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Barrett v. Hecla Min. Co. Appellant's Brief Dckt. 43639

IN THE SUPREME COURT OF THE STATE OF IDAHO

RONNEL E. BARRETT, an individual; GREGG HAMMERGERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs/Appellants, v. HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES 1-X, unknown parties, Defendants/Respondents,	**Supreme Court No. 43639** **District Case No. CV 2013-8793**

APPELLANTS' OPENING BRIEF

Appeal from the First Judicial District in and For the County of Kootenai
The Honorable Lansing L. Hayes, Presiding

Eric S. Rossman
Erica S. Phillips
ROSSMAN LAW GROUP, PLLC
737 N. 7th Street
Boise, ID 83702

Michael R. Christian
MARCUS, CHRISTIAN, HARDEE & DAVIES, LLP
737 N. 7th Street
Boise, ID 83702
Attorneys for Plaintiffs/Appellants

Michael E. Ramsden
RAMSDEN, MARFICE, EALY & HARRIS, LLP
700 Northwest Boulevard
P.O. Box 1336
Coeur d'Alene, ID 83816-1336
Attorneys for Defendants/Respondents

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RAMSDEN, MARFICE, EALY & HARRIS, LLP
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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Other Authorities:

I. STATEMENT OF THE CASE

A. Nature of the case.

This case arises from a rockburst which occurred on December 14, 2011 at the Lucky Friday mine in Mullan, Idaho. This rockburst resulted in injury to seven miners, including the Plaintiffs, Ronnel E. Barrett, Gregg Hammerberg, Eric J. Tester, and Matthew Williams (hereinafter "the Miners") who were working in the area of the 5900 level pillar at the Lucky Friday mine. On December 11, 2013, the Miners filed the complaint in this manner alleging knowing, intentional, willful and wanton injury to the Miners, respondeat superior liability against Hecla, and intentional infliction of emotional distress.

B. Course of Trial Court Proceedings and Disposition.

On December 11, 2013, the Miners filed the Complaint and Demand for Jury Trial in this matter, setting forth causes of action for knowing, intentional, willful and wanton injury to the Miners, respondeat superior liability against Hecla, and intentional infliction of emotional distress. R. Vol 1, pp. 18-40. The Miners alleged that Defendant Hecla Mining Company and the individual Defendants (hereinafter "Hecla") had knowingly, intentionally, willfully and wantonly injured them by assigning them to work in a location that was extremely dangerous without informing the Miners of the dangerous conditions. *Id.* Lastly, the Miners' Complaint alleged that Hecla had intentionally caused them to suffer severe emotional distress. *Id.*

On May 29, 2015, Hecla filed a Motion for Summary Judgment ("MSJ") seeking dismissal of the Miners' claims. *See* R. Vol. 1, p. 146. On June 15, 2015, the Miners filed a motion for partial summary judgment seeking a ruling from the District Court that the exclusive

liability provisions of the Idaho Workers' Compensation Act did not apply to the Miners' claims. *See* R., Vol. 3, p. 728. After oral argument, the District Court granted Hecla's motion for summary judgment on August 28, 2015, setting forth its reasoning in its Memorandum Decision and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Partial Summary Judgment ("Decision"). *See* R. Vol. 5, p. 1148. As set forth in the District Court's Decision, the motion for summary judgment was granted because of the District Court's determination that the exclusive liability provision of the Idaho Workers' Compensation Act § 72-209(3) did apply because there was no evidence that Hecla intended to injure the Miners. *See* R. Vol. 5, pp.1158-59.

Judgment was entered in favor of Hecla on September 17, 2015. *See* R. Vol. 5, p. 1161. The Miners timely filed the Notice of Appeal in this matter on October 5, 2015. *See* R. Vol. 5, p. 1163.

C. Statement of Facts.

1. The 5900 Pillar at the Lucky Friday Mine has a history of rockbursts and Hecla knew the pillar was unstable.

The Coeur D'Alene mining district has a long history of rock burst activity that was well known within in the district and to any company mining within the district. *See* R. Vol. 1, p. 191 (Deposition of Wilson Blake ("Blake Depo."), p. 33, LL 18-25). The Lucky Friday Mine was particularly susceptible to rock bursts given its high quartzite rock properties. *See* R. Vol. 1, pp. 190-191 (Blake Depo., p. 29, line 19 – p. 34, line 21). Since 2009, the mine had experienced a

sharp increase in the number of violent seismic events. *See* R. Vol. 1, pp. 193-194 (Blake Depo., p. 41, line 20 – p. 42, line 18); R. Vol. 1, p. 224 (Email dated April 4, 2011).

Wilson Blake, Ph.D is a geotechnical and consulting mine consultant who holds a Ph.D in mining engineering. Dr. Blake has specialized knowledge in rock mechanics. *See* R. Vol. 1, p. 191 (Blake Depo, p. 31, LL 7-17). Rock mechanics is the science of the behavior of openings under different loading conditions, including open pits and underground mining. *See* R. Vol. 1, p. 191 (Blake Depo., p. 31, LL 18-24). Since 2006, Dr. Blake, as a consultant for Hecla, had been warning Hecla management about the danger of leaving a drift pillar at the 5900 level of the Lucky Friday mine. *See* R. Vol. 1, p. 193; pp. 197-198 (Blake Depo., p. 39, line 14 - p. 41, line 19; p. 55, line 5 – p. 59, line 8). Specifically, Dr. Blake had informed Hecla that a majority of rock burst activity in the 5900 level area occurred within pillars and that, at some point, the pillar was going to be a serious issue for Hecla. Hecla proceeded with mining that area anyway. *See* R. Vol. 1, p. 193; 197-198 (Blake Depo., p. 39, line 22 to p. 40, line 11; p. 55, line 5 – p. 59, line 8).

Hecla had been seismic monitoring, stress monitoring and closure monitoring at certain areas of the Lucky Friday mine since 2006. *See* R. Vol. 1, p. 231 (Deposition of Doug Bayer ("Bayer Depo.), p. 19, line 21 – p. 20, line 21). Stress monitoring at the 5900 level showed dramatic increases in 2009 to the point where the mine was concerned about pillar failure. The pressures did, however, tend to level out in the subsequent years. *See* R. Vol. 2, p. 263 (Executive Summary dated March 22, 2010, p. iii). Modeling of the 5900 pillar was conducted by Rimas Pilkanis and Associates in 2009. *See* R. Vol. 2, p. 269 (Technical Memorandum dated

March 22, 2010, p. 1). Hecla was unhappy with the results of this modeling and retained Itasca, specifically Mark Board, Ph. D, to do further modeling in the spring of 2010. *See* R. Vol. 1, p. 192 (Blake Depo., p. 34, LL 1-15); R. Vol. 2, p. 269 (Technical Memorandum dated March 22, 2010). The Itasca modeling concluded that the pillar's width/height ratio (which Dr. Board calculated at 10:1 given the 100 foot height of the pillar at that time) supported the conclusion that the pillar could expect small perimeter failure at the pillar but that the core of the pillar would remain elastic enough to handle the stress placed upon it unless the width/height ratio were to change. *See* R. Vol. 2, p. 269 (Technical Memorandum dated March 22, 2010, p. 1); R. Vol. 3, p. 505 (November 25, 2011 Blake Memo, p. 2).

Dr. Blake had been consulting for Hecla since 1975 and Hecla was a major client of his. *See* R. Vol. 1, p. 186; 192 (Blake Depo., p. 11, LL 10-12; p. 35, line 2 – p. 36, line 5; p. 36, LL 19-23; p. 37, LL 17-22). Each time there was an incident at the Lucky Friday mine, Hecla would call Dr. Blake to consult. *See* R. Vol. 1, p. 192 (Blake Depo., p. 36, LL 6-18). Hecla did not employ a rock mechanics engineer prior to the December 14, 2011 rockburst and relied primarily on Dr. Blake's expertise. *See* R. Vol. 1, p. 230 (Bayer Depo., p. 14, line 22 – p. 15, line 3; p. 15, LL 11-16). Mine superintendent Doug Bayer testified that he did not consider himself to be a specialist in rock mechanics. *See* R. Vol. 1, p. 230 (Bayer Depo., p. 14, LL 19-21).

