make the situation less likely to reoccur. Cervis Repair Report, 6/30/06 (App. 0726).

Nutter depoi. 205:22-206:3 (App. 1308-09).

The trial court incorrectly concluded in its orders that Dr. Nutter did not hold these opinions to an appropriate degree of certainty. Yet, a review of Dr. Nutter's deposition testimony belies this conclusion. Concerning the first product defect theory, in a section of his testimony left out of the orders, Dr. Nutter expressed his opinion as a probability.

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

A. [Nutter] 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's possible to have occurred.

Q. **Is it probable that it occurred?**

A. **Given the history of these remotes, I would say it's probable.**

Plaintiffs' Response to Bucyrus Page 5, 1-2 (App. 0646-47). Dr. Nutter then goes on to note the inherent problem with having the crucial evidence unavailable to test.

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.

Nutter depo, 182:14-22 (App. 1303). Dr. Nutter's inability to testify to an absolute certainty is largely the result of not having been able to inspect the transmitter and remote control systems from both of the continuous miners that were working in close proximity at the time of Mr. Goldsborough's injury either close in time to when the injury occurred or at any time, given that

the remote control components have been lost by the respondents or the coal companies.

Regarding Dr. Nutter's second product defect opinion concerning the use of a single frequency for all of the TX-944 remote control systems, although Dr. Nutter was not familiar with the precise details of the teach-learn process that is used to link the receiver on a continuous miner with a TX-944 transmitter, Dr. Nutter did discuss that computer programming safeguards are known to fail and the consequences of failure causing the unintended movement of a continuous miner underground are too serious to be worth the risk. Nutter depo, 202:4-24.

Dr. Nutter also confirmed his certainty regarding all of his theories.

Q. [ICG counsel] Do you believe there are any other probable causes of Mr. Goldsborough's accident --

A. [Nutter] These --

Q. -- with the same degree of probability that you are attaching to these three opinions?

A. These three seem to be the most likely given the history of the equipment.

Q. And any other possible causes that are as equally as probable as these three causes?

A. No.

Nutter depo, 234: 13-22. Petitioners' expert has stated his opinions with sufficient certainty to present a triable issue regarding the cause of Mr. Goldsborough's injury.

c. Mr. Goldsborough's injury was not a result of operator error.

Both the trial court's factual findings and the conclusions it reaches based on these findings regarding the cause of Mr. Goldsborough's injury are incorrect. To support its operator error holding, the trial court found that Jason Nealis, a miner who was working with Mr. Goldsborough as a roof bolter on the day of the incident, "heard the accident occur" and "testified the continuous miner's motors were not shut off immediately prior to the accident." Order Granting Bucyrus Defendants' Motion for Summary Judgment ("Bucyrus Order"), ¶ 24 (App. 0006-07); Order

Granting Defendant, Structured Mining Systems, Inc.'s Motion for Summary Judgment ("Structured Order"), ¶ 28 (App. 0026); *see also* Bucyrus Order, ¶ 4 (App. 0002); Structured Order, ¶ 5 (App. 0014-15). Yet, there is no evidence that Mr. Nealis or anyone besides Mr. Goldsborough "heard the accident occur." Mr. Nealis did testify that he heard the continuous miner's motor running up until just before Mr. Goldsborough called for help. However, he later testifies that he could not remember how long the motor was actually off.

Q. [Plaintiffs' counsel] Now, based on what you recall hearing and seeing that day, could Mr. Goldsborough have had the pump motor off before he called for you?

A. [Nealis] I don't -- I don't remem- -- I don't remember. I don't remember.

Plaintiff's Objections to Proposed Order Granting Bucyrus Defendants' Motion for Summary Judgment ("Objections"), 2 (App. 1404). Thus, Mr. Nealis's testimony regarding the time lapse between the continuous miner's motors being shut off and Mr. Goldsborough's calling for help after his injury conflicts with itself and is not a proper basis for the trial court's finding.

