IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0577

(Underlying Monongalia County Civil Action No. 19-C-348)

STATE OF WEST VIRGINIA EX REL.
MARCH-WESTIN COMPANY, INC.,

Petitioner,

v.

THE HONORABLE PHILLIP D. GAUJOT, Judge of the Circuit Court of Monongalia County, and DAVID RAYMOND WESTON,

Respondents.

RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION

PREPARED BY:

Counsel for Respondent/Plaintiff
David Raymond Weston

ERIC M. HAYHURST (W.Va. No. 11042)
HAYHURST LAW, PLLC
34 Commerce Drive, Suite 203
Morgantown, WV 26501
Telephone: (304) 212-7099
Facsimile: (304) 212-7108
eric@hayhurstlaw.com

DATED: August 23, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. QUESTIONS PRESENTED

1. Whether the Circuit Court (Judge Phillip D. Gaujot presiding) committed clear legal error by striking Defendant March-Westin Company, Inc.'s Notice of Non-Party Fault filed pursuant to West Virginia Code § 55-7-13d because the non-party, the Monongalia County Commission, is immune from civil suit for claims under West Virginia Code § 29-12A-5(11) as a political subdivision?

2. Whether the Circuit Court committed clear error by striking Defendant March-Westin Company, Inc.'s Notice of Non-Party Fault because March-Westin is required to prove the Monongalia County Commission acted with deliberate intent with regard to Plaintiff's claim?

3. Whether the Circuit Court committed clear legal error by striking Defendant March-Westin Company, Inc.'s Notice of Non-Party Fault because the potential assessment of fault against the Monongalia County Commission under West Virginia Code § 55-7-13d would lead to an "inequitable" result if the Commission's workers' compensation insurance carrier is permitted to assert any subrogation rights it has against Plaintiff's potential award against March-Westin?

4. Whether the Circuit Court Committed clear error in holding that March-Westin cannot argue the fault of the Monongalia County Commission for Plaintiff's injuries because Plaintiff settled his workers' compensation claim against the Commission?

II. STATEMENT OF THE CASE

A. Pertinent Factual Background

Although not necessarily relevant for resolving the questions presented in this original jurisdiction action, some of the facts of this case are indeed disputed, despite the Petitioner's representation to the contrary. Specifically, it was the Petitioner, by and through its employees who undertook to remove the utility pole at issue at the Monongalia County Courthouse. In the days, weeks and months leading up to January 5, 2018, employees for the Petitioner coordinated with Dominion Hope on the installation of the new gas meter at the Monongalia County Commission ("Commission"). App. 0191, 0196-199. Matthew McMillan, the Petitioner's project manager for the Courthouse Square Project, wrote the following to representatives of Dominion Hope in an email on November 22, 2017:

> ***Reaching out to all of you about the new gas meter we are attempting to get from you at the Monongalia County Courthouse*** because I have been in contact with each of you at some point regarding this meter installation. ...
>
> ***The installation of this new meter is absolutely critical to the completion of the Monongalia County courthouse [sic] Plaza Renovations*** because this new service feeds the radiant heating system that runs through the new plaza. This is basically the main feature of the project and without your service installed it is completely unfunctional. Our schedule has us shooting to open the plaza by December 15th, so you can understand my concern with not having the new gas service. ***We*** not only need you all to install the new line and meter, but then our plumbers need to complete their lines to your new location and spend several days starting up the systems once the gas is received.
>
> ***I'm asking for the sake of the project for someone to can be my permanent contact for the installation*** to please contact me via phone or email to get this service installed as soon as possible.

App. 0198-199 (emphasis added).

Then, after the incident had occurred and the Petitioner was notified of a potential claim by the Respondent for his injury, Mr. McMillan and Harman Hartman had the following email exchange with their superiors:

From: [redacted]
To: [redacted]
Cc: [redacted]
Subject: Re: Telephone pole / court house
Date: Monday, July 2, 2018 9:03:09 AM

Matt's email accurately reflects my recollection of the events regarding the removal of the light pole.

Thanks

Harman Hartman
March-Westin
304-276-6800

On Jul 2, 2018, at 08:53, Matthew McMillian [redacted] wrote:

> Marguerite,
> Harman and I are sitting here now reviewing our memories. What I remembered is right that the new gas service required the pole to be removed which was not anticipated originally or on the drawings, but had to be done for the project. They did not keep the light though they did take the pole. Once the pole was on the ground Harman cut it into 8' pieces and loaded into a county truck for what we remember was Carlos's(county employee) personal use.
> Harman does remember their employee hurting his shoulder, but not sure exactly what the injury was. Harman and Darrel(county employee) were at the base cutting the pole loose as two county employees lowered the top from the window above. One of the guys in the window lowering it was the person who hurt his shoulder. Harman can't remember exactly how he was told the guy hurt his shoulder but he does know he was told after the fact, and it was not a situation where the guy screamed in pain. Harman said that from the time he got the saw to remove the pole to when it was loaded on a truck and complete was about a half hour. It was January and we remember it being pretty cold out.
> We will each update you if we can think of anything else, but it was only a half hour process and not a whole lot to it. Thank you.
>
> **From:** Matthew McMillian
> **Sent:** Monday, July 02, 2018 8:26 AM
> **To:** Marguerite Horvath [redacted]; Bob Kesling [redacted]; Harman Hartman [redacted]
> **Cc:** Jamie Ridgeway [redacted]
> **Subject:** RE: Telephone pole / court house
> Taking down the pole was required so that gas service could be supplied to the project. Bob Doyle was Mon County supervisor who approved his guys to work with us because I believe they had a light on the pole they wanted to reset to the building once the pole was removed. They may have wanted to keep the pole as well and that may be why they were helping, though I can't really recall if that is fact or not. I really just know that

MW00003870

we had to move the pole for gas service and nothing was on the pole other than their light. Other than that I thought the pole and work was all done successfully and without incident
Harman,
What do you recall?

From: Marguerite Horvath
Sent: Monday, July 02, 2018 8:20 AM
To: Matthew McMillian <[redacted]>; Bob Kesling <[redacted]>; Harman Hartman <[redacted]>
Cc: Jamie Ridgeway <[redacted]>
Subject: RE: Telephone pole / court house
It may never have been reported to MW at all. Anything you can remember, especially whoever was the person for the county that asked us to cut down the pole and who supplied county employees to help.

From: Matthew McMillian
Sent: Monday, July 2, 2018 8:18 AM
To: Bob Kesling <[redacted]>; Harman Hartman <[redacted]>
Cc: Jamie Ridgeway <[redacted]>; Marguerite Horvath <[redacted]>
Subject: RE: Telephone pole / court house
This is the first I have heard about this at all. I honestly don't remember any injury ever being reported to me. I do remember them working along with us to remove the pole, but do not remember an injury ever being reported to me. I just searched through my emails and can not find any correspondence regarding an injury either. I would have to turn to Harman for any info he may have about it.

