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**West Virginia  
Product Liability Law  
Monograph**

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**Dinsmôre**

With special thanks to litigation partner

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## I. Morningstar v. Black & Decker Manufacturing Co.

In 1979, the West Virginia Supreme Court of Appeals decided *Morningstar v. Black & Decker Manufacturing Co.*, the leading case in West Virginia product liability law. 253 S.E.2d 666 (W. Va. 1979).

Dean V. Morningstar (“Mr. Morningstar”) was injured while using a Black and Decker saw. Mr. Morningstar and his wife filed tort claims, Mr. Morningstar for personal injury and Mrs. Morningstar for loss of consortium, against Black and Decker claiming that the safety guard on the saw failed to close. *Id.* at 668.

In its decision in *Morningstar*, the West Virginia Supreme Court of Appeals established several important standards for product liability law in West Virginia. First, a product is defective unless it is “reasonably safe” for its “intended use.” *Id.* (syl. pt. 4). Second, there are three types of defects in product liability law: design, manufacture, and use (failure to adequately warn). *Id.* at 682. Third, the court expressly recognized, for the first time, a cause of action for strict liability in product liability cases. *See id.* at 677, 683.

In the absence of statutory regulation, *Morningstar* remains the leading authority for product liability law in West Virginia.

## II. Theories of Recovery

In West Virginia, a product liability action may be based on negligence, strict liability, or breach of warranty. *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983) (syl. pt. 6). These three theories require proof of different elements, and a plaintiff may thus submit a case to the jury on two or three theories at once. *Id.*

### A. Negligence

In West Virginia, the elements of a product liability claim based on negligence are: “(1) the manufacturer owed the consumer a duty to design/manufacture/warn regarding the product, (2) the product was defective thereby breaching that duty, (3) the breach of the duty proximately caused the plaintiff’s injuries, and (4) the plaintiff was injured.” Philip Combs & Andrew Cooke, *Modern Products Liability Law in West Virginia*, 113 W. VA. L. REV. 417, 452 (2011); *see also Aikens v. Debow*, 541 S.E.2d 576, 580–81 (W. Va. 2000) (generally discussing the elements of negligence). While negligence remains a viable cause of action in product liability cases, strict liability and breach of warranty are now the ascendant theories of recovery in this area. Combs & Cooke, *supra*, at 451. Thus, one does not find extensive modern case law on negligence in product liability suits.

## B. Strict Liability

In *Morningstar v. Black & Decker Manufacturing Co.*, the West Virginia Supreme Court of Appeals expressly recognized strict liability as a theory of recovery in product liability cases. 253 S.E.2d 666. Strict liability defers from negligence because it “relieve[s] the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and [it] permit[s] proof of the defective condition of the product as the principal basis of liability.” *Id.* (syl. pt. 3); *see also Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 784 (W. Va. 1991) (quoting J. W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 826 (1973)). Because the focus in strict liability is on the defective product and not the defendant’s conduct, in West Virginia a plaintiff may assert strict liability against any party in the chain of distribution, even “innocent seller[s].” *Dunn v. Kanawha County Bd. of Educ.*, 459 S.E.2d 151, 157 (W. Va. 1995). Liability is not limited to the manufacturer of the product. *Id.*

Under West Virginia law, the

“test for establishing strict liability in tort is whether 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.”

*Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 672 S.E.2d 345, 355 (W. Va. 2008) (quoting *Morningstar*, 253 S.E.2d 666 (syl. pt. 4)).<sup>1</sup> Considerations in determining whether a product was not reasonably safe for its intended use include “the concept of all of those uses a reasonably prudent person might make of the product, having in mind its characteristics, warnings and labels.” *Morningstar*, 253 S.E.2d 666 (syl. pt. 6). A product may be considered in a defective condition, unreasonably dangerous to the user by virtue of (1) a defective design; (2) a manufacturing defect; or (3) a use defect (failure to adequately warn).

### 1. Design Defects

Over the years, U.S. state and federal courts have employed two different tests for design defects: the consumer expectations test and the risk–utility test. *See Combs & Cooke, supra*, at 425. The consumer expectations test focuses on whether the product at issue conforms to consumers’ reasonable expectations. *Id.* The risk–utility test asks whether a product “design reasonably balances the risk of the harm and the costs of reducing that risk.” *Id.* The *Morningstar* Court adopted a version of the risk–utility test when it declared that, to

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<sup>1</sup> In adopting this test, the West Virginia Supreme Court of Appeals combined parts of the Restatement (Second) of Torts § 402A (1965) and the California Supreme Court’s test in *Greenman v. Yuba Power Products*, 377 P.2d 897 (Cal. 1963). *Combs & Cooke, supra*, at 423.

determine if a product is “not reasonably safe” and therefore defective, the “product is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general state of the art of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.” 253 S.E.2d 666 (syl. pt. 5). In other words, the question is how, in designing the product at issue, a reasonably prudent manufacturer would have balanced the risk of harm and the costs of reducing that risk.

Based on *Morningstar*, some commentators have suggested that, in West Virginia, “the elements of a defective design case are: (1) that the product was not reasonably safe (2) for its intended use (3) due to a defective design feature (4) which proximately caused plaintiff’s injury.” Combs & Cooke, *supra*, at 427 (citing *Morningstar*, 253 S.E.2d at 667). The first element “includes the sub-elements that (1) the safety is to be tested by the conduct of a reasonably prudent manufacturer, (2) the relevant time period is the date of manufacture, and (3) risk–utility analysis is used to determine whether the design was reasonable.” *Id.* at 427.

The West Virginia Supreme Court of Appeals has never directly addressed whether a plaintiff, in proving defective design, must prove the existence of a feasible alternative design that would be reasonably safe. *Michael v. Wyeth, LLC*, No. 2:04-0435, 2011 U.S. Dist. LEXIS 56157, at \*32 (S.D. W. Va. May 25, 2011). Combs and Cooke note that in *Church v. Wesson*, 385 S.E.2d 393 (W. Va. 1989) (per curiam), the Supreme Court “upheld a directed verdict for the defendant, in a strict liability context, on the ground that the plaintiff failed to establish the feasibility of a proffered alternative design.” Combs & Cooke, *supra*, at 427. Still, in a 2011 opinion, the U.S. District Court for the Southern District of West Virginia refused to read this as establishing a requirement that plaintiffs prove a feasible alternative design. *Michael*, 2011 U.S. Dist. LEXIS 56157, at \*32 (citing Combs & Cooke, *supra*, at 427). Instead, the district court found that “offering evidence of a safer alternative is [merely] one method of showing that a product is ‘not reasonably safe for its intended use’ for the purposes of a design defect claim.” *Id.*

A plaintiff may admit evidence of compliance with common safety standards in order to prove that a design was reasonable. *Johnson ex rel. Johnson v. General Motors Corp.*, 438 S.E.2d 28, 39 (W. Va. 1993). Such evidence is not, however, dispositive on the issue of defectiveness. *Id.*; *Estep*, 672 S.E.2d at 356–57 (citing and following *Johnson*, 438 S.E.2d at 39).

#### a. Crashworthiness

The West Virginia Supreme Court of Appeals has recognized the “crashworthiness” doctrine. See *Blankenship*, 406 S.E.2d at 782. The crashworthiness doctrine often arises in the context of motor vehicle crashes. Under this doctrine, a manufacturer’s liability “is based on an alleged failure to protect the occupants of a vehicle from the *consequences* of the crash rather than liability for the crash itself.” *Estep*, 672 S.E.2d at 352. In *Blankenship v. General Motors Corp.*, the Court rejected the Third Circuit standard for crashworthiness that came from *Huddle*

*v. Levin*, 537 F.2d 726 (3rd Cir. 1976). *Blankenship*, 406 S.E.2d at 786. Instead, the Court adopted the Tenth Circuit rule that had been laid out in *Fox v. Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978). *Blankenship*, 406 S.E.2d at 786. The *Fox* rule is significantly more lenient than the *Huddle* standard. Under the *Fox* rule,

the plaintiff need show only a defect that was a factor in causing some aspect of the plaintiff's harm. Once the plaintiff has made this prima facie showing, the manufacturer can then limit its liability if it can show that the plaintiff's injuries are capable of apportionment between the first and second collisions.

*Id.*

## 2. Manufacturing Defects

A manufacturing defect can arise when a product “comes off the assembly line in a substandard condition.” *Morningstar*, 253 S.E.2d at 681 (quoting *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 454 (Cal. 1978)). Combs and Cooke, extrapolating from *Morningstar*, provide the following elements for a manufacturing defect claim: “(1) the product was defective (i.e. not reasonably safe for its intended use) (2) due to a manufacturing defect (3) present at the time the product left the manufacturer's control and (4) which proximately caused plaintiff's injury.” Combs & Cooke, *supra*, at 429 (citing *Morningstar*, 253 S.E.2d at 680).

The second and third elements warrant further consideration here. In order to prove the existence of a manufacturing defect at the time of sale, the plaintiff need not have direct proof of the particular defect. Instead,

circumstantial evidence may be sufficient . . . even though the precise nature of the defect cannot be identified, so long as the evidence shows that a malfunction in the product occurred that would not ordinarily happen in the absence of a defect. Moreover, the plaintiff must show there was neither abnormal use of the product nor a reasonable secondary cause for the malfunction.

*Anderson v. Chrysler Corp.*, 403 S.E.2d 189, 194 (W. Va. 1991).<sup>2</sup> Following this logic, where a plaintiff's car began a garage fire which then spread to the plaintiff's home, but the car and the fire alarm system had been destroyed, the Court concluded that the circumstantial evidence was sufficient to create a genuine issue of material fact as to whether the car and the fire alarm system were defective. *Bennett v. ASCO Services Inc.*, 621 S.E.2d 710 (W. Va. 2005).

