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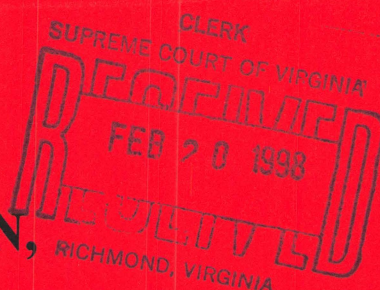
In The  
**Supreme Court of Virginia**

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RECORD NO. 972627

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**KENNETH WAYNE AUSTIN,**



*Plaintiff-Appellant,*

v.

**CONSOLIDATION COAL COMPANY,**

*Defendant-Appellee.*

---

**APPENDIX**

---

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*Counsel for Appellant*

*Counsel for Appellant*

*Counsel for Appellee*



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IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

FILED

MAY 19 1997

CLERK'S OFFICE U.S. DIST.  
DIST. OF W. VA.

KENNETH AUSTIN,

Plaintiff,

vs.

CONSOLIDATION COAL COMPANY,

Defendant,

CIVIL ACTION NO: 5:97-0520

SERVE:

CONSOLIDATION COAL COMPANY  
& C T Corporation System  
Registered Agent  
707 Virginia Street East  
Charleston, WV 25301

COMPLAINT

The plaintiff, Kenneth Austin ("Austin"), by counsel, moves the Court for judgment against the defendant, Consolidation Coal Company ("Consolidation"), in the amount and on the grounds hereinafter set forth, and in support thereof alleges the following:

JURISDICTION AND GENERAL ALLEGATIONS

1. This is an action for bodily injuries arising out of the destruction of evidence (to-wit: a certain fire hose) by the

defendant the significance of which underlies a certain products liability claim which follows a mining accident which occurred in the course of Austin's employment with Consolidation on May 20, 1995, in Buchanan County, Virginia. The companion products liability case is now pending in this Court and is styled as Kenneth Austin vs. National Fire Hose Corporation and Fairmont Supply Company, Civil Action Number 5:96-2044.

2. Austin is a natural person who resides in Wyoming County, West Virginia.

3. Consolidation is a Delaware corporation which conducts business in both the Commonwealth of Virginia and the State of West Virginia.

4. Austin alleges that the hose which is the subject of this litigation was manufactured by National Fire Hose Corporation ("National Fire") and sold by Fairmont Supply Company ("Fairmont") to Consolidation in the State of West Virginia for ultimate use by Consolidation at a certain mine site in Buchanan County, Virginia. Consolidation likewise transacts business in the State of West Virginia, including, inter alia, the mining of coal and the acquisition of supplies, such as the fire hose which is the subject of this litigation, as envisioned in WV Code § 56-33-33.

5. The amount in controversy, excluding interest and costs, exceeds Seventy-Five Thousand Dollars (\$75,000.00). This Court has jurisdiction over this suit based upon 28 U.S.C. §§ 1332 and 1441 (a). This Court likewise has in personam jurisdiction under the West Virginia Long Arm Statute.

6. On or about May 20, 1995, Austin was preparing to wet down an underground mine area which had been exposed to a welding operation when the hose ruptured. Austin received injuries about the head and face.

COUNT I

7. Austin realleges the allegations in the paragraphs one through six inclusive, and the same are made a part hereof and are incorporated by reference herein.

8. Subsequent to the aforesaid injury and prior to filing his products liability claim against National Fire Hose and Fairmont, Austin filed a Petition and a Bill of Complaint, in the Circuit Court of Buchanan County, Virginia, in order to obtain the identity of the manufacturer and seller of the hose which is the subject of this litigation. Those actions were subsequently consolidated for hearing on May 23, 1996. A copy of those pleadings are attached hereto and are incorporated by reference herein collectively as "Exhibit A."

9. The Circuit Court of Buchanan County directed Consolidation to submit to a deposition in order to enable Austin to learn the identity of the manufacturer and seller of the hose and issued a verbal directive at the time of the hearing that the hose was not to be destroyed or otherwise secreted to enable the Austin to ultimately recover the hose. A copy of the transcript from that proceeding is attached hereto and is incorporated by reference herein as "Exhibit B."

10. Subsequent to the hearing mentioned in the preceding



paragraph of this Complaint, Consolidation produced the name of the manufacturer and seller of the hose to Austin's counsel which eliminated the necessity of deposing a Consolidation representative to learn those identities. The aforesaid information was produced to Austin's counsel.

11. Based on subsequent conversations between Austin's counsel, Thomas R. Scott, Jr., and Consolidation's counsel in the Buchanan County Circuit Court proceedings, Stephen M. Hodges, Austin has learned that Consolidation violated the Circuit Court's directive and that the hose, which is both the subject of the products liability litigation and this litigation, is no longer available. Austin has likewise attempted to obtain a portion of the hose which he understands was furnished by Consolidation to National Fire and/or Fairmont, without success. Upon information and belief, Austin has learned that the aforesaid portion of the hose was returned to Consolidation and that the latter has refused to disclose its whereabouts.

12. Consolidation has negligently, recklessly and/or intentionally confiscated the hose which is the subject of this litigation and has either destroyed the same or refused to disclose its whereabouts. As a direct and proximate result of the actions of Consolidation, Austin's products liability claim against National Fire and Fairmont has been prejudiced.

13. Consolidation owed a duty to Austin to preserve the hose and a fiduciary responsibility to Austin. Under the terms of the Virginia Worker's Compensation Act, Consolidation was entitled to

file a products liability claim against National Fire and Fairmont on behalf of Austin and was otherwise subrogated to his rights against those entities upon the making of a claim by Austin against Consolidation for worker's compensation benefits. Stated differently, Consolidation was entitled to recover all benefits paid to Austin or on his behalf in the event of Austin's recovery in the underlying products liability claim. Upon information and believe, Consolidation may own or have an ownership or on going business interest with one or more of the defendants in the underlying products liability claim. Consolidation breached its fiduciary duty owed to Austin by refusing or otherwise failing to file the products liability claim, which Austin has now filed in his own right, despite which Consolidation may still be entitled to subrogation and otherwise by destroying the hose, which by the directive of the Buchanan County Circuit was to remain in tact.

14. As a direct and proximate result of the allegations set forth in the preceding paragraphs hereof, Austin's ability to successfully prosecute his products liability claim against National Fire and Fairmont has been substantially impaired and compromised and it is likely that Austin will go uncompensated for his serious and permanent injuries; his inability to transact his business; his past, present and future bodily and mental pain and suffering; his permanent disability, deformity and loss of earning capacity; and his past, present and future, hospital, doctors and related bills in an effort to be cured of said injuries.

15. The actions of Consolidation were intentional, reckless,

mischievous and with a total and conscious disregard of its civil obligations and other fiduciary duties owed to Austin. Austin is therefore entitled to recover punitive damages.

WHEREFORE, Austin moves the Court for judgment against the defendant, Consolidation, in the sum of Two Million Dollars (\$2,000,000.00) for compensatory damages and the additional sum of Two Million Dollars (\$2,000,000.00) for punitive damages, totalling Four Million Dollars (\$4,000,000.00), with interest thereon from the date that the hose was destroyed or otherwise secreted, until paid, and his costs in this behalf expended. Austin further moves the Court for a trial by jury.

**KENNETH AUSTIN**

**By Counsel**

**DONALD T. CARUTH, ESQ.**  
Brewster, Morhous & Cameron  
P. O. Box 529  
Bluefield, WV 24701-0529  
(304) 325-9177

By 

**THOMAS R. SCOTT, JR., ESQ.**  
Street, Street, Street, Scott & Bowman  
P. O. Box 2100  
Grundy, VA 24614  
(540) 935-2128  
VSB# 16513

By 

filed

VIRGINIA: IN THE CIRCUIT COURT OF BUCHANAN COUNTY

KENNETH AUSTIN,  
  
Complainant,  
  
vs.  
  
CONSOLIDATION COAL COMPANY,  
  
Defendant,

\_\_\_\_\_

Chancery Case No. 242-95

SERVE: CONSOLIDATION COAL COMPANY  
c/o Edward R. Parker, Registered Agent  
5511 Staples Mill Road  
Richmond, VA 23228

BILL OF COMPLAINT

The Complainant alleges the following:

1. Complainant was seriously injured in a mine accident arising out of and in the course of his employment with Consolidation Coal Company ("Consolidation") on or about May 20, 1995.
2. Under the exclusivity provisions of the Virginia Worker's Compensation Act, Complainant cannot prosecute a civil suit against Consolidation. However, Complainant is entitled and plans to bring a third party claim against the manufacturer and/or installer of the hose which he contends injured him.
3. On August 30 and September 22, 1995, Complainant's counsel corresponded with Consolidation's local counsel. A copy of

those letters are attached hereto and are incorporated by reference herein collectively as "Exhibit A". In those letters, Complainant's counsel requested, inter alia, permission for his representative to retrieve the hose and offered to execute a release, similar to one executed in an unrelated case with the same counsel, releasing Consolidation from any loss or liability in light of the exclusivity provisions of the Act.

4. Due to a lack of response from Consolidation's counsel, Complainant filed a Petition on October 11, 1995, requesting the Court to enter an order authorizing him to depose all knowledgeable officials employed by Consolidation for the purpose of perpetuating their testimony. A copy of that Petition is attached hereto and is incorporated by reference herein as "Exhibit B". Consolidation has declined to cooperate in connection with Complainant's request.

5. Complainant will be irreparably harmed in the intended prosecution in the event he is not permitted to have his experts view the hose. Complainant has no adequate remedy at law.

WHEREFORE, Complainant prays that the Court issue a permanent and perpetual mandatory injunction directing the defendant, its agents, servants, and/or employees to permit him and his experts, including attorneys, to view the hose at reasonable times and places and to test the hose off-site for the purpose of ascertaining whether or not they have a viable claim against the manufacturer and/or installer of the hose; and further prays that



the Court grant him an award of his attorney's fees and costs in this behalf expended; and such other and further relief as the nature of this case may require.

KENNETH AUSTIN

By Counsel

STREET, STREET, STREET, SCOTT & BOWMAN  
PO Box 2100  
Grundy, VA 24614  
(540) 935-2128

By Thermon R. Scott p.q.

August 30, 1995

Stephen Hodges, Esq.  
Penn Stuart Eskridge & Jones  
P. O. Box 2288  
Abingdon, VA 24212

Re: Kenneth Austin vs.  
Consolidation Coal Company  
D/A: 05/20/95  
Our File No. 25001

Dear Steve:

Pursuant to our telephone conversation Tuesday, please request Consol to preserve the hose and to advise when my representative might retrieve the same or when our engineer might inspect it. We are willing to give Consol the same release as in the Baker case since the compensation act precludes suit against Consol.

With best regards, I remain

Very truly yours,

*Cgw*

Thomas R. Scott, Jr.

TRS/cjw

xc: Donald T. Caruth, Esq.  
Ervin B. Davis  
Kenneth Austin

September 22, 1995

VIA FACSIMILE AND REGULAR MAIL

Stephen M. Hodges, Esq.  
Penn, Stuart, Eskridge & Jones  
P. O. Box 2288  
Abingdon, VA 24212

Re: Kenneth Austin vs.  
Consolidation Coal Company  
D/A: 05/20/95  
Our File No. 25001

Dear Steve:

As requested in my letter to you dated August 30, 1995, please advise as soon as possible when my representative might retrieve the hose or when our engineer might inspect the same.

With best regards, I remain

Very truly yours,



Thomas R. Scott, Jr.

TRS/cjw

Enclosure

xc: Donald T. Caruth, Esq.  
Kenneth Austin  
Ervin B. Davis

**VIRGINIA:**

**IN THE CIRCUIT COURT OF BUCHANAN COUNTY**

**KENNETH AUSTIN,**

**Petitioner,**

**vs.**

Case No. 216-95

**CONSOLIDATION COAL COMPANY,**

**Respondent,**

SERVE: CONSOLIDATION COAL COMPANY  
c/o Edward R. Parker, Registered Agent  
5511 Staples Mill Road  
Richmond, VA 23228

**PETITION**

Kenneth Austin, by counsel, for his verified petition pursuant to Rule 4:2 of the Rules of the Supreme Court of Virginia states:

1. Petitioner was seriously injured in a mine accident arising out of and in the course of his employment with Consolidation Coal Company ("Consolidation") on or about May 20, 1995. The accident occurred in Buchanan County, Virginia.

2. Petitioner intends to make a claim for bodily injuries against any third party stranger to his employment, including, but not limited to, products liability manufacturers, etc.

3. On August 30, 1995, Petitioner's counsel corresponded with Consolidations's local counsel. A copy of that letter is attached hereto and is incorporated by reference herein as "Exhibit A." In that letter, Petitioner's counsel requested Consolidation's

local counsel for permission for Petitioner's representative to retrieve the hose in question or for him to advise when Petitioner's engineer might view and inspect the hose, and offered to execute a release, similar to one executed in an unrelated case with the same counsel, releasing Consolidation from any loss or liability in light of the exclusivity provisions of the Act.

4. On September 22, 1995, Petitioner's counsel corresponded again with Consolidation's local counsel. A copy of that letter is attached hereto and is incorporated by reference herein as "Exhibit B." In that letter, Petitioner's counsel again requested Consolidation's local counsel for permission for Petitioner's representative to retrieve the hose or to advise when Petitioner's engineer might view and inspect the same.

5. Petitioner believes that some third party stranger to his employment is the sole proximate cause of his accident and injury. He will be prejudiced should the executives at Consolidation become incapable or otherwise unavailable as to testifying on this point. He desires to perpetuate their testimony and avers that a failure to do so will be unjust to all involved.

6. Petitioner expects to file an action cognizable in a Court of this Commonwealth, but is unable to cause it to be brought until the investigation is complete by the perpetuation of the testimony sought herein.

7. Petitioner expects to be a party to a products liability suit to be filed in the appropriate Court of this Commonwealth of Virginia, but he is presently unable to bring his case or cause it



to be brought.

8. The Petitioner is unaware as to the name of the manufacturer of the product which caused his injury, although he has been led to believe that the product was defective and that the defect did in fact cause his accident and injury.

9. Petitioner desires to establish, by the proposed testimony of the appropriate corporate representatives of Consolidation, the name and address of the manufacturer, seller, distributor, installer or any other entity that may be liable to him for the product which he believes to have caused his accident and injury.

10. Petitioner is unable to pursue his claim for the injuries he sustained until he has been able to establish the name and address of the legal entities that may have legal liability to him, and he is also unable to establish the legal liability of those entities that may be liable to him without having access for purposes of inspection and photographing of the product in question.

WHEREFORE, Petitioner petitions this Court to enter an Order authorizing him to depose all knowledgeable officials employed by Consolidation for the purpose of perpetuating their testimony pursuant to Rule 4:2 of the Rules of the Supreme Court of Virginia.

KENNETH AUSTIN

By Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this the 11<sup>th</sup> day of October, 1995,  
I forwarded a true copy of the foregoing Petition to Stephen M.  
Hodges, Esq., Penn, Stuart, Eskridge & Jones, P. O. Box 2288,  
Abingdon, VA 24212-2288.

STREET, STREET, STREET, SCOTT & BOWMAN  
P. O. Box 2100  
Grundy, VA 24614

By

Thomas R. Scott, Jr.  
Thomas R. Scott, Jr., Esq.  
VSB No. 16513

p.q.

August 30, 1995

Stephen Hodges, Esq.  
Penn Stuart Eskridge & Jones  
P. O. Box 2288  
Abingdon, VA 24212

Re: Kenneth Austin vs.  
Consolidation Coal Company  
D/A: 05/20/95  
Our File No. 25001

Dear Steve:

Pursuant to our telephone conversation Tuesday, please request Consol to preserve the hose and to advise when my representative might retrieve the same or when our engineer might inspect it. We are willing to give Consol the same release as in the Baker case since the compensation act precludes suit against Consol.

With best regards, I remain

Very truly yours,

Cgw

Thomas R. Scott, Jr.

TRS/cjw

.. xc: Donald T. Caruth, Esq.  
Ervin B. Davis  
Kenneth Austin

A0034289.DOC

September 22, 1995

VIA FACSIMILE AND REGULAR MAIL

Stephen M. Hodges, Esq.  
Penn, Stuart, Eskridge & Jones  
P. O. Box 2288  
Abingdon, VA 24212

Re: Kenneth Austin vs.  
Consolidation Coal Company  
D/A: 05/20/95  
Our File No. 25001

Dear Steve:

As requested in my letter to you dated August 30, 1995, please advise as soon as possible when my representative might retrieve the hose or when our engineer might inspect the same.

With best regards, I remain

Very truly yours,

*TS*

Thomas R. Scott, Jr.

TRS/cjw

Enclosure

xc: Donald T. Caruth, Esq.  
Kenneth Austin  
Ervin B. Davis

A0034289.DOC

ORIGINAL

VIRGINIA: IN THE CIRCUIT COURT OF BUCHANAN COUNTY

KENNETH AUSTIN, )  
 )  
Plaintiff )  
 )  
VS ) CASE NO. 316-95  
 )  
CONSOLIDATION COAL COMPANY, )  
 )  
Defendant )

May 23, 1996

HEARING

APPEARANCES:

THOMAS R. SCOTT, JR., ESQ.  
Street, Street, Street, Scott & Bowman  
P.O. Box 2100  
Grundy, VA 24614  
Counsel for Plaintiff

STEPHEN M. HODGES, ESQ.  
PennStuart  
P.O. Box 2288  
Abingdon, VA 24212-2288  
Counsel for Defendant

Reported by:

Phyllis M. Mullins, Court Reporter  
HC61, Box 50  
Paynesville, WV 24873  
(304) 967-7981



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This cause came on this the 23rd day of May, 1996, to be heard before THE HONORABLE KEARY R. WILLIAMS, Judge of the Circuit Court of Buchanan County, Virginia.

The Court Reporter, Phyllis M. Mullins, was duly sworn.

THE COURT: Mr. Scott, is this your Motion?

MR. SCOTT: Yes, sir.

THE COURT: On the 2nd of March. We've rescheduled this a time or two.

MR. SCOTT: Yes, sir, we have. Whenever you're ready, I'll...

THE COURT: Actually, I guess, we got Consol's Demurrer and a Motion to Consolidate before that.

MR. HODGES: The consolidation has been granted, Your Honor, without any objection. I believe there's an order to that effect. If there's not, it's agreed.

THE COURT: Let's see. I don't see that order. Has the order been circulated and endorsed?

1 MR. HODGES: I thought it had been actually entered.

2 MR. SCOTT: I've got an entered order dated  
3 February...January 22, 96. Well, not for consolidation.  
4 I'm sorry.

5 THE COURT: I don't see the Order for consolidation,  
6 maybe it's not gotten in the file. It looks to me as  
7 though the Demurrer is the first matter for the Court to  
8 consider, so we'll hear from Consol's counsel concerning  
9 the Demurrer and then move on to the other matters in the  
10 file.

11 MR. HODGES: Your Honor, the background is that there  
12 are two distinct proceedings here. I take it you have both  
13 files.

14 THE COURT: I only have one file. I've only got 242-  
15 95.

16 MR. HODGES: Well, this is...This may be simple enough  
17 that I may be able to frame it out for you and you could  
18 address this without seeing the paperwork. I suggest we  
19 give that a go. Mr. Austin apparently was injured in an  
20 industrial accident at Consol's coal mine here in the  
21 County, and it's alleged here and it's undisputed, that he  
22 seeks to investigate and potentially file a law suit  
23 against someone, a product liability law suit. He's not  
24 ascertaining any claims against Consol. They were his  
25 employer and his claims are, of course, handled under the

1 comp act. But he seeks to investigate and to get access to  
2 and come upon Consol's property and look at a hose.  
3 Apparently there was an industrial type of water hose that  
4 was involved in this accident and the first proceeding that  
5 he filed, and apparently you don't have the file right  
6 before you, was a proceeding under Rule 4:2, which is the  
7 Rule that allows that depositions before actions or pending  
8 appeal and a Motion to Dismiss was filed on that and I  
9 believe the parties would be ready to address that today or  
10 whenever. I understand this is all on the table to be  
11 considered today. Is that correct, Mr. Scott?

12 MR. SCOTT: Yes.

13 MR. HODGES: Alright. And then before any of that was  
14 disposed of, the case that I take it you have in your hand  
15 was filed, which is a Bill of Complaint, which I understand  
16 just to be for equitable relief for a mandatory injunction  
17 allowing Mr. Austin's representatives, whoever it might be,  
18 investigators, engineers or whatever, to come on the  
19 company's property and investigate this hose. And our  
20 position on the chancery case, you've called for that  
21 first, that's the Demurrer, is breathtakingly simple, and  
22 it is this. That this is private property, it is owned by  
23 the company, it is on their real estate that their mine  
24 area, the area of their mine, surface area, and there is no  
25 legal right for Mr. Austin to come upon the property or

1 otherwise demand that this property be turned over through  
2 a legal process. I make this a simple analogy, Judge. If  
3 you and I are neighbors and I come over to your house and  
4 I knock on your door and I say I want to walk through your  
5 house; I'm not going to harm you; I'm not going to hurt  
6 anything; I'm not a thief; I'm your neighbor; I want to  
7 walk through your house; I just want to see what the  
8 decorations are like in there. Well, you have a right to  
9 say no and you don't owe an explanation to me and you  
10 really don't even owe an explanation in Court. And if that  
11 case came before Your Honor, it's perhaps oversimplified,  
12 but that's the principle of this case. If that case came  
13 before you, I don't think you'd have any problem with  
14 saying that is not a legal right. You, in my analogy,  
15 have a property right to have your home and have your  
16 property free from others coming on it, whether they  
17 articulate some reason or not. Now the company has reasons  
18 that are perfectly satisfactory to it. This is only one of  
19 several of these that have come in the past and there would  
20 be more to come in the future. As you know, these  
21 environments are...There are hazards there and we live in  
22 a litigious society and you have people coming in and so  
23 forth and in this day and age, in the business world, the  
24 mining industry in particular, the resources are stretched,  
25 these companies are just...Have enough resources to try to

1 accomplish their critical mission, their main mission,  
2 mining, washing and selling coal, and they are asking the  
3 Court just to draw a line, simply a legal line. There is  
4 no legal precedent, there's no legal rule, there's no legal  
5 reason why the Court would enjoin them to let him come on  
6 the property. His goals are legitimate. He has a right to  
7 investigate and try to find facts that would support a  
8 claim if he wants to do that. But his goal does not  
9 override the company's property right to exclude those,  
10 unless there's some specific legal doctrine that would  
11 allow him to come forward and I'm not aware of any and none  
12 has ever been cited to me in this case or any other case.

