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

IN THE SUPREME COURT FOR THE STATE OF IDAHO

RONNEL E. BARRETT, an individual; GREGG HAMMERBERG, an individual; ERIC J. TESTER, an individual; and MATTHEW WILLIAMS, an individual, Plaintiffs/Appellants, vs. HECLA MINING COMPANY, a Delaware Corporation; JOHN JORDAN, an individual; DOUG BAYER, an individual; SCOTT HOGAMIER, an individual; and DOES I-X, Defendants/Respondents.	Supreme Court No. 43639

RESPONDENTS' BRIEF

Appeal from the District Court of the
First Judicial District for Kootenai County

Honorable Lansing L. Haynes, District Judge, Presiding

Eric S. Rossman
Rossman Law Group, PLLC
717 N. 7th Street
Boise, ID 83702

Attorneys for Appellants

Michael R. Christian
Marcus, Christian, Hardee & Davies, LLP
737 N. 7th Street
Boise, ID 83702

Attorneys for Appellants

Michael E. Ramsden
Theron J. De Smet
Ramsden, Marfice, Ealy & Harris, LLP
PO Box 1336
Coeur d'Alene ID 83816-1336

Attorneys for Respondents

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Attorneys for Appellants

Michael E. Ramsden
Theron J. De Smet
Ramsden, Marfice, Ealy & Harris, LLP
PO Box 1336
Coeur d'Alene ID 83816-1336

Attorneys for Respondents

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case arises out of an accident at the Lucky Friday Mine, in Idaho's Silver Valley, on December 14, 2011, that injured seven employees of Hecla Limited, four of whom are Plaintiffs here. The accident occurred while the employees were executing a Rehabilitation Plan to address a safety risk created shortly before by an unpredictable event called a rock burst. The Rehabilitation Plan was developed by experienced mining engineers at Hecla in conjunction with a Ph.D. expert on rock mechanics and geological engineering, and was also approved by the United States Mine Safety & Health Administration ("MSHA").

Each of the plaintiffs was an employee of Hecla who was injured on the job. The worker's compensation system, not the courts, is the exclusive remedy for such injuries (the "Exclusivity Rule"), unless the action that caused the injuries satisfies a narrow exception to the rule. Specifically, Idaho's worker's compensation law provides that employees are exempted from the Exclusivity Rule only if the action that injured them was "wilful or unprovoked physical aggression." Idaho Code § 72-209(3). This Court has interpreted this phrase twice previously, holding that it means employees may file claims in court *only* when an employer or its agents "physically and offensively or hostilely attacked the employee" with "an intention to injure the employee." *Kearney v. Denker*, 114 Idaho 755, 757-58 (1988); *see also DeMoss v. City of Coeur d'Alene*, 118 Idaho 176 (1990). Idaho's rule is also consistent with the vast majority of other states, which have adopted the same rule.

Plaintiffs now try to persuade this Court to disregard the plain language of the statute, discard decades-long, settled Idaho precedent, and depart from the majority rule in the United States. They

argue that the worker's compensation law "does not require a showing of an intent to injure the employee" (App. Brief p. 14), even though both the statute itself and this Court's decisions interpreting it plainly indicate that it does. Expanding the types of claims that can be brought outside the worker's compensation system would undermine the compromise crafted by the Legislature and reflected in the worker's compensation law—a compromise that gives employees swift and certain compensation regardless of fault, but also gives employers some certainty and minimizes litigation costs. If claims of recklessness or gross negligence for workplace injuries are permitted in court, that compromise would be disrupted, and the Legislature's intent thwarted.

Plaintiffs attempt to distract the Court from the issue presented with a blatant mischaracterization of the record that is plainly intended only to prejudice the Court against Defendants in the hope that the Court will ignore the law. They do so because, as the district court correctly held, there is no evidence in the record suggesting that Defendants physically and offensively or hostilely attacked Plaintiffs with intent to injure them. Indeed, Plaintiffs do not even *argue* that Defendants did so, which is why they try to reinterpret the worker's compensation law and the Court's own precedent to broaden the exception to the Exclusivity Rule. The Court should decline Plaintiffs' request. The worker's compensation law is clear as to the conduct required before an employee can bring a lawsuit for workplace injuries, and this Court's precedent interpreting the statute is equally clear.

It likely has not escaped the Court's notice that this appeal is the second appeal now pending before the Court brought by Hecla employees injured on the job and seeking to enlarge the exception to the Exclusivity Rule. This does not reflect that Hecla employees are frequently injured, but rather

that two unfortunate events occurred at the mine in 2011 in which miners were injured on the job—a sequence that was unprecedented at the mine before 2011 and has not continued since then either. These appeals together illustrate precisely why the Legislature crafted the compromise it did in the worker's compensation law. If employers and employees have to litigate after each accident as to whether the employer's conduct was faultless, negligent, grossly negligent, reckless, or intentional, there will be no hope of avoiding the litigation costs that the Legislature plainly sought to avoid through the worker's compensation system.

Thus, the Court should affirm the district court's summary judgment for Defendants. The exception to the Exclusivity Rule is clearly defined, and there is no question that Plaintiffs do not and cannot satisfy it.

B. Procedural History

Plaintiffs filed this lawsuit on December 11, 2013. (R. Vol. 1, pp. 18-40) Defendants answered the complaint on May 12, 2014. (R. Vol. 1, pp. 41-52) On May 29, 2015, after discovery, Defendants moved for summary judgment, seeking dismissal of Plaintiffs' claims because the Exclusivity Rule provides that their sole recourse is the worker's compensation system. (R. Vol. 1, pp. 146-168) On June 15, 2015, Plaintiffs cross-moved for partial summary judgment, seeking a ruling that the Exclusivity Rule does not apply to their claims. (R. Vol. 3-4, pp. 728-772)

On August 28, 2015, the district court entered an order granting Defendants' motion for summary judgment and denying Plaintiffs' cross-motion. (R. Vol. 5, pp. 1148-1160) Relying on this Court's decisions in *Kearney v. Denker*, 114 Idaho 755 (1988) and *DeMoss v. City of Coeur d'Alene*, 118 Idaho 176 (1990), the district court rejected Plaintiffs' argument that the exception to the

Exclusivity Rule "does not require a showing of an intent to harm on the part of the employer." (R. Vol. 5, p. 1155) "[I]t is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur." (R. Vol. 5, p. 1154) Applying these principles, the district court held that Plaintiffs' exclusive remedy was the worker's compensation system because "Plaintiffs' facts do not constitute an act of willful physical aggression." (R. Vol. 5, p. 1158) It held further that "Plaintiffs have failed to put forth any evidence that Defendants wanted to cause injury or death to Plaintiffs." (*Id.*)

The court entered judgment for Defendants on September 16, 2015. (R. Vol. 5, p. 1161) Plaintiffs timely filed a notice of appeal on October 5, 2015. (R. Vol. 5, pp. 1163-1167)

C. Statement of Facts

Plaintiffs' opening brief seriously misrepresents the record before the Court. This Section responds in two steps: First, it presents the uncontested facts in the record—facts that are more than a sufficient basis to affirm the district court's judgment. Second, it responds to Plaintiffs' misrepresentation of the record, to ensure that Defendants are not unfairly maligned by Plaintiffs' misleading allegations.

1. The Uncontested Facts

Hecla owns and operates the Lucky Friday Mine, which is one of the deepest underground silver mines in the United States, located in Idaho's Silver Valley. (R. Vol. 1, p. 21 (Compl. ¶ 18)) Although it is called the Lucky Friday *Mine*, Hecla has not mined the Lucky Friday *vein*—that is, the thin vertical ribbon of valuable ore embedded in the rock after which the mine was named—for more than a decade. (R. Vol. 3, p. 618) Rather, for the past ten-plus years, the Lucky Friday Mine has been

the access point for Hecla to mine the Gold Hunter vein, which is located approximately one mile away from the Lucky Friday vein. (R. Vol. 1, p. 170 (Bayer Decl.))[1] Miners descend using the Lucky Friday Mine's two mine shafts, and then travel one mile underground to get to the Gold Hunter vein. (*Id.*)

However, to get to the site of the mining activity at the Gold Hunter vein, miners must travel *through* the Gold Hunter vein to the other side of it and approach the vein from the far side. (R. Vol. 1, p. 170 (Bayer Decl.)) Thus, Hecla had to build a tunnel through the vein, to allow miners and equipment to pass through. The main tunnel through the Gold Hunter vein is at the 5900 level (meaning that it is 5900 feet below ground), and was created in 2005. (R. Vol. 1, p. 230 (Bayer Dep. 15:25-16:9); R. Vol. 1, p. 170 (Bayer Decl.)) In order to provide stability to the tunnel as it passed through the Gold Hunter vein, Hecla left a "pillar" of unmined rock surrounding it—essentially, a doughnut-shaped tube of rock, approximately 100 feet in diameter, that went through the Gold Hunter vein, and had a hole in the center that was large enough that vehicles could pass through as they went from the mine shaft, a mile away, through to the far side of the Gold Hunter vein. (R. Vol. 1, p. 170 (Bayer Decl.)) This was called the 5900 pillar. (*Id.*)

The 5900 pillar was planned and maintained by Hecla with expert help. During the planning of the pillar in 2004, Hecla retained consulting engineers to model the mining that would occur, so as

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[1] Doug Bayer was, in December 2011, the Superintendent of the Lucky Friday Mine. (R. Vol. 1, p. 169 (Bayer Decl.)) Prior to that, he was the mine's Foreman and Chief Engineer. (*Id.*) He has a Bachelor of Science degree in mining engineering and, as of 2011, had 25 years' experience in mining. (*Id.* at 170)

to leave the unmined tube of rock that became the 5900 pillar. (R. Vol. 1, p. 170 (Bayer Decl.)) After the pillar was created (and the tunnel excavated through it), Hecla often consulted with Dr. Wilson Blake to assist in assessing its stability.[2] (*Id.* at 171) In 2010, Hecla also retained Dr. Mark Board to prepare a mathematical model of the 5900 pillar to assess its stability.[3] (*Id.*) Hecla monitored the 5900 pillar with stress gauges since the pillar's creation. (*Id.*)

On November 16, 2011, a rock burst occurred in the 5900 pillar.[4] (R. Vol. 1, p. 30 (Compl. ¶ 61)) No one was injured. (*Id.*) However, the rock burst blocked passage through the pillar. (R. Vol. 2, pp. 473-474) Hecla immediately halted all mining activities in the entire mine. (R. Vol. 1, p. 171 (Bayer Decl.)) It is generally accepted that rehabilitation of a rock burst should be conducted shortly after the rock burst occurs, to minimize the chance of another rock burst occurring during the rehabilitation. (*Id.* at 172-73) Thus, the same day as the incident occurred, Hecla managers and MSHA representatives entered the mine and began working on a Rehabilitation Plan to address the damage at the 5900 pillar and minimize the risk that any future rock burst might present. (*Id.* at 172) Hecla also retained Dr. Blake to assist in the development of the Rehabilitation Plan. (R. Vol. 1, p. 144 (Blake Aff.))