From: Bob Kesling
Sent: Friday, June 29, 2018 12:44 PM
To: Harman Hartman <[redacted]>; Matthew McMillian <[redacted]>
Cc: Jamie Ridgeway <[redacted]>; Marguerite Horvath <[redacted]>
Subject: Telephone pole / court house
On 1-5-18 there was an incident regarding a telephone pole being cut down and as a result there was an injury to someone helping?
Please reply with everything that you know about this incident to include the who, whys and hows.
Thanks
Bob Kesling
Field Resource Coordinator
Mitch Weston Co
[redacted]
Cell - 304-826-0037

MW00003680

App. 0200-201.

In this email exchange, Mr. McMillan clearly states that the Commission employees, including Mr. Weston, were working with the Petitioner to remove the pole – not the other way around. *Id.* Additionally, he states that "we had to move the pole," meaning that the Petitioner, not

the Commission, was responsible for removing the pole. *Id.* Further, Mr. Hartman confirmed the accuracy of Mr. McMillan's account of what occurred on January 5, 2018, both in the email chain above and in his sworn testimony in this case. App. 0200, 0206-207.

The Petitioner has attempted to make the case that the removal of the pole was not within its scope of work on the Courthouse Square Project, but that contention is not supported by the evidence in this case. To be sure, the Respondent's expert, based upon the testimony and documentary evidence (i.e., previously quoted emails), has opined and testified that the removal of the pole was accepted by the Petitioner as part of its scope of work on the project. App. 0213-214, 0217, and 0219. Further, although the Respondent arguably testified in his deposition that the act of moving the pole from the ground was what hurt him, the Respondent has presented expert testimony based on industry standards that it was the Petitioner, as the general contractor, that was responsible for the overall safety of the removal of the pole and, thereby, responsible for the injury that occurred to the Petitioner. App. 0213-216 and 0219-220.

Finally, as noted in the Petition, the Respondent filed a workers' compensation claim with the Commission's workers' compensation insurer and that claim was deemed compensable. *Petition*, p. 3 It is important to also note that the permanent disability rating attributed to the January 5, 2018 incident by the workers' compensation retained examiner was a seven percent (7%) whole person impairment. App. 0070. Furthermore, the record is void of any factual development regarding the potential "deliberate intent" of the Commission.

B. Pertinent Procedural Background

The procedural background stated in the Petition is generally accurate. The Respondent only wishes to note two things:

1) that on March 30, 2021, Respondent filed "Plaintiff's Reply to March-Westin Company Inc.'s Response to Plaintiff's Motion to Strike Defendant's Notice Pursuant to Section 55-7-13d of the West Virginia Code" (*See* App. 0191-202); and
2) the Circuit Court, upon the Petitioner's motion, has stayed the trial, and all other aspects of the underlying matter pending resolution of this original jurisdiction matter.

III. SUMMARY OF ARGUMENT

The Petitioner has not met the burden for the extraordinary remedy it seeks by way of a writ of prohibition against the Circuit Court of Monongalia County ("Circuit Court"). This is true for two reasons: First, an appeal, should one be deemed necessary after the trial of the underlying action, is more than adequate to address the Petitioner's grievances with the Circuit Court's rulings in the underlying matter.

Second, the Circuit Court did not exceed its legitimate powers when it struck the Petitioner's "Notice Pursuant to Section 55-7-13d of the West Virginia Code" ("Notice"). Rather, the Circuit Court accurately and appropriately read and applied the Modified Comparative Fault Statute, codified as W.Va. Code § 55-7-13a *et seq.* ("Statute"), to the facts and circumstances of the instant case. Specifically, the Circuit Court correctly ruled that the plain language of the Statute excludes those nonparties who are otherwise immune from the provision regarding assessment of fault on a nonparty, W.Va. Code § 55-7-13d(a). The intent of the Legislature to exclude immune nonparties from an assessment of fault is made clear when the rest of W.Va. Code § 55-7-13d is read in *pari materia.* The Petitioner cites the cases of *Taylor v. Wallace Auto Parts & Services, Inc.*, 2020 U.S. Dist. LEXIS 47573 (N.D.W.Va. 2020), and *Metheney v. Deepwell Energy Servs., LLC*, 2021 U.S. Dist. LEXIS 120483 (N.D.W.Va. 2021), for support of its position. However, this Court's memorandum opinion in *State ex rel. Chalifoux v. Cramer*, No. 20-0929, 2021 W.Va.

LEXIS 317, 2021 WL 2420196 (W.Va. June 14, 2021) (memorandum decision), is far more instructive. In this case, the nonparty Commission is an immune political subdivision of the State of West Virginia given its status as the employer of the Respondent who procured workers' compensation insurance coverage that paid benefits on the Respondent's injury claim. As such, the Circuit Court correctly ruled that the Commission was not subject to being assessed fault on the verdict form in the underlying case. Simply put, the Circuit Court's ruling is not clear error that warrants the issuance of a writ of prohibition.

Further, reviewing and applying the entirety of the Statute, the Circuit Court correctly ruled that a party seeking to apportion fault upon a nonparty-employer must do so based upon a deliberate intent standard of proof. Specifically, the Statute imposes upon the party seeking to establish fault on a nonparty the burden of proving and alleging such fault. The Statute defines the term "fault" in terms of certain standards of proof for various causes of action, including "deliberate intent" under W.Va. Code § 23-4-2(d)(2). Again, reading the Statute in *pari materia*, the Circuit Court correctly held that the Respondent would have to prove deliberate intent in order to asses fault on the Commission in this case, which it simply could not do because the Respondent's injury did not meet the threshold permanent impairment rating. Additionally, the requirement to meet a deliberate intent standard of proof is in keeping with the common law, which required the same of those third-party defendants attempting to impose liability on an employer for an employee's injury.

Moreover, the Circuit Court correctly held that an inequity, absurdity and injustice would result if a jury were able to assess fault on the nonparty, immune Commission, thereby reducing the Respondent's recovery, when the Commission or its insurer would also be able to recoup the workers' compensation benefits paid to the Respondent through its right of subrogation. Although

it is the position of the Respondent that the Statute does not permit an assessment of fault on the Commission in this instance, our law of statutory construction permits a circuit court to prevent an injustice or absurdity from resulting in the application of the law if there is some other construction that is appropriate. In this case, the Legislature's wording of the Statute permits a reading of the Statute that would prevent the aforementioned injustice and absurdity, i.e., not permitting the assessment of fault on a nonparty, immune employer because its immunities are preserved and/or the requirement that proof of fault be established under a deliberate intent standard. Thus, the Circuit Court did not commit clear error in its challenged ruling.