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<sup>2</sup> This approach is sometimes called the malfunction theory or malfunction doctrine.

### 3. Use Defects (Failure to Adequately Warn)

The third type of defect is the use defect. Use defectiveness arises “when a product may be safe as designed and manufactured, but which becomes defective because of the failure to warn of dangers which may be present when the product is used in a particular manner.” *Ilosky*, 307 S.E.2d 603 (syl. pt. 2). There are three elements to make out a prima facie case based on use defect: “(1) the product was defective (i.e., not reasonably safe for its intended use) (2) due to an absent or inadequate warning that a reasonably prudent manufacturer should have included at the time the product was made and (3) which proximately caused plaintiff’s injury.” *Combs & Cooke, supra*, at 430.

Manufacturers have a duty to warn only of risks that arise from foreseeable uses of a product. As the West Virginia Supreme Court of Appeals has stated, “[a] manufacturer must anticipate all foreseeable uses of his product. In order to escape being unreasonably dangerous, a potentially dangerous product must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe.” *Ilosky*, 307 S.E.2d at 610 (quoting *Smith v. United States Gypsum Co.*, 612 P.2d 251, 254 (Okla. 1980)).

The issue of whether “a defendant’s efforts to warn of a product’s dangers are adequate is a jury question.” *Id.* (syl. pt. 4).

### C. Breach of Warranty

In general, the concept of warranty stems from a producer’s promise or guarantee that a product will act or perform in a certain way. Often this promise is given to a consumer at the time of purchase and lasts for either a finite time or for the life of the product.

West Virginia generally does not require privity of contract in order to sue for breach of warranty. *Dawson v. Canteen Corp.*, 212 S.E.2d 82 (W. Va. 1975) (syl.) (“The requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished.”). Thus, a person need not have been a party to the original warranty to have standing to sue for a breach of the warranty, and a plaintiff may sue any party in the chain of distribution. *See id.* at 83–84. *But see McMahon v. Advance Stores Co., Inc.*, 705 S.E.2d 131 (W. Va. 2010) (placing limits on when an individual, not a party to the original warranty, may still sue).

#### 1. Express Warranties

Express warranties are those given by the producer or seller of a product to a purchaser of the product. As the name suggests, these warranties are expressly stated in some way. Express warranties are defined by the West Virginia Code as follows:

*Express warranties by affirmation, promise, description, sample.*

- (1) Express warranties by the seller are created as follows:
  - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
  - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
  - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty. An affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not on its own create a warranty.

W. VA. CODE § 46-2-313 (2011).

There are several factors to consider when analyzing express warranties: (1) affirmation of fact, (2) falsity, and (3) basis of the bargain. These factors, which are discussed in the paragraphs below, will assist in determining whether an express warranty has in fact been formed, the scope of the warranty, and also the basis for any action for breach of warranty.

The affirmation of fact is essentially the promise by the producer or seller of a product that the product will perform in a certain way. No specific form is required for the creation of an affirmation. *Kemble v. Wiltison*, 114 S.E. 369 (W. Va. 1922) (syl. pt. 4). Still, the warrantor must affirm a fact; a statement of opinion is insufficient. *See Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F. Supp. 1194, 1201 (S.D. W. Va. 1986) (“The statements . . . relied upon by [the plaintiff] as warranties . . . are easily dismissed as merely opinions.”). In addition, some authorities suggest that the language used to create a warranty cannot be equivocal. *See Rohrbough v. Wyeth Laboratories, Inc.*, 719 F. Supp. 470, 477 (N.D. W. Va. 1989) (“[E]quivocal language is hardly an express warranty . . . .”); *Whittington v. Eli Lilly & Co.*, 333 F. Supp. 98, 100 (S.D. W. Va. 1971) (holding that, where a drug manufacturer stated that a contraceptive was “‘virtually’ 100% effective,” this did not create a warranty that the contraceptive would be absolutely effective); *Combs & Cooke, supra*, at 447 (quoting *Rohrbough* and *Whittington*).

Any action based on the violation of an express warranty will center on the idea that the affirmation was false. *See Combs & Cooke, supra*, at 447; *Rohrbough*, 719 F. Supp. at 477–78

(granting summary judgment on breach of an express warranty claim where the plaintiffs presented insufficient evidence to show that the statements at issue were false).

For a warranty to be created, the affirmation must be a part of the basis of the bargain. *McMahon*, 705 S.E.2d at 136 (quoting W. VA. CODE § 46-2-313(1)(a) (2007)); *Roxalana Hills, Ltd.*, 627 F. Supp. at 1200–01 (finding that no warranty was created where the statements at issue did not constitute a basis for the bargain); *Combs & Cooke, supra*, at 447. That is, “an express warranty is created only when the affirmation of fact, promise or description of the goods is part of the basis of the bargain made by the seller to the buyer about the goods being sold.” *Reed v. Sears Roebuck & Co.*, 426 S.E.2d 539, 546 (W. Va. 1992).

## 2. Implied Warranties

Implied warranties are those that are created through legislation or at common law. In West Virginia, there are two types of implied warranties that are created by statute: (1) the implied warranty of merchantability and (2) the implied warranty of fitness for particular purpose.

### a. Warranty of Merchantability

The warranty of merchantability in West Virginia is codified at West Virginia Code § 46-2-314. Under this section, “a warranty that . . . goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” W. VA. CODE § 46-2-314(1) (2011). Elsewhere the West Virginia Code defines “merchant” as

a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

W. VA. CODE § 46-2-104(1) (2011); *see also Foster v. Memorial Hospital Ass’n*, 219 S.E.2d 916, 920 (W. Va. 1975) (distinguishing between “a merchant . . . who is engaged in the active promotion and sale of his product such as coca cola bottles, automobile axles, or standardized drugs and [a non-merchant, such as] a doctor, dentist or lawyer . . . who supplies medicine, blood, tooth fillings, or legal briefs in the course of his professional relationship with a patient or client.”).

When the warranty of merchantability is implied, the goods at issue must be “merchantable.” The West Virginia Code states that:

- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and

- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.

W. VA. CODE § 46-2-314(2) (2011).

**b. Implied Warranty of Fitness for a Particular Purpose**

While the warranty of merchantability protects those using a product for its ordinary purposes, the implied warranty of fitness for a particular purpose protects those using a product for a particular purpose. As one court noted, a “particular purpose”

differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to the uses which are customarily made of the goods in question.

*Wilson v. Brown & Williamson Tobacco Corp.*, 968 F. Supp. 296 (S.D. W. Va. 1997) (quoting W. VA. CODE § 46-2-315 cmt. n.1). The West Virginia Code lays out the implied warranty of fitness for a particular purpose as follows:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

W. VA. CODE § 46-2-315 (2011). In order to recover under the implied warranty of fitness for a particular purpose, a plaintiff must show that the warranty both existed and arose out of a sale, and that “the lack of fitness for the particular purpose caused [the] plaintiff’s harm.” *Combs & Cooke, supra*, at 451.

#### D. The West Virginia Consumer Credit and Protection Act (WVCCPA)

West Virginia has a lengthy consumer protection act, the West Virginia Consumer Credit and Protection Act (WVCCPA), which occupies an entire chapter of the West Virginia Code. See W. VA. CODE § 46A (2011). The WVCCPA provides a private cause of action for injured consumers. W. VA. CODE § 46A-6-106(a) (2011); see also *White v. Wyeth*, 705 S.E.2d 828 (W. Va. 2010) (interpreting this private cause of action). The WVCCPA declares unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” W. VA. CODE § 46A-6-104 (2011). “Unfair methods of competition and unfair or deceptive acts or practices” is defined through a non-exhaustive list of activities, which include:

- (E) Representing that goods or services have . . . characteristics, . . . uses, [or] benefits . . . that they do not have . . . ;
- (H) Disparaging the goods . . . of another by false or misleading representation of fact;
- (L) Engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;
- (M) The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby;
- (N) Advertising, printing, displaying, publishing, distributing or broadcasting . . . any statement or representation with regard to the sale of goods . . . which is false, misleading or deceptive or which omits to state material information which is necessary to make the statements therein not false, misleading or deceptive[.]

*State ex rel. McGraw v. Johnson & Johnson*, 704 S.E.2d 677, 685 (W. Va. 2010) (quoting W. VA. CODE § 46A-6-102(7)(E), (H), (L), (M), (N)). Plaintiffs have used the WVCCPA as a cause of action in product liability suits. See, e.g., *id.* (suit against drug companies for allegedly misleading statements concerning two drugs); *White*, 705 S.E.2d 828 (suit against the manufacturers of certain hormone replacement therapy drugs); *Blankenship v. Ethicon, Inc.*, 656 S.E.2d 451 (W. Va. 2007) (suit against multiple defendants regarding the implantation of contaminated sutures in the plaintiff–patients); *In re W. Va. Rezulin Litig. v. Hutchison*, 585 S.E.2d 52 (W. Va. 2003) (suit against two companies who marketed and sold Rezulin, a drug that was allegedly defective).

### III. Post Sale Duties

The West Virginia Supreme Court of Appeals has recognized neither a post-sale duty to warn consumers, nor a post-sale duty to recall or retrofit products. In *Johnson ex rel. Johnson*, 438 S.E.2d 28, the court discussed whether manufacturers should have a post-sale duty to warn, but the court failed to rule on this issue, finding it moot. *Id.* at 37.

