IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0329

MICHAEL D. RUBLE, ET AL.,

Petitioners,

v.

Appeal from a final order of the Circuit Court of Cabell County (19-C-127)

RUST-OLEUM CORPORATION, ET AL.

Respondents.

PETITIONERS' REPLY BRIEF

Counsel for Petitioners, Michael D. Ruble and Brenda K. Ruble

R. Dean Hartley (WV Bar #1619)
Mark R. Staun (WV Bar #5728)
David B. Lunsford (WV Bar #12555)
HARTLEY LAW GROUP, PLLC
7 Pine Avenue
Wheeling, West Virginia 26003
Phone: (304) 233-0777
Fax: (304) 233-0774
dhartley@hartleylawgrp.com
mstaun@hartleylawgrp.com
dlunsford@hartleylawgrp.com

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I. INTRODUCTION

For over a century, this Court has interpreted this State's workers' compensation statute as providing an injured-employee with a statutory workers' compensation claim against his employer, while not interfering with the injured-employee's coexistent common law civil claims against any third-party tortfeasors. Respondents now seek to apply collateral estoppel in favor of third-parties who are not part of West Virginia's workers' compensation framework. Allowing such an application of collateral estoppel would solely serve to shield third-party defendants from well-established common law claims that have long been available to persons who are injured in their employment.

The Rubles do not ask this Court to abolish the well-established doctrine of collateral estoppel. Rather, the Rubles simply ask this Court to reject the Respondents' novel legal assertion that collateral estoppel may be invoked by third-party product liability defendants to defeat common law civil claims brought against them by a plaintiff-employee based on a ruling under the workers' compensation statute concerning occupational disease. The Rubles ask this Court to determine that collateral estoppel may not be applied in such circumstance generally and/or in the Rubles' case specifically, and upon doing so, to reverse the circuit court's order and remand this case for proceedings consistent therewith.

II. CLARIFICATION OF RESPONDENTS' STATEMENT OF CASE

The posture of this appeal is generally well-presented by *Petitioners' Brief* and *Respondents' Brief*. With that said, however, Respondents slightly mischaracterized the initial workers' compensation claims administrator's involvement in Mr. Ruble's workers' compensation claim. Contrary to Respondents' assertion that the claim administrator denied Mr. Ruble's workers' compensation claim based on "the evidence and arguments presented and reviewed[,]"

the claims administrator merely considered Mr. Ruble's application for workers' compensation benefits and denied the claim – only after Mr. Ruble filed a petition due to the claims administrator's failure to timely act on his claim.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents maintain that oral argument is unnecessary because, in their view, this appeal concerns the application of the well-settled doctrine of collateral estoppel. While the Rubles do not dispute that such doctrine is well-settled, the Respondents' view of this appeal is overly simplistic. Rather, the instant appeal presents issues of first impression for this Court, issues of fundamental public importance, and Constitutional questions regarding the application of collateral estoppel against a plaintiff-employee, in favor of third-party common law product liability defendants, following adverse determinations rendered in the plaintiff-employee's administrative workers' compensation litigation. This Court should select this case for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure so that the novel legal issue presented by this appeal may be fully considered and addressed.

IV. ARGUMENT

A. West Virginia law has not permitted and should not permit the application of collateral estoppel in favor of third-party product liability defendants after an employee-plaintiff loses his related occupational disease workers' compensation claim.

The Rubles do not ask this Court to reject the well-established doctrine of collateral estoppel. Instead, the Rubles ask this Court to address a legal question that has never been addressed by this Court; that is, whether third-party product liability defendants may utilize collateral estoppel to bar an employee-plaintiff's civil common law claims against them after the employee-plaintiff loses his related occupational disease workers' compensation claim. The Rubles maintain that this Court's answer should be "no."

1. **Respondents admit that West Virginia law has not previously allowed the application of collateral estoppel against an employee-plaintiff following the employee-plaintiff's loss of his related occupational disease workers' compensation claim. Facing a lack of authority, Respondents rely upon three foreign intermediate appellate court decisions to support their sought application of collateral estoppel.**

Respondents admit that "this Court has not expressly extended collateral estoppel to proceedings involving third-party, non-employer defendants." Resp'ts Br. at p. 18. Given a lack of supporting mandatory authority, Respondents turn to opinions issued by the intermediate appellate courts of Ohio[1], Pennsylvania[2], and New York[3], all of which allowed the application of collateral estoppel in favor of non-employer, third-party defendants, against whom the respective plaintiff-employees asserted civil claims as a result of acute traumatic injuries[4] that they allegedly suffered during the course of their employment.

These opinions do not consider West Virginia law, the respective states' workers' compensation statutory framework, case law interpreting each state's statutory workers' compensation system, or the states' respective constitutions, nor the policy concerns underlying the application of collateral estoppel, in favor of third-party, non-employer defendants, as a result of workers' compensation claims between employers and employees, particularly those involving

[1] *Young v. Gorski,* 2004 WL 540944 (Ohio Ct. App. Mar. 19, 2004).

