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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0329

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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.*

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PETITIONERS' BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. Whether the circuit court violated the Rubles' constitutionally-guaranteed rights to have their common law claims tried by jury when the circuit court held that collateral estoppel, based upon a final order of a parallel Workers' Compensation proceeding, barred the Rubles' civil claims against non-employer, third-party tortfeasors.
2. Whether the circuit court erred by applying collateral estoppel to bar the Rubles' claims against non-employer, third-party tortfeasors.
3. Whether the circuit court erred by taking judicial notice of the substantive causation determinations of the related Workers' Compensation proceedings, to establish that Mr. Ruble, in fact, did not develop an occupational disease as a result of his exposure to Respondents' chemical products that he worked with during the course and scope of his employment.

## **II. STATEMENT OF THE CASE**

### **A. Introduction.**

This appeal presents a fundamental and Constitutional question of first impression to this Court: Does the law of this State allow the application of collateral estoppel in favor of third-party product liability defendants when an employee-plaintiff loses his statutory workers' compensation occupational disease claim? Under the plain text of the West Virginia Constitution, case law examining West Virginia's statutory Workers' Compensation system and related common law civil claims against non-employer third-party defendants, and case law examining the scope of judicial notice, the answer to such question is plainly no.

In its rejection of Petitioners' answer to the above question, the circuit court noted that this Court has not addressed the relevant question and relied upon the reasoning of three foreign intermediate appellate courts, which did not confront similar state constitutional questions raised

by this appeal. In so doing, the circuit court also expanded the application of judicial notice beyond the limitations imposed by the prior teachings of this Court.

The circuit court's order has now squarely presented to this Court the issue of whether adverse decisions in the statutory Workers' Compensation system may be utilized by third-party product liability defendants to bar an employee-plaintiff's civil common law claims against such third-party product liability defendants, and the answer is "no." The circuit court's order ignores the Rubles' Constitutionally-guaranteed right to have their civil common law claims against the third-party product liability defendants decided by a jury; ignores the fact that the Rubles' civil common law claims against the third-party product liability defendants do not arise under West Virginia's Workers' Compensation Act – an entirely distinct statutory scheme; and ignores this Court's prior guidance that judicial notice may not be used to take notice of the truth of the matters asserted in the prior litigation but rather to establish the fact of such litigation and its related filings.

This Court should take this opportunity to clarify the impact of workers' compensation proceedings on civil common law claims pursued by employee-plaintiffs against third-party tortfeasors, and in so doing, reverse the circuit court's final order and hold instead that (1) employee-plaintiffs have a Constitutionally-guaranteed right to have their civil common law claims against third-party tortfeasors decided by a jury; (2) the Workers' Compensation system is a creature of statute arising from a renunciation of common law rights and defenses by employers and employees, and that conclusions arising therefrom may not be used in civil common law claims between employee-plaintiffs and third-party tortfeasors; and/or (3) judicial notice is limited to establishing the fact of a prior litigation and its related filings and shall not be utilized by a court to take notice of the truth of the matters asserted in the prior litigation, particularly final causation conclusions reached in Workers' Compensation proceedings between employers and employees.



## **B. Statement of facts.**

From approximately 1996 to 2018, Plaintiff Michael D. Ruble was employed by RPM International in various positions at a Lesage, West Virginia facility. During his employment, Mr. Ruble was exposed to toxic substances such as polyurethane stains, paint strippers, pure xylene, pure acetone, paint thinners, “special reducers[,]” and lacquer thinners. After developing neuropathy and dermatitis, Mr. Ruble filed a workers’ compensation occupational disease claim, and the Rubles filed the instant action, which includes common law civil claims against Respondents (herein referred to as “third-party product liability defendants”). JA 000005-JA 000034.

## **C. Legal background.**

West Virginia’s Workers’ Compensation system is set forth in Chapter 23 of the West Virginia Code. W. Va. Code § 23-1-1, et seq. West Virginia’s Workers’ Compensation statute expressly states that

It is the further intent of the Legislature that this chapter be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . . The workers’ compensation system in this state is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees’ right to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter and employers’ rights to raise common law defenses, such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. . . .

W. Va. Code § 23-1-1(b).

### **1. Historical context of workers’ compensation laws.**

Notwithstanding the Legislature’s express intent, an understanding of the history of workers’ compensation systems broadly and within this State is helpful. On a national level,

Nineteenth century employers owed a duty of care to employees, usually described in specific terms as a duty to provide employees with a reasonably safe place in which to work, reasonably safe tools and appliances, warnings of dangers likely to be unknown to employees, a sufficient number of suitable fellow servants, and rules that would make work safe. However, the ordinary rules of vicarious liability did not apply; under the fellow servant rule, the employer was not liable for injuries to an employee caused by the negligence of another employee. In addition, injured employees were barred by contributory negligence and a broad application of assumed risk. Beyond this, much of the work around machinery was unavoidably dangerous, so that injuries occurred often enough even without provable fault. All these things plus the delay and uncertainty of compensation made life for the injured worker almost intolerably difficult, especially in a day when no welfare backup of any kind was available.

...

Given the limited hopes a worker might have under the common law rules, workers' compensation statutes represented progressive reform. However, it originated in Germany, as Bismarck's defense against Marxism and workers' compensation ever since has shown a side favorable to workers and another side quite favorable to employers. In 1910 New York became the first state to enact a workers' compensation statute. This was held unconstitutional as a taking of property without due process because it imposed liability without fault, but with an amendment of its constitution New York got a statute that held up. Other states followed, most of them quickly. All states now have workers' compensation statutes. . . . Workers' compensation plans reflect the clearest expression of the enterprise liability ideas – that enterprise should bear the costs it systematically produces, including the costs of injury. But they also show a strong intent to limit significantly the employers' liability.

Dan B. Dobbs, *The Law of Torts* § 392, pp. 1097-1098 (2000).

The reasoning for this State's enactment of workers' compensation laws is similar to the national reasons described above. This Court has previously recalled "the purpose for the enactment of workmen's compensation legislation in the first instance." *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 907, 910, 161 W. Va. 695, 699 (1978).

