IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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., BUCYRUS AMERICA, INC., BUCYRUS MINING EQUIPMENT, INC., and STRUCTURED MINING SYSTEMS INC.	)	
Defendants below, Respondents.	)	

BRIEF ON BEHALF OF RESPONDENTS

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Defendants/Respondents Bucyrus International, Inc., Bucyrus America, Inc., and Bucyrus Mining Equipment, Inc. (collectively, "Bucyrus") and Structured Mining, Inc. ("Structured Mining") hereby jointly file this brief in opposition to Plaintiffs/Petitioners Kenneth and Mary Goldsborough's appeal from the Circuit Court's Orders entered on November 15, 2013, granting Bucyrus's and Structured Mining's Motions for Summary Judgment as to all of Petitioners' claims.

I. STATEMENT OF THE CASE

a. Petitioner's Accident

On June 27, 2008, Petitioner Kenneth Goldsborough was injured while operating a remote controlled continuous miner while working in an underground coal mine in Philippi, West Virginia. (MSHA Rpt. at 1, App. 0075). The continuous miner involved in the accident was a 25M-2 Series miner manufactured by DBT Inc., a predecessor company to Bucyrus. *Id.* The remote control system for the continuous miner was manufactured by Structured Mining. (Shirk Rpt., p. 14, ¶ 15, App. 0458).

Petitioner 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 him between the continuous miner and the coal rib (i.e. the coal wall). (MSHA Report p. 2, App. 0076; Goldsborough Depo. pp. 230-241, App. 0162 - 0165). Petitioner testified that he used the remote control transmitter to shut off the continuous miner's motor, walked around the machine and untangled a plastic curtain from the front left cutterhead of the continuous miner. He claims that as he was walking back between the continuous miner and the coal rib, he suddenly became pinned between the continuous miner and the coal rib. (Goldsborough Depo.

pp. 230-241, App. 0162 - 0165). Mr. Goldsborough testified that he did not actually know how his accident occurred:

> Q. [Counsel for Bucyrus] And your testimony is that as far as you know, the machine just moved on its own?
>
> A. [Mr. Goldsborough] ***I don't know what happened.*** The only thing I know, when I got to that point, I just feel a bunch of crunching. It was just (indicating) like a lightning strike. That is all I remember.
>
> ...
>
> Q. So you never actually saw the machine move?
>
> A. No, sir.
>
> Q. And you didn't hear anything before the accident occurred?
>
> A. No, sir, didn't hear a thing.

(App. 218) (emphasis added). Petitioner was found pinned between the continuous miner and the coal rib with the remote control transmitter still in his possession. (App. 0301).

The record before the Circuit Court contained considerable evidence demonstrating that Mr. Goldsborough accidentally moved the continuous miner onto himself while operating the continuous miner in a prohibited area. Jason Nealis, who was working approximately 50-75 feet from Petitioner at the time of the accident and who was the first person to attend to Petitioner after the accident, testified (contrary to Petitioner's version of the accident) that the machine's motor was still running at the time of the accident because Mr. Nealis heard Petitioner moving ("tramming") the continuous miner up until the very moment the accident occurred:

> Q. [Counsel for Bucyrus] So in your recollection, you hear the continuous miner being trammed. All of a sudden, it shut off. And then you hear Mr. Goldsborough instantly yelling for you?
>
> A. [Mr. Nealis] Yeah.
>
> Q. And you remember that clearly?
>
> A. Yeah. Oh, yeah.
>
> Q. You remember that clearly because he was yelling your name?
>
> A. Right.

(*Id.* at 51:6-15, 64, App. 0248).

After the accident, several miners came to Petitioner's aid and transported him out of the mine for medical attention. John Stemple was the mine safety manager at the time of the accident. (Stemple Dep. (individual) at 16-17, App. 0348). Mr. Stemple testified that when he saw Petitioner as he was being transported out of the mine, Petitioner admitted to him that he had "messed up" (*Id.* at 39, App. 0354) ("And it just sticks in my mind. Kenny [Petitioner] looked at me, and he said, 'I messed up.'"). Mr. Stemple testified that Petitioner made this unsolicited admission just minutes after the accident had occurred. (*Id.* at 124, App. 0375).

b. <u>The Structured Mining Remote Control Technology</u>

On the day of the accident, there were two 25M-2 continuous miners located in the section of mine in which the accident occurred. (Hess Depo. pp. 25-26, App. 0294). At the time of the accident, the two continuous miners were 164 feet apart with no direct view of each other. (Expert Technical Report of Neil Shirk, p. 14, ¶ 15, App. 0458). Both continuous miners employed remote control systems comprised of the TX-944 radio transmitter, which is situated in the remote control, and the RX-944 radio receiver, which is affixed to the continuous miner. (Shirk Rpt., p. 14, ¶ 15, App. 0458). These remote control systems were designed and manufactured by Respondent Structured Mining, and they employed a "teach-learn" technology that works as a safeguard to ensure that only one particular transmitter is able to control the movement and functions of one particular continuous miner. (Shirk Rpt., at 16, ¶ 23, App. 0460). This teach-learn process is carried out by physically connecting a specific transmitter to a specific continuous miner via a hardwired cable when using the transmitter with the continuous miner for the first time. *Id.* After the teach-learn process is performed, the subject TX-944 transmitter and the subject RX-944 receiver will be linked only to each other, ensuring that

control over the movement and functions of that particular continuous miner will be limited to only those commands the miner receives from the subject transmitter. *Id.*

c. Post-Accident Investigation

Within hours of the accident, federal investigators from the Mine Safety and Health Administration ("MSHA") 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. (MSHA/WVOMHST Rpts., App. 0073 - 0101).