[2] *Frederick v. Action Tire Co.,* 744 A.2d 762 (Pa. Super. Ct. 1999).

[3] *Lennon v. 56th & Park (NY) Owners LLC,* 199 A.D.3d 64 (N.Y. App. Div. 2021).

[4] It is noteworthy that the *Young, Frederick, and Lennon* plaintiff-employees claimed to have suffered acute, traumatic injuries and that the relevant workers' compensation factfinder found that they, in fact, did not suffer their claimed injuries. To the contrary, there is agreement that Mr. Ruble suffers from the diseases that he claimed in both his occupational disease workers' compensation claim and this action; however, the issue relates to whether or not those claimed occupational diseases were caused by his exposure to toxins, including Respondents' products, during his relevant employment. The analysis of such causation issue required the workers' compensation administrative law judge to consider complex scientific and medical evidence, and the Rubles maintain that such conclusion is, as is often the case in occupational disease cases, subject to reasonable dispute.

latent occupational diseases. Instead, the foreign intermediate appellate courts rotely applied each state's common law collateral estoppel doctrine.

2. Other state supreme courts have precluded the application of collateral estoppel against plaintiff-employees asserting common law civil claims against non-employer, third-party defendants even though the plaintiff-employees lost related workers' compensation claims due to an administrative finding of a lack of causation between the employee-plaintiff's injury and employment.

The Supreme Courts of Utah, Delaware, and Nebraska have each refused to apply collateral estoppel in favor of non-employer, third-party defendants, after a plaintiff-employee loses his or her workers' compensation claim on the basis of a lack of causation between the employee-plaintiff's injury and employment. Notably, the Utah and Delaware high courts both addressed this issue in the context of claimed occupational diseases.

The Supreme Court of Utah has faced the precise issue that this Court faces today:

> Whether a [lower court] may give a workers' compensation adjudication on the issue of causation preclusive effect in a civil action against a nonemployer third-party defendant. Stated another way, can a third-party defendant use a workers' compensation adjudication on the issue of causation to block relitigation of that issue in a civil suit?

Gudmundson v. Ozone, 210 UT 33, 232 P.3d 1059 (2010).

The *Gudmundson* court concluded that the lower court erred when it gave preclusive effect to the underlying workers' compensation adjudication. *Gudmundson,* 232 P.3d at 1067. In reaching its conclusion, the *Gudmundson* court considered the context of Utah's statutory workers' compensation system:

> The Utah Workers' Compensation Act represents a compromise between employee and employer. An injured employee receives 'a simple and speedy procedure which eliminates the expense, delay and uncertainty' in proving fault," . . . while the employer is granted immunity from suit by the employee. *See* Utah Code Ann. § 34A-2-105 (Supp.2009) ("The right to recover compensation pursuant to [the Utah Workers' Compensation Act] . . . is the exclusive remedy

> against the employer and . . . any officer, agent, or employee of the employer. . . .") This compromise does not affect an employee's statutory right to sue negligent third parties. *See* Utah Code Ann. § 34A-2-106(1) (Supp.2009) ("When any injury . . . is caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of the employer . . . the injured employee . . . may have an action for damages against the third person.")

Id.

After discussing the well-established doctrine of collateral estoppel, the *Gudmundson* court noted that "collateral estoppel is not an inflexible, universally acceptable principle" and that "its use may be limited in situations where it would subvert other legitimate policy considerations." *Id.* (internal quotations and citations omitted). While the *Gudmundson* court highlighted its established case law holding that "administrative adjudications may be given preclusive effect[,]" the *Gudmundson* court squarely confronted the issues this Court faces when considering the application of collateral estoppel in favor of non-employer, third-party defendants:

> Indeed, if workers' compensation adjudications were given preclusive effect in suits against nonemployer-third parties, injured workers would face a vexing dilemma: either elect the more simple and immediate relief afforded by workers' compensation or the more complex but potentially more lucrative civil litigation process. *See Messick v. Star Enter.*, 655 A.2d 1209, 1212-13 (Del. 1995) (explaining this dilemma); *Cunningham v. Prime Mover, Inc.*, 252 Neb. 899, 567 N.W.2d 178, 182-83 (1997) (same). The Utah Workers' Compensation Act does not require an employee to make such an election of remedies.
>
> On the one hand, Utah Code section 34A-2-105(1) clearly explains that a claim under the Workers' Compensation Act is 'the exclusive remedy against *the employer* . . . in place of any and all other civil liability whatsoever, at common law or otherwise, to the employee.' (emphasis added). Section 34A-2-106, on the other hand, clearly preserves an employee's civil remedies against nonemployer third parties when it states,
>
> (1) When any injury or death for which compensation is payable under [the Workers' Compensation Act] . . . is caused by the

> wrongful act or neglect of a person *other than* an employer, officer, agent, or employee of the employer:
>
> . . .
>
> (b) the injured employee or the employee's heirs or personal representative may have an action for damages *against the third person*.

Gudmundson, 232 P.3d at 1068.