The paramount reason for such legislation was, of course, that under the common law tort system workers injured in industrial accidents recovered compensatory damages in a rather small percentage of cases.<sup>1</sup>

The common law tort system with its defenses of contributory negligence, assumption of risk and the fellow servant rule was considered inimical to the public welfare and was replaced by a new and revolutionary system wherein “fault” became immaterial – essentially a no-fault system.

The Workmen’s Compensation Act was designed to remove Negligently caused industrial accidents from the common law tort system.<sup>2</sup> This quote from an earlier Workmen’s Compensation decision provides additional historical perspective and insight as to the purpose of this law:

“The conditions giving rise to a law, the faults to be remedied, the aspirations evidently intended to be efficiently embodied in the enactment, and the effects and consequences as regards responding to the prevailing conceptions of the necessities of public welfare, play an important part in shaping the proper administration of the legislation. In the aggregate, they sometimes shed very efficient light in aid of clearing up obscurities as to the legislative intent . . . The courts should fully appreciate that and be imbued with and guided by the manifest intent of the law to eradicate, utterly, the

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<sup>1</sup> See generally, 1 A. Larson’s, Workmen’s Compensation Law ch. 1-4 (1978); W. Prosser, The Law of Torts § 80 (4th ed. 1971). This excerpt from former Governor Henry Drury Hatfield’s speech to the Legislature indicates West Virginia’s experience with industrial accidents was not unlike experienced elsewhere in the county [sic]:

In harmony with the advance of civilization and our duty to our neighbor, a more humane system has grown up in the way of compensating workmen who are injured while engaged in the course of their employment. The burden in the past fell upon the employee first, but in case of death, to those dependent upon him. As the law stood previous to the passage of the Workmen’s Compensation law, the industry was indemnified by the insurance companies, and less than fifteen percent of the injured received any damages in case of litigation, and then, after a long-drawn-out litigation, which resulted in practically nothing for the plaintiff. The injustice to the employee and waste of time and money to the tax-payer has excited the attention of public spirited men, and it has been demonstrated that it would have been a saving of money for the tax-payer if a reasonable compensation had been paid out of the State treasury, thereby preventing court cost and injustice. There is, however, no good reason why such a procedure should be necessary in the face of other remedies, which in justice and good conscience should be willing to do their part. Journal of the Senate, App. A., p. 67 (1915).

<sup>2</sup> See generally, Journal of the Senate, p. 103-06 (1913) containing former Governor Hatfield’s address to the Legislature advocating passage of a compensation law to deal with accidents in modern industrial conditions.

injustice to employers and employees, and the public as well, of the old system, and to substitute in its place an entirely new one based on the highest conception of man's humanity to man and obligation to industry upon which all depend; recognizing the aggregate of its attending accidents as an element of cost to be liquidated and balanced in money in the course of consumption – a system dealing with employees, employers, and the public as necessarily mutual Participants in bearing the burdens of such accidents, displacing the one dealing only with the class of injuries happening through inadvertent failure, without real moral turpitude, to exercise average human care, and placing employee and employer, whose interests are economically the same, in the false position of adversaries, to the misfortune of both and the public, intensified by opportunity for those concerned as judicial assistants to profit by such misfortunes. Most lamentable it will be, if this new system – so freighted with hopes for the minimizing of human burdens and their equitable distribution shall not endure and be perfected to the best that human wisdom can attain.”

*Mandolidis*, 246 S.E.2d at 910-911, 161 W. Va. at 699-701, quoting, in part, *McVey v. Chesapeake & Potomac Telephone Co.*, 103 W. Va. 519, 522-3, 138 S.E. 97, 98 (1927) quoting *Milwaukee v. Miller*, 154 Wis. 652, 144 N.W. 188 (1913). (footnotes in original were designated as footnotes 3 and 4).

**2. History of this Court's prior recognition of the disparate nature of workers' compensation claims and employee-plaintiffs' civil actions against third-party tortfeasors.**

For more than a century, this Court has surveyed and recognized the distinctions between workers' compensation claims and civil actions pursued by employee-plaintiffs against third-party tortfeasors. In 1916, this Court observed that West Virginia's Workers' Compensation statute

deals solely with the employer and the employee and makes no reference whatever to third parties. It simply creates a fund to which the employee may apply for compensation for injuries sustained by him in the course of and resulting from his employment, and any employer subject to the act, who shall elect to pay into this fund the premiums provided by the act, is not liable to respond in damages at common law or statute for the injury or death of any employee however occurring, after such election and during any period in which the employer is not in default in the payment of such premiums, provided, the injured employee has remained in the service with notice that the employer has elected to pay into the fund the required premiums. This act does not release any employer from

liability for damages on account of injury or death of an employee caused by the deliberate intention to produce such injury or death.

There is nothing in our statute which would prohibit an employee who has received damages from a third person, from receiving from this fund the amount provided by law by way of compensation for damages arising out of the same act. . . .

*Mercer v. Ott*, 89 S.E. 952, 78 W. Va. 629, 636-637 (1916). *See also 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.”)

In 1917, this Court held that “an employe[e] who receives compensation for an injury from the workmen’s compensation fund, is not thereby estopped to sue a third person, not his employer, whose negligence caused [his] injury[.]” *Merrill v. Marietta Torpedo Co.*, 92 S.E. 112, 79 W. Va. 669 (1917). In *Merrill*, this Court further explained that

Plaintiff’s injury was not due to the negligence of his employer, but, according to the finding of the jury, to the negligence of defendant, an independent contractor to do a particular work. The compensation act does not deny right of action to a workman for injury received in the course of his employment, unless the negligence is that of the master, or such for which the master is liable at the common law. If the employee is injured in the course of his employment he is entitled to compensation out of the fund, whether his injury was occasioned by the negligence of the master or not; if occasioned by the negligence of a third person his right to compensation out of the fund is not thereby affected, nor is his right of action against a third person causing the injury impaired. The provision of the act is somewhat in the nature of life and accident insurance. That a person may be protected by accident insurance, and at the same time have a right of action against the person whose negligence produced the accident resulting in his injury, is well settled.

*Merrill*, 79 W. Va. at 678-679.

