

February 26-27, 1993.

CURRENT *MANDOLIDIS* LITIGATION

R. Dean Hartley
Phillips, Gardill, Kaiser, Boos & Hartley
61 Fourteenth Street
Wheeling, West Virginia 26003
(304) 232-6810 Telephone

I.

HISTORICAL BACKGROUND TO *MANDOLIDIS*

At the turn of the century, the common law tort system was utilized by workers who were injured on the job. The system was "fault" based and required the employee to prove that his injuries were the result of his/her employer's negligence. The employer could utilize the "unholy trinity" of contributory negligence, assumption of risk, and the fellow servant rule to defeat an employee's claim. The continued industrialization of the country and its associated devastating injuries, made it clear that the common law system was bellicose to the public welfare. Workers' Compensation acts were adopted to replace the "fault" base system with a "no-fault" procedure. **Negligently** caused industrial accidents were removed from the common law arena. *See*, 1 A. Larson's, Workmen Compensation Law ch 1-4 (1978); *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907, 910-911 (1978).

In 1913, West Virginia Legislature enacted W.Va. Code ' 23-4-2 which preserved an employee's common law cause of action "as if [the Act] had not been enacted" "if injury or death result to any employee from the deliberate intention of the employer to produce such injury or death." *Mandolidis, supra*. 161 W.Va. 695, 246 S.E.2d at 910.

From the adoption of ' 23-4-2 in 1913 until the *Mandolidis* decision in 1978, the Supreme Court attempted to delineate what was required to establish that the employee's

injuries or death were the result of the employer's "deliberate intent." In *Collins v. Dravo Contracting Co.*, 114 W.Va. 229, 171 S.E. 757 (1933), the Court found that the Complaint sufficiently pleaded allegations that the employer deliberately intended the injury and **rejected** the proposition that an employer could **never** intend that employee be injured or killed. In so doing, the Court stated:

We cannot see why the master cannot omit to perform a certain duty imposed by law upon him with the deliberate intent by so doing to inflict injury or death upon his employee. . . . If the defendant permitted the conditions set forth in the declaration to exist; if they were conditions that would naturally result in injury or death to its employees, and lent themselves to that purpose; if the defendant, prior to the happening that resulted in the death of plaintiff's decedent, knew full well that such conditions existed; then, however difficult the proof may be when it comes to that, as a matter of pleading, we cannot see why the very conditions alleged as matters of fact might not have been permitted to continue with the deliberate intent on the part of the employer, and with a design, that their continuance should cause injury or death or both to its employees.

Id., at 234-35, 171 S.E. at 759.

In *Maynard v. Island Creek Coal Co.*, Syllabus Pt. 1 held in part that "to bring a case with [' 23-4-2] at the very best there must be alleged facts from which the natural and probable consequence reasonably to be interpreted would be death or serious injury to the employee affected thereby." The *Maynard* court did not conclude that a showing of specific intent to injure or kill was required to remove a claim from the Workers' Compensation Act's exclusivity, but rather stated "that the carelessness, indifference and negligence of an employer may be so wanton as to warrant a judicial determination that his ulterior intent was to inflict injury." *Maynard*, 115 W.Va. at 252, 175 S.E. at 71.

In two cases decided after *Collins* and *Maynard*, the Court seemed to back away¹ from its early pronouncements that deliberate intent could be established by wanton carelessness, indifference and negligence, holding instead that

' 23-4-2 required "a specific deliberate attempt on the part of the [employer] to produce injury." *Allen v. Raleigh-Wyoming Mining Co.*, 117 W.Va. 631, 186 S.E. 612, 613 (1936)²; *Brewer v. Appalachian Constructors*, 135 W.Va. 739, 65 S.E.2d 87, 94 (1951)³.

II.

¹Justice Wilson felt that *Allen* "seemingly almost closed the door on actions by employees against employers." In discussing the confusion that the decisions created, he stated, "It would seem reasonable that if wantonness conveys the idea of purpose or design, actual or constructed, then evidence sufficient to show wanton misconduct and injury resulting therefrom should be considered sufficient to permit a jury to find both deliberation and intent." Interestingly, Justice Wilson pointed out that the court had not had problems applying "willful" misconduct to an employee. Citing, "[f]or example, in *Young v. State Compensation Commissioner*, 123 W.Va. 299, 303, 14 S.E.2d 774, 776 (1941), when it was dealing with a charge of willful misconduct of an employee, this Court stated: 'Knowledge of the statute or rule promulgated an *deliberate and intentional* violation of either constitutes willful misconduct.'" *Eisnaugle v. Booth*, 159 W.Va. 779, 226 S.E.2d 259, 263 (1976) (Wilson, J. concurring) (emphasis in original).

²The Court, in *Mandolidis*, noted that the *Allen* court had relied on Washington and Oregon decisions interpreting substantially similar decisions in support of its holding. The Oregon decision based its definition of "deliberate intent" on that state's murder statute. The West Virginia Supreme Court has specifically refused to adopt such a definition found in West Virginia's criminal statute in *Collins*.

³The Brewer Court reiterated the *Collins* and *Maynard* holdings, but added that the necessary proof would need to be exceptionally strong. "It may be that the carelessness, indifference and negligence of an employer may be so wanton as to warrant a judicial determination that his ulterior intent was to inflict injury. But in the very nature of things, a showing

MANDOLIDIS

which would warrant such finding would have to be clear and forceful in high degree." *Id.*

A. Given this precedential background, the Court in *Mandolidis v. Elkins Industries, Inc., supra.*, attempted to reconcile what seemed to be conflicting case law language so as to develop a concise definition of the term "deliberate intent" contained in W.Va. Code ' 23-4-2.⁴

1. When death or injury results from willful, wanton or reckless misconduct or an intentional tort, it is no longer accidental. . . and must be taken as having been inflicted with deliberate intention for the purposes of the workers' compensation act. *Mandolidis, supra.*, 161 W.Va. 695, 246 S.E.2d at 914.

2. The conduct removing the immunity bar must be undertaken with **a knowledge and an appreciation of the high degree or risk of physical harm to another created thereby**. Liability will require "a strong probability that harm may result." *Id.* (citations omitted) (emphasis added).