The *Gudmundson* court

> decline[d] to read these provisions as permitting an employee to engage third parties in the rigor of litigation while containing an implied threat that rulings made by an administrative law judge in a workers' compensation adjudication may, through the invocation of collateral estoppel, derail the employee's lawsuit. To compel an election of this nature would subvert the general purpose behind workers' compensation, which is to provide compensation to injured employees by a simple and speedy procedure which eliminates the expense, delay and uncertainty in proving fault. . . . Employees must not be forced to confront such a risk.

Id. (internal citations and quotations omitted).

Ultimately, the *Gudmundson* court determined that

> giving preclusive effect to Ms. Gudmundson's workers' compensation adjudication does not promote the purposes of collateral estoppel. Because the Workers' Compensation Act is only available to remedy wrongs committed by employers or their agents, Ms. Gudmundson could not involve third-party defendants in her workers' compensation adjudication even if she had so desired. Accordingly, her subsequent lawsuit against defendants was neither a waste of judicial resources nor an attempt to harass the defendants through vexatious litigation. *See Heine v. Simon,* 702 N.W.2d 752, 762 (Minn. 2005) ("[G]iven the exclusivity of the Workers' Compensation Act as a remedy against the employer, invocation of collateral estoppel in an employee's third-party action in a case . . . where the third party had, and could have had, no involvement in the workers' compensation proceedings does not necessarily serve the purposes of collateral estoppel.")[5] **We are therefore unable to**

[5] Curiously, while Respondents reject the Supreme Court of Arkansas' reliance on *Heine* in *Craven v. Fulton Sanitation Serv. Inc.,* 361 Ark. 390, 206 S.W.3d 842 (2005), the *Gudmundson* court found value in *Heine.*

> **discern any of the recognized justifications for the application of collateral estoppel in this case. Rather, it appears that the sole effect of collateral estoppel would be to shield third-party defendants** from confronting claims the Utah Legislature has expressly preserved for employees under the Utah Workers' Compensation Act. *See* Utah Code Ann. § 34A-2-106. We therefore decline to adopt a rule that would categorically give preclusive effect to workers' compensation adjudications in civil actions brought by an injured worker against nonemployer third parties.

Gudmundson, 232 P.3d at 1069. (footnote added). (emphasis added).

Likewise, the Supreme Court of Delaware rejected the application of collateral estoppel, in favor of non-employer, third-parties, based on a final adverse causation determination rendered in administrative workers' compensation litigation. *Messick,* 655 A.2d 1209 (Del. 1995). In so doing, the *Messick* court considered Delaware's workers' compensation statute which provides that claims for workers' compensation benefits "shall not act as an election of remedies, but such injured employee or his dependents or their personal representative may also proceed to enforce the liability of such third party for damages in accordance with this section." *Messick,* 655 A.2d at 1212.

The *Messick* court considered case law from the Superior Court of Delaware which considered the dilemma faced by an employee-plaintiff who subjects himself to the possibility of collateral estoppel and the potential preclusion of his third-party action when pursing a workers' compensation claim. *Id.* (citing *Foltz v. Pullman, Inc.,* Del. Super., 319 A.2d 38, 42 (1974)). The Delaware Supreme Court went on to criticize *Foltz* as follows:

> If *Foltz* were to be followed, the only way to avoid this result would be to litigate the third-party claim first and await the result before going to [Delaware's workers' compensation administrative board.] This defeats the purpose of the workers' compensation law, as the worker is left in the position of having to forego immediate aid and assistance before [Delaware's workers' compensation administrative board] in the hope that he wins his third-party suit.

> On the other hand, the third party has two chances to avoid risk – the first if the worker loses [in workers' compensation] (he then will be collaterally estopped from asserting the claim in a third-party suit), and the second if the worker wins [in workers' compensation] and files a third-party action. In a third-party action, the successful claimant could not use the doctrine of collateral estoppel as a shield against the claimant. See Restatement (Second) of Judgments § 29, at 291 (1982) (collateral estoppel should not apply to issues relitigated in third-party civil actions where 'treating the issue as conclusively determined would be incompatible with an applicable scheme of administering remedies in the actions involved.')

Messick, 655 A.2d at 1212-13.

The Supreme Court of Delaware then held that "the statutory preclusion of election of remedies dictates that collateral estoppel not bar the relitigation in third-party civil actions of factual issues decided in [workers' compensation] hearings." *Messick,* 655 A.2d at 1213.