13 THE COURT: Mr. Scott, did you want to respond to  
14 that?

15 MR. SCOTT: Yes, sir. Your Honor, as Mr. Hodges told  
16 you, my client was injured arising out of and in the course  
17 of his employment on or about May 20, 1995, while employed  
18 by Consolidation Coal Company at their Buchanan 1 Mine,  
19 which is located at Page. That's a non-union operation  
20 owned by Consol, as I understand it, independent of any  
21 acquisition of Island Creek, from Island Creek. At the  
22 time of the injury my client was holding a hose in his hand  
23 much like the fire hose that's encased outside the Court's  
24 chambers on the wall adjacent to the courtroom. He had  
25 been welding that day and the company policy was that, or



1 at least I would offer this in the form of a proffer, that  
2 if he were called to testify, he and a fellow worker had  
3 been welding that day and the company policy was at the  
4 conclusion of welding, conclusion of the work shift, that  
5 they were supposed to water down the objects upon which  
6 welding had been conducted and the work place in general as  
7 a safety precautionary measure to insure that a fire would  
8 not start after the work place was closed for the day. And  
9 my client was holding the hose in his hand and the hose  
10 was...The water itself was turned on by another individual,  
11 and for some reason unknown to us at this time, the hose  
12 malfunctioned and hit my client, presumably in both sides  
13 of the head, knocked him down, in turn, his head struck an  
14 approximately ninety (90) pound rail, much like a rail that  
15 a railroad car travels on and he's had serious and  
16 disabling injuries. Now as the Court well knows, our sole,  
17 exclusive remedy against Consol falls under the Workers'  
18 Compensation Act. Likewise, we cannot institute suit for  
19 his injuries against any fellow employee or any  
20 subcontractors of Consol that are in the same trade,  
21 business and occupation as Consol because the exclusivity  
22 provisions of the Virginia Workers' Compensation Act grant  
23 them, in fact, immunity from prosecution in a civil suit.  
24 But he does have a right, and as Mr. Hodges conceded, a  
25 legitimate interest in pursuing the seller of this hose and

1 the manufacturer of this hose and perhaps even the  
 2 component part manufacturers of this hose and product  
 3 liability claims on negligent design, breach of warranty,  
 4 and the like-type theories. He has the right to do that  
 5 and he obviously...He's in a catch 22 position. On the one  
 6 hand, he can't pick out somebody and file a suit unless he  
 7 knows who they are, unless he knows from whom the hose was  
 8 acquired, unless he knows who made it, and it's kind of  
 9 hard to argue these things piecemeal, because on one hand  
 10 you got a petition under Rule 4:2 to preserve testimony,  
 11 perhaps depose the president or purchasing agent or  
 12 whatever of Island Creek. On the other, you have a Bill of  
 13 Complaint, I'm trying to cover all bases. In any event, he  
 14 has the right to pursue his claim and he obviously has to  
 15 know against whom to pursue it. But even that might not be  
 16 enough, Your Honor, because as the Court well knows,  
 17 Virginia has a statute, which is akin to Federal Rule 11  
 18 Sanction Statute, where you can't just go file a suit  
 19 without any basis, so even if we already knew who the  
 20 seller of that hose was and the manufacturer of that hose,  
 21 at a minimum, we need to have that hose examined to  
 22 determine whether or not there's any inherent defect,  
 23 negligent design and the like in that hose that caused or  
 24 contributed to my client's injuries, and we can't do that  
 25 without the hose. We don't necessarily have to come onto

1 Consol's premises, they could deliver us the hose for  
2 analysis and if they want us to pay for it, you know, I  
3 mean that might even be arranged, too, assuming that  
4 they're not asking an arm and a leg and that's there's some  
5 reasonable price involved. There's always the possibility  
6 that we might need to come onto their premises to check the  
7 water pressure from the source where the water flowed  
8 through the hose. I don't know the answers to those things  
9 because, again, we don't have the hose, we haven't had an  
10 engineer look at it to examine it. If Your Honor were to  
11 deny us that right, counsel may very well be right that  
12 there's no precedent for it in Virginia, but there's no  
13 precedent against it in Virginia either because,  
14 unfortunately, we don't have much case precedent in our  
15 Rules of Court in things of this nature at all. But the  
16 Federal Court's replete with these kinds of requests. If  
17 I filed suit against ABC Company today, Judge Glen Williams  
18 or Judge Sam Wilson, would enter an order that dealt with  
19 testing of the hose and destructive testing at some point  
20 in time when everybody has their experts together,  
21 preserving the integrity of the hose until such time as  
22 those things can be done. That's routine in Federal Court.  
23 Here, I haven't gotten to that point yet because I don't  
24 know who Island Creek purchased it from and I don't know  
25 who made it and I need to have it examined. And could I

1 add one more thing? Judge, these people, I said Island  
2 Creek, I misspoke, Consol, there's a matter of fairness  
3 here, we're in a Court of equity, but, you know, when  
4 they...The Worker's Comp Act says that filing of a workers'  
5 compensation claim acts as an assignment...Excuse me. The  
6 making of a workers' compensation claim operates as an  
7 assignment to the employer against any third party that  
8 might be responsible. As the Court well knows, they're  
9 all...If the employer chooses not to do that, then he has  
10 the right to pursue his claim against any third party  
11 responsible. And in turn, the employer is subrogated to  
12 his rights. In other words, they're entitled to get back  
13 workers' compensation and medical benefits paid to him, or  
14 on his behalf, less their pro rata share of costs and  
15 attorney's fees. And so on the one hand, they got their  
16 hand hanging out; on the other hand, the law...for  
17 subrogation if he's successful. On the other hand, the law  
18 gives them and tells them that hey, you know, this...His  
19 making of a claim operates as an assignment against the  
20 third party that's responsible you filed on his behalf.  
21 It's almost as if they're in a fiduciary duty of  
22 responsibility capacity with him. But they don't want to  
23 give us the hose, they don't want to tell us who made it.  
24 They don't want to tell us from whom they purchased it. I  
25 am highly suspicious that they purchased it from some

1 sister company that they don't want to tell us about, and  
 2 I may be totally off base, maybe totally unfounded, but,  
 3 Judge, it's a pure matter of equity in a Court of equity.  
 4 This man is entitled to do that. I'm willing to even  
 5 attempt to make it so that if an expert needs to come onto  
 6 their premises to check the water pressure, we don't have  
 7 to if you order them to give us the hose, to come on their  
 8 premises, that the guy would sign a statement or release or  
 9 something in advance. But we're entitled to investigate  
 10 this accident. Can I say...Maybe you're heard enough.  
 11 I'll be...I wanted to...

12 THE COURT: Well, your approach is really unique. I  
 13 like what you're trying to do, but, Tom, I can't in good  
 14 conscience grant this injunction. You know, look where  
 15 that's going to go, if he decides he's got to go on their  
 16 property to examine that hose. He's got to take two (2) or  
 17 three (3) experts on there. You run the problem of  
 18 interfering with their operation. I'm just ifing but it's  
 19 just...The ramifications of doing that are just too far  
 20 reaching for this Court to undertake, you know.

21 MR. SCOTT: Well, how can I find out who made the  
 22 hose?

23 THE COURT: Well, I'm sure with, you know, your  
 24 ability to reason legally you can come up with something  
 25 and you may have talked your way into Federal Court with

1 this thing. It seems...Since there seems to be some  
2 federal precedent for this type thing. But certainly, I'm  
3 not in the position to enter an injunction to permit the  
4 party to go on Island Creek's property under these  
5 circumstances in order to investigate that. But I commend  
6 you on the unique...

7 MR. SCOTT: Well, Judge, what about Rule 4:2? I mean  
8 why can't I take their deposition to find out who they  
9 bought the hose from?

10 THE COURT: Well, I'm not sure you can't do that.

11 MR. SCOTT: Okay. Well, would you enter an order  
12 under that then?

13 THE COURT: I don't know that that's before the Court  
14 in such a fashion that I could take jurisdiction in order  
15 to do that with the pleadings that are here. But you might  
16 enlist some cooperation on the part of Consol.

17 MR. SCOTT: Judge, I've tried to enlist it and counsel  
18 won't tell me who made the hose or his client won't permit  
19 him to.

20 THE COURT: Maybe there's no cooperation forthcoming,  
21 but I'm, you know, I'm sure within your ability to reason  
22 all that out you're going to come up with something, but I  
23 don't think the injunction's the way to do it.

24 MR. SCOTT: Well, Judge, there's no other way to do it  
25 except to preserve testimony, is to take their president or

1 somebody's deposition, to find out who they bought the hose  
2 from.

3 THE COURT: How is the Court to insure that the same  
4 hose that purportedly injured your client is still there?  
5 I mean maybe it's no longer there.

6 MR. SCOTT: It may not be.

7 THE COURT: So, you know, I...Even if I were inclined  
8 to enter your injunction, I think I'd have to have more  
9 information before I could. You know I've got to balance  
10 that equity between the individual's rights and the  
11 company's rights and the individual's right to litigate and  
12 the company's right. When I attempt to balance that I  
13 certainly come down on the side of the company's property  
14 right. I might feel differently if this were a litigant  
15 that had no remedy, no other source of revenue, no other  
16 benefit, but in this instance he's already got workers'  
17 compensation, but I'm not saying he's limited to that. I'm  
18 saying he's entitled to pursue any other action against the  
19 manufacturer, seller, etc., but you can't do it, so far as  
20 this Court is concerned, with this injunctive proceeding.

21 MR. SCOTT: Alright. I'm going to respectfully note  
22 my exceptions and appeal that if I can't at least get you  
23 to order them to let me depose somebody. I don't care  
24 whether the hose is there or not. You should not...I would  
25 respectfully suggest, should not consider yourself...I

1       guess I'm so upset I can't speak well. You, I respectfully  
2       suggest that you should not concern yourself with whether  
3       or not I may have problems along the way with proving my  
4       products liability case.

5           THE COURT: I'm not concerned with that. I'm  
6       concerned with what kind of restrictions the Court and  
7       Courts would ultimately have in providing the remedy that  
8       you're asking for. You're going to have to restrict that  
9       in some fashion and the long range effects of that are so  
10      far reaching.

11          MR. SCOTT: Judge, I'm not talking about the Bill of  
12      Complaint now. I'm talking about under Rule 4:2, I should  
13      be permitted to depose somebody, some designee up there,  
14      some purchasing agent, who can look at those hose and...

15          THE COURT: The only thing I can say is file your suit  
16      and then depose them and that's risky because of what  
17      you've already identified, but, you know, that's all I can  
18      suggest.

19          MR. SCOTT: Well, what about under the Petition I  
20      filed under Rule 4:2?

21          THE COURT: I don't have it.

22          MR. SCOTT: That's why we filed two (2) suits. There  
23      were...

24          THE COURT: Well, I don't have but one here. That's  
25      part of my problem, I guess.



1 MR. SCOTT: What case number do you have?

2 THE WITNESS: I've only got...I got 242-95.

3 MR. SCOTT: Okay. Do you want me to go get it?

4 THE COURT: Yeah, see if it's out there.

5 MR. SCOTT: And, Judge, let me say here's...These  
6 are...We're agreeing that these two (2) suits are  
7 consolidated.

8 MR. HODGES: I thought they already had been, but they  
9 can be considered consolidated, as far as I'm concerned.

10 MR. SCOTT: And, Judge, if there's some technical  
11 defect to that Petition, I'm making a request in advance to  
12 amend because I'm not going to get sued for a malpractice  
13 claim because of some technical thing, I mean, you know.

14 THE COURT: Do you want to review that before we look  
15 at it or...

16 MR. SCOTT: Well, Judge, he's filed a Demurrer. I  
17 mean I'm assuming that Your Honor would always grant me, if  
18 there was some defect, the opportunity to amend.

19 THE COURT: If I granted his Demurrer, you'd have  
20 an...as long as it's not...The Demurrer is not granted with  
21 prejudice you can certainly amend or refile, but I didn't  
22 realize that in speaking of the issue that you brought up  
23 I needed to look at this file. I understood Mr. Hodges to  
24 say that I could look at that one file and possibly  
25 determine what we had. Alright. Now I have the 316-95,

1 the Petition pursuant to Rule 4:2, and I understand you  
2 filed a Demurrer in that case, as well.

3 MR. HODGES: I filed a Motion to Dismiss.

4 THE COURT: Okay. Motion to Dismiss.

5 MR. HODGES: Yes, sir.

6 THE COURT: Do you want to go forward with that?

7 MR. HODGES: Yes, sir. Rule 4:2 is a very precise,  
8 sets forth a very precise procedure, and sets it forth in  
9 detail as to how a party under some circumstances may take  
10 a deposition prior to the filing of suit in order to  
11 preserve testimony. If the requirements are set out in  
12 detail and the problem that Mr. Austin has here is that he  
13 doesn't meet the requirements. And it's our position that  
14 if these detailed requirements are not met, then the relief  
15 provided under the Rule could not be provided by the Court.  
16 Most dramatically, this Rule requires in several places  
17 that the potential adverse party in the law suit be named  
18 in the petition and be served. Now obviously, what we have  
19 is...The argument is going to be made and it's true. The  
20 argument is going to be made...We don't know who the  
21 adverse party is, that's what we're trying to find out, and  
22 I think that's a fair statement of where Mr. Austin is.  
23 But that proves our point, that this Rule is not designed  
24 for this use. If it were designed for this use, it would  
25 not have this provision in it. And so he's in the

1 position, even more dramatically on this proceeding than  
2 the other one, of trying to force a square peg into a round  
3 hole and it's not equity, it's nothing, it's the strict  
4 application of a Rule that's written out in black and white  
5 and requires the adverse party is the proceeding. Consol  
6 is not even a proper party to this proceeding and yet it's  
7 the only defendant, so the Rule doesn't fit.

8 THE COURT: Alright. Mr. Scott, did you want to  
9 respond to that?

10 MR. SCOTT: Yes, sir. I filed the Petition and...I  
11 keep hearing phones ring and noises and bells and whistles,  
12 I'm sorry, my mind isn't staying where it should be today.  
13 Rule 4:2 says that a person who desires to perpetuate his  
14 own testimony or that of another person regarding any  
15 matter that may be cognizant in any Court of this  
16 Commonwealth, may file a verified petition in the circuit  
17 court of the county or city of the residence of any  
18 expected adverse party. The petition shall be entitled in  
19 the name of petitioner and so forth and the like. As Mr.  
20 Hodges said, I have not named who the potential adverse  
21 party...Well, certainly Consol is a potential adverse party  
22 because if they have destroyed that hose it's going to be  
23 my position that the exclusivity of the Virginia Workers'  
24 Compensation Act did not protect them and that they are  
25 liable for his injuries over and above workers' comp. I

1 have also sent them some discovery asking them, in  
 2 connection with this verified petition proceeding, or at  
 3 least I believe I have, my best recollection, if I say  
 4 something wrong, I'm speaking out of ignorance from the  
 5 heart, asking them to identify the manufacturer and seller  
 6 of this hose. They, in turn, have stonewalled me and filed  
 7 a Motion for a Protective Order. And then I pursued these  
 8 proceedings today and Your Honor rules against me on both  
 9 of them and I go to Federal Court and then they're going  
 10 to claim it's res judicata. My guy is screwed, using the  
 11 vernacular, he's screwed. I know this Court is fair. For  
 12 God's sake, let me take the purchasing agent's or  
 13 somebody's deposition and I will agree at my expense, even  
 14 if I have to pay their lawyer's fees out of my own pocket,  
 15 to reconvene them all over again once we get that party and  
 16 get him in there, so that he can have notice. I'll do it  
 17 under any restrictions that the Court might impose. But  
 18 certainly I'm entitled to pursue this. Now, Judge, if you  
 19 know of some other way I can pursue it, I'll do that. I  
 20 ask you not to dismiss it. I mean I'd rather non-suit it  
 21 if you're going to dismiss it with prejudice.

22 THE COURT: The Rule provides that the names or a  
 23 description of the person he expects will be adverse  
 24 parties and their addresses, so far as known. I think that  
 25 provides that the adverse party can be described as the

1 manufacturer and/or seller of the hose in question, whose  
2 names and addresses are, as of this time, unknown.

3 MR. SCOTT: I put that in there.

4 MR. HODGES: Your Honor, service is required upon each  
5 person named in the petition as an expected adverse party.

6 THE COURT: Under the circumstances, I assume service  
7 can't be accomplished.

8 MR. SCOTT: Yes, sir. And the adverse party might  
9 have...I mean the manufacturer might have standing to raise  
10 that but...

11 THE COURT: I don't know that Consol could raise that  
12 issue.

13 MR. SCOTT: Judge, it's obvious why they're  
14 stonewalling.

15 MR. HODGES: (Laughs.)

16 THE COURT: (Laughs.)

17 MR. SCOTT: I don't think it's funny, with all due  
18 respect. I know my client doesn't.

19 THE COURT: Well, it's unique, Mr. Scott, it's not  
20 funny.

21 MR. SCOTT: My client doesn't think it's funny. I  
22 guess big corporations are alive and well and immune from  
23 suit in Virginia.

24 THE COURT: Well, I'm inclined to grant the motion  
25 for...or the order for depositions of the one party, the

1 purchasing agent.

2 MR. SCOTT: Well, Judge, I'm willing to let them  
3 designate who it is. I don't know who knows who they got  
4 the hose from.

5 THE COURT: Well, I think the burden is on you under  
6 Rule 4:2 to designate a person whose deposition you're  
7 going to take. I don't know that it shifts back to them to  
8 tell you who you should take. So if you want to take the  
9 deposition of the purchasing agent I'm going to grant that.  
10 If the Court is satisfied that perpetuation of the  
11 testimony may prevent a failure or delay of justice, the  
12 Court feels under the circumstances described, it could  
13 prevent a failure of justice, then they can order  
14 designating or describing the persons whose depositions may  
15 be taken and specifying the subject matter of the  
16 examination and whether depositions shall be oral or  
17 written. Are you asking oral or written?

18 MR. SCOTT: Oral.

19 MR. HODGES: Your Honor, I'll just point out that, and  
20 I'm quite sure the Court understands, I want to be sure  
21 that the party to this proceeding is to be the potential  
22 party to that suit that has not been filed yet.

23 THE COURT: Right.

24 MR. HODGES: It's pretty clear from the structure that  
25 that's the way you do it. And that person is not here,

1 instead another person is being brought in as a party to  
2 this proceeding. There is even a procedure set out in the  
3 Rule for having a representative appointed for people who  
4 are not present, and that's what...

5 MR. SCOTT: That's fine.

6 MR. HODGES: That's what the Court would be mandated  
7 to do if you think you have the authority under this Rule  
8 of law.

9 THE COURT: Well, I think having the authority, I have  
10 concluded that I have the authority. Where are you  
11 looking?

12 MR. HODGES: I'm looking at sub 2, the second  
13 sentence, page 142.

14 THE COURT: If service cannot with due diligence be  
15 made upon any expected adverse party named in the petition  
16 the Court may make such order as is just for service by  
17 publication. Otherwise, it shall appoint for persons not  
18 so served, an attorney who shall represent them. I don't  
19 suppose you could do that, it might be a conflict.

20 MR. HODGES: I think it would be.

21 THE COURT: For you to operate in that regard. Any  
22 suggestions as to who we might appoint as...

23 MR. SCOTT: Pick any lawyer in town. Pick any lawyer  
24 in town at my expense.

25 THE COURT: I need somebody that doesn't do any work

1 for Consol or have any contact or own any coal or whatever  
2 with Consol's...

3 MR. SCOTT: Well, Ron King doesn't do any work for  
4 Consol.

5 THE COURT: Alright. Ron King is a good choice.  
6 Cross-examine the deponent, if any, expected adverse party.  
7 Alright. I'll appoint Ron King as the person to be served  
8 to represent the adverse party under 4:2(2) of Rule 4:2.  
9 Now the depositions are going to be oral.

10 MR. SCOTT: Yes, sir. I'd like to take the oral  
11 deposition of the purchasing agent that purchased this  
12 particular hose.

13 THE COURT: That will be the purchasing agent and  
14 you're not going to name, we're going to do that by  
15 description. Is that right? Do you know the name of the  
16 purchasing agent?

17 MR. SCOTT: Well, Steve, will you not even tell me who  
18 the purchasing agent is that purchased this hose?

19 MR. HODGES: I don't know who it is.

20 THE COURT: The order has to specify the subject  
21 matter of the examination. What is the subject matter  
22 going to be?

23 MR. SCOTT: The subject matter is the description of  
24 this hose, make, model, serial number, year, size, the  
25 vendor who sold it to them and the manufacturer, if known,



1 date purchased.

2 THE COURT: Alright.

3 MR. SCOTT: We want to see a copy of the invoice.

4 THE COURT: You need to set all of that out in your  
5 order.

6 MR. SCOTT: Yes, sir, I will. Judge, may I make one  
7 more request, please, sir. At least in the injunction  
8 proceeding, would you enter an injunction that they not  
9 destroy this hose, and if they have no further use for it  
10 that I at least be able to buy it. That's a reasonable  
11 request, that they not destroy the evidence.

12 THE COURT: Well, that's certainly...

13 MR. SCOTT: When I say destroy, I mean in the  
14 intentional sense. If they're using it on the job and it  
15 blows up or something, I understand that. But I'm asking  
16 that they at least preserve it until I can pursue this  
17 matter further, and that if for some reason they want to  
18 get rid of it, that I be able to buy the salvage off of  
19 them. I mean gosh, that's a fair request.

20 THE COURT: Well, in all...I don't know that I can do  
21 that under the proceedings here before the court.

22 MR. SCOTT: No, sir. You got two...

23 THE COURT: Well, I think it's certainly understand  
24 that...

25 MR. SCOTT: You got two (2) proceedings before the

1 Court.

2 THE COURT: Well, I've already ruled in the one and I  
3 don't know that I can...I don't know that I can find the  
4 request that you're now making under the injunctive  
5 proceeding.

6 MR. SCOTT: Judge, there's...Certainly, the Court has  
7 the equitable power to order a person in possession of a  
8 piece of equipment, such as a hose, that...

9 THE COURT: Well, I'm going to...The order under the  
10 law case should contain a statement that no parties are to  
11 do anything as far as to effect the integrity of the hose  
12 that's the subject of this petition, during the pendency of  
13 this matter.

14 MR. SCOTT: Alright, sir.

15 THE COURT: I assume that's not going to happen, but  
16 as an admonition, I guess, to all concerned parties, that  
17 should be in the order.

18 MR. SCOTT: Alright, sir.

19 THE COURT: Alright. Now are you going to fashion  
20 this order for Mr. Hodges to...

21 MR. SCOTT: Yes, sir.

22 THE COURT: Endorse and I assume he'll want to endorse  
23 that objected to.

24 MR. SCOTT: Yes, sir.

25 THE COURT: Okay.. Anything further we need to

1 consider regarding this matter?

2 MR. HODGES: No, sir.

3 MR. SCOTT: Not that I'm aware of.

4 THE COURT: Alright. Fashion the order and ship it to  
5 Mr. Hodges.

6 MR. SCOTT: Yes, sir.

7 CERTIFICATION

8 STATE OF VIRGINIA,

9 COUNTY OF BUCHANAN, to-wit:

10 I, Phyllis M. Mullins, Court Reporter and Notary  
11 Public for the State of Virginia, do hereby certify that  
12 the foregoing proceeding was recorded on a tape recording  
13 machine and later reduced to typewritten form by me  
14 personally; that I was first duly sworn by the Court to  
15 accurately take down and transcribe the said proceedings;  
16 that the foregoing is a true and correct transcript of the  
17 said proceedings to the best of my understanding, skill and  
18 ability; that I am neither counsel for, nor related to any  
19 of the parties hereto and have no interest in the matter  
20 whatsoever.