In 1960, this Court revisited the disparate nature of workers’ compensation claims and common law causes of action brought against third-party tortfeasors:

The first is solely for statutory benefits and the second results form common law liability. Under the provisions of Chapter 23 of the West Virginia Code, entitled Workers' Compensation, the relationship between the employer who is a subscriber to the fund and his employee is one of implied contract. The employer agrees that his injured employees may be compensated for injuries sustained in the course of and as a result of their employment without regard to negligence except in certain instances not here material.

*Jones*, 115 S.E.2d at 134.

As recently as 2016, this Court relied on *Jones* for the proposition that "all awards in workers' compensation claims are solely statutory in nature." *Metcalf v. W. Va. United Health Sys.*, Case No. 15-0304, \*3 (Mem. Decision dated Feb. 26, 2016) (citing *Jones v. Appalachian Electric Power Company*, 115 S.E.2d 129, 134, 145 W. Va. 478, 488 (1960)).

With this background in mind, it is evident that West Virginia's Workers' Compensation Act is intended to provide a statutory scheme for employers and employees to address injuries suffered by employees in the course and scope of their employment and is not designed to address common law claims between employee-plaintiffs and third-party product liability defendants. In this vein, this Court has not previously allowed the application of collateral estoppel, premised upon workers' compensation proceedings, in favor of third-party tortfeasors against whom employee-plaintiffs have asserted civil common law claims.<sup>3</sup> The question that is squarely in front

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<sup>3</sup> This Court and the United States District Court for the Northern District of West Virginia have considered the application of collateral estoppel in civil cases between employers and employees, following final workers' compensation orders. See *White v. SWCC*, 262 S.E.2d 752, 164 W. Va. 284 (1980) (in an appeal of an order of the Workmen's Compensation Appeal Board which affirmed a ruling of the Workmen's Compensation Commissioner rejecting appellant's claim to compensation benefits for occupational pneumoconiosis, this Court indicated that "the doctrine of res judicata is applicable to Workmen's Compensation cases" between employers and employees); *Corley v. E. Associated Coal Corp.*, 2009 WL 723120 (N.D.W. Va. Mar. 18, 2009) (indicating that while workers' compensation proceedings between employers and employees are quasi-judicial proceedings to which res judicata or collateral estoppel may attach and have preclusive effect in some instances, collateral estoppel could not be applied in favor of the employer-defendant, in a deliberate intent case between an employee-plaintiff and employer-defendant, because the underlying workers' compensation order, which denied the claim on the basis of a failure to

of this Court today is whether collateral estoppel may be applied to bar a plaintiff-employee's civil common law claims against third-party product liability defendants.

**D. Procedural history.**

**1. The related workers' compensation occupational disease claim.**

Mr. Ruble and his physician executed a *West Virginia Workers' Compensation Employees' and Physicians' Report of Occupational Injury or Disease* on January 3, 2019. The related claim was premised upon "solvent toxicity/chemical exposure with neuropathy [and] dermatitis[.]" JA 000032-JA 000033.

Mr. Ruble then filed his related occupational disease workers' compensation claim, which was denied by the applicable claim administrator in an order dated September 24, 2019. JA 000585. The claim administrator's order was affirmed by the Office of Judges on October 15, 2020.<sup>4</sup> JA 000585-JA 000613.

Mr. Ruble appealed the Office of Judge's decision to the State of West Virginia Workers' Compensation Board of Review. Although it made several modifications to the Office of Judges order, including an admonition that "[t]he Board does not adopt the Administrative Law Judge's statement that the salient question is whether the claimant was over-exposed to the chemicals[.]"

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file such claim before the applicable statute of limitations ran, was not a final decision on the merits for the purposes of res judicata or collateral estoppel).

<sup>4</sup> At the Office of Judges level, the Administrative Law Judge found that a preponderance of the evidence indicates that the substances at issues can be toxic, if an individual is overexposed to such substances; that the medical articles submitted by Mr. Ruble suggest over-exposure to similar products can be toxic; that Mr. Ruble's medical records suggest the products that he worked with can be toxic; that Mr. Ruble's employer suggested that the chemicals it uses could cause an occupational disease if an individual is overexposed, but that Mr. Ruble was not exposed to chemical levels sufficient to cause an occupational disease; that Mr. Ruble's workplace blends, fills, and mixes substances which can cause polyneuropathy; and that Mr. Ruble established that fumes were present at his workplace, and that employees (including Mr. Ruble) could be exposed to the actual liquid chemicals that were canned at such workplace.

the Board of Review affirmed the Office of Judges' denial of Mr. Ruble's occupational disease claim. JA 000614-JA 000616.

Mr. Ruble did not appeal the Board of Review's order to this Court. As a result, the Board of Review's order is a final decision on the merits of the related workers' compensation proceedings between Mr. Ruble and his employer.

**2. The underlying civil action as it relates to the Rubles' common law claims against the third-party product liability defendant Respondents.**

While the above-mentioned workers' compensation proceedings remained pending, Petitioners filed their initial complaint on March 18, 2019. JA 0000005-JA000034. Petitioners amended their complaint on March 19, 2020. JA 000167-JA 000197. Much of the litigation is not relevant to this appeal; therefore, Petitioners will focus on the aspects of the underlying civil litigation that are critical to the issues presented to this Court by this appeal.

On or about January 25, 2022, Matrix Chemical LLC ("Matrix"), a third-party product liability defendant, filed its *Defendant Matrix Chemical LLC's Motion to Dismiss* and supporting memorandum. JA 000569-JA000623. Therein, Matrix contended that it was entitled to dismissal of the Rubles' claims brought against it because "Michael Ruble's prior workers' compensation proceedings and this case concern the exact same alleged workplace exposure, time frame, and alleged injuries[,] and the workers' compensation proceedings "determined that Michael Ruble's alleged injuries were not caused by exposure to chemicals at his workplace." JA 000571. At its core, Matrix's position is that "the issue in this case of whether Michael Ruble was injured due to workplace exposure to chemicals has already been decided and cannot be relitigated" as a result of collateral estoppel principles. JA 000571. Several Respondents joined in Matrix's motion.