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[2] Dr. Blake has a Ph.D. in mining engineering, and had, as of 2011, 45 years' experience in mining engineering. (R. Vol. 1, p. 143 (Blake Aff.))

[3] Dr. Board has a Ph.D. in geological engineering, and 40 years of experience in underground mines. (R. Vol. 5, p. 997 (Board Decl.))

[4] A rock burst is "a sudden and violent failure of overstressed rock resulting in the instantaneous release of large amounts of accumulated energy." 30 C.F.R. § 57.2.

The Rehabilitation Plan that was the product of Hecla, MSHA, and Dr. Blake's work consisted of two phases. The first phase was to shore up the ceiling and walls of the tunnel using specialized bolts, chain-link mesh, and a two- to three-inch thick layer of "shotcrete," which is concrete applied with compressed air at high velocity. (R. Vol. 1, p. 172 (Bayer Decl.)) The second phase was installing a steel tunnel liner in the tunnel, and then filling the space between the tunnel's walls and the liner with a concrete foam called Tekfoam. (*Id.*)

On November 16, 2011, MSHA approved the Rehabilitation Plan. (R. Vol. 2, p. 475 (MSHA Order)) So did Dr. Blake, who opined that another large rock burst in the area was unlikely and that the Rehabilitation Plan would protect employees from the types of small rock bursts that might still occur. (R. Vol. 3, p. 508 (Blake Report))

Consequently, the Rehabilitation Plan was initiated. Hecla provided "jumbo" drills for the miners installing the specialized bolts, because jumbo drills allow a miner to be farther away from the wall. (R. Vol. 1, p. 229 (Bayer Dep. 13:13-18)) During this first phase of the Plan, Hecla employees noticed some popping and cracking sounds and minor dribbling from the rock walls. (R. Vol. 1, pp. 203-204 (Blake Dep. 79:18-85:9); R. Vol. 4, p. 827 (Williams Aff.)) Such sounds are a normal occurrence at the mine, and do not typically foreshadow an upcoming event. (R. Vol. 1, p. 203 (Blake Dep. 80:11-81:7))[5] Further, the reason the Rehabilitation Plan was being implemented was to address

[5] Dr. Blake testified further that such noises and dribbling are "very typical in deep underground mines," and "a normal consequence of advancing an opening in stressed ground," which is what the miners were doing in the first phase of the Rehabilitation Plan. (R. Vol. 1, p. 203 (Blake Dep. 80:13-14 and 81:2-3)) Dr. Blake testified that such phenomena are not unexpected: "It's when it

risk at the 5900 pillar created by the November rock burst, not because there was no risk. Even so, Defendants did not expect another event to occur so soon after the previous rock burst, and no event did—the employees completed the first phase of the Rehabilitation Plan on December 1, 2011 without incident.

In addition to shoring up the ceiling and walls of the tunnel, the Rehabilitation Plan also included the installation of new stress gauges in the walls of the 5900 pillar, to monitor the stress levels in the rock. (R. Vol. 1, p. 97 (Bayer Mem.)) Hecla monitored the stress level readings twice each day. (R. Vol. 1, p. 236 (Bayer Dep. 38:2-19))[6]

After the completion of the first phase of the Rehabilitation Plan, MSHA permitted Hecla to resume normal mining activity while it waited for the steel tunnel liner to arrive at the mine so that the second phase of the Rehabilitation Plan could begin. (R. Vol. 1, pp. 215-216 (Blake Dep. 129:25-130:2); R. Vol. 2, pp. 479-480 (MSHA Order)) Dr. Blake was also comfortable with the resumption

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stops that and it's kind of storing energy somewhere that this used to give the old miners an indication that it's time to get the hell out." (R. Vol. 1, p. 203 (Blake Dep. 81:4-7))

[6] The original plan called for Hecla to install six new stress gauges. (R. Vol. 1, p. 240 (Bayer Dep. 54:13-16)) Hecla had only three in its possession, which it installed, and then it ordered three more. (*Id.* (55:4-6)) Plaintiffs assert that "Hecla never installed the three remaining gauges" (App. Brief p. 10), but they ignore the evidence *they elicited* that Hecla ultimately realized that if the gauges were installed between the wall and the tunnel liner, they would not be accessible in the future. (R. Vol. 1, p. 241 (Bayer Dep. 59:20-22)) As a result, Hecla changed the plan, and notified MSHA that it would install the three additional gauges just outside the tunnel liner once the liner was installed. (*Id.* (59:17-19)) So, the three final gauges were not installed, but only because the installation of the tunnel liner was not completed. (*Id.* (59:24-60:1) ("So it didn't matter if they were there that day or not. I had to get the tunnel liner in first and then get the gauges in."))

of mining between the two phases. (R. Vol. 1, pp. 215-216 (Blake Dep. 129:25-130:2)) Thus, Hecla resumed normal mining activity on December 6, 2011. (R. Vol. 1, p. 173 (Bayer Decl.))

Once the tunnel liner arrived, Hecla proceeded with the second phase of the Rehabilitation Plan. This work commenced on December 14, 2011. (R. Vol. 1, pp. 253-54 (Bayer Dep. 109:10-110:13)) Because the tunnel liner was to be installed on December 14, all mining activity was stopped at the end of the second shift on December 13. (R. Vol. 1, p. 173 (Bayer Decl.)) Hecla briefed its employees, including Plaintiffs, on the process of installing the tunnel liner, and reviewed safety protocols. (*Id.* at 174) Hecla also provided Plaintiffs (and others) with safety equipment for installing the tunnel liner. (*Id.*)

Doug Bayer, the Superintendent of the Lucky Friday Mine, oversaw and participated in the installation of the tunnel liner on December 14, 2011. (R. Vol. 1, p. 173 (Bayer Decl.)) That morning, he spent approximately six hours at the 5900 pillar. (*Id.*) He inspected the work area and the progress installing the tunnel liner. (*Id.*) He observed no cracks in the shotcrete that had been applied in the first phase of the Rehabilitation Plan or any other changes to the walls or ceiling of the 5900 pillar—or anything that would suggest the pillar was unsafe. (*Id.*)

However, at 7:40 pm on December 14, 2011, a rock burst occurred in the 5900 pillar. (R. Vol. 1, p. 23 (Compl. ¶ 26)) Plaintiffs suffered injuries in the rock burst. (*Id.*) In addition to Plaintiffs, a member of Hecla's management team, Geoff Parker, was in the 5900 pillar and was injured. (Sup. R., p. 7 (Amended Bayer Decl.)) Because Hecla had stopped mining activities nearly 24 hours earlier, it is clear that mining activities did not cause the rock burst. (R. Vol. 5, p. 1003 (Board Decl.) ("The blasting associated with the mining cycle between December 6 and December 13, 2011 was not a

cause of the rockburst of December 14, 2011 which was totally unpredictable."); R. Vol. 1, p. 174 (Bayer Decl.) ("This rockburst was not associated with blasting, as normal mining operations had ceased the day before."); *South v. Baker*, 62 A.3d 1, 10 (Del. Ch. 2012) ("'No mine blasting had taken place anywhere in the mine for the previous 24 hours; therefore, the rock burst [was] unrelated to mining activities.'" (quoting the plaintiff's complaint))[7] Even if the mining had occurred closer in time to the rock burst, it was so far away from the 5900 pillar that it would not have had any impact on the pillar. (R. Vol. 1, p. 145 (Blake Aff. ¶¶ 15-16))

None of the evidence set out above is contested by Plaintiffs with admissible evidence.

2. Plaintiffs' Mischaracterization And Misuse Of The Record

In a cynical attempt to distract the Court from the issue actually presented by their appeal, Plaintiffs' brief includes a lengthy recitation of "evidence" that misrepresents and distorts the record. Although not relevant to the resolution of this appeal, Defendants are compelled to respond.