Similarly, the Supreme Court of Nebraska reversed an underlying summary judgment, in favor of a non-employer, third party defendant, premised upon a workers' compensation court's determination that the employee-plaintiff's condition was not caused by the employee-plaintiff's workplace accident. *Cunningham v. Prime Mover, Inc.,* 252 Neb. 899, 567 N.W.2d 178 (1997). The *Cunningham* court "point[ed] out that the application of collateral estoppel may also chill the purpose and effect of the compensation court[,]" and explained that the potential application of collateral estoppel may cause "the injured party [to] be reluctant to proceed with a workers' compensation claim unless and until extensive and expensive discovery has been completed involving all potential claims against third parties." *Cunningham,* 567 N.W.2d. at 182. In support, the *Cunningham* court looked to an opinion from a California intermediate appellate court which stressed that "[t]he possibility of collateral estoppel consequences of a workers' compensation determination with its effect upon the economic balance of the controversy is counter to" workers' compensation law's policy of securing "the quick and, where possible, certain resolution of

questions of coverage." *Id.* at 183 (quoting *Kelly v. Trans Globe Travel Bureau, Inc.*, 60 Cal.App.3d 195, 202-03, 101 Cal.Rptr. 488, 493 (1976)).

Ultimately, the Supreme Court of Nebraska held that "[f]or public policy reasons and because Cunningham did not have the opportunity to fully and fairly litigate his claim, we conclude that the doctrine of collateral estoppel should not be applied so as to bar Cunningham from relitigating the issue of causation against third parties." *Cunningham,* 567 N.W.2d at 183. Accordingly, the Supreme Court of Nebraska reversed the lower court's grant of summary judgment and remanded the case for further proceedings.

As is further discussed below and in *Petitioners' Brief*, West Virginia's case law interpreting its Workers' Compensation statute is consistent with the concepts set forth in, and which serve as the bases for, the decisions reached by the state supreme courts in *Gudmundson*, *Messick*, and *Cunningham.*

3. West Virginia's workers' compensation statute only references third-party tortfeasors in relationship to an employer's subrogation rights resulting from a compensable workplace injury or death. Such statute does not foreclose the Rubles' third-party common law claims against Respondents; rather, well-established case law interpreting West Virginia's Workers' Compensation statute recognizes that the Rubles have common law tort claims that are distinct from Mr. Rubles' rejected workers' compensation claim.

Aside from W. Va. Code § 23-2A-1, West Virginia's Workers' Compensation Act is silent concerning the impact of workers' compensation claims upon an employee-plaintiff's coexistent tort claim against a non-employer, third-party tortfeasor. W. Va. Code § 23-2A-1 provides the following statutory mechanism for an employer to subrogate from any civil tort recovery that an employee-plaintiff makes against a third-party:

> (a) Where a compensable injury or death is caused, in whole or in part, by the act or omission of a third party, the injured worker or, if he or she is deceased or physically or mentally incompetent, his or her dependents or personal representative

> are entitled to compensation under the provision of this chapter, and shall not by having received compensation benefits be precluded from making claim against the third party.
>
> (b) Notwithstanding the provisions of § 23-2A-1(a) of this code, if an injured worker, his or her dependents, or his or her personal representative makes a claim against the third party and recovers any sum for the claim:
>
> [then depending on the year that the claim arose, a different subsection for subrogation calculation method will apply.]
>
> . . .
>
> (d) In the event that an injured worker, his or her dependents or personal representative makes a claim against a third party, there shall be, and there is hereby created, a statutory subrogation lien upon the moneys received which shall exist in favor of the Insurance Commissioner, private carrier, or self-insured employer, whichever is applicable.

W. Va. Code § 23-2A-1.

Respondents read these statutory provisions as "'preserv[ing] only third-party claims when there is a compensable injury or death' caused by a third party." Resp'ts Br. at p. 10, n. 26. That is, "[s]ince Ruble did not have a workplace injury, [West Virginia's] statute suggests that he cannot pursue a third-party action[.]" *Id.*

While there is no case law interpreting the impact of W. Va. Code § 23-2A-1 on a plaintiff-employee's claims against a non-employer, third-party tortfeasor, the plain meaning of such statute does not make the existence of a compensable injury or death a condition precedent to an employee-plaintiff's coexistent common law tort claims against non-employer, third-party defendants. Rather, such statute merely establishes an automatic statutory lien to the employer, in the event that the plaintiff-employee recovers tort damages from a third-party as a result of the same injury that is the basis for a compensable injury found against the plaintiff-employee's employer in a workers' compensation proceeding.

In fact, the statute specifically contemplates that a compensable workers' compensation claim shall not preclude an employee-plaintiff from pursuing a tort claim against non-employer, third-party defendants, like Respondents. This position is fully consistent with West Virginia's well-established case law that was previously briefed by the Rubles and which stands for the proposition that workers' compensation claims are distinct from common law claims that an employee-plaintiff may elect to pursue against a non-employer, third-party tortfeasor. *See* Pet'rs Br. at pp. 6-9; *Mercer v. Ott,* 78 W. Va. 629, 636-37, 89 S.E. 952; *Crab Orchard Improvement Co. v. Chesapeake & O. Ry. Co.,* 33 F.Supp. 580 (S.D. W. Va. 1940), aff'd 115 F.2d 277 (4th Cir. 1940)) ("It is therefore the obvious intention of the West Virginia law to give the employee an entirely new remedy in addition to the one he had at common law or under the Wrongful Death Statute, and the law that gives that additional remedy deals only with the employer-employee relationship and not at all with third parties."); *Merrill v. Marietta Torpedo Co.,* 79 W. Va. 669, 92 S.E.112 (1917); *Jones v. Appalachian Electric Power Co.,* 145 W. Va. 478, 115 S.E.2d 129 (1960). As a result, while the statute is silent, this Court's well-established case law interpreting West Virginia's Workers' Compensation statute parallels what is expressly provided by the statutes considered by the Supreme Courts of Utah and Delaware in *Gudmundson* and *Messick.*

4. The West Virginia Constitution guarantees the Rubles' right to a jury trial, and this right must be protected so long as the Rubles can present evidence sufficient to survive a motion for summary judgment.