2. *A major rockburst occurred on November 16, 2011 further compromising stability at the 5900 pillar.*

On November 16, 2011 a major rock burst occurred which caused substantial damage up to the 5700 drift pillar effectively closing that pillar. The burst further caused damage at the

5900 pillar involving large slabs of rock falling from the roof of the pillar, left no fragmented rock or dust consistent with a strain or pillar failure at the 5900 level, left all of the walls of the 5900 level pillar intact and still carrying substantial loads, and left clear evidence of a fault slip at the 5700 level of the mine. *See* R. Vol. 1, pp. 199; 201; 202-203; 208 (Blake Depo., p. 64, line 22 – p. 65, line 7; p. 71, line 25 – p. 72, line 10; p. 72, line 17 – p. 73, line 5; p. 77, line 11 – p. 78, line 15; p. 98, LL 8-15). Dr. Blake sent an e-mail on November 17, 2011 after inspecting the 5900 pillar in which he stated that the damage at the 5900 pillar was consistent with a fault slip. *See* R. Vol. 1, pp. 208; 209 (Blake Depo., p. 101, LL 4-16; p. 103, line 6- 104, line 10); R. Vol. 2, p. 306 (E-mail dated November 17, 2011).

a. The 5900 level pillar was at its maximum unconfined strength.

Dr. Blake authored a memo, dated November 25, 2011, in which he indicated that the vertical and horizontal stress at the 5900 pillar leading up to the November 16, 2011 burst was "very near the unconfined compressive strength of the pillar." *See* R. Vol. 3, p. 506 (Memo dated November 25, 2011, p. 2). Hecla instructed Dr. Blake to send a draft of his report to Doug Bayer, the mine superintendent, before preparing a final draft because the report would ultimately be provided to the Mine Safety and Health Administration (MSHA) who was investigating the November 16, 2011 burst. *See* R. Vol. 1, pp. 186-187; 212 (Blake Depo., p. 13, line 23 – p. 15, line 7; p. 114, line 21 – p. 115, line 8).

b. The pillar's walls were "popping," "cracking" and "spalling."

Dr. Blake testified that employees of the mine were complaining to him during his visit that the walls of the 5900 pillar were "popping," "cracking" and "spalling" when they tried to

drive bolts and dywidags into them indicating the walls were carrying substantial stress. He also testified that he believed the shift boss was present when this information was conveyed. *See* R. Vol. 1, pp. 203-204 (Blake Depo., p. 79, line 18 – p. 81, line 22; p. 82, LL 4-25). Employees were unable to get the East wall to take dywidags, so they instead had to drive eight (8) foot split sets into the wall to hold ground support. *See* R. Vol. 4, p. 824 (Affidavit of Rick Valerio, ¶ 8); R. Vol. 1, p. 261 (Bayer Depo., p. 139, LL 9-20). Hecla used a "jumbo" to drill the bores for monitoring gauges because it allowed them to be a sufficient distance from the wall during the drilling. The Geokon manual for the stress monitors states that the holes should be diamond drilled, not drilled from a jumbo. *See* R. Vol. 1, pp. 229-230 (Bayer Depo., p. 12, LL 14-23; p. 13, line 21 – p. 14, line 5).

Dr. Blake issued a report on November 18, 2011, after Bayer's review, which states that the cause of the burst was a "strain burst" and that it could not be assumed that the pillar was de-stressed based on the fact that the upper ribs and back appeared to be solid. *See* R. Vol. 1, p.210 (Blake Depo., p. 106, line 19 – p. 107, line 15); R. Vol. 2, p. 309 (Report dated November 18, 2011). Dr. Blake testified that one could not have expected much if any energy or strain release at the 5900 pillar if it was concluded that the burst was a fault slip at the 5700 level. *See* R. Vol. 1, p. 201 (Blake Depo., p. 71, line 9 – p. 72, line 10).

c. The dimensions of the pillar rendered it a serious risk of complete failure.

Dr. Blake testified that, based on his prior research at the Galena mine in the same district and with similar rock properties to the Lucky Friday mine, he published a doctoral thesis on the

relationship between pillar size and complete pillar failure in that area. *See* R. Vol. 1, p. 196 (Blake Depo., p. 53, LL 7-16); R. Vol. 2, p. 312 (Study). Dr. Blake testified that the conclusion he drew from his research was that 8-10 foot wide pillars that were 40 feet or less in height were at serious risk of complete failure due to their inability to carry a sufficient load. Dr. Blake testified that when a pillar is smaller than 40 feet in height, you can expect rockbursting. *See* R. Vol. 1, pp. 195-196; 213 (Blake Depo., p. 48, line 16 – p. 52, line 16; p. 119, LL 16-25; p. 121, LL 11-25).

Dr. Blake testified that the November 16, 2011 burst rendered the 5900 pillar to an approximate width/height ratio of 3 or 3.5 to 1. *See* R. Vol. 1, pp. 205-206 (Blake Depo., p. 89, line 4 – p. 90, line 18). As a result, Dr. Blake included a sentence in his draft report on November 25, 2011 that stated the 5900 level pillar was "borderline stable" which, based upon Dr. Blake's research, was at serious risk of complete failure. *See* R. Vol. 1, p. 213 (Blake Depo., p. 119, line 16 – p. 121, line 25); R. Vol. 3, p. 505 (Memo dated November 25, 2011). Dr. Blake's memo further advised Hecla to proceed with caution in the rehabilitation process. *See* R. Vol. 3, p. 505 (Memo dated November 25, 2011).

3. Hecla misrepresented the stability of the pillar to MSHA.

Despite the express language in Dr. Blake's draft report, Bayer testified that he did not know the pillar was borderline stable and would not have put miners at the 5900 level pillar had he thought the pillar was borderline stable. *See* R. Vol. 1, p. 251 (Bayer Depo., p. 101, LL 6-8).

Bayer either removed the sentence from the report or requested that Dr. Blake remove it. Dr. Blake testified that he removed the "borderline stable" language at the suggestion of Hecla.

The sentence was not included in the report that was shared with MSHA. *See* R. Vol. 1, pp. 214 (Blake Depo., p. 123, LL 1-19); *see also* R. Vol. 2, p. 301 (Revised Memo dated November 25, 2011). Bayer sent "updates" to MSHA on November 29, December 1, December 2, and December 6, 2011 asking for modifications to the 103k order which had allowed rehabilitation of the 5900 pillar. Ultimately on December 6, 2011, Hecla resumed mining operations at the Gold Hunter vein. Hecla lied to MSHA by stating in its updates that the November 16, 2011 burst de-stressed "a majority" of the pressures at the 5900 level, that stress monitoring readings had "stabilized" and that the mine did not expect "any measurable increase in stress" to occur for weeks if not months. *See* R. Vol. 2, pp. 378-389 (Updates, dated November 29, December 1, December 2, and December 6, 2011); R. Vol. 1, pp. 256-257; 258 (Bayer Depo., p. 121, line 12 – p. 124, line 19; p. 128, line 23 – p. 129, line 17).

Bayer also falsely told MSHA that the stress monitoring information would be reviewed daily by mine personnel and Hecla's rock mechanics consultant. *See* R. Vol. 1, p. 258 (Bayer Depo., p. 127, LL 21-24). Bayer testified that his statement to MSHA regarding the de-stressing of the 5900 level pillar was based not on Dr. Blake's statements to him, but rather his own history and experience at the mine. *See* R. Vol. 1, p. 258 (Bayer Depo., p. 129, LL 5-24). Bayer further testified that his statement about the amount of time that it would take the stress to build-up was based not on any statement from Dr. Blake, but rather from his own experience and history. *See* R. Vol. 1, pp. 258-259 (Bayer Depo., p. 129, line 25 – p. 130, line 15). Dr. Blake, however, testified that the 5900 pillar was at its maximum unconfined strength prior to the November 16, 2011 burst; that the fault slip in reality released little, if any, stress from the pillar;

and that stress monitoring readings indicated that pressures increased every reading of every shift of every day between December 2, 2011 and December 14, 2011 (the burst that injured the Miners) resulting in an increase in 1000 psi in just two weeks. *See* R. Vol. 1, pp. 214; 216-217 (Blake Depo., p. 123, line 23 – p. 124, line 22; p. 131, line 18 – p. 134, line 2); R. Vol. 2, pp. 498-500 (Stress Monitoring graph).

Dr. Blake testified that he never told Hecla the information that Doug Bayer was reporting to MSHA regarding the alleged destressing at the 5900 level pillar or the estimate that it would take weeks or months for any measurable increase in stress to occur at the 5900 level pillar. *See* R. Vol. 1, p. 218 (Blake Depo., p. 140, LL 3-6). Dr. Blake specifically testified that he did not tell Doug Bayer or anyone at Hecla that he believed the November 16th burst had dissipated a majority of the stress at the 5900 pillar. *See* R. Vol. 1, pp. 217-218 (Blake Depo., p. 137, LL 6-17; p. 140, LL 3-6). Dr. Blake admitted that Hecla showed him only four to five days of monitoring gauge readings beginning on December 2, 2011. *See* R. Vol. 1, p. 216 (Blake Depo., p. 131, line 22 – p. 132, line 14).