The Rubles filed their *Plaintiffs' Response in Opposition to Defendant Matrix Chemical LLC's Motion to Dismiss* on February 10, 2022. JA 000633-JA 000664. Therein, the Rubles



explained that Matrix, a third-party product liability defendant, cannot invoke the doctrine of collateral estoppel to bar the Rubles' common law claims against it, and that permitting Matrix to do so would deprive the Rubles of their constitutionally-guaranteed right to have a jury determine the factual issues of such common law civil claims. In support of their position, the Rubles highlighted the disparate nature of workers' compensation proceedings and common law tort claims; examined case law from the Supreme Court of Arkansas interpreting Arkansas' similar constitutional provision, finding that collateral estoppel may not be applied in civil cases following adverse causation determinations in workers' compensation proceedings; and explained the bounds of judicial notice, asserting that the circuit court could not accept workers' compensation causation determinations via judicial notice, for the truth of the matters asserted, but instead, could only utilize judicial notice to establish the fact of the prior workers' compensation proceedings and the related filings. In regard to the joining Respondents, the Rubles filed responses adopting their arguments advanced in *Plaintiffs' Response in Opposition to Defendant Matrix Chemical LLC's Motion to Dismiss*. JA 000671-JA 000674, JA 000708-JA 000715, JA 000716-000721.

Matrix filed its *Defendant Matrix Chemical LLC's Reply in Support of its Motion to Dismiss* on February 15, 2022. JA 000699-JA 000754. Therein, Matrix admits that West Virginia "courts have not expressly extended [issue preclusion] to proceedings involving third-party, non-employer defendants in any reported case[,] but that "[t]his case presents the [circuit court] with the opportunity to do so." JA 000700. Matrix dismissed the Arkansas case offered by the Rubles and again directed the circuit court to orders issued by foreign intermediate appellate courts for the proposition that, due to the outcome of Mr. Ruble's workers' compensation proceedings, the issue of causation may not be relitigated in the civil action involving common law claims between the Rubles and Matrix.

The circuit court held oral argument on March 1, 2022, and at the conclusion of the hearing, granted the Defendants' motions. JA 000778-JA 000804. Thereafter, on April 4, 2022, the circuit court entered its *Dismissal Order* granting Matrix's Motion to Dismiss, overruling Plaintiffs' objections, and applying the logic of its dismissal of Matrix to the remaining moving and non-moving defendants. JA 000805-JA 000823. As such, the circuit court dismissed Plaintiffs' case with prejudice.

The Rubles filed their Notice of Appeal with this Court on April 29, 2022, and this appeal ensued. JA 000824-JA 000862.

### **III. SUMMARY OF ARGUMENT**

This Court is confronted with a question that it has not previously addressed: Does the law of this State allow the application of collateral estoppel in favor of third-party product liability defendants when an employee-plaintiff loses his statutory workers' compensation occupational disease claim? The answer is no.

Workers' compensation proceedings, like the workers' compensation proceedings between Mr. Ruble and his employer, arise from a statutory system premised upon a mutual renunciation of common law rights and defenses by employers and employees alike, and such proceedings do not include third-party product liability defendants, like the Respondents to this appeal. Workers' compensation proceedings against employers are creatures of statute and are distinct from common law civil claims that employee-plaintiffs may also elect to pursue against third-party defendants who caused or substantially contributed to the same injury that is the subject of a workers' compensation claim against the employee-plaintiff's employer.

The West Virginia Constitution expressly preserves the right to a jury trial in certain common law actions, including the common law claims that the Rubles assert in this action against

Matrix and the joining third-party product liability defendant Respondents. The West Virginia Constitution must be applied as written to protect the Constitutional right to have a jury hear common law claims. The circuit court's dismissal order took such right from the Rubles when the circuit court held that the Rubles' common law claims against the third-party product liability defendant Respondents were barred. This Court should reverse the circuit court's dismissal order and determine that a third-party tortfeasor, like Matrix and Respondents, may not utilize collateral estoppel to defeat civil common law claims against them after an employee-plaintiff loses a statutory workers' compensation claim. If this Court affirms, it will disregard its century-old teachings concerning the disparate nature of statutory workers' compensation claims brought against employers and common law claims brought against third-party defendants, and in so doing, practically merge the civil and administrative claims such that the statutory workers' compensation system becomes the final arbiter of nearly all work-related injury and occupational disease claims. Such a merged system may lead to injured employees choosing to forego workers' compensation claims rather than simultaneously pursuing workers' compensation and common law negligence claims arising from the same operative facts.

Notwithstanding the above Constitutional and collateral estoppel issues, this Court may also reverse the circuit court's dismissal order on the basis that the circuit court misapplied judicial notice principles when dismissing the Rubles' case. This Court's past guidance on judicial notice permits a circuit court to take notice of the fact of the prior workers' compensation litigation between Mr. Ruble and his employer but does not allow the circuit court to adopt the workers' compensation causation determinations for the truth of the matters asserted by such causation determinations. In other words, judicial notice does not allow the circuit court to usurp the role of

a jury, replacing the potential findings of a jury with the findings reached by the factfinder in the statutory workers' compensation system.

As such, the circuit court's dismissal order should be reversed, and this case should be remanded for further proceedings.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Rubles request oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure as this appeal involves issues of first impression for this Court, issues of fundamental public importance, and Constitutional questions regarding the validity of the final order dismissing the Rubles' common law claims against the third-party product liability defendants that are Respondents to this appeal.

#### **V. STANDARD OF REVIEW**

This appeal is before this Court for review of the circuit court's final order dismissing the Rubles' common law claims against the third party product liability defendant Respondents. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. pt. 1, *Abadir v. Dellinger*, 709 S.E.2d 743, 227 W. Va. 338 (2011).

#### **VI. ARGUMENT**

##### **A. The circuit court's application of collateral estoppel violates the Rubles' right to a trial by jury concerning their common law claims, a right that is expressly conferred by the Constitution of West Virginia.**

The Rubles agree that the circuit court correctly identified West Virginia's four-part test concerning the application of collateral estoppel. See Syl. pt. 1, *State v. Miller*, 459 S.E.2d 114, 194 W. Va. 3 (1995). However, under the facts at hand involving underlying workers' compensation proceedings and related civil common law claims against the third-party product liability defendant Respondents, the circuit court's application of collateral estoppel, barring the

Rubles' common law claims against Respondents, deprived the Rubles of their constitutionally-conferred right to have a jury determine whether Mr. Ruble's exposure to Respondents' toxic chemicals was a cause or substantial contributing factor in his development of the relevant occupational diseases.