During MSHA's accident investigation on the day of Petitioner's accident, investigators and mine personnel investigated and confirmed that a second remote control transmitter and its linked receiver onboard a second continuous miner in the same mine could not control the continuous miner involved in Petitioner's accident. (Stemple Depo., pp. 129-132, App. 0376 - 0377). During the investigation, these same individuals also confirmed that the transmitter for the second continuous miner had already been through the teach-learn linking process with the second continuous miner. *Id.*

In addition to conducting an underground investigation of the accident scene and the equipment at issue, as part of its investigation, MSHA also took possession of the remote control components from the continuous miner at issue and performed an off-site investigation and testing. (MSHA Report, App. 1112). Upon completing 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." (App. 1122).

MSHA concluded that Petitioner's accident occurred because of operator error in that Petitioner 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." (MSHA Report at 5). MSHA's report concludes: "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." (WVOMHST Report, App. 0101).

One of Respondents' liability experts, Clyde Reed, interpreted machine data that was recovered from the subject continuous miner's on-board memory card. (Defendants' Liability Expert Disclosures pp. 2-3, App. 0418 - 0419). 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 Petitioner did not shut off the continuous miner's motor prior to his accident, as he claimed. *Id.* The data further reveals that the left and right trams (the tracks on the left and right side of the continuous miner) of the miner were both being activated at the time of the accident, which is consistent with Petitioner tramming (moving) the miner while standing in the prohibited red zone in the moments before his accident. *Id.* Petitioners' own expert concedes that the data could be interpreted this way. (App. 0214).

d. Petitioners' Product Defect Theories

Petitioners filed this lawsuit on June 27, 2010, two years after the accident occurred. Petitioners asserted strict products liability, negligence and breach of warranty claims against Respondents 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, at ¶10, App. 1348 - 1349). Mrs. Goldsborough asserted a derivative loss of consortium claim. (Complaint, at ¶31, App. 1352).

Petitioners advanced two product defect theories: i) water infiltrated the remote control transmitter of the allegedly powered-down continuous miner and activated the continuous miner's motors in the proper sequence[1] thereby causing the continuous miner to move and injure Petitioner; and ii) the single-frequency design of the machine's remote control system allowed the transmitter from a second continuous miner to control the subject machine and cause Petitioner's accident. (*See* Petitioners' Appeal Brief, p. 20-21).

To support their product defect theories, Petitioners employed a single liability expert, Dr. Roy Nutter.[2] Concerning Petitioners' first alleged product defect theory – that water infiltrated the remote control transmitter of the allegedly powered-down continuous miner and activated the continuous miner's motors in the proper sequence thereby causing the continuous

---

[1] In order to power up a continuous miner and cause it to move, an operator must use go through the following procedure using the remote control transmitter: (1) engage the pump motor enable switch, then (2) within a specified time of engaging the pump motor enable switch, engage the pump start switch, then (3) engage the tram enable switch, and then (4) within 2.5 seconds of engaging the tram enable switch, engage the tram levers. (App. 0388). If the switches and levers are not engaged in this exact sequence within the specified time periods, the continuous miner will not move. (*Id.*).

[2] Petitioners initially relied upon the opinions of liability expert Dr. Thomas Smith. However, after Dr. Smith's deposition testimony, by Petitioners' admission, failed to support their claims, Petitioners sought and obtained leave of the Circuit Court to substitute Dr. Roy Nutter as their sole liability expert. (App. 1341).

miner to move and injure Petitioner – Dr. Nutter admitted that he 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. [Dr. 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 possibly could have occurred.***
>
> Q. Is it probable that it occurred?
>
> A. Given the history of these remotes, I would say it's probable.
>
> 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. pp. 181-82, App. 0816) (emphasis added).

Similarly, regarding Petitioners' second alleged product defect theory – that the single-frequency design of the machine's remote control system allowed the transmitter from a second continuous miner to control the subject machine and cause Petitioner's accident – Dr. Nutter conceded that he could not opine that the remote control transmitter at issue was defectively designed. Dr. Nutter admitted that he was aware that the remote control transmitter at issue employed "teach-learn" technology that was created as a safeguard so that only one machine

could be controlled by a single remote, but then conceded that he did not know enough about the teach-learn technology 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. [Dr. Nutter] 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, App. 0822 - 0823).

Dr. Nutter further conceded that he could not rule out operator error as the cause of Petitioner's accident:

> Q. [Counsel for Bucyrus] Would you agree that there is a possibility Mr. Goldsborough was actually operating the continuous miner while he was in the red zone?
>
> A. [Dr. Nutter] I don't think there's any way to judge that. The only information we have is the data from [the subject continuous miner's on-board memory card]. And, you can use that data to reach that conclusion, possibly.

(App. 0214).

II. SUMMARY OF ARGUMENT

The Circuit Court correctly held that Petitioners failed to meet their burden of establishing a prima facie case and that Respondents were entitled to judgment as a matter of law. Because Petitioners cannot prove through direct evidence that a product defect or negligent act by Respondents caused Petitioners' alleged injuries, Petitioners attempted to prove these

claims using only circumstantial evidence, relying on the malfunction theory for their products liability claims and on the doctrine of *res ipsa loquitur* for their negligence claims.