Article III, section 13 of the West Virginia Constitution provides that

> In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved, and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law.

W. Va. Const. art. III, § 13.

Respondents present the Rubles' argument premised upon article III, Section 13 of the West Virginia Constitution as a radical departure from established law: "a claimed entitlement to a jury trial **under all circumstances.**" Resp'ts Br. at p. 1. (emphasis added). Respondents' characterization is inaccurate. The Rubles do not maintain that they are entitled to a jury trial in any possible circumstance. Naturally, prior to a trial of this action, Respondents would have the right to test the Rubles' claims and the supporting evidence via a motion for summary judgment brought under Rule 56 of the West Virginia Rules of Civil Procedure. In the event that the Rubles are unable to meet the standards established by Rule 56 and its interpreting case law, then they would not be entitled to a jury trial; as such, the Rubles incorporate such caveat into all arguments below. Simply put, Respondents' above characterization is a straw man argument that should be summarily rejected by this Court.

5. This Court should interpret the West Virginia Constitution to provide a right to have a jury determine common law causes of action brought by injured-employees against third-party tortfeasors.

Respondents' attack on the Rubles' constitutional argument is largely based on the Rule 56 issue addressed above, language that differs between the Constitutions of this State and the State of Arkansas, and the Supreme Court of the United States' case law allowing administrative claims to serve as a basis for the application of collateral estoppel.

Respondents highlight this Court's prior rejection of a constitutional argument premised, in part, upon article III, Section 13 of the West Virginia Constitution, in which this Court indicated that the Georgia Constitution's promise that "the right to trial by jury shall remain inviolate" "differs substantially" from West Virginia's similar constitutional provision (which guarantees that the right to trial by jury "shall be preserved") and thus, the Georgia court's analysis of its constitution "is not persuasive" to this Court. *MacDonald v. City Hosp. Inc.*, 227 W. Va. 707, 715

S.E.2d 405 (2011). Based on this, Respondents summarily reject the Rubles' reliance on the *Craven* case, which turned, in part, on the Arkansas Constitution's guarantee that "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy." *Craven,* 206 S.W.2d at 844. (quoting art. 2, § 7 Ark. Const.)

In their haste to dismiss the Rubles' constitutional argument, Respondents fail to address the nature of *MacDonald* and the Georgia case discussed therein. These cases deal with the constitutionality of noneconomic damage caps applied to medical negligence cases, following the passage of such damage caps by the respective legislatures of West Virginia and Georgia. *See Atlanta Oculoplastic Surgery, PC v. Nestlehutt,* 286 Ga. 731, 691 S.E.2d 218 (2010). Simply put, *MacDonald* dealt solely with the issue of such a damage cap, not with the plaintiff's ability to present his or her case to a jury generally. In *MacDonald*, this Court considered its past precedent concerning noneconomic damage caps passed by the Legislature and explained that

> [a] legislature adopting a prospective rule of law that limits all claims for pain and suffering in all cases is not acting as a fact finder in a legal controversy. It is acting permissibly within its legislative powers that entitle it to create and repeal causes of action. The right of jury trials in cases at law is not impacted. Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function.

MacDonald, 227 W. Va. at 716-17 (internal citation omitted).

In its rejection of the MacDonalds' argument premised upon the West Virginia Constitution's guarantee of a right to trial by jury, this Court next considered the "reexamination" clause provided by the last sentence of article III, Section 13 of the West Virginia Constitution. The "reexamination" clause is not at issue here.

Respondents assert that the "shall remain inviolate" language contained in the Arkansas Constitution should be the end of this Court's consideration of any persuasive value of the Supreme

Court of Arkansas' interpretation of its constitution, in the *Craven* case, when this Court interprets the West Virginia Constitution's guarantee of a right to trial by jury. However, Respondents have ignored the distinct nature of the issues faced by this Court in *MacDonald* and the instant appeal. Simply put, while the MacDonalds *had access to a jury but contended that damage limitations imposed by the Legislature deprived them of their constitutionally-guaranteed right to a jury trial*, without reversal, the Rubles will be utterly deprived of the constitutionally-guaranteed right to *have a jury hear any part of their common law causes of action, including the issue of causation incident thereto*. As a result, *MacDonald* is not the end of the road; this Court must interpret the West Virginia Constitution's "right to jury trial" provision as it applies to the instant action.