4. One of the stress monitors is defective and Hecla refuses to install the remaining three required monitors.

MSHA's 103k order required Hecla to install six stress monitors at the 5900 level during the rehabilitation process. *See* R. Vol. 2, pp. 477-478. Hecla only installed three of them, one of which was defective. *See* R. Vol. 2, p. 378 (Bayer Depo., p. 55, line 20 – p. 56, line 7). Dr. Blake admitted that negative readings from the East Low gauge clearly were not an accurate reading of stress, that the surrounding rock around the gauge must have crumbled and that he

would expect the stress at the East well to be consistent with the readings at the West Low gauge. *See* R. Vol. 1, p. 217 (Blake Depo., p. 134, line 3 – p. 135, line 18; p. 136, LL 16-23).

Hecla never communicated to MSHA that the East low gauges were improperly installed and were providing inaccurate information. *See* R. Vol. 3, pp. 502-503 (MSHA Citation No. 8559615, dated May 15, 2012). Hecla never did anything to reinstall or check the placement of the East low gauge. *See* R. Vol. 1, pp. 236-238 (Bayer Depo., p. 41, line 14 – p. 46, line 3; p. 46, LL 20-24). Hecla represented to MSHA that it would install three gauges immediately and that an additional three would be installed as soon as received by Hecla which were to be shipped from the manufacturer on December 7, 2011. This requirement was set forth in MSHA's 103k order. *See* R. Vol. 1, pp. 239-240 (Bayer Depo., p. 53, line 24 – p. 54, line 12); R. Vol. 2, pp. 378-379 (November 29, 2011 memo to MSHA). Hecla never installed the three remaining gauges. *See* R. Vol. 2, p. 378 (Bayer Depo., p. 55, line 20 – p. 56, line 7).

5. Hecla lied to MSHA.

Hecla lied to MSHA by submitting a modified November 25, 2011 memo that did not include Dr. Blake's conclusion about the borderline stability of the 5900 level pillar. *See* R. Vol. 1, p. 214 (Blake Depo., p. 122, line 1 – p. 123, line 19); R. Vol. 2, p. 301 (Revised Memo dated November 25, 2011). Hecla lied to MSHA through Bayer's representations regarding the release of stress and stress readings at the 5900 level pillar. *See* R. Vol. 1, pp. 217-218 (Blake Depo., p. 137, LL 6-17; p. 140, LL 3-6); R. Vol. 1, pp. 257; 258-259 (Bayer Depo., p. 123, line 25 – p. 124, line 24; p. 128, line 25 – p. 130, line 15).

6. Hecla lied to its own employees.

Hecla did not allow the Miners to have access to the stress and closure readings. *See* R. Vol. 2, p. 403 (Deposition of John Jordan ("Jordan Depo."), p. 46, LL 17-23); R. Vol. 4, p. 822 (Affidavit of Rick Valerio). Hecla never informed employees that the November 16, 2011 burst did not relieve stress at the 5900 level pillar. *See* R. Vol. 4, pp. 822; 826; 896 (Affidavits of Matt Williams, Rick Valerio, and Rick Norman). Hecla never told employees that the 5900 level pillar was at its maximum unconfined strength. *See* R. Vol. 4, pp. 822, 826; 896 (Affidavits of Matt Williams, Rick Valerio, and Rick Norman). Hecla never told employees that stress readings showed steady increases in pressures at the 5900 level pillar. *See* R. Vol. 2, p. 448 (Deposition of Scott Hogamier ("Hogamier Depo."), p. 61, LL 13-20); R. Vol. 4, pp. 822; 826; 896 (Affidavits of Matt Williams, Rick Valerio, and Rick Norman).

Approximately two to three days following the November 16, 2011 burst, Doug Bayer was inspecting the pillar while mine employees were working on it. At that time, he held what was represented to be a report from Wilson Blake and he said to the miners that he knew several of them were concerned about the safety of the pillar but, while waiving the report in the air, he stated the report indicated that "we don't have to worry about it for at least five years." *See* R. Vol. 4, p. 824 (Affidavit of Rick Valerio, ¶ 7). As miners were attempting to drill dywidags into the East wall of the pillar, the wall was slipping preventing them from taking hold in the wall. Rick Valerio told Doug Bayer that he believed that there was a fault slip in the East wall of the pillar as the dywidags were not taking in the wall. He looked at Mr. Valerio and, without responding, walked away from him with no response. *See* R. Vol. 4, p. 824 (Affidavit of Rick

Valerio, ¶ 8). When the company began running trucks through the pillar before the rehabilitation was complete, mine employees asked Doug Bayer in his office if the employees driving the trucks should be worried while driving through the pillar. Mr. Bayer's response was that there were no concerns about the safety of the employees while working in or travelling through the pillar. *See* R. Vol. 4, p. 898 (Affidavit of Rick Norman, ¶ 9).

7. Despite inevitable complete failure of the pillar, Hecla restarts mining operations increasing stress to the pillar.

On December 6, 2011, Hecla resumed "normal" mining activities which included blasting at six stopes during both shifts between December 6, 2011 and December 13, 2011 while knowing the relationship between blasting and rock burst activity in the mine and, as set forth above, while knowing that the pillar was at serious risk of failure. *See* R. Vol. 1, pp. 254-255 (Bayer Depo., p. 111, line 20 – p. 112, line 15; p. 112, line 13 – p. 115, line 3); R. Vol. 2, pp. 457-471 (Shift Reports). MSHA was never informed of the full nature of the mining activities during this time and had only approved "very limited activity". *See* R. Vol. 1, pp. 253-254 (Bayer Depo., p. 106, line 5 – p. 112, line 1); R. Vol. 2, p. 477 (Modification Order 8605614-03). The mining resumed prior to the completion of the rehabilitation work on the 5900 level pillar and prior to the installation of the tunnel liner that had been ordered which was needed to ensure maximum protection for workers in the pillar. *See* R. Vol. 1, pp. 254; 252 (Bayer Depo., p. 110, LL 5-13; p. 103, LL 3-21).

8. Hecla's conduct caused another rockburst seriously injuring the Miners.

The November 16, 2011 burst, and the changed width/height ratio of the pillar and

continued stress from associated mining, caused a massive rockburst on December 14, 2011 causing serious injuries to the Miners. *See* R. Vol. 2, p. 488 (December 27, 2011 Memorandum from Wilson Blake and Mark Board, p. 6).

II. ISSUES PRESENTED

A. ***Did the District Court err by holding that Defendants were entitled to summary judgment based upon the exclusive remedy provisions within the Idaho Worker's Compensation Act, Idaho Code § 72-209(3)?***

III. ARGUMENT

A. *Standard of Review.*

"In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Lockheed Martin Corp. v. Idaho State Tax Comm.*, 142 Idaho 790, 793, 134 P.3d 641, 644 (2006). Rule 56(c) of the Idaho Rules of Civil Procedure provides, in pertinent part, that summary judgment "shall be rendered forthwith if the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]" However, the party responding to summary judgment is not required to present evidence on every element of his or her case at that time of summary judgment, but rather must establish a genuine issue of material fact regarding the element or elements challenged by the moving party's motion. *See Thomson v. Idaho Ins. Agency,* 126 Idaho 527, 530, 887 P.2d 1034, 1037 (1994).

"All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Robert Comstock, LLC v. Keybank Nat'l Assoc.*, 142 Idaho 568, 571, 130 P.3d 1106, 1109 (2006). "This Court freely reviews issues of law." *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730, 732 (2011) citing *Lattin v. Adams Cnty.*, 149 Idaho 497, 500, 236 P.3d 1257, 1260 (2010).

B. The Court Erred in Granting Summary Judgment to Hecla.

The Idaho Worker's Compensation Law expressly states that it provides the exclusive remedy for employees injured while working for an employer, except where the injury is proximately caused by the "wilful[sic] or unprovoked physical aggression of the employer" or its employees and that such loss of exemption shall apply to the employer if the employer provoked or authorized the willful physical aggression. *See* Idaho Code § 72-209(3).[1] In the proceedings below, the district court held that despite this express language, in order to fall within the exception found in Idaho Code § 72-209(3), an employee must prove that the employer intended to injure the employee.

The term "willful physical aggression" does not require a showing of an intent to injure the employee. As set forth in detail below, the legislative history of the Idaho Worker's Compensation Act and this Court's extensive case law regarding the use of "willful" does not support that conclusion. Additionally, this Court has defined the term "physical aggression" as

[1] Within Idaho Code § 72-209(3), the statue uses the term "wilful." This appears to be nothing more than a misspelling by the Legislature in enacting the provision. In the interest of consistency with court decisions and modern usage of the word, the Miners will use the correct spelling of "willful" throughout this Appellate Brief.

an "offensive act." When such definitions are applied to this case, it is clear that there are genuine issues of material fact remaining for trial in this case.