Finally, because the Statute is inapplicable to the underlying case based upon the reasons above, the Petitioner would have to resort to the common law in order to either argue the fault of the Commission to the jury or seek contribution for that portion of fault attributable to the Commission. The common law requires that such claims or defenses be made to the same burden of proof the Respondent would have to prove in order to make a claim directly against his employer, i.e, deliberate intent. However, the Petitioner cannot prove deliberate intent against the Commission as the requisite permanent whole person impairment rating is not present in this case. As such, the Petitioner is prohibited at common law from arguing the fault of the Commission to the jury of this matter.

For these reasons, the Circuit Court did not commit clear legal error by striking the Petitioner's Notice and, as such, the requested writ of prohibition should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent is of the belief that this matter meets the criteria set forth in Rule 20 of the Rules of Appellate Procedure and that the decisional process would be significantly aided by oral

argument in that it would allow the parties to further address the arguments presented in the briefs and to respond to questions of the Court regarding the issues presented herein.

V. ARGUMENT

A. Standard of Review

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code § 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). This Court has proscribed the following test for examining cases wherein it is alleged that a trial court has exceeded its legitimate powers, such as this one:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).[1]

"We grant the extraordinary remedy of prohibition 'to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts.'" *State ex rel. Amerisourcebergen Drug Corp. v. Moats*, ___ W.Va. ___, 859 S.E.2d 374, 2021 W.Va. LEXIS 330, *21 (2021) (citing

[1] The Petitioner only addresses the first, second and third factors in its Petition. As such, it should be assumed that the other factors are not met and the Respondent is responding accordingly in this Response.

State ex rel Vanderra Res., LLC, 242 W.Va at 40, 829 S.E.2d at 40). Moreover, "... prohibition against judges is a drastic and extraordinary remedy [and] it is reserved for really extraordinary causes." *State ex rel. Tucker County Solid Waste Auth. v. W.Va. Div. of Labor*, 222 W.Va. 588, 593, 688 S.E.2d 217, 222 (2008) (internal citations omitted). "'It is well established that prohibition does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error, or certiorari.'" *State ex rel. Davidson v. Hoke*, 207 W.Va. 332, 337, 532 S.E.2d 50, 55 (2000) (internal citations omitted). Further, "[w]here the issue on an appeal from the circuit court is clearly a question of law ... involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. pt. 5, *Vanderpool v. Hunt*, 241 W.Va. 254, 823 S.E.2d 526 (2019) (citing Syl. pt. 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)).

B. An Appeal Is Both Available and Adequate to Address the Petitioner's Grievances With the Circuit Court's Ruling In This Matter Such That a Writ of Prohibition Should Be Denied.

"Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue." Syl. pt. 1, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973).

Without citing to any authority, the Petitioner argues to this Court that it has no other adequate means to obtain relief from the alleged error of the Circuit Court. To the contrary, should, after the trial of this matter, the Petitioner be unsatisfied with the jury's verdict, it has the right under W.Va. Code § 58-5-1 *et seq.* and the West Virginia Rules of Appellate Procedure to bring an appeal of the matter, and the Circuit Court's rulings regarding the Notice, before this Court.

Moreover, in asserting that it would be somehow damaged if the trial went forward based upon the Circuit Court's ruling, the Petitioner presumes that a jury would place some or all of the fault on the Commission if it was included on the verdict form. To the contrary, as demonstrated above, there is more than enough evidence for a jury to conclude that it was, in fact, the Petitioner who was entirely at fault for the Respondent's injury, and such a result is just as likely even if the Commission were on the verdict form. Additionally, it is the Respondent, who is the actual injured party here (suffering a permanent injury), who continues to incur damage the longer this case drags out. As such, the Petitioner has not satisfied the first and second factors of the *Hoover* test. Further, as demonstrated below, there is no abuse of power or clear legal error that would entitle the Petitioner to the extraordinary relief it requests of this Court.

C. The Circuit Court Did Not Err When Issuing its Order Granting the Respondent's Motion to Strike the Petitioner's Notice.

1. Immune nonparties are not subject to assessment of fault under W.Va. Code § 55-7-13d.

In 2015, the West Virginia Legislature enacted the Statute in an attempt to "alter the common law 'principles of comparative fault governing tort actions.'" *Amerisourcebergen*, ___ W.Va. ___, 859 S.E.2d 374, 2021 W.Va. LEXIS 330, *38 (Hutchison, J. concurring) (quoting W.Va. Code § 55-7-13a(b)). "Statutes in derogation of the common law are strictly construed." Syl. pt. 1, *Kellar v. James*, 63 W. Va. 139, 140, 59 S.E. 939, 939 (1907).[2]

---

[2] In his *Americsourcebergen* concurrence with the decision to deny the requested writ of prohibition, Justice Hutchison wrote as follows regarding the Statute and its attempt to alter the common law or rules of procedure:

> To the extent the statute seeks to change the common law, it is a longstanding maxim that "[s]tatutes in derogation of the common law are strictly construed." Syl. pt. 1, *Kellar v. James*, 63 W.Va. 139, 59 S.E. 939 (1907). *Accord*, Syllabus Point 3, *Bank of Weston v. Thomas*, 75 W.Va. 321, 83 S.E. 985 (1914) ("Statutes in derogation of the common law are allowed effect only to the extent clearly indicated by the terms used. Nothing can be added otherwise than by necessary implication arising from such terms."); Syl. pt. 5,

The Statute states, in relevant part, as follows:

(a) Determination of fault of parties and nonparties. —

(1) In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit;

...

(3) In all instances where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty. ...;

(4) *Nothing in this section is meant to eliminate or diminish any defenses or immunities, which exist as of the effective date of this section, except as expressly noted herein*;

(5) Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of named parties. Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability in that or any other action, or may not be introduced as evidence of liability or for any other purpose in any other action; and

---

Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W. Va. 484, 647 S.E.2d 920 (2007) ("Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law."). To the extent the statute seeks to impose a rule of procedure upon the courts, Article VIII, Section 3 of the West Virginia Constitution "unquestionably provides this Court with the sole constitutional authority to promulgate rules for the judicial system, and demands that those rules have the force of law." *State ex rel. Workman v. Carmichael*, 241 W. Va. 105, 132, 819 S.E.2d 251, 278 (2018). *Accord*, Syl. pt. 10, *Teter v. Old Colony Co.*, 190 W. Va. 711, 714, 441 S.E.2d 728, 731 (1994) ("Under Article VIII, ... Section 3 of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them."); Syl. pt. 1, *Bennett v. Warner*, 179 W. Va. 742, 372 S.E.2d 920 (1988) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."). "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." Syl. pt. 2, *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 490 S.E.2d 891 (1997).