Still, the court's statements are instructive. In a footnote, the court seemed to quietly reject a post-sale duty to warn in strict liability cases by simply quoting from *Ilosky v. Michelin Tire Corp.*: "product unsafeness arising from failure to warn is to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product . . . at the time the product was made." *Id.* at 37 n.5 (emphasis added) (quoting *Ilosky*, 307 S.E.2d at 611) (internal quotation marks omitted). Yet, the court also seemed to leave open the possibility of imposing a post-sale duty under a negligence framework when the court stated rather glibly: "we have not addressed the issue of whether the duty to warn under a negligence theory in a product liability case differs, and if so, how." *Id.*

### IV. Unavoidably Unsafe Products

The Restatement (Second) of Torts § 402A, Comment k, recognizes that there are some products, particularly drugs and vaccines, which, "in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use." *Smith v. Wyeth Labs. & Wyeth Labs., Inc.*, No. 84-2002, 1986 U.S. Dist. LEXIS 21331, at \*12 (S.D. W. Va. Aug. 21, 1986) (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)). Because such products can help to avoid, treat, or cure horrible diseases, the Restatement declares that these products may justifiably be marketed and used, despite "the unavoidable high degree of risk which they involve." *Id.* at \*13 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)). Thus, these products "properly prepared, and accompanied by proper direction and warning, [are] not defective, nor . . . unreasonably dangerous," and the manufacturers of such products should not incur strict liability for injuries caused by these products. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)).

The West Virginia Supreme Court of Appeals has never expressly adopted Comment k. *Rohrbough*, 719 F. Supp. at 476. Still, the federal courts in West Virginia have assumed that the West Virginia courts would adopt Comment k. *Id.* at 477 n.1 ("It seems likely that . . . the West Virginia courts would . . . apply the comment k exception where a product is proven to be unavoidably unsafe."); *Smith*, 1986 U.S. Dist. LEXIS 21331, at \*12 ("[I]t is likely that the comments, often relied upon by other courts for guidance, would influence the West Virginia court.").

## V. Causation

Regardless of the theory of recovery, in a product liability suit the plaintiff must prove proximate causation. See *Tolley v. Carboline Co.*, 617 S.E.2d 508, 512 (W. Va. 2005) (collecting cases in order to show that proximate cause is an element for negligence, breach of warranty, and strict liability causes of action). The West Virginia Supreme Court of Appeals has recently defined proximate cause in the following manner: “the proximate cause of an event is that cause which in actual sequence, unbroken by any independent cause, produces the event and without which the event would not have occurred.” *Id.* (internal quotation marks omitted); *White*, 705 S.E.2d 828 (adopting similar language at syl. pt. 4 in a suit against drug manufacturers brought pursuant to the WVCCPA). Older opinions offer alternative formulations. See, e.g., *Yates v. Mancari*, 168 S.E.2d 746, 752–53 (W. Va. 1969) (“[T]he proximate cause of an injury is the efficient, principal, superior or controlling agency from which springs the harm as contradistinguished from those causes which are merely incidental or subsidiary to such efficient, principal, superior or controlling cause . . . . [T]he proximate cause of an injury . . . has been defined by this Court as the last negligent act contributing to the injury and without which the injury would not have occurred[.]” (internal citations and quotation marks omitted)); *Anderson v. Baltimore & O. R.R.*, 81 S.E. 579, 580 (W. Va. 1914) (“Proximate cause . . . is that which naturally led to and which may have been expected to be directly instrumental in producing the loss. Or, as differently stated, it is that act which directly produced or concurred in producing the injury. . . . [I]n determining what is the proximate cause[,] the true rule is that the injury must be the natural and probable consequence of the negligent act.” (internal citations and quotation marks omitted)).

The West Virginia Supreme Court of Appeals has sometimes used the term “sole proximate cause.” This term seems to suggest that, in proving liability, the plaintiff must identify one, and only one, tortious act that caused the plaintiff’s harm. The West Virginia Supreme Court of Appeals has repeatedly rejected this interpretation. See *Everly v. Columbia Gas*, 301 S.E.2d 165 (W. Va. 1982) (syl. pt. 2); *Yates*, 168 S.E.2d at 752–53. Thus, “the proximate cause may consist of one or more than one negligent act of causation by one or more persons which produces the injury.” *Yates*, 168 S.E.2d at 753. Stated otherwise, “[w]here separate and distinct negligent acts of two or more persons continue unbroken to the instant of an injury, contributing directly and immediately thereto and constituting the efficient cause thereof, such acts constitute the sole proximate cause of the injury.” *Hudnall v. Mate Creek Trucking*, 490 S.E.2d 56 (W. Va. 1997) (syl. pt. 2) (internal quotation marks omitted).

Proximate causation takes on particular importance in failure to warn cases. In *Tracy v. Cottrell*, 524 S.E.2d 879 (W. Va. 1999), the West Virginia Supreme Court of Appeals found no error in the following jury instructions, which explain how proximate cause operates in failure to warn cases:

In order to recover under a failure to warn theory, plaintiff must prove by a preponderance of the evidence that the lack or inadequacy of warnings in the 1988 Chevrolet Celebrity proximately caused Douglas Tracy’s death. GM may

only be liable to petitioner for failure to warn where there is evidence that a warning would have made a difference. Therefore, plaintiff must prove that the lack of a warning regarding the seat belts in the 1988 Chevrolet Celebrity proximately caused Douglas Tracy's death, and that the presence of a warning would have prevented his death. Plaintiff must establish that the warning suggested by plaintiff would have caused Douglas Tracy to act differently or otherwise change his behavior in a manner which would have avoided his death. If you find that a warning by GM would not have prevented Douglas Tracy's death, then you must find in favor of GM.

524 S.E.2d 879, 890 n.9 (W. Va. 1999).

Breaks in the chain of causation have caused defendants to prevail in the following failure-to-warn scenarios. First, defendants have prevailed in cases where warnings were perhaps inadequate, but the consumers did not read them. In these cases, even if the warnings had been adequate, the warnings would not have helped to avoid injury. See *In re Zyprexa Products Liability Litigation*, Nos. 04-MD-1596, 07-CV-987, 2009 U.S. Dist. LEXIS 47573, at \*99–100 (E.D.N.Y. June 1, 2009) (applying West Virginia law); *Meade v. Parsley*, 2:09-cv-00388, 2010 U.S. Dist. LEXIS 125217, at \*29–34 (S.D. W. Va. Nov. 24, 2010). Second, defendants have prevailed in cases where they allegedly failed to adequately warn a drug or device prescriber, but the prescriber already had prior knowledge of the risks associated with the drug or device, and there was evidence that a warning would not have changed the prescriber's actions. See *Wilkinson v. Duff*, 575 S.E.2d 335, 341 (W. Va. 2002); *Pumphrey v. C.R. Bard, Inc.*, 906 F. Supp. 334, 339 (N.D. W. Va. 1995).

## VI. Alternative, Enterprise, Market Share, and Concert of Action Theories of Liability

The West Virginia Supreme Court of Appeals has neither adopted, nor even directly addressed, alternative liability, enterprise liability, and market share liability. In *Spencer v. McClure*, 618 S.E.2d 451 (W. Va. 2005), the court faced a fact pattern that seemed to warranted consideration of alternative liability. In this case, the plaintiffs were injured in a series of car accidents involving multiple vehicles. The plaintiffs were first rear-ended during an initial accident. Then, an additional vehicle crashed into the wrecked cars, causing the plaintiffs to suffer a second accident. *Id.* at 453. The plaintiffs sued the other drivers for negligence. *Id.* At trial, the driver who caused the second accident argued that the plaintiffs had not proven that her alleged negligence proximately caused the plaintiffs' injuries. *Id.* at 454. Had the court applied alternative liability here, it might have relieved the plaintiffs of the burden of proving causation. The burden of proving causation would have shifted to the two negligent drivers who caused each accident. Justice Starcher, writing in dissent, made this very point and cited the famous California case on alternative liability, *Summers v. Tice*. *Id.* at 457 (Starcher, J., dissenting) (citing *Summers v. Tice*, 199 P.2d 1 (Cal. 1948)). The majority, however, did not even address alternative liability, and it held that, in this case, the plaintiffs were still required to prove causation. *Id.* at 455–56 (majority opinion). Because the plaintiffs could not prove

causation, the court affirmed the lower court's decision to grant judgment as a matter of law in favor of the driver who caused the second accident. *Id.* at 457.

The West Virginia Supreme Court of Appeals has adopted the "theory of joint concerted tortious activity" embodied in the Restatement (Second) of Torts § 876(b) (1965). *Price v. Halstead*, 355 S.E.2d 380, 386 (W. Va. 1987); *see also Courtney v. Courtney*, 413 S.E.2d 418, 426 (W. Va. 1991). This section of the Restatement states: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." RESTATEMENT (SECOND) OF TORTS § 876(b) (1965).<sup>3</sup> In *Courtney v. Courtney*, 413 S.E.2d 418, the court also adopted a list of six non-exhaustive factors for determining when a person should be liable for assisting or encouraging another's tort: "a. the nature of the act encouraged; b. the amount of assistance given by the defendant; c. the defendant's presence or absence at the time of the tort; d. the defendant's relation to the other tortfeasor; e. the defendant's state of mind; and f. the foreseeability of the harm that occurred." *Id.* at 426 (quoting *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1163 (3d Cir. 1986)).

## VII. Successor Liability

Traditionally, under West Virginia common law, "the purchaser of all the assets of a corporation was not liable for the debts or liabilities of the corporation purchased." *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992) (syl. pt. 2). This rule, however, has been eroded with exceptions. Thus, under current law,

A successor corporation can be liable for the debts and obligations of a predecessor corporation if there was an express or implied assumption of liability, if the transaction was fraudulent, or if some element of the transaction was not made in good faith. Successor liability will also attach in a consolidation or merger under W. Va. Code, 31-3-37(a)(5) (1974). Finally, such liability will also result where the successor corporation is a mere continuation or reincarnation of its predecessor.