1. The Idaho Worker's Compensation Act Provides an Exemption from the Exclusive Remedy Provisions of the Act where Willful Physical Aggression is Shown.

The Idaho Worker's Compensation Act was passed in 1972, replacing the prior Idaho Workmen's Compensation Act. *See* Compiler's Notes to Idaho Code § 72-101. Among the numerous changes to the law was the inclusion of an exemption to the exclusive liability provisions in cases where the injury was caused by the willful or unprovoked physical aggression of the employer. The provisions of the former Idaho Workmen's Compensation Act, Idaho Code § 72-102 provided that all phases of industrial injuries were withdrawn from private controversy and subject exclusively to the provision of workmen's compensation, regardless of fault. *See Roe v. Albertsons, Inc.*, 141 Idaho 524, 527-30, 112 P.3d 812, 815-18 (2005). In contrast, Idaho Code § 72-209(3), enacted in 1972, expressly exempts the employer from the exclusive liability protections of Idaho's Worker's Compensation Law in the case of "wilful [sic] or unprovoked physical aggression." *See* Idaho Code § 72-209(3). Thus, the legislature clearly intended that certain actions of the employer would not be subject to the exclusive remedy provisions of Idaho's Worker's Compensation Law.

2. Under Idaho Law, "Willful" does not Require a Showing of Intent to Harm.

A mental state required of an employer to satisfy the exemption to the exclusive remedy provisions of the Idaho Worker's Compensation Act is identified as willful. A review of the legislative history of the adoption of the Idaho Worker's Compensation Act reveals little, if any,

insight into the interpretation of this term. However, the primary author of the 1972 revision, E.B. Smith, did offer a definition of "willful" as applied to the proposed provision which would exclude an employee from coverage under the Act if the injury was caused solely by the employee's "willful" intention to injure himself. Within a document entitled *Comparative Studies of the Model Code with Idaho's Workmen's Compensation and Occupation Disease Compensation Laws*, Mr. Smith stated that willfulness connotes "deliberation or calculated, determined, and stubborn persistence in a particular course in order to satisfy the will of the actor." *See* R. Vol. 3, pp. 530-531 (Smith, E.B, COMPARATIVE STUDIES OF THE MODEL CODE WITH IDAHO'S WORKMEN'S COMPENSATION AND OCCUPATIONAL DISEASE COMPENSATION., p. 24). As explained below, this definition is very consistent with the judicial interpretation of the term by the Idaho Supreme Court and as expressed within Idaho Model Jury Instruction No. 2.25. There is absolutely no indication within the Act or within the legislative history behind the exemption that the legislature in any way intended to modify or alter the meaning relating to the term "willful." Rather, there is clear evidence that the term willful as used in the statute was intended to mean something more than negligence, but less than intent to harm.

a. Statutory Language.

Established case law holds that,

> When the legislature 'borrows terms of art in which are accumulated the legal tradition and meaning . . . it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.'

State v. Oar, 129 Idaho 337, 340, 924 P.2d 599, 602 (1996) (quoting *Morissette v. United States*, 342 U.S. 246, 263, 72 S. Ct. 240, 250 (1952)).

Based on this established rule of construction, it is clear that by using the term "willful" within Idaho Code § 72-209(3), the legislature intended that word to have the common legal meaning given to that word as identified by Mr. Smith when he authored the current version of the statute. Further, the Idaho Supreme Court has recognized that the legislature is presumed to know existing judicial interpretations when it amends a statute. *See Robinson v. Bateman-Hall, Inc.*, 139 Idaho 207, 76 P.3d 951 (2003). Various provisions of the Idaho Worker's Compensation Law have been amended since 1972 and the legislature has not changed the word "willful" nor provided an additional definition of that word. As such, the legislature is presumed to know and approve of the existing judicial definition of "willful." In fact, had the legislature intended for "willful" to have a different meaning, it most certainly would have provided one as it has done in other statutes. *See, e.g.*, Idaho Code § 6-904C (providing a specific definition for "reckless, willful and wanton" conduct under the Idaho Tort Claims Act). Because the legislature chose not to specifically define willful within the Idaho Worker's Compensation Act, it would be disingenuous to interpret willful differently as used in Idaho Code § 72-209(3) than as used in any other statute or common law application.

b. Case law defining "willful."

In *Hennefer v. Blaine County Sch. Dist. #61*, 158 Idaho 242, 346 P.3d 259 (Idaho 2015), the Idaho Supreme Court addressed the legal definition of the terms reckless, willful, and willful

and wanton. The Court approved Idaho Pattern Jury Instruction 2.25 which provides a definition of "willful and wanton" and recognized that there was no distinction between "reckless" and willful and wanton." *See id.* The definition set forth in Jury Instruction 2.25 provides:

> The words "willful and wanton" ... mean more than ordinary negligence. The words mean intentional or reckless actions, taken under circumstances where the actor knew or should have known that the actions not only created an unreasonable risk of harm to another, but involved a high degree of probability that such harm would actually result.

See id. This same definition has been applied in other contexts. For example, the Idaho Supreme Court has applied this definition to "willful and wanton" conduct by a landowner which would exclude the landowner from the protections of the Idaho Recreational Use Statute. *See Jacobsen v. Rathdrum*, 115 Idaho 266, 766 P.2d 736 (1988). In *Jacobsen*, this Court recognized that the definition set forth in Jury Instruction No. 225 (the precursor to current IDJI 2.25) was the proper definition to apply to a claim that a landowner was exempt from the protections of the Recreational Use Statute. *See id.* at 270, 766 P.2d at 740.

Given these decisions, it is clear that the Idaho Legislature did not intend that the exemption carry a different meaning for the term "willful" than that defined repeatedly by the Idaho courts. Had it intended to do so, it would have done so expressly. In this case, as is set forth in the Statement of Facts, there is extensive evidence demonstrating the existence of willful conduct by Hecla management. It subjectively knew and objectively should have known that the 5900 foot pillar was dangerous and unstable with objectively identifiable stress measurements showing substantial increases in stress in the pillar during every shift of every day that the

rehabilitation continued. Hecla's rock mechanics consultant told management that the prior modeling of the pillar was rendered invalid by the substantially changed dimensions of the pillar (an approximately 2/3 reduction in width/height dimension), that further modeling was necessary, that the pillar was stressed to its capacity, and that the new dimension of the pillar rendered it at serious risk of complete failure given his prior research in the Coeur D'Alene mining district. Management knew that blasting and mining above and below the pillar was a known trigger for rock burst activity, yet **before the rehabilitation** could be completed, Hecla restarted blasting during every shift at six different stopes within the mine both above and below the pillar. As discussed herein, Hecla management lied to MSHA investigators regarding the stability of the pillar. To induce the employees to continue working in the area, management refused to show them stress and closure data or consultant reports and fraudulently told them that the pillar was "stable", that it was not increasing in stress and that further rock bursting was not expected by consultants for "at least five years." These representations were made by management while knowing that the pillar was unstable, that it had reached its maximum stress bearing capacity and that stress readings showed an increase in measurable stress within the pillar of **over a thousand psi** in less than two weeks of active monitoring. As if manipulating the federal government and its employees were not enough, management provided the ultimate demonstration of its willful and conscious disregard for the value of safety to its employees, by violating MSHA's 103k order by restarting blasting and mining at six different areas of the mine each shift for a week leading up to the fateful 2.2 Richter rock burst on December 14, 2011 that

buried seven of its miners. Clearly, there is substantial evidence in this case that Hecla management acted willfully as intended by the statute.

3. "Physical Aggression" is an Act, not a Mental State.

Although Idaho Code § 72-209(3) has been a part of the Idaho Worker's Compensation Act since 1972, there is very little case law available interpreting that provision. However, it is patently clear that the Idaho Legislature included the term, "willful" to define the required mental state to satisfy the exemption. It is further clear that the term "willful" has been repeatedly defined by the Idaho Supreme Court to require something substantially less than a showing of an "intent to harm." To satisfy the exemption, the required act that must be demonstrated by the employer with the "willful" state of mind is identified as "physical aggression." In applying the term "willful physical aggression" it is clear that the court has identified a threshold resting somewhere between an "intent to harm" and negligent conduct.

The first case to directly address this provision as an exception to the exclusive remedy of the Worker's Compensation Act was *Cope v. State*, 108 Idaho 416, 700 P.2d 38 (1985). In *Cope*, the plaintiff had sued his employer for damages suffered when he was attacked/tackled by a patient at the State Hospital while working as a rehab technician. *See id.* The district court granted summary judgment to the employer and the Idaho Supreme Court affirmed on the basis that the plaintiff had alleged no physical aggression by the employer or the employer's agent. *See id.*

The next case addressing Idaho Code § 72-209(3) is *Kearney v. Denker*, 114 Idaho 755, 760 P.2d 1171 (1988). In *Kearney*, an employee was injured while operating a lawn mower and

alleged that the employer had failed to install certain safety devices on the mower which caused the injuries. *See id.* at 756, 760 P.2d at 1172. The employee alleged that the employer was willfully, wantonly, and grossly negligent in such a way that it was substantially certain that someone would be injured. *See id.* The district court granted summary judgment based on the exclusive remedy provisions of the Idaho Worker's Compensation Act and the employee appealed.