Amerisourcebergen, ___ W.Va. ____, n. 7, 859 S.E.2d 374, n.7 2021 W.Va. LEXIS 330, n. 7 (Hutchison, J. concurring).

...

> (g) Limitations. — Nothing in this section creates a cause of action. *Nothing in this section alters, in any way, the immunity of any person as established by statute or common law.*

W.Va. Code § 55-7-13d(a) and (g) (emphasis added).

"[S]ignificance and effect must, if possible, be given to every section, clause, word or part of [a] statute." Syl. pt. 4, *Young v. Apogee Coal Co.*, LLC, 232 W.Va. 554, 753 S.E.2d 52 (2013). Furthermore,

> [s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

Syl. pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975).

In the instant case, the Circuit Court has reviewed the plain language of the entire Statute in *pari materia* and determined that it prohibits the inclusion of an immune political subdivision in a jury's assessment of fault. App. 0003-4. Specifically, the Circuit Court reasoned that "it is clear from the plain language of the Statute that the Legislature did not intend to except from the Statute non-parties who are otherwise immune from suit as the Statute [at 55-7-13d(a)(4) and (g)] expressly preserves all immunities available under the law to the non-party." App. 0004. If the Legislature had intended to allow non-parties who are otherwise immune from suit to be included in an assessment of fault, there would have been no need to include the specific section at W.Va. Code § 55-7-13d(a)(4) preserving nonparty immunities. To be sure, the Legislature went on in subsection (g) to pronounce again, this time using the absolutist phrase "in any way," that the Statute does not "alter[], ***in any way***, the immunity of any person as established by statute or

common law." W.Va. Code § 55-7-13d(g) (emphasis added). Thus, the Circuit Court read the Statute in *pari materia* and gave significance and effect to every part of the Statute.

The Petitioner's argument that the Circuit Court erred focuses on the phrase "regardless of whether the person was or could have been named as a party to the suit." On the face of it, that phrase is ambiguous as the Legislature does not define what the phrase means. Is the phrase referring to identity issues (i.e., the party is unknown), jurisdictional issues (i.e., the court does not have jurisdiction over the party) or something else entirely that precludes naming the party in the suit in a court of this State? The Legislature simply did not specify. The Legislature did, however, expressly state within the Statute that immunities are preserved and not ***in any way*** altered. *See* W.Va. Code § 55-7-13d(a)(4) and (g). Thus, when the separate sections of the Statute are read in *pari materia*, it is clear that the Legislature intended to except immune persons from the provision that proscribes assessment of fault on nonparties.

In support of its argument, the Petitioner cites two cases from the Northern District of West Virginia – *Taylor.*, 2020 U.S. Dist. LEXIS 47573, and *Metheney*, 2021 U.S. Dist. LEXIS 120483. However, these cases are unpersuasive. The *Taylor* and *Metheney* courts' analyses of the Statute are misguided in that both courts sidestep the immunity issue raised by the plaintiffs in those cases and rely on the inability of the assessment of fault to confer liability upon a nonparty as proscribed in subsection (a)(5) of the Statute.[3] None of the named parties in *Taylor* or *Metheney*, or even in this case, have proposed or in any way argued or attempted to assert that an apportionment of "fault" by a jury would impose "liability" upon the immune nonparties at issue, nor could they as

[3] "Assessments of percentages of fault for nonparties are used only as a vehicle for accurately determining the fault of named parties. Where fault is assessed against nonparties, findings of such fault do not subject any nonparty to liability in that or any other action, or may not be introduced as evidence of liability or for any other purpose in any other action." W.Va. Code § 55-7-13d(a)(5).

the nonparties at issue in each case are, quite simply, immune from responding in damages in the context of each case. Instead, the argument by the plaintiffs in those cases, and that of the Respondent here, is that the Statute, as written, excepts from any apportionment of "fault" an otherwise immune person or entity. Ergo, in addition to not being able to impose liability upon an immune entity, neither can a jury apportion fault to an immune entity. As such, the Circuit Court did not clearly err in applying W.Va. Code § 55-7-13d in this case. Additionally, the contrary applications of the Statute by the two Northern District cases illustrate, at worst, that the Statute is ambiguous as it pertains to the apportionment of fault to a nonparty such that the Circuit Court could not have committed "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts.'" *Amerisourcebergen*, ___ W.Va. ____, 859 S.E.2d 374, 2021 W.Va. LEXIS 330, *21.

In a case analogous to this one, this Court in *Chalifoux* denied a writ of prohibition after the circuit court denied a motion to place a nonparty on a verdict form pursuant to the Statute. No. 20-0929, 2021 W.Va. LEXIS 317, 2021 WL 2420196 (memorandum decision). Specifically, the matter involved a medical malpractice action in which the defendant-doctor requested that other healthcare providers be placed on the verdict form in accord with the Statute and the Medical Professional Liability Act, W.Va. Code § 55-7B-9. *Id.* at *3-4. The circuit court interpreted and applied the applicable statutes and denied the defendant-doctor's motion to place the nonparties on the verdict form. *Id.* at *4. In doing so, the circuit court reasoned that:

> (1) West Virginia Code § 55-7B-9 (2016) plainly contemplates that "all alleged parties" does not include health care providers who are not actual parties to the underlying litigation, or who had not previously settled with the plaintiff; (2) Caselaw pre-dating the several liability provisions of the MPLA does not allow health care providers to avoid liability for the entirety of any verdict rendered, and thus "there is no reason to ask the jury to attribute any responsibility" to the Akron

> providers; and (3) Allowing a non-party on the verdict form would prejudice Mr. Moellendick because he elected not to sue the Akron providers.

Id. at *4.

This Court reviewed the *Chalifoux* circuit court's interpretation and application of the Statute and its denial of the request to place nonparties on the verdict form under the same. *Id.* at *6. After review, this Court denied the writ of prohibition and held as follows:

> we conclude that Dr. Chalifoux has failed to demonstrate that the circuit court's order rises to the level of clear error as a matter of law. Thus, while there were arguments made that supported both Dr. Chalifoux's Combined Notice and Motion and Mr. Moellendick's response, Dr. Chalifoux has not demonstrated that he is entitled to the issuance of a writ of prohibition under either the third or the fourth *Hoover* factors. Rather, based on our consideration of the relevant *Hoover* factors, we discern no reason this case may not proceed to a final resolution before the circuit court.

Id., at *11-12.