3. Proof of subjective realization of the risk may and must be proven by circumstantial evidence.

a. Employers' knowledge of the existence and contents of federal and state safety laws and regulations as competent evidence.

b. Prior deaths or injuries as a result of the risks are relevant. *Id.*, at 914, n.10.

c. The standard by which the conduct and resulting harm is judged to determine its "intentional" characteristics is not only the subjective knowledge of the

⁴Justice Miller suggested that the [t]he divergent language in our cases arises from the struggle to place the term "deliberate intention" into an existing legal compartment." *Mandolidis, supra.*, 161 W.Va. 695, 246 S.E.2d at 924 (Miller, J. concurring).

individual, but what would be known by a reasonable person. *Id.*, at 925 (Miller, J., concurring). Justice Miller suggested that the [t]he divergent language in our cases arises from the struggle to place the term "deliberate intention" into an existing legal compartment."

Mandolidis, supra., 161 W.Va. 695, 246 S.E.2d at 924 (Miller, J. concurring)

4. Intent is inferred. *Id.*, at 918.

a. Intent is bound to be the existence of a state of mind, and since that state of mind must be arrived at in proof by the establishment of facts extraneous to the mind itself, it seems to us that it is always bound to be a deduction or conclusion from the facts so established. *Collins, supra.*, 114 W.Va. at 235, S.E.2d at 759.

b. . . . The inquiry is directed at the degree of probability that the conduct will produce a given result. The higher degree of probability that a given result will follow, the greater the intention is inferred from the conduct. *Mandolidis, supra.*, at 925 (Miller, J., concurring).

B. In the state court decisions which applied the *Mandolidis* standard, prior to the 1983 amendment, only one case was found to have met the elevated standard established by the Court in 1978.

1. *Cline v. Joy Mfg. Co.*, 172 W.Va. 769, 310 S.E.2d 835 (1983). A company foreman was injured operating a continuous miner after an hourly worker left the miner incapacitated with water in the cab. The court formulated the *Mandolidis* decision into a standardized test and held in Syllabus Pt. 1:

Under *Mandolidis v. Elkins Industries, Inc.*, [161] W.Va. [695], 246 S.E.2d 907 (1978), it is essential in order to recover that the employer's misconduct must be of an intentional or

willful, wanton and reckless character, that the employer must have knowledge and appreciation of the high degree of risk of physical harm to another created by such misconduct, and, of course, that the employer's action must be the proximate cause of the injury.

After reiterating the test, the court found that the facts could not meet the elevated standard. There was no order to run the continuous miner; no one other than the plaintiff was aware of its condition; and the miner could have been left unattended until the water was pumped from its cab.

2. *Kane v. Corning Glass Works.*, 175 W.Va. 77, 331 S.E.2d 807 (1984).

(Standard not met: no safety violations; no evidence canopy constituted dangerous condition which demonstrated intent to injure by continuous operation.)

3. *Mooney v. Eastern Associated Coal Corp.*, 174 W.Va. 350, 326 S.E.2d 427 (1984).

b. Justice Miller, in dissent, No pointed out that the defendant had revised the bolt plan, previously approved by federal and state inspectors, to increase the number and length of roof bolts; and added cribbing and postal supports to bolster the roof's support. Two MSHA citations were issued to the defendant, one from another area of the mine, and a second from the are where plaintiff was killed which had been corrected the day of the accident.⁵ There was no evidence of a prior accident. No one was ordered to work in the section in light of the imminent danger. All of which failed to demonstrate, in Justice

⁵A violation and its prompt remedy does not reflect willful or intentional conduct calculated to inflict injury or death. *Mooney, supra.*, 174 W.Va. 350, 326 S.E.2d at 433 (Miller, J. dissenting).

Miller's opinion, a deliberate intent to kill the plaintiff.

c. W. Va. Code ' 23-4-2(b) clearly indicates that "damages in a *Mandolidis*-type suit are 'for excess damages' above those provided by compensation. *Mooney v. Eastern Associated Coal Corp.*, 174 W.Va. 350, 326 S.E.2d 427, 430 (1984). *Mooney* further indicates that "evidence of the value of compensation benefits must be submitted to the jury with instructions that any verdict for the plaintiff shall be for damages in excess of such benefits", and that "[a]n employer has the burden of proof because [the offset] ... is a reduction of an employer's exposure to damages." *Mooney v. Eastern Associated Coal Corp.*, *supra*, 326 S.E.2d at 430 & n. 3 (emphasis in original). In addition, the Court's decision in *Mooney* indicates that the employer will be entitled to offset the present value of a life award with respect to the employee's claim for damages alone, and that there will be no offset in connection with the damages awarded to the wife for her loss of consortium claim. *Mooney v. Eastern Associated Coal Corp.*, *supra*, 326 S.E.2d at 430-31, 434-35.

Going beyond the majority's opinion in *Mooney* four of the five Justices further held in section II of Justice Miller's dissenting opinion and discussed the actual procedural mechanics of how the jury should decide the offset issue. There it was held that the issue of the offset will be decided in a bifurcated trial. "The first part of the trial would decide liability and damages ..., and the second phase would decide the workers' compensation benefits offset received by the plaintiff." *Mooney v. Eastern Associated Coal Corp.*, *supra*, 326 S.E.2d at 433. Accordingly, the employer is not be able to interject the issue of workers' compensation benefits into the initial phase of the trial where the jury will decide the issues of liability and damages.

4. *Delp v. Itmann Coal Co.*, 176 W.Va. 252, 342 S.E.2d 219 (1986)

(Standard not met: no prior incidents of lever locking because of a bolt being used instead of a cotter pin; no one had problems with the continuous miner on the shift prior to the accident; MSHA inspected the equipment after the accident and issued no citations; no evidence that using a bolt in the lever instead of a cotter pin violated federal or state safety regulations; no evidence that improper substitution of a bolt for a cotter pin caused the tram levers to lock; and no injury in the past.)

5. *Dreyer v. Weirton Steel, Division of National Steel Corp.*, 178 W.Va.

540, 363 S.E.2d 127 (1986).

a. After sweeping up dust and debris, plaintiff placed her bucket of debris on the ground. As she prepared to take a lunch break, a gust of wind blew the contents of the bucket into her face. The evidence introduced indicated that the plaintiff's treatment of the eye injury at the plant infirmary was below the standard of care. Additionally, she was given no goggles to perform the task.

b. Court held that while her first aid treatment may have been negligent, it was not done with deliberate intention to injure her. The *Mandolidis* standard was not met in that there was no showing that the particles which blew into the plaintiff's face were alkaline in nature; various other employees had performed the job for four years without injury; no previous eye injuries; no similar eye injuries; no evidence that the defendant had notice of such injuries and failed to take corrective action.