To survive summary judgment on the malfunction theory claim, Petitioners had the burden of proving that a product defect is ***the most likely explanation*** of Petitioner's accident and that ***no other cause of the accident is likely***. Petitioners' cannot satisfy this burden. Petitioners' sole liability expert did not testify that a product defect was the most likely explanation of the accident and substantial evidence that Petitioner's own error caused his accident precludes Petitioners from proving that no other cause of the accident is likely.

Concerning Petitioners' negligence claims based on the doctrine *res ipsa loquitur*, the doctrine is inapplicable in this case, as a matter of law, because the accident at issue can be explained (and has been by substantial evidence) by Petitioner's own conduct, without any negligence on the part of Respondents. In addition, the *res ipsa loquitur* claims suffer from the same proof deficiencies that exist with Petitioners' strict products liability / malfunction theory claims. Petitioners' warranty claims likewise fail for lack of any proof that any alleged breach of warranty proximately caused the Petitioner's accident.

This Court can affirm the Circuit Court's decision based solely on the foregoing, without the need to address the remaining issues raised by Petitioners. Petitioners' additional arguments, however, also lack merit. Petitioners claims were properly dismissed at the summary judgment stage for the additional reason that they failed to adduce sufficient evidence to satisfy their burden under the risk/utility analysis and feasible alternative design requirements set forth by this Court in *Morningstar v. Black & Decker Mfr. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979), and *Church v. Wesson*, 182 W.Va. 37, 385 S.E.2d 393 (1989). The Circuit Court correctly held

that these are essential elements of a strict products liability claim under West Virginia law, and that Petitioners had failed to meet their burden under each requirement.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents request that the Court set this case for oral argument under Rule 19 of the Revised Rules of Appellate Procedure and propose that the case be resolved by an opinion or memorandum decision. The purported "issue[] of fundamental public importance" suggested by Petitioners regarding the alleged unavailability of certain evidence, (*see* Petitioners' Brief at 14), was resolved by the Circuit Court in a separate Order that has not been appealed, and is not properly before this Court. The true issues on appeal involve the application of established West Virginia case law regarding the minimum elements required of a plaintiff in order to establish a prima facie products liability claim. Petitioners appeal from a decision of the Circuit Court holding that Petitioners failed to present sufficient evidence to support such a prima facie case. *See* Rule 19(a) (1),(3). That decision should be affirmed in keeping with well-established West Virginia products liability law.

IV. ARGUMENT

a. Standard of Review

This Court reviews a Circuit Court's order granting summary judgment *de novo*. *Beatty v. Ford Motor Co.*, 212 W.Va. 471, 474, 574 S.E.2d 803, 806 (2002) (citing Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)). The Court must apply the same test as the Circuit Court, 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." *Id.* (citing Syl. Pt. 3, *Aetna Cas. & Surety Co. v. Fed. Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963)). As with the Circuit Court, this Court "must draw any permissible inference from

the underlying facts in the light most favorable to the party opposing the motion . . . ." *Id.* (citation omitted). However, where a plaintiff fails to demonstrate facts sufficient to raise a legitimate question for the jury, summary judgment is appropriate. *Id.*

b. <u>The Circuit Court correctly held that Petitioners cannot satisfy their burden of proving their claims through circumstantial evidence.</u>

Because Petitioners admittedly cannot prove a single alleged cause of Mr. Goldsborough's injury through direct evidence, Petitioners attempted to prove their claims through circumstantial evidence, relying on the malfunction theory for their strict products liability claim and the doctrine of *res ipsa loquitur* for their negligence claim. (*See* Petitioners' Appeal Brief, pp. 16-28, 35-39) (Arguing that, because their sole liability expert cannot identify a specific defect that caused the accident, Petitioners can prove their claims through circumstantial evidence). The Circuit Court properly determined that Petitioners cannot satisfy their burden of proving a prima facie case of strict products liability or negligence through circumstantial evidence.

i. <u>Petitioners cannot prove a strict products liability claim through the malfunction theory.</u>

In *Morningstar v. Black and Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979) the West Virginia Supreme Court of Appeals 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 857, 253 S.E.2d at 667, 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 883, 253 S.E.2d at 680.

Pursuant to the malfunction theory, there are certain circumstances in which a plaintiff who cannot identify the specific defect that caused a loss can prove his or her claim through circumstantial evidence. *Beatty v. Ford Motor Co.*, 212 W. Va. 471, 475, 574 S.E.2d 803, 807 (2002). In order to make out a prima facie case of strict products liability through the use of circumstantial evidence, a plaintiff must prove 1) "a malfunction in the product occurred that would not ordinarily happen in the absence of a defect" and 2) "there was neither [(a)] abnormal use of the product nor [(b)] a reasonable secondary cause for the malfunction." *Id.*

To survive summary judgment on a malfunction theory claim, a plaintiff must "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." *Bennett v. ASCO Services, Inc.*, 218 W.Va. 41, 49, 621 S.E.2d 710, 718 (2005) (emphasis added). In addition, to survive summary judgment on a malfunction theory claim, a plaintiff must also rule out abnormal product use and reasonable secondary causes by showing that "***no other cause is likely***." *Id.* (emphasis added). Where a plaintiff cannot support a conclusion that a product defect was the most likely explanation of an accident or when a plaintiff fails to sufficiently eliminate other potential causes of the accident, there is no genuine issue of material fact, and consequently, no legitimate question for the jury. *Beatty*, 212 W.Va. at 475, 574 S.E.2d at 807.