First, Plaintiffs assert that "[t]he Lucky Friday Mine was particularly susceptible to rock bursts given its high quartzite rock properties," citing the deposition testimony of Hecla's consultant, Dr. Blake. (App. Brief p. 2) But Plaintiffs are well aware that the mining at issue here was of the *Gold Hunter* vein, not the Lucky Friday vein, which is located one mile away. (*See supra* at 5) As Dr. Blake testified *at the very pages Plaintiffs cite*, "the Gold Hunter is much more—less burst—much less burst prone than the actual Lucky Friday Mine." (R. Vol. 1, p. 191 (Blake Dep. 30:9-11)) Thus,

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[7] Plaintiffs *argue* that the rock burst was caused by mining activities (App. Brief pp. 12-13), but the only evidence they cite in support of this assertion is R. 488, which says nothing of the sort. (App. Brief p. 13)

the properties of the Lucky Friday vein are irrelevant: The Gold Hunter vein—that is, the vein being mined and the vein that the 5900 pillar went through—does not share those properties. (*Id.*)

Second, Plaintiffs assert that Dr. Blake "warned" about "the danger of leaving a drift pillar at the 5900 level." (App. Brief p. 3) But Plaintiffs omit that Dr. Blake's concern was "the long-term stability of the pillar not the short-term stability." (R. Vol. 1, p. 198 (Blake Dep. 61:6-7)) Thus, as Dr. Blake explained, "I did not expect the 5900 I-Drift pillar to fail as soon as 2011." (R. Vol. 1, p. 144 (Blake Aff. ¶ 8)) Thus, Plaintiffs represent Dr. Blake's concern as relevant to 2011, whereas Dr. Blake clearly explained that it was not.

Third, Plaintiffs devote pages to contending that Defendants ignored signs that a failure of the 5900 pillar was imminent. (App. Brief pp. 2-9) Defendants disagree that they ignored any warning signs of imminent pillar failure. But the disagreement is irrelevant, because the 5900 pillar *did not fail*. Rather, it is uncontested that the 5900 pillar experienced *a rock burst* on December 14, 2011. (R. Vol. 1, p. 32 (Compl. ¶ 74) (alleging that a rock burst occurred)) A pillar failure is different than a rock burst, as Dr. Board, a Ph.D. in geological engineering, swore under oath. (R. Vol. 5, p. 999 (Board Decl.) ("There is a distinction between a pillar failure and a rockburst."))

This is not a technical distinction: Whereas pillar failures can sometimes be predicted in advance, "[a] rockburst is an unpredictable event of rock failure associated with either movement on pre-existing discontinuities within the rock mass or from localized failure of brittle, intact, rock." (R. Vol. 5, p. 999 (Board Decl.)) Thus, the stress gauges that feature prominently in Plaintiffs' brief are irrelevant to the rock burst that actually caused Plaintiffs' injuries, because gauges "cannot be used to

predict rockbursts." (*Id.* at 999-1000)[8] "Although scientists have for many decades attempted to use various monitoring devices to predict seismic events, the science has not advanced to the point that prediction of seismic events such as rockbursts (or earthquakes) is possible." (*Id.* at 1000) No witness or evidence contradicts Dr. Board's sworn explanation that rock bursts are not predictable.

Further, the record does not even support that there were signs of an imminent pillar failure—which stands to reason because there never was a pillar failure. For instance, Plaintiffs argue that Defendants knew or should have known that the 5900 pillar was unstable because "identifiable stress measurements showing substantial increases in stress in the pillar" were recorded "during every shift of every day that the rehabilitation continued." (App. Brief pp. 18-19) But Plaintiffs omit that Hecla's two Ph.D. consultants have sworn under oath that the stress readings *did not* indicate imminent danger. Specifically, Dr. Blake testified that, although the stress levels were increasing, "the rate of increase [wa]s decreasing." (R. Vol. 1, p. 217 (Blake Dep. 135:23-24)) The conclusion he drew is that "[i]t's increasing, but it's -- it's not a dramatic increase as we often see prior to something happening." (*Id.* at 217-18 (135:25-136:2)) Similarly, Dr. Board reviewed the stress measurements and concluded that "the readings that were taken do not show an increase in stress that would be predictive of the failure of the 5900 drift pillar and certainly are not predictive of the rockburst of December 14, 2011." (R. Vol. 5, p. 1000 (Board Decl.)) Plaintiffs put the stress measurements before the Court, hoping the

[8] To be clear, the stress gauges did not show signs of a coming pillar failure either. Dr. Board offered a sworn statement that, contrary to Plaintiffs' contention, the readings from the stress gauges in the 5900 pillar "do not show an increase in stress that would be predictive of the failure of the 5900 drift pillar." (R. Vol. 5, p. 1000 (Board Decl.))

Court will draw its own conclusions as to what an increase in stress levels means.[9] They conspicuously avoid explaining to the Court what experts in these technical details have testified that the increase means.

Plaintiffs also assert that Defendants knew or should have known that the 5900 pillar was unstable because Dr. Blake wrote on November 25, 2011 that the stress on the pillar was "very near the unconfined compressive strength of the pillar." (App. Brief p. 5, citing R. Vol. 3, p. 506) But again Plaintiffs omit key evidence putting into context the isolated snippet they pull out of the record. As an initial matter, Plaintiffs' discussion of the unconfined strength of the pillar is misleading, *because the pillar was confined.* (R. Vol. 5, pp. 1000-1001 (Board Decl.)) Rock that is surrounded by other rock can bear more load, and the pillar was surrounded by other rock. Thus, the conclusion that Dr. Blake drew from his statement about unconfined compressive strength was not that the pillar was in imminent danger of collapse, but that "any further loss *of confinement* could lead to pillar failure." (R. Vol. 3, p. 506 (emphasis added)) In other words, the issue he identified of unconfined strength was not a current risk, given the pillar's confined state, but *could* become a problem *if* confinement was lost. (Obviously, given that the pillar did not fail, this potential problem did not become an actual problem.) Regardless, however one interprets Dr. Blake's statement about

[9] Although Plaintiffs note that the stress readings showed "an increase in 1000 psi in just two weeks (App. Brief pp. 9, 32), they neglect to explain the baseline stress levels on the pillar, so that the Court has context to understand the seemingly large increase. With good reason: When put in context, 1,000 psi is not a large increase. Rather, the record indicates that the baseline stress levels on the pillar were "about 12 to 16,000 psi and about 9 - 11,000 psi." (R. Vol. 5, p. 1028) Thus, a 1,000 increase in psi represents only a 6% to 11% increase.

unconfined strength, Dr. Blake *approved* the Rehabilitation Plan. (*See supra* at 7) Plainly, he was not intending to convey an imminent pillar failure.

Fourth, Plaintiffs represent that the record establishes that Defendants "falsely told MSHA that the stress monitoring information would be reviewed daily by mine personnel and Hecla's rock mechanics consultant." (App. Brief p. 8) But the only evidence in the record suggests that Defendants did review the data as intended. Plaintiffs cite the testimony of Mine Superintendent Doug Bayer in support of their assertion, but the testimony they cite says only that Bayer did indeed tell MSHA that the stress gauge readings would be reviewed daily by mine personnel and the consultant. (*Id.*, citing R. Vol. 1, p. 258 (Bayer Dep. 127:21-24)) And, critically, immediately following the testimony to which Plaintiffs cite, Bayer testified that he followed through on that statement:

> Q. Did you read the stress data on a daily basis?
>
> A. I'm not sure I understand the question. It was downloaded daily, and I saw the updates daily, if that's ...
>
> Q. Okay. So you saw updates indicating the stress levels as determined by the monitoring gauges?
>
> A. Yes.
>
> Q. And you did that daily?
>
> A. Yes.

(R. Vol. 1, p. 258 (Bayer Dep. 128:6-15))[10] And as to the consultant, Plaintiffs concede that he received "four to five days of monitoring gauge readings." (App. Brief p. 9) Given that the daily

[10] Plaintiffs emphasize that Bayer testified that he is not a specialist in rock mechanics. (App. Brief pp. 4, 33-34) Plaintiffs omit that Bayer also testified that, although he is not a specialist, he has substantial experience with rock mechanics. (R. Vol. 1, p. 230 (Bayer Dep. 14:14-18) ("[A]t

readings were supposed to continue for only a week (R. Vol. 2, p. 384), Hecla did do substantially what it said it would. And, regardless, Hecla's statement to MSHA was not backward looking (that is, not telling MSHA what it had already done), but forward looking (telling MSHA what it *would* do). Plaintiffs offer no evidence that Hecla did not intend to provide a full week of data to the consultant at the time it told MSHA it would do so. Consequently, Plaintiffs cite to no evidence that Defendants lied to MSHA. They simply assert the record contains evidence that it does not.

Relatedly, Plaintiffs also argue that "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." (App. Brief p. 8) Yet Plaintiffs submit no evidence suggesting that these statements were not honest beliefs at the time they were made. Indeed, Dr. Blake's report to MSHA indicated that "the amount of stored strain energy now in the pillar has also been significantly reduced" (R. Vol. 2, p. 303), and that "the occurrence of another large burst in this pillar is unlikely." (*Id.* at 304) Further, Hecla provided the stress measurements themselves to MSHA, so that MSHA could draw its own conclusions. (R. Vol. 1, p. 252 (Bayer Dep. 104:3-5))

Lucky Friday my first job as a -- my title was a senior mine engineer. And one of my responsibilities was doing some of the rock mechanics. So I have a fair amount of experience at the mine with rock mechanics."); R. Vol. 1, p. 170 (Bayer Decl.) ("I also worked with the Bureau of Mines on studies they were doing in rock mechanics.")) Additionally, Bayer has a college degree in mining engineering, and formerly served as the mine's Chief Engineer and Foreman. (R. Vol. 1, pp. 169-70 (Bayer Decl.)) The allegation that Bayer is not qualified to offer his own views on risks in the mine is nonsense.