6. *Miller v. Gibson*, 177 W.Va. 535, 355 S.E.2d 28 (1987) (Third party

complaint against board of education for contribution under *Mandolidis*. Standard not met:

no prior accidents or injuries; bleachers were found to be structurally sound by private consulting firm a few months before the fall; no citations; no reports of any injuries prior to fall.)

7. *Duty v. Walker*, 180 W.Va. 149, 375 S.E.2d 781 (1988).

a. Plaintiff's decedent was killed when drill collars swung free.

The court determined that the *Mandolidis* standard had not been met in that the procedure was used for a number of years with no injuries; no complaints had been made by the hourly workers concerning the procedure; no evidence of safety regulation violations; and no charges or citations were issued after the accident.

b. The same [*Mandolidis*] principles apply to actions against fellow employees for personal injury. *Id.* at 784. citing W.Va. Code \S 23-2-6a (1985 Replacement Vol.).

C. In the Fourth Circuit decisions which applied the *Mandolidis* standard, prior to the 1983 amendment, no case was found to have met the elevated standard established by the West Virginia Supreme Court in 1978. The Fourth Circuit either reversed the jury findings for the plaintiffs or affirmed the District Court's granting of summary judgment for the defendants.

1. *Smith v. ACF Industries, Inc.*, 687 F.2d 40 (4th Cir. 1982). The Court reversed a jury verdict in favor of the plaintiff finding there was no evidence of prior serious injuries and that the employer had utilized warning lights and buzzers to alert its employees of the potential danger. In interpreting *Mandolidis*, the Fourth Circuit Court of Appeals noted that the West Virginia Supreme Court:

. . . did not intend to open its common law courts to every employee suffering injuries because of an unsafe working place or condition created or maintained by a negligent or grossly negligent employer. The *Mandolidis* standard requires substantially more than that. *Smith v. ACF Industries, Inc.*, 687 F.2d 40, 43 (4th Cir. 1982).

2. *Marshall v. Sisters of Pallotine Missionary Soc.*, 703 F.2d 92 (4th Cir. 1983). The Court reversed a jury verdict in favor of the plaintiff in a slip and fall case. The Court found that there was no evidence offered to establish that her employer was aware of two prior falls, neither of which the plaintiff offered any evidence as to the cause of the same.

3. *Stapleton v. Ashland Oil, Inc.*, 774 F.2d 622 (4th Cir. 1985). (Robbery and rape of a convenience store employee are not consequences substantially certain to result from the way of the shop was operated. The Court found that robbery and rape, although unacceptable, were everyday occurrences of life which could not have been foreseen by the employer. The Court discounted the fact that robberies had been occurring in the neighborhood, the store had received threatening telephone calls, and a bomb threat was made to store personnel. The Court further discounted the fact that the plaintiff was left alone to attend to the store on the evening shift, and was performing her duties in the parking lot when the incident occurred.)

4. *Walls v. Dravo Corp.*, 813 F.2d 404 (4th Cir. 1986) (TABLE, TEXT IN WESTLAW, NO. 85-1975). (The Court affirmed the District Court's granting of summary judgment in favor of the employer concluding that Dravo violated no federal rules, there was no evidence of prior injury or death from TDI exposure at the plant, nor was there any

testimony indicating that Walls, or any other Dravo employee, had been fired or threatened for refusal to work after detecting an odor in the work area. Plaintiff's claim really was against the premises owner, Mobay, who had lied to Walls and Dravo concerning the nature of the TDI line.)

5. *Boggess v. Monsanto Co.*, 829 F.2d 34 (4th Cir. 1987) (TABLE, TEXT IN WESTLAW, NO. 86-3081). (The Court affirmed a jury verdict in favor of the defendant. The jury found that Monsanto had not acted diligently in seeking to determine the possible impact of exposure to dioxin on the health of its employees, but had not acted willfully or recklessly. Monsanto offered substantial evidence that after it became known that PAB was a carcinogen, it did all that it could to protect its employees from its effects short of immediate discontinuation of its production. The record would have supported a verdict in Monsanto's favor, but against the defendant's proof, there was substantial circumstantial evidence which would support a finding of indifference despite some measures to reduce the hazard. **We think a jury question was presented.**

6. *Bennett v. Nat. Steel Corp.*, 881 F.2d 1069 (4th Cir. 1989). (TABLE, TEXT IN WESTLAW, NO. 88-2853). (The Court affirmed summary judgment in favor of the defendant. Plaintiff brakeman was killed when, in the process of slowing a train by changing cars and setting brakes, he stumbled in the twilight on slag and debris adjacent to the track and fell under the wheels of the moving train. There was no evidence that over the course of several decades of this practice of dumping ore trains, another brakeman had ever been injured. The company's practices were not plainly violative of law or custom, although after the accident the company was issued a citation by OSHA because of the build up of

debris. **It is not enough that other companies may have abandoned the practice used at National.**⁶ Although there was some evidence of the employer's awareness of the slag problem and some evidence of employee complaints, few employees seemed very concerned about the conditions, and considering the length of time the process of dropping cars was in force and the slag existed, the few complaints and lack of corrective action do not demonstrate deliberate indifference.

D. In the West Virginia District Court decisions which applied the *Mandolidis* standard, prior to the 1983 amendment, few cases were found to have met the elevated standard established by the West Virginia Supreme Court in 1978, and in those rare instances where the District Court Judge permitted a case to go to the jury, the Fourth Circuit reversed each and every jury verdict in favor of the plaintiff.

1. *Belcher v. J. H. Fletcher and Co.*, 498 F.Supp. 629 (S.D. W.Va. 1980).

(Third party complaint seeking contribution from employer dismissed based on lack of pleading any facts which would amount to an intentional tort or willful, wanton and reckless misconduct.)