The trial court also apparently found that the conclusions reached by MSHA and the WVOMHST are reliable. *See* Bucyrus Order, ¶ 25 (App. 0007); Structured, ¶ 29 (App. 0026); *see also* Bucyrus Order, ¶¶ 7-10 (App. 0002-03); Structured Order, ¶¶ 8-10 (App. 0015-16). However, the investigation conducted by these agencies was incomplete and the conclusions drawn are, therefore, unreliable and inadmissible.⁷ For example, MSHA admits a "detailed examination of the remote control components was not performed," MSHA remote system report, 9 (App. 1119), and its testing of the components, which occurred seven weeks later, was done on a simulator and not on a continuous miner. *Id.* Also, Dr. Nutter noted in his deposition that MSHA did not check either

⁷ Also pending at the time of the respondents' summary judgment motions was the petitioners' Motion *in Limine* No. 5 to prohibit the respondents from presenting the MSHA and WVOMHST conclusions during trial because of the incompleteness of the investigations. *See* Certified Docket Sheet, line 325 (App. 1337).

of the transmitters for water intrusion. Nutter depo, 183:7-184:13 (App. 1303); *see also* 187:21-188:10 (App. 1304) (criticizing MSHA's failure to spend time investigating the second transmitter that was being used at the time of Mr. Goldsborough's injury and MSHA's handling of the missing information from the CF card). Additionally, there is no evidence in either report to refute Mr. Goldsborough's description of what occurred. Yet, MSHA concluded that Mr. Goldsborough was injured because he was operating the machine from within the red zone.⁸ MSHA Report of Investigation, 5 (App. 0079). The WVOMHST concluded that Mr. Goldsborough was operating the machine at the time of his injury. WVOMHST Report (App. 0100). These conclusions appear to be based not on any affirmative evidence, but on the agencies' failure to identify any other cause. Thus, the conclusions in these reports should not be a basis for the trial court's holding.

The trial court next relies on Bucyrus employee and expert Clyde Reed's interpretation of "recovered" data regarding the continuous miner that Mr. Goldsborough was operating and Mr. Reed's conclusion that Mr. Goldsborough ran the continuous miner into himself, stating that "Mr. Reed's conclusions are unrebutted." *See* Bucyrus Order, ¶ 26 (App. 0007); Structured Order, ¶ 30 (App. 0026-27); *see also* Bucyrus Order, ¶ 11 (App. 0003); Structured Order, ¶ 11 (App. 0016-17). Yet, Mr. Reed's opinions are not unrebutted. Petitioners' expert Dr. Nutter testified that, based on his review of the data, it was more probable that Mr. Goldsborough's injury occurred after the machine was shut down. *Id.*; Nutter depo, 214:11-215:11 (App. 1311).⁹ Thus, Mr. Reed's opinion,

⁸ Red zones are areas within the close proximity of the miner that present "pinch points," where one could be hit by the machine while it is moving. *See* MSHA Red Zone handout (App. 0103).

⁹ Although in this section of his deposition Dr. Nutter agrees that Mr. Goldsborough was in the red zone at the time of the injury, Dr. Nutter later acknowledges that there is no red zone if the machine motors are turned off, as Mr. Goldsborough has testified. Nutter depo, 272:15-273:3 (App. 1325).

rather than being un rebutted, is merely one conclusion that may be drawn from the recovered data, if that data with the missing information is reliable enough to be admissible. The information Mr. Reed has interpreted is incomplete as it does not contain the data showing the “errors” that occurred when the continuous miner was running. Nutter depo, 83:9-21 (App. 1278) (noting error files are missing from recovered data), 261:9-22 (App. 1322) (stating defendants’ forensics expert did not recover error data); *see also* Objections, 4-5 (App. 1406-07) (discussing the recovered data and missing data). That there were 21 errors with the teach-learn process the day before Mr. Goldsborough’s injury makes this missing data all the more important in interpreting what was occurring with the continuous miner at the critical time. Moreover, assuming the data is admissible, then it must be viewed in the light most favorable to the petitioners and, for summary judgment purposes, Dr. Nutter’s conclusions must be accepted as true. This the trial court failed to do. Therefore, the petitioners have presented sufficient evidence from which a jury could reasonably conclude that the most likely cause of Mr. Goldsborough’s injuries was a respondents’ defective product and not operator error. The trial court’s grant of summary judgment should be overturned.