More importantly for purposes of this appeal, Dr. Blake's statement regarding stress did not deter his opinion that the Rehabilitation Plan should proceed. Although his report opined that "we cannot yet assume that the remaining pillar is *completely* destressed," the words immediately following it concluded: "Therefore during rehabilitation work we need to proceed with caution." (R. Vol. 2, p. 310 (Blake Rept.) (emphasis added)) Thus, although Dr. Blake recognized that some stress may still have been in the pillar, he believed the Rehabilitation Plan should proceed. Indeed, the fact that some stress remained in the pillar *was a key reason for* the Rehabilitation Plan, because small rock bursts might still be expected, as Dr. Blake explained in another of his reports. (R. Vol. 3, p. 507)

Fifth, Plaintiffs assert the record establishes that one of the three stress gauges Hecla installed in the 5900 pillar "was defective." (App. Brief p. 9) Plaintiffs represent that Doug Bayer's testimony supports this assertion, but it says nothing of the sort. (*Id.*, citing R. Vol. 1, p. 240 (Bayer Dep. 55:20-56:7)) Plaintiffs also cite the testimony of Dr. Blake, but Blake testified that "I believe it's reading accurately, but I believe that the rock immediately above that gauge was not carrying stress." (R. Vol. 1, p. 217 (Blake Dep. 135:6-8)) Thus, the uniform evidence establishes that Defendants thought (and continue to think) that the third stress gauge was providing accurate readings of the rock at the point where it was inserted. To be clear, the stress levels at that single point were not representative of the wall in general. But Defendants knew that, which is why they installed and monitored multiple gauges, and why they discounted the readings from the third gauge. (R. Vol. 1, p. 217 (Blake Dep. 135:4) ("I discounted the gauge.")) This is not evidence of malfeasance; it is evidence that Defendants were being careful, with multiple redundancies and a sophisticated understanding of the technology and the mine.

Sixth, Plaintiffs contend that Dr. Blake prepared a report indicating that the 5900 pillar was "borderline stable," but removed that sentence from the final report at Hecla's request. (App. Brief pp. 7-8) This is based on two versions of Dr. Blake's report, one that Plaintiffs characterize as a draft and one that they characterize as the final. (R. Vol. 2, pp. 301-304; R. Vol. 3, pp. 505-508) Plaintiffs assert that the draft report contains the sentence "This pillar is borderline stable based on mining history at Lucky Friday/Gold Hunter" (R. Vol. 3, p. 506), but that it was removed from the final version. There is only one problem: The report that Plaintiffs assert is the final report clearly is not: It still contains editorial questions to the author. (R. Vol. 2, p. 304 ("will you recommend or say this is approach [that] would be the recommended long term option?")) On the other hand, the report that Plaintiffs characterize as the draft reacts to the editorial question, which means it must have been later in time, not earlier, as Plaintiffs posit. (R. Vol. 3, p. 508 ("I recommend that a backfilled tunnel access through this pillar be constructed as a longterm solution.")) And that later-in-time version has the "borderline" sentence. Thus, Plaintiffs have the order of the drafts wrong; the sentence they argue was removed was actually added.[11]

But, regardless, both versions of the report *support* the Rehabilitation Plan. Both opine that the Rehabilitation Plan would address the risk present in the 5900 pillar. Specifically, both reports say:

> The ground support installed during the rehabilitation of the 5900 pillar will contain the damage from any further small bursts that might be induced by continuing closure. Installing some type of tunnel sets through this pillar, and isolating them

[11] To be clear, in responding to Plaintiffs' suggestive, leading questions at his deposition, Dr. Blake appeared to make the same mistake as Plaintiffs. (R. Vol. 1, p. 214 (Blake Dep. 123:4-9))

> from the pillar by something like TechFoam, will insure the long term stability of the access through this pillar.

(R. Vol. 2, p. 304; R. Vol. 3, p. 508) Thus, while Plaintiffs imply that the "borderline" stability of the 5900 pillar was a reason Defendants should not have moved forward with the Rehabilitation Plan, the very document they rely on contradicts them.

Seventh, Plaintiffs contend that MSHA never approved the resumption of full mining activities between the first and second phases of the Rehabilitation Plan, and that Hecla never told MSHA that it planned to resume full mining activities. (App. Brief p. 12) Plaintiffs' story has no support in the record, and is directly contradicted by it. First, Plaintiffs assert that MSHA "only approved 'very limited activity.'" (*Id.*) But the MSHA order that Plaintiffs cite for this statement is *the wrong order*. (R. Vol. 2, p. 477) That order, dated November 30, 2011, gave Hecla permission to install stress gauges in the 5900 pillar. (*Id.*) But, on December 6, 2011, MSHA issued another order that gave permission for "normal mining activities." (R. Vol. 2, p. 480 (MSHA Order)) Second, Plaintiffs assert that "MSHA was never informed of the full nature of the mining activities during this time." (App. Brief p. 12) No evidence supports this assertion either. Rather, Doug Bayer testified that he told MSHA that Hecla requested to "resume mining operations and production." (R. Vol. 1, p. 253 (Bayer Dep. 108:24-25)) No record evidence contradicts him, and in fact Bayer's statement is consistent with MSHA's December 6 approval order.

* * *

A fundamental problem with Plaintiffs' presentation is that they pretend as though Defendants said, and Plaintiffs believed, that the 5900 pillar was a risk-free area. That proposition is ludicrous.

The very reason Plaintiffs were assigned to the install the steel tunnel liner in the 5900 pillar is that Hecla was attempting *to address* a risk. To do so, the uncontested evidence demonstrates, Defendants developed the Rehabilitation Plan, in conjunction with a Ph.D. consultant and MSHA. And, in fact, the Rehabilitation Plan was successful in preventing the risk of a pillar failure. Further, if the Rehabilitation Plan had been completed before the next rock burst occurred—which the uncontested evidence indicates Defendants believed it would be—then it would have prevented the accident that injured Plaintiffs on December 14 as well. In short, Defendants identified and attempted to address a known risk. They did so competently and with a well-developed plan: (1) they retained professional assistance and also received input and approval from the government; (2) they installed multiple new stress gauges; (3) they trained the miners executing the plan; (4) they equipped those miners with safety equipment; and (5) they assigned members of management to oversee and assist with the rehabilitation work—including on the very day the rock burst at issue occurred. During the rehabilitation process, a risk that cannot be predicted occurred, injuring Plaintiffs. That is precisely the type of event for which the worker's compensation system was created.

II. 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." *Estate of Becker v. Callahan*, 140 Idaho 522, 525 (2004). In the trial court, "[s]ummary judgment is appropriate if the pleadings, depositions, and admissions 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." *Id.* "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which [the] Court exercises free review." *Id.*

III. ARGUMENT

The district court correctly held that Plaintiffs' claims are barred by the Exclusivity Rule of the worker's compensation law. The Exclusivity Rule provides that "the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representatives or assigns." Idaho Code § 72-209(1). Thus, for nearly all claims of injuries at work, an employee cannot bring suit, but has recourse only to the worker's compensation system. The statute contains a narrow exception: If the injury was caused by the "wilful or unprovoked physical aggression" of the employer or its agents, then the worker's compensation law is not the exclusive recourse for the employee, and he or she can bring both a worker's compensation claim and a lawsuit. Idaho Code § 72-209(3). The district court correctly held that a physical attack with an intention to injure is required in order to satisfy the exception to the Exclusivity Rule, and correctly held further that Plaintiffs had not submitted any evidence suggesting Defendants committed a physical attack with any such intent.

A. Plaintiffs Must Show They Were Injured By A Wilful, Physical Attack In Order To Satisfy The Exception To The Exclusivity Rule.

1. This Court's Decisions In *Kearney* And *DeMoss* Set Forth The Governing Standard For The Exception To The Exclusivity Rule.

This Court has twice addressed the scope of the exception to the Exclusivity Rule. In each decision, the Court held that "wilful or unprovoked physical aggression" means a physical attack intended to injure. First, in *Kearney v. Denker*, 114 Idaho 755 (1988), the Court reviewed a case

brought by an employee who was injured while working as a landscaper when her right foot was partially severed by the lawn mower she was operating. *Id.* at 756. She sued in court, arguing that her claim was for "wilful or unprovoked physical aggression," and so fell within the exception to the Exclusivity Rule. *Id.* at 756-57. Specifically, the employee argued that her employer did not install "a safety device and a grip that would shut off the engine when the operator's hands came off the handlebars," which "were included in the parts shipped with the chassis," and also that the employer "did not install a grass deflector that was shipped with the chassis," which "would have covered an opening at the rear of the lawn mower that exposed the rotary blade and the cutting area." *Id.* The employee claimed that the employer was "willfully, wantonly and grossly negligent, which negligence was so extreme as to be substantially certain to injure someone." *Id.*

This Court held that the employee's exclusive recourse was the worker's compensation law. It explained that "[t]he word 'aggression'" in the statute "connotes 'an offensive action' such as an 'overt hostile attack.'" *Kearney*, 114 Idaho at 757. Thus, to invoke the exception, an employee must have "evidence of some offensive action or hostile attack." *Id.* The Court held further that "[i]t is not sufficient to prove that the alleged aggressor committed negligent acts," *even if* those acts "made it *substantially certain* that injury would occur." *Id.* (emphasis added). Applying this principle, the Court explained that "[t]here was no evidence presented to the trial court in this case that the employer wilfully or without provocation physically and offensively or hostilely attacked the employee." *Id.* Consequently, "the trial court was justified in granting summary judgment against the employee." *Id.* at 758. Eliminating any uncertainty, the Court summed up, explaining that the exception to the

Exclusivity Rule "require[s] an intention to injure the employee." *Id.* It affirmed summary judgment for the defendants. *Id.*

