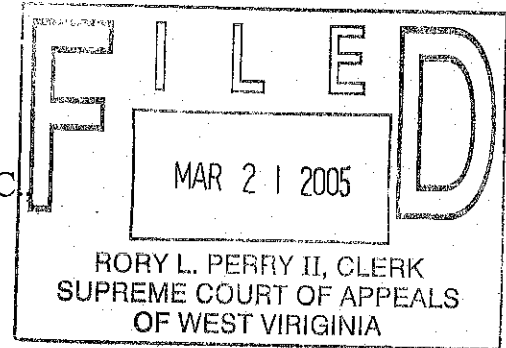


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 31947

KENNETH G. BENNETT, ROSILYN K. BENNETT,
REBECCA A. BENNETT and BOB BENNETT HOMES, INC.
a West Virginia corporation,

Plaintiffs/Appellants,



v.

ASCÓ SERVICES, INC., a West Virginia corporation; ADEMCO GROUP,
A DIVISION OF PITTPWAY CORPORATION, a foreign corporation,
PITTPWAY CORPORATION, a foreign corporation; SYSTEM SENSOR,
a foreign corporation; HONEYWELL, INC., a foreign corporation;
CHEMTRONICS CARIBE, INC., a foreign corporation; KIDDE-FENWAL,
INC., a foreign corporation; TOYOTA MOTOR CORPORATION, a foreign
corporation; TOYOTA MOTOR MANUFACTURING OF KENTUCKY, INC.,
a foreign corporation; TOYOTA MOTOR MANUFACTURING, U.S.A., INC.,
a foreign corporation; TOYOTA MOTOR SALES, U.S.A., INC., a foreign
corporation; COBB AND COULSON AUTO SALES, INC., d/b/a C & C DODGE
TOYOTA, a foreign corporation; OHIO FARMERS INSURANCE COMPANY, a
foreign corporation; WESTFIELD INSURANCE COMPANY, a foreign
corporation; WESTFIELD COMPANIES, a foreign corporation; and
WESTFIELD GROUP, a foreign corporation,

Defendants/Appellees.

**RESPONSE OF OHIO FARMERS INSURANCE COMPANY AND WESTFIELD
INSURANCE COMPANY TO PLAINTIFFS' APPEAL BRIEF**

Brent K. Kesner (WV Bar #2022)
Ellen R. Archibald (WV Bar #5183)
KESNER, KESNER & BRAMBLE, PLLC
112 Capitol Street
Post Office Box 2587
Charleston, West Virginia 25329
(304) 345-5200

Counsel for Ohio Farmers Insurance Company and Westfield Insurance Company

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INTRODUCTION

Ohio Farmers Insurance Company (Ohio Farmers) and Westfield Insurance Company (Westfield), Defendants below, respond to the Plaintiffs' Appeal Brief filed by Kenneth G. Bennett, Rosilyn K. Bennett, and Rebecca A. Bennett (the Bennett Family), and Bob Bennett Homes, Inc. (together, the Bennetts). The Bennetts appeal three orders entered December 11, 2003, by the Circuit Court of Wood County (the Circuit Court). While none of the orders addressed the spoliation claims against Ohio Farmers or Westfield, Ohio Farmers and Westfield file respond to Plaintiffs' Appeal Brief because it references those claims.

KIND OF PROCEEDING AND RULINGS TO DATE

This action arose from a March 25, 1998, fire that destroyed the Bennett Family's home and contents, including their autos. The Bennett Family contacted their homeowners insurer, Ohio Farmers, and their auto insurer, Westfield.

Ohio Farmers and Westfield paid the Bennett Family a total of more than one million dollars (\$1,000,000) on their home and auto claims. After its investigation, Ohio Farmers did not object to the Bennett Family's razing of their burned home. After investigating and paying the Bennett Family's "total loss" auto claim and taking title to the Camry, Westfield sold the remains of Rebecca Bennett's Toyota Camry (the Camry) for salvage.

Mr. Bennett first considered legal action in December, 1999. The Bennetts filed this action in March, 2000, against Toyota Motor Corporation, Toyota Motor Manufacturing of Kentucky, Inc., Toyota Motor Manufacturing, U.S.A., Inc., Toyota Motor Sales, U.S.A., Inc., and Cobb and Coulson Auto Sales, Inc., d/b/a C & C Dodge Toyota (together, the Toyota

Defendants); ASCO Services, Inc. (ASCO); and ADEMCO Group, Pittway Corporation, System Sensor, and Honeywell, Inc. (the Honeywell Defendants). The Bennetts alleged that the Camry caught fire and caused their home to burn, and that their home alarm system, installed by ASCO and containing some components manufactured by the Honeywell Defendants, did not timely warn the Bennett Family of the fire.