On appeal, the Idaho Supreme Court directly addressed Idaho Code § 72-209(3) and held that the word "aggression" connotes an "offensive action." *See id.* at 757, 760 P.2d at 1173. This Court then held that "[t]o prove aggression there must be evidence of some offensive action or hostile attack. It is not sufficient to prove the alleged aggressor committed **negligent acts** that made it substantially certain that injury would occur." *See id.* (emphasis added). The Court then concluded that because the employee did not allege any willful physical offensive attack on the employee, the district court properly granted summary judgment and affirmed. *See id.* Thus, in *Kearney*, the Idaho Supreme Court established that Idaho Code § 72-209(3) required something more than ordinary negligence with a substantial certainty of harm and, instead, required willful offensive action against the employee. This standard was then affirmed in *DeMoss v. Coeur D'Alene*, 118 Idaho 176, 795 P.2d 875 (1990).

In *DeMoss*, the plaintiffs brought suit seeking recovery for mental anguish resulting from asbestos exposure. *See id.* The district court granted summary judgment based on the exclusive remedy of the worker's compensation law and the Court affirmed reiterating its statement that it is not sufficient to prove that the alleged aggressor committed negligent acts that made it

substantially certain that injury would occur. *See id.* at 179, 795 P.2d at 878. The Court based this decision on the fact that there was no evidence that the employer actually knew the substance was asbestos until after the first exposure had occurred and that, at best, the failure to provide adequate protective gear was merely negligent. *See id.*

The provision was next addressed in *Dominguez v. Evergreen Res., Inc.*, 142 Idaho 7, 121 P.3d 938 (2005). In *Dominguez*, the plaintiff had worked for the defendant and was instructed to enter and clean a steel tank which had been used as part of a cyanide-leach process and which had a layer of cyanide laced sludge in the bottom. *See id.* at 9, 121 P.3d at 940. The evidence showed that the employer knew it was dangerous to enter the tank but concealed the knowledge from Dominguez. The employer had failed to obtain the proper permit for entry into the tank in violation of federal regulations and had failed to provide any safety training or equipment. *See id.* During the cleaning process, Dominguez was overcome by poisonous hydrogen cyanide gas and lost consciousness. He ultimately suffered severe and irreversible brain damage. *See id.* at 10, 121 P.3d at 941. Dominguez filed suit against his employer alleging willful physical aggression to avoid the exclusive remedy provisions of the Workers' Compensation Act. *See id.* Eventually, the employer's attorney withdrew and the employer failed to find new counsel leading the district court to enter default against the employer. *See id.*

On appeal, the employer asserted that Dominguez's claims were barred by the exclusive remedy provision of the Idaho Worker's Compensation Act. The Idaho Supreme Court disagreed and stated that Dominguez had alleged willful or unprovoked physical aggression by his employer and, therefore, his claim fell into the statutory exception. *See id.* at 12; 121 P.3d at

943. Thus, this Court recognized that the statutory exception applied to a claim where the employer willfully placed an employee in a situation where there was a high probability that an injury would occur.

Because the case involved a default judgment, Hecla has argued that the Court never held that the circumstances alleged by Dominguez actually fell within the statutory exception. However, a review of the case demonstrates that the Court was fully aware of the factual circumstances alleged by Dominguez and nevertheless recognized that the statutory exception applied to his case. Specifically, the Court restated the facts of the case as follows:

> In the summer of 1996, Elias directed Dominguez and another employee to wash out the sludge that had accumulated in the steel tank. **Dominguez alleges Elias knew it was hazardous to enter the steel tank, but concealed that knowledge from Dominguez. Contrary to federal regulations, no confined space entry permit had been prepared, there had been no special employee training, appropriate safety equipment was not provided, and no attendant was standing by.** The two employees entered the steel tank through a manhole opening on the top of the tank, and using a water hose and broom the pair attempted to wash the sludge out through a small opening. While in the steel tank, Dominguez was overcome by poisonous hydrogen cyanide gas and lost consciousness. The other employee was able to escape.

See id. at 9, 121 P.3d at 940 (emphasis added).

Based on this recitation, it is clear that the Court expressly recognized the facts underlying Dominguez's claim of willful physical aggression and agreed that a cause of action satisfying the statutory exemption had been properly alleged. In its decision, the court stated:

> In this case, Dominguez has alleged a willful or unprovoked physical aggression by his employer, and therefore his claim falls into a statutory exception to the exclusive remedy rule. I.C. § 72-

> 209(3). Consequently, Dominguez is permitted to collect those worker's compensation benefits for which he is eligible and to bring a cause of action against his employer outside the worker's compensation system.

Dominguez, 142 Idaho at 12, 121 P.3d at 943. The decision is clear that it was not based simply on Dominguez setting forth a conclusory allegation of willful or unprovoked physical aggression. Rather, the determination that Dominguez had alleged willful or unprovoked physical aggression was based upon the underlying facts within the complaint.

In *Olson v. Kirkham*, 111 Idaho 34, 37, 720 P.2d 217, 220 (Ct. App. 1986), the Idaho Court of Appeals held that a default judgment is not appropriate where a complaint fails to state a valid cause of action. *See id.* ("A court having before it a sworn complaint alleging a good cause of action has no need to take testimony to reaffirm that allegations of the complaint."). This holding is in accord with other courts. *See e.g.*, *Benny v. Pipes*, 799 F.2d 489, 495 (9th Cir. 1986) (finding that the complaint stated a valid claim for relief before affirming a default judgment). As such, while the Court was obligated to take the facts alleged by Dominguez as true upon a default, those facts still had to form the basis for a valid claim for relief. Based on the recitation of facts by the Court, it is clear that this Court upheld the complaint as stating a valid cause of action under the exemption allowing recovery outside of the Idaho Worker's Compensation Act with an understanding that the facts alleged within the complaint met the definition of "willful physical aggression."

The fact that *Dominguez* did more than just affirm a default judgment without any consideration of the existence of a valid cause of action is further supported by the findings of

the bankruptcy judge in *In re Elias*, 302 B.R. 900 (Id. Bankr. 2003). In *Elias*, the bankruptcy court was asked to determine whether the default judgment entered by the state district court, in the *Dominguez* case, had a preclusive effect on the non-dischargeability of the judgment entered against Dominguez's employer. In holding that the default judgment did have preclusive effect, the bankruptcy court stated "the default judgment actually decided the issues raised by Plaintiff's complaint in the state court action because 'upon default, the allegations of the complaint are taken as true.'" *See id.* at 912 (quoting *Olson*, 111 Idaho at 37, 720 P.2d at 220). The bankruptcy court further found that the default judgment determined that Defendant committed an act of "'wilful [sic] or unprovoked physical aggression upon [Plaintiff]' by sending him into the tank car without providing adequate safety equipment or taking appropriate safety precautions." *See id.* (emphasis added). The bankruptcy court further recognized that "the default judgment can be fairly read as establishing that when Defendant sent Plaintiff into the tank car, he acted with a harmful state of mind and that, in doing so, Defendant either understood, or knowingly disregarded the likely consequences of Plaintiff's entry into a confined space containing harmful chemicals, with little or no ventilation or safety equipment." *See id.* (emphasis added).

The conclusion to be drawn from the cases cited above is that the statutory exception to the exclusive remedy of the Worker's Compensation Act embodied in Idaho Code § 72-209(3) requires something more than ordinary negligence combined with a substantial risk of harm but something less than deliberate intent to injure. The exception can be applied where an employer engages in an offensive act and willfully exposes an employee to circumstances creating a

substantial likelihood of injury without regard for the employee's safety and/or the likely consequences to the Plaintiff.

It is further clear that the term "willful physical aggression" does not require an actual physical striking of the employee by the employer. Had the legislature intended such an act to meet the exemption, it would have stated so expressly within the exception. "Aggression" does not mean "striking." It means the engagement of an offensive act toward the employee subjecting the employee to a substantial risk of physical harm with a substantial likelihood that such harm would result. A contrary definition cannot be rationalized with the court's decision in *Dominguez* or its repeated decisions setting forth that "willfulness" does not require a demonstration of intent to harm. Further, one can envision no policy consideration that would justify an exemption where an employee physically strikes an employee, but not where, as here, the employer lies to its employees and the Federal Government in willfully exposing its employees to a known, substantial risk of death or serious injury. Lying to an employee in order to fraudulently induce him/her to act in a way which exposed him/her to a substantial risk of physical injury or death must be an "offensive act" sufficient to meet the definition of "physical aggression." An overtly formalistic, contrary construction of the term would not only be in contradiction of Idaho Supreme Court precedent, but also would ignore the very policies and principles upon which the exemption was created.