The Court took up the exception to the Exclusivity Rule again in *DeMoss v. City of Coeur d'Alene*, 118 Idaho 176 (1990). There, four employees sued their employer, which had ordered them to cut up a boiler so that it could be removed from a community center. *Id.* at 176-77. One of the employees had told the foreman assigned to the project that he suspected the boiler contained asbestos insulation. *Id.* at 177. No effort was taken by the foreman to investigate that suspicion. *Id.* Instead, the foreman forged ahead and ordered the employees to remove the insulation material from the boiler. *Id.* He told the employees that "nobody knew for sure what the material was and that there was a minimal risk." *Id.* Later, the employer tested the insulation, and found that it did contain asbestos. *Id.* Even so, a supervisor aware of the test results told the foreman that the material "was harmless, and that no hazard would be presented by its removal."[12] *Id.* The foreman again ordered the employees to work with the insulation. *Id.* Only later did the employees find out they had been working with dangerous asbestos. *Id.* In their lawsuit, they argued that the defendants "knew the material they required the appellants to remove was asbestos; that the defendants 'lied' to the appellants by not telling them it was asbestos; and that the defendants failed to provide adequate

[12] Plaintiffs' description of *DeMoss* conveniently ignores this lie by the employer, which is significant given Plaintiffs' accusations that Defendants lied to them and to MSHA. (App. Brief pp. 21-22) Here, Defendants deny Plaintiffs' allegations (and submit that the record supports them), but the point is that, even if Plaintiffs are correct, their claim would still be foreclosed by *DeMoss*, which found such lies insufficient.

protective gear to the appellants, all of which was tantamount to an 'offensive action or hostile attack.'" *Id.* at 178.

This Court disagreed. It explained that "the plaintiffs all acknowledged that they had no reason to believe any of the defendants harbored ill feelings toward them or wanted to cause them injury in any manner." *DeMoss*, 118 Idaho at 179. Further, although an employee had indicated that the insulation *might* contain asbestos, "[t]he record does not show that [the foreman] or any of the defendants actually knew that it was asbestos until the test results from the laboratory were received." *Id.* Finally, the Court explained, although the employer still sent the employees to work with the asbestos after it received the test results, it did give them some protective clothing. And, "while the protective clothing provided to the workers prior to the second round of removal may indeed have been inadequate, that does not rise to the level of 'unprovoked physical aggression.'" *Id.* Consequently, citing *Kearney*, the Court held that "[t]he plaintiffs have not proved any 'wilful or unprovoked physical aggression' as required in I.C. § 72-209(3), and thus the plaintiffs' state tort claims were preempted by the Worker's Compensation Act." *Id.* And the Court further held: "To reiterate what we said in *Kearney v. Denker*, 'It is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur.'" *Id.* It affirmed summary judgment for the defendants. *Id.*

Thus, this Court has been clear, and the question has been settled for more than 25 years, that a physical attack with intent to injure is required before an employee may bring a lawsuit for a workplace injury.

2. Idaho's Rule Is In Accord With The Majority Of Other States.

The requirement of intent to injure is the rule not just in Idaho, but widely throughout the country, adopted by both courts and legislatures. Indeed, one leading treatise explains that it is "the almost *unanimous* rule" that "misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury" does not satisfy the exception to the Exclusivity Rule. 9 *Larson's Workers' Compensation Law* § 103.03.[13] The treatise further explains:

> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, fostering a culture of alcohol use at off-premises, after-hours company events, wilfully violating a safety statute, failing to protect employees from crime, refusing to respond to an employee's medical needs and restrictions, or withholding information about worksite hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of accidental character.

Id. (internal footnotes omitted). In short, to satisfy the exception to the Exclusivity Rule, there must be a "deliberate infliction of harm comparable to an intentional left jab to the chin." *Id.*

For instance, in *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315 (Alaska 1989), the Alaska Supreme Court reviewed a lawsuit against an employer brought by the families of commercial airline

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[13] *Larson's* has been cited repeatedly by this Court as authoritative on worker's compensation issues. *See, e.g., Kelly v. Blue Ribbon Linen Supply, Inc.*, 159 Idaho 324, 338 (2015); *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 293 (2014); *Wernecke v. St. Maries Joint Sch. Dist. #401*, 147 Idaho 277, 285-86 (2009). *Larson's* has also been held out as authoritative by other state supreme courts. *See, e.g., Helf v. Chevron U.S.A., Inc.*, 361 P.3d 63, 82 (Utah 2015) (describing *Larson's* as a "leading commentator"); *State Farm Mutual Auto. Ins. v. Wilson*, 199 P.3d 581, 590 (Alaska 2008) (referring to *Larson's* as "a leading text"); *Kawakami v. City and County of Honolulu*, 59 P.3d 920, 924 (Haw. 2002) (referring to *Larson's* as "the leading treatise on worker's compensation"); *Brittingham v. St. Michael's Rectory*, 788 A.2d 519, 523 (Del. 2002) (referring to *Larson's* as "the leading authoritative treatise on the subject").

pilots who were killed when their plane crashed. The plaintiffs alleged that the employer required the pilots to fly even though, "[b]y completing this mission, [the pilots] would necessarily violate the Federal Aviation Administration's (FAA) flight time and duty regulations." *Id.* at 316. Further, other pilots reported the employer's "disapproval of pilots' refusals to fly because they were fatigued." *Id.* at 317. The plaintiffs argued they had alleged "an intentional tort of dispatching [the deceased pilots] for a night flight ... without adequate rest or sleep." *Id.*

The court held that the allegations were insufficient to satisfy the exception to the Exclusivity Rule. It explained that "the facts alleged fail to make out an intentional tort. At best, the complaint alleges gross negligence or wilful and knowing violation of FAA regulations." *Van Biene*, 779 P.2d at 318. The court explained further that "[t]he vast majority of courts have held that such allegations do not constitute an intentional act allowing suit outside of the worker's compensation act." *Id.*

In *Moore v. Environmental Construction Corp.*, 147 S.W.3d 13 (Ky. 2004), the Kentucky Supreme Court heard an appeal of a claim by the family of an employee who was killed when a trench he was digging collapsed. After the collapse, the Occupational Health & Safety Administration investigated, and "issued four serious citations" against the employer, including for "failing to provide a ladder to escape the trench; for failure to have a competent person conduct daily inspection of trench; and for not taking adequate safety precautions for a trench over five feet deep." *Id.* at 16 & n.4. The case was tried to a jury, which determined that the employer had caused the employee's death through "deliberate intention." *Id.* at 14.

Despite the jury's verdict, the court held that the evidence did not satisfy the exception to the Exclusivity Rule. The court explained that, to satisfy the exception, "the employer must have

determined to injure an employee and used some means appropriate to that end, and there must be specific intent." *Moore*, 147 S.W.3d at 16. "The defendant who acts in the belief or consciousness that the act is causing appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong." *Id.* at 16-17. As a result, the court held that the employer's "violation of OSHA regulations and acknowledgment of the possible consequences does not amount to a deliberate intention to produce [the employee's] death." *Id.* at 18-19.

Similarly, in *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157 (Del. 2000), the Delaware Supreme Court reviewed a lawsuit brought by the family of an employee of a painting company who had fallen off a bridge he was painting and died. The plaintiff alleged "numerous acts of negligence, in violation of Occupational Safety Health Administration ('OHSA') safety regulations, includ[ing] the failure to provide a training program for employees concerning personal fall arrest systems, failure to provide a safe working environment, and a failure to meet necessary safety requirements in the operation of equipment." *Id.* at 160.

The court held that the allegations were insufficient to satisfy the exception to the Exclusivity Rule. It first explained that "there is a split of authority as to how to judge an employer's conduct and two rules have emerged: the intentional tort doctrine followed by the majority of states and the substantial certainty doctrine that is followed by only a few states."[14] *Rafferty*, 760 A.2d at 159-60.

[14] The substantial certainty rule was endorsed by Justice Huntley, who concurred in *Kearney*. *See Kearney*, 114 Idaho at 758 (Huntley, J., concurring). That position was rejected by the majority.

The intentional tort doctrine—which is what Idaho's legislature adopted, as *Kearney* explained—requires "a deliberate intent to bring about injury." *Id.* at 160. The substantial certainty doctrine requires only "that the alleged conduct or condition permitted by the employer caused a situation where the employee would definitely be harmed." *Id.* The plaintiff in *Rafferty* argued that the court should expand the exception to the Exclusivity Rule by adopting the substantial certainty doctrine, but the court held that "we cannot rewrite the statute to apply the substantial certainty doctrine in Delaware." *Id.* And, regardless, the court held, it would not matter, for the plaintiff's allegations were insufficient "[e]ven if Delaware followed the substantial certainty rule." *Id.*

Finally, in *Griffin v. George's, Inc.*, 589 S.W.2d 24 (Ark. 1979), the Arkansas Supreme Court heard a case brought by an employee of a grain warehouse who had been injured when he was pulled into an unguarded grain auger. *Id.* at 25-26. The employee alleged that the auger had "no grate or any other protective guard" to prevent people from falling into it; that the employer had removed a grate that had been there originally; and that there was usually grain lying on the ground around the auger, such that people coming near it could easily slip and fall into it. *Id.* The employee alleged that the employer's actions were "in direct violation of federal and state statutes and regulations," and that the employer "could have easily been corrected by installation of a protective covering over the opening." *Id.* Finally, the plaintiff alleged that "the employer was aware that this condition was hazardous and dangerous to its employees and recognized the substantial certainty that it would result

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Id. at 757 ("It is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur.").

in injury to an employee," but that, despite this knowledge, it "gave [the employee] a dangerous work assignment which placed him in direct danger of injury by the auger." *Id.*