The Bennetts later joined Ohio Farmers and Westfield as Defendants, alleging their spoliation of evidence. The Bennetts joined Chemetronics Caribe, Inc., and Kidde-Fenwal Inc. (together, the Chemetronics Defendants), after learning that they may have manufactured a component of the home alarm system.

All Defendants sought summary judgment. The Circuit Court has not decided ASCO's, Ohio Farmers', or Westfield's motions, but on December 11, 2003, it granted final summary judgment on the merits for the Toyota Defendants (the Toyota Order) and the Honeywell Defendants (the Honeywell Order). It granted summary judgment and dismissed the Chemetronics Defendants under the statute of limitations (the Chemetronics Order).¹

This Court granted the Bennetts' Petition for Appeal of the Toyota Order, the Honeywell Order, and the Chemetronics Order (together, the 12/11/03 Orders). It ordered the Bennetts to file their appellate brief within thirty (30) days of receipt of the Order entered January 14, 2005. The Bennetts filed Plaintiffs' Appellate Brief on February 22, 2005.

¹*Cf.* Plaintiffs' Appeal Brief at 1 ("The Appellants seek relief from ... three (3) Orders ... granting summary judgment to all defendants on plaintiffs' claims of product liability essentially on the basis that plaintiffs were unable to identify the precise defects and/or causes of the fire and alarm failure due to the spoliation of the Camry and the fire alarm system.").

STATEMENT OF FACTS

A. After fire destroyed the Bennett Family home, their insurers paid their claims.

Bob Bennett Homes, Inc., built the Bennett Family home. The Bennetts assert that the builder relied on ASCO's advice on and installation of a home alarm system, but that the alarm system did not sound on the night of the fire. Plaintiffs' Appeal Brief at 1-4.

Neither Mr. nor Mrs. Bennett saw the fire start or in its beginning stage, but they assert that each looked through a door into the garage for a few seconds and saw the Camry in flames. *Id.* at 4-6. Mr. Bennett had to look over or under another car in the garage to see the Camry, but he recalls that "a portion of the undercarriage of the Camry was engulfed in flames and that material appeared to be melting off of the car[.]" *Id.* at 6; Kenneth G. Bennett Depo. 11/30/00 at 247-48.

The Bennett Family "suffered essentially a total loss of their home and its contents before the fire could be extinguished." Plaintiffs' Appeal Brief at 6. They contacted Ohio Farmers, their homeowners insurer, and Westfield, which insured the Camry.² Ohio Farmers' and Westfield's adjusters met with Mr. Bennett on March 26, 1998, the day after the fire. Together, Ohio Farmers and Westfield paid the Bennett Family more than one million dollars (\$1,000,000) on their fire claims.

²CNA insured two (2) other autos and paid the Bennett Family's claims. There is no indication that CNA preserved either auto.

B. After Ohio Farmers' thorough investigations, Mr. Bennett decided to raze the Bennett Family home. Westfield took title to the Camry and left it at the salvage yard.

Ohio Farmers' homeowners adjuster gave the Bennett Family \$25,000 on March 26, 1998, as an advancement. He retained Robert Stewart, a certified fire investigator and the primary investigator on around 1,700 fires, to perform a cause and origin (C&O) investigation. Rosilyn Bennett Depo. at 57; Robert Stewart Depo. at 8-9, 16-17. Stewart examined the Bennett Family home and took extensive photographs on March 26 and 27, 1998. Mr. Bennett did not ask Stewart to examine the alarm system, nor did Mr. Bennett tell Stewart that any part of the alarm system had not operated properly. Stewart Depo. at 48.

Rebecca Bennett parked the three year old Camry in the garage at least three (3) hours before the fire. The Camry's Toyota service records showed no fire-related problems; it had been serviced at auto shops other than authorized Toyota shops, but no records from those shops were available. The Camry did not appear "different" or "unusual" on the night of the fire. Rebecca Bennett Depo. at 9, 15, 26, 33, 86.

At the time of the fire, the Camry was parked between two (2) other autos, and a lighting fixture and an electric garage door opener had been left on top of it before the fire. A gasoline can, between the Camry and the Bennett Family's pick-up truck, had contained some "product" at the time of the fire and was destroyed in the fire. A piece of gasoline-powered equipment was found nearby. Stewart Depo. at 49-50.

Westfield's adjuster had the Bennetts' autos pulled from the garage on March 27, 1998. The adjuster paid \$16,618.75 for the Camry as a total loss, and Mr. Bennett signed its

title over to Westfield. Kenneth Bennett Depo. at 115, 225. The adjuster said the Camry would be taken to Hilltop Auto Wrecking, where a thorough investigation would be done, but he did not say how long the Camry would be kept or how long the investigation would take. *Id.* at 115, 225, 275-76.