In the instant case, this Court should follow the reasoning that led it to conclude a writ of prohibition was not appropriate in *Chalifoux* – that the Circuit Court's application of the Statute and the striking of the Petitioner's Notice does not "rise to the level of clear error as *a* matter of law" and deny the writ of prohibition sought by the Petitioner. *Id.*, at *11.

2. Even if an immune nonparty such as the Commission may be assessed fault under the Statute, the Petitioner must prove that the Commission acted with deliberate intent in order for a jury to do so.

The Statute, again in derogation of the common law, purports to allow parties in an action for damages to seek to have a trier of fact assess the fault of a nonparty, in addition to those parties named in the action, on a verdict form in terms of percentages of fault. *See* W.Va. Code § 55-7-13d. In that regard, the Statute defines "comparative fault" as "the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property,

expressed as a percentage." W.Va. Code § 55-7-13a(a). The Statute further defines the term "fault" as follows:

> "Fault" means an act or omission of a person, which is a proximate cause of injury or death to another person or persons, damage to property, or economic injury, including, but not limited to, negligence, malpractice, strict product liability, absolute liability, ***liability under section two [§ 23-4-2], article four, chapter twenty-three of this code*** or assumption of the risk.

W.Va. Code § 55-7-13b (emphasis added). The Statute goes on to state, in relevant part, that:

> (a) Determination of fault of parties and nonparties. —
>
> > (1) In assessing percentages of ***fault***, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit
>
> ...
>
> (d) Burden of proof. — The burden of alleging and proving comparative ***fault*** shall be upon the person who seeks to establish such fault.

W.Va. Code § 55-7-13d(a)(1) and (d) (emphasis added).

The Circuit Court, in reviewing these provisions of the Statute, held that "even if the Statute permitted the inclusion of an immune political subdivision in the jury's determination of fault, such as the Commission, the Statute would require that the [Petitioner] prove fault against the Commission based upon existing law as it pertains to employer liability (i.e., deliberate intent)." App. 0004.

Once again, "significance and effect must, if possible, be given to every section, clause, word or part of [a] statute." Syl. pt. 4, *Young*, 232 W.Va. 554, 753 S.E.2d 52. "This 'cardinal rule' applies to all words in a statute, even ... small and seemingly insignificant" words. *State ex rel. Monster Tree Serv. v. Cramer*, ___ W.Va. __, 853 S.E.2d 595, 606 (2020). "It is always presumed that the legislature will not enact a meaningless or usesless statute." Syl. pt. 4, *State ex rel.*

Hardesty v. Aracoma-Chief Logan No. 4523, VFW of the United States, Inc., 147 W.Va. 645, 129 S.E.2d 921 (1963). Moreover,

> [s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

Syl. pt. 5, *Fruehauf Corp.*, 159 W. Va. 14, 217 S.E.2d 907; *see also Vanderpool*, 241 W.Va. at 261, 823 S.E.2d at 533 (It is also a court's duty to "'review the act or statute in its entirety to ascertain legislative intent properly.'") (quoting *Fruehauf Corp.*). "Accordingly, we look not just to a lone clause in one paragraph in one statute; we consider the entire statutory scheme as crafted by the Legislature." *Div. of Justice & Cmty. Servs. v. Fairmont State Univ.*, 242 W.Va. 489, 496, 836 S.E.2d 456, 463 (2019). "To that end, 'that which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect, according to their nature and ordinary meaning, is as much a part of it as if it had been declared in express terms.'" *Vanderpool*, 241 W.Va. at 262, 823 S.E.2d at 534 (internal citations omitted).

In *Tucker County Solid Waste Auth.*, this Court was called upon to review the West Virginia Prevailing Wage Act and the intersection of the terms "employee" and "workman" contained therein. *See generally Tucker County Solid Waste Auth.*, 222 W.Va. 588, 688 S.E.2d 217. Though lengthy, this Court's analysis and holding, while applying the foregoing principles of statutory construction, among others, is instructive in this case:

> While the language of this statute is plain, its application is a bit more problematic. This definitional section, W. Va. Code § 21-5A-1(7), refers to "employees" of a public authority, while the general purpose section, W. Va. Code § 21-5A-2, references "workmen" employed by a public authority. The Act does not, however, separately define the term "workman." Having carefully reviewed the entire Act, it is apparent that the Legislature intended the definition of "employee" to also give meaning to the term "workman." Aside from an isolated reference to the word

"employees" in the context of defining "construction industry" and use of the word "employee" in the definition of that term, the words "employee" and "employees" are not used elsewhere in the Act. The terms "workman" and "workmen" are repeatedly referenced throughout the Act, but they are not defined therein. Thus, it is clear that the Legislature intended the definition of "employee" to apply throughout the entire article setting forth the Prevailing Wage Act and to ascribe meaning to the word "workman." *See* W. Va. Code § 21-5A-1(7) (providing definition of "[t]he term 'employee' *for the purposes of this article"* (emphasis added)). To construe the word "employee" otherwise would render it meaningless, and, in matters of statutory construction, every effort is made to give effect to each word and phrase adopted by the Legislature, the presumption being that the Legislature would not have committed a futile act. In other words, "[i]t is always presumed that the legislature will not enact a meaningless or useless statute." Accordingly, we hold that, pursuant to W. Va. Code § 21-5A-1(7) (1961) (Repl. Vol. 2002), the terms "employee" and "workman," as used in the West Virginia Prevailing Wage Act, W. Va. Code § 21-5A-1, *et seq.*, do not include workers who are (1) employed or hired by a public authority on a regular basis, (2) employed or hired by a public authority on a temporary basis, (3) employed or hired by a public authority to perform temporary repairs, or (4) employed or hired by a public authority to perform emergency repairs.

Applying W. Va. Code § 21-5A-1(7)'s definition of "employee"/"workman" to the policy declared in W. Va. Code § 21-5A-2 requires further statutory construction in order to give meaning to the legislative intent evidenced therein. As it is currently written, and as it was interpreted in *ACT Foundation,* W. Va. Code § 21-5A-2 requires the prevailing wage to be paid to "all workmen employed *by or on behalf of* any public authority" when such workers are "engaged in the construction of public improvements." W. Va. Code § 21-5A-2 (emphasis added). However, the definition of "employee"/"workman" specifically excludes from its scope those workers employed or hired *by* a public authority. W. Va. Code § 21-5A-1(7). It is not possible, then, to require that the prevailing wage be paid to persons employed *by* a public authority because the more specific definitional section has specifically excluded such workers from the definition of "employee." ***Thus, the only construction that will give meaning and effect to both the definitional section and the policy declaration section necessarily requires us to limit the scope and application of the purpose of the prevailing wage requirement. Any other construction would create an absurd result, which we are bound to avoid.*** *See* Syl. pt. 2, *Richards v. Harman,* 217 W. Va. 206, 617 S.E.2d 556 (2005) ("'Where a particular construction of a statute will result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.' Syllabus Point 2, *Newhart v. Pennybacker,* 120 W. Va. 774, 200 S.E. 350 (1938)."); Syl. pt. 2, *Conseco Fin. Serv'g Corp. v. Myers,* 211 W. Va. 631, 567 S.E.2d 641 (2002) ("'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. *It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and*

> *absurdity.'* Syllabus Point 2, *Click v. Click,* 98 W. Va. 419, 127 S.E. 194 (1925)." (emphasis added)). Therefore, we hold that W. Va. Code § 21-5A-2 (1961) (Repl. Vol. 2002) requires the prevailing wage to be paid to all workmen who are employed "on behalf of any public authority" and who are "engaged in the construction of public improvements."