21 Given under my hand and seal on this the 10th day of  
22 June, 1996.

23   
24 NOTARY PUBLIC

25 My commission expires January 31, 1999.

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

KENNETH AUSTIN,  
Plaintiff

vs.)

Civil Action No. 5:97-0520

CONSOLIDATION COAL COMPANY,  
Defendant.

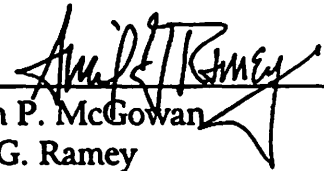
MOTION TO DISMISS

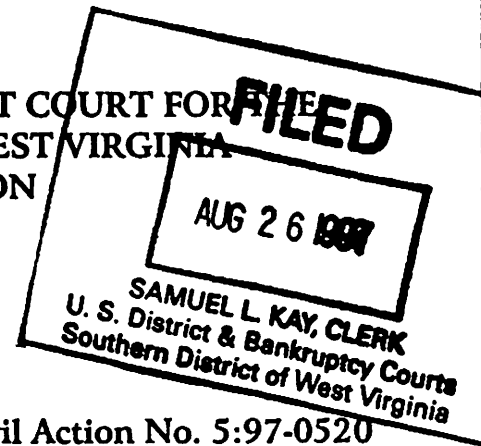
Now comes the defendant, Consolidation Coal Company, by Steptoe & Johnson, Steven P. McGowan, and Ancil G. Ramey, its attorneys, and hereby moves this Court to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(6), because neither Virginia nor West Virginia recognizes a cause of action for spoliation of evidence and would be unlikely to recognize such cause of action under the circumstances of this case, as more fully discussed in a memorandum of law filed contemporaneously herewith.

CONSOLIDATION COAL COMPANY

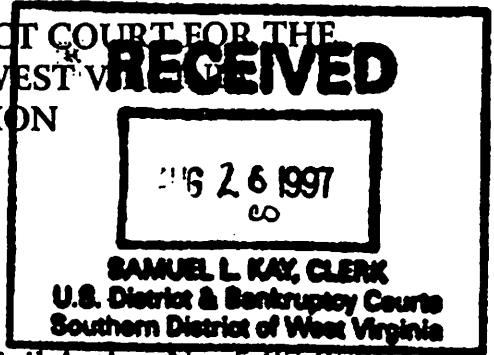
By Counsel

STEPTOE & JOHNSON  
Of Counsel

  
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IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION



KENNETH AUSTIN,

Plaintiff

vs.)

Civil Action No. 5:97-0520

CONSOLIDATION COAL COMPANY,

Defendant.

MEMORANDUM OF LAW  
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

The plaintiff's complaint, attached as Exhibit A, fails to state a cause of action upon which relief can be granted. Accepting the plaintiff's allegations as true, he still cannot prevail because a cause of action for spoliation of evidence has never been recognized in either Virginia or West Virginia,<sup>1</sup> nor is it likely that such cause of action would be recognized under the circumstances alleged in the complaint.

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<sup>1</sup> It is unclear from the plaintiff's complaint whether he alleges that the spoliation of evidence occurred in Virginia or West Virginia. It appears from the plaintiff's complaint, and the defendant asserts, that the law of the State of Virginia, where the cause of action seems to have accrued, would govern under choice of law principles. Because neither state has recognized a cause of action for spoliation, however, nor would appear likely to recognize such cause of action under the circumstances of this case, dismissal under Fed. R. Civ. P. 12(b)(5) applying the law of either Virginia or West Virginia would appear to be appropriate.

## II. STATEMENT OF FACTS

The following statement of facts are taken entirely from the complaint and, for purposes of this motion, are taken as true. The plaintiff alleges that he was injured while employed by the defendant due to a defective fire hose. Because the plaintiff received workers' compensation benefits, any direct cause of action against the defendant was barred by statutory immunity under Virginia law. In order to ascertain the identity of the manufacturer and seller of the hose, the plaintiff filed an action against the defendant in state court in Virginia, and thereafter determined their identities. Subsequently, the plaintiff filed a separate product liability action in this Court against the manufacturer of the hose, National Fire Hose Corporation, and the distributor of the hose, Fairmont Supply Company.

The plaintiff alleges that, in violation of a directive by a state court judge in Virginia, the defendant allowed the hose to be destroyed. For purposes of this motion, the defendant does not dispute the allegation that the hose no longer exists. The plaintiff asserts that the defendant had a duty to preserve the hose as evidence in his product liability case against the manufacturer and distributor of the hose. This duty, the plaintiff contends, is based upon the fact that, under the law of Virginia, the defendant would have a right of subrogation for workers' compensation benefits paid against any money the plaintiff might recover from third-parties arising

from the industrial accident. The plaintiff goes so far as to assert in his complaint that the defendant had an obligation to institute a product liability action on his behalf.

### III. DISCUSSION OF LAW

The defendant recognizes that dismissal under Fed. R. Civ. P. 12(b)(6) should be granted only where the allegations in the complaint clearly demonstrate that the plaintiff does not have a claim and that no set of facts would support plaintiff's claim. Roe v. County Comm'n, 926 F. Supp. 74 (N.D. W. Va. 1996); Booth v. Old National Bank, 900 F. Supp. 836 (N.D. W. Va. 1995); Cromer ex rel. Martin v. Lounsbury Chiropractic Offices, Inc., 866 F. Supp. 960 (S.D. W. Va. 1994). Moreover, the defendant acknowledges that, in ruling on a motion pursuant to Fed. R. Civ. P. 12(b)(6), all of the allegations of the complaint must be taken as true. Bank One v. United States Fidelity & Guaranty Co., 869 F. Supp. 426 (S.D. W. Va., 1994); Ridgeway Coal Co. v. FMC Corp., 616 F. Supp. 404 (S.D. W. Va., 1985). On the other hand, although all the facts pleaded in a complaint must be taken as true for purposes of Fed. R. Civ. P. 12(b)(6), conclusions of law which a plaintiff has drawn from those facts are not entitled to the same presumption. Bashaw v. Belz Hotel Management Co., 872 F. Supp. 323 (S.D. W. Va., 1995); Vance v. Bordenkircher, 533 F. Supp. 429 (N.D. W. Va., 1982); Dostert v.

Washington Post Co., 531 F. Supp. 165 (N.D. W. Va.. 1982).

**A. WEST VIRGINIA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL OR NEGLIGENT SPOILIATION OF EVIDENCE.**

Recently, in Harrison v. Davis, 197 W. Va.. 651, 478 S.E.2d 104 (1996), the Court affirmed the dismissal of an action for spoliation of evidence. The plaintiff in Harrison filed suit against several defendants, alleging that they had wrongfully caused the death of her infant daughter. Id. at 654-55, 478 S.E.2d at 107-08. During the course of discovery, the plaintiff learned that certain fetal monitor strips were missing. Id. at 654 n. 7, 478 S.E.2d at 107. Accordingly, as part of her complaint she asserted a claim for spoliation of evidence. Id.

Because the plaintiff in Harrison did not request the fetal monitor strips until more than two years after her child's death, the trial court granted the defendants' motion to dismiss under W. Va.. R. Civ. P. 12(b)(6). In affirming this dismissal, the Court stated:

The claim for spoliation of evidence is a novel issue in this State. Although we have decided two cases involving such a claim, we have yet to recognize spoliation of evidence as a valid cause of action. See State ex rel. State Farm Fire & Casualty Co. v. Madden, 192 W. Va.. 155, 451 S.E.2d 721 (1994)(noting that plaintiff alleged spoliation of evidence in his amended complaint); Taylor v. Ford Motor Co., 185 W. Va.. 518, 408 S.E.2d 270



(1991)(refusing to determine validity of cause of action for spoliation of evidence). *We again decline to resolve the validity of such a cause of action because we find the circuit court properly dismissed the plaintiff's spoliation of evidence claim as untimely filed.*

Id. at 664, 478 S.E.2d at 117. [Emphasis supplied and footnotes omitted].

In footnote thirty-one of Harrison, the Court expressly recognized that there is a split of authority throughout the country on whether spoliation of evidence is a valid cause of action:

Some jurisdictions recognize a cause of action for spoliation of evidence, see, e.g., Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831 (D. Kan. 1992); Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. Dist. Ct. App. 1990), rev. denied, 598 So. 2d 76 (Fla. 1991), while other jurisdictions refuse to acknowledge such a claim, see, e.g., Murray v. Farmers Ins. Co., 118 Idaho 224, 796 P.2d 101 (1990); Panich v. Iron Wood Prod. Corp., 179 Mich. App. 136, 445 N.W.2d 795 (1989); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 (Minn. 1990).

Id. at 664 n. 31, 478 S.E.2d at 117. See also Moore v. United States, 864 F. Supp. 163 (D. Colo. 1994)(not recognizing tort of intentional spoliation of evidence under Colorado law); Weigl v. Quincy Specialities Co., 158 Misc. 2d 753, 601 N.Y.S.2d 774 (N.Y. Super. Ct. 1993)(refusing to recognize tort of intentional spoliation of evidence); 5636 Alpha Road v. NCNB Texas National Bank, 879 F. Supp. 655

(N.D. Tex. 1995)(not recognizing tort of intentional spoliation of evidence under Texas law); Brewer v. Dowling, 862 S.W.2d 156 (Tex. App. 1993)(not recognizing tort of intentional spoliation of evidence).

**B. VIRGINIA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL OR NEGLIGENT SPOILIATION OF EVIDENCE.**

Unlike West Virginia, Virginia has no reported cases referring to a cause of action for spoliation of evidence. Moreover, the only opinions by the Supreme Court of Virginia referring to spoliation applied an evidentiary standard that would indicate that recognition of a cause of action would be unlikely. In Jones v. Lamm, 193 Va.. 506, 507, 69 S.E.2d 430, 431 (1952), the plaintiff was injured when he stepped through a board in the bed of a wagon while employed as a laborer on the defendants' farm. Following the accident, the wagon was destroyed by the defendants. Id. at 510, 69 S.E.2d at 432. The plaintiff further alleged that such destruction occurred after his claim had been placed in the hands of an attorney. Id. Despite this, the Supreme Court of Appeals of Virginia rejected the plaintiff's assertion that destruction of the bed was proof of negligence:

Assuming that appellee's suspicion is correct, the destruction of this evidence would have been reprehensible but it would not be proof of primary negligence. We are assuming that the accident occurred as outlined by the appellee.

Id. at 510-511, 69 S.E.2d at 432-33. In Robey v. Richmond Coca-Cola Bottling Works, Inc., 192 Va. 192, 193, 64 S.E.2d 723, 724 (1951), the plaintiff was injured when the bottom of a pasteboard carton broke and bottles fell to the pavement and burst. Following the accident, the carton was discarded by one of the defendants. Id. at 195, 64 S.E.2d at 725. Affirming a directed verdict for the defendants, the Supreme Court of Appeals of Virginia stated:

Neither is the present plaintiff's case strengthened by the failure of the defendant to preserve and produce at the trial the damaged carton. At best, an inspection of the carton would have added nothing to the verbal testimony adduced by the plaintiff that it was worn and damaged. It would have thrown no additional light on how or when the damage occurred.

Id. at 199, 64 S.E.2d at 727. Finally, in Norfolk & Western Ry. Co. v. Sonney, 236 Va. 482, 374 S.E.2d 71 (1988), an injured railroad employee had instituted a FELA action against his employer. The ladder that the employee alleged had caused his injuries had not been preserved by the employer, and the presiding judge commented on this at trial. Id. at 484-85, 374 S.E.2d at 72-73. Holding that these comments constituted reversible error, the Supreme Court of Virginia stated:

In the present case, the railroad timely moved for a mistrial. The trial court not only denied the motion for a mistrial but made no effort whatever to attempt to correct the obvious damage done by its patently improper comment that the railroad had destroyed the evidence.

Id. at 486, 374 S.E.2d at 73.

- C. IT IS UNLIKELY THAT EITHER WEST VIRGINIA OR VIRGINIA WOULD RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL OR NEGLIGENT SPOILIATION OF EVIDENCE BY AN EMPLOYER WHEN AN EMPLOYEE IS INJURED DURING THE COURSE OF HIS OR HER EMPLOYMENT AND INSTITUTES A CAUSE OF ACTION FOR PRODUCT LIABILITY AGAINST THE MANUFACTURER AND SELLER OF THE INSTRUMENTALITY WHICH ALLEGEDLY CAUSED HIS OR HER WORKPLACE INJURIES AND WHICH IS SUBSEQUENTLY DESTROYED OR DISCARDED BY THE EMPLOYER.

The defendant believes there are several reasons why it is unlikely that either West Virginia or Virginia would recognize a cause of action for intentional or negligent spoliation of evidence under the circumstances of this case.

First, the Supreme Court of Virginia has never recognized a cause of action for spoliation of evidence and the Supreme Court of Appeals of West Virginia has twice declined to recognize a cause of action for spoliation of evidence when presented with the opportunity. See Harrison, supra at 664, 478 S.E.2d at 117; Taylor, supra at 519 n. 2, 408 S.E.2d at 271. In Taylor, in particular, where the plaintiffs sued an insurance company claiming that its destruction of a truck significantly reduced the value of their product liability action against the manufacturer and seller, the circumstances were remarkably similar to those in the

instant case. Yet, the Court stated, "In essence, the Taylors were suing Erie for the tort of intentional and negligent spoliation of evidence. *This cause of action is of relatively recent vintage . . . . We express no view on the merits of this cause of action.*" Id. [Emphasis supplied].

Second, as likely would the Supreme Court of Virginia, the Supreme Court of Appeals of West Virginia noted in Harrison that any cause for spoliation of evidence would be contingent upon the existence of a duty on the part of the defendant to preserve the evidence. As it stated in footnote thirty-two:

Because we have not decided the viability of a spoliation of evidence claim in West Virginia, we similarly decline to determine whether the defendant Raleigh General Hospital had a duty to preserve Ms. Harrison's and Megan's medical records or whether; if such duty exists, the hospital breached this duty.

197 W. Va.. at 664 n. 32, 478 S.E.2d at 117. In the plaintiff's complaint in this action, he asserts that a "fiduciary duty" was created between himself and the defendant because of the defendant's right of subrogation against any recovery in the product liability action. This, however, does not comport with the definition of fiduciary relationship recognized in West Virginia. In State ex rel. Kitzmiller v. Henning, 190 W. Va.. 142, 144, 437 S.E.2d 452, 454 (1993), for example, the Court stated, "This Court has recognized that a fiduciary relationship arises:

'[W]henEVER a trust, continuous or temporary, is specially reposed in the skill or integrity of another, or the property or pecuniary interests, in whole or in part, or the bodily custody, of one person, is placed in the charge of another.' McKinley v. Lynch, 58 W. Va.. 44, 57, 51 S.E. 4, 9 (1905)." See also Koontz v. Long, 181 W. Va.. 800, 803. 384 S.E.2d 837, 840 (1989). Neither does it comport with the definition of agency or fiduciary relationship recognized in Virginia. In Collins v. Commonwealth, 226 Va.. 223, 231, 307 S.E.2d 884, 889 (1983), for example, the Supreme Court of Virginia stated, "We have approved the definition of agency as a consensual fiduciary relationship 'which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' Murphy v. Holiday Inns, Inc., 216 Va.. 490, 492, 219 S.E.2d 874, 876 (1975) (quoting Restatement (Second) of Agency § 1 (1958))." Similarly, in State Farm Mut. Auto. Ins. Co. v. Weisman, 247 Va.. 199, 441 S.E.2d 16 (1994), the Supreme Court of Virginia stated:

Agency is defined as "a fiduciary relationship resulting from one person's manifestation of consent to another person that the other shall act on his behalf and subject to his control, and the other person's manifestation of consent so to act." Reistroffer v. Person, 247 Va.. 45, 47, 439 S.E.2d 376, 378 (1994); accord Allen v. Lindstrom, 237 Va.. 489, 496, 379 S.E.2d 450, 454, cert. denied, 493 U.S. 849, 110 S.Ct. 145, 107 L.Ed.2d 104 (1989). An agency relationship is never presumed; to the contrary, the law presumes that a person is acting for

himself and not as another's agent. Allen, 237 Va.. at 496, 379 S.E.2d at 454. Moreover, the party alleging an agency relationship bears the burden of proving it. Id. Further, whether an agency relationship exists is a question to be resolved by the fact finder unless the existence of the relationship is shown by undisputed facts or by unambiguous written documents. Reistroffer, 247 Va.. at 47, 439 S.E.2d at 378; Drake v. Livesay, 231 Va.. 117, 121, 341 S.E.2d 186, 189 (1986).

247 Va.. at 203, 441 S.E.2d at 19. The plaintiff in this action attempts to rely upon the defendant's right of subrogation against the proceeds of any recovery in the products liability action. "Subrogation," however, is defined as, "the substitution of one person in place of another with reference to a lawful claim or right." 73 Am. Jur. 2d Subrogation § 1, at 598 (1974). Although the fact that the defendant had certain rights of subrogation with respect to any sums recovered by the plaintiff in his products liability action might impose certain obligations upon the *plaintiff* with respect to those rights, such would not impose any fiduciary duty upon the *defendant*. Under West Virginia law of fiduciary relationships, the plaintiff placed no "trust" in the "skill or integrity" of the defendant, nor did the plaintiff place any "property or pecuniary interest" in the charge of the defendant. Under Virginia law of agency or fiduciary relationships, the plaintiff manifested no consent to the defendant that it was authorized to on his behalf and subject to his control, and the defendant certainly never manifested any consent to so act. Accordingly, the

defendant owned no fiduciary duty to the plaintiff nor had any agency relationship with the plaintiff which would support the cause of action asserted under either West Virginia or Virginia law.

Third, although “[c]ourts have recognized a common-law cause of action in tort for intentional interference with prospective civil actions by spoliation of evidence where the defendant had agreed with the plaintiff’s counsel that it would safeguard and preserve certain evidence for inspection and use by the plaintiff, and thereafter destroyed the evidence . . . ,” it has also been noted that, “Another court decided that it would not recognize a common-law tort action for intentional interference with a prospective civil action by spoliation of evidence where the evidence had allegedly been intentionally destroyed by a third person who was not a party to the action in which the evidence would have been used.” Thomas G. Fischer, Intentional Spoliation of Evidence. Interfering with Prospective Civil Action, as Actionable, 70 A.L.R.4th 984, § 2, at 986 (1989). In Syllabus Point 3 of Koplin v. Rosel Well Perforators, Inc., 241 Kan. 206, 734 P.2d 1177 (1987), the case referred to in this annotation, the Kansas Supreme Court held, “In response to a certified question from the federal district court asking whether Kansas would recognize a common law tort action for intentional interference with a prospective civil action by spoliation of evidence, it is held: The answer is in the negative under



the facts of this case." The circumstances in Koplin were quite similar to those presented in this case, and the defendant submits warrant a similar decision by this Court:

This case arises out of injuries suffered by the plaintiff employee in an on-the-job accident. The accident occurred when a piece of equipment called a T-clamp failed due to an alleged defect. The T-clamp was manufactured and sold to the defendant employer Rosel Well Perforators, Inc., by the defendants Gearhart Industries, Inc., Pengo Industries and Geosource, Inc. Plaintiff alleges that immediately after the accident, an agent of Rosel Well Perforators, Inc., intentionally destroyed the T-clamp so that plaintiff would no longer have access to it for purposes of potential litigation.

Plaintiff recovered workmen's compensation benefits for his injuries. He brings this action against Gearhart Industries, Inc., Pengo Industries and Geosource, Inc., on product liability and breach of warranty claims. He also makes claims against his employer, Rosel Well Perforators, Inc., for 'interference with a prospective civil action by spoliation of evidence.' Plaintiff claims that, as a direct result of Rosel Well Perforators, Inc.'s, destruction of the T-clamp, plaintiff may be unable to produce and/or show how the T-clamp failed and caused his injuries. Thus, plaintiff contends that he has lost a valuable expectancy in recovering against Gearhart Industries, Inc., Pengo Industries and Geosource, Inc., on his product liability and breach of warranty claims.

241 Kan. at 207, 734 P.2d at 1178-79. Likewise, as in this case, these facts were presented to the court in the context of a motion to dismiss, and the court accepted

as true the assertions made in the complaint. Id. at 208, 734 P.2d at 1179. The court began by discussing decisions by other courts rejecting claims of spoliation of evidence on the part of employers where their employees are injured and may have causes of action against third parties:

In Coley v. Ogden Mem. Hosp., 107 A.D.2d 67, 485 N.Y.S.2d 876 (1985), plaintiff sustained injuries in the course of his employment when he fell from a ladder which collapsed. The ladder was discarded. Plaintiff sued his employer, alleging that the failure to preserve the ladder precluded discovery of the identity of its manufacturer and thereby foreclosed plaintiff's potential product liability action against third parties. The court affirmed the trial court's dismissal of plaintiff's claim, stating:

"We are unable to identify any duty owed by defendant to plaintiff with regard to the safekeeping of the ladder. The record reveals no promise by defendant or its employees to inspect or safeguard the ladder for plaintiff's benefit...." 107 A.D.2d at 69, 485 N.Y.S.2d 876.

241 Kan. at 209, 734 P.2d at 1180. The court further discussed another case involving a claim of spoliation of evidence by an employer:

Similarly in Parker v. Thyssen Min. Const. Inc., 428 So.2d 615 (Ala.1983), the Alabama Supreme Court found no independent common-law duty on the part of an employer to preserve evidence for an employee's potential civil action against third parties. In Parker, plaintiff was injured on the job when a concrete wall collapsed. Following the accident, plaintiff's employer

collected samples of the concrete. Plaintiff later brought suit against his employer, alleging that the employer's negligent action in collecting the samples and failing to preserve them wrongfully interfered with and impaired his ability to pursue claims against the manufacturer and suppliers of the cement. The Alabama court affirmed summary judgment against plaintiff.

241 Kan. at 210, 734 P.2d at 1180. The court distinguished Smith v. Superior Court, 151 Cal.App.3d 491, 198 Cal.Rptr. 829 (1984) and Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986), in which courts had recognized a cause of action for spoliation of evidence:

Both Smith and Hazen are readily distinguishable from the case before us. In Smith, Abbott Ford had agreed with Smith's counsel that it would safeguard and preserve the automotive parts for inspection and use by the plaintiff, thereby creating a duty to do so. No such agreement exists in the case at bar. In Hazen, the destruction of an allegedly exculpatory tape would presumably make conviction easier for the prosecution. *In both cases the evidence was destroyed by the adverse party in pending litigation to the direct benefit of such party. That is not the situation with which we are faced. To the contrary, it would be to the disadvantage of the appellee herein to destroy any evidence because as the employer of appellant it would have been subrogated to any recovery Koplin might have obtained to the extent of the workers' compensation payments made to Koplin. K.S.A. 44-504. Additionally, appellee here was not the adverse party in any action pending or contemplated by appellant.*

241 Kan. at 212, 734 P.2d at 1181. [Emphasis supplied]. Of course, this is precisely the point made by the defendant in this case. It was not a party to any

pending or impending litigation involving the plaintiff and the hose. The destruction of the hose would in no way benefit the defendant, and would actually prejudice its subrogation rights. It had no duty and made no representations, moreover, that it would preserve the hose.