**1. The Constitution of West Virginia confers a right to a jury trial in suits at common law, like the common law claims brought against Respondents in this action.**

The circuit court applied collateral estoppel to dismiss the Rubles' common law claims against Respondents; Respondents are third-party product liability defendants. The application of collateral estoppel was premised upon orders entered in statutory workers' compensation proceedings between Mr. Ruble and his employer. The circuit court's dismissal of the Rubles' common law claims against the third-party product liability defendants, deprived the Rubles of their Constitutionally-guaranteed right to a jury trial in suits brought under the common law. In that vein, Article III, section 13 of the Constitution of West Virginia provides as follows:

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.

When interpreting the Constitution of West Virginia, this Court has noted that “[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed.” Syl. pt. 2, *State ex rel. West Virginia Citizen Action Group v. Tomblin*, 715 S.E.2d 36, 39 (2011) (quoting Syl. pt. 3, *State ex rel. Smith v. Gore*, 143 S.E.2d 791, 150 W. Va. 71 (1965)). “Courts are not concerned with the wisdom or expedencies of constitutional provisions, and the duty of the judiciary is merely to carry out the

provisions of the plain language stated in the constitution.” Syl. pt. 3, *State ex rel. West Virginia Citizen Action Group*, 715 S.E.2d at 739. (quoting Syl. pt. 3, *State ex rel. Casey v. Pauley*, 210 S.E.2d 649, 158 W. Va. 298 (1975)). “Words used in a state constitution, as distinguished from any other written law, should be taken in their general and ordinary sense.” Syl. pt. 4, *State ex rel. West Virginia Citizen Action Group*, 715 S.E.2d at 739. (quoting Syl. pt. 6, *State ex rel. Trent v. Sims*, 77 S.E.2d 122, 138 W. Va. 244 (1953)). “As used in constitutional provisions, the word ‘shall’ is generally used in the imperative or mandatory sense.” Syl. pt. 5, *State ex rel. West Virginia Citizen Action Group*, 715 S.E.2d at 739. (quoting Syl. pt. 3, *State ex rel. Trent v. Sims*, 77 S.E.2d 122, 138 W. Va. 244 (1953)).

2. **Respondents were not Mr. Ruble’s employer; accordingly, Respondents’ respective relationships to Mr. Ruble were not subject to the exchange of rights between employers and employees provided by the workers’ compensation system set forth in Chapter 23 of the West Virginia Code. Instead, the Rubles maintain common law claims against Respondents.**

Chapter 23 of the West Virginia Code sets forth a Workers’ Compensation system that is

. . . based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees’ rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter and employers’ rights to raise common law defenses, such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. . . .

W. Va. Code § 23-1-1(b). Nowhere in this provision - or any other workers’ compensation provision - does the “mutual renunciation of common law rights” extend to third-party defendants. Moreover, this Court has previously stressed the difference between statutory workers’ compensation claims and third-party common-law claims: “the claim of an employee . . . for compensation benefits and the claim . . . against a third-party tort-feasor are different in kind. The first is solely for statutory benefits and the second results from common law liability.” *Jones v.*

*Appalachian Elec. Power Co.*, 115 S.E.2d 129, 134, 145 W. Va. 478 (1960). Similarly, the United States Court of Appeals for the Fourth Circuit has recently considered West Virginia’s workers’ compensation framework, noting that “while a claim that an injured employee asserts against *his employer* for injuries arising in the course of and resulting from his employment is generally a workers’ compensation claim, a claim brought against a *third party* for the same injuries is a common-law claim that does not arise under the Workers’ Compensation Act.” *United Fin. Cas. Co. v. Ball*, 941 F.3d 710, 715 (4th Cir. 2019) (emphasis in original). In this case, the Rubles assert the following civil product liability claims against Respondents: negligence, breach of warranty, strict liability, and loss of consortium. JA 000167-JA 000197.

**3. West Virginia’s Constitution does not require an injured employee to choose between enforcing his statutory workers’ compensation rights and his constitutional right to a jury trial in common law claims against third-party tortfeasors.**

As is explained above, the Constitution of West Virginia guarantees a trial by jury in suits at common law, where the value in controversy exceeds twenty dollars and a trial by jury is required by either party. Given Mr. Ruble’s occupational diseases that are the subject of the instant action, it cannot be disputed that the value of this matter exceeds twenty dollars. Additionally, the Rubles demanded a jury trial in their Complaint filed on March 18, 2019.

As is explained above, this Court has never addressed the issue of whether or not collateral estoppel, premised upon an adverse workers’ compensation decision, may be utilized to bar a common law claim between an employee-plaintiff and a third-party defendant. The Supreme Court of Arkansas has previously confronted a similar attempt by a third-party defendant to invoke collateral estoppel, following an adverse causation decision by the Arkansas Workers’

Compensation Commission. *See Craven v. Fulton Sanitation Service, Inc.*, 206 S.W.3d 842, 361 Ark. 390 (2005).

The *Craven* case followed an automobile crash wherein the vehicle operated by Craven was rear-ended by a vehicle owned by Fulton Sanitation Service, Inc (“Fulton”) and operated by Kendale Lloyd Toney (“Toney”). Because Craven was on the job at the time of the crash, Craven filed a workers’ compensation claim against his employer, Cockram Concrete (“Cockram”), alleging injury to his neck, upper back, and lower back. *Craven*, 206 S.W.3d at 843. While Cockram accepted compensability of Craven’s neck and upper back injuries, Craven “questioned whether his lower-back injuries had been caused by the accident.” *Id.* Upon consideration of Craven’s workers’ compensation claim, the Arkansas Workers’ Compensation Commission’s Administrative Law Judge “concluded that [Craven] had failed to prove a causal relationship between his lower-back injuries and the automobile accident. The ALJ’s decision was affirmed by the Commission. [Craven] appealed to the court of appeals; however, he abandoned the appeal when he failed to lodge the record with the appellate court.” *Craven*, 206 S.W.3d at 843-44.