3. **The Trial Court Erred by Adding Elements to the *Prima Facie* Case for Strict Liability in Tort Based on a Defective Product that Have Not Been Adopted by this Court.**

The trial court erroneously concluded that petitioners were required to present certain evidence as part of their *prima facie* case for strict liability in tort based on a defective design. Specifically, the trial court applied a seven factor risk/utility analysis that this Court mentioned in *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979), but has never adopted as part of a plaintiff’s *prima facie* case. Additionally, the trial court held that petitioners failed to present evidence of a “feasible alternative design” for the defective product – another

element which this Court has not adopted. The trial court's reliance on these two elements is error, requiring that its grants of summary judgment to respondents be overturned.

Even if these elements were required, petitioners have presented sufficient evidence on both the risk/utility analysis and on a feasible alternative design to make summary judgment improper.

a. The trial court erroneously granted respondents' motions for summary judgment based on the risk/utility analysis.

(1) The risk/utility analysis is not an essential element of the prima facie case in a defective design claim.

In its orders granting the respondents' respective motions for summary judgment, the trial court held that *Morningstar* adopted a seven factor risk/utility test. See Bucyrus Order, ¶ 39 (App. 0009) ("Plaintiffs have not presented sufficient evidence under the *Morningstar* seven-factor risk/utility analysis to prove a product defect."); Structured Order, ¶ 43 (App. 0030-31)(same).

Respondents' filings below, and the trial court when it adopted the respondents' proposed orders *in toto*, overstate the role of the risk/utility analysis referred to in *Morningstar* because this Court has not adopted this analysis as part of this state's test for a strict liability in tort claim. See discussion, Plaintiffs' Response to Bucyrus, 18 (App. 0625). What the trial court and respondents refer to as the "*Morningstar* test" is actually a mere reference by this Court to the seven risk/utility factors relied upon by New Jersey in its strict liability in tort jurisprudence to determine whether a product is defective. *Morningstar*, 162 W. Va. at 885-86, 253 S.E.2d at 681-82 (citing *Cepeda v. Cumberland Engineering Co.*, 76 N.J. 152, 386 A.2d 816 (1978)). After discussion, this Court rejected New Jersey's approach. Noting that New Jersey in *Cepeda* "suggests it is following Section 402A [of the Restatement (2d) of Torts]," *id.* at 885, 253 S.E.2d at 681, this Court held that

the rule expressed in *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 27 Cal.

Rptr. 697, 377 P.2d 897 (1963), permitting recovery in a tort product liability case, where a defective product causes personal injury, is a more appropriate rule than Section 402A of the *Restatement, Second, Torts* (1965), which requires the defective condition to be unreasonably dangerous.

Id., Syl. Pt. 7. Thus, the seven factors of the risk/utility *analysis* are not a “test,” as the trial court determined in the present case, that a plaintiff must meet to establish a *prima facie* case. Granted, this Court did not dismiss these factors entirely, commenting that the factors “do[] have a place in a tort product liability case by setting the general contours of relevant expert testimony concerning the defectiveness of the product.” *Id.* at 887, 253 S.E.2d at 682. Thus, this Court did not adopt the risk/utility analysis as an element of a *prima facie* case. Rather, it recognized that the factors set forth in *Cepeda* provide a helpful guide for expert testimony.

The United States Court of Appeals for the Fourth Circuit correctly interpreted this Court’s view of the “risk/utility analysis” when it held that

in *Morningstar* **the West Virginia court did not adopt the risk/utility analysis as a definitive standard.** The court simply mentioned the risk/utility framework in the context of discussing various methods of proving that a product is defective. Thus, *Morningstar* recognized that the risk/utility analysis “does have a place” in the product liability field but cautioned that the analysis “is not easily susceptible to a jury instruction.”