2. *Littlejohn v. ACF Industries Corp.*, 556 F.Supp. 70 (S.D. W.Va. 1982).

b. The plaintiff had worked as a brakeman for a total of nineteen days prior to his injury after having received a mere day and one-half of orientation and training. The plaintiff claimed that the radio he was using to contact the engineer somehow

⁶Under the 1983 amendment to '23-4-2, a violation of industry custom and practice would support one of the five elements of the revised standard.

did not permit the signal to be transmitted. The more logical explanation was that the plaintiff had utilized the wrong channel in his attempt at communication.

c. The Court held that the defendant was not put on notice of the likelihood of injury such as the plaintiff sustained due to the lack of a previous accident of similar nature. The defendant was never cited for any safety violations for either the coupling or uncoupling of cars or the transmittal of radio communications. The defendant had received no complaints from any source with regard to the procedures. There had been no accident prior to plaintiff's unfortunate incident. More importantly, the Court found that the defendant could not be "chargeable with knowledge beforehand that one such as the plaintiff would not only act on the assumption that his verbally unacknowledged command had been received by his engineer but also would for any reason fail to comply with the defendant's instruction that he stay away from rail cars when they were moving together, including specifically the couplers." *Littlejohn, supra.*, 556 F.Supp. at 75.

3. *Parsons v. Shoney's, Inc.*, 580 F.Supp. 129 (S.D. W.Va. 1983). (Under West Virginia law, the spouse of an injured worker, who has a cause of action under W.Va. Code ' 23-4-2, may join in the action to assert his or her loss of consortium claim.)

4. *James v. Stedman Machine Co., Inc.*, Civil Action No. 82-2030 (S.D. W.Va. Jan. 10, 1984). (Employer who is found to have deliberately intended the injury or death of its employee, permitting a cause of action under ¶ 23-4-2, is not entitled to indemnification or contribution from a third party defendant.)

5. *Nedley v. Consolidation Coal Co.*, 578 F.Supp. 1528 (N.D. W.Va. 1984). (Plaintiff was injured when he attempted to break through a wooden door in a hut

located next to a train track located in his employer's mine. None of the cars hit the hut in which plaintiff was located, and the only injuries plaintiff received were the result of his "trying to Rocky Bleier it" out the door.)

a. The Court then suggest nine factors which should be elevated in determining whether an employer can be liable under the *Mandolidis* statute.

1. Whether the complained of condition had resulted in previous death or injury (and the nature of any injury).

2. Whether the condition had been recognized as violative of state or federal law or accepted industry practice.

3. The nature and extent of any training or indoctrination given by the employer to the employee relevant to the condition giving rise to the injury.

4. Knowledge by the employer that the injury causing condition had a propensity to injure.

5. The employer's attitude and response to voiced complaints of employees to the injurious condition.

6. The source and frequency of concerns calling attention to the injury producing condition.

7. The length of time which elapsed between the time the condition became apparent until the date of the injury. What likelihood existed that the existing condition would produce serious injury.

8. The reason the employer allowed the condition to exist.

9. Assuming that some hazard was created by the lack of

certain safety precautions what, if any, safety features were in place or practiced. 578 F.Supp. at 1532.

b. The existence or nonexistence of some number of these factors, together with the seriousness of the factors present create a formula for aiding in the determination as to whether an employer has deliberately intended to injure its workman, has acted in a willful, wanton and reckless manner, or has acted with actual knowledge that it is unreasonably exposing its employees to "great, recognized risks of serious harm." *Id.*

Therefore, before a company can be legally charged with the responsibility of changing practices or improving safety, the company must be put on notice that its existing practices or measures to insure safety are inadequate. This is the point where most of the other above-listed factors enter the picture. An employee's complaint does result in immediate and actual notice of a potential hazard. This notice, when combined with other factors such as prior accident or injury, the likelihood that the condition or practice will cause harm, the reason for the existence of the condition, the time the condition has existed without causing harm or damage, and whether the condition is contrary to law or accepted practice, will result in a complaint deserving of a remedy and having the potential of *Mandolidis*-type liability.

In essence, to overlook or ignore a naked safety complaint may well be negligence; to overlook or ignore a complaint which is founded upon good reason, as exemplified by the factors listed, would surely be indicative of deliberate intent to injure.

578 F.Supp. 1532-1533.

6. *Estep v. Chemetals Corp.*, 580 F.Supp. 254 (N.D. W.Va. 1984).

(Standard not met: no showing that the employer was aware of the possibility of an explosion as the result of cooling hot flux pots with a water hose; no prior incidents over a nine-year period; no evidence to establish propensity for the pots to explode; no grievances filed; no

follow-up on prior concerns when no action was taken; no OSHA citations issued or violations found regarding flux pot cooling. Although the method of cooling may have been negligent, the Court failed to see an intentional disregard for the employee's safety.)

7. *Norris v. ACF Industries, Inc.*, 609 F.Supp. 549 (S.D. W.Va. 1985).

(Affirmative defenses of comparative negligence, assumption of risk, and injury by a fellow servant were unavailable as a matter of law in a *Mandolidis*-type action under ' 23-4-2.

III.

1983 AMENDMENT TO W.Va. CODE ' 23-4-2

Despite the fact that in all but one of the *Mandolidis* decisions decided prior to 1983 the employer was successful in having the employee's claim dismissed or overturned, hysteria abounded as business leaders, the press, and the insurance industry predicted economic Armageddon if the *Mandolidis* decision was not overturned. This group of "chicken littles" ultimately prevailed in persuading the Legislature to amend ' 23-4-2 and effectively overrule the *Mandolidis* decision.⁷ *Mandolidis*-type actions are now governed by W. Va. Code '

⁷Interestingly, while the perceived hole in the sky was plugged by the overruling of *Mandolidis*, the Court has indicated that the heavens have been completely opened by the amendment of ' 23-4-2. In *Mayles v. Shoney's, Inc.*, 185 W.Va. 485, 405 S.E.2d 15, 23 (1990), the Court concluded

Ironically, this is not the sort of case wherein, under all the facts and circumstances, the appellee could probably have prevailed under the extremely narrow concept of deliberate intent enunciated in *Mandolidis*. See 246 S.E.2d at 907. The reason the appellee would likely have been unsuccessful under *Mandolidis* is because we do not perceive this as the type of injury result[ing] from wilful, wanton or reckless misconduct [where] such . . . injury [wa]s no longer accidental in any meaningful sense of the word, and [therefore] must be taken as having been inflicted with deliberate intention . . . " *Id.* at 914. **However, the legislature, in an apparent effort to narrow the parameters of civil liability for employers, has indeed broadened the concept by enactment of the five-part test of W.Va. Code '**

23-4-2 (c)(2) which sets forth two statutory definitions of "deliberate intent". Syl. Pt. 1, *Mayles v. Shoney's, Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990); *Blevins v. Beckley Magnetite, Inc.*, 185 W.Va. 633, 408 S.E.2d 385, 390 (1991). *Weekly v. Olin, Corp.*, 681 F.Supp. 346, 350 (N.D. W.Va. 1987). Accordingly, this statute provides two theories of liability which are available to employees.

