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**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Starcher, J., dissenting:

The majority opinion in the instant case studiously omits any suggestion that Eastern's actions were reprehensible and outrageous. But there is a strong case to be made that they were. It is for this reason that Mr. Philyaw's claim should be decided by a jury.

Taking the evidence in the light most favorable to Mr. Philyaw, Eastern engaged in a longstanding scheme to keep the truth about dangerous dust levels in its mines a secret from regulators and employees – by manipulating the dust level data reported to MSHA.

It is undisputed that Mr. Philyaw was expected to keep that reported data within legal limits or lose his job, despite the fact that (according to Philyaw) the only way to do so was to engage in subterfuge measures like artificially reducing coal production on the days that dust inspectors visited the mine, or directing the inspectors to a dust-free section of the mine. In other words, according to Philyaw's evidence, Philyaw was directed to skew the reported data in order to conceal the existence of unsafe working conditions. *See* n.2, majority opinion.¹

Is demanding that an employee improperly subject his fellow employees to

¹Of course, Eastern denies any such implication in its commands to Mr. Philyaw. Only in a trial could the truth of Mr. Philyaw's version of events – *versus* Eastern's – be ascertained.

unsafe conditions outrageous and intolerable?

I submit that this is at the least a jury question.

For this reason, I would reverse the grant of summary judgment for Eastern. Accordingly, I dissent. I am authorized to state that Justice Albright joins in this separate opinion.