Pulice v. Wood/Chuck Chipper Corp., 1997 U.S. App. LEXIS 15171, *9-10 (4th Cir. 1997) (*per curiam*) (emphasis added).

Similarly, in a case requiring an analysis of West Virginia product liability law, the United States Court of Appeals for the Seventh Circuit noted that “[w]hile the *Morningstar* court agreed that ‘a risk/utility analysis does have a place in a torts product liability case by setting the general contours of relevant expert testimony,’ 253 S.E.2d at 682, **the court rejected the doctrine’s use as a jury standard.** Instead, the court held, ‘what is a defective product must be analyzed in traditional tort

terminology.” *Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 69 (7th Cir. Ind. 1981) (emphasis added).

The conclusions of the Fourth and Seventh Circuits are supported by the absence in this Court’s decisions following *Morningstar* of any further reference to the “risk/utility” analysis. Although this Court acknowledged the conceptual usefulness of the idea, it has never required a plaintiff to present specific evidence on each factor to survive a motion for summary judgment.

b. Petitioners presented sufficient evidence relevant to the risk/utility analysis.

Even if this Court did require specific evidence on each factor of the risk/utility analysis, the petitioners presented sufficient evidence to preclude the entry of summary judgment. *See* Plaintiffs’ Response to Bucyrus, 19-20 n. 7 (App. 0626-27) (addressing the seven factors). The testimony of the petitioners’ expert, Dr. Roy Nutter, combined with other evidence in the record, created a genuine issue of material fact as to the defective design of the Structured TX-944 remote control system and the defectiveness of the Bucyrus continuous miner once it was fitted with the TX-944.

- Factor 1: The usefulness and desirability of the product – its utility to the user and to the public as a whole. Petitioners do not dispute that continuous miners equipped with remote control systems are useful products. The use of remotely controlled machinery allows the operator to remain under supported roof while mining coal, rather than earlier products where the operator would control functions from on board the deck of the machine. *See* Goldsborough depo, 50:20-52:22 (App. 1238-39)(discussing career operating “deck” and remote miners).
- Factor 2: The safety aspects of the product -- the likelihood that it will cause injury, and the probable seriousness of the injury. The likelihood and probable seriousness of injuries caused by the unintended movement of continuous miners are extremely high, given the close quarters in an underground mine and the size and mobile nature of the machines. As Mr. Goldsborough’s near-fatal injuries in this case demonstrate, the potential consequences of unintended movement of these machines are grave.
- Factor 3: The availability of a substitute product which would meet the same need and not

be as unsafe. Bucyrus offered a remote system from a different manufacturer known as “Forced Potato.” *See* Plaintiffs’ Response to Bucyrus, 19-20 n. 7 (App. 0626-627). At the customer’s request, Bucyrus replaced the Structured TX-944 remote control systems on the continuous miners Mr. Goldsborough had been using with those from Forced Potato after Mr. Goldsborough’s injury. *Id.*

Additionally, as early as 2006, Bucyrus and Structured were working to improve the TX-944 transmitter’s watertightness in order to gain approval to sell the remote systems in India – but at the same time did not modify the transmitters they were selling – or had already sold and were continually repairing – in the United States. *See* Hearing Transcript, 13:1-18 (App. 1198).

- Factor 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. Dr. Nutter’s testimony supports a conclusion that feasible modifications to the Structured remote control system designed for use on the Bucyrus continuous miners could have reduced or eliminated the unsafe conditions presented by the TX-944 transmitter’s susceptibility to water, moisture and dust. He stated more needed to be done to seal the switches and screws on the transmitter, that the design Structured used would have been appropriate for aboveground use, but it did not meet acceptable standards for a product intended to be used in an underground coal mine. Nutter depo., 192:3-194:13 (App. 1305-06). Dr. Nutter opined that, absent better waterproofing on the existing toggles and buttons, the transmitter’s switches should not have come to the outside of the box through the faceplate but should have been designed so they could be manipulated using a mechanical mechanism from the outside. *Id.* at 194:19-24 (App. 1306).