1. Petitioners cannot satisfy their burden of proving that a product defect most likely caused the accident at issue.

Concerning Petitioners' first alleged product defect theory – that water infiltrated the remote control 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 Petitioner – Petitioners incorrectly represent that Dr. Nutter concluded that water

"probably caused" the accident and "most likely caused unintended movement." (Petitioners' Appeal Brief, pp. 10 and 11). To the contrary, Dr. Nutter admitted that he 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. [Dr. 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?
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> A. That's correct.
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> Q. And is that the scenario you believe occurred in this case?
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> A. ***I have never said it occurred. I have said it possibly could have occurred.***
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> Q. Is it probable that it occurred?
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> A. Given the history of these remotes, I would say it's probable.
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> Q. And is it probable that it occurred in that sequence?
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> 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. pp. 181-82, App. 0816) (emphasis added).

Dr. Nutter further admitted that he had not done any investigation to determine himself what water in this transmitter's circuitry would do. (App. 0785). Dr. Nutter's lack of certainty about causation is consistent with Petitioners' failure to produce any evidence showing that water was present inside the subject remote control unit *at the time of Petitioner's accident.* The only evidence Petitioners identify to even suggest that there could have ever been water inside the subject remote control is the report of a Structured Mining employee who did not inspect the

subject transmitter until September 18, 2008, some two months *after* Petitioner's accident and long after the transmitter's protective case, top lid and seal were damaged during Petitioner's accident, exposing the transmitter to unknown elements and conditions. (Petitioners' Appeal Brief, p. 8, App. 0846). There is no evidence to suggest that this report is reflective of the condition of the subject transmitter unit at the time of Petitioner's accident.

A jury should not be given the opportunity to speculate that i) water had infiltrated the transmitter at the time of the accident and ii) the most likely explanation of Petitioner's accident was that water shorted certain circuits within the transmitter, in a very specific sequence thereby causing unintended machine movement, especially given that Petitioners' own expert liability witness does not even hold such opinions. *Crane & Equip. Rental Co. v. Park Corp.*, 177 W.Va. 65, 68, 350 S.E.2d 692, 696 (1986) ("A jury will not be permitted to base its findings of fact upon conjecture or speculation.") (quoting *Oates v. Continental Ins. Co.*, 137 W.Va. 501, 512, 72 S.E.2d 886, 892 (1952)).

Petitioners' second design defect theory that the single-frequency design of the subject continuous miner's remote control system allowed signals from the transmitter of a second continuous miner to inadvertently control the subject continuous miner's movements, thereby causing Petitioner's accident, similarly lacks evidentiary support. Petitioners' own expert, Dr. Nutter, conceded that he could not opine that the remote control transmitter at issue was defectively designed. Dr. Nutter admitted that he was aware that the remote control transmitter at issue employed "teach-learn" technology that was created as a safeguard permitting only one remote control transmitter to control only its linked continuous miner, but 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. [Dr. Nutter] 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, App. 0822 - 0823).

Dr. Nutter was admittedly unfamiliar with the teach-learn mechanism by which the subject single-frequency design operates, and therefore could not opine as to whether such a design constitutes a defect. Dr. Nutter, therefore, could not possibly opine on the likelihood that such a design caused the Petitioner's accident.

Petitioner's own testimony also fails to demonstrate that a product defect was the most likely cause of the accident at issue. Petitioner admitted that he, in fact, does *not* know how his accident occurred, nor was Petitioner proffered (or qualified) as a liability expert so that he could opine as to the existence of a product defect. (App. 0218).

Because Petitioners failed to satisfy their burden of proving that a product defect was the most likely cause of the accident at issue, any jury verdict reaching such a conclusion about these complex technical issues would be improperly based on speculation. *Beatty*, 212 W. Va. at 476, 574 S.E.2d at 808. The lack of evidence on this issue, alone, supports the Circuit Court's dismissal of Petitioners' products liability claims. However, the Circuit Court's rulings are also

supported by Petitioners' failure to sufficiently rule out product misuse or alternative causes of Petitioner's accident.

2. Petitioners did not satisfy their burden of proving that no cause other than a product defect likely caused the accident at issue.

In addition to being unable to prove that a product defect was the most likely explanation of the Petitioner's accident, the Circuit Court correctly determined that, given the overwhelming evidence that Petitioner's accident was caused by operator error, Petitioners are unable to demonstrate that that no other cause was likely. (Order Granting Bucyrus Defendants' Motion for Summary Judgment, ¶¶ 20-27, App. 0006-0008); *see Bennett*, 218 W.Va. at 49, 621 S.E.2d at 718.

Petitioners' own expert, Dr. Nutter, admitted that he could not rule out operator error as a reasonable secondary cause of Petitioner's accident. (App. 0214) (testifying that one could use the data from the subject continuous miner's on-board memory card to reach MSHA's conclusion that Petitioner's accident was caused by operator error). Nor is Petitioner's own testimony explaining that that he did not cause the subject mining accident sufficient to rule out operator error as a reasonable alternative explanation. Petitioners contend that Mr. Goldsborough has consistently and unchangingly maintained his own account of the accident, and that his testimony is sufficient to permit a jury to conclude that a product defect caused the accident. This Court, however, has previously found such self-serving testimony by a plaintiff to be insufficient to support a prima facie claim based on circumstantial evidence.