A number of other federal courts in situations similar to those presented in the instant case have refused to recognize a cause of action for spoliation of evidence. In 5636 Alpha Road, *supra* at 665, a federal district court awarded summary judgment on a negligent spoliation claim to the defendant, which the plaintiff charged with the loss or destruction of certain documents, noting that:

The best Alpha can do to support a claim for negligent spoliation is to rely on a Texas case that discussed the theory but neither accepted nor rejected it. See Diehl v. Rocky Mountain Communications, Inc., 818 S.W.2d 183, 184 (Tex. App. 1991, writ denied). This hardly supports the proposition that Texas recognizes such a claim. *This federal court will not make new state law.* Accordingly, the claim is dismissed as a cause of action.

[Emphasis supplied and footnote omitted]. Similarly, in Moore v. United States, *supra* at 165, where the plaintiffs asserted spoliation of evidence after the ATVs which allegedly caused their injuries had been sold by the defendants at an auction, the court stated:

Since Colorado courts have given no indication that Colorado recognizes such a claim, it would be reasonable

to "predict" that the state's highest court would also choose not to recognize the claim in this case.

Furthermore, federal courts exercising diversity jurisdiction have traditionally applied existing state law and have refrained from creating *new* state law where the state's highest court has not done so. See City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 122-23 (3rd Cir. 1993). Recognizing Plaintiffs' claim for spoliation of evidence in this case would create new law for Colorado.

[Emphasis in original and footnote omitted].<sup>2</sup> Finally, in Wilson v. Beloit Corp., 921 F.2d 765 (8th Cir. 1990), the Eighth Circuit affirmed the dismissal of a claim of spoliation of evidence in a case with circumstances similar to those presented in this case. In Wilson, the plaintiff was injured during the course of his employment

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<sup>2</sup> The court in Moore noted, as has the Supreme Court of Virginia, that:

Colorado law recognizes alleged "spoliation of evidence" as a rule of evidence, rather than a claim for relief. It raises a presumption that the evidence would have been unfavorable to the party allegedly responsible for destruction or suppression of evidence. The presumption is rebuttable and constitutes a question of fact. See Richardson v. Richardson, 124 Colo. 240, 236 P.2d 121, 127 (1951); see also Schmidt v. Ford Motor Co., 112 F.R.D. 216, 217-21 (D. Colo. 1986) wherein I discussed other methods of dealing with spoliation and misconduct by counsel.

864 F. Supp. at 163. See also 29 Am. Jur. 2d Evidence § 175, at 220 (1967) ("It is generally held that where a party . . . destroys or spoils evidence, a presumption or inference arises that such evidence . . . would have been unfavorable to him."). [Footnotes omitted].

by the defendant. Id. at 766. Later, he filed an action against the manufacturer of the machine which allegedly caused his injuries. Id. When he discovered that parts of the machine involved in the accident were missing, he then sued his employer for intentional or negligent spoliation of evidence. Id. Affirming the district court's award of summary judgment to the employer under the law of Arkansas, the Eighth Circuit stated:

The district court . . . found that Arkansas tort law did not impose a duty to preserve evidence. The court was unable to find an Arkansas case recognizing a common law tort for intentional interference with a prospective civil action by spoliation of evidence. The Wilsons concede that there are no binding Arkansas decisions recognizing such a tort, but contend that because other jurisdictions have recognized such a tort, summary judgment for IPC is improper. This *non sequitur* ignores one of the two basic criteria for summary disposition, namely, that summary judgment is proper where the moving party is entitled to judgment as a matter of law. See, e.g., Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984). Here, the district court held that IPC was entitled to judgment as a matter of Arkansas law, and we defer to this state-law ruling.

Id. at 767.

In addition to these federal decisions, there are a number of state cases refusing to recognize a cause of action for spoliation of evidence under circumstances similar to those presented in this case. In Weigl v. Quincy Specialities Co., *supra*

at 754-55, 601 N.Y.S.2d at \_\_\_, for example, a university employee who had sued the manufacturer of a laboratory coat that had caught fire, also sued the university under theories of intentional and negligent spoliation for its failure to produce the coat. In rejecting the employee's claim, the court stated:

Spoliation of evidence appears to have been recognized as an actionable tort in three states, Alaska, Florida and California, (see, e.g., Hazen v. Municipality of Anchorage, 718 P.2d 456 [Alaska 1986]; Miller v. Allstate Insurance Co., 573 So.2d 24 [Fla.App. 3 Dist.1990]; and Bondu v. Gurvich, 473 So.2d 1307 [Fla.App. 3rd Dist.1984], rev. denied, 484 So.2d 7 [Fla.1986]; Smith v. Superior Court, 151 Cal.App.3d 491, 198 Cal.Rptr. 829 [Cal.App. 2 Dist.1984] ), while the majority of jurisdictions refuse to recognize such a cause of action. (see, e.g., Wilson v. Beloit Corp., 921 F.2d 765 [8th Cir.1990]; Edwards v. Louisville Ladder Co., 796 F.Supp. 966 [W.D.La.1992]; Federated Mutual Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 [Minn.1990]; Koplin v. Rosel Well Perforators, Inc., 241 Kan. 206, 734 P.2d 1177 [Kan.1987]; Murray v. Farmers Ins. Co., 118 Idaho 224, 796 P.2d 101 [Idaho 1990]; La Raia v. Superior Court, 150 Ariz. 118, 722 P.2d 286 [Ariz.1986]; Tomas v. Nationwide Mutual Ins. Co., 79 Ohio App.3d 624, 607 N.E.2d 944 [Ohio Ct.App.1992]; Panich v. Iron Wood Products Corp., 179 Mich.App. 136, 445 N.W.2d 795 [Mich.Ct.App.1989]; Murphy v. Target Products, 580 N.E.2d 687 [Ind.App.1991]; Gardner v. Blackston, 185 Ga.App. 754, 365 S.E.2d 545 [Ga.Ct.App.1988]; Petrik v. Monarch Printing Corp., 150 Ill.App.3d 248, 103 Ill.Dec. 774, 501 N.E.2d 1312 [Ill.App. 1 Dist.1986]; Miller v. Montgomery County, 64 Md.App. 202, 494 A.2d 761 [Md.Ct.Spec.Ap.1985] ).

The Courts of New York follow the majority view and do not recognize spoliation of evidence as a cognizable tort action. A review of the relevant case law in this jurisdiction has disclosed no case precedent which recognized spoliation as a valid tort action. Rather in Pharr v. Cortese, 147 Misc.2d 1078, 559 N.Y.S.2d 780 (Sup.Ct.N.Y.Co.1990) the Court refused to sustain intentional spoliation of records as a viable cause of action under the factual evidence of that case.

Id. at 776. 601 N.Y.S.2d at \_\_\_\_\_. Similarly, in Panich v. Iron Wood Products Corp., supra at 138, 445 N.W.2d at 796, a worker who had intended to institute a products liability action against the manufacturer of a electrical box for injuries sustained when it exploded, brought an action for negligence and intentional interference with economic advantage against his employer which had destroyed the box. As in the present case, the plaintiff in Panich claimed that the state workers' compensation statute somehow imposed upon his employer the obligation to preserve the evidence. Rejecting this argument and affirming summary disposition in favor of the employer, the Court of Appeals of Michigan stated:

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall forthwith be paid to the employee or his dependents or personal representative



and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

A cardinal rule of statutory construction is that the words and phrases in a statute are to be given their plain and ordinary meaning. Van Dam v. Grand Rapids Civil Service Bd., 162 Mich.App. 135, 138, 412 N.W.2d 260 (1987). Common sense should be employed when construing a statute. People v. Meadows, 175 Mich.App. 355, 437 N.W.2d 405 (1989).

Plaintiff argues that the WDCA expressly or impliedly imposes a duty upon an employer to preserve evidence for the benefit of its employees' third-party claims. We find no language in the statutory provision supportive of plaintiff's position and note that plaintiff's strained and expansive construction is not buttressed by any legislative history or case law.

The role of the judiciary is to construe statutes as intended by the Legislature, not to rewrite them. No fair reading of the statute lends support to plaintiff's position that the Legislature intended to impose such a duty on employers. Although it is certainly in the employer's interest to preserve evidence, since an employer's workers' compensation lien will be reimbursed by a third-party recovery, we hold that the statute does not impose such a duty on employers.

Id. at 141-42, 445 N.W.2d at 798. Moreover, as is the case herein, the court further recognized, "[I]n the instant case it was not in the defendant's interest to destroy the remains of the electrical box since the same workers' compensation provision upon which the plaintiff relies grants the employer an economic interest

as to third-party tort recoveries.” Id. at 142, 445 N.W.2d at 799.

#### IV. CONCLUSION

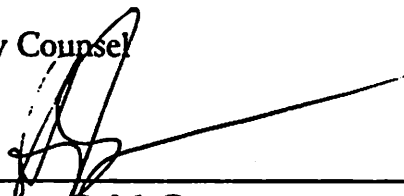
The plaintiff's complaint clearly fails to state a cause of action upon which relief can be granted. Neither Virginia nor West Virginia has recognized a cause of action for intentional or negligent spoliation of evidence. Several of the decisions previously discussed indicate that it is inappropriate for a federal court to recognize a cause of action in a jurisdiction where the State's highest court has either failed to refused to do so. Moreover, even if it might be appropriate to engage in speculation regarding whether the courts of last resort in Virginia or West Virginia might recognize this cause of action, both their prior decisions and the decisions of the overwhelming majority of courts in other jurisdictions indicate that they would not recognize such cause of action under the circumstances of this case. Where there have been representations regarding the preservation of evidence as in a few of the cases recognizing a cause of action, a fiduciary or agency relationship might be created which could possibly support a claim. The plaintiff's complaint, however, makes no such allegations. In addition, as several courts have noted, his argument that the defendant's right to subrogation creates a fiduciary relationship stands the concept of subrogation on its head. The defendant, which would have been subrogated to any recovery by the plaintiff, had every economic incentive to

preserve the hose.

Wherefore, the defendant prays that this Court grant its motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), and award such other relief as it deems appropriate.

CONSOLIDATION COAL COMPANY

By Counsel

A handwritten signature in black ink, appearing to be 'S. McGowan', is written over a horizontal line.

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IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

KENNETH AUSTIN,

Plaintiff

vs.)

Civil Action No. 5:97-0520

CONSOLIDATION COAL COMPANY,

Defendant.

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that I served the foregoing "Motion to Dismiss" and "Memorandum of Law in Support of Defendant's Motion to Dismiss" on this 25th day of August, 1997, upon counsel of record in the above-referenced proceeding, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Donald T. Caruth, Esq.  
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P.O. Box 529  
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Grundy, VA. 24614

A handwritten signature in black ink, appearing to read "Ancil G. Ramey", is written over a horizontal line.

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

**FILED**

OCT 31 1997

SAMUEL L. KAY, CLERK  
U. S. District & Bankruptcy Courts  
Southern District of West Virginia

KENNETH WAYNE AUSTIN,

Plaintiff

v.

CONSOLIDATION COAL COMPANY,

Defendant

Civil Action No. 5:97-0520

**RESPONSE TO DEFENDANT'S MOTION TO DISMISS**

Comes now the plaintiff, Kenneth Wayne Austin, by counsel, and hereby moves this Court to deny the defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) because both Virginia and West Virginia may recognize a cause of action for spoliation of evidence based upon the facts and circumstances of this case as more fully discussed in plaintiff's Memorandum of Law filed herewith and specifically incorporated by reference herein.

KENNETH AUSTIN,  
By counsel.



Donald T. Caruth  
Brewster, Morhous & Cameron  
Post Office Box 529  
Bluefield, West Virginia 24701-0529  
(304) 325-9177

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SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

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**MEMORANDUM OF LAW**

**I. INTRODUCTION**

Kenneth Wayne Austin ("Austin"), the plaintiff herein, agrees that neither West Virginia nor Virginia has specifically held that a cause of action for spoliation of evidence exists in either jurisdiction. Although the West Virginia Supreme Court reviewed several cases involving allegations of spoliation of evidence, the Court did not reach the issue involving the validity of such a cause of action because the cases were decided upon unrelated or collateral matters. The Virginia Supreme Court, however, has not had the opportunity to address the issue in any case. Austin respectfully submits that both West Virginia and Virginia are likely to recognize a cause of action for the spoliation of evidence based upon the facts and circumstances of this case.

**II. STATEMENT OF FACTS**

Austin sustained severe injuries as a consequence of an accident that occurred during the course of his employment with Consolidation Coal Company

("Consolidation"), the defendant herein. Although Virginia law statutorily bars a cause of action against an employer for injuries sustained during the course of the employment, Austin clearly has a cause of action against the manufacturer and distributor of the defective fire hose which caused his injuries. Austin has instituted a civil action against the manufacturer of the hose, National Fire Hose Corporation, and the distributor of the hose, Fairmont Supply Corporation ("Fairmont Supply"), which is now pending in this Court in Civil Action No. 5:96-2044 (hereinafter referred to as "third party action") Despite numerous requests (See Exhibit A), Consolidation failed and refused to produce the defective fire hose in question for Austin's investigation of his third party claim. This is despite the fact that Consolidation had only a short time prior to such requests provided the entire hose to Fairmont Supply for testing (Exhibit B). Austin received information during the course of his investigation against the third party manufacturer that the distributor of the defective hose, Fairmont Supply, was either a subsidiary or affiliate corporation of Consolidation.

Austin initiated proceedings in state court in an effort to obtain the defective fire hose and fully investigate his third party claim against the manufacturer. (See Petition and Bill of Complaint filed in the Circuit Court of Buchanan County, Virginia attached hereto and incorporated by reference herein collectively as "Exhibit C"). During those proceedings, the trial judge admonished Consolidation to preserve and protect the defective fire hose for the benefit of

Austin.<sup>1</sup> Consolidation never objected, contested, or otherwise disagreed with that directive. At the present time, however, Consolidation does not dispute the allegation that the hose no longer exists. Clearly, Consolidation had no incentive whatsoever to preserve and protect the defective fire hose due to its relationship with either or both the seller and manufacturer. In fact, Consolidation had an incentive to destroy the defective hose to prevent the successful prosecution of a third party claim against its affiliated company by Austin.

Although Austin never had the opportunity to inspect and examine the hose, Fairmont Supply was provided the entire hose and National Fire Hose Corporation was given samples of undamaged portions of the hose for independent review, analysis and inspection. However, neither Consolidation, Fairmont Supply, or National Fire Hose Corporation appear to have tested the defective portion of the hose or that portion of the hose which ruptured and caused Austin's severe injuries. Consolidation obviously preserved evidence favorable to its case and assisted in the development of expert opinions from that evidence while destroying

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<sup>1</sup> At the hearing on May 23, 1996 in Case No. 316-95, the Court stated:

Well, I'm going to.. The Order under the law case should contain a statement that no parties are to do anything as far as to effect [sic] the integrity of the hose that's the subject of this petition, during the pendency of this matter.

.....I assume that's not going to happen, but as an admonition, I guess, to all concerned parties, that should be in the order.

Hearing Transcript dated May 23, 1996, p. 24, a copy of which is attached hereto as "Exhibit B."



the defective portion of the hose. At this same time Consolidation knew or had notice of Austin's probable litigation and was under a judicial directive to preserve the integrity of the hose.<sup>2</sup> Consolidation deliberately and intentionally destroyed the hose to inhibit Austin's ability to pursue his third party claim against Consolidation's affiliate corporation.

### III. DISCUSSION OF LAW

Several states recognize a cause of action in tort for the failure to preserve or destruction of evidence, commonly know as spoliation of evidence cases. The elements are: 1) pending or probable litigation involving the plaintiff, 2) knowledge on part of the defendant that litigation exists or is probable, 3) willful destruction of evidence by the defendant designed to disrupt plaintiff's case, 4) disruption of plaintiff's case, and 5) damages proximately caused by the defendant's acts. See Smith v. Howard Johnson Co., 67 Ohio St. 3d 28, 615 N. E. 2d 1037 (1993). Austin respectfully represents to this Court that the equities of his case entitle him to a valid cause of action for spoliation of evidence.

The California Court of Appeals first recognized a tort for the intentional destruction of evidence in the case of Smith v. Superior Court, 198 Cal. Rptr. 830 (Ct. App. 1984). The Court of Appeals recognized that the plaintiff's right to bring a personal injury law suit was a legally protected interest and that her interest was invaded by the actions of the defendant who intentionally spoiled the evidence in question. The Court further held that the intentional spoliation of

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<sup>2</sup> See N. 1, ante.

evidence caused an unreasonable interference with the interest of others or the plaintiff's interest in having an opportunity to win her suit. *Id.* at 837. The Court focused upon the plaintiff's probable expectations from the personal injury suit which were significant enough to warrant protection from interference. More importantly, the Court recited the familiar legal maxim that "for every wrong there is a remedy." *Id.* at 832.

Some courts have also recognized negligent spoliation of evidence or a legally recognized duty to protect such evidence from loss or destruction. The elements of negligent spoliation are similar to those of a typical negligence action: duty, breach, causation, and damages. See Continental Ins. Co. v. Harman, 576 So. 2d 313, 315 (Fla. Dist. Ct. App. 1990).

Consolidation cited numerous cases in its Memorandum of Law supporting its Motion to Dismiss where the courts failed to recognize a separate cause of action for the spoliation of evidence.<sup>3</sup> Consolidation, however, failed to mention that at least eight states have recognized a tort claim for the spoliation of evidence. Those states are: Alaska, Florida, Michigan, Mississippi, New Jersey, North Carolina, Ohio, and Oklahoma.<sup>4</sup> Each state apparently articulated its own

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<sup>3</sup> Wilson, *Recent Decision, the Alabama Supreme Court Side Steps a Definitive Ruling in Christian v. Kenneth Chandler Construction Co.: Should Alabama Adopt the Independent Tort of Spoliation*, 47 Ala. L. Rev. 971 (1996).

<sup>4</sup> See Hazen v. Municipality of Anchorage, 718 P. 2d 456, 464 (Alaska 1986); Bondu v. Gurvich, 473 So. 2d 1307, 1313 (Fla. Dist. Ct. App. 1984); Jackovich v. General Adjustment Bureau, Inc., 326 N.W. 2d 458, 466 (Mich. Ct. App. 1982); DeLaughter v. Lawrence County Hosp., 601 So. 2d 818, 821 (Miss. 1992); Viviano v. CBS, Inc., 597 A. 2d 543, 549-50 (N.J. Super. Ct. App. Div. 1991); Henry v. Deen, 310

decision or reason to adopt the tort of spoliation. The Courts in these state decisions noted that there had been a serious interference with a litigant's due process rights, and that no adequate remedy existed to correct the wrongdoing.<sup>5</sup> Austin respectfully suggests that the states that have failed to recognize such a cause of action have based their decisions upon the availability of other causes of action or avenues of relief. In contrast, the courts which have acknowledged the cause of action for the spoliation of evidence have recognized under the factual situations presented that no other remedy or relief was available to the prospective plaintiffs.

#### A. West Virginia Law on the Spoliation of Evidence

Consolidation relies upon the case of Harrison v. Davis, 197 W. Va. 651, 478 S. E. 2d 104 (1996) which purportedly affirmed the dismissal of an action for spoliation of evidence. The Harrison case involved a wrongful death action which alleged, in part, spoliation of evidence. The West Virginia Supreme Court affirmed the trial court's dismissal of the spoliation of evidence claim based upon untimeliness and the two year statute of limitations period for the filing of a wrongful death claim and not the invalidity of a cause of action for spoliation of evidence. In fact, the Court in Harrison acknowledged that it declined to resolve the validity of such a cause of action because the trial court properly dismissed the

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S.E. 2d 326, 336 (N. C. 1984); Smith v. Howard Johnson Co., 615 N.E. 2d 1037, 1038 (Ohio 1993); and Barker v. Bledsoe, 85 F.R.D. 545, 547-48 (W.D. Okla. 1979).

<sup>5</sup> Id. at Page 978.

spoilation of evidence claim as untimely filed. Id. 197 W. Va. 651, 664, 478 S. E. 2d 104, 117.

Austin respectfully suggests that the West Virginia Supreme Court has not specifically recognized the tort of spoilation of evidence simply because the opportunity has never arisen. But the Court implied in Harrison that such a cause of action might exist in West Virginia. Moreover, Consolidation cannot state with any degree of certainty that the West Virginia Supreme Court would deny such a cause of action since West Virginia recognizes the legal maxim that for every wrong, there is a remedy.

#### **B. Virginia Law Regarding Spoilation of Evidence**

Austin agrees that there are no reported cases referring to a cause of action for spoilation of evidence in Virginia. Austin, however, disagrees with Consolidation's assertion that opinions from the Supreme Court of Virginia referring to spoilation applied an evidentiary standard that would indicate that recognition of the cause of action would be unlikely. In fact, Austin respectfully suggests that certain cases indicate that Virginia would recognize a cause of action for the spoilation of evidence.

In Gentry v. Toyota Motor Corporation, 252 Va. 30, 471 S.E. 2d 485 (1996), the Virginia Supreme Court reversed the trial court's dismissal for spoilation of evidence. In that case, the plaintiff was rendered a paraplegic as a result of an automobile accident involving a Toyota pickup. The plaintiff, Gentry, alleged that the truck's sudden acceleration caused the accident. The plaintiff's expert, without

authorization or permission from anyone including the plaintiff, removed the temperature control cable impinged on the accelerator by using a hacksaw on the truck's instrument panel. He also apparently removed the accelerator pedal rod. Id.

The defendant, Toyota, moved for dismissal of the case claiming that the expert had so damaged the truck during the course of his inspection that Toyota was deprived of its right to inspect and test the truck for any evidence of defect and that its ability to defend the action was severely prejudiced. The Supreme Court reversed the dismissal on the grounds that Toyota was not prejudiced by the expert's action because plaintiff sought to recover on the theory that the carburetor had caused the accident and not the accelerator. In fact, Toyota's own expert testified that his inspection and opinion concerning the carburetor were not affected by the expert's actions. The Court's opinion and rationale clearly suggests that had the expert's action prejudiced Toyota, the Court would have held otherwise. The issue of whether prejudice has resulted from the spoliation would be equally relevant to an analysis of spoliation affecting a plaintiff's suit for damages.

The United States District Court for the Eastern District of Virginia in Anderson v. National R. R. Passenger Corp., 866 F. Supp. 937 (E.D. Va. 1994) recognized the Court's power to permit a "spoliation inference," i.e., that evidence destroyed by a party would have been unfavorable to the position of that party. Id. at 943 citing Schmid v. Milwaukee Electric Tool Corp., 13 F. 3d 76, 78 (3rd Cir. 1994); EEOC v. American Nat'l Bank, 652 F. 2d 1176, 1195 (4th Cir. 1981), cert. denied, 459 U.S. 923, 74 L. Ed. 2d 186, 103 S. Ct. 235 (1982). The Court further noted that the

inference stems from the "common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than a party in the same position who does not destroy the [evidence]." Id. citing Nation-wide Check Corp. v. Forest Hill Distributors, Inc., 692 F. 2d 214, 218 (1st Cir. 1982).