The court held that the plaintiff's claim did not satisfy the exception to the Exclusivity Rule. The exception, the court explained, applies only to "acts committed with an actual, specific and deliberate intent on the part of the employer to injure the employee." *Griffin*, 589 S.W.2d at 27. Thus, to satisfy the exception, "the complaint must be based upon allegations of an intentional or deliberate act by the employer with a desire to bring about the consequences of the act, and not upon allegations of wilful and wanton conduct by negligent direction to the employee to use a device known by the employer to be defective or failure to warn the employee of an unsafe condition of which the employer was aware." *Id.*[15]

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[15] The four decisions discussed above are representative of a large body of law from other states that is in full accord with this Court's decisions in *Kearney* and *DeMoss*. *Accord* Ariz. Rev. Stat. § 23-1022 (exclusivity rule applies unless the employee was subject to "an act done knowingly and purposely with the direct object of injuring another."); *Torres v. Parkhouse Tire Service, Inc.*, 30 P.3d 57, 60 (Cal. 2001) (holding that "intended injurious conduct" is required to satisfy the exception to the exclusivity rule); *Schwindt v. Hershey Foods Corp.*, 81 P.3d 1144, 1147 (Colo. Ct. App. 2003) ("We agree with the analysis in the Larson's treatise and decline to adopt the 'substantial certainty' approach taken by a minority of the courts."); *Copass v. Illinois Power Co.*, 569 N.E.2d 1211, 1215 (Ill. Ct. App. 1991) ("we hold that plaintiff is required to allege defendants had the specific intent to injure."); *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1275 (Ind. 1994) ("nothing short of deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice"); *Johnson v. Mountaire Farms*, 503 A.2d 708, 711-12 (Md. Ct. App. 1986) (to satisfy the exception to the Exclusivity Rule requires "an intentional or deliberate act by the employer with a desire to bring about the consequences of the act"); Mich. Comp. Laws § 418.131 (exception to the exclusivity rule satisfied only when "the employer specifically intended an injury"); *Gunderson v. Harrington*, 632 N.W.2d 695, 703 (Minn. 2001) (the employee must identify evidence the employer "consciously and deliberately intended to injure" in order to satisfy the exception to the Exclusivity Rule); *Bowden v. Young*, 120 So.3d 971, 982 (Miss. 2013) ("the plaintiff must show actual intent to injure the employee"); *Light v. J.C. Indus.*, 926 S.W.2d 25, 27 (Mo. Ct. App. 1996) (worker's compensation is the exclusive remedy

Thus, Defendants' position is supported not only by *Kearney* and *DeMoss*, but also by the broad majority of states across the country.

3. The Court Should Reject Plaintiffs' Reinterpretation Of The Statute.

Plaintiffs argue: "The term 'willful physical aggression' does not require a showing of an intent to injure the employee." (App. Brief p. 14) Plaintiffs do not so much as acknowledge, let alone attempt to explain, the transparent inconsistency between their position and this Court's direct statement to the contrary in *Kearney* that "§ 72-209(3) require[s] an intention to injure the employee." *Kearney*, 114 Idaho at 758. Instead, Plaintiffs engage in flawed legal analysis that stretches to reach their desired result.

a. Plaintiffs' "Legislative History" Is Inaccurate.

Plaintiffs first argue that the legislative history of the worker's compensation law establishes that the term "wilful" does not require intent to injure. (App. Brief pp. 15-16) Plaintiffs' sole support

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"so long as the employer does not intentionally injure the employee"); *Harris v. State*, 294 P.3d 382, 386 (Mont. 2013) (an employee must show "an intentional and deliberate act specifically and actually intended to cause injury"); *Conway v. Circus Casinos, Inc.*, 8 P.3d 837, 840 (Nev. 2000) (requiring that the employer "deliberately and specifically intended to injure them"); *Pereira v. St. Joseph's Cemetery*, 54 A.D.3d 835, 836-37 (N.Y. App. Div. 2008) ("the conduct must be engaged in with the desire to bring about the consequences of the act; a mere knowledge and appreciation of a risk is not the same as the intent to cause injury"); N.D. Cent. Code § 65-01-01.1 (employer's action must be taken "with the conscious purpose of inflicting the injury"); *Kaminski v. Metal & Wire Prods.*, 927 N.E.2d 1066, 1079 (Ohio 2010) ("the only way an employee can recover is if the employer acted with intent to cause injury"); *Peay v. U.S. Silica Co.*, 437 S.E.2d 64 (S.C. 1993) (enforcing intentional tort doctrine, and refusing to adopt substantial certainty doctrine); *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239, 243 (Tenn. 2003) (requiring "actual intent to injure"); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 109 P.3d 805, 810 (Wash. 2005) ("Even failure to observe safety laws or procedures does not constitute specific intent to injure, nor does an act that had only substantial certainty of producing injury.").

for this argument is one excerpted page from an undated typed manuscript by E.B. Smith, who served as an advisor to a committee leading up to the 1972 amendment to the worker's compensation law that added the exception to the Exclusivity Rule. (*Id.*) This is not valid legislative history. Mr. Smith was not even a legislator. While he may have had a role advising some legislators before the bill became law, he did not vote on its passage, so his view of what it means is not relevant. Indeed, this Court has discounted even the individual views of people who *were* in the Legislature at the time of enactment because they represent the view of only one legislator. *See, e.g., Gillihan v. Gump*, 140 Idaho 264, 268 (2004) ("[T]the accepted rule in most jurisdictions is that the beliefs of one legislator do not establish that the legislature intended something other than its express declaration."). Here, Mr. Smith represents the view of no legislator, and so is all the more inconsequential.

Equally importantly, Mr. Smith's statement does not support Plaintiffs' view that the exception to the Exclusivity Rule does not require intent to injure. Mr. Smith wrote: "Mere 'intention' *is not enough*, inasmuch as 'wilful' connotes deliberation or calculated, determined and stubborn persistence." (R. Vol. 3, p. 531 (emphasis added)) Thus, Mr. Smith did not argue that "wilful" means a standard lower than intent; he argued that "mere" intent was "not enough"—that *even more* was required for an act to be willful. Thus, the supposed legislative history submitted by Plaintiffs supports Defendants' position, not Plaintiffs'.

Plaintiffs also argue that the fact that the Legislature has amended various parts of the worker's compensation law since adding the exception to the Exclusivity Rule in 1972 supports their argument that the Legislature agrees with Plaintiffs' interpretation of the statute. (App. Brief p. 17) To the contrary, this Court issued *Kearney* in 1988, and stated clearly at that time that the statute "require[s]

an intention to injure the employee." *Kearney*, 114 Idaho at 758. Thus, Plaintiffs' argument proves *Defendants'* point: This Court's interpretation of the statute has been absolutely clear for more than 25 years, and the Legislature has not changed it, despite opportunities to do so. Therefore, it is fair to presume that this Court got it right in *Kearney*, and accurately understood the Legislature's intent. *See, e.g., Pfau v. Comair Holdings, Inc.*, 135 Idaho 152, 156 (2000) ("We must presume the legislature, by leaving the definition of damages unchanged, intended damages to be interpreted in accordance with our precedent."); *Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.").

b. Plaintiffs' Precedent Is Off-Point.

Next—still before they so much as mention this Court's binding decisions in *Kearney* and *DeMoss*—Plaintiffs argue that the word "wilful" in the statutory phrase "wilful or unprovoked physical aggression" was intended to mean "something more than negligence, but less than intent to harm." (App. Brief p. 16) Plaintiffs support this conclusion by citing decisions explaining that the phrase "willful and wanton" includes recklessness. (*Id.* at 17-18) But the phrase "willful and wanton" does not appear in the worker's compensation law; rather, the term "wilful" does, by itself. As this Court has previously explained when the Legislature used the *same* term in different places, if the Legislature intended different meanings, it would have used different terms. *See, e.g., Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 211 (2003) ("Fundamentally, if the legislature had intended I.C. § 72-223 to provide broader immunity, then it could have used language different from that used in

I.C. § 72-102 and the definition of 'employer.'"). Here, the Legislature *did* use different terms, and the best interpretation of that choice is that the different terms have different meanings.

That is particularly true here because the term "willful and wanton" means "[c]onduct which is committed with an intentional or reckless disregard for the safety of others." *Black's Law Dictionary* at 1600 (6th Ed.). By contrast, "willful" used alone means "[p]roceeding from a conscious motion of the will," and "[i]ntending the result which actually comes to pass." *Id.* at 1599. Thus, although it is linguistically odd that adding "and wanton" to "willful" creates a *lower* standard than the term "willful" alone, that is precisely how the legal terms of art work. And, of course, the Legislature is presumed to understand these terms of art when it legislates. *See, e.g., State v. Oar*, 129 Idaho 337, 340 (1996) (gathering additional precedent); *FAA v. Cooper*, 132 S.Ct. 1441, 1449 (2012) ("[I]t is a 'cardinal rule of statutory construction' that, when Congress employs a term of art, 'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'"). As a result, this Court's explanation in *Hennefer v. Blaine County School District*, 158 Idaho 242 (2015) (discussed at App. Brief pp. 17-18) that the term "willful and wanton" includes recklessness is not surprising, but it does not help Plaintiffs here. The same is true of *Jacobsen v. City of Rathdrum*, 115 Idaho 266 (1988) (discussed at App. Brief p. 18), which also discussed the term "wilful or wanton." *Id.* at 270-71.