Likewise, Respondents' reference to case law addressing the Seventh Amendment of the United States Constitution is unavailing to the issue of whether collateral estoppel may be invoked by a third-party after an adverse final administrative order. Specifically, Respondents direct this Court to *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 135 S.Ct. 1293 (2015) for the proposition that the Seventh Amendment's similar "right of trial by jury" provision "does not negate the issue-preclusive effect of a judgment, even if that judgment was entered by a juryless tribunal." Resp'ts Br. at p. 9.

While the Rubles agree with the proposition that a juryless tribunal's final judgment may have preclusive effect in certain circumstances (including as it applies to a plaintiff-employee's deliberate intention claim against his employer following an adverse final determination in the plaintiff-employee's related administrative workers' compensation proceedings[6]), *B & B Hardware* does not address the constitutional "right to jury trial" provision issue that is squarely before this Court: whether the application of collateral estoppel to bar a common law civil claim

[6] *See* Pet'rs Br. at pp. 8-9, n. 3.

brought against a third-party, based on an adverse administrative determination not involving such third-party, violates the Rubles' constitutionally-guaranteed right to a trial by jury.

It is worth noting that the *B & B Hardware* case involved parties who opposed each other, in a trademark dispute, on the issue of the likelihood of confusion, in a registration matter before the Trademark Trial and Appeal Board ["TTAB"] and a related Lanham Act case before a federal district court. Critically, "**Hargis does not argue that giving issue preclusive effect to the TTAB's decision would be unconstitutional. Instead, Hargis contends only that we should read the Lanham Act narrowly because a broad reading *might* be unconstitutional.**" *B&B Hardware, Inc.*, 135 S.Ct. at 1304. (emphasis added). Unlike Hargis, the Rubles have prominently raised the issue of whether the application of collateral estoppel to the final causation determinations rendered by the workers' compensation administrative system violates their "right of jury trial" guaranteed by article III, Section 13 of the West Virginia Constitution.

The Rubles maintain that the circuit court's application of collateral estoppel violates their constitutionally-guaranteed "right of jury trial," and this Court is tasked with interpreting the West Virginia Constitution to determine whether or not such right has been violated. In so doing, this Court may rely on the persuasive reasoning employed by the Supreme Courts of Arkansas (*Craven*), Utah (*Gudmundson*), Delaware (*Messick*), and Nebraska (*Cunningham*), as well as this Court's prior case law interpreting West Virginia's Workers' Compensation statute as providing an injured employee with a claim for statutory benefits that is distinct from any common law tort claim that an injured-employee may also have against a third-party, non-employer defendant. *See Jones,* 115 S.E.2d at 134.

B. The circuit court erred by exceeding the scope of judicial notice authorized by this Court's prior teachings.

At the outset, the Rubles insist that Respondents have mischaracterized the standard that applies to this Court's review of the judicial notice issue raised by this appeal. While Respondents assert that the circuit court's application of judicial notice is subject to an abuse of discretion standard, *see* Resp'ts Br. at p. 21, this Court must engage in a two-pronged analysis to fully consider this assignment of error. On the first level, this Court must use a *de novo* standard of review when considering the legal questions involving the proper scope of judicial notice pursuant to Rule 201 of the West Virginia Rules of Evidence. *See* Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving the interpretation of a statue, we apply a de novo standard of review.") Once the law is properly established, this Court should review the circuit court's application of judicial notice under an abuse of discretion standard. *See* Syl. pt. 1, *McDougal v. McCammon,* 193 W. Va. 229, 455 S.E.2d 788 (1995). ("The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary . . . rulings of the circuit court under an abuse of discretion standard.")

Respondents assert that the Rubles "want[] this Court to revise judicial notice in a way that relegates collateral estoppel to the history books." Resp'ts Br. at p. 22. This is not so. Instead, the Rubles ask this Court to ensure that the circuit court's use of judicial notice complies with the limits previously established by this Court in *Arnold Agency* and the case law discussed therein.

While Respondents makes much ado about judicial notice necessarily leading to collateral estoppel, Respondents ignore this Court's reference to *Federal Practice and Procedure*: "As one

treatise explains, '[i]f it were possible for a court to take judicial notice of a fact because it has been found to be true in some other action, the doctrine of collateral estoppel would be superfluous.'" *Arnold Agency v. W. Va. Lottery Com'n,* 206 W. Va. 583, 526 S.E.2d 814, 827 (1999). (quoting 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5106, at 247 (2d ed. Supp. 1999). As such, it is apparent that the concepts of judicial notice and collateral estoppel, while related, are distinct and should be applied as such.