A. Under W. Va. Code ' 23-4-2(c)(2)(i), an employer loses its immunity from suit under the Workers' Compensation Act if it:

acted with a consciously, subjectively and deliberately formed intention to produce the specific result of injury ... to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton or reckless misconduct....

Under this statute, the term "intentional" denotes that the employer desires to cause the consequences of its act, or that it believes that the consequences are substantially certain to result from its act. *Cline v. Joy Manufacturing Co.*, ___ W.Va. ___, 310 S.E.2d 835, 838 (1983), *applying*, RESTATEMENT (SECOND) OF TORTS ' 8A (1965). As Justice Miller commented in his concurring opinion in *Mandolidis*:

Generally, the law recognizes that intention can be ascertained either from verbal or nonverbal conduct of a party. The simplest proof is where the actor admits he consciously intended his conduct to produce the result it did.

The more usual situation is where intention must be inferred

23-4-2(c)(2)(ii). (emphasis added)

from a person's conduct. Here, the inquiry is directed at the degree of probability that the conduct will produce a given result. The higher degree of probability that a given result will follow, the greater the intention is inferred from the conduct.

The link between the conduct and the resulting harm is not only a causative inquiry, but includes another factor by which the conduct is judged - the degree of seriousness of harm. Conduct which carries a high probability that serious harm will result is high on the scale of intentional conduct.

Mandolidis v. Elkins Industries, Inc., 161 W.Va. 695, 246 S.E.2d 907, 925 (1978) (Miller, J., concurring). While the Court's holding in *Mandolidis, supra*, 246 S.E.2d at 912, that a showing of specific intent to injure was not required for an injured employee to be able to recover damages has been abrogated by the 1983 amendment to W. Va. Code ' 23-4-2(c)(2)(i)(A), it is nonetheless clear that specific intent may be determined by the jury from all the facts and circumstances surrounding the case. See, *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907, 925 (1978) (Miller, J., concurring); *Sias v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321, 327 (1991).

The relevancy of prior incidents in establishing an employer's knowledge and subjective realization of the hazards posed by a certain procedure is demonstrated by the following sampling of cases, where the presence or absence of prior, similar accidents was an important factor in the Court's determination of whether an injured worker had a cause of action against his employer. See *e.g.*, *Miller v. Gibson*, 177 W.Va. 535, 355 S.E.2d 28, 30 (1987); *Dreyer v. Weirton Steel*, 178 W.Va. 540, 363 S.E.2d 127, 129 (1986); *Delp v. Itmann Coal Co.*, 176 W.Va. 252, 342 S.E.2d 219, 222 (1986); *Kane v. Corning Glass Works*, 175 W.Va. 77, 331 S.E.2d 807, 809 (1984); *Mooney v. Eastern Associated Coal Corp.*, 174 W.Va.

350, 326 S.E.2d 427, 429 (1984); *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907, 914 n. 10 & 915 (1978).

Under the Occupational Safety and Health Act, a willful violation is established by proof "that (1) the employer has committed a violation of the Act and (2) the violation was committed voluntarily with intentional disregard or demonstrated plain indifference to the Act." Rothstein, *Occupational Safety and Health Law* ' 315, p. 313-15 (2nd ed. 1983), *citing inter alia*, *Lukens Steel Co.*, 10 OSHC 1115, 1981 OSHD 25,742 (1981), *Intercountry Construction Co. v. OSHRC*, 522 F.2d 777 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072, 96 S.Ct. 854, 47 L.Ed.2d 82 (1976). "[C]arelessness, lack of diligence in discovering a violation, and impotent efforts to eliminate a hazard do not constitute willfulness [under the Act]. On the other hand, a 'cavalier' attitude to employee safety, a conscious disregard for OSHA requirements, and the substitution of other measures believed to be as safe as OSHA standards constitutes a willful violation." Rothstein, *supra*, at ' 315, p. 49 (2nd ed. 1988 Cum. Supp.), *citing*, *Williams Enterprises, Inc.*, 13 OSHC 1249, 1987 OSHD 27,893 (1987).⁸

Mindful of the West Virginia Supreme Court of Appeals' adoption of the Restatement's definition of "intentional" conduct in *Mandolidis*-type actions, so that the term "[i]ntentional denotes that the [employer] desires to cause the consequences of [its] act, *or that [it] believes that the consequences are substantially certain to result from it*, *Cline v. Joy Manufacturing Co.*, *supra*, 310 S.E.2d at 838 (emphasis added), when combined with the fact that an employer fails to abate its practices which are in violation of the Occupational Safety

⁸By utilizing an expert competent to testify that the employer's actions were a willful violation of the Occupational Safety & Health Act, an employee may present sufficient evidence to withstand a motion for summary judgment and/or directed verdict.

& Health Act when such violations constitute "[c]onduct which carries a high probability that serious harm will result", *Mandolidis v. Elkins Industries, Inc.*, *supra*, 246 S.E.2d at 925 (Miller, J., concurring), the employee may have sustained his burden of proof under the theory of liability codified in W.Va. Code ' 23-4-2(c)(2)(i).

B. The second theory of liability which is available to the Plaintiffs in this action is set forth in W. Va. Code ' 23-4-2(c)(2)(ii). This statute contains five statutory elements which, if established by an injured worker, will operate to preserve his common law action against his employer. *Syl. Pt. 2, Mayles v. Shoney's, Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990); *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991). These five elements are as follows:

- (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
- (B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;
- (C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, **or** of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule or regulation or standard generally requiring safe workplaces, equipment or working conditions;
- (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific

unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition. [emphasis added]⁹

1. Specific unsafe working condition with a strong probability of serious injury or death.

In *Handley v. Union Carbide Corp.*, the court, while recognizing that W. Va. Code, 23-4-2(c)(2)(ii)(A) does not offer any "express guidance ... as to the characteristics which will mark a working condition as 'specific'", was:

persuaded by the statutory element which concerns itself with violations of a governmental regulation or industry safety standard. **This element indicates that a working condition cannot be so narrowly defined as to escape the attention of governmental regulations or industry standards.** In other words, it must be identified to the extent that, isolated from the rest of the work place, it is apt to possess its own distinct collection of procedures related to safety. As a parallel concept, the specific working condition should present a possible risk of injury which can be perceived within definite parameters. For example, the table saw in *Mandolidis* represented a specific