Id., 222 W. Va. 588, 598-600, 668 S.E.2d 217, 227-29 (some internal citations omitted).

Additionally, in *Monster Tree Serv. v. Cramer*, this Court was faced with a writ of prohibition analysis over whether the defendant below had "refused" a certified mailing containing service of process from the Secretary of State. *Id.*, ___ W.Va. ___, 853 S.E.2d 595, 605. Specifically, the statute at issue pertaining to service of process on a nonresident required that the returned mailing show "the stamp of the post-office department that delivery has been refused." *Id.* at 606. The mailing at issue was returned with the handwritten notations "NOT AT THIS ADDRESS" and "RETURN TO SENDER." *Id.* at 605. However, there was no "stamp" that the mailing was "refused," as required by the statute. *Id.* at 606. Thus, this Court ruled that the service of process was ineffective and that the court below did not have jurisdiction over the subject defendant. *Id.* at 607. In doing so, this Court reasoned that the cardinal rule of statutory construction that requires that every section, clause, word or part of a statute be given significance and effect "applies to all words in a statute, even words as small and seemingly insignificant as 'stamp'" *Id.* at 606.

Similarly, in *Vanderpool,* this Court was called upon to review the meaning of "state entity" within the Maxwell Governmental Access to Financial Records Act, W.Va. Code § 31A-2A-1 et seq., and whether it included a county sheriff's department. 241 W.Va. at 259-261, 823 S.E.2d at 532-533. The Act defined "state entity" as "any state or local government office, officer, department, division, bureau, board or commission, including the Legislature, and any other state or local government agency of West Virginia, its political subdivisions and any agent therof." *Id.*

This Court, relying upon the above-quoted statutory rules of construction, found that the term "state entity" did include county government officials, including the county sheriff. *Id.*, 241 W.Va. at 262, 823 S.E.2d at 534. This Court reasoned that "[s]uch parsing of the statutory language achieves an absurd result that is simply not permitted under our rules of statutory construction." *Id.*

The *Tucker*, *Monster* and *Vanderpool* cases demonstrate the importance, indeed the requirement, that every clause and word, no matter how small or seemingly insignificant, must be given meaning and effect. In this instance, the subject statutory words and clauses are the "burden of proof" provision and the definition of "fault." Specifically, the Statute states that "[t]he burden of alleging and proving comparative fault shall be upon the person who seeks to establish such ***fault***." W.Va. Code § 55-7-13d(d) (emphasis added). "Comparative fault" is defined within the Statute as "the degree to which the ***fault*** of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage." W.Va. Code § 55-7-13a(a) (emphasis added). "Fault" is specifically defined within the Statute, among other things, as "liability under section two [§ 23-4-2], article four , chapter twenty-three of this code," otherwise known as deliberate intent. W.Va. Code § 55-7-13b.

It is clear that when the aforementioned statutory clauses and words are read in *pari materia*, the Legislature intended to require those persons attempting to apportion fault on nonparties to have to prove that fault to a particular burden of proof dependent upon the claims involved in the action. Any other reading of the Statute "would lead to injustice and absurdity." *Tucker*, cited *supra*. For instance, the Statute also defines "fault" as proximate cause through "malpractice." Should a professional defendant, like a doctor or dentist, be able to allege fault of another professional defendant without having to prove that such nonparty deviated from

the accepted standard of care? Similarly, the Statute also defines "fault" with regard to "strict product liability." Should a defendant-manufacturer be able to allege and prove to any less degree of fault on a nonparty co-manufacturer than that to which the defendant-manufacturer is held? If the answer to any of these questions is yes, then that would be an absurd and unjust reading of the statute and result for the plaintiff. The same must go for the burden of proof required of a defendant who alleges that a nonparty-employer is partially or entirely at fault and seeks to have that employer included on a verdict form for assessment of fault purposes. It would be an absurd and unjust reading of the Statute if that defendant is not required to prove fault to the same degree that the plaintiff would be had she, even if she could have, named the employer as a defendant in the first instance.

The Petitioner seeks to have this Court render just such an absurd result. In support of its position, the Petitioner cites, once again, the cases from the Northern District of West Virginia, *Taylor* and *Metheney*. The analyses conducted by the Northern District in both cases, however, failed to give significance and effect to the burden of proof clause and the definition of "fault" imposed by the Legislature within the Statute. To be sure, the *Taylor* court largely ignored both parts of the Statute and did not consider their meanings in *pari materia* with the rest of the Statute. *See Taylor*, 2020 U.S. Dist. LEXIS 47573, 2020 WL 1316730. The *Metheney* court, considered the definition of "fault," but failed to consider the burden of proof provision. *See Metheney*, 2021 U.S. Dist. LEXIS 120483 *18-21, 2021 WL 2668821. As a result, both courts rendered those parts of the Statute superfluous in clear violation of cardinal rules of statutory construction. As such, neither of those opinions should be considered persuasive on this Court.

To be sure, prior to the enactment of the Statute, the common law in West Virginia required those third-party defendants who wished to place fault for a worker's injury on an employer to

prove such fault under a deliberate intent standard of proof. *See Sydenstricker v. Unipunch Prods.*, 169 W.Va. 440, 288 S.E.2d 511 (1982) (holding that a third-party defendant may bring a claim against an employer for contribution on an injured employee's injury claim, but must prove the contribution claim on a deliberate intent standard); s*ee also* Syl. pt. 2, *Doe v. Wal-Mart Stores, Inc.*, 210 W.Va. 664, 558 S.E.2d 663 (2001) ("It is improper for counsel to make arguments to the jury regarding a party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury where the evidence establishing the absent party's liability has not been fully developed."). However, the Statute purports to alter the common law to allow defendants to have a jury assess fault of another party without having to bring third-party complaints. *See Chalifoux*, No. 20-0929, 2021 W.Va. LEXIS 317 *10, 2021 WL 2420196. The Petitioner argues that the Statute further alters the common law to not require a defendant to prove such a claim of nonparty fault to any particular burden of proof, but there is nothing in the Statute that expressly overrules the common law on that point, which is required: "'The common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested.'" Syl. Pt. 4, *Seagraves v. Legg*, 147 W.Va. 331, 127 S.E.2d 605 (1962) (quoting *Shifflette v. Lilly*, 130 W.Va. 297, 43 S.E.2d 289, 1947). Further, "[i]f the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation." *State ex rel. Van Nguyen v. Berger*, 199 W.Va. 71, 75, 483 S.E.2d 71, 75 (1996).