If the Court were to look to prior precedent interpreting other uses of the terms that appear in the worker's compensation law, it should look to instances where the term "wilful" appears alone, without "wanton." This happens often, and this Court has interpreted "wilful" to mean an intentional act. Thus, the wilful desertion of a marriage requires "intent to desert." Idaho Code § 32-606; *see*

also Campbell v. Campbell, 120 Idaho 394, 403 (1991). The term "wilful" in criminal laws requires "a purpose or willingness to commit the act or make the omission referred to." Idaho Code § 18-101(1); *see also State v. Fetterly*, 126 Idaho 475, 477 (1994) (holding that the mental state of wilfulness is required to convict someone of the crime of wilful concealment). This Court has even held that the term "willful" in another section of the worker's compensation law itself means a mental state greater than negligence or recklessness. *See Shoemaker v. Snow Crop Marketers*, 74 Idaho 151, 158-59 (1953) (interpreting Idaho Code § 72-208). Thus, Plaintiffs' argument that this Court should interpret the worker's compensation law's use of the term "wilful" to have the same meaning as "wilful and wanton" not only runs headlong into *Kearney*, but would also conflict with the many other uses of "wilful" throughout the Idaho Code.

In sum, the district court got the law right, relying on this Court's prior decisions. That Plaintiffs wait until page 20 of their brief to mention either of the Court's binding decisions in *Kearney* and *DeMoss* speaks volumes. As the district court succinctly explained: "It is true that I.C. § 72-209(3) does not use the phrase 'intentional act,' but it does use the phrase 'willful physical aggression.' One is hard to put [sic] to explain how an act of willful physical aggression is not an intentional act." (R. Vol. 5, p. 1158)[16]

[16] Once the district court held, based on *Kearney* and *DeMoss*, that intent to injure was required, it looked to (among other things) three non-Idaho decisions that supported its conclusion that Plaintiffs have not established a genuine dispute whether Defendants acted with intent to injure them. (R. Vol. 5, pp. 1156-58) Plaintiffs criticize this reliance, arguing that the decisions do not establish that the exception to the Exclusivity Rule requires intent to injure. (App. Brief pp. 27-28) But that is not why the district court relied on them. Rather, it relied on them in assessing whether Plaintiffs had met their burden after it had already decided that their burden was to

c. *Dominguez* Did Not Overrule *Kearney* And *DeMoss*.

When Plaintiffs finally discuss this Court's precedent interpreting the exception to the Exclusivity Rule, they offer only a quick nod to *Kearney* and *DeMoss* (App. Brief pp. 20-22), but then spend nearly four full pages discussing *Dominguez v. Evergreen Resources, Inc.*, 142 Idaho 7 (2005). (App. Brief pp. 22-25) Plaintiffs essentially contend that *Dominguez* changed the rule set out in *Kearney* and *DeMoss*—and apparently did that without even saying so.

Plaintiffs misunderstand *Dominguez*, which did not address the scope of the exception to the Exclusivity Rule. Rather, it addressed only the question whether, when the exception to the Exclusivity Rule is satisfied, an employee can file both a worker's compensation claim *and* a lawsuit. As the Court summarized, "[t]he Employer argues an injury is either (1) an accident sustained in the course of employment, or (2) the result of an intentional tort—but cannot be both." *Dominguez*, 142 Idaho at 11. According to the employer, because Mr. Dominguez had filed a worker's compensation claim, it was "inconsistent for Dominguez to continue to claim he was the victim of an intentional tort." *Id.* However, the Court disagreed, holding that "an employee is not required to forgo the filing of a worker's compensation claim in order to sue his employer for willful or unprovoked physical aggression." *Id.* at 12.

Thus, *Dominguez* did not address the question already answered by *Kearney* and *DeMoss* regarding the scope of the exception to the Exclusivity Rule. Indeed, contrary to Plaintiffs' description of the decision, *Dominguez* explicitly refused to review the merits of the plaintiff's claim. As the

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establish an intention to injure. The district court's decision that Plaintiffs have no facts suggesting an intention to injure was plainly correct. *See infra*, Part III.B.

Court explained, the plaintiff had secured a default judgment against the employer in the district court. *Dominguez*, 142 Idaho at 7. Consequently, the Court held, review of the judgment against the employer "would be improper." *Id.* at 13. The Court explained that "a judgment by default is a final judgment," and "no appeal lies directly from such a ruling." *Id.* at 14. "If a matter was abandoned by the defaulting party and never properly presented to the trial court, there can be no error by the trial court on a question it was never asked to consider." *Id.* Thus, *Dominguez* did not even purport to say anything about whether the facts alleged there satisfied the exception to the Exclusivity Rule; it refused to review of the merits of the defendant's appeal from the default judgment.[17]

And even if *Dominguez* did redefine the scope of the exception to the Exclusivity Rule (which it did not), the facts at issue there are far removed from the evidence here. In *Dominguez*, the employer ordered an employee to enter and clean a tank the employer knew contained cyanide sludge. *Dominguez*, 142 Idaho at 9. The employee, Mr. Dominguez, alleged—and the allegation was taken as true because the employer defaulted—that the employer "knew it was hazardous to enter the steel tank, but concealed that fact from Dominguez." *Id.* After entering the tank, Mr. Dominguez collapsed

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[17] Plaintiffs argue that *Dominguez* must have spoken to whether the plaintiff's allegations satisfied the exception to the Exclusivity Rule, because, even in the event of a default judgment, the factual allegations "still had to form the basis for a valid claim for relief." (App. Brief p. 24) But in making this argument, Plaintiffs simply ignore what this Court said—namely, that it would not review the merits of the case. Plaintiffs cannot credibly argue that this Court reached a conclusion it did not actually reach. Plaintiffs' reliance on *In re Elias*, 302 B.R. 900 (Bankr. D. Idaho 2003) is even further afield. That decision, from a federal bankruptcy court, involved the same litigants as *Dominguez* and addressed the question whether the judgment of the district court in *Dominguez* was dischargeable in the employer's bankruptcy proceeding. *Id.* at 902. In analyzing that question, the court held that the judgment in *Dominguez* had a preclusive effect on the issue of whether the defendants acted with "an extremely harmful state of mind." *Id.* at 912. It said nothing about this Court's decision in *Dominguez*, which had not even been issued yet.

and lost consciousness. When firefighters arrived to attempt a rescue, the employer "was allegedly uncooperative with rescue and medical workers, refusing to accurately identify the material in the steel tank and thereby hampering Dominguez's rescue and treatment." *Id.* at 10.

Plaintiffs have submitted no evidence of any similar intentional conduct here. They have submitted no evidence that any of the defendants intended to injure anyone, and they have submitted no evidence that any defendant knew a rock burst was imminent. Nor have they offered any evidence that Defendants interfered with rescue efforts. Rather, the uncontested evidence shows that Defendants acted reasonably in trying to address the risk in the 5900 pillar after the initial rock burst in November 2011: They hired an expert consultant, who supported the Rehabilitation Plan, and they obtained MSHA's approval of the Plan as well. That a rock burst occurred, which no one disputes is an unpredictable event, cannot be said to be an existing and imminent hazard equivalent to cyanide sludge trapped in a tank. As a result, even if *Dominguez* was read to broaden the scope of the exception to the Exclusivity Rule, Plaintiffs still could not satisfy it.

4. *Kearney* And *DeMoss* Were Correctly Decided.

In addition to being the settled law of this State and representative of the majority view across the United States, *Kearney* and *DeMoss* were rightly decided. The minority view—the substantial certainty test—would not be faithful to the language of Idaho's worker's compensation law, and also would disturb the balance between employees and employers that is inherent in the worker's compensation system.

First, *Kearney* and *DeMoss* were rightly decided because they were true to the statutory language in the worker's compensation law. The exception to the Exclusivity Rule provides that

employees are not exempt from the Exclusivity Rule unless their injury was caused by "wilful or unprovoked physical aggression." Idaho Code § 72-209(3). Thus, *Kearney* and *DeMoss* were not starting from scratch and considering which rule would be best; they were interpreting the specific language the Legislature used. And the decisions plainly were correct that "wilful or unprovoked physical aggression" indicates intent. As *Kearney* explained, the term "aggression" connotes an affirmative act, such as an "overt hostile attack." *Kearney*, 114 Idaho at 757. It is not possible to commit an overt hostile attack without intent to do so. Thus, *Kearney* and *DeMoss* properly interpreted the language of the worker's compensation law.

Second, *Kearney* and *DeMoss* were rightly decided because adopting the substantial certainty test would disrupt one of the primary rationales for the worker's compensation system. As this Court has explained, one reason for the worker's compensation system is "to provide sure and certain relief for injured workmen ... regardless of fault." *Blake v. Starr*, 146 Idaho 847, 851 (2009). However, that is not the only reason: Another purpose of the system is to provide something in return to employers—"to protect industry by providing a limit on liability." *Id.*; *see also* 9 *Larson's Workers' Compensation Law* § 103.03 (explaining that one of the central purposes to the Exclusivity Rule is "to minimize litigation, even litigation of undoubted merit").

Adopting the substantial certainty test would undo the limits on employer liability—including, significantly, the limits on litigation expenses. As a practical matter, in almost any tort case, a plaintiff can allege negligence, gross negligence, or recklessness. The difference between them is not easily resolved without trial. As a result, if recklessness could satisfy the exception to the Exclusivity Rule, the number of lawsuits against employers could rise dramatically, as would the

length and cost of each proceeding, because courts would be unable to resolve whether the employer's actions were reckless, or something less, without a trial. Thus, as the Arkansas Supreme Court explained in rejecting the substantial certainty test, "if employers are required not only to provide worker's compensation but also to defend tort actions of employees and to respond in damages for torts, there would be a subversion of the very purpose of the whole workmen's compensation scheme." *Griffin v. George's, Inc.*, 589 S.W.2d 24, 27 (Ark. 1979). For that reason, *Kearney* and *DeMoss* not only correctly implemented the Legislature's intent, but also preserved the compromise on which the worker's compensation system is premised.