4. Cases from other jurisdictions are not applicable to Idaho's Worker's Compensation Act.

Within the district court's Memorandum Decision, the district court cited to cases from

other jurisdictions to support its holding that Idaho Code § 72-209(3) precluded the Miners' suit. First, the district court cited to *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D. Idaho 1975). The district court stated that, in *Provo*, even knowingly permitting hazardous work was not sufficient to constitute an intentional act to allow for a common law remedy by the employee. *See* R. Vol. 5, p. 1156 (MSJ decision, p. 9). However, it must first be noted that *Provo* was a decision of the federal district court, not binding on this Court. Secondly, as the federal district court itself recognized, the injuries at issue arose in 1971, prior to the amendments to the Worker's Compensation Act. *See Provo*, 393 F. Supp. at 780. Under the prior version of the statute, the statute specifically provided that all phases of common law remedies of workers against employers was "withdrawn from private controversy and sure and certain relief for injured workmen ... is hereby provided regardless of questions of fault and to the exclusion of every other remedy . . . and to that end all civil actions and civil causes of action for such personal injuries . . . are hereby abolished except as in this act provided." *See Provo*, 393 F. Supp. at 781 (quoting Idaho Code § 72-102 (1971)). The prior version of the Worker's Compensation Act had no exception for "willful physical aggression." *See id.* Thus, the federal district court's conclusion that the employee's claim did not amount to an intentional tort is irrelevant to the analysis in this case. Rather, to fall within the exception to the exclusive liability provisions, the Miners must only prove willful physical aggression, not an intentional tort. Therefore, the district court's reliance on this case is mistaken.

The district court also cited to *Higley v. Weyerhaeuser Co.*, 524 P.2d 596 (Wash. Ct. App. 1975). However, as the district court itself noted, Washington's workers' compensation statute

only provides an exception to the exclusive remedy provision when the injury or death to the workman is caused by the deliberate intention of the employer to produce such injury or death. *See* R. Vol. 5, pp. 1156-1157 (MSJ Decision, pp. 9-10). Again, in Idaho, the Miners do not have to prove a deliberate intention to cause injury. Idaho's statute clearly states that they must prove willful physical aggression. Nothing in *Higley*, or even the district court's discussion of *Higley*, explains how "deliberate intent to injure" is the equivalent of willful physical aggression. Thus, again, the district court's reliance on this case is unhelpful.

Lastly, the district court cited to *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir. 1980). As with the other cases, Louisiana's workers' compensation statute provided an exclusion from liability for "an intentional act." Despite acknowledging that Idaho's statute does not mention an intentional act, but rather willful physical aggression, the district court nevertheless opines that the two must be the same thing. *See* R. Vol. 5, p. 1158 (MSJ Decision, p. 11). However, as was set forth in detail above, Idaho law has clearly provided that "willful" is not the same as intentional. Therefore, there is absolutely no basis for the district court's conclusion that willful, as used in the Idaho Worker's Compensation Act, is the equivalent of intentional. Thus, the cases cited by the district court simply do not support the district court's decision in this case.

Hecla has also relied on out of state authority in the briefing in this matter. Specifically, Hecla cited to *Torres v. Parkhouse Tire Service, Inc.*, 30 P.3d 57, 60 (Cal. 2001) as support for its motion for summary judgment below. In *Torres*, the California Supreme Court attempted to interpret "willful and unprovoked physical aggression" in relation to "horseplay" between

employees at an employer's worksite. *See id.* at 58. It held that "willful and unprovoked physical aggression" required an intent to injure. The California court's holding in *Torres* is not applicable to the facts of this case. First, the case did not involve the type of conduct at issue here, but rather involved "horseplay" between employees at the employer's premises. Additionally, the holding was based on California's own interpretation of "physical aggression" which is substantially different from the way this Court has interpreted that same term. *See, e.g.*, *Kearney*, 114 Idaho at 757-758, 760 P.2d at 1173-1174 (defining "physical aggression as an offensive or hostile act."). In contrast to California, this Court has never interpreted "willful" or "physical aggression" as requiring an actual, subjective intent to injury the employee. California's interpretation of "willful physical aggression" is simply inapplicable and irrelevant to the interpretation of Idaho Code § 72-209(3). Thus, the cases from other jurisdictions cited by the district court and Hecla do not support the grant of summary judgment in this matter.

5. The Miners have pled a valid cause of action in tort against Hecla as matter of law.

As is thoroughly discussed above, if the Miners can establish that Hecla committed "willful physical aggression" the Miners are entitled to pursue their tort claims against Hecla outside of the Workers' Compensation proceedings. The facts supporting such willful physical aggression in this matter are fully set forth in the Statement of Facts, *supra.*

a. Hecla knew the pillar was unstable.

Hecla did not employ a rock mechanics expert in 2011 and in fact relied exclusively upon a consultant, Wilson Blake, Ph.D., regarding any rock mechanics issues including rock bursts

and pillar stability. Neither its mine superintendent, Doug Bayer, nor any of its employees had necessary training, education or certification as a rock mechanics expert. *See supra*, p.4. Following the November 16, 2011 rockburst, Hecla management knew that the pillar had reached its maximum unconfined strength and that the walls of the pillar continued to carry stress. *See supra*, p. 5. Dr. Blake's November 25, 2011 draft memo stated that the stress on the 5900 level pillar leading up to the November 16, 2011 burst "was very near the unconfined compressive strength of the pillar." *See supra*, p. 5*; see also* R. Vol. 3, pp. 505-508.

Dr. Blake's memo further included a sentence that the November 16, 2011 burst had rendered the 5900 level pillar to condition identified as "borderline stable." *See supra*, p. 7. Dr. Blake specifically testified that:

119

16 **Q.** You said, "The pillar is borderline stable
17 based on mining history at Lucky Friday/Gold Hunter."
18 When you say borderline stable, that's based on your
19 Galena research, correct?

20 **A.** Well, that's based on pillar failures in most
21 mines. As I say, once that pillar becomes less than 35
22 feet**, you can expect it to burst**. And that was ...

23 **Q.** And that's what you were trying to tell Hecla
24 at that point is it's borderline --

25 **A.** Yes.

See R. Vol. 1, p. 213 (Blake Depo, p. 119, LL 16-25 (emphasis added)).

121

11 Q. And from your research, pillars 40 feet or
12 smaller in height are -- have a history in the Coeur
13 d'Alene silver district of failing, correct?

14 A. **When the size is reduced beyond that, the**

15 history has been you can expect rockbursting.

See R. Vol. 1, p. 213 (Blake Depo, p. 121, LL 11-15).

Hecla either removed or instructed Dr. Blake to remove language regarding the borderline stability of the pillar from the report before such report was provided to MSHA. *See supra*, p. 7. In regards to the change in the memo, Dr. Blake testified that:

123

Q. Well, you sent him Exhibit 24 for his review, correct?

A. That's right.

Q. And then you created a final memo, which is Exhibit 13, correct?

A. That's correct.

Q. And Exhibit 13 does not have language that says this pillar is borderline stable, correct?

A. That's correct.

Q. And the removal of that sentence would have come at the suggestion of Hecla, correct?

MR. RAMSDEN: Object to the form.

THE WITNESS: I did remove it.

BY MR. ROSSMAN:

Q. At the suggestion of Hecla, correct?

A. It would have to be the case.

See R. Vol. 1, p. 214 (Blake Depo, p. 123, LL 1-16 (emphasis added)).

Despite his knowledge, that the pillar was unstable, Bayer provided updates to MSHA on November 29, December 1, December 2, and December 6, 2011 asking for modifications to the 103k order which would allow rehabilitation of the pillar and, ultimately, on December 6, 2011,

to allow the resumption of mining operations in the mine. *See supra*, p. 8. These mining operations commenced even before the rehabilitation of the 5900 level pillar were complete. *See supra*, p. 12.

Bayer's "updates" sent to MSHA included statements regarding the status of the pillar that he knew were false and/or knew had not been supported by Hecla's own expert. *See supra*, pp. 7-9. Bayer knew that the pillar had reached its maximum unconfined stress capacity, that the size of the pillar had substantially changed, that it was at serious risk of complete failure and that actual measurable increases in stress, ultimately showing an increase of over one thousand psi, were recorded every shift of every day during the rehabilitation. Of course, Hecla refused to show the results to MSHA, its employees and even its own rock mechanics consultant while expressly representing that it did not expect "any measurable increase" in stresses for weeks if not months following rehabilitation of the pillar. *See supra*, pp. 8-10. The mining that resumed between December 6, 2011 and December 13, 2011 occurred while Hecla knew the relationship between blasting and rock burst activity in the mine as well as the fact that the pillar was carrying stress and stresses were rapidly increasing in the pillar. *See supra*, p. 12.

b. Hecla lied to MSHA and the miners about the stress levels at the pillar.