Another change Dr. Nutter suggested to improve the overall watertightness of the transmitter was the construction of an enclosure made of billet aluminum rather than the plastic selected by Structured. *Id.* at 53:8-9 (App. 1270). Dr. Nutter explained that in the coal mine environment, “[p]lastic cases don’t work. So first of all, cases crack. When you get a crack, you get water.” *Id.* at 193:1-3 (App. 1305). Dr. Nutter specifically noted that, in a number of reported instances, the plastic case of the a TX-944 transmitter’s battery cover allowed screws to come loose, creating “another entry point for water.” *Id.* at 193:4-9 (App. 1305). He further criticized the design of the transmitter’s faceplate. *Id.* at 193:9-11 (App. 1305).

None of these changes – sturdier materials, better seals, and waterproof switches – would have impaired the usefulness of the transmitters. In fact, increasing watertightness would reduce downtime and improve production for the customer. Further, in the context of a very expensive continuous miner, the addition of more robust components in the transmitter should not have materially affected the overall price of the remote control system, and certainly not of the continuous miner itself.

- Factor 5: The user’s ability to avoid danger by the exercise of care in the use of the product. Although a user should take care to avoid the hazard of unintended movement, there are times when a coal miner must necessarily approach the continuous miner once he shuts off the machine, as Kenneth Goldsborough did. *See* Plaintiffs’ Response to Bucyrus, 7 (App. 0614) (citing Goldsborough’s testimony that he pushed the button to deactivate the miner before walking toward the cutter heads). Thus, a user cannot avoid the specific hazard at issue here, *i.e.*, a sudden movement with no warning.
- Factor 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. This hazard – sudden, unintended movement after powering off the machine – is not “obvious,” even though reports of similar sudden movements had occurred with this machine. Such movement should not occur absent a defect in the continuous miner’s remote control system.
- Factor 7: The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance. Manufacturers of mining equipment, such as the respondents, make products for a dangerous industry and understand that minimizing the risk of injury is a vital business goal. The cost of the products is high, but the risk of serious injury to or the death of a miner because of a defect is even higher.

Therefore, summary judgment was improperly granted in this case.

c. The trial court erroneously granted respondents’ motions to dismiss based on lack of a feasible alternative design.

(1) A feasible alternative design as not an element of a *prima facie* case.

The trial court further erred by elevating one factor of the risk/utility analysis to an independent element of a plaintiff’s *prima facie* case, *i.e.*, “[t]he availability of a substitute product which would meet the same need and not be as unsafe.” *Morningstar*, 162 W. Va. at 886, 253 S.E.2d at 682 n. 20 (quoting *Cepeda*, 386 A.2d at 826-27). Respondents argued this requirement as a “feasible alternative design,” which was adopted by the trial court. *See* Bucyrus Order, ¶ 34 (App. 0008) (“[p]laintiffs 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).”); Structured Order, ¶ 38 (App. 0029)(same).

Yet, neither *Morningstar* nor *Church* require any such showing as an element of a plaintiff’s case. In *Church*, this Court affirmed the grant of a directed verdict in a case that involved a metal roof bolt wrench which had suddenly broken and injured the plaintiff coal miner. *Church v. Wesson*, 182 W. Va. 37, 38, 385 S.E.2d 393, 394 (1989) (*per curiam*). The miner’s expert originally “opined that the wrench had sustained a fatigue-type failure caused by impairment from extended use.” *Id.* at 39, 385 S.E.2d at 395. However, he performed a second examination and changed his opinion, this time stating “that the wrench failed in a single overload event caused by its defective design.” *Id.* The plaintiff’s expert testified at trial that, rather than welding, the wrench should have been made using a forging process. *Id.*

