



IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOAT-SINK LITIGATION

**CIVIL ACTION NO.: 11-C-5000000
(Honorable John A. Hutchison)**

THIS DOCUMENT APPLIES TO ALL CASES

ORDER CERTIFYING QUESTIONS OF LAW

On a previous day came the Defendant Preiser Scientific, Inc. ("Preiser"), by and through its counsel, Webster J. Arceneaux, III and the law firm of Lewis Glasser Casey & Rollins, PLLC, and Employer Defendants, SGS North America, Inc.; Allied Chemical Corporation; U.S. Steel Mining Company, LLC; United States Steel Corporation; TraDet, Inc.; Carbon Fuel Company; Island Creek Coal Company; Consolidation Coal Company; Buffalo Mining Company; Elkay Mining Company; and Virginia Crews Company, by and through Liaison Counsel, Jon L. Anderson and the law firm of Jackson Kelly PLLC, and provided filings and argument related to the *Employer Defendants' Motion to Certify Question of Law*, Transaction ID# 45645680; *Preiser Scientific, Inc.'s Response to Employer Defendants' Motion to Certify Question of Law and in Support of Its Cross-Claims for Contribution*, Transaction ID# 45821620; Preiser's *Objections and Notices of Preservation of Cross-Claims for Contribution* filed in various cases that are before the Court Transaction ID# 44974737, 44975340, 44975970, 44975650, 45532699, 45627833, 45628663, 45628990, 45703600, 45738428, and 45738605.

The Court, upon review of the same, and being otherwise sufficiently advised, recognizes the Employer Defendants' request for certification with regard to this issue and through this Order certifies the legal questions set forth below.

In these actions, originally filed in 17 different counties in West Virginia, referred to the Mass Litigation Panel and now identified as *In re: Float Sink Litigation*, Civil Action No. 11-C-5000000, the Plaintiffs allege that they have suffered various personal injuries as a result of

exposure to perchloroethylene (“PCE”) during their employment with the various Employer Defendants. The Complaints and Amended Complaints at issue specifically allege deliberate intent claims against Employer Defendants and negligent and strict product liability claims based on alleged failure to warn against Preiser.

The Plaintiffs’ deliberate intent causes of action against Employer Defendants have been dismissed on various dispositive grounds, primarily procedural in nature. Preiser contends that, pursuant to *Sydenstricker v. Unipunch Prods.*, 169 W. Va. 440, 288 S.E.2d 511 (1982), it is entitled to maintain cross-claims for contribution, sounding in deliberate intent for any amounts the Plaintiffs may ultimately recover against Preiser. The Employer Defendants contend that the 1983 Amendments to W. Va. Code § 23-4-2 prohibit such a cross-claim by Preiser and they have filed a Motion to Certify Question of Law in support of that position. Preiser has filed a Response to that Motion to Certify Question of Law and submitted alternate proposed Questions of Law. Preiser has also filed Objections and Notices of Preservation of Cross-Claims for Contribution in various cases that are before the Court.

The Court, upon review of the pleadings of the parties as well as the arguments of counsel believes that the questions presented by the parties are appropriate for certification. Specifically, the Court notes that W. Va. Code § 58-5-2 provides as follows:

Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the supreme court of appeals.

The Court finds that the issues presented are novel in that the Supreme Court of Appeals of West Virginia has not issued any decisions directly addressing the viability of third party contribution claims sounding in deliberate intent following the 1983 amendments to the Workers' Compensation Act. Further, the Court finds that the issue presented herein is central to this case and demonstrates a pure issue of law. Finally, without certification, the only mechanism available to obtain appellate review on these issues is to allow this matter to proceed to verdict.

That being said, the Court is concerned that neither side has addressed *Cecil, et al. v. D and M Incorporated, et al.*, 205 W.Va. 162, 517 S.E. 2d 27 (1999), in which the Supreme Court of Appeals of West Virginia applied common law principles to allow set offs for good faith settlements made by non-employer defendants where the jury found an employer defendant liable based upon a deliberate intent cause of action.

Plaintiffs in the *Cecil* case settled with non-employer defendants who were sued based on a products liability theory. The non-settling employer defendant was sued based on a deliberate intent theory and was found liable by the jury at trial. The employer defendant believed it was entitled to a set off for the other defendants' good faith settlements. Plaintiffs argued the Workers' Compensation Act displaced the common law "one satisfaction rule" because an injured worker was permitted a double recovery in instances where the employee received benefits under the Worker's Compensation Act and also recovered against a third-party tortfeasor. On appeal, the Supreme Court found that the common law "one satisfaction rule" applied in the context of a "deliberate intention" claim. *Cecil*, 205 W. Va. at 170, 517 S.E.2d at 35. The Court recognized that an employee is entitled to receive workers' compensation benefits and yet, pursue a judgment against a third-party tortfeasor. However, in a deliberate intention

action, the employee is seeking to recover from his or her employer amounts in excess of the benefits paid by the workers compensation system. If the employee proves deliberate intention, he or she is entitled to be “made whole” for the injuries sustained, and the “one satisfaction rule” must be applied. *Id.*

As held by the Court in Syllabus Point 5 of *Cecil*, “Defendants in a civil action against whom a verdict is rendered are entitled to have the verdict reduced by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties. Syllabus Point 1, in part, *Clark v. Kawasaki Motors Corp., U.S.A.*, 200 W.Va. 763, 490 S.E.2d 852 (1997).” The *Cecil* opinion is important because set off of a judgment in a deliberate intention case for a third-party negligent tortfeasor is plainly a common law remedy.

Furthermore, the following language in the Workers Compensation Act is, if not identical, substantially similar to the pre-1983 statute:

If injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter *and has a cause of action against the employer, as if this chapter had not been enacted*, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter, whether filed or not.

W. Va. Code § 23-4-2(c) (2005) (emphasis added). This indicates to the Court that, if deliberate intent is proved, the employee has a common law cause of action with entitlement to common law damages.

The adoption by the Court of the proposed certified questions and responses, as set forth in Judge Robert Chafin’s December 9, 2011, Certification Order in *Dotson v. Mine Safety Appliances Company, et al.*, Civil Action 11-C-316, Circuit Court of Mingo County, West

Virginia, signals our concern that these questions need resolution in order to settle this issue for future litigation.¹

Accordingly, the Court certifies the following questions, which are substantively identical to those questions certified in *Dotson v Mine Safety Appliances Company, et al.*, Civil Action 11-C-316, dated December 9, 2011:

Certified Question 1: Did the West Virginia Legislature intend, by enacting the 1983 amendments to W. Va. Code § 23-4-2, to eliminate third-party deliberate intent actions for contribution?

Answer: No.

Certified Question 2: Does a third-party, such as Preiser Scientific, Inc. have a right to bring a contribution claim against a plaintiff's employer for deliberate intent conduct?

Answer: Yes.

The Court, having answered the questions as indicated, requests that the Supreme Court of Appeals of West Virginia issue an opinion confirming the Court's answers to the certified questions.

Pursuant to the Rules of Appellate Procedure 17(a), the parties are hereby directed to prepare a joint appendix of the record sufficient to permit review of the certified questions.

The respective objections of any parties aggrieved by this Order are hereby noted and preserved.

The Clerk is directed to send a copy of this Order to all counsel of record.

Enter: September 10, 2012.

/s/ John A. Hutchison
Lead Presiding Judge
Float-Sink Litigation

¹ Preiser advised the Court the certified questions in *Dotson* were set for argument on September 5, 2012, but would be dismissed based on settlement of that case.