Virginia also recognizes the "missing witness" presumption. If a party, without explanation, fails to call an available witness who has knowledge of necessary and material facts, the Court may presume that the witness's testimony would have been unfavorable to the party who failed to call the witness. Stockton v. City of Charlottesville, 178 Va. 164, 16 S. E. 2d 376 (1941); Vann v. Harden, 187 Va. 555, 47 S. E. 2d 314 (1948); McGehee v. Perkins, 188 Va. 116, 49 S. E. 2d 304 (1948); American Health Ins. Corp v. Newcomb, 197 Va. 836, 91 S. E. 2d 447 (1956); Barner v. Whitehead, 204 Va. 634, 133 S. E. 2d 283 (1963); Barnette v. Dickens, 205 Va. 12, 135 S. E. 2d 109 (1964); Facchina v. Richardson, 213 Va. 440, 192 S. E. 2d 791 (1972); Neeley v. Johnson, 215 Va. 565, 211 S. E. 2d 100 (1975); Virginia Heart Inst., Ltd. v. Northside Elec. Corp., 221 Va. 1119, 277 S. E. 2d 216 (1981); Harper v. B & W Bandag Center, Inc., 226 Va. 469, 311 S. E. 2d 104 (1984); Faison v. Hudson, 243 Va. 397, 417 S. E. 2d 305 (1992). Austin respectfully suggests that the premise for the "missing witness" presumption is very similar to the theory of spoliation of evidence, and that Virginia would recognize the cause of action for spoliation. Clearly the missing witness or missing evidence type of presumption could not correct the prejudice to Austin in his third party action because Consolidation, which destroyed the

evidence, is not and cannot be made a party in that action. It can be presumed to be for the benefit of Fairmont Supply Company, Consolidation's affiliate company, that the evidence disappeared.

**C. West Virginia and Virginia are Likely to  
Recognize a Cause of Action for Intentional or Negligent  
Spoilation of Evidence Based Upon the Facts and Circumstances of this Case.**

In the context of products liability litigation under Virginia law, a plaintiff who cannot produce the item allegedly responsible for his injuries must present evidence tending to negate all reasonable alternative explanations of an accident. Logan v. Montgomery Ward, 216 Va. 425, 428, 219 S.E. 2d 685 (1975); Lemons v. Ryder Truck Rental, 906 F. Supp. 328, 332 (W. D. Va. 1995). Clearly, Austin can no longer produce the defective hose. Presumably the defendant manufacturer would most certainly require Austin to negate all reasonable alternative explanations for the explosion. Austin respectfully suggests that the burden to negate all reasonable alternative explanations would appear to be an insurmountable task in this case. For this reason, he clearly has no other alternative remedy available to him.

The manufacturer of the hose surely will require Austin to prove each and every element, including causation, to prevail in his third party products liability case. Due to the relationship between Consolidation and the seller/distributor, Consolidation had every reason to destroy the hose and inhibit Austin's case. Consolidation should not be allowed to cloak itself behind the claim that neither Virginia nor West Virginia has specifically recognized a cause of action

for the spoilation of evidence. Austin reminds the Court that Consolidation may have had knowledge at the time of the destruction of the hose that a cause of action for spoilation had not been specifically recognized in either Virginia or West Virginia. Consolidation could certainly have had sufficient knowledge and clearly had the motive to destroy the hose to protect its affiliate, Fairmont, with impunity in all respects. Curiously, the hose disappeared immediately after inspection by Fairmont Supply on June 8, 1995 (See Exhibit B). Consolidation should not be allowed to benefit from its intentional and deliberate act in disposing of or destroying the defective part of the hose.

Consolidation also contends that an agency or fiduciary relationship never existed it and between Austin. This claim overlooks the fact that Austin was an employee of Consolidation at the time of the accident. A master/servant relationship existed between Austin and Consolidation. Both federal and state law mandate numerous requirements and duties, particularly in the context of the coal mining industry, employers to their employees. For instance, various federal and state agencies require that employers provide their employees with safe working environments. The Mine Safety and Health Administration and the Division of Mines, Minerals, and Energy are the most prevalent federal and state agencies in charge of policing the environment of working coal miners and ensuring that employers promptly investigate and preserve evidence relating to serious injuries. Consolidation did in fact have a duty to preserve the hose.



Consolidation claims that a fiduciary relationship did not exist under West Virginia or Virginia law because of the lack of trust or skill placed in the charge of Consolidation or the fact that there was no consensual relationship between Austin and Consolidation. Austin represents unto this Court that the Virginia Workers Compensation Act ("Act") established such a consensual or fiduciary relationship as a matter of law. The Act provides inter alia:

**SUBROGATION OF EMPLOYER TO EMPLOYEE'S RIGHTS AGAINST THIRD PARTIES; EVIDENCE; RECOVERY; COMPROMISE.** A. A claim against an employer under this title for injury or death benefits shall operate as an assignment to the employer of any right to recover damages which the injured employee, his personal representative or other person may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce, in his own name or in the name of the injured employee or his personal representative, the legal liability of such other party. The amount of compensation paid by the employer or the amount of compensation to which the injured employee or his dependents are entitled shall not be admissible as evidence in any action brought to recover damages.

B. Any amount collected by the employer under the provisions of this section in excess of the amount paid by the employer or for which he is liable shall be held by the employer for the benefit of the injured employee, his personal representative, or other person entitled thereto, less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees as provided in § 65.2-311.

C. No compromise settlement shall be made by the employer in the exercise of such right of subrogation without the approval of the Commission and the injured employee or the personal representative or dependent of the deceased employee being first obtained. (Code 1950 §65-38; 1960, c. 89; 1968, c. 660, § 65.1-41; 1991, c. 355.)

Virginia Code § 65.2-309. The Act further provides:

**PROTECTION OF EMPLOYER WHEN EMPLOYEE SUES THIRD PARTY.** In any action by an employee, his personal representative or other person against any person other than the employer, the court shall, on petition or motion of the employer at any time prior to the verdict, ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses incurred by the employer under the provisions of this title and deduct therefrom a proportionate share of such amounts as are paid by the plaintiff for reasonable expenses and attorney's fees as provided in § 65.2-311; and, in event of judgment against such person other than the employer, the court shall in its order require that the judgment debtor pay such compensation and expenses of the employer, less said share of expenses and attorney's fees, so ascertained by the court out of the amount of the judgment, so far as sufficient, and the balance, if any, to the judgment creditor (Code 1950 § 65-39, c. 534; 1960, c. 89; 1968, c. 660; § 65.1-42; 1991, c. 305.)

Virginia Code § 65.2-310. The Act allows an employer to recover the payment of compensation benefits and medical expenses regardless of who initiates the action against the third party.

The Act operates as an assignment of right or rights by an employee to employer. Austin's assignment of rights by virtue of the Act created a relationship of trust between Consolidation and him. The Act also created a duty upon Consolidation and elevated it to a position of trust. In the case Bondu v. Gurvich, supra, the Court held that certain administrative regulations imposed a specific duty on a hospital to maintain and furnish records to a decedent's personal representative, and such regulations supported a cause of action for intentional spoliation of evidence. Id. at 1313. Consolidation breached its duty under the Act to

preserve and maintain the integrity of the hose for Austin's benefit inasmuch as any third party or tort claim could be expected to yield a far more significant recovery for his severe injuries than benefits paid to him by virtue of the Act. Stated differently, if Consolidation destroyed the hose to protect its affiliate, Fairmont Supply, which is a defendant in the third party products liability litigation, from enormous tort damages which far exceed his compensation benefits, then Consolidation derived a benefit from that destruction rather than a detriment and should be held accountable for spoilation of the evidence.

Consolidation concedes that some courts have recognized a cause of action for spoilation of evidence based upon an agreement to preserve certain evidence for inspection and use by the injured party. See Koplin v. Rosel Well Perforators, Inc., 241 Kan. 206, 734 P. 2d 1177 (1987). Consolidation cites Koplin and other cases cited therein for the proposition that no agreement existed between Austin and Consolidation for the preservation of the hose. However, an agreement did in fact exist for the preservation of the hose. Austin requested the hose on numerous occasions to no avail. Austin also instituted state court proceedings in an effort to obtain the hose. During that proceeding, the trial judge admonished Consolidation to preserve the hose for the benefit of Austin. Consolidation never objected, contested, protested, or otherwise disagreed with that directive. It is clear that Consolidation implicitly, if not explicitly, agreed to preserve the hose for his benefit. More importantly, Consolidation was ordered by the Court not to destroy the hose.

Consolidation contends that it is not part of any pending or impending litigation involving Austin and the hose. Consolidation also contends that destruction of the hose would in no way benefit Consolidation but would actually prejudice its subrogation rights. Consolidation, however, has failed to mention the relationship between it and the seller/distributor of the hose. Since the seller is an affiliate or subsidiary corporation of Consolidation, the former ostensibly had ample reason to destroy the hose and effectively destroy any third party claim with it.

Based upon Austin's information and belief, the seller is an affiliate corporation of Consolidation which sells/distributes hoses for distribution to Consolidation's coal operations. Austin respectfully suggests that Consolidation's destruction of the hose is similar to the cases of Smith v. Superior Court, supra and Hazen v. Municipality of Anchorage, 718 P. 2d 456 (Alaska 1986). In those cases, the evidence was destroyed by the adverse party in pending litigation to the direct benefit of such party. Although Consolidation is not involved in pending litigation, its affiliate, Fairmont Supply, is and it clearly knew that Austin contemplated such action due to the numerous requests made by Austin for the hose and because of Consolidation's involvement in the state court proceeding to obtain the hose. More importantly, Consolidation had an interest and motive to destroy the hose to protect its affiliate corporation. The seller/distributor of the hose and Consolidation are one and the same for purposes of determining the adverse party to his third party claim as evidenced by their sharing of the hose for testing and analysis and their legal relationship.

Virginia recognizes the legal maxim that the common law, which provides a remedy for every wrong, will furnish the appropriate action to redress a grievance. Chaffinch v. C & P Tel. Co., 227 Va. 68, 313 S. E. 2d 376 (1984); Swift & Co. v. City of Newport News, 105 Va. 108, 52 SE 821 (1906); Nelson County v. Louing, 126 Va. 283, 101 SE 406 (1919); Shirley v. Russell, 149 Va. 658, 140 SE 816 (1927); Western State Hospital v. Mackey, 151 Va. 495, 145 SE 419 (1928). For the reasons previously stated, Austin simply may not be able to establish a valid third party claim on any other ground except spoliation of evidence because the defective hose no longer exists. As a consequence, Austin respectfully represents that the Virginia Supreme Court and West Virginia Supreme Court would in fact recognize a cause of action for the spoliation of evidence to remedy the wrong against him.

The equities of this case dictate that Austin should have a cause of action against Consolidation for spoliation of evidence. Consolidation clearly knew that Austin wanted the defective hose for inspection and analysis since it provided the hose to its affiliated company, Fairmont Supply Company, which had portions of the hose evaluated and analyzed in anticipation of a possible third party claim. Moreover, Consolidation shared an undamaged portion of the hose with the National Fire Hose, the manufacturer of the hose, for purposes of analysis. This clearly reflects the relationship between Consolidation and the seller Fairmont Supply, and its affirmative steps to assist the manufacturer who distributed the product through Fairmont Supply. If Consolidation really had an incentive to assist plaintiff for purposes of subrogation, it would have shared the defective hose with

Austin and not the manufacturer and distributor. Consolidation, however, shared the hose with the manufacturer and seller/distributor and not Austin in order to protect its subsidiary or affiliate corporation.

In this case, Consolidation destroyed adverse evidence which directly benefitted its subsidiary or affiliate corporation. Even assuming arguendo that Consolidation owed no direct duty to Austin to preserve the hose, Consolidation and its affiliate or subsidiary corporation should not be allowed to benefit from the obvious intentional destruction of the hose. This case is clearly distinguishable from the numerous cases cited by Consolidation where the party who had allegedly spoliated evidence did have an incentive to preserve the evidence. Consolidation had an economic incentive to destroy the hose to prevent recovery by Austin.

#### CONCLUSION

Austin respectfully represents that the equities of his case require that he have and be allowed to pursue a valid cause of action against Consolidation for the intentional spoilation of evidence and the destruction of the fire hose which caused his severe injuries. Consolidation destroyed the fire hose because of its relationship to the seller. It has offered no other explanation of such destruction. The relationship between Consolidation and the seller, Fairmont Supply, essentially rendered Consolidation liable to itself in the event of subrogation and liable to Austin for all damages in excess of workers' compensation. Consolidation has blatantly attempted to eliminate the exposure or liability of Fairmont for worker's compensation benefits and Austin's third party claims which may far exceed any

payments available to Austin pursuant to the Act. Consolidation had an extra incentive to destroy the hose if it had knowledge that no case law in either West Virginia or Virginia had recognized a cause of action for spoliation of evidence. Because of the lack of any case law, Austin respectfully suggest that Consolidation may have believed it could destroy the hose with impunity. The common law which provides a remedy for every wrong would recognize a cause of action for the spoliation of evidence to redress Consolidation's actions against Austin. If necessary, this Court should refer the question of the validity of a cause of action for the spoliation of evidence in this particular case to the Supreme Courts of West Virginia and Virginia.

KENNETH WAYNE AUSTIN,  
By Counsel.



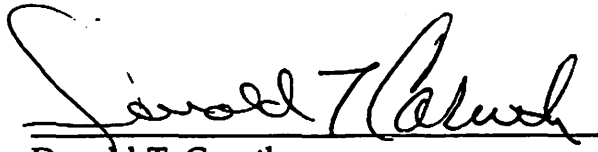
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Thomas R. Scott, Jr., Esq.  
Street, Street, Street, Scott & Bowman  
339 West Main Street  
Post Office Box 2100  
Grundy, Virginia 24614

**CERTIFICATE OF SERVICE**

I, Donald T. Caruth, hereby certify that on the \_\_\_\_ day of October, 1997, I caused a true copy of the foregoing RESPONSE TO DEFENDANT'S MOTION TO DISMISS and MEMORANDUM OF LAW to be served upon counsel of record in the above referenced proceeding by depositing a true copy thereof in the United States mail postage pre-paid addressed as follows:

Ancil G. Ramey  
Steptoe & Johnson  
Bank One Center  
7th Floor  
P.O. Box 1588  
Charleston, West Virginia 25326-1588

  
Donald T. Caruth



August 30, 1995

Stephen Hodges, Esq.  
Penn Stuart Eskridge & Jones  
P. O. Box 2288  
Abingdon, VA 24212

Re: Kenneth Austin vs.  
Consolidation Coal Company  
D/A: 05/20/95  
Our File No. 25001

Dear Steve:

Pursuant to our telephone conversation Tuesday, please request Consol to preserve the hose and to advise when my representative might retrieve the same or when our engineer might inspect it. We are willing to give Consol the same release as in the Baker case since the compensation act precludes suit against Consol.

With best regards, I remain

Very truly yours,

Cgw

Thomas R. Scott, Jr.

TRS/cjw

xc: Donald T. Caruth, Esq.  
Ervin B. Davis  
Kenneth Austin

September 22, 1995

VIA FACSIMILE AND REGULAR MAIL

Stephen M. Hodges, Esq.  
Penn, Stuart, Eskridge & Jones  
P. O. Box 2288  
Abingdon, VA 24212

Re: Kenneth Austin vs.  
Consolidation Coal Company  
D/A: 05/20/95  
Our File No. 25001

Dear Steve:

As requested in my letter to you dated August 30, 1995, please advise as soon as possible when my representative might retrieve the hose or when our engineer might inspect the same.

With best regards, I remain

Very truly yours,



Thomas R. Scott, Jr.

TRS/cjw

Enclosure

xc: Donald T. Caruth, Esq.  
Kenneth Austin  
Ervin B. Davis



June 8, 1995

TO : Larry Patts

FROM: Bob Watring *BW*

RE : 1-1/2 Faircoal Failure Evaluation from Buchanan Mine

HOSE DESCRIPTION: Old style FC600 with black layline and brass couplings. New style is with red layline and aluminum couplings. Layline "FAIRCOAL 600 FLAME RESISTANT MSHA NO. 2G-15/1 50 X 1-1/2 SJ SERVICE TEST TO 300 PSI PER NFPA 1962 11/90."

EVALUATION BY: Larry Patts, Bob Watring and Bill Rowan

EXTERNAL INSPECTION: Stretched out hose full length to examine for cover defects. Two bursts located: one 1'-2" directly behind male coupling, which was intact, and other approximately 20 ft. from female end. Both burst located on fold of hose.

TESTING: Coupled two samples from burst hose and pressurized to 300 PSI and 600 PSI. Both held with no leaks or slippage. One hose burst at 925 PSI; and other at 950 PSI.

OBSERVATION #1: Further examination of burst area in middle of hose showed hose contained a lot of gradular pieces falling out of the burst hose. One piece was approximately 3/8" in size. These pieces were concentrated in an area one foot either direction of burst. Using a magnet, these appear to be rust fragments of metal possibly from the underground piping system. The burst area near the male end did not contain these fragments. The hose was split length-wise, but only a small amount of fragments were found.

OBSERVATION #2: By splitting the hose lengthwise, we looked at the fold area of the inner tube, since this is where the bursts occurred. There appears to be some cracking of the tube along the fold in some places.

OBSERVATION #3: The likelihood of a double burst is extremely rare, especially in a 50 ft. length of hose. Since a failure is at the weakest point, this would indicate the hose had two equally weak points. Very hard to determine how this could happen. Could hose have been kinked, burst, then burst again? Or were the burst simultaneous? Also, what PSI did this occur?

DISPOSITION OF FAILED HOSE:

- Larry Patts took one test sample, failed areas, and a length of hose split lengthwise. Also, a bag of rust fragments.
- FRP kept one test sample, plus some random sections of failed hose.
- Sent random lengths of hose to National Fire Hose on VRO5598. I have talked with Dave Williams concerning this.

If you have further questions, please call.

REW/jrc



ORIGINAL

VIRGINIA: IN THE CIRCUIT COURT OF BUCHANAN COUNTY

KENNETH AUSTIN,

Plaintiff

VS

CONSOLIDATION COAL COMPANY,

Defendant

CASE NO. 316-95

May 23, 1996

HEARING

APPEARANCES:

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This cause came on this the 23rd day of May, 1996, to be heard before THE HONORABLE KEARY R. WILLIAMS, Judge of the Circuit Court of Buchanan County, Virginia.

The Court Reporter, Phyllis M. Mullins, was duly sworn.

THE COURT: Mr. Scott, is this your Motion?

MR. SCOTT: Yes, sir.

THE COURT: On the 2nd of March. We've rescheduled this a time or two.

MR. SCOTT: Yes, sir, we have. Whenever you're ready, I'll...

THE COURT: Actually, I guess, we got Consol's Demurrer and a Motion to Consolidate before that.

MR. HODGES: The consolidation has been granted, Your Honor, without any objection. I believe there's an order to that effect. If there's not, it's agreed.

THE COURT: Let's see. I don't see that order. Has the order been circulated and endorsed?

1 MR. HODGES: I thought it had been actually entered.

2 MR. SCOTT: I've got an entered order dated  
3 February...January 22, 96. Well, not for consolidation.  
4 I'm sorry.

5 THE COURT: I don't see the Order for consolidation,  
6 maybe it's not gotten in the file. It looks to me as  
7 though the Demurrer is the first matter for the Court to  
8 consider, so we'll hear from Consol's counsel concerning  
9 the Demurrer and then move on to the other matters in the  
10 file.

11 MR. HODGES: Your Honor, the background is that there  
12 are two distinct proceedings here. I take it you have both  
13 files.

14 THE COURT: I only have one file. I've only got 242-  
15 95.

16 MR. HODGES: Well, this is...This may be simple enough  
17 that I may be able to frame it out for you and you could  
18 address this without seeing the paperwork. I suggest we  
19 give that a go. Mr. Austin apparently was injured in an  
20 industrial accident at Consol's coal mine here in the  
21 County, and it's alleged here and it's undisputed, that he  
22 seeks to investigate and potentially file a law suit  
23 against someone, a product liability law suit. He's not  
24 ascertaining any claims against Consol. They were his  
25 employer and his claims are, of course, handled under the

1 comp act. But he seeks to investigate and to get access to  
2 and come upon Consol's property and look at a hose.  
3 Apparently there was an industrial type of water hose that  
4 was involved in this accident and the first proceeding that  
5 he filed, and apparently you don't have the file right  
6 before you, was a proceeding under Rule 4:2, which is the  
7 Rule that allows that depositions before actions or pending  
8 appeal and a Motion to Dismiss was filed on that and I  
9 believe the parties would be ready to address that today or  
10 whenever. I understand this is all on the table to be  
11 considered today. Is that correct, Mr. Scott?

12 MR. SCOTT: Yes.

13 MR. HODGES: Alright. And then before any of that was  
14 disposed of, the case that I take it you have in your hand  
15 was filed, which is a Bill of Complaint, which I understand  
16 just to be for equitable relief for a mandatory injunction  
17 allowing Mr. Austin's representatives, whoever it might be,  
18 investigators, engineers or whatever, to come on the  
19 company's property and investigate this hose. And our  
20 position on the chancery case, you've called for that  
21 first, that's the Demurrer, is breathtakingly simple, and  
22 it is this. That this is private property, it is owned by  
23 the company, it is on their real estate that their mine  
24 area, the area of their mine, surface area, and there is no  
25 legal right for Mr. Austin to come upon the property or



1 otherwise demand that this property be turned over through  
2 a legal process. I make this a simple analogy, Judge. If  
3 you and I are neighbors and I come over to your house and  
4 I knock on your door and I say I want to walk through your  
5 house; I'm not going to harm you; I'm not going to hurt  
6 anything; I'm not a thief; I'm your neighbor; I want to  
7 walk through your house; I just want to see what the  
8 decorations are like in there. Well, you have a right to  
9 say no and you don't owe an explanation to me and you  
10 really don't even owe an explanation in Court. And if that  
11 case came before Your Honor, it's perhaps oversimplified,  
12 but that's the principle of this case. If that case came  
13 before you, I don't think you'd have any problem with  
14 saying that is not a legal right. You, in my analogy,  
15 have a property right to have your home and have your  
16 property free from others coming on it, whether they  
17 articulate some reason or not. Now the company has reasons  
18 that are perfectly satisfactory to it. This is only one of  
19 several of these that have come in the past and there would  
20 be more to come in the future. As you know, these  
21 environments are...There are hazards there and we live in  
22 a litigious society and you have people coming in and so  
23 forth and in this day and age, in the business world, the  
24 mining industry in particular, the resources are stretched,  
25 these companies are just...Have enough resources to try to

1 accomplish their critical mission, their main mission,  
2 mining, washing and selling coal, and they are asking the  
3 Court just to draw a line, simply a legal line. There is  
4 no legal precedent, there's no legal rule, there's no legal  
5 reason why the Court would enjoin them to let him come on  
6 the property. His goals are legitimate. He has a right to  
7 investigate and try to find facts that would support a  
8 claim if he wants to do that. But his goal does not  
9 override the company's property right to exclude those,  
10 unless there's some specific legal doctrine that would  
11 allow him to come forward and I'm not aware of any and none  
12 has ever been cited to me in this case or any other case.