*Id.* (syl. pt. 3). In addition,

When a corporation acquires or merges with a company manufacturing a product that is known to create serious health hazards, and the successor corporation continues to produce the same product in the same manner, it may be found liable for punitive

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<sup>3</sup> The West Virginia Supreme Court of Appeals also favorably quoted, without necessarily adopting, the Restatement (Second) of Torts § 876(c) (1965), in *Morris v. Consolidation Coal Co.*, 446 S.E.2d 648, 657 (W. Va. 1994). This section of the Restatement declares: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." RESTATEMENT (SECOND) OF TORTS § 876(c) (1965).

damages for liabilities incurred by the predecessor company in its manufacture of such product.

*Id.* (syl. pt. 4); see also *Jordan v. Ravenswood Aluminum Corp.*, 455 S.E.2d 561 (W. Va. 1995) (reaffirming and applying these rules in a case involving a tractor that was allegedly negligently manufactured or designed).

## VIII. Defenses

### A. Superseding Cause

“Superseding cause” may be defined as “an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.” *Adams v. Parsons*, No. 2:10-0423, 2011 U.S. Dist. LEXIS 41834, at \*20 n.7 (S.D. W. Va. Apr. 15, 2011) (quoting RESTATEMENT (SECOND) OF TORTS § 440 (1965)). To be a superseding cause, the intervening act “must be a negligent act which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.” *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256, 270 (W. Va. 2001) (citing *Wehner v. Weinstein*, 444 S.E.2d 27 (W. Va. 1994) (syl. pt. 3)). To determine if an intervening act is a superseding cause, the test is foreseeability: Could the tortfeasor reasonably foresee the intervening act and resultant injury? *Harbaugh v. Coffinbarger*, 543 S.E.2d 338, 345 (W. Va. 2000). Making this determination is usually the jury’s responsibility. *Sheetz*, 547 S.E.2d 256 (syl. pt. 5) (quoting *Evans v. Farmer*, 133 S.E.2d 710 (W. Va. 1963) (syl. pt. 2)).

In general, “a willful, malicious, or criminal act” will serve as a superseding cause. *Yourtee v. Hubbard*, 474 S.E.2d 613, 620 (W. Va. 1996) (although the defendant left his keys in his car which facilitated its theft, the thief drove in such a manner as to provide an interceding efficient cause for the death of the plaintiff’s decedent).

### B. Contributory Negligence / Comparative Fault

At one time, West Virginia applied the doctrine of contributory negligence. If a plaintiff’s negligence contributed in any way to the plaintiff’s injuries, the plaintiff was completely barred from recovering. *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 882 (W. Va. 1979). Contributory negligence is now no longer a complete bar to recovery. *Id.* (syl. pt. 3).

In place of contributory negligence, the West Virginia Supreme Court of Appeals has adopted a form of modified comparative negligence. *Honaker v. Mahon*, 552 S.E.2d 788, 792 n.3 (W. Va. 2001). Under this system of comparative negligence, “a party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.” *Bradley*, 256 S.E.2d 879 (syl. pt. 3). Assuming a plaintiff was less than fifty percent at fault, the plaintiff will recover, but the plaintiff’s recovery will be reduced by the percentage of the plaintiff’s fault.

*See id.* at 886. For strict liability claims, the West Virginia Supreme Court of Appeals has further stated that “[c]omparative negligence is available as an affirmative defense . . . so long as the complained of conduct is not a failure to discover a defect or to guard against it.” *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982) (syl. pt. 5).

### C. Assumption of the Risk

Assumption of the risk is a defense where: (1) the plaintiff fully appreciated the nature and extent of a risk, and (2) the plaintiff voluntarily proceeded to encounter the risk. *Cross v. Noland*, 190 S.E.2d 18, 22 (W. Va. 1972); *see also King v. Kayak Mfg. Corp.*, 387 S.E.2d 511, 517 (W. Va. 1989). For product liability cases, the plaintiff need not have anticipated the precise cause of harm and need not have been aware of the precise product defect. *Descor Corp. v. Harry W. Trushel Constr. Co.*, 413 S.E.2d 85, 93–94 (W. Va. 1991). The plaintiff must only have been aware of the general risk from the product. *See id.* at 92–93.

Assumption of the risk operates much like comparative fault. That is, a plaintiff’s assumption of risk does not completely bar recovery. *King*, 387 S.E.2d at 516; *Bills v. Life Style Homes*, 429 S.E.2d 80, 81–82 (W. Va. 1993). Instead, the plaintiff is only barred from recovery if “his degree of fault . . . equals or exceeds the combined fault or negligence of the other parties to the accident.” *King*, 387 S.E.2d 511 (syl. pt. 2). As long as the plaintiff’s fault is less than fifty percent, the plaintiff will recover something, but the plaintiff’s recovery will be reduced by the amount of the plaintiff’s fault. *See id.* at 517 n.17.

### D. State of the Art Defense

The state of the art defense allows a defendant to escape product liability if the defendant can prove that the product at issue was state of the art (i.e. as safe as possible) at the time of manufacture. This is a viable defense under West Virginia law, even though the West Virginia Supreme Court of Appeals has only implicitly recognized the defense. In *Morningstar*, the court imposed liability for the manufacture of “unsafe” products. “Unsafe” was

to be tested by what the reasonably prudent manufacturer would accomplish in regard to the safety of the product, having in mind the general *state of the art* of the manufacturing process, including design, labels and warnings, as it relates to economic costs, at the time the product was made.

*Morningstar*, 253 S.E.2d 666 (syl. pt. 5) (emphasis added); *see also Johnson ex rel. Johnson*, 438 S.E.2d at 36–39 (approving jury instructions that used the phrase “state of the art”). In a later case, the court affirmed a directed verdict for the defendant, because the defendant’s “expert testimony established that the [manufacturing] process employed by [the defendant] was the ‘state of the art’ at the time of manufacture.” *Church*, 385 S.E.2d at 396.

## **E. Federal Preemption of State Law Claims**

Where a state law contradicts or interferes with a federal law, federal law will preempt, and thus invalidate, the state law. *Brown v. Genesis Healthcare Corp.*, No. 35494, 2011 W. Va. LEXIS 61, at \*46 (W. Va. Jan. 19, 2011) (quoting *Cutright v. Metropolitan Life Ins. Co.*, 491 S.E.2d 308 (W. Va. 1997) (syl. pt. 1)). A federal statute may preempt a state law claim either expressly or implicitly. *Id.* at \*47. Express preemption occurs where Congress expressly states, in the language of a federal statute, that the statute preempts contrary state laws. *See id.* (syl. pt. 3) (quoting *Morgan v. Ford Motor Co.*, 680 S.E.2d 77 (W. Va. 2009) (syl. pt. 6)). Implied preemption may arise either of two ways:

Implied field preemption occurs where the scheme of federal regulation is so pervasive that it is reasonable to infer that Congress left no room for the states to supplement it. Implied conflict preemption occurs where compliance with both federal and state regulations is physically impossible, or where the state regulation is an obstacle to the accomplishment or execution of congressional objectives.

*Id.* (syl. pt. 4) (quoting *Morgan*, 680 S.E.2d 77 (syl. pt. 7)).

The West Virginia state and federal courts have addressed preemption in the context of cases challenging the safety of motor vehicles. In *Moser v. Ford Motor Co.*, the U.S. District Court for the Northern District of West Virginia concluded that a federal regulation, FMVSS 208, preempted a plaintiff's suit challenging the type of seatbelt that Ford chose for its 1990 Escort. 28 F. App'x 168 (N.D. W. Va. 2001). Similarly, in *Morgan v. Ford Motor Co.*, 680 S.E.2d 77, the West Virginia Supreme Court of Appeals held that "because the [National Highway Traffic Safety Administration] gave manufacturers the option to choose to install either tempered glass or laminated glass in side windows of vehicles in FMVSS 205, permitting the plaintiff to proceed with a state tort action would foreclose that choice and would interfere with federal policy." *Id.* at 94–95. Thus, the plaintiff's claim was preempted.

In drug and medical devices cases, preemption is now governed by the United States Supreme Court opinions in *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (claim preempted) and *Wyeth v. Levine*, 29 S. Ct. 1187 (2009) (preemption rejected). There have been few West Virginia cases which address these issues. In *State ex rel. McGraw v. Johnson & Johnson*, an FDA warning letter regarding inappropriate advertising was an insufficient federal determination to justify preclusion. 704 S.E.2d 677.

## **F. Statutes of Limitations and Repose**

Statutes of limitations require potential plaintiffs to bring suit within a particular period of time, or else the right to sue is lost. Under West Virginia law, a two-year statute of limitations applies to product liability claims based on negligence or strict liability. *See Sewell v.*

*Gregory*, 371 S.E.2d 82, 84 (W. Va. 1988) (citing the statute of limitations at W. Va. Code § 55-2-12). For breach of warranty claims, “[w]here the damages sought are traditionally associated with a tort injury” (i.e. personal injuries), a two-year statute of limitations applies. *Taylor v. Ford Motor Corp.*, 408 S.E.2d 270, 274 (W. Va. 1991) (applying W. VA. CODE § 55-2-12). Otherwise, West Virginia Code § 46-2-725 imposes a four year statutory period to warranty claims. *Id.* Under the WVCCPA’s statute of limitations, the statutory period varies depending on the circumstances:

With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

W. VA. CODE § 46A-5-101(1) (2011).

The West Virginia Supreme Court of Appeals has adopted the discovery rule for most statutes of limitations in product liability cases. See *Hickman v. Grover*, 358 S.E.2d 810, 813 (W. Va. 1987). Thus, the statutes of limitations do not necessarily begin to run at the moment the plaintiff is injured. Instead, “the statute[s] of limitations begin . . . to run when the plaintiff knows, or by the exercise of reasonable diligence should know, (1) that he has been injured, (2) the identity of the maker of the product, and (3) that the product had a causal relation to his injury.” *Id.* This discovery rule does not apply to the four-year statute of limitations for warranty actions. *Basham v. General Shale*, 377 S.E.2d 830, 835 (W. Va. 1988). This statute of limitations begins to run when the product is delivered to the consumer, thus making this statute of limitations more like a statute of repose. *Taylor*, 408 S.E.2d at 273.<sup>4</sup>

## G. The Government Contractor Defense

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the U.S. Supreme Court recognized the “government contractor defense.” This defense arises where a manufacturer has contracted to sell military equipment to the federal government. The manufacturer cannot be liable for design defects in the equipment if: (1) the federal government endorsed reasonably precise specifications; (2) the equipment adhered to the specifications; and (3) the contractor warned the federal government of any dangers in the use of the equipment that were not known to the government, but were known to the contractor. *Id.* at 512. The U.S. District Court for the Southern District of West Virginia applied the government contractor defense in *Campbell v. Brook Trout Coal, LLC*, No. 2:07-0651, 2008 U.S. Dist. LEXIS 73924, at

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<sup>4</sup> Other than this statute, “[t]here is no general statute of repose that applies to products liability actions in West Virginia.” Combs & Cooke, *supra*, at 476–77.