Thereafter, Craven filed a lawsuit against Fulton and Toney seeking damages relating to the lower-back injuries that he claimed to have suffered in the underlying crash. Similar to Matrix and the joining Respondents, Fulton and Toney “moved for summary judgment on the ground that the ALJ’s determination of the issue of causation precluded [Craven] from relitigating it.” *Craven*, 206 S.W.3d at 844. Craven argued that “giving preclusive effect to the Commission’s judgment on the issue of causation would deprive him of his constitutional right to have that factual issue determined by a jury.” Craven also asserted that an Arkansas statute<sup>5</sup> provides that making a

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<sup>5</sup> Specifically, Craven invoked Ark. Code § 11-9-410(a)(1)(A): “The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his or her dependents, to make a claim or maintain an action in court against any third party



workers' compensation claim shall not impact an employee's right to maintain a civil action against a third-party. *Id.* The trial court granted Fulton and Toney's summary judgment motion; Craven appealed the trial court's order.

In *Craven*, "[t]he sole issue on appeal [was] whether the doctrine of *res judicata*[, more specifically, issue preclusion or collateral estoppel,] may be applied to a final judgment of the Workers' Compensation Commission so as to bar the employee's constitutional right to a jury trial against a third-party tortfeasor." *Id.* The *Craven* Court noted that it had previously held that claim preclusion or issue preclusion can be applied to issues determined by final judgment or decree of the Arkansas Workers' Compensation Commission, given the Commission's exercise of "*quasi-judicial* functions in its investigations and determinations and its awards [which] are in the nature of judgments." *Craven*, 206 S.W.3d at 845. The *Craven* Court "conclude[d] that [collateral estoppel] may not be applied to bar an employee from having a jury determine factual issues in an action at law against a third party." *Id.* In support, the *Craven* Court stressed that Article 2, Section 7 of the Arkansas Constitution provides 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." The *Craven* Court further explained that the right to trial by jury "is a fundamental right . . . [and] extends to all cases that were triable by a jury at common law. . . . Tort cases, such as the negligence suit present in this case, are civil cases that were triable by juries at common law." *Id.*

The *Craven* Court went on to explain that Arkansas' statutory workers' compensation system involved a mutual exchange of rights and remedies between employers and employees, "chang[ing] the common law by shifting the burden of all work-related injuries from the individual employers and employees to the consuming public, with the concept of fault being virtually

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for injury, but the employer or employer's carrier shall be entitled to reasonable notice and opportunity to join in the action."

immaterial.” *Craven*, 206 S.W.3d at 846. From this position, the *Craven* Court construed Ark. Code § 11-9-410(a)(1)(A), in combination with the state’s constitutional grant of the right to a jury trial in civil cases, “conclud[ing] that the trial court erred in giving preclusive effect to the Commission’s judgment on the issue of causation.” *Craven*, 206 S.W.3d at 846. Further, “given the nature of [the Arkansas workers’ compensation] proceedings, especially the lack of a jury trial, we conclude that to give the Commission’s decision preclusive effect would deprive [Craven] of a full and fair opportunity to litigate the issue.” *Craven*, 206 S.W.3d at 847. The *Craven* Court went so far as to discuss policy ramifications of the application of the requested collateral estoppel: “Were we to hold that the Commission’s determination precluded [Craven’s] suit against [Fulton and Toney], we would effectively be requiring him to choose between enforcing his rights under the workers’ compensation laws and his constitutional right to a jury trial against the third-party tortfeasor. The Workers’ Compensation Act does not require [Craven] to make such a choice, and nor do we.” *Id.* The *Craven* Court ultimately held as follows:

In sum, under our state constitution and the Workers’ Compensation Act, an employee injured by the negligence of a third party is entitled to have a jury determine the issue of causation, as well as any other factual issues. . . . We therefore conclude that the trial court erred in giving preclusive effect to the Commission’s determination on the issue of causation, and we reverse the order of summary judgment and remand for further proceedings.

*Craven*, 206 S.W.3d at 847-48.

This Court is confronted with a scenario that is nearly identical to *Craven* and appears to be a matter of first impression in this State: the Constitution of West Virginia provides a constitutional guarantee to a jury trial in certain suits at common law and like *Craven*, the Rubles’ common law claims against third-party product liability defendant Respondents have been dismissed by the circuit court on the basis that collateral estoppel bars such common law claims.

Also like Arkansas's statute, in *Jones*, this Court recognized that "the claim of an employee or the dependent of a deceased employee against the employer for compensation benefits and the claim of either against a third party tort-feasor are different in kind. The first is solely for statutory benefits and the second results from common law liability." *Jones v. Appalachian Elec. Power Co.*, 115 S.E.2d 129, 134, 145 W. Va. 478 (1960).

In their briefings below, Matrix and the joining Respondents failed to cite to any West Virginia case standing for the proposition that a third-party defendant may utilize collateral estoppel, based upon an adverse workers' compensation determination, to bar a common law suit brought against such third-party defendant. While Matrix cited to three foreign intermediate appellate court opinions supporting its position (Ohio, Pennsylvania, and New York), those cases fail to consider whether such relief violated the respective employee-plaintiffs' rights under the constitutions of their respective states. Also, Matrix discusses *Corley v. E. Associated Coal Corp.*, 2009 WL 723120 (N.D. W. Va. 2009) for the proposition that underlying workers' compensation proceedings are, in essence, quasi-judicial proceedings; however, the *Corley* court only dealt with an employer-defendant's invocation of collateral estoppel in a civil deliberate intent case. Unlike *Corley*, this appeal deals with the application of collateral estoppel to bar common law civil claims against third-party product liability defendants.

This Court should reverse the circuit court's dismissal order, finding that the circuit court violated the Rubles' constitutionally-conferred right to a jury trial of their common law claims against the third-party product liability defendant Respondents.