13 THE COURT: Mr. Scott, did you want to respond to  
14 that?

15 MR. SCOTT: Yes, sir. Your Honor, as Mr. Hodges told  
16 you, my client was injured arising out of and in the course  
17 of his employment on or about May 20, 1995, while employed  
18 by Consolidation Coal Company at their Buchanan 1 Mine,  
19 which is located at Page. That's a non-union operation  
20 owned by Consol, as I understand it, independent of any  
21 acquisition of Island Creek, from Island Creek. At the  
22 time of the injury my client was holding a hose in his hand  
23 much like the fire hose that's encased outside the Court's  
24 chambers on the wall adjacent to the courtroom. He had  
25 been welding that day and the company policy was that, or

1 at least I would offer this in the form of a proffer, that  
2 if he were called to testify, he and a fellow worker had  
3 been welding that day and the company policy was at the  
4 conclusion of welding, conclusion of the work shift, that  
5 they were supposed to water down the objects upon which  
6 welding had been conducted and the work place in general as  
7 a safety precautionary measure to insure that a fire would  
8 not start after the work place was closed for the day. And  
9 my client was holding the hose in his hand and the hose  
10 was...The water itself was turned on by another individual,  
11 and for some reason unknown to us at this time, the hose  
12 malfunctioned and hit my client, presumably in both sides  
13 of the head, knocked him down, in turn, his head struck an  
14 approximately ninety (90) pound rail, much like a rail that  
15 a railroad car travels on and he's had serious and  
16 disabling injuries. Now as the Court well knows, our sole,  
17 exclusive remedy against Consol falls under the Workers'  
18 Compensation Act. Likewise, we cannot institute suit for  
19 his injuries against any fellow employee or any  
20 subcontractors of Consol that are in the same trade,  
21 business and occupation as Consol because the exclusivity  
22 provisions of the Virginia Workers' Compensation Act grant  
23 them, in fact, immunity from prosecution in a civil suit.  
24 But he does have a right, and as Mr. Hodges conceded, a  
25 legitimate interest in pursuing the seller of this hose and

1 the manufacturer of this hose and perhaps even the  
 2 component part manufacturers of this hose and product  
 3 liability claims on negligent design, breach of warranty,  
 4 and the like-type theories. He has the right to do that  
 5 and he obviously...He's in a catch 22 position. On the one  
 6 hand, he can't pick out somebody and file a suit unless he  
 7 knows who they are, unless he knows from whom the hose was  
 8 acquired, unless he knows who made it, and it's kind of  
 9 hard to argue these things piecemeal, because on one hand  
 10 you got a petition under Rule 4:2 to preserve testimony,  
 11 perhaps depose the president or purchasing agent or  
 12 whatever of Island Creek. On the other, you have a Bill of  
 13 Complaint, I'm trying to cover all bases. In any event, he  
 14 has the right to pursue his claim and he obviously has to  
 15 know against whom to pursue it. But even that might not be  
 16 enough, Your Honor, because as the Court well knows,  
 17 Virginia has a statute, which is akin to Federal Rule 11  
 18 Sanction Statute, where you can't just go file a suit  
 19 without any basis, so even if we already knew who the  
 20 seller of that hose was and the manufacturer of that hose,  
 21 at a minimum, we need to have that hose examined to  
 22 determine whether or not there's any inherent defect,  
 23 negligent design and the like in that hose that caused or  
 24 contributed to my client's injuries, and we can't do that  
 25 without the hose. We don't necessarily have to come onto

1 Consol's premises, they could deliver us the hose for  
2 analysis and if they want us to pay for it, you know, I  
3 mean that might even be arranged, too, assuming that  
4 they're not asking an arm and a leg and that's there's some  
5 reasonable price involved. There's always the possibility  
6 that we might need to come onto their premises to check the  
7 water pressure from the source where the water flowed  
8 through the hose. I don't know the answers to those things  
9 because, again, we don't have the hose, we haven't had an  
10 engineer look at it to examine it. If Your Honor were to  
11 deny us that right, counsel may very well be right that  
12 there's no precedent for it in Virginia, but there's no  
13 precedent against it in Virginia either because,  
14 unfortunately, we don't have much case precedent in our  
15 Rules of Court in things of this nature at all. But the  
16 Federal Court's replete with these kinds of requests. If  
17 I filed suit against ABC Company today, Judge Glen Williams  
18 or Judge Sam Wilson, would enter an order that dealt with  
19 testing of the hose and destructive testing at some point  
20 in time when everybody has their experts together,  
21 preserving the integrity of the hose until such time as  
22 those things can be done. That's routine in Federal Court.  
23 Here, I haven't gotten to that point yet because I don't  
24 know who Island Creek purchased it from and I don't know  
25 who made it and I need to have it examined. And could I

1 add one more thing? Judge, these people, I said Island  
2 Creek, I misspoke, Consol, there's a matter of fairness  
3 here, we're in a Court of equity, but, you know, when  
4 they...The Worker's Comp Act says that filing of a workers'  
5 compensation claim acts as an assignment...Excuse me. The  
6 making of a workers' compensation claim operates as an  
7 assignment to the employer against any third party that  
8 might be responsible. As the Court well knows, they're  
9 all...If the employer chooses not to do that, then he has  
10 the right to pursue his claim against any third party  
11 responsible. And in turn, the employer is subrogated to  
12 his rights. In other words, they're entitled to get back  
13 workers' compensation and medical benefits paid to him, or  
14 on his behalf, less their pro rata share of costs and  
15 attorney's fees. And so on the one hand, they got their  
16 hand hanging out; on the other hand, the law...for  
17 subrogation if he's successful. On the other hand, the law  
18 gives them and tells them that hey, you know, this...His  
19 making of a claim operates as an assignment against the  
20 third party that's responsible you filed on his behalf.  
21 It's almost as if they're in a fiduciary duty of  
22 responsibility capacity with him. But they don't want to  
23 give us the hose, they don't want to tell us who made it.  
24 They don't want to tell us from whom they purchased it. I  
25 am highly suspicious that they purchased it from some

1 sister company that they don't want to tell us about, and  
2 I may be totally off base, maybe totally unfounded, but,  
3 Judge, it's a pure matter of equity in a Court of equity.  
4 This man is entitled to do that. I'm willing to even  
5 attempt to make it so that if an expert needs to come onto  
6 their premises to check the water pressure, we don't have  
7 to if you order them to give us the hose, to come on their  
8 premises, that the guy would sign a statement or release or  
9 something in advance. But we're entitled to investigate  
10 this accident. Can I say...Maybe you're heard enough.  
11 I'll be...I wanted to...

12 THE COURT: Well, your approach is really unique. I  
13 like what you're trying to do, but, Tom, I can't in good  
14 conscience grant this injunction. You know, look where  
15 that's going to go, if he decides he's got to go on their  
16 property to examine that hose. He's got to take two (2) or  
17 three (3) experts on there. You run the problem of  
18 interfering with their operation. I'm just ifing but it's  
19 just...The ramifications of doing that are just too far  
20 reaching for this Court to undertake, you know.

21 MR. SCOTT: Well, how can I find out who made the  
22 hose?

23 THE COURT: Well, I'm sure with, you know, your  
24 ability to reason legally you can come up with something  
25 and you may have talked your way into Federal Court with

1 this thing. It seems...Since there seems to be some  
2 federal precedent for this type thing. But certainly, I'm  
3 not in the position to enter an injunction to permit the  
4 party to go on Island Creek's property under these  
5 circumstances in order to investigate that. But I commend  
6 you on the unique...

7 MR. SCOTT: Well, Judge, what about Rule 4:2? I mean  
8 why can't I take their deposition to find out who they  
9 bought the hose from?

10 THE COURT: Well, I'm not sure you can't do that.

11 MR. SCOTT: Okay. Well, would you enter an order  
12 under that then?

13 THE COURT: I don't know that that's before the Court  
14 in such a fashion that I could take jurisdiction in order  
15 to do that with the pleadings that are here. But you might  
16 enlist some cooperation on the part of Consol.

17 MR. SCOTT: Judge, I've tried to enlist it and counsel  
18 won't tell me who made the hose or his client won't permit  
19 him to.

20 THE COURT: Maybe there's no cooperation forthcoming,  
21 but I'm, you know, I'm sure within your ability to reason  
22 all that out you're going to come up with something, but I  
23 don't think the injunction's the way to do it.

24 MR. SCOTT: Well, Judge, there's no other way to do it  
25 except to preserve testimony, is to take their president or



1 somebody's deposition, to find out who they bought the hose  
2 from.

3 THE COURT: How is the Court to insure that the same  
4 hose that purportedly injured your client is still there?  
5 I mean maybe it's no longer there.

6 MR. SCOTT: It may not be.

7 THE COURT: So, you know, I...Even if I were inclined  
8 to enter your injunction, I think I'd have to have more  
9 information before I could. You know I've got to balance  
10 that equity between the individual's rights and the  
11 company's rights and the individual's right to litigate and  
12 the company's right. When I attempt to balance that I  
13 certainly come down on the side of the company's property  
14 right. I might feel differently if this were a litigant  
15 that had no remedy, no other source of revenue, no other  
16 benefit, but in this instance he's already got workers'  
17 compensation, but I'm not saying he's limited to that. I'm  
18 saying he's entitled to pursue any other action against the  
19 manufacturer, seller, etc., but you can't do it, so far as  
20 this Court is concerned, with this injunctive proceeding.

21 MR. SCOTT: Alright. I'm going to respectfully note  
22 my exceptions and appeal that if I can't at least get you  
23 to order them to let me depose somebody. I don't care  
24 whether the hose is there or not. You should not...I would  
25 respectfully suggest, should not consider yourself...I

1 guess I'm so upset I can't speak well. You, I respectfully  
2 suggest that you should not concern yourself with whether  
3 or not I may have problems along the way with proving my  
4 products liability case.

5 THE COURT: I'm not concerned with that. I'm  
6 concerned with what kind of restrictions the Court and  
7 Courts would ultimately have in providing the remedy that  
8 you're asking for. You're going to have to restrict that  
9 in some fashion and the long range effects of that are so  
10 far reaching.

11 MR. SCOTT: Judge, I'm not talking about the Bill of  
12 Complaint now. I'm talking about under Rule 4:2, I should  
13 be permitted to depose somebody, some designee up there,  
14 some purchasing agent, who can look at those hose and...

15 THE COURT: The only thing I can say is file your suit  
16 and then depose them and that's risky because of what  
17 you've already identified, but, you know, that's all I can  
18 suggest.

19 MR. SCOTT: Well, what about under the Petition I  
20 filed under Rule 4:2?

21 THE COURT: I don't have it.

22 MR. SCOTT: That's why we filed two (2) suits. There  
23 were...

24 THE COURT: Well, I don't have but one here. That's  
25 part of my problem, I guess.

1 MR. SCOTT: What case number do you have?

2 THE WITNESS: I've only got...I got 242-95.

3 MR. SCOTT: Okay. Do you want me to go get it?

4 THE COURT: Yeah, see if it's out there.

5 MR. SCOTT: And, Judge, let me say here's...These  
6 are...We're agreeing that these two (2) suits are  
7 consolidated.

8 MR. HODGES: I thought they already had been, but they  
9 can be considered consolidated, as far as I'm concerned.

10 MR. SCOTT: And, Judge, if there's some technical  
11 defect to that Petition, I'm making a request in advance to  
12 amend because I'm not going to get sued for a malpractice  
13 claim because of some technical thing, I mean, you know.

14 THE COURT: Do you want to review that before we look  
15 at it or...

16 MR. SCOTT: Well, Judge, he's filed a Demurrer. I  
17 mean I'm assuming that Your Honor would always grant me, if  
18 there was some defect, the opportunity to amend.

19 THE COURT: If I granted his Demurrer, you'd have  
20 an...as long as it's not...The Demurrer is not granted with  
21 prejudice you can certainly amend or refile, but I didn't  
22 realize that in speaking of the issue that you brought up  
23 I needed to look at this file. I understood Mr. Hodges to  
24 say that I could look at that one file and possibly  
25 determine what we had. Alright. Now I have the 316-95,

1 the Petition pursuant to Rule 4:2, and I understand you  
 2 filed a Demurrer in that case, as well.

3 MR. HODGES: I filed a Motion to Dismiss.

4 THE COURT: Okay. Motion to Dismiss.

5 MR. HODGES: Yes, sir.

6 THE COURT: Do you want to go forward with that?

7 MR. HODGES: Yes, sir. Rule 4:2 is a very precise,  
 8 sets forth a very precise procedure, and sets it forth in  
 9 detail as to how a party under some circumstances may take  
 10 a deposition prior to the filing of suit in order to  
 11 preserve testimony. If the requirements are set out in  
 12 detail and the problem that Mr. Austin has here is that he  
 13 doesn't meet the requirements. And it's our position that  
 14 if these detailed requirements are not met, then the relief  
 15 provided under the Rule could not be provided by the Court.  
 16 Most dramatically, this Rule requires in several places  
 17 that the potential adverse party in the law suit be named  
 18 in the petition and be served. Now obviously, what we have  
 19 is...The argument is going to be made and it's true. The  
 20 argument is going to be made...We don't know who the  
 21 adverse party is, that's what we're trying to find out, and  
 22 I think that's a fair statement of where Mr. Austin is.  
 23 But that proves our point, that this Rule is not designed  
 24 for this use. If it were designed for this use, it would  
 25 not have this provision in it. And so he's in the

1 position, even more dramatically on this proceeding than  
2 the other one, of trying to force a square peg into a round  
3 hole and it's not equity, it's nothing, it's the strict  
4 application of a Rule that's written out in black and white  
5 and requires the adverse party is the proceeding. Consol  
6 is not even a proper party to this proceeding and yet it's  
7 the only defendant, so the Rule doesn't fit.

8 THE COURT: Alright. Mr. Scott, did you want to  
9 respond to that?

10 MR. SCOTT: Yes, sir. I filed the Petition and...I  
11 keep hearing phones ring and noises and bells and whistles,  
12 I'm sorry, my mind isn't staying where it should be today.  
13 Rule 4:2 says that a person who desires to perpetuate his  
14 own testimony or that of another person regarding any  
15 matter that may be cognizant in any Court of this  
16 Commonwealth, may file a verified petition in the circuit  
17 court of the county or city of the residence of any  
18 expected adverse party. The petition shall be entitled in  
19 the name of petitioner and so forth and the like. As Mr.  
20 Hodges said, I have not named who the potential adverse  
21 party...Well, certainly Consol is a potential adverse party  
22 because if they have destroyed that hose it's going to be  
23 my position that the exclusivity of the Virginia Workers'  
24 Compensation Act did not protect them and that they are  
25 liable for his injuries over and above workers' comp. I

1 have also sent them some discovery asking them, in  
 2 connection with this verified petition proceeding, or at  
 3 least I believe I have, my best recollection, if I say  
 4 something wrong, I'm speaking out of ignorance from the  
 5 heart, asking them to identify the manufacturer and seller  
 6 of this hose. They, in turn, have stonewalled me and filed  
 7 a Motion for a Protective Order. And then I pursued these  
 8 proceedings today and Your Honor rules against me on both  
 9 of them and I go to Federal Court and then they're going  
 10 to claim it's res judicata. My guy is screwed, using the  
 11 vernacular, he's screwed. I know this Court is fair. For  
 12 God's sake, let me take the purchasing agent's or  
 13 somebody's deposition and I will agree at my expense, even  
 14 if I have to pay their lawyer's fees out of my own pocket,  
 15 to reconvene them all over again once we get that party and  
 16 get him in there, so that he can have notice. I'll do it  
 17 under any restrictions that the Court might impose. But  
 18 certainly I'm entitled to pursue this. Now, Judge, if you  
 19 know of some other way I can pursue it, I'll do that. I  
 20 ask you not to dismiss it. I mean I'd rather non-suit it  
 21 if you're going to dismiss it with prejudice.

22 THE COURT: The Rule provides that the names or a  
 23 description of the person he expects will be adverse  
 24 parties and their addresses, so far as known. I think that  
 25 provides that the adverse party can be described as the

1 manufacturer and/or seller of the hose in question; whose  
2 names and addresses are, as of this time, unknown.

3 MR. SCOTT: I put that in there.

4 MR. HODGES: Your Honor, service is required upon each  
5 person named in the petition as an expected adverse party.

6 THE COURT: Under the circumstances, I assume service  
7 can't be accomplished.

8 MR. SCOTT: Yes, sir. And the adverse party might  
9 have...I mean the manufacturer might have standing to raise  
10 that but...

11 THE COURT: I don't know that Consol could raise that  
12 issue.

13 MR. SCOTT: Judge, it's obvious why they're  
14 stonewalling.

15 MR. HODGES: (Laughs.)

16 THE COURT: (Laughs.)

17 MR. SCOTT: I don't think it's funny, with all due  
18 respect. I know my client doesn't.

19 THE COURT: Well, it's unique, Mr. Scott, it's not  
20 funny.

21 MR. SCOTT: My client doesn't think it's funny. I  
22 guess big corporations are alive and well and immune from  
23 suit in Virginia.

24 THE COURT: Well, I'm inclined to grant the motion  
25 for...or the order for depositions of the one party, the

1 purchasing agent.

2 MR. SCOTT: Well, Judge, I'm willing to let them  
3 designate who it is. I don't know who knows who they got  
4 the hose from.

5 THE COURT: Well, I think the burden is on you under  
6 Rule 4:2 to designate a person whose deposition you're  
7 going to take. I don't know that it shifts back to them to  
8 tell you who you should take. So if you want to take the  
9 deposition of the purchasing agent I'm going to grant that.  
10 If the Court is satisfied that perpetuation of the  
11 testimony may prevent a failure or delay of justice, the  
12 Court feels under the circumstances described, it could  
13 prevent a failure of justice, then they can order  
14 designating or describing the persons whose depositions may  
15 be taken and specifying the subject matter of the  
16 examination and whether depositions shall be oral or  
17 written. Are you asking oral or written?

18 MR. SCOTT: Oral.

19 MR. HODGES: Your Honor, I'll just point out that, and  
20 I'm quite sure the Court understands, I want to be sure  
21 that the party to this proceeding is to be the potential  
22 party to that suit that has not been filed yet.

23 THE COURT: Right.

24 MR. HODGES: It's pretty clear from the structure that  
25 that's the way you do it. And that person is not here,



1 instead another person is being brought in as a party to  
2 this proceeding. There is even a procedure set out in the  
3 Rule for having a representative appointed for people who  
4 are not present, and that's what...

5 MR. SCOTT: That's fine.

6 MR. HODGES: That's what the Court would be mandated  
7 to do if you think you have the authority under this Rule  
8 of law.

9 THE COURT: Well, I think having the authority, I have  
10 concluded that I have the authority. Where are you  
11 looking?

12 MR. HODGES: I'm looking at sub 2, the second  
13 sentence, page 142.

14 THE COURT: If service cannot with due diligence be  
15 made upon any expected adverse party named in the petition  
16 the Court may make such order as is just for service by  
17 publication. Otherwise, it shall appoint for persons not  
18 so served, an attorney who shall represent them. I don't  
19 suppose you could do that, it might be a conflict.

20 MR. HODGES: I think it would be.

21 THE COURT: For you to operate in that regard. Any  
22 suggestions as to who we might appoint as...

23 MR. SCOTT: Pick any lawyer in town. Pick any lawyer  
24 in town at my expense.

25 THE COURT: I need somebody that doesn't do any work

1 for Consol or have any contact or own any coal or whatever  
2 with Consol's...

3 MR. SCOTT: Well, Ron King doesn't do any work for  
4 Consol.

5 THE COURT: Alright. Ron King is a good choice.  
6 Cross-examine the deponent, if any, expected adverse party.  
7 Alright. I'll appoint Ron King as the person to be served  
8 to represent the adverse party under 4:2(2) of Rule 4:2.  
9 Now the depositions are going to be oral.

10 MR. SCOTT: Yes, sir. I'd like to take the oral  
11 deposition of the purchasing agent that purchased this  
12 particular hose.

13 THE COURT: That will be the purchasing agent and  
14 you're not going to name, we're going to do that by  
15 description. Is that right? Do you know the name of the  
16 purchasing agent?

17 MR. SCOTT: Well, Steve, will you not even tell me who  
18 the purchasing agent is that purchased this hose?

19 MR. HODGES: I don't know who it is.

20 THE COURT: The order has to specify the subject  
21 matter of the examination. What is the subject matter  
22 going to be?

23 MR. SCOTT: The subject matter is the description of  
24 this hose, make, model, serial number, year, size, the  
25 vendor who sold it to them and the manufacturer, if known,

1 date purchased.

2 THE COURT: Alright.

3 MR. SCOTT: We want to see a copy of the invoice.

4 THE COURT: You need to set all of that out in your  
5 order.

6 MR. SCOTT: Yes, sir, I will. Judge, may I make one  
7 more request, please, sir. At least in the injunction  
8 proceeding, would you enter an injunction that they not  
9 destroy this hose, and if they have no further use for it  
10 that I at least be able to buy it. That's a reasonable  
11 request, that they not destroy the evidence.

12 THE COURT: Well, that's certainly...

13 MR. SCOTT: When I say destroy, I mean in the  
14 intentional sense. If they're using it on the job and it  
15 blows up or something, I understand that. But I'm asking  
16 that they at least preserve it until I can pursue this  
17 matter further, and that if for some reason they want to  
18 get rid of it, that I be able to buy the salvage off of  
19 them. I mean gosh, that's a fair request.

20 THE COURT: Well, in all...I don't know that I can do  
21 that under the proceedings here before the court.

22 MR. SCOTT: No, sir. You got two...

23 THE COURT: Well, I think it's certainly understand  
24 that...

25 MR. SCOTT: You got two (2) proceedings before the

1 Court.

2 THE COURT: Well, I've already ruled in the one and I  
3 don't know that I can...I don't know; that I can find the  
4 request that you're now making under the injunctive  
5 proceeding.

6 MR. SCOTT: Judge, there's...Certainly, the Court has  
7 the equitable power to order a person in possession of a  
8 piece of equipment, such as a hose, that...

9 THE COURT: Well, I'm going to...The order under the  
10 law case should contain a statement that no parties are to  
11 do anything as far as to effect the integrity of the hose  
12 that's the subject of this petition, during the pendency of  
13 this matter.

14 MR. SCOTT: Alright, sir.

15 THE COURT: I assume that's not going to happen, but  
16 as an admonition, I guess, to all concerned parties, that  
17 should be in the order.

18 MR. SCOTT: Alright, sir.

19 THE COURT: Alright. Now are you going to fashion  
20 this order for Mr. Hodges to...

21 MR. SCOTT: Yes, sir.

22 THE COURT: Endorse and I assume he'll want to endorse  
23 that objected to.

24 MR. SCOTT: Yes, sir.

25 THE COURT: Okay. Anything further we need to

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consider regarding this matter?

MR. HODGES: No, sir.

MR. SCOTT: Not that I'm aware of.

THE COURT: Alright. Fashion the order and ship it to Mr. Hodges.