\*30–39 (S.D. W. Va. June 19, 2009) (denying contractor’s motion to dismiss, which was based on the government contractor defense).

#### H. The Open and Obvious Doctrine & the Common Knowledge Doctrine

Under the open and obvious doctrine, there is no duty to warn of open and obvious dangers. Prior to 2013, the law in West Virginia interpreting this doctrine had only been predicted by federal appellate courts, with the courts concluding that it was likely the Supreme Court would apply the doctrine [*See Roney v. Gencorp.*, 654 F. Supp. 2d 501, 502 (S.D. W. Va. 2009)]. *But see Harris v. Karri-On Campers, Inc.*, 640 F.2d 65, 76 (7th Cir. 1981) (applying West Virginia law and concluding that the lower court erred by giving an instruction on “the obvious danger doctrine,” because *Morningstar* implicitly rejected this doctrine).

However, in November, 2013, in the case of *Hersh v. E-T., P’ship*, 752 S.E.2d 336 (W. Va. 2013), the Supreme Court of Appeals expressly abolished the open and obvious doctrine in cases involving premises liability, finding that “the obviousness of a danger does not relieve an owner or possessor’s duty of care towards others, and does not preclude recovery by a plaintiff as a matter of law. Whether a plaintiff’s conduct under the circumstances was reasonable will be determined under the principles of comparative negligence.” (*Id.* pg. 342). The case involved a staircase without a handrail, and a plaintiff who fell, asserting the lack of handrails contributed to his injuries. Similarly, under the common knowledge doctrine, there is no duty to warn of dangers that are common knowledge. Based upon the Supreme Court’s holding in *Hersh*, and the 7<sup>th</sup> Circuit’s interpretation of West Virginia law in *Harris*, one would expect the common knowledge to similarly be disapproved in West Virginia.

#### I. The Sophisticated User Doctrine

In some cases a supplier may supply a product to a sophisticated entity, such as a large industrial employer, which is aware of the product’s dangers, and that entity may give the product to third parties (e.g. employees) to use. If the product then injures the third parties, the third parties may sue the supplier for failure to warn. Under such circumstances, the supplier might assert the sophisticated user doctrine in order to escape liability. As articulated by the federal courts, under the sophisticated user doctrine, a supplier has no duty to warn third parties where the supplier reasonably relied on a sophisticated entity, who was aware of a product’s dangers, to warn the third parties. *Roney*, 654 F. Supp. 2d at 506–507 (discussing Fourth Circuit case law). Under such circumstances, the sophisticated entity alone has a duty to warn the third parties. *Id.* This doctrine is often traced to the comments that follow the Restatement (Second) of Torts § 388 (1965). *Id.* at 503 & n.1.

The West Virginia Supreme Court of Appeals has never expressly adopted the sophisticated user doctrine, though it has approvingly quoted one of the Restatement comments upon which this doctrine rests. *See Ilosky*, 307 S.E.2d at 611 n.8 (quoting RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965)). The U.S. District Court for the Southern District of West Virginia, however, recently determined that the Supreme Court of Appeals would adopt the doctrine. *See Roney*, 654 F. Supp. 2d at 505, 507.

## J. The Bulk Supplier Doctrine

The bulk supplier doctrine is often applied alongside the sophisticated user doctrine. *Roney*, 654 F. Supp. 2d at 507 n.2. The bulk supplier doctrine arises where a bulk supplier supplies a product to an entity, and that entity then supplies the product to third parties. Under such circumstances, requiring the supplier to directly warn third parties might impose a severe burden on the supplier. *See id.* at 507. This is particularly true if the supplier is supplying truckloads of an “ingredient,” such as a chemical or sand, that the intermediary entity then combines with other “ingredients” to create a final product. *See, e.g., Coffey v. Chemical Specialties*, No. 92-2397, 1993 U.S. App. LEXIS 21430 (4th Cir. Aug. 20, 1993) (applying the bulk supplier doctrine to a case, arising under South Carolina law, that involved chemicals which were supplied in bulk). Thus, under the bulk supplier doctrine, the supplier owes no duty to warn the third parties; the bulk supplier only has a duty to warn the intermediary entity. *See id.* at \*8. Like the sophisticated user doctrine, this doctrine is based on the comments that follow the Restatement (Second) of Torts § 388 (1965). *Roney*, 654 F. Supp. 2d at 507 & n.2.

As with the sophisticated user doctrine, the West Virginia Supreme Court of Appeals has not adopted the bulk supplier doctrine. Still, the U.S. District Court for the Southern District of West Virginia has determined that the Supreme Court of Appeals would adopt the doctrine. *Id.* at 507.

## K. Seatbelt Defense

Some jurisdictions recognize a so-called “seatbelt defense,” allowing a defendant to minimize or eliminate liability by showing that the plaintiff, injured in a car accident, was not wearing a seatbelt. *See, e.g., Wemyss v. Coleman*, 729 S.W.2d 174, 178–81 (Ky. 1987). This defense is not recognized in West Virginia. In fact, a West Virginia statute declares that evidence of a seatbelt’s non-use “is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages.” W. VA. CODE § 17C-15-49(d) (2011).

## IX. Damages

### A. Personal Injury Damages

Personal injury damages are probably the most common type of damages in product liability cases. This category of damages can include “reasonable and necessary medical bills, lost wages, pain and suffering, [emotional distress,] mental anguish . . . and other damages flowing from the injury.” *Combs & Cooke, supra*, at 494. It can also include future damages caused by an injury, as long as the plaintiff proves the permanency or future effect of the injury with reasonable certainty. *Jordan v. Bero*, 210 S.E.2d 618, 634 (W. Va. 1974). Finally, it can include damages for the loss of consortium of a spouse, parent, or child. *King v. Bittinger*, 231

S.E.2d 239, 243–44 (W. Va. 1976) (citing W. VA. CODE § 48-3-19a); *Belcher v. Goins*, 400 S.E.2d 830 (W. Va. 1990) (syl. pt. 2).

### 1. Emotional Distress Damages

Special rules apply to awards of emotional distress damages. Under West Virginia law, neither physical contact nor physical injury is a prerequisite to recovering emotional distress damages. See *Heldreth v. Marrs*, 425 S.E.2d 157 (W. Va. 1992) (syl. pt. 2) (“[A] defendant may be held liable for negligently causing a plaintiff to experience serious emotional distress . . . even though such distress did not result in physical injury[.]”); *Courtney v. Courtney*, 413 S.E.2d 418, 421 (W. Va. 1991) (discussing *Lambert v. Brewster*, 125 S.E. 244 (W. Va. 1924)). West Virginia also allows bystanders to recover for negligent infliction of emotional distress. See *Heldreth*, 425 S.E.2d at 169 (adopting a four factor test).

### B. Wrongful Death Damages

In a wrongful death action, the jury’s verdict “shall include, but may not be limited to, damages for the following:”

(A) Sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advice of the decedent; (B) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (C) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (D) reasonable funeral expenses.

W. VA. CODE § 55-7-6(c)(1) (2011).

### C. Property Damage & Pure Economic Loss

Under West Virginia law, a plaintiff may bring a strict product liability claim where the plaintiff has only suffered damages to property, in the absence of personal injuries. *Star Furniture Co.*, 297 S.E.2d 854 (syl. pt. 1). Still, the property damages must either: (1) include damage to property other than the defective product; or (2) if the damage is only damage to the defective product, the product must have been damaged in a sudden calamitous event. *Id.* (syl. pts. 2–3). Where a plaintiff has suffered damages merely because a defective product is worth less than the amount bargained for, the plaintiff’s remedy lies in contract. See *id.* at 859–60.

### D. Punitive Damages

In a product liability suit, a plaintiff may recover punitive damages if the plaintiff can prove that his injuries were caused by malicious, oppressive, wanton, willful or reckless conduct—or by conduct constituting criminal indifference to civil obligations. *Davis*, 420 S.E. 2d

at 559–60; *Ilosky*, 307 S.E. 2d at 619 (quoting *O'Brien v. Snodgrass*, 16 S.E.2d 621 (W. Va. 1941)); *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895) (syl. pt. 4). The West Virginia Supreme Court of Appeals has stated that “malice” involves “the general disregard of the rights of others, rather than an intent to injure a particular individual.” *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 821 (W. Va. 2009) (citing *Addair v. Huffman*, 195 S.E.2d 739, 746 (W. Va. 1973)).

Punitive damages are generally not available in contract actions, such as actions for breach of warranty. *Warden v. Bank of Mingo*, 341 S.E.2d 679, 684 (W. Va. 1986). Still, if “the breach of contract amounts to an independent and willful tort,” the general rule “does not apply.” *Id.* at 684 n.7 (citing *Goodstein v. Weinberg*, 245 S.E.2d 140 (Va. 1978)).