⁹Justice McHugh, in *Sias v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321, 326 (1991) stated that:

Paraphrased, these five elements are: (1) a specific unsafe working condition with a strong probability of serious injury or death; (2) subjective realization and appreciation of that condition by the employer; (3) that the condition was a violation, whether cited or not, of a specifically applicable federal or state safety statute or regulation or of a commonly accepted and specifically applicable safety standard in the employer's type of business or industry; (4) intentional exposure by the employer of the employee to that specific unsafe working condition subjectively realized and appreciated by the employer; and (5) such exposure to that condition proximately caused the serious injury or death of the employee.

unsafe working condition. If it had been part of a multiple piece assembly line, the assembly line could not be said to constitute the specific working condition; the table saw itself sufficiently supplied the elements of safety and danger. Naturally, the scope and features of a specific working condition will depend greatly upon the complexity and nature of the work place (emphasis added).

Handley v. Union Carbide Corp., 620 F.Supp. 428, 437 (S.D. W.Va. 1985), *affirmed*, 804 F.2d 265 (4th Cir. 1986).

In *Handley*, the district court held that the handling of a chemical in its granular and molten forms constituted two separate specific working conditions. The court further found, on the basis of another chemical's safety data sheet, that the unloading of this second chemical by hooking and unhooking hoses to tankers constituted a separate specific working condition from the hosing down and sewerage of spills of that chemical. *Handley v. Union Carbide Corp.*, *supra*, 620 F.Supp. at 437, 441. In affirming the district court's analysis of this element of the statute, the Fourth Circuit stated:

the district court correctly separated Handley's **occupational duties** into distinct components for which individualized safety standards and procedures could be devised. In this carefully phrased statute no wording is more deliberate than that which requires proof of a specific unsafe working condition. This phraseology is included in all of the subsections requiring proof of egregious employer misconduct. The evidence in each instance must relate to a specific condition in a particular workplace. Obviously, such a condition must be sufficiently identifiable and sufficiently subject to narrow categorization that "specific" government or industry safety rules can be formulated and applied to it. It is true that workplace circumstances vary infinitely, and the issue whether a particular **occupational practice** constitutes a "specific unsafe working condition" may often be resolved through evidence of particularized safety standards applicable to that practice (emphasis added).

Handley v. Union Carbide Corp., *supra*, 804 F.2d at 272. *Accord*, *Mayles v. Shoney's, Inc.*, 185 W.Va. 88, 405 S.E.2d 15, 20-21 (1990); *Greene v. Carolina Freight Carriers*, 840 F.2d 10 (4th Cir. 1988) (TABLE, TEXT IN WESTLAW, NO. 87-1669) (general safety regulation is insufficient to meet the requirement of W.Va. Code ' 23-4-2); *Justice v. Norfolk & Western Ry Co.*, 657 F.Supp. 340, 341 (S.D. W.Va. 1987) ("A specific unsafe working condition can be identified as such by industry standards regulating certain conditions known to be unsafe or by government regulations doing likewise.").

In *Sias*, *supra*, 185 W.Va. 569, 408 S.E.2d at 326, the Court found that the trial court was clearly wrong in ruling that a coal outburst caused by a faulty pillar recovery method was merely a general unsafe working condition that is faced generally by miners in underground coal mines. The trial court's finding was under minded by citation to the employer by MSHA for violating 30 *C.F.R.* ' 75.203(a) (1990). In a footnote, the Court found it strange that the trial judge determined that the working condition was general in nature yet failed to find subjective realization of the hazard by the employer. If the hazard was a relatively common one, subjective realization would necessarily follow. *Sias*, *supra* at 326, n.5.

2. Subjective realization and appreciation of the condition by the employer.

"Subjective realization, like any state of mind, must be shown usually by circumstantial evidence, from which, ordinarily, conflicting inferences reasonably can be drawn." *Sias v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321, 327 (1991). "The 'deliberate intention' exception to the Workers' Compensation system is meant to deter the malicious employer, not to punish the stupid one." *Helmick v. Potomac Edison Co.*, 185 W.Va. 269,

406 S.E.2d 700, 705 (1991). If the employer does not realize the danger involved in a particular task, it cannot therefore have a subjective realization of the potential harm. In the most recent *Mandolidis* decision, Justice Workman has indicated that:

This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong possibility of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge.

Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 408 S.E.2d 385, 393 (1991).¹⁰ Certainly, if the evidence establishes that management had a subjective realization and appreciation of the dangers of the unsafe working condition on behalf of the employer, the second element of the five-part test is satisfied.¹¹ *Mayles v. Shoney's, Inc.*, 185 W.Va. 88, 405 S.E.2d 15, 22 (1990).

The cases determining whether the employer has subjective realization and appreciation of the unsafe working condition have consistently followed the analysis set forth in *Mandolidis* and the cases thereafter. *See, supra*, Section II.

The issue of subjective realization is fairly straightforward when the plaintiff alleges to have suffered an acute injury, since the employer either knew or did not know that its actions

¹⁰Compare Justice Miller's concurring opinion in *Mandolidis*, wherein he stated that ". . . the standard by which the conduct and its resulting harm is judged to determine its 'intentional' characteristics is not only the subjective knowledge of the individual, **but what would be known by a reasonable person.**" 161 W.Va. 695, 246 S.E.2d at 925 (Miller, J., concurring) (citations omitted).

¹¹A corporation is liable for wrongs committed by agents within the scope of their employment. *See Lions v. Davy-Pocahontas Coal Co.*, 75 W.Va. 739, 744, 84 S.E. 744, 746 (1915).

or inactions would cause harm. "Subjective realization" may be complicated in the toxic chemical exposure case. If a chemical is known to cause a certain disease, but instead causes a different disease process, the employer may contend that it could not have had a subjective realization of the harm suffered by the plaintiff.