Employees informed Dr. Blake that during the rehabilitation efforts at the pillar, the walls were "popping," "cracking" and "spalling" when they tried to drive bolts and dywidags into the walls. Despite a modification order that required that, "[a]ny significant changes will be reported to MSHA to include additional stressing, closure, cracking or squeeze and deformity" none of

these reports were actually communicated to MSHA. *See* R. Vol. 2, p. 477 (Modification Order 8605614-03); *see also*, *supra*, p. 10. Bayer informed MSHA that Hecla had installed three stress monitors in the 5900 pillar and falsely stated that it would install three additional monitors as soon as they arrived from the manufacturer. *See supra*, p. 10. Bayer falsely informed MSHA that the stress monitoring information would be reviewed daily by mine personnel and Hecla's rock mechanic consultant. *See supra*, p. 8. Dr. Blake stated that he received four to five days' worth of monitoring information in total. *See supra*, p. 9.

Bayer never informed MSHA that the East Low gauge showed invalid readings and Hecla never took steps to reinstall or check the placement of the gauge. *See supra*, pp. 9-10. Dr. Blake testified that negative readings from the East Low gauge were clearly inaccurate and that the surrounding rock around the gauge must have crumbled. *See supra*, p. 9. Hecla never installed the remaining three gauges as it falsely represented it would to MSHA. *See supra*, p. 10. Hecla never informed MSHA or employees that the stress readings on the West Low gauge showed per shift, steadily increasing pressures at the 5900 level pillar. *See supra*, pp. 10-11. Hecla never allowed employees to see the stress monitoring information. *See supra*, p. 10. Approximately two to three days following the November 16, 2011 burst, Doug Bayer was inspecting the pillar while mine employees were working on it. Mr. Bayer falsely informed the miners that "we don't have to worry about [the pillar] for at least five years." *See supra*, p. 11.

In his deposition, Bayer admitted that his representations to employees and MSHA regarding the release of stress at the 5900 level pillar, the stability of the pillar, and the expectations of future stability of the pillar were not based on anything told to him by Dr. Blake

but rather his own history and experience at the mine. Bayer is not a rock mechanics expert and its consultant who held a Ph.D in this area, Dr. Blake, expressly testified that Bayer's representations to MSHA were incorrect. *See supra*, pp. 8-9.

c. Bayer's lies induced MSHA to issue modifications to allow mining that it would not have otherwise allowed.

MSHA was never told of Dr. Blake's serious concerns of pillar failure or that miners were complaining of spalling, cracking, and popping of rock at the pillar. In fact, Bayer stated that the pillar appeared to be stable. *See supra*, pp. 7-9. MSHA was never told that Hecla failed to install the three remaining gauges as promised by Hecla. *See supra*, p. 10. MSHA was never told that the existing gauges were showing steadily increasing pressures over the two week period they were monitored prior to December 14, 2011. *See supra*, p. 8-9. MSHA was never told that the third gauge installed in the east wall was registering consistently invalid stress readings and that no action was taken to reinstall the gauge to obtain accurate readings. *See supra*, pp. 9-10. MSHA was not informed that Hecla was initiating full mining operations with blasting at six different stopes above and below the 5900 level pillar before rehabilitation of the pillar was completed. Modification order 8605614-03 permitted only "very limited activity" based upon false representations to it by Bayer. *See supra*, p. 12.

d. Hecla's lies induced miners to work at the 5900 level pillar without knowing of the substantially dangerous condition of the pillar.

Rick Norman, Rick Vallerio, and Matt Williams are current and/or former employees of Hecla who worked on the 5900 level pillar between November and December 14, 2011. *See* R. Vol. 4, pp. 896; 822; 826 (Affidavits of Rick Norman, Rick Vallerio, and Matt Williams). Each

miner testified by affidavit that Hecla management, including Doug Bayer, were informed that the walls were cracking, spalling and popping when they tried to drive bolts and dywidags into the walls. *See* R. Vol. 4, pp. 896; 822; 826 (Affidavits of Rick Norman, Rick Vallerio, and Matt Williams.) Each miner testified by affidavit that they were expressly told by Doug Bayer that the pillar was safe, and Rick Vallerio was told that Dr. Blake's report said the pillar was safe for at least five years. *See supra*, p. 11, *see also* R. Vol. 4, pp. 896; 822; 826 (Affidavits of Rick Norman, Rick Vallerio and Matt Williams). Each miner testified by affidavit that they were never told by Hecla management that the stress monitors were showing steadily increasing pressures or that Dr. Blake had expressed concerns about the safety of the pillar. *See* R. Vol. 4, pp. 896; 822; 826 (Affidavits of Rick Norman, Rick Vallerio, and Matt Williams). Each miner testified by affidavit that had they known that Dr. Blake considered the pillar to be borderline stable and that stress monitoring data was showing steadily increasing pressures, they would not have worked at the pillar and would have taken steps to remove any mining personnel from working at the pillar. *See id.* (Affidavits of Rick Norman, Rick Vallerio, and Matt Williams.)

e. The Miners' experts agree that Hecla engaged in willful physical aggression.

In addition to the evidence above, the conclusion that Hecla's conduct amounted to willful physical aggression is further supported by the Miners' experts Jack Spadero and James W. Dally, PhD. Dr. Dally is a rock mechanics expert with a B.S. and M.S. in Mechanical Engineering and a Ph.D. in Mechanics. *See* R. Vol. 4, pp. 934-946 (Affidavit of James W. Dally,

Ph.D. ("Dally Affidavit"), (CV). Dr. Dally has authored numerous textbooks and technical papers on engineering and stress analysis.

Within Dr. Dally's Affidavit, he reviews the history surrounding the November 16, 2011 rockburst, as well as the Memorandum authored by Dr. Blake on November 18, 2011 and November 25, 2011. Dr. Dally concludes that Mr. Bayer's decision to request resumption in mining activity was a dangerous decision because it involved blasting that was known to trigger rock bursts. *See* R. Vol. 4, p. 911 (Dally Affidavit, ¶ 27). Dr. Dally states that there is considerable evidence that blasting triggers seismic events in the Lucky Friday Mine. *See* R. Vol. 4, p. 924 (Dally Affidavit, ¶ 55). A footnote in a letter from Hecla's counsel in the MSHA proceedings, Jackson Kelly PLLC, admits that "[t]he vast majority of seismic events at the Lucky Friday mine are triggered by blasting." *See* R. Vol. 3, p. 595 n.1; R. Vol. 3, p. 658 (Geotechnical Characteristics of the Lucky Friday Mine, December 2012, Section 4.2.3; Rock burst Control Plan, Lucky Friday Unit, December 2012).

Dr. Dally further notes that Hecla was mining above and below the 5900 level pillar after December 6, 2011 and that such mining has two detrimental effects. First it allowed for more than 100 opportunities to trigger a seismic event from blasting and, second, removal of ore from above and below the 5900 level pillar increased the mined out area and thereby increased the pressure on the side wall of the pillar. *See* R. Vol. 4, p. 925 (Dally Affidavit, ¶ 58). Dr. Dally has reviewed the actions of the mine management as has been set forth previously and concludes that the managers of the Lucky Friday Mine were taking unwarrantable risk in deciding to rehabilitate the 5900 drift and that the risk was inexcusable when the stress gauges were showing

increasing stresses on the pillar. *See* R. Vol. 4, p. 928 (Dally Affidavit, ¶ 67). Dr. Dally further declares that Hecla acted willfully with gross disregard for the safety of its employees when it resumed mining that involved blasting. *See id.* Lastly, Dr. Dally concludes that Hecla's conduct constituted "willful physical aggression" when it engaged in a conscious choice of action under circumstances where Hecla knew or should have known that this conduct created an unreasonable risk of direct physical injury and aggression to the miners and that there was a high degree of probability that such direct physical injury would actually result from the conduct. *See* R. Vol. 4, p. 928 (Dally Affidavit, ¶ 68).

Mr. Spadero is a Mine Safety and Health/Environmental Consultant. *See* R. Vol. 4, p. 774 (Affidavit of Jack Spadero, ¶ 4). Mr. Spadero is a former superintendent of the National Mine Health and Safety Academy, has a degree in mining engineering, and has specialized knowledge regarding the application of Mine Safety and Health Act to working mines. He further has specialized knowledge regarding mining accidents and health and safety issues in mining based on his education and more than twenty years experience working for MSHA and other departments within the Department of Labor. *See* R. Vol. 4, pp. 774-775; pp. 795-821 (Affidavit of Jack Spadero, ¶¶ 5-8 and (Spadero's CV)).