In *Beatty*, 212 W.Va. 471, 574 S.E.2d 803, the plaintiff asserted a strict products liability claim based on the malfunction theory after being involved in a motor vehicle accident while driving a van manufactured by the defendants. The plaintiff maintained that he was operating

the van safely at the time of the accident, and that the van suddenly went out of control. *Id.* at 473, 574 S.E.2d at 805. The circuit court granted the defendant's motion for summary judgment, and this Court affirmed, finding that "there is a substantial possibility that . . . the [plaintiff's] carelessness in operating the van may have been, at the very least, a contributing factor to the accident." *Id.* at 476, 574 S.E.2d at 808. Thus, mere testimony by the plaintiff that he was not acting negligently is not sufficient evidence to rule out operator error as a reasonable alternative cause of the accident.

The Circuit Court in this case also considered substantial additional evidence that would prevent a jury from finding that a product defect was the likely cause of Petitioner's accident. Two independent government investigative agencies with special expertise in mining accidents investigated this accident and both concluded that Petitioner's accident occurred because he was operating the continuous miner while in 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." App. 0079) (WVOMHST: conditions contributing to accident included that Petitioner "was operating the radio remote continuous miner when he was caught between the cable handler and the coal rib" App. 0101). Further evidence demonstrating that Petitioner's accident was likely caused by operator error is his admission to John Stemple shortly after his accident that he had "messed up," (Stemple Dep. (individual) at 39, App. 0354), and in the testimony of Jason Nealis that (contrary to Petitioner's version of the accident) the motor on the subject continuous miner was running up until the very moment the accident occurred. (Nealis Dep. at 48-51, App. 0257 - 0248). Moreover, Petitioners cannot deny that operator error is supported by the opinions of Respondents' liability expert, Clyde Reed, and the data retrieved from the subject continuous

miner's memory card, given that Petitioners' own expert admitted that this data could be interpreted to show operator error. (Defendants' Liability Expert Disclosures at 2-3, App. 0214).

Given the overwhelming evidence of operator error being the cause of Petitioner's accident, Petitioner's reliance on *Anderson v. Chrysler Corp.*, 184 W.Va. 641, 403 S.E.2d 189 (1991), and *Bennett*, 218 W.Va. 41, 621 S.E.2d 710, is misplaced, as those cases fail to support Petitioners' position that their claims should proceed to trial. In *Anderson*, the plaintiffs asserted a strict products liability claim against a car manufacturer after a relatively new car spontaneously caught fire and was destroyed. In finding that the circuit court erred in directing a verdict against the plaintiffs, this Court held that the plaintiffs met their burden of proving a prima facie case under a malfunction theory because (unlike the present case) there "was *no evidence* of abnormal use or of any reasonable secondary cause of the malfunction." *Anderson,* 184 W. Va. at 194, 403 S.E.2d at 646 (emphasis added).

Similarly, in *Bennett* the plaintiffs asserted strict products liability claims against a car manufacturer and a home alarm manufacturer, alleging that the car spontaneously caught fire and destroyed their home and that the home alarm failed to work and prevent the loss. This Court held that sufficient evidence existed for plaintiffs to prove a prima facie case under a malfunction theory, again because (unlike the present case) there was *no evidence* of abnormal use or of any reasonable secondary cause of the alleged product malfunctions. In fact, the plaintiffs in *Bennett* went as far as to offer expert testimony specifically demonstrating why other potential causes could not have been the source of the fire.[3] Plaintiffs in this case, however, have not and cannot

[3] Concerning the fire alarm, the plaintiffs introduced expert testimony of a specific defect in the wiring of the alarm that caused the fire and post-accident investigators ruled out secondary causes. *Bennett,* 218 W. Va. at 48, 621 S.E. 2d at 717. Concerning the car, plaintiffs introduced evidence that it was well-maintained and was not being misused at the time of the fire and post-accident investigators ruled out secondary causes. *Id.* at 49, 621 S.E. 2d at 718. The plaintiffs' experts testified that there was no defect

make such a showing, as their own expert admittedly cannot rule out operator error as a reasonably secondary cause.

The present case more closely resembles *Beatty*, 212 W.Va. 471, 574 S.E.2d 803, in which this Court affirmed a circuit court's dismissal, at the summary judgment stage, of a claim that the steering mechanism in a van manufactured by the defendant was defective and caused an accident. In *Beatty*, as in the present case, there was evidence that operator error was a reasonable secondary cause of the accident. The evidence came in the form of i) post-accident investigators that attributed the accident to the plaintiff's failure to control his vehicle on slippery pavement; and ii) a conclusion from the defendant's expert that the steering mechanism did not cause the accident. This Court, therefore, affirmed the circuit court's dismissal of the plaintiff's claims at the summary judgment stage. Here, the evidence of operator error as a likely cause of Petitioner's accident is even more substantial than the evidence in *Beatty*.

3. Petitioners' allegations of "lost" evidence are irrelevant to this appeal.

Petitioners' suggest that Respondents (or Petitioner's former employer) somehow lost "significant evidence supporting [Petitioners'] claims," which impeded Petitioners' ability to prove their "claim even under the malfunction theory" and hampered their "expert's ability to state with certainty which defect caused the injury." (Petitioners' Appeal Brief at 13 and 14). This accusation lacks merit and should be disregarded.