In *Arnold Agency*, this Court made clear that a circuit court had discretion to take notice of particular records to establish that an individual had, in fact, been convicted of mail fraud. *Arnold Agency,* 526 S.E.2d at 827. This Court clarified, however, that "while a court may take judicial notice of the orders of another court, such notice is 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *Id.*

Similarly, in relevant part, the Handbook on Evidence for West Virginia Lawyers suggests that while

> courts routinely take judicial notice of "documents" filed in other cases, it is not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings. It is also clear that a court may take judicial notice of an "order" in another case only for the limited purpose of recognizing the "judicial act" that the order represents or the subject matter of the litigation, not for the truth of the matters asserted in the other litigation. **Further, a court cannot take judicial notice of findings of fact of another case. Judicial notice of findings of fact of another case exceeds the limits of Rule 201. This is so because findings do not constitute facts "not subject to reasonable dispute" within the meaning of the rule.** Such findings are not usually common knowledge, nor are they derived from an unimpeachable source. Further, if it was permissible for a court to take judicial notice of fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous. In this regards, courts should distinguish between taking judicial notice of the truth of findings of fact set out in another court record, and the use of those facts for some purpose that does not depend on the truth of the facts set out. This is to say that factual

> findings in another case ordinarily are not admissible for their truth in another case through judicial notice.
>
> For example, in the case of *In the Matter of Breedlove* it was held that in a driver's license revocation proceeding judicial notice may be taken of an adjudicative fact, but only if the fact is not subject to reasonable dispute. The fact which judicial notice was taken in *Breedlove* was a document showing a prior conviction for DUI. Similarly, in *Arnold Agency v. West Virginia Lottery Comm'n* it was held that it was the trial court's prerogative to take judicial notice of another court's records for purposes of determining whether a person had been convicted of mail fraud. However, the opinion cautioned that "while a court may take judicial notice of the orders of another court pursuant to Rule 201, such notice may not be for the truth of the matters asserted in another litigation, but rather is limited to establishing the fact of such litigation and related findings."

Louis J. Palmer, Jr., Handbook on Evidence for West Virginia Lawyers, § 201.04[5] (7th ed. 2021). (emphasis added).

In its order that is the basis of this appeal, the circuit court took judicial notice of the final causation determination found in Mr. Rubles' occupational disease workers' compensation claim, and based upon such determination, concluded that the Rubles were collaterally estopped from relitigating the issue of causation. The circuit court exceeded the limits of Rule 201. As was noted above, the complex medical and scientific causation determination rendered by the administrative law judge in Mr. Rubles' occupational disease workers' compensation claim is subject to reasonable dispute.

As a result, this Court should, at minimum, determine that the circuit court's wholesale adoption of the final causation determinations rendered in the underlying workers' compensation process was an abuse of discretion that used such notice for the truth of the matters asserted in the underlying workers' compensation process. Upon doing so, this Court should reverse the circuit court's order and remand this action for further proceedings.

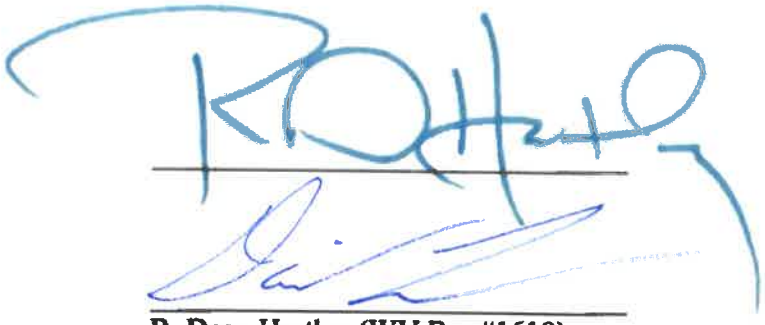
V. CONCLUSION

This Court's century-old case law interpreting West Virginia's workers' compensation statute recognizes that a statutory claim for workers' compensation benefits is distinct from any coexistent common law tort claims that an injured-employee may also possess and that nothing in West Virginia's workers' compensation statute prohibits an injured employee from maintaining a common law tort action against such a third-party tortfeasor. Respondents' efforts to invoke collateral estoppel against the Rubles would solely serve to shield third-party defendants from the Rubles' common law tort claims that have been recognized by this Court for over a century. Moreover, such application of collateral estoppel violates the Rubles' right to a jury trial that is guaranteed by the West Virginia Constitution and the judicial notice principles established by Rule 201 of the West Virginia Rules of Evidence and its interpreting case law. The circuit court erred, and this Court should reverse the circuit court's order and remand this action for further proceedings.

Dated: October 6, 2022

MICHAEL D. RUBLE AND BRENDA K. RUBLE, Petitioners,

By Counsel,



R. Dean Hartley (WV Bar #1619)
Mark R. Staun (WV Bar #5728)
David B. Lunsford (WV Bar #12555)
HARTLEY LAW GROUP, PLLC
7 Pine Avenue
Wheeling, WV 26003
Phone: (304) 233-0777
Fax: (304) 233-0774
dhartley@hartleylawgrp.com
mstaun@hartleylawgrp.com
dlunsford@hartleylawgrp.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINA

Docket No. 22-0329

MICHAEL D. RUBLE, ET AL.,

Petitioners,

v.

Appeal from a final order of the Circuit Court of Cabell County (19-C-127)

RUST-OLEUM CORPORATION, ET AL.

Respondents.