This Court sustained the directed verdict against the plaintiff miner for several reasons. First, the evidence was “undisputed” that at the time of the wrench’s manufacture, it was not feasible to manufacture the product by forging. *Id.* at 40, 385 S.E.2d at 396. Second, the defendant’s “expert testimony established that the welding process . . . was the ‘state of the art’ at the time of manufacture.” *Id.* Finally, the plaintiff miner’s expert’s “credibility was severely impeached when he admitted that he had never designed nor manufactured any mining supplies” and was not familiar with the equipment on which the wrench was used. *Id.*

Thus, this Court’s *per curiam* opinion in *Church* did not add to the required elements of a defective design case under *Morningstar*. Rather, it merely upheld the grant of a directed verdict where the plaintiff’s expert could present *no* evidence that the product at issue did not meet reasonable design standards at the time it was manufactured. Nowhere in *Church*, nor anywhere else

that the petitioners' counsel could locate in this Court's decisions following *Morningstar*, is the requirement found that a plaintiff must offer a "feasible alternative design" to establish a *prima facie* case against the manufacturer and/or seller of a defective product.

d. Petitioners presented sufficient evidence of feasible alternative designs.

As noted with regard to the third and fourth factors under the *Cepeda* risk/utility analysis at Section B. 3, pp. 30-31, *supra*, Dr. Nutter testified as to several options that would have provided a greater level of protection against unintended movement of the continuous miner, including more robust seals, an aluminum rather than plastic case, and a technique for the installation of switches which would have prevented the entry of moisture.

Dr. Nutter's testimony also supports a conclusion that the single-frequency design chosen by Structured was unsafe because it presented a higher risk of one transmitter accidentally activating the wrong continuous miner and that using multiple frequencies was a safer reasonable alternative. Nutter depo, 205:16-19 (App. 1308). He further noted that the tested range of the transmitters was greater than the distance between the two continuous miners operating on the section at the time of Mr. Goldsborough's injury. *Id.* at 205:20-206:16 (App. 1308-09). Dr. Nutter testified about how a multiple-frequency system would be safer and how such a system could be implemented. Nutter depo., 202:14-205:19 (App. 1308). Further, as noted above, the respondents actually did create alternative designs, including better "fortification" against water ingress, *see* Structured repair list (App. 1128-1148), and a design to meet approval for overseas markets. *See* Hearing Transcript, 13:1-18 (App. 1198).

Therefore, even if the risk/utility analysis or feasible alternative design were a part of the

petitioners' *prima facie* case, petitioners have presented evidence that would preclude the entry of summary judgment. The trial court reached its holdings in this case by ignoring material facts supporting petitioners' claims and construing inferences against petitioners. There is a volume of evidence in the record to demonstrate that the Bucyrus continuous miners equipped with Structured's TX-944 remote control system were not reasonably safe for the purpose of mining coal underground.

4. **The Trial Court Erred by Construing Disputed Questions of Fact Against the Petitioners in Contradiction of Well Established Standards for Summary Judgment.**

The trial court also construed disputed facts against the petitioners in order to reach its conclusions that (1) the petitioners did not sufficiently rule out secondary causes to prove a *prima facie* case of negligence under *res ipsa loquitur*, (2) the petitioners did not point to sufficient evidence to meet the *Morningstar* standard, and (3) Mrs. Goldsborough cannot sustain a loss of consortium claim. Petitioners address each of these issues in turn.

a. **Petitioners have produced sufficient evidence from which a jury could reasonably conclude that respondents were negligent.**

The law does not require petitioners, in order to survive summary judgment, to disprove to an absolute certainty every other possible cause for the incident. Rather, petitioners need only present "evidence that has the capacity to sway the outcome," *i.e.*, evidence from which a jury could fairly conclude that the petitioners' version of the incident is more probable than the secondary cause asserted by the respondents. The trial court was incorrect in its holdings that petitioners have not met their burden of presenting evidence that could sway the outcome of the case.

In reaching its conclusion that petitioners cannot sustain a negligence claim, the trial court relied upon the doctrine of *res ipsa loquitur*.