Petitioners suggest that, if they had access to certain additional evidence, they would have been able to support their claims. Leaving aside the question of how Petitioners could argue that evidence they have never seen supports their position, their argument about lost evidence was rejected when Petitioners filed an unsuccessful motion to amend the Complaint to

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in the electrical wiring of plaintiffs' home which could have caused the fire, and that other potential causes, such as a gasoline can, lacked an ignition source, and therefore could not have caused the fire. *Id.*

add spoliation claims against Respondents. (*See* filings concerning Petitioner's Motion to File Amended Complaint, App. 1337, Lines 230, 233 and 234).[4] That motion was denied by the Circuit Court, the Complaint was never amended, the Circuit Court's decision was not appealed and the issues are, therefore, not properly before this Court.

More importantly, this issue is irrelevant to this appeal. The issue on appeal is whether Petitioners established a prima facie products liability case pursuant to West Virginia law. The unavailability of certain evidence does not raise or lower Petitioners' required threshold showing to overcome summary judgment on a claim based on circumstantial evidence. *Bennett*, 218 W.Va. 41, 621 S.E.2d 710. Because Petitioners did not satisfy their burden of proving a prima facie products liability case through circumstantial evidence, the Circuit Court properly granted summary judgment in favor of Respondents.

ii. Petitioners cannot prove negligence under the rule of *res ipsa loquitur.*

Petitioners incorrectly argue that they "presented sufficient evidence on each element of the *res ipsa loquitur* test to survive summary judgment in this case." (Petitioners' Appeal Brief, p. 38). "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 Petitioner 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*, 212 W. Va. at 476, 574 S.E.2d at 808. "It is the function of *the court* to determine whether the inference may reasonably be drawn by the jury" and ensure that the

[4] Because Petitioners did not appeal the ruling on their Motion to File Amended Complaint, Respondents did not request that the actual filings related to this Motion be included in the Appendix. These filings remain available as part of the entire case record. W.Va. R. App. 6(b).

record evidence is "not simply evidence which would force the jury to speculate in order to reach its conclusion." *Id.* 212 W. Va. at 476, 574 S.E.2d at 808 (emphasis added).

"The doctrine of *res ipsa loquitur* cannot be invoked where the existence of negligence is wholly a matter of conjecture and the circumstances are not proved, but must themselves be presumed, or when it may be inferred that there was no negligence on the part of the defendant." *Farley v. Meadows*, 185 W.Va. 48, 50, 404 S.E.2d 537, 539 (1991). The doctrine is inapplicable in this case, as a matter of law, because the accident at issue can be explained (and has been by substantial evidence) by Petitioner's own conduct, without any negligence on the part of Respondents. *Farley*, 185 W.Va. at 50, 404 S.E.2d at 539 ("The doctrine [of *res ipsa loquitur*] applies only in cases where defendant's negligence is the *only* inference that can reasonably and legitimately be drawn from the circumstances.") (emphasis added); *see also Mrotek v. Coal River Canoe Livery, Ltd.*, 214 W.Va. 490, 590 S.E.2d 683 (2003) (doctrine of *res ipsa loquitur* inapplicable, as a matter of law, in a claim that a defective ski binding caused a skiing accident because skiing accidents can occur solely from a skier's own actions).

Moreover, the *res ipsa loquitur* claims against Respondents suffer from the same proof deficiencies identified above with respect to Petitioners' malfunction theory claims. *See Beatty*, 212 W.Va. 471, 574 S.E.2d 803 (negligence claim based on *res ipsa loquitur* dismissed on summary judgment based on same evidence that resulted in dismissal of malfunction theory claim). Petitioners cannot, as a matter of law, eliminate other reasonably probable causes of Petitioner's accident in light of the substantial evidence from Petitioner's co-workers, two independent government agencies that specialize in mining accident investigations, and the continuous miner computer data (which even Petitioner's own expert agrees can be interpreted to

show operator error), all of which support a secondary cause of the accident in the form of operator error. The Circuit Court properly dismissed Petitioners' negligence claims.

c. <u>The Circuit Court correctly held that Petitioners cannot satisfy their burden of proving their breach of warranty claims.</u>

The Circuit Court correctly held that Respondents were entitled to judgment as a matter of law on Petitioners' breach of warranty claims. For the same reasons that Petitioners cannot establish a prima facie case of negligence or strict products liability, Petitioners cannot establish a prima facie case of breach of warranty. A plaintiff asserting a claim for breach of warranty has the burden of establishing that the alleged breach was the legal cause of the plaintiff's damages. *See, e.g.*, *Tolley v. Carboline Co.*, 217 W.Va. 158, 162, 617 S.E.2d 508, 512 (2005). Petitioners admittedly cannot demonstrate that any specific act, defect, or breach proximately caused Mr. Goldsborough's injury. (*See* Petitioners' Appeal Brief, pp. 16-28, 35-39). Indeed, Petitioners' sole liability expert admitted that he could not even opine that either of the Petitioners' alleged defects was the most likely explanation of Mr. Goldsborough's accident. (Nutter Depo. pp. 181-82, 204-07, App. 0816, 0822 - 0823). Given the Petitioners' inability to prove causation, and the substantial evidence of operator error as a reasonable alternative cause, any jury verdict concluding that a breach of warranty proximately caused Mr. Goldsborough's accident would be improperly based on speculation. *Crane & Equip. Rental Co. v. Park Corp.*, 177 W.Va. 65, 68, 350 S.E.2d 692, 696 (1986) ("A jury will not be permitted to base its findings of fact upon conjecture or speculation.") (quoting *Oates v. Continental Ins. Co.*, 137 W.Va. 501, 512, 72 S.E.2d 886, 892 (1952)). As Petitioners cannot prove that any alleged breach of warranty proximately caused Mr. Goldsborough's accident, the Circuit Court correctly held that Petitioners failed to meet the prima facie burden and that Respondents are entitled to judgment as a matter of law.

d. <u>The Circuit Court correctly held that the risk/utility analysis and feasible alternative design requirement are necessary elements of a prima facie case under West Virginia products liability law</u>.