- B. If the circuit court's dismissal order is affirmed, then the final arbiter of nearly all work-related injury or occupational disease claims -- civil and administrative -- becomes the statutory workers' compensation system, even though third-party defendants are not parties to workers' compensation claims. Such a merged system may result in employees choosing to forego workers' compensation claims rather than simultaneously pursuing workers'**

**compensation and common law negligence claims arising from the same operative facts.**

Since the inception of West Virginia's statutory workers' compensation system, this Court has recognized a stark distinction between statutory workers' compensation claims and common law negligence claims that an injured employee may choose to bring against a third-party defendant. *See Mercer v. Ott*, 89 S.E. 952, 78 W. Va. 629, 636-637 (1916); *Merrill v. Marietta Torpedo Co.*, 92 S.E. 112, 79 W. Va. 669 (1917); *Jones v. Appalachian Electric Power Company*, 115 S.E.2d 129, 134, 145 W. Va. 478, 488 (1960). If this Court affirms the circuit court's order dismissing the Rubles' common law product liability claims brought against the third-party product liability defendant Respondents, it will cast nearly all work-related injury or occupational disease claims into a merged system wherein the workers' compensation system determines the ultimate rights and liabilities between, not only employers and employees, but also, third-party defendants – who are not parties to the related workers' compensation claims - and individuals claiming to have suffered injury during the course and scope of their employment.

Under such a merged system, it is foreseeable that injured employees may elect to only pursue common law claims against third-party defendants as such claims typically involve more substantial potential damages and provide unfettered access to an employee-plaintiff's constitutional right to a jury trial. The fundamental policy concerns addressed by the *Craven* court are squarely before this Court: that is, the application of collateral estoppel to bar an employee-plaintiff's common law civil claim brought against a third-party defendant, "would effectively be requiring [the employee-plaintiff] to choose between enforcing his rights under the workers' compensation laws and his constitutional right to a jury trial against the third-party tortfeasor." *Craven*, at p. 847. For more than a century, this Court has consistently separated the two systems

available to injured workers, and this Court should not force West Virginia workers to choose between workers' compensation benefits and common law damages.

- C. **The circuit court's dismissal of the Rubles' common law civil claims against the third-party product liability defendant Respondents practically availed Respondents of the statutory immunity provided only to employers and elevated the standard of proof required in the Rubles' common law product liability claims, which exist separate and apart from Mr. Ruble's statutory workers' compensation claim.**

Through its application of collateral estoppel to dismiss the Rubles' common law claims brought against the third-party product liability defendant Respondents, the circuit court eliminated common law claims which were not considered in, and are different from, the claims decided in the workers' compensation proceedings between Mr. Ruble and his employer. Specifically, in his efforts to prove his workers' compensation, occupational disease claim, Mr. Ruble was required to meet the following statutory elements:

- (1) That there is a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the<sup>6</sup> proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction[.]

West Virginia Code § 23-4-1(f). (footnote added).

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<sup>6</sup> Notably, W. Va. Code § 23-4-1(f)(3) requires an occupational disease claimant to prove that his occupational exposure was the proximate cause of his injury. Whereas, in a tort action, like the Rubles' dismissed claims brought against the third-party product liability defendant Respondents: "A party in a tort action is not required to prove that the negligence of one sought to be charged with an injury was the sole proximate cause of the injury. . . ." Syl. pt. 2, *Everly v. Columbia Gas of West Virginia, Inc.*, 301 S.E.2d 165, 171 W. Va. 534 (1982); *but see Powell v. State Workmen's Compensation Commissioner*, 273 S.E.2d 832, 166 W. Va. 327 (1980).

While there are similar issues in Mr. Ruble's workers' compensation claim against his employer and the Rubles' common law product liability claims, Matrix and the joining Respondents were not entitled to the dismissal granted by the circuit court. For example, the Rubles' common law negligence claim requires a "plaintiff to establish, by a preponderance of the testimony, three propositions: (1) A duty which the defendant owes to him; (2) A negligent breach of that duty; (3) Injuries received thereby, resulting proximately from the breach of that duty." *Webb v. Brown & Williamson Tobacco Co.*, 2 S.E.2d 898, 899, 121 W. Va. 115 (1939) (internal citations omitted). Mr. Ruble's workers' compensation claim did not address whether the third-party product liability defendant Respondents owed a duty to Mr. Ruble and whether the Respondents breached that duty, proximately causing Mr. Ruble's injuries and damages. Simply put, the Respondents and their respective conduct were not at issue in the statutory workers' compensation proceedings between Mr. Ruble and his employer.

Moreover, the Rubles' claim for common-law strict liability against Matrix and the third-party product liability defendant Respondents requires that the Rubles prove "the involved product is defective in the sense that it is not reasonably safe for its intended use. The standard of reasonable safeness is determined not by the particular manufacturer, but by what a reasonably prudent manufacturer's standards should have been at the time the product was made." Syl. pt. 4, *Morningstar v. Black and Decker Mfg. Co.*, 253 S.E.2d 666, 162 W. Va. 857 (1979). Mr. Ruble's workers' compensation claim did not address whether or not Respondents' products were defective or the other elements required in common-law strict liability claims.

Just as the Rubles are not required to meet each of the statutory elements required by West Virginia Code § 23-4-1(f) in their civil common law claims, Matrix and the joining third-party product liability defendant Respondents were not entitled to the application of collateral estoppel

to the Rubles' common law claims that were not adjudicated in the statutory workers' compensation proceedings between Mr. Ruble and his employer.<sup>7</sup> Also, the circuit court's application of collateral estoppel not only deprived Mrs. Ruble of her constitutionally-granted right to trial by jury of her common law claims, but it prohibited her from even seeking damages for common law loss of consortium since there was no comparable recourse available to her through Mr. Ruble's workers' compensation claim against his employer.<sup>8</sup>

**D. The West Virginia Rules of Evidence do not permit the circuit court to adopt, as settled, the conclusions reached by the factfinder in the statutory workers' compensation system. Instead, as it relates to the Rubles' common law civil claims against the third-party product liability defendant Respondents, the circuit court may only determine whether the jury will be permitted to consider the fact of the workers' compensation litigation when rendering its own factual determinations.**

Even if this Court rejects the Rubles' constitutionally-based argument, then this Court still should reverse the circuit court's dismissal order, given its overreaching application of judicial notice principles. The West Virginia Rules of Evidence contemplate two types of judicial notice: judicial notice of adjudicative facts and judicial notice of law. The type of judicial notice

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<sup>7</sup> Even in the context of a workers' compensation claim between an employee and employer, this Court has previously held that a prior finding that the claimant's actual dust exposure did not constitute a harmful exposure was not equivalent to a finding of no exposure whatsoever, and therefore, that res judicata could not bar the introduction of the claimant's work history testimony in a subsequent occupational pneumoconiosis workers' compensation claim brought by the same claimant. *See White v. SWCC*, 262 S.E.2d at 755-756, 164 W. Va. at 287-288. It would be egregious to allow a differing outcome to a third-party defendant against whom the Rubles assert common law product liability claims.