In multiple decisions from the last twenty years, the U.S. Supreme Court has recognized that the Fourteenth Amendment to the U.S. Constitution places a limit on punitive damages. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Among other things, these Supreme Court opinions recognize that the amount of a punitive damages award must be proportional to the amount of harm the plaintiff suffered. The West Virginia Supreme Court of Appeals has applied the rules from these decisions in several product liability cases. See, e.g., *State ex rel. Chemtall Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007) (finding award of punitive damages unconstitutional); *In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005) (holding that the Supreme Court’s opinion in *Campbell* does not preclude bifurcation of trials into two phases: (1) liability, and (2) determination of damages, including punitive damages). The West Virginia Supreme Court of Appeals also recently reaffirmed its determination that

“The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1.”

*Peters*, 680 S.E.2d 791 (syl. pt. 21) (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992) (syl. pt. 15), *aff’d*, 509 U.S. 443 (1993)).

## **X. Special Evidentiary Concerns**

### **A. Evidence of Subsequent Remedial Measures**

West Virginia Rule of Evidence 407 provides:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

W. VA. R. EVID. 407; *see also Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663, 676–77 (W. Va. 2001) (interpreting West Virginia Rule of Evidence 407). This rule is identical to Federal Rule of Evidence 407, which is used in the federal courts. *See Malone v. Microdyne Corp.*, 26 F.3d 471, 480 (4th Cir. 1994) (quoting the entire text of Federal Rule of Evidence 407).

## B. Expert Testimony

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), controls the admissibility of scientific expert testimony under Federal Rule of Evidence 702. Under *Daubert*, a trial court must perform the “gatekeeping” role of screening out junk science by ensuring that an expert’s proffered testimony is sufficiently reliable and relevant to assist the jury. The West Virginia Supreme Court of Appeals adopted *Daubert* in *Wilt v. Buracker*, 443 S.E.2d 196, 203 (W. Va. 1993).

The United States Supreme Court subsequently held in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), that the trial court is to apply the *Daubert* analysis in connection with all forms of expert testimony, not just that which is deemed “scientific knowledge.” The West Virginia Supreme Court of Appeals has declined to follow *Kumho*. *See, e.g., West Virginia Div. of Highways v. Butler*, 516 S.E.2d 769, 774–75 n.4 (W. Va. 1999) (“We decline to adopt the *Kumho* analysis in this case.”); *Watson v. INCO Alloys Int’l, Inc.*, 545 S.E.2d 294, 301 (W. Va. 2001) (“We hold that unless an engineer’s opinion is derived from the methods and procedures of science, his or her testimony is generally considered technical in nature, and not scientific.”). In *Butler*, the court specifically explained how West Virginia courts should determine what constitutes scientific knowledge, saying:

[T]he question of admissibility under *Daubert* and *Wilt* only arises if it is first established that the testimony deals with “scientific knowledge.” “Scientific” implies a grounding in the methods and procedures of science while “knowledge” connotes more than subjective belief or unsupported speculation. In order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. It is the circuit court’s responsibility initially to determine whether the expert’s proposed testimony amounts to “scientific knowledge” and, in doing so, to analyze not what the experts say, but what basis they have for saying it.

*Butler*, 516 S.E.2d at 774, n.4 (citing *Gentry v. Mangum*, 466 S.E.2d 171 (W. Va. 1995) (syl. pt. 6)).

The appellate standard of review for evidentiary rulings is abuse of discretion, and *Daubert* does not alter this rule. *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). In *Joiner* the U.S. Supreme Court held that the trial court did not abuse its discretion by excluding expert testimony relying upon animal studies that were factually dissimilar to the human medical facts at issue. Nor did the court abuse its discretion in finding the experts’ opinions to be without

sufficient basis, scientifically and factually, to rise above “subjective belief or unsupported speculation.” Nothing in *Daubert* requires the court to admit opinion evidence connected to data only by the “ipse dixit” of the expert. The West Virginia Supreme Court of Appeals also applies the abuse of discretion standard when reviewing a circuit court’s decision to admit or exclude expert testimony. *San Francisco v. Wendy’s Int’l, Inc.*, 656 S.E.2d 485, 491 (W. Va. 2007).

### **C. Prior Accidents or Claims**

The West Virginia Supreme Court of Appeals has consistently recognized the following rule: “To be admissible at all, similar occurrence evidence must relate to accidents or injuries or defects existing at substantially the same place and under substantially the same conditions. Evidence of injuries occurring under different circumstances or conditions is not admissible.” *Gable v. Kroger Co.*, 410 S.E.2d 701 (W. Va. 1991) (syl. pt. 3); *Roberts v. Consolidation Coal Co.*, 539 S.E.2d 478, 501 n.28 (W. Va. 2000) (quoting *Gable*); *Collins v. Bennett*, 486 S.E.2d 793, 797 (W. Va. 1997) (quoting *Gable*); *State Farm Mut. Auto. Ins. Co. v. Stephens*, 425 S.E.2d 577, 584 n.12 (W. Va. 1992) (quoting *Gable*). Evidence of a prior accident may be excluded if the prior accident occurred a substantial time before the accident at issue. See *Collins*, 486 S.E.2d at 797 (holding that that circuit judge did not abuse his discretion in excluding evidence of one incident that occurred years earlier and one that occurred years later); *Gable*, 410 S.E.2d at 704 (holding that the trial judge did not abuse his discretion in excluding evidence of an accident that occurred over two years before the accident at issue).

The federal courts apply a similar rule under the Federal Rules of Evidence. See *Fields v. General Motors Corp.*, No. 92-1514, 1993 U.S. App. LEXIS 14652, at \*2–3 (4th Cir. June 16, 1993) (“In products liability cases . . . ‘evidence of prior accidents is admissible only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case’ being tried.” (quoting *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332 (8th Cir. 1985))).

### **D. Evidence of Plaintiff’s Comparative Fault**

In West Virginia evidence of a plaintiff’s causative fault is generally admissible. In asbestos cases, evidence of a plaintiff’s smoking habits may be admissible even though these habits do not concern the specific use or misuse of the product. *Adams v. Consolidation Rail Corp.*, 591 S.E.2d 269, 274–75 (W. Va. 2003).

### **E. The Collateral Source Rule**

The West Virginia Supreme Court of Appeals has recognized the collateral source rule. See *Ratlief v. Yokum*, 280 S.E.2d 584 (W. Va. 1981) (syl. pts. 7–8). This rule “operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party.” *Id.* (syl. pt. 7). In addition, the rule generally disallows defendants to inquire into, or present evidence on, the

issue of “whether the plaintiff has received payments from collateral sources.” *Id.* (syl. pt. 8). Collateral source evidence is inadmissible even if the defendant is seeking to prove only that the plaintiff’s award of prejudgment interest should be lessened, because the plaintiff’s expenses were paid for by a collateral source, rather than being paid out of pocket. *See Ilosky*, 307 S.E.2d 603 (syl. pt. 13). The collateral source rule applies to uninsured or underinsured benefits, *Johnson ex rel. Johnson*, 438 S.E.2d 28 (syl. pt. 4), as well as workmen’s compensation benefits and unemployment benefits, *Orr v. Crowder*, 315 S.E.2d 593, 610 (W. Va. 1983).

Even if the collateral source rule is violated and evidence of collateral benefits is admitted, the error may be harmless. This occurs where, for instance, the jury ruled against the plaintiff on the issue of liability, and thus collateral source evidence, which would have a tendency to lessen the amount of damages if the jury had found for the plaintiff on the issue of liability, becomes irrelevant. *See Keese v. General Refuse Serv.*, 604 S.E.2d 449, 457 (W. Va. 2004); *Ratlief*, 280 S.E.2d at 590.

#### F. Spoliation of Evidence

The West Virginia Supreme Court of Appeals has not recognized the tort of negligent spoliation where the spoliator is a party to the present action. *See Hannah v. Heeter*, 584 S.E.2d 560 (W. Va. 2003) (syl. pt. 2) (“West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action.”). Instead, where the spoliator is a party, the remedy for negligent spoliation is some form of litigation sanction. *Id.* at 568. The court may, for instance, give an adverse inference jury instruction. *Id.* at 567 (citing *Tracy*, 524 S.E.2d 879). Alternatively, the court may impose sanctions pursuant to West Virginia Rule of Civil Procedure 37(b)(2). *Id.* These sanctions are:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; [or]
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order [compelling discovery] is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

*Id.* at 567–68 (quoting W. VA. R. CIV. P. 37(b)(2)).

Before giving an adverse inference instruction or imposing sanctions, a court must consider the following “factors”:

(1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.

*Id.* at 567 (quoting *Tracy*, 524 S.E.2d 879 (syl. pt. 2)). The party seeking the instruction or the sanctions has the burden of proving "each element of the four-factor spoliation test." *Id.* (quoting *Tracy*, 524 S.E.2d 879 (syl. pt. 2)). The first element may be dispositive: If "the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed." *Id.* (quoting *Tracy*, 524 S.E.2d 879 (syl. pt. 2)). Thus, in *Tracy v. Cottrell*, the West Virginia Supreme Court of Appeals found that the trial court abused its discretion by giving an adverse jury instruction offered by the defendant, General Motors, because the plaintiff in the case did not control, own, possess or have authority over the destroyed evidence (a 1988 Chevrolet Celebrity with an allegedly defective seat belt restraint system). 524 S.E.2d at 890.<sup>5</sup>

Where a third party commits negligent spoliation, litigation sanctions would neither be effective, nor sensible. Thus, the West Virginia Supreme Court of Appeals has recognized a stand-alone tort for negligent spoliation by a third party. *Mace v. Ford Motor Co.*, 653 S.E.2d 660 (W. Va. 2007) (syl. pt. 1) (quoting *Hannah*, 584 S.E.2d 560 (syl. pt. 5)). The elements of this tort are:

(1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages.