MR. SCOTT: Yes, sir.

CERTIFICATION

STATE OF VIRGINIA,

COUNTY OF BUCHANAN, to-wit:

I, Phyllis M. Mullins, Court Reporter and Notary Public for the State of Virginia, do hereby certify that the foregoing proceeding was recorded on a tape recording machine and later reduced to typewritten form by me personally; that I was first duly sworn by the Court to accurately take down and transcribe the said proceedings; that the foregoing is a true and correct transcript of the said proceedings to the best of my understanding, skill and ability; that I am neither counsel for, nor related to any of the parties hereto and have no interest in the matter whatsoever.

Given under my hand and seal on this the 10th day of June, 1996.

  
NOTARY PUBLIC

My commission expires January 31, 1999.

IN THE UNITED STATES DISTRICT COURT OF THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

RECEIVED

NOV 24 1997

SAMUEL L. KAY, CLERK  
U.S. District & Bankruptcy Court  
Southern District of West Virginia

KENNETH AUSTIN,

Plaintiff

vs.)

Civil Action No. 5:97-0520  
Judge Goodwin

CONSOLIDATION COAL COMPANY,

Defendant.

REPLY MEMORANDUM OF LAW  
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

This memorandum of law is respectfully submitted in reply to the plaintiff's response to the motion to dismiss. Although the plaintiff states in his memorandum that "both West Virginia and Virginia are likely to recognize a cause of action for spoliation [sic] of evidence based upon the facts and circumstances of this case," his discussion of law persuasively demonstrates to the contrary. Moreover, the plaintiff has not addressed the defendant's argument that it is inappropriate for this Court to recognize a cause of action which has been discussed by the courts of last resorts in both West Virginia and Virginia, but which has never been recognized as viable in either jurisdiction. Accordingly, the defendant reiterates its request that this Court enter an order dismissing this suit for failing to state a cause of action upon which relief may be granted.

## II. STATEMENT OF FACTS

In its earlier memorandum, the defendant stated, "The following statement of facts are taken entirely from the complaint and, for purposes of this motion, are taken as true." Accordingly, the plaintiff's statement of facts in his memorandum of law does not deviate significantly from the defendant's statement of facts in its earlier memorandum. In an attempt to bolster his case, however, the plaintiff has attached certain documents to his memorandum. Obviously, this matter is before this Court on a motion to dismiss, not for summary judgment. Accordingly, reference to such material is not particularly helpful in analyzing the key question regarding whether, assuming each and every allegation of the complaint as true, the plaintiff has stated a cause of action upon which relief can be granted. If neither West Virginia nor Virginia recognize a cause of action for spoliation of evidence, which the plaintiff concedes is his claim, then, respectfully, this Court should grant the defendant's motion to dismiss, and all of the exhibits attached to the plaintiff's memorandum of law do not create a cause of action where none exists.

## III. DISCUSSION OF LAW

As noted in the plaintiff's memorandum of law, relatively few states have recognized the tort of spoliation of evidence. No section of the Restatement (Second) of Torts addresses the cause of action and, those states which have

recognized it, have done so under circumstances substantially dissimilar from those presented in the instant case, e.g., where the defendant in the underlying suit was charged with spoliation or where the defendant in the spoliation suit promised or otherwise undertook to preserve the evidence. Not only are neither of those circumstances present in the instant case, neither jurisdiction whose law might apply to this case has nor is likely to recognize a cause of action for spoliation of evidence.

**A. WEST VIRGINIA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL OR NEGLIGENT SPOLIATION OF EVIDENCE.**

The plaintiff concedes that in Harrison v. Davis, 197 W. Va.. 651, 478 S.E.2d 104 (1996), the Court affirmed the dismissal of an action for spoliation of evidence. The plaintiff in Harrison filed suit against several defendants, alleging that they had wrongfully caused the death of her infant daughter. Id. at 654-55, 478 S.E.2d at 107-08. During the course of discovery, the plaintiff learned that certain fetal monitor strips were missing. Id. at 654 n. 7, 478 S.E.2d at 107. Accordingly, as part of her complaint she asserted a claim for spoliation of evidence. Id.

Because the plaintiff in Harrison did not request the fetal monitor strips until more than two years after her child's death, the trial court granted the defendants' motion to dismiss under W. Va.. R. Civ. P. 12(b)(6). In affirming this dismissal,



the Court stated:

The claim for spoliation of evidence is a novel issue in this State. Although we have decided two cases involving such a claim, we have yet to recognize spoliation of evidence as a valid cause of action. See State ex rel. State Farm Fire & Casualty Co. v. Madden, 192 W. Va. 155, 451 S.E.2d 721 (1994)(noting that plaintiff alleged spoliation of evidence in his amended complaint); Taylor v. Ford Motor Co., 185 W. Va. 518, 408 S.E.2d 270 (1991)(refusing to determine validity of cause of action for spoliation of evidence). *We again decline to resolve the validity of such a cause of action because we find the circuit court properly dismissed the plaintiff's spoliation of evidence claim as untimely filed.*

Id. at 664, 478 S.E.2d at 117. [Emphasis supplied and footnotes omitted].

In footnote thirty-one of Harrison, the Court expressly recognized that there is a split of authority throughout the country on whether spoliation of evidence is a valid cause of action:

Some jurisdictions recognize a cause of action for spoliation of evidence, see, e.g., Foster v. Lawrence Memorial Hosp., 809 F. Supp. 831 (D. Kan. 1992); Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); Continental Ins. Co. v. Herman, 576 So. 2d 313 (Fla. Dist. Ct. App. 1990), rev. denied, 598 So. 2d 76 (Fla. 1991), while other jurisdictions refuse to acknowledge such a claim, see, e.g., Murray v. Farmers Ins. Co., 118 Idaho 224, 796 P.2d 101 (1990); Panich v. Iron Wood Prod. Corp., 179 Mich. App. 136, 445 N.W.2d 795 (1989); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434 (Minn. 1990).

Id. at 664 n. 31, 478 S.E.2d at 117. See also Moore v. United States, 864 F. Supp. 163 (D. Colo. 1994)(not recognizing tort of intentional spoliation of evidence under Colorado law); Weigl v. Quincy Specialities Co., 158 Misc. 2d 753, 601 N.Y.S.2d 774 (N.Y. Super. Ct. 1993)(refusing to recognize tort of intentional spoliation of evidence); 5636 Alpha Road v. NCNB Texas National Bank, 879 F. Supp. 655 (N.D. Tex. 1995)(not recognizing tort of intentional spoliation of evidence under Texas law); Brewer v. Dowling, 862 S.W.2d 156 (Tex. App. 1993)(not recognizing tort of intentional spoliation of evidence). It nevertheless chose not to align itself with those jurisdictions that have recognized the cause of action.

The plaintiff's argument with respect to Harrison is that, "Consolidation cannot state with any degree of certainty that the West Virginia Supreme Court would deny such a cause of action since West Virginia recognizes the legal maxim that for every wrong, there is a remedy." [Memo. at 7]. To the contrary, in Wallace v. Wallace, 155 W. Va. 569, 575-76, 184 S.E.2d 327, 331 (1971), where the Court held that West Virginia does not recognize a common law action for alienation of parental affection, it stated:

In Gibson v. Johnston, 75 Ohio L. Abst. 413, 144 N.E.2d 310, appeal dismissed, 166 Ohio St. 288, 141 N.E.2d 767, with reference to the contention, advanced in the case at bar, that the common law affords a remedy for every wrong, the court said:

'The maxim, 'Ubi Jus, ibi remedium', liberally translated, declares that a legal wrong is the resultant of the violation of a legal right, for which the law provides a remedy. A wrong not within the scope of the law of a given jurisdiction, either from the standpoint of the common law, or when not prescribed by statute, cannot be regarded as a legal wrong.

'The duty of the parent to support, educate and protect the child was given recognition under the common law, but the reciprocal rights of the child in relation to his interest in the society and affection of the parent, were not recognized under the common law as construed and applied in this state, except as may be modified by statute. It follows that a child does not have a right of action for an injury which he has sustained in his relation with his parents, proximately caused by the negligent act of a third person.'

Clearly, under West Virginia law, there is not a remedy for every wrong, but only those wrongs for which the law recognizes a remedy.<sup>1</sup> In Harrison, the Court was squarely presented with the issue of whether the spoliation of evidence constituted a wrong for which the law of West Virginia recognizes a remedy, and nevertheless failed to so hold.

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<sup>1</sup> Obviously, this same legal principle would apply to analyzing whether a cause of action for spoliation of evidence would be recognized in the Commonwealth of Virginia.

**B. VIRGINIA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL OR NEGLIGENT SPOILIATION OF EVIDENCE.**

The plaintiff concedes that Virginia has never recognized a cause of action for spoliation of evidence. The Virginia cases cited by the plaintiff, respectfully, are insufficient to support any reasonable conclusion that spoliation of evidence would be recognized as a cause of action in the Commonwealth. In Gentry v. Toyota Motor Corp., 252 Va. 30, 471 S.E.2d 485 (1996), for example, the Court actually overturned a trial judge's decision based on a spoliation of evidence theory. The defendant finds it difficult to understand how a decision implicitly rejecting a spoliation theory supports the conclusion that the Court would recognize a cause of action. In Anderson v. National Railroad Passenger Corp., 866 F. Supp. 937, 946 (E.D. Va. 1994), the court was applying the Federal Rules of Evidence, not the law of Virginia, and, in any event, concluded that it "would abuse its discretion by permitting a spoliation inference."<sup>2</sup> Again, the defendant believes that a court's refusal to apply a spoliation inference undermines, rather than supports, the plaintiff's claim that such cause of action would be recognized in Virginia. Finally, the "missing witness" cases discussed by the plaintiff, an evidentiary principle

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<sup>2</sup> This refusal to apply the spoliation evidentiary rule is consistent with similar decisions discussed in the defendant's earlier memorandum. See Norfolk & Western Ry. Co. v. Sonney, 236 Va. 482, 374 S.E.2d 71 (1988); Jones v. Lamm, 193 Va. 506, 507, 69 S.E.2d 430, 431 (1952); Robey v. Richmond Coca-Cola Bottling Works, Inc., 192 Va. 192, 193, 64 S.E.2d 723, 724 (1951)

widely-recognized even by those jurisdictions that have rejected a cause of action for spoliation of evidence, would not, in the defendant's view, presage any recognition of the cause of action by the Supreme Court of Virginia.

- C. IT IS UNLIKELY THAT EITHER WEST VIRGINIA OR VIRGINIA WOULD RECOGNIZE A CAUSE OF ACTION FOR INTENTIONAL OR NEGLIGENT SPOILIATION OF EVIDENCE BY AN EMPLOYER WHEN AN EMPLOYEE IS INJURED DURING THE COURSE OF HIS OR HER EMPLOYMENT AND INSTITUTES A CAUSE OF ACTION FOR PRODUCT LIABILITY AGAINST THE MANUFACTURER AND SELLER OF THE INSTRUMENTALITY WHICH ALLEGEDLY CAUSED HIS OR HER WORKPLACE INJURIES AND WHICH IS SUBSEQUENTLY DESTROYED OR DISCARDED BY THE EMPLOYER.

As the plaintiff acknowledges, Virginia products liability law accommodates a plaintiff in a products liability case who cannot produce the item allegedly responsible for his or her injuries by allowing the case to proceed if the plaintiff can present evidence negating all reasonable explanations of an accident. Lemons v. Ryder Truck Rental, 906 F. Supp. 328 (W.D. Va. 1995); Logan v. Montgomery Ward, 216 Va. 425, 219 S.E.2d 685 (1975). Similarly, in this case, in the plaintiff's product liability action, he can present evidence, based upon his recollection of the accident, as well as his experts' analysis of the reports of the defense experts, that the hose failed due to a defect. Even if the defense experts conclude that the hose was not defective, but failed for some other reason, the

plaintiff's experts might be able to offer a contrary opinion based upon their review of the reports of defense experts and the plaintiff's description of the accident. The plaintiff's burden in his product liability case is no greater than that of any plaintiff who is injured by a product destroyed in the accident which resulted in the plaintiff's injuries. Moreover, if the plaintiff can establish some relationship between the defendant in this case and one of the defendants in the other case, he might be able to assert, under the applicable rules of evidence, that he should have the benefit of the spoliation inference. Accordingly, the plaintiff is clearly not left without appropriate remedies.

For obvious reasons, the plaintiff in this case seeks to ascribe sinister motives in the alleged destruction of fragments of a hose. He ignores, however, the substantial burden he seeks to place on the owners of any property alleged to have caused an injury. In this case, the property is merely a piece of hose that perhaps could have been thrown in a corner or placed in a warehouse. In other cases, however, the property might be a large piece of industrial equipment that, for practical reasons, cannot be left in place until the applicable statute of limitations expires. Or, the property might be some small, insignificant item that an employee, without any knowledge by the employer, is alleged to have caused the employee some injury. It is simply an unreasonable burden to impose upon one person the

common law obligation to indefinitely preserve evidence for the benefit of another person's cause of action against a third-party.

As noted in the defendant's earlier memorandum, in Syllabus Point 3 of Koplin v. Rosel Well Perforators, Inc., 241 Kan. 206, 734 P.2d 1177 (1987), the Kansas Supreme Court held, "In response to a certified question from the federal district court asking whether Kansas would recognize a common law tort action for intentional interference with a prospective civil action by spoliation of evidence, it is held: The answer is in the negative under the facts of this case." The circumstances in Koplin were quite similar to those presented in this case, and the defendant submits warrant a similar decision by this Court:

This case arises out of injuries suffered by the plaintiff employee in an on-the-job accident. The accident occurred when a piece of equipment called a T-clamp failed due to an alleged defect. The T-clamp was manufactured and sold to the defendant employer Rosel Well Perforators, Inc., by the defendants Gearhart Industries, Inc., Pengo Industries and Geosource, Inc. Plaintiff alleges that immediately after the accident, an agent of Rosel Well Perforators, Inc., intentionally destroyed the T-clamp so that plaintiff would no longer have access to it for purposes of potential litigation.

Plaintiff recovered workmen's compensation benefits for his injuries. He brings this action against Gearhart Industries, Inc., Pengo Industries and Geosource, Inc., on product liability and breach of warranty claims. He also makes claims against his employer, Rosel Well Perforators, Inc., for interference with a prospective civil

action by spoliation of evidence.' Plaintiff claims that, as a direct result of Rosel Well Perforators, Inc.'s, destruction of the T-clamp, plaintiff may be unable to produce and/or show how the T-clamp failed and caused his injuries. Thus, plaintiff contends that he has lost a valuable expectancy in recovering against Gearhart Industries, Inc., Pengo Industries and Geosource, Inc., on his product liability and breach of warranty claims.

241 Kan. at 207, 734 P.2d at 1178-79. Likewise, as in this case, these facts were presented to the court in the context of a motion to dismiss, and the court accepted as true the assertions made in the complaint. *Id.* at 208, 734 P.2d at 1179. The court began by discussing decisions by other courts rejecting claims of spoliation of evidence on the part of employers where their employees are injured and may have causes of action against third parties:

In Coley v. Ogden Mem. Hosp., 107 A.D.2d 67, 485 N.Y.S.2d 876 (1985), plaintiff sustained injuries in the course of his employment when he fell from a ladder which collapsed. The ladder was discarded. Plaintiff sued his employer, alleging that the failure to preserve the ladder precluded discovery of the identity of its manufacturer and thereby foreclosed plaintiff's potential product liability action against third parties. The court affirmed the trial court's dismissal of plaintiff's claim, stating:

"We are unable to identify any duty owed by defendant to plaintiff with regard to the safekeeping of the ladder. The record reveals no promise by defendant or its employees to inspect or safeguard the ladder for plaintiff's benefit...." 107



A.D.2d at 69, 485 N.Y.S.2d 876.

241 Kan. at 209, 734 P.2d at 1180. The court further discussed another case involving a claim of spoliation of evidence by an employer:

Similarly in Parker v. Thyssen Min. Const., Inc., 428 So.2d 615 (Ala.1983), the Alabama Supreme Court found no independent common-law duty on the part of an employer to preserve evidence for an employee's potential civil action against third parties. In Parker, plaintiff was injured on the job when a concrete wall collapsed. Following the accident, plaintiff's employer collected samples of the concrete. Plaintiff later brought suit against his employer, alleging that the employer's negligent action in collecting the samples and failing to preserve them wrongfully interfered with and impaired his ability to pursue claims against the manufacturer and suppliers of the cement. The Alabama court affirmed summary judgment against plaintiff.

241 Kan. at 210, 734 P.2d at 1180. The court distinguished Smith v. Superior Court, 151 Cal.App.3d 491, 198 Cal.Rptr. 829 (1984) and Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986), in which courts had recognized a cause of action for spoliation of evidence:

Both Smith and Hazen are readily distinguishable from the case before us. In Smith, Abbott Ford had agreed with Smith's counsel that it would safeguard and preserve the automotive parts for inspection and use by the plaintiff, thereby creating a duty to do so. No such agreement exists in the case at bar. In Hazen, the destruction of an allegedly exculpatory tape would presumably make conviction easier for the prosecution. *In both cases the evidence was destroyed by the adverse party in pending litigation to the direct benefit of such party. That is*

*not the situation with which we are faced. To the contrary, it would be to the disadvantage of the appellee herein to destroy any evidence because as the employer of appellant it would have been subrogated to any recovery Koplin might have obtained to the extent of the workers' compensation payments made to Koplin. K.S.A. 44-504. Additionally, appellee here was not the adverse party in any action pending or contemplated by appellant.*

241 Kan. at 212, 734 P.2d at 1181. [Emphasis supplied]. Of course, this is precisely the point made by the defendant in this case. It was not a party to any pending or impending litigation involving the plaintiff and the hose. The destruction of the hose would in no way benefit the defendant, and would actually prejudice its subrogation rights. The reason the hose was returned to the manufacturer and the seller was the same reason any consumer would return a product, i.e., in order to obtain a replacement and for a determination to be made regarding the cause of the failure. The fact that the seller might have some insignificant corporate relationship with the defendant is simply insufficient to support any cause of action for spoliation by the plaintiff. The defendant had no duty and made no representations that it would preserve the hose for the plaintiff's benefit. Accordingly, the defendant submits that dismissal is appropriate.

**D. THE PLAINTIFF FAILS TO ADDRESS THE POLICY RECOGNIZED IN A NUMBER OF SPOILIATION CASES THAT IT IS INAPPROPRIATE FOR A FEDERAL DISTRICT COURT TO MAKE NEW STATE LAW.**

As noted in the defendant's initial memorandum of law, a number of other federal courts in situations similar to those presented in the instant case have refused to recognize a cause of action for spoliation of evidence. In 5636 Alpha Road, supra at 665, a federal district court awarded summary judgment on a negligent spoliation claim to the defendant, which the plaintiff charged with the loss or destruction of certain documents, noting that:

The best Alpha can do to support a claim for negligent spoliation is to rely on a Texas case that discussed the theory but neither accepted nor rejected it. See Diehl v. Rocky Mountain Communications, Inc., 818 S.W.2d 183, 184 (Tex. App. 1991, writ denied). This hardly supports the proposition that Texas recognizes such a claim. *This federal court will not make new state law.* Accordingly, the claim is dismissed as a cause of action.

[Emphasis supplied and footnote omitted]. Similarly, in Moore v. United States, supra at 165, where the plaintiffs asserted spoliation of evidence after the ATVs which allegedly caused their injuries had been sold by the defendants at an auction, the court stated:

Since Colorado courts have given no indication that Colorado recognizes such a claim, it would be reasonable to "predict" that the state's highest court would also choose not to recognize the claim in this case.

Furthermore, federal courts exercising diversity jurisdiction have traditionally applied existing state law and have refrained from creating *new* state law where the state's highest court has not done so. See City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 122-23 (3rd Cir. 1993). Recognizing Plaintiffs' claim for spoliation of evidence in this case would create new law for Colorado.

[Emphasis in original and footnote omitted].<sup>3</sup> Finally, in Wilson v. Beloit Corp., 921 F.2d 765 (8th Cir. 1990), the Eighth Circuit affirmed the dismissal of a claim of spoliation of evidence in a case with circumstances similar to those presented in this case. In Wilson, the plaintiff was injured during the course of his employment by the defendant. Id. at 766. Later, he filed an action against the manufacturer of the machine which allegedly caused his injuries. Id. When he discovered that parts

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<sup>3</sup> The court in Moore noted, as has the Supreme Court of Virginia, that:

Colorado law recognizes alleged "spoliation of evidence" as a rule of evidence, rather than a claim for relief. It raises a presumption that the evidence would have been unfavorable to the party allegedly responsible for destruction or suppression of evidence. The presumption is rebuttable and constitutes a question of fact. See Richardson v. Richardson, 124 Colo. 240, 236 P.2d 121, 127 (1951); see also Schmidt v. Ford Motor Co., 112 F.R.D. 216, 217-21 (D. Colo. 1986) wherein I discussed other methods of dealing with spoliation and misconduct by counsel.

864 F. Supp. at 163. See also 29 Am. Jur. 2d Evidence § 175, at 220 (1967) ("It is generally held that where a party . . . destroys or spoils evidence, a presumption or inference arises that such evidence . . . would have been unfavorable to him."). [Footnotes omitted].

of the machine involved in the accident were missing, he then sued his employer for intentional or negligent spoliation of evidence. Id. Affirming the district court's award of summary judgment to the employer under the law of Arkansas, the Eighth Circuit stated:

The district court . . . found that Arkansas tort law did not impose a duty to preserve evidence. The court was unable to find an Arkansas case recognizing a common law tort for intentional interference with a prospective civil action by spoliation of evidence. The Wilsons concede that there are no binding Arkansas decisions recognizing such a tort, but contend that because other jurisdictions have recognized such a tort, summary judgment for IPC is improper. This *non sequitur* ignores one of the two basic criteria for summary disposition, namely, that summary judgment is proper where the moving party is entitled to judgment as a matter of law. See, e.g., Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984). Here, the district court held that IPC was entitled to judgment as a matter of *Arkansas* law, and we defer to this state-law ruling.

Id. at 767.

**E. ALL OF THE CASES RELIED UPON BY THE PLAINTIFF RECOGNIZING A SPOILIATION CAUSE OF ACTION ARE DISTINGUISHABLE.**

All of the cases noted by the plaintiff recognizing a spoliation cause of action are distinguishable from the case *sub judice*. They involve the breach of promises to preserve evidence; the spoliation of evidence by the defendant in the underlying action; the application of circumstances that might constitute spoliation to other

tort principles already recognized in the jurisdiction; or the application of the evidentiary inference rather than recognition of an independent tort.