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.

Bucyrus Order, ¶ 29 (App. 0007) (quoting Syl. Pt. 4, *Beatty v. Ford Motor Co.*, 212 W. Va. 471, 574 S.E.2d 803 (2002) (*per curiam*); Structured Order, ¶ 33 (App. 0027) (same). As this Court has explained, a trial court's role in a *res ipsa loquitur* case is "to make a preliminary determination that the evidence that a plaintiff intends to present is indeed circumstantial evidence that will lead to reasonable inferences by the jury, and is not simply evidence which would force the jury to speculate in order to reach its conclusion." *Beatty, supra*, 212 W. Va. at 476, 574 S.E.2d at 808 (interpreting *Foster v. City of Keyser*, 202 W. Va. 1, 21, 501 S.E.2d 165, 185 (1997)). For the reasons stated in Section B. 2, pp. 18-27, above, petitioners have presented sufficient evidence from which a jury could reasonably conclude that respondents were negligent in their design of and continuing duty to monitor the use and performance of the TX-944 remote control system in order to reasonably ensure their product's safety. Those reasons include: the failure to design the TX-944 transmitter to withstand the harsh, wet environment that exists at the working face of an underground coal mine; the failure to monitor the TX-944 remote systems, particularly the transmitters, once they were in use and to correct the problems of water ingress into the transmitters which caused short-circuits of the electronic switches that control the continuous miners; and Mr. Goldsborough's unchanging account of his injury.

It is undisputed that a continuous miner does not normally move on its own. Yet, as discussed at Section B. 2 a., pp. 19-20, Mr. Goldsborough has been consistent in his explanation that

he was injured when the continuous miner he had shut down moved suddenly, without his giving it a command through the remote control system, and pinned him against the mine rib. Since his interview with the investigators after his injury through his deposition in this case, Mr. Goldsborough's unchanging account of the events leading up to his injury includes his insistence that he turned off the power to the continuous miner's motors using the button the transmitter. Plaintiffs' Response to Bucyrus, 7 (App. 0614); Goldsborough depo, 224:1-4, 233:1-234:9 (App. 0161, 0163); WVOMHST report (App. 0099) ("Mr. Goldsborough stated on 11-17-2008 that he had turned the DBT mining machine off and as he was walking down the right side of the machine he was pinned against the coal rib by the machine."). Yet, the miner suddenly moved and pinned him to the right mine rib. Goldsborough depo, 250:2-20, 303:19-304:1 (App. 0167, 0181); WVOMHST report (App. 0099). Mr. Goldsborough has consistently and compellingly stated that the continuous miner moved on its own. Goldsborough depo, 306:11-307:3 (App. 0181).

Dr. Nutter's testimony further corroborates Mr. Goldsborough's account of the events, particularly based on his review of the "recovered" data. Although the reliability of the data to reveal what was actually going on with the miner at the time of Mr. Goldsborough's injury is highly questionable, to the extent that it appears to show the voltages going to various pieces of equipment on the miner, the data is consistent with Mr. Goldsborough's testimony, *i.e.*, that the injury occurred after the machine had been deactivated. Nutter depo. at 238-21:239:2 (App. 1317). From this evidence, the jury could reasonably infer that Mr. Goldsborough's injury occurred as he describes and, therefore, was most probably caused by a defect in the TX-944 transmitter.

As noted above, the only "other responsible cause" asserted in this case is the respondents' allegation that Mr. Goldsborough's story is not credible, that either he was intentionally operating

the miner from within the red zone and got hit or he stood there and let the miner run into himself. In support of their theory, respondents point to MSHA's conclusion after its incomplete investigation, as discussed, *supra* at 25-26, and Mr. Goldsborough's honest testimony that at times he has stepped into the red zone to move the miner's cable. Goldsborough depo., 451:15-453:6 (App. 0226). However, there is no evidence that Mr. Goldsborough has ever operated the continuous miner from within the red zone, only that he would step into the area to move a cable while the motor was still turned on. *Id.* In any case, whether the respondents' asserted secondary cause can be ruled out depends upon the jury's resolution of disputed facts regarding Mr. Goldsborough's consistent version of the events. In other words, if the jury finds Mr. Goldsborough's testimony credible, then the secondary cause has been ruled out.