In *Handley v. Union Carbide Corp.*, 620 F.Supp. 428 (S.D. W.Va. 1985), *affirmed*, 804 F.2d 265 (4th Cir. 1986), a chemical worker brought an action against his employer after he developed scleroderma, which he alleged was a result of his occupational exposure to silicon tetrachloride. In support of his claim, the plaintiff presented testimony concerning the dangers of exposure to silicon tetrachloride, including the testimony of a physician, who testified that when it reacts with water, such as moisture in the air, it breaks down into silica and hydrochloric acid, and that the silica particles, if inhaled, can cause scarring of the lungs. 620 F.Supp. at 437. In defense, Carbide argued that it could not have had an appreciation of the risk of scleroderma from exposure to silicon tetrachloride, since the medical community is divided into various schools of thought on the cause of that disease. Carbide sought to focus the court's and jury's attention on the actual consequences of its conduct - *i.e.*, the plaintiff's development of a specific disease - as opposed to the broader category of risks which were known to be associated with exposure to the toxin. However, the court rejected this argument, stating that, it was "not convinced that Carbide had to know that exposure to silicon tetrachloride would cause *scleroderma*." 620 F.Supp. at 438 (emphasis by the court).

Additionally, *see, Mantz v. Verson Allsteel Press Co.*, No. H-90-58, slip op. at 6, 1991 WL 254194 (Ohio Ct. App. Oct. 4, 1991) ("The employee need not prove that the employer had an actual subjective intent to cause the injury sustained or that the employer knew that the

exact injury sustained would occur. . . . The employee must prove that the employer knew that because of the exact danger posed, the employee would be harmed in some manner similar to the injury sustained or that the employer knew that because of the exact danger posed, it was highly probable (substantially certain) that employee would be harmed in some manner similar to the injury sustained.") *citing, Fyffe v. Jenos, Inc.*, 59 Ohio St.2d 115, 117, 570 N.E.2d 1108, 1111 (1991).¹²

3. Condition is a violation, whether cited or not, of a specifically applicable safety statute, regulation or standard.

In *Greene v. Carolina Freight Carriers*, 663 F.Supp. 112 (S.D. W.Va. 1987), *affirmed*, 840 F.2d 10 (4th Cir. 1988) (unpublished table disposition), the plaintiff was injured when he fell as he was attempting to get into one of his employer's truck when a metal step gave way. The step had broken 15 days earlier and the defendant had been informed by a mechanic that it could not be repaired. The defendant nonetheless insisted that the mechanic weld the step. After the mechanic completed the job, he informed the defendant that he could not guarantee that the step would hold. While the defendant ordered a new step for the tractor, it did not take the truck out of service in the interim. Notwithstanding the fact that there was this evidence in the record to support the inference that the defendant knew that the step was unsafe, the court granted defendant summary judgment on the grounds that the plaintiff could not satisfy the third statutory element. In this regard, the court found that the regulation which Greene relied upon was only a general, non-specific safety regulation, the

¹²See also, *Balbos v. Eagle-Picher Industries, Inc.*, 326 Md. 179, 604 A.2d 445 (1992), wherein the court indicated that "the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated."

violation of which could not be used to impute "intent" to the defendant employer so as to the defeat its immunity from suit. As the court stated:

[T]he West Virginia Legislature intended only egregious acts **or omissions** by the employer to be actionable. One measure of the employer's culpability would be whether it ignored or circumvented a known legal duty - not the duty contemplated by principles of negligence law, but rather a duty which has been made express and specific by positive law or industry custom and practice.

To put the employer on notice, and to evidence its egregious conduct, the statute or standard must specifically address the unsafe working condition in question. (emphasis added)

Greene v. Carolina Freight Carriers, supra, 663 F.Supp. at 115.

4. Intentional Exposure.

The fourth element is the intentional **exposure** by the employer of the employee to the specific unsafe working condition. This element is not satisfied by inadvertence or mere negligence. **THE EMPLOYER'S SPECIFIC INTENT TO INJURE THE EMPLOYEE IS NOT REQUIRED TO BE ESTABLISHED UNDER THIS INTENTIONAL EXPOSURE ELEMENT.** *Sias v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321, 327 (1991).

In *Handley*, the district court elaborated on this element as follows:

The fourth element required to be proven is that 'notwithstanding the existence of the [three facts just mentioned, the] employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally.' The key word is 'intentionally.' By the wording of the statute, it is obvious that 'intentionally' means more than that the exposure was not by mere mistake or negligence. The statute also requires knowledge of the three preceding facts. By the same token, **the statute does not require proof that the employer**

intended to injure the employee by exposing him to the unsafe condition. That is the ultimate issue sought to be determined by the five-element test under the ... statute. The law will infer deliberate intent if the employer acted with knowledge in intentionally exposing the employee.
[emphasis added]

Handley v. Union Carbide Corp., *supra*, 620 F.Supp. at 439.

5. Proximate Cause.

The final element of Plaintiff's cause of action is that Plaintiff "suffered serious injury ... as a direct and proximate result of such specific unsafe working condition." W. Va. Code ' 24-3-2(c)(2)(ii)(E). Normally this element is uncontested where plaintiff has suffered an acute injury, since it is self-evident that the accident was the cause of the plaintiff's injury. The proximate cause element becomes more problematic in a toxic chemical exposure case.

IV.

PROVING SPECIFIC UNSAFE WORKING CONDITION, SUBJECTIVE REALIZATION AND SAFETY STATUTES, REGULATIONS, OR STANDARDS

- A. Government Agencies.
 - 1. OSHA
 - 2. NIOSH
 - 3. MSHA
- B. State Agencies.
 - 1. Industrial Hygiene Departments
 - 2. Workers' Compensation Acts
 - 3. Workers' Compensation claims
- C. Trade Organizations

1. Industrial Hygiene Foundation
 2. Industry specific trade groups
- D. Safety Organizations
1. ANSI
 2. National Safety Council
 3. ACGIH
- E. Defendant's Library
1. Textbooks
 2. Periodicals
 3. Bibliographies
- F. Computer Research
1. Westlaw/Lexis
 2. Medline
 3. Toxline
 4. DIALOG