Instead of clearly derogating the common law, the Statute expressly states that "[t]he burden of alleging and proving comparative fault ***shall*** be upon the person who seeks to establish such ***fault***." W.Va. Code § 55-7-13d(d) (emphasis added). The Statute defines "fault" to include deliberate intent under the Workers' Compensation Act – the only way an employee can prove

fault against an employer when the employer has secured workers' compensation insurance.[4] *See* W.Va. Code § 55-7-13b and W.Va. Code § 23-4-1 *et seq.* Thus, the clear intent of the Legislature in the Statute was to uphold and codify the common law espoused in *Doe*, 210 W.Va. 664, 558 S.E.2d 663, and *Sydenstricker*, 169 W.Va. 440, 288 S.E.2d 511, and require a defendant to prove fault on a nonparty employer the same as a plaintiff-employee would, under a deliberate intent standard. To require anything less would, as Justice Hutchison put it in his concurrence in *Amerisourcebergen*, "invite every defendant in every civil suit to flail about, blaming strangers for harms caused by the defendant" without any regard for burden of proof requirements – the proverbial "spaghetti will be thrown at strangers with hope that it sticks." ___ W.Va. ____, 859 S.E.2d 374, 2021 W.Va. LEXIS 330, *39.

In this case, the record is void of the requisite evidence under W.Va. Code § 23-4-2(d)(2) to establish deliberate intent against the Commission. Rather, the only evidence in the record as it pertains to deliberate intent is the Respondent's permanent whole person impairment rating attributable to his work injury, which is 7%. *See* App. 0070. The deliberate intent statute requires a threshold percentage of "at least thirteen percent (13%)" in order to prove such a claim. *See* W.Va. Code § 23-4-2(d)(2)(B)(v)(I)(a). As such, the Petitioner could not meet the burden of proof under a deliberate intent standard.[5] Thus, the Circuit Court did not commit error and the writ of prohibition should be denied.

---

[4] This case presents a unique scenario in that the Respondent was employed by the Monongalia County Commission, a political subdivision of the State of West Virginia, and under W.Va. Code § 29-12A-5(a)(11) and Syl. pt. 4, *Michael v. Marion Cnty. Bd. of Educ.*, 198 W. Va. 523, 482 S.E.2d 140 (1996), the Commission was entirely immune from suit as workers' compensation covered the Respondent's injury. As such, the Commission could not even be held liable under a deliberate intent standard. However, permitting the Petitioner to attempt to prove fault on the nonparty-Commission under any lesser standard would create an injustice and absurdity in the law.

[5] To the extent that the Petitioner argues that because the Commission is entirely immune under W.Va. Code § 29-12A-5(a)(11) and *Michael*, 198 W. Va. 523, 482 S.E.2d 140, even to a deliberate intent claim, then it should not have to meet a deliberate intent standard, that creates an even more absurd and unjust

3. The application of W.Va. Code § 55-7-13d where the nonparty is an immune employer creates an absurd and unjust result as a plaintiff's recovery is doubly reduced.

The Workers' Compensation Act both permits an injured employee to bring a claim against a third party responsible for the employee's injuries and permits the self-insured employer or employer's workers' compensation insurance carrier a statutory right of subrogation against a recovery in such third-party claim. *See* W.Va. Code § 23-2A-1. That statutory right of subrogation is not subject to a reduction or nullification based upon the made-whole doctrine (i.e., plaintiff failed to fully recover their damages) recognized in West Virginia. *See* Syl. Pt. 4, *Bush v. Richardson*, 199 W.Va. 374, 484 S.E.2d 490 (1997). Rather, the lien held by a self-insured employer or insurance carrier is negotiable, but the only reduction required by the workers' compensation subrogation statute are deductions for reasonable attorneys' fees and costs. *See* W.Va. Code § 23-2A-1(b)(3). Thus, a lienholder is able – indeed almost certain – to demand and receive reimbursement from a plaintiff who recovers against a third-party, but whose recovery is reduced by the assessed fault on a nonparty-employer, should such be permitted under the Statute.

"'Where a particular construction of a statute will result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.'" Syl. pt. 2, *Richards v. Harman*, 217 W. Va. 206, 617 S.E.2d 556 (2005) (quoting Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938)). "'It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. *It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and*

---

result for the Respondent in that it would allow the Petitioner to mount an empty chair defense against a nonparty that the Respondent could never have sued under any circumstances, and make such defense to an undefined burden of proof, i.e, the proverbial spaghetti on the wall analogy.

absurdity." Syl. pt. 2, *Conseco Fin. Serv'g Corp. v. Myers,* 211 W. Va. 631, 567 S.E.2d 641 (2002) (quoting Syl. pt. 2, *Click v. Click,* 98 W. Va. 419, 127 S.E. 194 (1925) (emphasis in original)).

The Supreme Court of Tennessee, faced with this issue of a double reduction of a plaintiff's damages if an immune employer is allowed to be assessed fault by a jury, created an exception to its rule allowing apportionment of fault to otherwise immune nonparties that prohibits apportionment of fault to immune employers. *See Carroll v. Whitney*, 29 S.W.3d 14, 19 (Tenn. 2000). Like in West Virginia, a Tennessee "... employer's liability is governed exclusively by the Workers' Compensation Law," but a third-party claim may be brought. *Id.* 29 S.W.3d at 19. "If the employee succeeds in an action against a third party, the employer that has fully or partially paid its maximum liability for workers' compensation is entitled to a subrogation lien against the employee's recovery." *Id.* The Tennessee Court, in reaffirming the exception for nonparty employers to be assessed fault, reasoned as follows:

> An example illustrates the basic unfairness that would result from application of the standard we adopt today to cases brought against third parties by employees injured on the job. An employee who is injured by a piece of equipment may have a cause of action for products liability against the machine's manufacturer. However, the manufacturer could assert at trial that the employer altered the machine, and that this alteration caused the employee's injury. A jury, acting on this use of the nonparty defense, could then allocate fault between the manufacturer and the immune employer, thereby reducing the employee's recovery. Subsequently, the employer could exercise its right of subrogation with regard to the damages assessed against the manufacturer and recovered by the employee. Essentially then, the employer's right of subrogation would defeat the employee's statutory right to seek damages from other tortfeasors. We are unwilling to extend our holding this far.