The respondents' negligence in this case is within the scope of their duty to place into the stream of commerce only products that are designed and manufactured with reasonable care, and their continuing duty to monitor the use and performance of their products once placed into commerce to reasonably ensure their product's safety. As discussed at Section B. 2, pp. 18-24, these respondents designed and placed into the stream of commerce the TX-944 remote control system that (1) included a transmitter that was not designed to withstand the environment in which it was intended to be used, allowing water to get into the housing where the electronic switches that control the continuous miner are located, and (2) operated all of its units on the same frequency which introduced the danger of missed timing allowing a transmitter to operate a machine other than the one with which it was paired.

Petitioners have presented sufficient evidence on each element of the *res ipsa loquitur* test to survive summary judgment in this case.

b. Petitioners have presented sufficient evidence for a jury to conclude that the TX-944 remote control system violated respondents' warranty of merchantability and fitness.

The trial court again erred, at ¶ 33 of the Bucyrus order and ¶ 37 of the Structured order, when it found *sua sponte* that the petitioners cannot prove their breach of warranty claim because they cannot prove a breach was the legal cause of Mr. Goldsborough's injury. Petitioners have adduced evidence from which a jury could reasonably conclude that respondents' product breached the warranty of merchantability and fitness for its intended purpose.

Each of the three elements of the warranty for fitness of purpose must be thus proved. The elements are: (1) The seller at the time of the contracting had reason to know the particular purpose for which the goods were required; (2) the reliance by the plaintiff as buyer upon the skill or judgment of the seller to select suitable goods; and (3) that the goods were unfit for the particular purpose.

Jones, Inc. v. W. A. Wiedebusch Plumbing & Heating Co., 157 W. Va. 257, 267, 201 S.E.2d 248, 254 (1973) (citing W. Va. Code § 46-2-315 1931; *Garner v. S. & S. Livestock Dealers, Inc.*, 248 So. 2d 783 (Miss. 1971)). *See also* Syl. Pt., *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975) (abolishing privity requirement for express and imply warranty claims). Petitioners may prove their claim through circumstantial evidence.

The third element entails a determination of whether the goods were unfit for the particular purpose for which they were sold. The plaintiff was not required to exclude every possible cause for the malfunctioning of the [product], but could establish the existence of the defective condition by circumstantial evidence.

Id. at 270-271, 201 S.E.2d 248, 255-256 (citations omitted). For the reasons discussed, *supra*, at Sec. B. 2, pp. 13-27, petitioners have presented sufficient evidence to avoid summary judgment on their warranty claim.

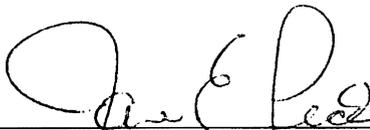
5. Mrs. Goldsborough Can Sustain a Loss of Consortium Claim.

Because her husband has valid claims against these respondents, Mrs. Goldsborough's claim for loss of consortium should likewise be presented to the jury and ¶ 43 of the Bucyrus order and ¶ 47 of the Structured order should also be overturned. *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 54, 602 S.E.2d 483, 497 (2004) (noting loss of consortium is a derivative claim).

VI. CONCLUSION

The trial court in this case erred by failing to follow the clear precedent established by this Court regarding the showing necessary to overcome summary judgment in a case of strict liability in tort regarding a defective product, regarding the elements of a *prima facie* case of strict liability in tort and regarding the inferences to be drawn and from disputed facts when considering a Rule 56(c) summary judgment motion. Wherefore, petitioners respectfully request that this Court reverse the orders of the trial court granting summary judgment to the respondents and remand this case for trial.

Respectfully submitted.
Petitioners, by counsel.



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CERTIFICATE OF SERVICE

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