This Court can affirm the Circuit Court's decision based solely on the Circuit Court's correct holding that Petitioners cannot satisfy their burden of proving their products liability and negligence claims through circumstantial evidence, without the need to address the remaining issues raised by Petitioners. Petitioners' additional arguments, however, also lack merit.

The Circuit Court correctly held that West Virginia law requires a risk/utility analysis of a product's design to determine whether a particular design is defective. The Circuit Court also correctly held that West Virginia law requires Petitioners to 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. Without satisfying these elements, Petitioners cannot establish that their alleged design flaws constitute "defects" under West Virginia products liability law. Petitioners failed to satisfy their burden under both of these essential elements, and each element therefore constitutes a separate and sufficient basis for the dismissal of Petitioners' claims.

In *Morningstar*, this Court established the minimum requirements under West Virginia law for a plaintiff to prevail on a claim for defective design of a product. 162 W.Va. 857, 253 S.E.2d 666. The Court held that in order to prove that a product is defective, a plaintiff must show that it was "not reasonably safe for its intended use." *Id.* at 857-58, 253 S.E.2d at 667. The Court further held that "[t]he term 'unsafe' imparts a standard that the product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to 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.*"

Id. at 858, 253 S.E.2d at 667 (emphasis added). This standard evinces a risk/utility analysis as a central part of the trial court's evaluation of the sufficiency of a plaintiff's products liability claims. Indeed, the Court expressly stated that "[w]e believe that a risk/utility analysis does have a place in a tort products liability case by setting the general contours of relevant expert testimony concerning defectiveness of the product." *Id.* at 887, 253 S.E.2d at 682. The Court then recognized and cited approvingly the seven-factor risk/utility analysis adopted by the New Jersey Supreme Court in *Cepeda v. Cumberland Engineering Co., Inc.*, 76 N.J. 152, 386 A.2d 816 (1978), *overruled on other grounds*, *Suter v. San Angelo Foundry & Machine Co.*, 81 N.J. 150, 177, 406 A.2d 140, 153 (1979). *Morningstar*, 162 W.Va. at 885-87, 253 S.E.2d at 681-82.

This Court has also held that evidence of a feasible alternative design is an essential element of a plaintiff's defective design products liability claim. In *Church v. Wesson*, 182 W.Va. 37, 385 S.E.2d 393 (1989), this Court affirmed the trial court's grant of a directed verdict in favor of the defense, finding that the petitioners had failed to establish a prima facie case of design defect because the product at issue reflected the "state of the art" in the design and manufacturing process, and because the petitioners' proposed alternative design "was not feasible" at the time the product was manufactured. *Id.* at 40, 385 S.E.2d at 396. This conclusion is further supported by the Court's holding in *Morningstar*, in which the Court held that "reasonable safeness" of the product in question is to be evaluated "having in mind the *general state of the art of the manufacturing process*[.]" *Morningstar*, 162 W.Va. at 885-87, 253 S.E.2d at 681-82 (emphasis added). Additionally, the factors considered in *Morningstar*'s risk/utility analysis expressly include the availability of a feasible alternative design for the challenged product. *Id.* at 885-86, n.20, 253 S.E.2d at 681 (Factor No. 3: "[t]he availability of a substitute product which would meet the same need and not be as unsafe."). Thus, this Court has

repeatedly held that evidence of a feasible alternative design is an essential element of a design defect products liability claim under West Virginia law.

i. Petitioners have not presented sufficient evidence of risk/utility analysis or feasible alternative design, and therefore cannot prove a product defect.

The seven-factor risk/utility analysis recognized in *Morningstar* calls upon courts 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.

Id. at 885-87, n.20, 253 S.E.2d at 681-82 (quoting *Cepeda*, 76 N.J. at 174, 386 A.2d at 826-27).

Petitioners have failed to present sufficient evidence pertaining to this risk/utility analysis to meet their burden of establishing a prima facie case of design defect under West Virginia law. First, Petitioners agree with Respondents that continuous miners are extremely useful and important pieces of equipment in the coal mining and energy production fields. Regarding the second, fifth, and sixth factors, Petitioners' contention that continuous miners pose a risk of "unintended movement" is completely unsupported by any evidence in the record. Petitioners

have offered no direct evidence that such unintended movement actually occurred in this case, or that the subject continuous miner poses any risk of injury when properly used. Regarding the seventh factor of the risk/utility analysis, it is undesirable to require a manufacturer to pass on to its customers and insurers the cost of a loss which could have been avoided had the Petitioner only observed the warnings and safety training he was given. *See Monaham v. Toro Co.*, 856 F. Supp. 955, 964 (E.D. Pa. 1994) (applying same seven-factor analysis and concluding, "Defendant should not have to spread among its customers the economic loss resulting from injuries from a product that is not defective, and for which the risk of harm can be eliminated by operating the product properly and heeding given warnings.").