CERTIFICATE OF SERVICE

I, R. DEAN HARTLEY, counsel for Petitioners Michael D. Ruble and Brenda K. Ruble, do hereby certify that I have caused to be served the foregoing **PETITIONERS' REPLY BRIEF**, filed on this day, by depositing the same into the United States Mail, First Class, postage pre-paid, this 6th day of October 2022, addressed to the following:

Christopher D. Stofko, Esq.
Vaughn K. Schultz, Esq.
DICKIE, MCCAMEY & CHILCOTE, P.C.
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402
Cstofko@dmclaw.com
vschultz@dmclaw.com
Counsel for Rust-Oleum Corporation, RPM International Inc. and Exxon Mobil Corporation

Rodney L. Baker, II, Esq.
Jason E. Roma, Esq.
STEPTOE & JOHNSON, PLLC
825 Third Avenue, Ste. 400
Huntington, WV 25722-2195
rodney.baker@steptoe-johnson.com
jason.roma@steptoe-johnson.com

Counsel for The Early Construction Company
Roy D. Baker, Jr., Esquire
BAKER LAW OFFICES, PLLC
125 Camelot Drive
Huntington, WV 25701
rbaker@wvbakerlaw.com
Counsel for Citgo Petroleum Corporation

Niall A. Paul, Esq.
Charity K. Lawrence, Esq.
SPILMAN, THOMAS & BATTLE, PLLC
300 Kanawha Blvd, East
Charleston, WV 25321-0273
npaul@spilmanlaw.com
clawrence@spilmanlaw.com
Counsel for E. I. DuPont de Nemours and Company

Edward A. Smallwood, Esquire
Leo G. Daly, Esquire
Colby S. Bryson, Esquire
POST & SCHELL, P.C.
One Oxford Centre, 301 Grant Street
Suite 3010
Pittsburgh, PA 15219
esmallwood@postschell.com
ldaly@postschell.com
cbryson@postschell.com
Counsel for Bayer Corporation, Bayer CropScience, LP, Monsanto Company, Akzo Nobel Inc., and Nouryon Functional Chemicals LLC,

James J.A. Mulhall, Esquire
Dallas F. Kratzer, Esquire
STEPTOE & JOHNSON, PLLC
P.O. Box 1616
Morgantown, WV 26507-1616
james.mulhall@steptoe-johnson.com
dallas.kratzer@steptoe-johnson.com

and

Ancil G. Ramey, Esquire
STEPTOE & JOHNSON, PLLC
P.O. Box 2195
Huntington, WV 25722-2195
ancil.ramey@steptoe-johnson.com

Counsel for Matrix Chemical, LLC
R. Scott Long, Esquire
Raj A. Shah, Esquire
HENDRICKSON & LONG, PLLC
214 Capitol Street
Charleston, WV 25301
scott@handl.com
rshah@handl.com
Counsel for Advansix, Inc.

Sharon Z. Hall, Esquire
Joni M. Mangino, Esquire
Joseph W. Selep, Esquire
ZIMMER KUNZ, PLLC
243 Three Springs Drive, Suite 14A
Weirton, WV 26062
hall@zklaw.com
mangino@zklaw.com
selep@zklaw.com
Counsel for Brenntag Mid-South, Inc.

J. Tyler Dinsmore, Esquire
William J. Hanna, Esquire
FLAHERTY SENSABAUGH BONASSO, PLLC
P.O. Box 3843
Charleston, WV 25338-3843
tdinsmore@flahertylegal.com
whanna@flahertylegal.com
Counsel for The Yenkin-Majestic Paint Corporation

Michael Bonasso, Esquire
William J. Hanna, Esquire
Evan Aldridge, Esquire
FLAHERTY SENSABAUGH BONASSO, PLLC
P.O. Box 3843
Charleston, WV 25338-3843
mbonasso@flahertylegal.com
whanna@flahertylegal.com
Counsel for Univar Solutions, Inc. and
Nexeo Solutions, LLC

David P. Lodge, Esquire
Fishkin Lucks
1601 Market Street, 19th Floor
Philadelphia, PA 19103
dlodge@fishkinlucks.com

and

Steven M. Lucks, Esquire
Fishkin Lucks
One Riverfront Plaza, Suite 410
Newark, NJ 07102
slucks@fishkinlucks.com
Counsel for Univar Solutions and Nexeo Solutions, Inc.

Daniel R. Bentz, Esquire
Sarah C. Boehme, Esquire
Marks, O'Neill, O'Brien, Doherty & Kelly, P.C.
Suite 2600, Gulf Tower
707 Grant Street
Pittsburgh, PA 15219
arodgers@moodklaw.com
JHolden@moodklaw.com
Counsel for FBC Chemical Corporation

Charles R. Bailey, Esquire
Justin Taylor, Esquire
Lauren D. Mahaney, Esquire
BAILEY & WYANT, PLLC
500 Virginia Street, East, Ste. 600
Charleston, WV 25337-3710
cbailey@baileywyant.com
jtaylor@baileywyant.com
Counsel for Special Materials Global U.S.A. Inc.

R. Dean Hartley (WV Bar #1619)