Id.

Additionally, the Supreme Court Arizona also realized the absurdity and injustice that would result if this double reduction of an injured employee's recovery were permitted by the law.

See Aitken v. Industrial Comm. of Arizona, 183 Ariz. 387, 904 P.2d 456 (1995). In *Aitken*, the court interpreted the state's workers' compensation subrogation provision to preclude a lien if the compensation benefits paid by the employer or its insurance carrier did not exceed its total apportionment of fault as a nonparty in a third-party injury action. *Id.*, 183 Ariz. At 392, 904 P.2d at 461. Although the Arizona Court was interpreting the workers' compensation subrogation statute rather than the comparative fault statute, its reasoning still applies: "We should therefoe continue to interpret it in a manner that achieves the legislative objectives of distributing responsibility according to fault and avoiding double recovery while ensuring full and fair compensation. Because any other interpretation would be at the expense of the injured workman." *Id.* (internal citations omitted).

The Tennessee and Arizona courts realized the absurdity and injustice of allowing the assessment of fault on a nonparty employer while also allowing the same employer or its insurance carrier to assert a lien on a recovery reduced by its own share of fault. Indeed, if the Petitioner's position, and that of the *Taylor* and *Metheney* courts, cited *supra*, is to be adopted, that absurdity and injustice would be perpetuated onto injured workers in West Virginia. Rather, the Circuit Court correctly invoked the Legislature's true intent, as detailed above, and prohibited the assessment of fault on the Commission, a nonparty, immune employer. To the extent that the Statute could be read to the contrary (i.e. permitting a nonparty, immune employer to be assessed fault), then that "construction, though apparently warranted by the literal sense of the words in [the S]tatute, ... would lead to injustice and absurdity." Syl. pt. 2, *Conseco,* 211 W. Va. 631, 567 S.E.2d 641. If that be the case, then the Circuit Court was well within its power, indeed it exercised its duty, to disregard said construction, which would be absurd and result in a deep injustice to the Respondent, among others, and conclude that the more reasonable construction is to not permit an

assessment of fault on the Commission. *See Id.* and Syl. pt. 2, *Richards*, 217 W. Va. 206, 617 S.E.2d 556. As such, the Circuit Court did not err and the writ of prohibition requested by the Petitioner should be denied.

4. The Circuit Court did not err by precluding the Petitioner from arguing an empty chair defense with regard to the Commission.

As is established above, the Statute does not permit the inclusion of a nonparty, immune employer on a verdict form for purposes of assessing fault, i.e., it does not permit an empty chair defense against an immune employer. Thus, in order for the Petitioner to have the jury consider the fault of the Commission in this case, it would need to resort to common law principles, should they still exist given the enactment of the Statute.[6] In this regard, the Circuit Court properly ruled that the Petitioner could not make an empty chair defense argument to the jury regarding the Commission's fault.

The common law in West Virginia is clear: an empty chair defense may not be presented unless evidence establishing an absent party's liability has been fully developed. *See Doe*, cited *supra*. When that absent party is the employer of the plaintiff, such proof must be established to under a deliberate intent standard of proof. *See Sydenstricker*, cited *supra*. Moreover, "[w]hile a defendant has a right of contribution against a joint tortfeasor, [*Sydenstricker*] and *Zando* clearly establish that the right 'is derivative in the sense that it may be brought by a joint tortfeasor on *any theory of liability that could have been asserted by the injured plaintiff.*'" *Landis v Hearthmark, LLC*, 232 W.Va. 64, 73, 750 S.E.2d 280, 289 (2013) (citing Syl. pt. 4, *Bd. of Educ. of McDowell*

[6] This intersection of the Statute and the common law principles of third-party and contribution actions has not been addressed by this Court and has not been brought before the Court by the Petitioner in this original jurisdiction action.

Cty. v. Zando, Martin & Milstead, Inc., 182 W.Va. 597, 390 S.E.2d 796 (1990)[7]. Further, joint tortfeasors who have made good faith settlements with the plaintiffs are exempted from any further apportionment of fault or liability in a civil action. *See* Syl. pts. 5, 6 and 7, *Zando*, 182 W.Va. 597, 390 S.E.2d 796.

In this case, as the Commission was the employer of the Respondent, any evidence for an empty chair defense would need to be established to a standard of deliberate intent.[8] As demonstrated above, the Petitioner has not and, in fact, cannot make out a claim for deliberate intent against the Commission in this case. Furthermore, the Respondent has already made and settled the only claim he had available against the Commission – a workers' compensation claim. As such, the Circuit Court was clearly within its legitimate power to prohibit an empty chair defense by the Petitioner against the Commission. Therefore, the writ of rohibition should be denied.

VI. CONCLUSION

For the foregoing reasons, the Circuit Court acted within its legitimate powers in interpreting and applying the Modified Comparative Fault Statute and striking the Petitioner's Notice of Non-Party Fault and prohibiting the Petitioner from arguing the fault of the nonparty-employer Monongalia County Commission at the trial of this matter. Therefore, the Respondent requests that this Court deny the Verified Petition for Writ of Prohibition.

---

[7] The Petitioner cites *Landis* in its Petition in support of its position that an immune person could be placed on a verdict form, but *Landis* does not alter the requirement that any such assessment of fault must be based on the appropriate theory of liability.

[8] *See* n. 3, *supra*.

DAVID RAYMOND WESTON,

Respondent,

By counsel:

ERIC M. HAYHURST (W.Va. No. 11042)
HAYHURST LAW PLLC
34 Commerce Dr., Ste. 203
Morgantown, WV 26501
(304) 212-7099 office
(304) 212-7108 fax
eric@hayhurstlaw.com

CERTIFICATE OF SERVICE

I, Eric M. Hayhurst, counsel for Respondent David Raymond Weston, do hereby certify that I have served the foregoing **"Response to Verified Petition for Writ of Prohibition"** upon all parties and known counsel of record, via Electronic and First-Class Mail, as indicated below, this 23rd day of August, 2021, addressed as follows:

Keith C. Gamble, Esq.
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
2414 Cranberry Square
Morgantown, WV 26508
Counsel for Petitioner

Honorable Phillip D. Gaujot
Monongalia County Circuit Court
Monongalia County Justice Center
75 High Street, Suite 31
Morgantown, WV 26505

ERIC M. HAYHURST
(W.Va. No. 11042)