<sup>8</sup> A common-law loss of consortium claim is available to a plaintiff-spouse who has suffered "the loss or impairment of the services and society of his [spouse] and of his [spouse's] capacity to engage in sexual intercourse . . . resulting from injuries to his [spouse] which are caused by the negligence of the defendant." *Shreve v. Farris*, 111 S.E.2d 169, 144 W. Va. 819 (1959). Should Mr. Ruble die from his alleged occupational diseases, then Mrs. Ruble would be able to seek compensation through a dependents' benefit claim. *See* West Virginia Code § 23-4-10. However, in Mr. Ruble's denied workers' compensation claim, she was not entitled to such benefits. Moreover, the benefits provided by Workers' Compensation to a dependent are limited to funeral and indemnity benefits whereas under her common law loss of consortium claim, she is potentially entitled to more than economic benefits.

applicable to this case is based on judicial notice of adjudicative facts. Specifically, Rule 201 of the West Virginia Rules of Evidence provides, in relevant part:

- (b) The court may judicially notice a fact that is not subject to reasonable dispute because it:
  - (1) is generally known within the trial court's territorial jurisdiction; or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

W. Va. R. Evid. 201(b).

From this, the relevant issues concern the impact of the circuit court taking judicial notice of the underlying workers' compensation orders and the scope of any such judicial notice. In its dismissal order, the circuit court held that it "can take notice of the decision of the Office of Judges and the order of the Board of Review for the purposes of determining that those administrative bodies decided that Ruble's injuries were not caused by chemical exposure in his workplace." JA 000819. Most critically, the circuit court stated that "[w]hether those administrative bodies were unquestionably correct does not matter for the purposes of collateral estoppel; the question is whether they decided the issue of causation, and they did." JA 000820. Accordingly, it is apparent that the circuit court accepted the workers' compensation causation determination – as a settled issue, in contravention of this Court's prior teachings concerning the limits of judicial notice:

It was certainly within the circuit court's prerogative to use the records for the purpose of ascertaining that Bryan had, in fact, been convicted of mail fraud. Under W. Va. R. Evid. 201, a court is permitted to take judicial notice of adjudicative facts that cannot reasonably be questioned in light of information provided by a party litigant. However, 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.'



*Arnold Agency v. W. Va. Lottery Com'n*, 526 S.E.2d 814, 827, 206 W. Va. 583 (1999). (internal citations omitted). (quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)).

Given *Arnold Agency*, it is clear that judicial notice of the underlying workers' compensation orders should not have been for the truth of the matters set forth therein, i.e., to establish a lack of causation between Mr. Ruble's workplace exposures and alleged occupational diseases. Notwithstanding, the circuit court accepted the workers' compensation causation determination as an issue not subject to reasonable dispute.

This Court's application of judicial notice principles parallels the application of judicial notice principles by other courts. In *Liberty Mut. Ins. Co.*, the United States Court of Appeals for the Second Circuit concluded "that the Bankruptcy Orders and the Agriculture Order were not admissible to establish the existence of a statutory trust." *Liberty Mut. Ins. Co.*, 969 F.2d at 1388. In further explaining its rationale, the Second Circuit pointed to two prior cases involving the limits of judicial notice:

In *E.I. du Pont de Nemours & Co. v. Cullen*, 791 F.2d 5 (1st Cir. 1986), the court took judicial notice of a complaint that had been filed in a related state court action to ascertain the legal nature of the claim stated in that complaint, not to support any factual determination in the subsequent litigation. . . . Similarly, in *Ives Lab., Inc. v. Darby Drug Co.*, 638 F.2d 538, 544 n. 8 (2d Cir. 1981), rev'd on other grounds . . . we took judicial notice of several indictments simply to establish that such indictments had in fact been returned, but 'of course express[ed] no opinion as to the guilt or innocence of those indicted.'

*Liberty Mut. Ins. Co.*, 969 F.2d at 1389.

In light of these judicial notice principles, this Court should reverse the circuit court's dismissal order and instruct the circuit court that, on remand, it should only apply judicial notice to take notice of the fact of the underlying workers' compensation litigation between Mr. Ruble and his employer. This Court should further instruct the circuit court that it not accept the workers'

compensation causation determination for the truth of the matter asserted, and instead, that the circuit court must permit the jury to render its own factual determination on the issue of causation.

## **VII. CONCLUSION**

Petitioners respectfully request that this Court reverse the circuit court's dismissal order that is the subject of this appeal, holding that the Rubles have a constitutional right to a jury trial on their common law product liability claims against the third-party defendant Respondents, and further hold that a third-party defendant is not permitted to invoke collateral estoppel to bar common law civil cases, following adverse orders arising in the statutory workers' compensation system.

In the event that the Court holds that a third-party defendant may invoke collateral estoppel concerning issues addressed in a statutory workers' compensation proceeding between an employee-plaintiff and his employer, Petitioners respectfully request that this Court reverse the circuit court's dismissal order by following its prior guidance concerning the bounds of judicial notice, holding that the circuit court's application of judicial notice was inappropriate. In such a scenario, Petitioners respectfully request that this Court clarify its prior teaching from *Arnold Agency*, holding that judicial notice may only be used by the circuit court to take notice of the fact of the workers' compensation litigation between Mr. Ruble and his employer, and that the circuit court may not accept the workers' compensation causation determination for the truth of such causation determinations. Petitioners request all further relief this Court deems appropriate, equitable, and just.

Dated: August 4, 2022

**MICHAEL D. RUBLE AND BRENDA K.  
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINA

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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' BRIEF** and **JOINT APPENDIX**, filed on this day, by depositing the same into the United States Mail, First Class, postage pre-paid, this 4<sup>th</sup> day of August 2022, addressed to the following:

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