*Id.* (syl. pt. 2) (quoting *Hannah*, 584 S.E.2d 560 (syl. pt. 8)). In addition, once the plaintiff has established the first four elements, "there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable

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<sup>5</sup> The West Virginia Supreme Court of Appeals has used confusing language in adopting and applying this four-part test. The four parts of the test are sometimes called factors and sometimes called elements. The court has stated that, in proving spoliation, a movant must prove each of the four parts, suggesting these parts are elements. Yet, it seems that only the first of the four parts is dispositive, thus perhaps suggesting that only this first part is an element and the remaining parts are mere factors.

presumption or else be liable for damages.” *Id.* (syl. pt. 2) (quoting *Hannah*, 584 S.E.2d 560 (syl. pt. 8)).

In *Mace v. Ford Motor Co.*, following a car accident, the plaintiff vehicle owners sued the manufacturer and the dealer of their vehicle based on strict liability and negligence. Immediately after the accident, but prior to the suit, the plaintiffs’ insurer took the vehicle to a salvage company. The plaintiffs eventually added the insurer as a defendant, suing the insurer for spoliation. The West Virginia Supreme Court of Appeals affirmed the lower court’s grant of summary judgment on the claim of spoliation, because: (1) there was no pending or potential litigation at the time that the insurer salvaged the vehicle; and (2) the insurer did not gain actual knowledge of any pending or potential litigation until almost two years after the accident. *Id.* at 665, 667; *see also State ex rel. Vedder v. Zakaib*, 618 S.E.2d 537 (W. Va. 2005) (similar facts).

The West Virginia Supreme Court of Appeals has also recognized the tort of intentional spoliation, regardless of whether the spoliator is a party to the present action or a third party. *Hannah*, 584 S.E.2d 560 (syl. pt. 9). Intentional spoliation “is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person’s recovery in a civil action.” *Id.* (syl. pt. 10) (internal quotation marks omitted). The elements of this tort are similar to the elements for negligent spoliation:

(1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party’s ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party’s ability to prevail in the pending or potential civil action; (6) the party’s inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.

*Id.* (syl. pt. 11). In cases of intentional spoliation, punitive damages may be awarded. *Id.* at 573.

#### **G. Admissibility of Government Studies and Police Reports**

West Virginia Rule of Evidence 803(8) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (8) Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency,

or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

W. VA. R. EVID. 803(8). This rule is nearly identical to Federal Rule of Evidence 803(8), which is used in the federal courts. *See Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108, 111 (4th Cir. 1993) (quoting the entire text of Federal Rule of Evidence 803(8)).

Under subpart (A) of the West Virginia rule, the West Virginia Supreme Court of Appeals has held that court documents are admissible, *see State v. McCraine*, 588 S.E.2d 177, 186 (W. Va. 2003), as are public records of conviction, *see State v. Morris*, 509 S.E.2d 327, 331 (W. Va. 1998). Under subpart (B), the court has held that “a record of the accuracy inspection of an intoxilyzer or breathalyzer machine performed by a certified breath test operator [even if the operator is a law enforcement officer] is admissible.” *See State v. Dilliner*, 569 S.E.2d 211 (W. Va. 2002) (syl. pts. 3–4). Finally, under subpart (C), the court has found that a “STATEMENT OF ARRESTING OFFICER” is admissible in a civil action, *see Crouch v. West Virginia DMV*, 631 S.E.2d 628, 633 n.10 (W. Va. 2006), as is a police officer’s accident report, *see Hadox v. Martin*, 544 S.E.2d 395, 402 (W. Va. 2001), and a commission order finding someone incompetent to manage his own affairs, *see Hess v. Arbogast*, 376 S.E.2d 333, 339–340 (W. Va. 1988).

In a product liability case, the West Virginia Court of Appeals held that subparts (B) and (C) did not allow admission of a letter which an official at a public agency, the National Highway Traffic Safety Administration (NHTSA), wrote to Ford regarding the safety of its Bronco II vehicle. *Gamblin v. Ford Motor Co.*, 513 S.E.2d 467, 471 (W. Va. 1998). This letter merely: (1) apprised Ford of the allegations that the plaintiff had made to the NHTSA against Ford; (2) summarized the NHTSA’s prior inquiries regarding the Bronco II; and (3) requested that Ford provide the NHTSA with further documentation. *Id.* Thus, the letter did not set forth “matters observed pursuant to duty” or “factual findings resulting from an investigation.”

## **XI. Jury Instructions**

In West Virginia, trial courts enjoy broad discretion in formulating jury instructions and in choosing particular wording, as long as the instructions correctly state the law. *Perrine v. E. I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 871 (W. Va. 2010) (quoting *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374 (W. Va. 1995) (syl. pt. 6)); *Tracy*, 524 S.E.2d at 886 (quoting *State v. Guthrie*, 461 S.E.2d 163 (W. Va. 1995) (syl. pt. 4)). Even erroneous jury instructions will not lead to reversal on appeal, if the error “could not have affected the outcome of the case.” *Tracy*, 524 S.E.2d at 886. In addition, “[a] trial court’s refusal to give a proffered jury instruction is not reversible error if the instruction did not ‘concern[] an

important point in the trial.” *In re Tobacco Litig.*, 600 S.E.2d 188, 194 (W. Va. 2004) (quoting *State v. Derr*, 451 S.E.2d 731 (W. Va. 1994) (syl. pt. 11)).

In the context of a failure to warn case, the West Virginia Supreme Court of Appeals has found that jury instructions are not erroneous simply because they use the terms “warnings” and “instructions” interchangeably. *Tracy*, 524 S.E.2d at 890–91. But, in the context of crashworthiness, the court found that the following language was reversible error: “the plaintiff must establish that an alleged defect was *the proximate cause* of Douglas Tracy’s death.” *Id.* at 894–95 (internal quotations omitted). In place of “the proximate cause” the instructions should have used the words “a factor in causing.” *See id.*

## **XII. Contribution, Indemnity, and Apportionment of Liability**

Traditionally, in cases where two or more defendants proximately caused a harm, “West Virginia was a pure joint and several liability jurisdiction, with no statutory dilution of the doctrine.” *Combs & Cooke, supra*, at 503. Under joint and several liability, “[a] plaintiff may elect to sue any or all of those responsible for his injuries and collect his damages from whomever is able to pay, irrespective of their percentage of fault.” *Strahin v. Cleavenger*, 603 S.E.2d 197 (W. Va. 2004) (syl. pt. 13). In 2005, the West Virginia Legislature passed a statute that alters this arrangement. *See* W. VA. CODE § 55-7-24 (2011) (effective July 8, 2005).<sup>6</sup> Pursuant to this statute, for “any cause of action involving the tortious conduct of more than one defendant, the trial court shall:”

- (1) Instruct the jury to determine, or, if there is no jury, find, the total amount of damages sustained by the claimant and the proportionate fault of each of the parties in the litigation at the time the verdict is rendered; and
- (2) Enter judgment against each defendant found to be liable on the basis of the rules of joint and several liability, except that if any defendant is thirty percent or less at fault, then that defendant’s liability shall be several and not joint and he or she shall be liable only for the damages attributable to him or her, except as otherwise provided in this section.

*Id.* § 55-7-24(a)(1)–(2). In other words, joint and several liability is only imposed on defendants who are found to be more than thirty percent at fault. All others are severally liable; they are liable only for the damages attributable to them.

This statute, however, further states that “the rules of joint and several liability shall apply to . . . [a]ny party strictly liable for the manufacture and sale of a defective product.” *Id.* § 55-7-24(b)(4). Thus, joint and several liability is always imposed on manufacturers found

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<sup>6</sup> As of October 19, 2011, there is no case law on this statute from either the West Virginia Supreme Court of Appeals or any federal court.

liable based on strict product liability. By its language, this provision does not extend to manufacturers found liable on a negligence or breach of warranty theory of liability.

This statute has an additional provision that may be relevant in product liability litigation. This provision states that “if a claimant through good faith efforts is unable to collect from a liable defendant, the claimant may . . . move for reallocation of any uncollectible amount among the other parties in the litigation at the time the verdict is rendered.” *Id.* § 55-7-24(c). When a party moves for reallocation, “the court shall determine whether all or part of a defendant’s proportionate share of the verdict is uncollectible from that defendant and shall reallocate such uncollectible amount among the other parties in the litigation at the time the verdict is rendered.” *Id.* § 55-7-24(c)(1).

Finally, this statute makes clear, on its face, that it is not intended “to affect, impair or abrogate any right of indemnity or contribution.” *Id.* § 55-7-24(d).

Since 1872 West Virginia has recognized, by statute,<sup>7</sup> the right of contribution in both torts and contracts cases. *Sitzes v. Anchor Motor Freight*, 289 S.E.2d 679, 686 (W. Va. 1982). The issue of contribution “arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation.” *Charleston Area Med. Ctr., Inc. v. Parke-Davis*, 614 S.E.2d 15 (W. Va. 2005) (syl. pt. 4) (quoting *Sydenstricker v. Unipunch Products, Inc.*, 288 S.E.2d 511 (W. Va. 1982) (syl. pt. 4)). Under such circumstances, the party may seek contribution from those who have an obligation to pay, but have not paid their fair share.