WEST VIRGINIA

MANDOLIDIS DECISIONS

1. *Blevins v. Beckley Magnetite, Inc.*, 185 W.Va. 633, 408 S.E.2d 385 (1991).
2. *Sias v. W-P Coal Co.*, 185 W.Va. 569, 408 S.E.2d 321 (1991).
3. *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991).
4. *Mayles v. Shoney's, Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990).
5. *Beard v. Beckley Coal Min. Co.*, 183 W.Va. 485, 396 S.E.2d 447 (1990).
6. *Dunn v. Consolidation Coal Co.*, 180 W.Va. 681, 379 S.E.2d 485 (1989).
7. *Riggle v. Allied Chemical Corp.*, 180 W.Va. 561, 378 S.E.2d 282 (1989).
8. *Duty v. Walker*, 180 W.Va. 149, 375 S.E.2d 781 (1988).
9. *Cline v. Jumacris Min. Co.*, 177 W.Va. 589, 355 S.E.2d 378 (1987).
10. *Miller v. Gibson*, 177 W.Va. 535, 355 S.E.2d 28 (1987).
11. *Dreyer v. Weirton Steel, Div. of Nat. Steel Corp.*, 178 W.Va. 540, 363 S.E.2d 127 (1986).
12. *Delp v. Itmann Coal Co.*, 176 W.Va. 252, 342 S.E.2d 219 (1986).
13. *Mooney v. Eastern Associated Coal Corp.*, 174 W.Va. 350, 326 S.E.2d 427 (1984).
14. *Kane v. Corning Glass Works*, 175 W.Va. 77, 331 S.E.2d 807 (1984).
15. *Cline v. Joy Mfg. Co.*, 172 W.Va. 769, 310 S.E.2d 835 (1983).
16. *Chambers v. Sovereign Coal Corp.*, 170 W.Va. 537, 295 S.E.2d 28 (1982).

17. *Sydenstricker v. Unipunch Products, Inc.*, 169 W.Va. 440, 288 S.E.2d 511 (1982).
18. *Mandolidis v. Elkins Industries, Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978).
19. *Eisnaugle v. Booth*, 159 W.Va. 779, 226 S.E.2d 259 (1976).
20. *Brewer v. Appalachian Constructors, Inc.*, 135 W.Va. 739, 65 S.E.2d 87 (1951).
21. *Allen v. Raleigh-Wyoming Mining Co.*, 117 W.Va. 631, 186 S.E. 612 (1936).
22. *Maynard v. Island Creek Coal Co.*, 115 W.Va. 249, 175 S.E. 70 (1934).
23. *Collins v. Dravo Contracting Co.*, 114 W.Va. 229, 171 S.E. 757 (1933).

FOURTH CIRCUIT

MANDOLIDIS DECISIONS

1. *Webb v. Ruth Trace Minerals, Inc.*, 883 F.2d 70 (4th Cir. 1989) (TABLE, TEXT IN WESTLAW, NO. 88-3633).
2. *Bennett v. Nat. Steel Corp.*, 881 F.2d 1069 (4th Cir. 1989) (TABLE, TEXT IN WESTLAW, NO. 88-2853).
3. *Staten v. Old Ben Coal Co.*, 846 F.2d 74 (4th Cir. 1988) (TABLE, TEXT IN WESTLAW, NO. 87-3737).
4. *Greene v. Caroline Freight Carriers*, 840 F.2d 10 (4th Cir. 1988) (TABLE, TEXT IN WESTLAW, NO. 87-1669).
5. *Bell v. Volkswagen of America, Inc.*, 836 F.2d 545 (4th Cir. 1987) (TABLE, TEXT IN WESTLAW, NO. 87-2552).
6. *Boggess v. Monsanto Co.*, 829 F.2d 34 (4th Cir. 1987) (TABLE, TEXT IN WESTLAW, NO. 86-3081).
7. *Walls v. U.S. Steel Min. Co., Inc.*, 816 F.2d 674 (4th Cir. 1987) (TABLE, TEXT IN WESTLAW, NO. 86-1122).
8. *Handley v. Union Carbide Corp.*, 804 F.2d 265 (4th Cir. 1986)
9. *Walls v. Dravo Corp.*, 813 F.2d 404 (4th Cir. 1986) (TABLE, TEXT IN WESTLAW, NO. 85-1975).
10. *Stapleton v. Ashland Oil, Inc.*, 774 F.2d 622 (4th Cir. 1985).
11. *Marshall v. Sisters of Pallotine Missionary Soc.*, 703 F.2d 92 (4th Cir. 1983).
12. *Smith v. ACF Industries, Inc.*, 687 F.2d 40 (4th Cir. 1982).

DISTRICT COURT

MANDOLIDIS DECISIONS

1. *Risden v. B.C. Industries, Inc.*, Civil Action No. 91-0016-W(S) (N.D. W.Va. Nov. 24, 1992) (Stamp, J.).
2. *Yeater v. Allied Chemical Co.*, 755 F.Supp. 1330 (N.D. W.Va. 1991).
3. *Ball v. Joy Mfg. Co.*, 755 F.Supp. 1344 (S.D. W.Va. 1990).
4. *Weekly v. Olin Corp*, 681 F.Supp. 346 (N.D. W.Va. 1987).
5. *Greene v. Carolina Freight Carriers*, 663 F.Supp. 112 (S.D. W.Va. 1987).
6. *Justice v. Norfolk and Western Ry. Co.*, 657 F.Supp. 340 (S.D. W.Va. 1987).
7. *Rinehart v. Consolidation Coal Co.*, 660 F.Supp. 1140 (N.D. W.Va. 1987).
8. *Handley v. Union Carbide Corp.*, 622 F.Supp. 1065 (S.D. W.Va. 1985).
9. *Handley v. Union Carbide Corp.*, 620 F.Supp. 428 (S.D. W.Va. 1985).
10. *Black Diamond Girl Scout Council, Inc. v. St. Paul Fire & Marine Ins. Co.*, 621 F.Supp. 96 (S.D. W.Va. 1985).
12. *Norris v. ACF Industries, Inc.*, 609 F.Supp. 549 (S.D. W.Va. 1985).
13. *James v. Stedman Machine Co.*, Civil Action No. 82-2030 (S.D. W.Va. Jan. 10, 1984) (Copenhaver, J.).
14. *Nedley v. Consolidation Coal Co.*, 578 F.Supp. 1528 (N.D. W.Va. 1984).
15. *Estep v. Chemetals Corp.*, 580 F.Supp. 254 (N.D. W.Va. 1984).
16. *Parsons v. Shoney's, Inc.*, 580 F.Supp. 129 S.D. W.Va. 1983).
17. *Littlejohn v. ACF Industries Corporation*, 556 F.Supp. 70 (S.D. W.Va. 1982).
18. *Belcher v. J.H. Fletcher & Co.*, 498 F.Supp. 629 (S.D. W.Va. 1980).