Within Mr. Spadero's Affidavit, he identifies multiple illustrations of a deliberate intent by Hecla management, including Doug Bayer, to deceive MSHA regarding the stability of the 5900 level pillar. *See* R. Vol. 4, pp. 780-785 (Spadero Affidavit, ¶¶ 17 – 24). Mr. Spadero further reviews MSHA's investigation into the December 14, 2011 rockburst, including MSHA's conclusions that Hecla acted with reckless disregard to the safety of the miners. *See* R. Vol. 4,

pp. 786-788 (Spadero Affidavit, ¶¶ 26 – 30). Mr. Spadero concludes that mine management personnel knew that the 5900 level pillar posed a risk of serious injury or death to miners and deliberately and knowingly gave false information to MSHA following the November 16, 2011 rockburst that led MSHA to believe that there were no longer stresses in the 5900 level pillar. *See* R. Vol. 4, pp. 782-786; 789; 792 (Spadero Affidavit, ¶¶ 20 – 25, 34 – 35, 42 – 43). Mr. Spadero concludes that Hecla deliberately deceived MSHA and deliberately and recklessly ignored the advice of its own rock mechanics consultant. *See* R. Vol. 4, p. 790-791 (Spadero Affidavit, ¶¶ 37-39). Lastly, Mr. Spadero concludes that Hecla's actions constituted willful physical aggression towards the miners on December 14, 2011. *See* R. Vol. 4, p. 792-793 (Spadero Affidavit, ¶ 45).

The Affidavits of Dr. Dally and Mr. Spadero, along with the substantial evidence provided in this case, demonstrate that upon a review of all of the circumstances surrounding the time period between November 16, 2011 and December 14, 2011 and in light of the conduct by Hecla, Hecla committed willful physical aggression against the Miners. It did so by lying to the Miners and MSHA regarding the stress conditions on the pillar and allowing mining activity to resume by blasting on levels both below and above the pillar resulting in the rockburst which severely injured the Miners.

f. Hecla's actions constitute willful physical aggression.

As is set forth above, the Miners have evidence in this case that would demonstrate that Hecla knew that the pillar was unstable, that it was at its maximum unconfined strength, that it had not been de-stressed by the November 16, 2011 rockburst, that the pillar was building stress

every shift of every day, and that blasting was a known trigger for rockburst activity within the mine. Despite this knowledge, the evidence demonstrates that Hecla lied to MSHA and its own employee miners regarding the stress levels and stress monitoring at the pillar; excluded vital information from Dr. Blake's reports from MSHA and the miners; pushed for permission to resume mining activities before the rehabilitation of the pillar was complete (and based upon inaccurate information); and resumed such mining activities despite not having completed rehabilitation of the pillar. These false statements were calculated to induce MSHA to issue modifications to its original 103k order barring further activity within the mine, and further calculated to induce the miners to continue rehabilitation of the pillar.

The evidence demonstrates that this is not a case of "mere negligence with a substantial risk of harm" as occurred in *Kearney.* Rather, the facts of this case are substantially similar to the facts presented to the court in the *Dominguez* case. As in *Dominguez*, the employer induced its employees into what the employer knew was an exceedingly dangerous situation without regard to the risks it was placing upon its employees. Additionally, while there is no evidence the employer in *Dominguez* lied to regulatory authorities or the employee prior to the incident, in this case there is substantial evidence that Hecla committed repeated offensive acts by lying to both MSHA and its employees. If Hecla's aggressive and offensive conduct does not rise to the level of "intentional or reckless actions, taken under circumstances where the actor knew or should have known that the actions not only created an unreasonable risk of physical harm to another, but involved a high degree of probability that such harm would actually result" then no conduct short of physical striking by an employer could meet that standard.

As was set forth in *Kearney*, "aggression" means an offensive or hostile act. In this case, Hecla intentionally lied to both employees and MSHA regarding the stability of the pillar and the stress levels building on the pillar. It lied about how it was monitoring the stresses within the pillar and it concealed evidence that the unstable pillar was building stress. Clearly, lying to employees about life-threatening dangers associated with the work is an offensive act. It is an overt act which would offend any employee. Hecla engaged in this offensive act and ordered work done on the 5900 level pillar when Hecla knew that the actions created an unreasonable risk of harm and involved a high degree of probability that such harm would result. Hecla knew that Wilson Blake had described the pillar as borderline stable and had expressed to management serious concerns about its stability. It knew that it had not been de-stressed as Hecla represented to MSHA, that there was objective evidence of stress on the pillar in the form of the cracking, spalling, and popping of the walls reported by the miners, as well as the steadily increasing pressures on the only two operating stress monitors on the west and top walls. Hecla knew that the pillar was in serious danger of failure yet chose to disregard that danger, lie to federal authorities and its employees, and place its miners in a situation where it was highly likely that serious physical harm would result. And such harm did result, causing serious injuries to the miners.

There is a sound public policy basis for allowing employees to seek tort damages in cases where the evidence demonstrates that an employer fraudulently placed employees in dangerous situations where serious physical injury or death was highly likely to occur. The purpose of the Idaho Worker's Compensation Act was to provide sure and certain relief to employers and

employees in the case of industrial accidents without regard to fault. *See Blake v. Starr*, 146 Idaho 847, 848-849, 203 P.3d 1246, 1247-1248 (2009). It was a recognition that in the normal course of employment accidents, even those caused by the negligence of the employer or employee, can occur and that the civil justice system was ill-suited to bringing speedy and necessary relief to injured workers and certainty to employers. *See id.* Nothing in that purpose is served by limiting the liability of employers under these circumstances. Allowing employers to retain the exclusive liability of the worker's compensations system in cases where the employer knowingly places his employees in highly dangerous situations and lies to the employees about their safety concerns, effectively rewards employers for their actions and substantially limits the employee's ability to obtain a full recovery for his/her injuries. Pre-emption under these circumstances shields the employer from the "market cost" of willfully placing its employees at substantial risk of harm in the name of profits. Nothing in the policy behind worker's compensation law supports that kind of protection for dangerous employers.

Protection of Hecla under these circumstances would have wide-spread implications. An employer who orders its employee to drive a vehicle with no brakes or, as in *Dominguez*, knowingly places upon its employees a substantial risk of serious injury or death would be substantially protected from serious responsibility for its actions. There is absolutely no public policy which would support such arbitrary distinctions. Furthermore, contrary to Hecla's arguments below, such a holding will not open the "floodgates of litigation." In the forty-plus year history of this Act, there have been three or four cases brought before the Idaho Supreme Court seeking to fit within the exception to the exclusive liability provisions of Idaho Code § 72-

209(3). Applying the express language used by the legislature will not flood the courts with tort claims by employees, but rather will ensure that in these most egregious of situations – where employers recklessly disregard the safety of their employees with knowledge of the substantial risk facing these employees – innocent employees will have a remedy beyond just the limited recovery available under worker's compensation law. Such a result will remove financial incentives for employers to place profits over the well-being of their employees. The public policy underlying worker's compensation law supports allowing employees in these types of situations to bring a cause of action against their employer.

Simply put, when an employer engages in willful conduct that includes an offensive act and results in physical injury to the employee, that employee is an innocent victim just as any third party would be. And public policy supports allowing tort victims to seek a full recovery of damages in the civil justice system. An employer engaged in that level of wrongful conduct does not deserve the protections of the Idaho Worker's Compensation Act and should not be allowed to use its protections as a shield from full liability. To do so would do nothing but provide incentive for employers to willfully place employees in highly dangerous situations where the monetary reward exceeds the known liability. This was never the purpose of the Idaho Worker's Compensation Act and, therefore, the Miners must be allowed to proceed with their tort claims against Hecla in this matter.

IV. CONCLUSION

For the reasons set forth above, the Miners respectfully request that the Court reverse the District Court's decision granting Hecla's Motion for Summary Judgment and remand this matter to the District Court for further proceedings including, but not limited to, trial.

DATED this 3rd day of March, 2016.

ROSSMAN LAW GROUP, PLLC

By: Erica S. Phillips
for Eric S. Rossman
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2016 I caused a true and correct copy of the foregoing to be forwarded with all the required charges prepaid, by the method(s) indicated below to the following persons:

Michael E. Ramsden
RAMSDEN, MARFICE, EALY
& HARRIS, LLP
700 Northwest Boulevard
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

Hand Delivery ____
U.S. Mail ✓
Facsimile 208-664-5884 ____
Overnight Mail ____
Electronic Mail ✓
mramsden@ramsdenlyons.com

Erica S. Phillips
for Eric S. Rossman

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