In some cases, a plaintiff may choose to sue only one tortfeasor, and not other tortfeasors. Under such circumstances, the tortfeasor–defendant may desire contribution from the tortfeasors who were not sued. Here, the tortfeasor–defendant may assert “an inchoate right of contribution” by filing a third-party claim for contribution, in the present suit, against the other tortfeasor or tortfeasors, pursuant to West Virginia Rule of Civil Procedure 14(a). *Howell v. Luckey*, 518 S.E.2d 873 (W. Va. 1999) (syl. pt. 5). The tortfeasor–defendant cannot pursue the inchoate right of contribution by filing a separate suit against the other tortfeasors after judgment is reached in the first suit. *Id.* at 877.

Settlements can affect the right to contribution. If an injured party settles its claim against one tortfeasor prior to filing suit, that tortfeasor cannot then seek contribution from other tortfeasors who are not a party to the settlement. *Charleston Area Med. Ctr., Inc.*, 614 S.E.2d 15 (syl. pt. 6). Likewise, if an injured party settles its claim with one tortfeasor prior to a judicial determination of liability, the tortfeasor is not liable to other tortfeasors for

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<sup>7</sup> This statute states: “Where a judgment is rendered in an action ex delicto [i.e. in tort] against several persons jointly, and satisfaction of such judgment is made by any one or more of such persons, the others shall be liable to contribution to the same extent as if the judgment were upon an action ex contractu [i.e. in contract].” W. VA. CODE § 55-7-13 (2011).

contribution. *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796 (W. Va. 1990) (syl. pt. 6).

Through contribution, a tortfeasor may only recover the amount that the tortfeasor has paid in excess of the tortfeasor's share. In contrast, indemnity allows one party to recover from another party all the damages that the first party has paid. See *Sydenstricker*, 288 S.E.2d 511 (syl. pt. 4). Indemnity may be established pursuant to a contract, where one party agrees to indemnify another party. Alternatively, indemnification may be implied where one party is "made liable to the injured party because of some positive duty created by statute or the common law, but the actual cause of the injury was the act of" another party. *Combs & Cooke, supra*, at 501. Under such circumstances, the party that is liable can recover from the party that caused the injury. In product liability cases, "[a] seller who does not contribute to the defect in a product may have an implied indemnity remedy against the manufacturer of the product, when the seller is sued by the user." *Hill v. Joseph T. Ryerson & Son*, 268 S.E.2d 296 (W. Va. 1980) (syl. pt. 1). Notably, a party can seek indemnification only if the party is without fault. *Harvest Capital v. W. Va. Dep't of Energy*, 560 S.E.2d 509 (W. Va. 2002) (syl. pt. 3) (quoting *Sydenstricker*, 288 S.E.2d 511 (syl. pt. 2)).

While good faith settlement can negate claims for contribution, it cannot negate claims for indemnification. As the West Virginia Supreme Court has stated:

In a multiparty product liability lawsuit, a good faith settlement between the plaintiff(s) and the manufacturing defendant who is responsible for the defective product will not extinguish the right of a non-settling defendant to seek implied indemnification when the liability of the non-settling defendant is predicated not on its own independent fault or negligence, but on a theory of strict liability.

*Dunn*, 459 S.E.2d 151 (syl. pt. 6).

### **XIII. Obesity Claims**

The West Virginia Supreme Court of Appeals has not addressed the issue of whether the manufacturers and sellers of food may be liable, based on a product liability theory, for obesity, weight gain, or other health conditions caused by unhealthy foods. The West Virginia Legislature also has not legislated with regard to this issue.

### **XIV. Drug and Medical Device Litigation**

Many of the issues applicable to product liability cases have particular importance in drug and medical device litigation.

## A. Medical Monitoring

The West Virginia Supreme Court of Appeals recognized a cause of action for medical monitoring in *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999) (syl. pt. 2). According to the court, “[a] claim for medical monitoring seeks to recover the anticipated costs of long-term diagnostic testing necessary to detect latent diseases that may develop as a result of tortious exposure to toxic substances.” *Id.* at 429. Under West Virginia law,

In order to sustain a claim for medical monitoring expenses . . . the plaintiff must prove that (1) he or she has been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

*Id.* (syl. pt. 3). In proving the second element, the plaintiff “must present scientific evidence demonstrating a probable link between exposure to a particular compound and human disease.” *Id.* at 433. For the fifth element, “reasonably necessary” means “something that a qualified physician would prescribe based upon the demonstrated exposure to a particular toxic agent.” *Id.*

In subsequently applying the holdings of *Bower*, the West Virginia Supreme Court of Appeals has noted that “*Bower* establishes an extremely high bar for a plaintiff to overcome before there can be any recovery for medical monitoring.” *In re Tobacco Litig.*, 600 S.E.2d at 194. The court has also held that, in class action suits brought pursuant to West Virginia Rule of Civil Procedure 23(b)(2), once liability is established, a court may use its equitable powers “to establish and administer a court-supervised medical monitoring program to oversee and direct medical surveillance, and provide for medical examinations and testing of members of a class.” *In re W. Va. Rezulin Litig. v. Hutchison*, 585 S.E.2d 52 (W. Va. 2003) (syl. pt. 14). Finally, in *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815 (syl. pt. 5), the court determined that punitive damages are not available for a medical monitoring claim.

## B. The Learned Intermediary Doctrine

Under the learned intermediary doctrine, a drug or medical device manufacturer only has a duty to warn physicians of the dangers associated with a drug or device, and the physician “then assumes responsibility for advising the individual patient of risks associated with the drug or device.” *Odom v. G. D. Searle & Co.*, 979 F.2d 1001, 1003 (4th Cir. 1992) (applying South Carolina law). Courts have also sometimes allowed pharmacies to rely upon the learned intermediary doctrine as a defense, so that a pharmacist has no duty to warn customers of the

dangers associated with prescription drugs as long as the pharmacist did not alter the drugs following manufacture. *See Ashworth v. Albers Med., Inc.*, 395 F. Supp. 2d 395, 407 (S.D. W. Va. 2005).

The West Virginia Supreme Court of Appeals has, however, expressly rejected the learned intermediary doctrine as applied to manufacturers of prescription drugs. *See State ex rel. Johnson & Johnson v. Karl*, 647 S.E.2d 899, 914 (W. Va. 2007). The import of this decision is not entirely clear. *See Hartman v. Caraco Pharm. Labs., Ltd.*, No. 2:10-1319, 2011 U.S. Dist. LEXIS 46924, at \*10–11 (S.D. W. Va. Apr. 29, 2011). The decision may be regarded as an unequivocal rejection of the learned intermediary doctrine, or it may be interpreted only as a rejection of the doctrine as applied to prescription drug manufacturers. *Id.* At least one federal court has found that, after *Karl*, pharmacists still may rely upon the learned intermediary doctrine. *See Vagenos v. Alza Corp.*, NO. 1:09-1523, 2010 U.S. Dist. LEXIS 75020, at \*15 (S.D. W. Va. July 23, 2010).

### C. Limited Liability of Drug Sellers

Under West Virginia law,

All persons, whether licensed pharmacists or not, shall be responsible for the quality of all drugs, chemicals and medicines they may sell or dispense, with the exception of those sold in or dispensed unchanged from the original retail package of the manufacturer, in which event the manufacturer shall be responsible.

W. VA. CODE § 30-15-12(a) (2011). The federal courts have disagreed about whether this statute insulates those who sell drugs from *all product liability claims*, or only from claims relating to quality (thus, not insulating sellers from failure to warn claims). *See Hartman v. Caraco Pharm. Labs., Ltd.*, No. 2:10-1319, 2011 U.S. Dist. LEXIS 46924, at \*6–8 (S.D. W. Va. Apr. 29, 2011) (collecting cases and discussing this split in authority).

### D. The WVCCPA & Prescription Drugs

In *White*, 705 S.E.2d 828, the West Virginia Supreme Court of Appeals held that “[t]he private cause of action afforded consumers under [the WVCCPA] does not extend to prescription drug purchases.” *Id.* (syl. pt. 6). The purpose of the WVCCPA is to protect consumers when they purchase and consume products. *See id.* at 836. Given this purpose, “[p]rescription drug cases are not the type of private causes of action contemplated under the terms and purposes of the WVCCPA because the consumer cannot and does not decide what product to purchase.” *Id.* at 838. Instead, this decision is largely made by the prescribing physician, as well as the FDA, which regulates prescription drugs. *See id.* Both physicians and the FDA also serve to protect consumers, thus obviating the need for a private cause of action based on the WVCCPA. *See id.*

**E. Unavoidably Unsafe Drugs**

In many states, a drug or medical device is not defective simply because it is unavoidably unsafe. The West Virginia Supreme Court of Appeals has not directly addressed this issue. For more details, please refer to Part IV, *supra*.

**F. Federal Preemption of State Law Claims**

In some circumstances, manufacturers of drugs or medical devices may be able to defend a state tort claim by arguing that the claim is preempted by federal law. For more details, please refer to Part VIII.E, *supra*.

Parties citing to non-West Virginia cases in West Virginia courts should be aware of West Virginia Trial Court Rule 6.04, which states:

If a motion or memoranda contains a citation to a case not reported in United States Reports (U.S.), West Virginia Reports (W.Va.), or South Eastern Reporter (S.E., S.E.2d), a copy of that case must be attached. If a motion or memorandum contains a citation to a statute other than a West Virginia or federal statute, a copy of the statute must be attached. If a motion or memorandum contains a citation to any regulation, a copy of that regulation must be attached. The attachment requirement applies only with respect to the copy of the motion or memorandum transmitted to the judicial officer and to opposing counsel, not to any copy filed in the office of the clerk.

Citation of unpublished opinions in West Virginia federal courts is controlled by Fourth Circuit Rule 32.1 and Federal Rule of Appellate Procedure 32.1(b).

Decisions of the West Virginia Supreme Court of Appeals (since 1991) can be accessed through the West Virginia Supreme Court of Appeals' website; [www.courtswv.gov](http://www.courtswv.gov).

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