B. The District Court Properly Determined That Plaintiffs' Claims Are Barred Because They Have Proffered No Evidence Of A Wilful, Physical Attack.

The district court correctly held that "Plaintiffs' facts do not constitute an act of willful physical aggression." (R. Vol. 5, p. 1158) *Kearney* and *DeMoss* are dispositive of Plaintiffs' claims here, for Plaintiffs have submitted no evidence whatsoever of any physical attack with intent to injure. Thus, as in *Kearney*, even if Defendants' actions made it substantially certain that injury would occur by implementing the Rehabilitation Plan—which, to be clear, there is no evidence of—that would not be enough. And, as in *DeMoss*, even if Defendants knew the 5900 pillar was unsafe—which, again, there is no evidence of—that is not enough. Rather, this Court has been clear: The exception to the Exclusivity Rule applies *only* when an employer or its agents physically attack an employee with intent to injure him. *Kearney*, 114 Idaho at 757 (a defendant must "wilfully or without provocation physically and offensively or hostilely attacked the employee"). There is no evidence of that here, and not even any allegation of it. Plaintiffs have presented no evidence that Defendants physically

attacked them, or had any intention to injure them.[18] Rather, at best for Plaintiffs, they suggest that Defendants put Plaintiffs in a situation they knew to involve risk. But, even if Plaintiffs' story were true (and, to be clear, it is not), that would be insufficient under the worker's compensation law and this Court's precedent interpreting it.

1. The Risk Of A Pillar Failure Is Irrelevant Because There Was No Pillar Failure, And Even If There Was, Sending Miners To The Pillar To Address The Risk Would Not Be A Physical Attack With Intent To Injure.

Most of Plaintiffs' story focuses on what Plaintiffs assert were known risks of the 5900 pillar failing. (App. Brief pp. 2-13, 29-32) Plaintiffs argue that Defendants were aware of increased stress readings from the pillar's stress gauges, and that Dr. Blake concluded that the pillar was near its unconfined compressive strength and was only borderline stable. (*Id.* at 2-13, 33-34) Plaintiffs' argument is insufficient.

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[18] Plaintiffs do offer the affidavits of two experts, who opine that Defendants' conduct was "willful" and with "deliberate intent." (App. Brief pp. 35-38) Such "expert" opinions are plainly inadmissible, even on a motion for summary judgment. As this Court explained in *Athay v. Stacey*, 142 Idaho 360 (2005), an expert's opinions regarding mental state are inadmissible. Specifically, in *Athay* the Court considered an expert's opinion that the defendants' conduct constituted "reckless disregard." *Id.* at 366. The Court held the opinion inadmissible for two reasons: First, "there is no indication that the expert knew the standard in Idaho for reckless disregard." *Id.* at 367. Rather, "[w]ithout defining what he understood the standard to be, he simply stated several times throughout his affidavits that the [defendants'] conduct constituted reckless disregard." *Id.* Second, "reckless disregard includes the element that the [defendant] actually perceived the high degree of manifest danger and continued his course of conduct." *Id.* "The [plaintiffs'] expert is no more qualified than the average juror to draw conclusions from the evidence regarding what any of the Defendants actually perceived or understood." *Id.* at 368. Here, Plaintiffs' experts' opinions are foreclosed by both of *Athay*'s reasons. First, Plaintiffs' experts opined on the relevant legal standard without any indication they understand what the standard means. Second, Plaintiffs' experts are no more qualified to draw conclusions from the evidence about intent than a jury would be. As a result, Plaintiffs' experts' affidavits cannot be considered.

First, the risk of pillar failure cannot satisfy the exception to the Exclusivity Rule because the 5900 pillar did not fail, and so did not cause Plaintiffs' injuries. *See supra* at 11. The exception to the Exclusivity Rule is satisfied only where the wilful or unprovoked physical aggression "proximately caused" the employee's injury. Idaho Code § 72-209(3). Thus, because Plaintiffs were not injured by a pillar failure, Defendants' actions with regard to a risk of pillar failure cannot satisfy the statute.

Second, Plaintiffs' allegation that Defendants were aware of a risk of pillar failure, but sent Plaintiffs to do rehabilitation work anyway, is not a physical attack that could satisfy the statute. Indeed, in *Kearney*, the employer directed the employee to use a lawn mower that it (allegedly) knew to be dangerous. *See supra* at 21-22. Although it had ready access to additional safety equipment that it could have installed on the mower to mitigate the risk, the employer did not do so. *Id.* However, even though the employee was then injured by the very risks that the employer neglected to address, the Court held that the exception to the Exclusivity Rule was not satisfied, because there was no physical and offensive or hostile attack against the employee. *Kearney*, 114 Idaho at 757.

Similarly, in *DeMoss*, the employer first sent employees to work with what it knew might be asbestos. It made no effort to investigate an employee's suspicion that it was asbestos. *See supra* at 22-23. Then, after the employer received confirmation of asbestos, it again sent the employees to work with the material—this time *knowing* it was asbestos, lying to the employees by telling them it was something harmless, and providing the employees with minimal safety clothing (paper coveralls and masks). *Id.* Again, although the employer was alleged to have sent employees into a known risky situation, and even lied about it, the Court held that the exception to the Exclusivity Rule was not

satisfied, because there was "no showing of unprovoked physical aggression, as required by I.C. § 72-209(3)." *DeMoss*, 118 Idaho at 178.

At best for Plaintiffs, the same is true here. Even if Plaintiffs' allegations are correct (which, as shown above, they are not), there is no evidence that Defendants committed a physical attack on Plaintiffs, let alone they did so with intent to injure them. Under *Kearney* and *DeMoss*, directing an employee into a situation that is known to involve risk does not satisfy the statute.

Finally, Plaintiffs cannot rely on statements by Hecla's consultant while ignoring other statements. Dr. Blake was clear that (1) "the occurrence of another large burst in this pillar is unlikely"; and (2) that the Rehabilitation Plan should proceed, and that "[t]he ground support installed during rehabilitation of the 5900 pillar will contain the damage from any further small bursts that might be induced by continuing closure." (R. Vol. 2, p. 304 (Blake Report)) Plaintiffs cannot have it both ways: They cannot rely on Dr. Blake's assessment that the 5900 pillar presented some risk, but disregard his conclusion that the way to address that risk was the very Rehabilitation Plan that Plaintiffs were implementing when they were injured. When considered in context, it is clear that Hecla received expert advice that it should proceed with the Rehabilitation Plan.

2. Conducting Mining Activities Is Not A Physical Attack With Intent To Injure.

As explained above, the evidence demonstrates that Hecla's mining activities between the first and second phases of the Rehabilitation Plan did not cause the December 14 rock burst. *See supra* at 11. But, even if they did, that would not satisfy the exception to the Exclusivity Rule because even Plaintiffs do not allege that Hecla engaged in mining activities *intending* to injure them. At best for

Plaintiffs, Hecla engaged in mining activities despite the additional risk those activities created. Taking actions with the knowledge that those actions create risk of injuring employees does not satisfy the statutory test. The statute requires that the employer's action be a physical attack with "an intention to injure the employee." *Kearney*, 114 Idaho at 758. Plaintiffs cannot credibly argue—and they do not argue—that Hecla's mining, at locations other than the 5900 pillar, and stopping a day before Plaintiffs were injured, was intended to injure Plaintiffs. They argue only that the blasting increased the risk of injury to them. That is insufficient under the statute, as explained in *Kearney* and *DeMoss*.

3. Lying To Employees And To MSHA Would Not Constitute A Physical Attack With Intent To Injure.

Throughout their brief, Plaintiffs accuse Defendants of lying, both to Plaintiffs and to MSHA. (App. Brief pp. 7-12) Again, Defendants strenuously contest these allegations—and contest that there is any support in the record for Plaintiffs' assertion. *See supra* at 14-16. But even if Plaintiffs are correct, the allegations would not satisfy the exception to the Exclusivity Rule.

First, lying to MSHA is wholly irrelevant. In no way could that constitute an offensive or hostile physical attack on Plaintiffs. This is true primarily because lying to MSHA does not involve Plaintiffs. But it is also true because it is not a physical action, and it is not an attack.

Second, lying to Plaintiffs themselves would not satisfy the statute either, because it would not constitute a physical attack. For instance, in *DeMoss*, the employer eventually tested the substance insulating the boiler and determined that it was indeed asbestos. *See supra* at 22-23. After it received the results indicating that the substance was asbestos, a supervisor still told the employees that the

substance was harmless and sent them back to work with it. *Id.* That allegation was determined not to satisfy the statute in *DeMoss*, because it did "not rise to the level of 'unprovoked physical aggression.'" *DeMoss*, 118 Idaho at 179. The same would be true here, even if Plaintiffs' allegations are correct (which they are not).

IV. CONCLUSION

The exception to the Exclusivity Rule requires "wilful or unprovoked physical aggression," which requires Defendants to have intended to injure Plaintiffs. No evidence of such intent exists on this record and there is no genuine dispute of material fact. The district court's decision granting summary judgment in favor of Defendants was proper, and should be affirmed.

DATED this 29th day of April, 2016.

RAMSDEN, MARTICE, EALY & HARRIS, LLP

By _____
Michael E. Ramsden, Of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2016, I served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

Eric S. Rossman Rossman Law Group, PLLC 717 N. 7th Street Boise, ID 83702	✓ US Mail ___ Overnight Mail ___ Hand Delivered ___ Facsimile (208) 342-2170
Michael R. Christian Marcus, Christian, Hardee & Davies, LLP 737 N. 7th Street Boise, ID 83702	✓ US Mail ___ Overnight Mail ___ Hand Delivered ___ Facsimile (208) 342-2170

Michael E. Ramsden