Most importantly, the third and fourth factors both concern whether Petitioners have proposed a feasible alternative design that would eliminate the product's unsafe character without impeding the product's utility. In addition to being a factor relevant to the risk/utility analysis, presentation of a feasible alternative design is also a separate and essential element of Petitioners' products liability claims. *Church*, 182 W.Va. 37, 385 S.E.2d 393; *Morningstar*, 162 W.Va. 857, 253 S.E.2d 666. In this case, Petitioners have failed to offer *any evidence*, aside from the pure speculation of their liability expert, regarding a feasible alternative design that would address any of the product design defects Petitioners allege. This is not a matter of crediting the testimony of Respondents' witnesses over that of the non-moving plaintiff. This is simply a case in which the Petitioners have failed to offer any evidence in support of this necessary element of their claim.

For instance, regarding whether Dr. Nutter has designed a transmitter that, in his opinion, would withstand the water, moisture, or dust ingress that Petitioners claim rendered the subject remote control system design defective, Dr. Nutter testified: "***No but I certainly thought about***

it." *(Nutter Dep.* at 195, App. 0820). Dr. Nutter's opinions regarding a stronger casing, better-sealed switches, and waterproofing are therefore completely hypothetical, and have not been tested or modeled, much less manufactured by the Petitioners or their expert. Petitioners mention in passing transmitters manufactured by Forced Potato and remote systems developed in India.[5] However, neither Petitioners nor Dr. Nutter offer any explanation of how or why those designs would be superior to the design at issue. They have conducted no testing, performed no data analysis, and made no comparison of the risks or benefits of employing those other models, and so have failed to meet their burden of demonstrating the feasibility of a safer alternative design.

The same is true of Petitioners' single-frequency theory of design defect. As observed above, Dr. Nutter testified that he was not sufficiently familiar with the teach-learn technology used in the single-frequency design to even opine whether that design was defective. (App. 0822 - 0823). In addition to being unable to testify that the single-frequency design was defective, Dr. Nutter also could not identify any 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. [Petitioners' products liability expert] I do not know.
>
> Q. Have you done anything to investigate that?
>
> A. I have not.

[5] Petitioners failed to make any mention of remote systems developed in India in opposition to Petitioners' motions below, and therefore should be precluded from making any such argument here. In any event, Petitioners' argument that such Indian remote systems or the Forced Potato system represent feasible alternative designs is without merit, as that argument is based on no facts, data, or analysis whatsoever. Petitioners have made absolutely no effort to perform any type of analysis of the relative risks and benefits of these systems as compared with the system employed on the subject continuous miner.

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.

(*Nutter Dep.* at 207-08, App. 0823). Thus, Dr. Nutter's suggestion that Respondents should have used a multiple-frequency design is purely theoretical and is not based on any facts or data. Petitioners and Dr. Nutter have conducted no analysis of the relative safety of each design, and therefore have failed to meet their burden of demonstrating the feasibility of a safer alternative design.

The Circuit Court correctly held that Petitioners failed to meet their burden under the *Morningstar* risk/utility analysis and that Petitioners failed to demonstrate the feasibility of a safer alternative design. Because of these failures, Petitioners cannot establish a prima facie case that the challenged design was defective, and the Circuit Court's Order granting judgment as a matter of law in favor of Bucyrus and Structured Mining should be affirmed.

e. <u>Mary Goldsborough cannot sustain a claim for loss of consortium.</u>

The Circuit Court correctly held that Mary Goldsborough's claim for loss of consortium is necessarily derivative of Kenneth Goldsborough's underlying tort claims, and that in light of the Petitioners' failure to establish a prima facie case in support of those tort claims, Mrs. Goldsborough's derivative claim must likewise be dismissed. *Councell v. Homner Laughlin China Co.*, 823 F. Supp. 2d 370, 385 (N.D.W.Va. 2011).

V. CONCLUSION

Petitioners failed to meet the burden required to submit their claim to a jury, and the Circuit Court's Order granting Bucyrus International, Inc., Bucyrus America, Inc., Bucyrus

Mining Equipment, Inc. and Structured Mining, Inc.'s judgment as a matter of law should therefore be affirmed.

RESPECTFULLY SUBMITTED.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KENNETH GOLDSBOROUGH and MARY GOLDSBOROUGH, Plaintiffs below, Petitioners, v. BUCYRUS INTERNATIONAL, INC., BUCYRUS AMERICA, INC., BUCYRUS MINING EQUIPMENT, INC., and STRUCTURED MINING SYSTEMS INC. Defendants below, Respondents.	)	Docket No. 13-1323 (Kanawha County Circuit Court Civil Action No. 10-C-1170)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 1st day of May, 2014, via e-mail and first class U.S. Mail, upon the following:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KENNETH GOLDSBOROUGH and MARY GOLDSBOROUGH, Plaintiffs below, Petitioners, v. BUCYRUS INTERNATIONAL, INC., BUCYRUS AMERICA, INC., BUCYRUS MINING EQUIPMENT, INC., and STRUCTURED MINING SYSTEMS INC. Defendants below, Respondents.	))))))))))))))))	Docket No. 13-1323 (Kanawha County Circuit Court Civil Action No. 10-C-1170)

CORRECTED CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 1st day of May, 2014, via first class U.S. Mail, upon the following:

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