In Smith v. Superior Court, 151 Cal. App. 3d 491, 494, 198 Cal Rptr. 829, 831 (1984), for example, "*Abbott Ford agreed with the Smiths' counsel to maintain certain automotive parts (physical evidence), pending further investigation.*" [Emphasis supplied]. In Bondu v. Gurvich, 473 So. 2d 1307, 1311 (Fla. App. 1984), the "crux of the plaintiff's cause of action *against the hospital* is the failure to keep and maintain records, which failure rendered the plaintiff unable to prove the medical malpractice of the hospital and others." [Emphasis supplied]. In DeLaughter v. Lawrence County Hospital, 601 So. 2d 818 (Miss. 1992), the party accused of spoliation was the *defendant hospital* and the matter of spoliation was discussed solely with respect to its *evidentiary effect*, not with respect to supporting an independent cause of action. In Hazen v. Anchorage, 718 P.2d 456, 464 (Alaska 1996), it was the *defendant police officers* who were charged with alteration of an arrest tape. In Jackovich v. General Adjustment Bureau, Inc., 119 Mich. App. 221, 235, 326 N.W.2d 458, 464 (1982), the court did not expressly recognize a cause of action for spoliation of evidence and affirmed the dismissal of the plaintiff's action for "*conversion*" because there "was no evidence presented that Choi intentionally lost the parts." [Emphasis supplied]. In Viviano v. CBS, Inc., 251 N.J. Super. 113, 122, 597 A.2d 543, 548 (1991), the

plaintiff's cause of action was not spoliation of evidence, but "[t]he question of defendants' liability was submitted to the jury on four legal theories, *fraudulent concealment, fraudulent misrepresentation, conspiracy, and interference with prospective economic advantage.*" [Emphasis supplied]. In Henry v. Deen, 310 N.C. 75, 88, 310 S.E.2d 326, 334 (1984), the *defendant physicians* were charged with falsifying medical records and the court's decision was not based upon a spoliation theory, but on its *rules of civil procedure* which allow the imposition of costs for discovery violations. In Smith v. Howard Johnson Company, Inc., 67 Ohio St. 3d 28, 29, 615 N.E.2d 1037, 1038 (1993), the court conditioned the right to institute a spoliation action against third-parties on it being instituted "*at the same time as the primary action,*" which was not done in the instant case. [Emphasis supplied]. Finally, in Barker v. Bledsoe, 85 F.R.D. 545, 547 (W.D. Okla. 1979), the matter is discussed solely in terms of the *evidentiary effect* of the unavailability of evidence due to spoliation. The defendant submits that these cases are hardly compelling persuasive authority for recognizing a cause of action that has heretofore not be recognized in either Virginia or West Virginia.

#### IV. CONCLUSION


The defendant respectfully submits that the plaintiff has simply failed to state a cause of action upon which relief can be granted. He is, however, not

without remedies. He can seek, in the products liability action, a ruling on whether the evidentiary rule regarding spoliation of evidence applies. Moreover, even in the absence of a favorable ruling in this regard, his experts can evaluate the expert opinions of the defendants in the product liability action and determine whether they disagree with their conclusions. The defendant respectfully submits that there is simply no good reason to venture into uncharted territory under the circumstances of this case.

CONSOLIDATION COAL COMPANY

By Counsel

STEPTOE & JOHNSON  
Of Counsel

  
\_\_\_\_\_  
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IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

KENNETH AUSTIN,

Plaintiff

vs.)

Civil Action No. 5:97-0520

CONSOLIDATION COAL COMPANY,

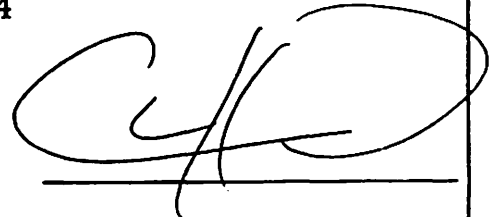
Defendant.

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that I served the foregoing "Reply Memorandum of Law in Support of Defendant's Motion to Dismiss" on this 24th day of November, 1997, upon counsel of record in the above-referenced proceeding, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

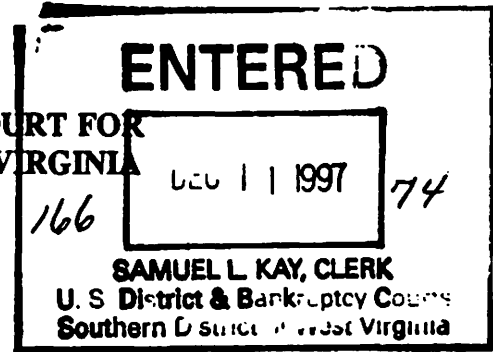
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Brewster, Morhous & Cameron  
P.O. Box 529  
Bluefield, WV 24701-0529

Thomas R. Scott, Esq.  
Street, Street, Street, Scott & Bowman  
P.O. Box 2100  
Grundy, VA. 24614



IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA

BECKLEY DIVISION



KENNETH WAYNE AUSTIN,

Plaintiff,

vs.

CIVIL ACTION NO. 5:97-0520

CONSOLIDATION COAL COMPANY,

Defendant.

**ORDER**

Pursuant to Rule 5:42 of the Virginia Rules of Court, this Court hereby **CERTIFIES** the question of law described below to the Supreme Court of Virginia. Because certification is necessary to resolve a pending action and there is no controlling precedent on point under Virginia law, the Court **REQUESTS** that the Supreme Court of Virginia furnish it with an answer to the following question of law:

**(1) Nature of the Controversy**

The above-styled case is an action in tort, with federal jurisdiction predicated upon diversity of citizenship under 28 U.S.C. § 1332.

**(2) Question of Law to be Answered**

Whether Virginia law would recognize intentional or negligent interference with a prospective civil action by spoliation of evidence as an independent tort under the facts described below.

### **(3) Statement of Facts**

The facts stated herein arise in the context of the defendant's Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the Court will articulate all relevant facts in the light most favorable to the plaintiff, taking all allegations contained in his complaint as true.

On May 20, 1995, the plaintiff Kenneth Austin was injured while working in a coal mine in Buchanan County, Virginia. The accident occurred when a hose that Mr. Austin was using to cool down a welding area burst in his hands, causing severe injuries to his face and neck. Because he received workers' compensation benefits, Mr. Austin was barred by statutory immunity under Virginia law from pursuing a cause of action against his employer, Consolidation Coal Company ("Consolidation"), the defendant in the above-styled case. Therefore, Mr. Austin chose to pursue a products liability action against the manufacturer and distributor of the allegedly defective hose which caused his injuries.

However, Consolidation allegedly refused to disclose the identities of the manufacturer and distributor to Mr. Austin. Consolidation also refused to provide Mr. Austin with samples of the hose, or to allow his expert to evaluate the hose on Consolidation's property. This is despite the fact that Consolidation freely granted access to the hose to both the manufacturer and the distributor for their defense experts to evaluate. When one year passed and Consolidation had still failed to provide voluntary cooperation, Mr. Austin filed an action against them in the Buchanan County Circuit Court. At a May 23, 1996 hearing, Judge Keary R. Williams ordered that Consolidation's purchasing agent sit for a deposition with plaintiff's counsel for the purpose of discovering the identities of the manufacturer and distributor of the hose. Judge Williams also ordered Consolidation to

preserve the hose as evidence until the plaintiff's experts had an opportunity to test it.

In direct violation of this court order, Consolidation allegedly destroyed the hose before Mr. Austin's experts ever had a chance to conduct independent testing. Mr. Austin did eventually discover the identities of the manufacturer, National Fire Hose Corporation, and the distributor, Fairmont Supply Company, and subsequently filed suit against both companies in this Court. Discovery also revealed that the distributor, Fairmont Supply Company, is either a subsidiary or an affiliate corporation of Consolidation. Due to Consolidation's destruction of the allegedly defective hose, Mr. Austin claims that he confronts significant obstacles in proving his products liability claim. For this reason, Mr. Austin initiated the above-styled action against Consolidation, claiming that they tortiously interfered with his ability to pursue a products liability suit when they destroyed the allegedly defective hose. Other courts have labeled such tortious conduct as "spoliation of evidence."

**(4) Names of the Parties Involved**

The plaintiff in the above-styled case is Kenneth Austin, who resides in Wyoming County, West Virginia. The defendant is Consolidation Coal Company, which owns the mine in Buchanan County, Virginia, where the plaintiff's injury occurred.

**(5) Counsel for the Parties**

Mr. Austin is represented by Donald T. Caruth of Brewster, Morhous & Cameron, P.O. Box 529, Bluefield, West Virginia, 24701-0529. He may be reached at (304) 325-9177. Mr. Austin is also represented by Thomas R. Scott, Jr. of Street, Street, Street, Scott & Bowman, 339 West Main Street, P.O. Box 2100, Grundy, Virginia, 24614. Mr. Scott may be reached at (540) 935-2128.

Consolidation Coal Company is represented by Ancil G. Ramey and Steven P.

McGowan of Steptoe & Johnson, Bank One Center, 7th Floor, P.O. Box 1588, Charleston, West Virginia, 25326-1588. They may be reached at (304) 353-8000.

**(6) Why Certification is Necessary**

Currently pending before this Court is defendant Consolidation Coal Company's Motion to Dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The defendant argues that the plaintiff Kenneth Austin has failed to state a claim for which relief may be granted because neither Virginia nor West Virginia recognizes the tort of intentional or negligent interference with a prospective civil action by spoliation of evidence. Under West Virginia choice of law principles, it appears that decisions in the above-styled case will be governed by Virginia law because the injury occurred in Virginia and public policy concerns do not require this Court to apply West Virginia law. No court in Virginia has addressed the issue of whether interference with a prospective civil action by spoliation of evidence states a viable cause of action under Virginia tort law. Therefore, certification of this issue is necessary to assist the Court in ruling on defendant's Motion to Dismiss.

For the foregoing reasons, this Court respectfully **REQUESTS** that the Supreme Court of Virginia provide an answer to the question of whether Virginia law would recognize intentional or negligent interference with a prospective civil action by spoliation of evidence as an independent tort under the facts described herein. The Court **DIRECTS** the Clerk to send a certified copy of this Order to the Supreme Court of Virginia, all counsel of record, and any unrepresented party. The Court further **DIRECTS** the Clerk to send a copy of the court file to the Supreme Court of Virginia.

ENTER: December 10, 1997

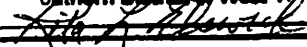
  
\_\_\_\_\_  
JOSEPH R. GOODWIN  
UNITED STATES DISTRICT JUDGE

**A TRUE COPY CERTIF**

DEC 11 1997

SAMUEL L. KAY, CLERK  
U.S. District & Bankruptcy Co.  
Southern District of West Vi.

By



Deputy

12/18/97

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

KENNETH AUSTIN,

Plaintiff

vs.)

Civil Action No. 5:97-0520  
Judge Goodwin

CONSOLIDATION COAL COMPANY,

Defendant.

MOTION TO AMEND CERTIFICATION ORDER

NOW COMES the defendant, Consolidation Coal Company, by Steptoe & Johnson, Steven P. McGowan, and Ancil G. Ramey, its attorneys, and hereby moves this Court to amend its certification order entered in this matter on the 11th day of December, 1997, as follows.

As correctly noted in this Court's certification order, this matter is currently pending on a motion under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a cause of action upon which relief may be granted. Review of a motion under Fed. R. Civ. P. 12(b)(6) is limited to the allegations contained in the complaint. This is acknowledged on page two of this Court's certification order, where it is stated, "Accordingly, the Court will articulate all relevant facts in the light most favorable to the plaintiff, *taking all allegations contained in his complaint as true.*" [Emphasis supplied].

Rather than confining itself to the plaintiff's complaint, however, the certification deviates materially from the allegations in the complaint. For example, the complaint states, "Austin was preparing to wet down an underground mine area which had been exposed to a welding operation when the hose ruptured," but the order states, "The accident occurred when a hose that Mr. Austin was using to cool down a welding area burst in his hands . . . ." The complaint states, "Austin received injuries about the head and face," but the order states that he received "severe injuries to his face and neck." The order states, "Consolidation allegedly refused to disclose the identities of the manufacturer and distributor to Mr. Austin." but nowhere is this specific allegation contained in the complaint. The order states, "Consolidation also refused to provide Mr. Austin with samples of the hose, or to allow his expert to evaluate the hose on Consolidation's property," but nowhere is this specific allegation contained in the complaint. The order states, "Judge Williams also ordered Consolidation to preserve the hose as evidence until the plaintiff's experts had an opportunity to test it," but the complaint states, "The Circuit Court of Buchanan County . . . issued a verbal directive at the time of the hearing that the hose was not to be destroyed or otherwise secreted to enable Austin to ultimately recover the hose."<sup>1</sup> The order states, "In direct violation of this court

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<sup>1</sup> In fact, as reflected in the transcript of the hearing, which was attached to the plaintiff's complaint, Judge Williams stated, "Well, I'm going to . . . The order under the law



order, Consolidation allegedly destroyed the hose before Mr. Austin's experts ever had a chance to conduct independent testing," but the complaint states, "the hose . . . is no longer available. . . . Upon information and belief, Austin has learned that the aforesaid portion of the hose was returned to Consolidation and that the latter has refused to disclose its whereabouts." The order states, "Discovery also revealed that the distributor, Fairmont Supply Company, is either a subsidiary or an affiliate corporation of Consolidation," but nowhere is this allegation contained within the four corners of the complaint.

The defendant respectfully submits that this Court's certification order should be amended to provide only that the allegations of fact contained in the plaintiff's complaint are, for purposes of both Fed. R. Civ. P. 12(b)(6) and the certified question proceeding, presumed to be true. Otherwise, this Court's order has the effect of amending the plaintiff's complaint and essentially converting this matter to one under Fed. R. Civ. P. 56 without the benefit of discovery. In the alternative, this Court might direct the parties to prepare an agreed statement of facts or to submit proposed statements of fact. In any event, the defendant has filed a proper motion under Fed. R. Civ. P. 12(b)(6), asserting that, assuming the truth of each and every one of its allegations, *the complaint fails to state a cause of action*

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*case should contain a statement that no parties are to do anything as far as to effect the integrity of the hose that's the subject of this petition, during the pendency of this matter."*

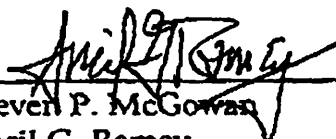
upon which relief may be granted under the law of the Commonwealth of Virginia. Pursuant to this motion, certification of the question to the Supreme Court of Virginia is perfectly proper, but the defendant submits that it should be done so *pursuant to the allegations contained in the complaint.*

WHEREFORE, the defendant respectfully requests that this Court (1) enter an amended certification order providing only, with respect to the statement of facts, that the allegations of the complaint are assumed to be true; (2) direct the parties to submit an agreed statement of facts; or (3) allow the parties to submit proposed statement of facts for purposes of the certification.

CONSOLIDATION COAL COMPANY

By Counsel

STEPTOE & JOHNSON  
Of Counsel

  
\_\_\_\_\_  
Steven P. McGowan  
Ancil G. Ramey  
P.O. Box 1588  
Charleston, WV 25326-1588  
Telephone (304) 353-8000

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

KENNETH AUSTIN,

Plaintiff

vs.)

Civil Action No. 5:97-0520

CONSOLIDATION COAL COMPANY,

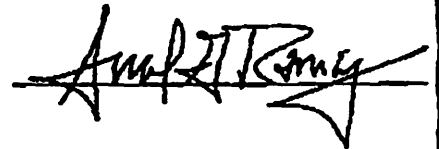
Defendant.

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that I served the foregoing "Motion for Amended Certification Order" on this 18th day of December, 1997, upon counsel of record in the above-referenced proceeding, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Donald T. Caruth, Esq.  
Brewster, Morhous & Cameron  
P.O. Box 529  
Bluefield, WV 24701-0529

Thomas R. Scott, Esq.  
Street, Street, Street, Scott & Bowman  
P.O. Box 2100  
Grundy, VA 24614



12/29/97

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION

KENNETH AUSTIN,

Plaintiff

vs.)

Civil Action No. 5:97-0520  
Judge Goodwin

CONSOLIDATION COAL COMPANY,

Defendant.

MOTION FOR A CONTINUANCE

NOW COMES the defendant, Consolidation Coal Company, by Steptoe & Johnson, Steven P. McGowan, and Ancil G. Ramey, its attorneys, and hereby moves this Court for a continuance of a pretrial conference scheduled in the above-referenced matter for "Tuesday, December 29, 1997, at 3:00 p.m., in Beckley, West Virginia,"<sup>1</sup> for the following reasons.

First, it is the defendant's belief that this matter may have been consolidated for purposes of the pretrial conference with Kenneth Austin v. National Fire Hose Corporation, et al., Civil Action Number 5:96-2044, and that William H. File, III, Esq., an attorney for one of the defendants in such case, has requested a continuance of the pretrial conference. If this Court acts favorably on said motion;

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<sup>1</sup> Because December 19, 1997, is a Monday, rather than Tuesday, the defendant assumes that the order was intended to read, "Monday, December 29, 1997, at 3:00 p.m., in Beckley, West Virginia."

the defendant submits that consideration of its motion should likewise be favorable.

Second, the scheduling order states, "Individuals with full authority to settle the case shall be present in person," and Karl T. Skyrpak, Senior Counsel with Consol, Inc., the person with such authority on behalf of the defendant, had previously scheduled to be on vacation the week of December 29, 1997.

Third, this matter has been certified to the Supreme Court of Virginia and the defendant's motion to amend this Court's certification order has been filed and is pending.

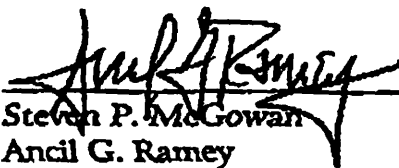
Finally, the defendant is authorized to inform this Court that counsel for the plaintiff, Donald T. Caruth, Esq., not only does not oppose, but joins in this motion for a continuance of the pretrial conference.

WHEREFORE, the defendant respectfully requests that this Court enter an Order continuing the pretrial conference scheduled for Monday, December 29, 1997.

CONSOLIDATION COAL COMPANY

By Counsel

STEPTOE & JOHNSON  
Of Counsel

  
Steven P. McGowan  
Ancil G. Ramey  
P.O. Box 1588  
Charleston, WV 25326-1588  
Telephone (304) 353-8000

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
BECKLEY DIVISION**

**KENNETH AUSTIN,**

**Plaintiff**

**vs.)**

**Civil Action No. 5:97-0520**

**CONSOLIDATION COAL COMPANY,**

**Defendant.**

**CERTIFICATE OF SERVICE**

I, Ancil G. Ramey, do hereby certify that I served the foregoing "Motion for Continuance" on this 22nd day of December, 1997, upon counsel of record in the above-referenced proceeding, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Donald T. Caruth, Esq.  
Brewster, Morhous & Cameron  
P.O. Box 529  
Bluefield, WV 24701-0529

Thomas R. Scott, Esq.  
Street, Street, Street, Scott & Bowman  
P.O. Box 2100  
Grundy, VA 24614

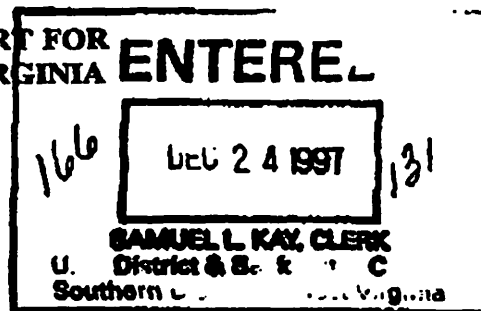


12/24/97

IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA

**ENTERED**

**BECKLEY DIVISION**



**KENNETH WAYNE AUSTIN,**

**Plaintiff,**

**vs.**

**CIVIL ACTION NO. 5:97-0520**

**CONSOLIDATION COAL COMPANY,**

**Defendant.**

**AND**

**KENNETH AUSTIN,**

**Plaintiff,**

**vs.**

**CIVIL ACTION NO. 5:96-2044**

**NATIONAL FIRE HOSE CORPORATION, and  
FAIRMONT SUPPLY COMPANY,**

**Defendants.**

*Put  
date on calendar -  
Find out if  
I need to go. NO -  
Don  
will  
cover  
this  
ep*

**ORDER**

Pending in each of these matters are motions by the defendants to continue the pretrial conference currently set for December 29, 1997, at 3:00 p.m. in Beckley. The Court **ORDERS** that the motions be granted and that the pretrial conference currently set for December 29, 1997, at be continued until February 2, 1998, at 3:00 p.m. in Charleston.

The Clerk is directed to send a copy of this order to all counsel of record and to any unrepresented party.

ENTER: December 22, 1997



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JOSEPH R. GOODWIN  
UNITED STATES DISTRICT JUDGE



**IN THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF WEST VIRGINIA**

**BECKLEY DIVISION**

**KENNETH WAYNE AUSTIN,**

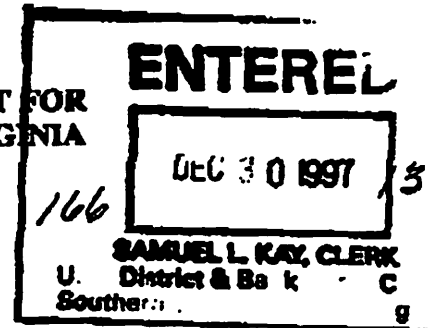
*Plaintiff,*

*vs.*

**CIVIL ACTION NO. 5:97-0520**

**CONSOLIDATION COAL COMPANY,**

*Defendant.*



**ORDER**

The defendant in the above-styled case has filed a Motion to Amend the Certification Order, in which this Court certifies a question of law to the Supreme Court of Virginia. Certification is necessary in order for the Court to rule on the defendant's Motion to Dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The defendant does not dispute the propriety of certifying the question of law to the Supreme Court of Virginia. However, the defendant moves to amend the Certification Order on the grounds the Court improperly included facts in the Certification Order that were not contained in the plaintiff's complaint.

All facts recounted by the Court in the Certification Order were derived from the complaint and the parties' briefing of the Motion to Dismiss. The Court included facts from the parties' briefs that were not explicitly contained in the complaint in order to provide the proper context for the Supreme Court of Virginia to decide the certified question of law. If the Court were ruling on the defendant's Motion to Dismiss, the Court would be confined to

the facts contained in the complaint. However, the Court is not bound by the same Rule 12(b)(6) standard when certifying a question of law to the highest state court in Virginia under Rule 5:42 of the Virginia Rules of Court. Accordingly, the Court **FINDS** that inclusion of facts not contained in the complaint in the Certification Order is proper.

For the above-stated reasons, defendant's Motion to Amend the Certification Order is hereby **DENIED**. The Court **DIRECTS** the Clerk to send of copy of this Order to counsel of record and any unrepresented parties.

ENTER: December 29, 1997



JOSEPH R. GOODWIN  
UNITED STATES DISTRICT JUDGE

VIRGINIA:

*In the Supreme Court of Virginia hold at the Supreme Court Building in the  
City of Richmond on* Wednesday the 14th day of January, 1998.

Kenneth Wayne Austin, Plaintiff,  
against Record No. 972627  
Consolidation Coal Company, Defendant.

Upon consideration of the order of certification entered by the United States District Court for the Southern District of West Virginia, Beckley Division, this Court accepts the question of law certified by the said United States District Court in this case.

Oral argument tentatively is scheduled for 30 minutes during the April 1998 session of this Court. The time for filing plaintiff's opening brief and appendix and the designation of the parts of the record to be included in the appendix shall run from the date of this order. The filing of all other briefs and pleadings shall be in accordance with Rules 5:26 through 5:32.

A Copy,

Teste:

  
Clerk