Stewart determined that the fire most likely started in the garage, but he could not tell whether the Camry was involved in causing it. He obtained Mr. Bennett's, Ohio Farmers', and Westfield's permission to bring in an auto fire specialist. *Id.* at 21-25. Willis Davison, the specialist, examined the Camry and its "exhaust, electrical, fuel and emissions systems." W.L. Davison, Jr. Opinion 4/27/98. He took extensive photographs, but "nearly all of the combustible material ... had been consumed[,]" including the electrical wiring. *Id.* While "[s]everal areas of electrical activity" were apparent, he could not determine whether they caused the fire or resulted from it. *Id.* He could see "no possibility for subrogation ..." *Id.*

Under their policies' terms, Ohio Farmers and Westfield each sought to determine if it could seek subrogation from a third party. Once Westfield paid for the "total loss" Camry, Mr. Bennett dealt with Ohio Farmers' adjuster and had no further contact with Westfield. Mr. Bennett was aware of Ohio Farmers' concern about subrogation, but Ohio Farmers' adjuster did not recall discussing Mr. Bennett's litigation with Mr. Bennett. *Id.* at 199-201, 278; Timothy C. Call, Ohio Farmers adjuster, Depo. 10/18/01, at 70.

Mr. Bennett never went to Hilltop Auto Wrecking to see the Camry. Kenneth Bennett Depo. at 201. He "never contacted Toyota," and until he sought counsel in December, 1999, he made no effort to find out if the Toyota still existed. *Id.* at 209, 211-12. Mr. Bennett

“always assumed” that an insured could buy back a total loss auto after the insurer paid for it, but no one at Ohio Farmers told him that. Mr. Bennett did not recall telling the Ohio Farmers adjuster not to destroy the Toyota Camry, and he never asked if he could keep it. *Id.* at 274, 317.

In late spring, 1998, the fourth or fifth week after the fire, Mr. Bennett asked if Ohio Farmers objected to removal of debris from the Bennett Family’s property. *Id.* at 287. Adjuster Call’s supervisor asked Call to “contact[] the carrier for the auto and see if they have any reason not to go ahead with the demo[lition of the Bennett Family Home]. Does our C&O speculate as to the cause? We have a lot of money at stake and if we need to go further we are willing to do so.” Royden Browning, Ohio Farmers supervisor, Depo. at 17-18. Call replied that “[t]hat the C&O could not speculate because of the condition of the auto.” *Id.* at 17-18.

Ohio Farmers concluded from auto fire expert Davison’s opinion that it could not recover any subrogation for the fire. Ohio Farmers had no objection to; and paid for, the debris removal and disposal. Kenneth Bennett Depo. at 287, 291-92.

Mr. Bennett arranged for debris removal but did not preserve any of the home alarm system’s alarms, sensors, or monitoring equipment. Nor did he look through the house or the debris for alarm equipment or tell anyone else to do so. *Id.* at 121-123, 139, 287-90. He had the property razed and remaining contents hauled to the dump or buried. *Id.* at 139. Through the end of 1998, he did not report any problems to ASCO, which installed the alarm system. *Id.* at 120.

Mr. Bennett testified that Ohio Farmers' adjuster said that there would be a thorough investigation, that they would get the equipment they could salvage, and that there would be an investigation of that equipment. Mr. Bennett "assumed" that a thorough investigation would include examination of the Camry and the alarm system. However, no one from Ohio Farmers said that Ohio Farmers would take the Camry or the alarm equipment, and Mr. Bennett never instructed Ohio Farmers to do so. *Id.* at 281-82.

Mr. Bennett did not recall whom he told about the allegedly faulty alarm system. *Id.* at 124-25. He did not recall asking Ohio Farmers to keep the alarm equipment, but he said the insurance people told him that the equipment involved in the fire would be kept. To Mr. Bennett, "involved equipment" meant the Camry, but he was "not certain that it meant the alarm equipment." *Id.* at 125. Mr. Bennett believed it was "common sense" that the Camry caused the home to burn, but when asked if he would defer to expert fire investigators, he answered, "That's correct." *Id.* at 284.

C. The Bennetts first considered a lawsuit in December, 1999, and filed this action in March, 2000.

Ohio Farmers made the final payment on the home loss claim in June, 1999. Kenneth Bennett Depo. at 293. "It never entered [Mr. Bennett's] mind about legal action until well after a year after this fire." *Id.* at 116.

In summer or fall, 1999, a friend told Mr. Bennett that the Camry's catalytic converter caused the fire. Mr. Bennett did not tell Ohio Farmers about his friend's opinion because Mr. Bennett was "not sure at that point that I was convinced that I should bring legal matters. I

mean, I wasn't even convinced at that time that I even had any grounds to bring a lawsuit." *Id.* at 197, 208. He first contacted a lawyer in December, 1999. *Id.* at 209.

The Bennetts filed this action in March, 2000, against ASCO, the Toyota Defendants, and the Honeywell Defendants. They joined Ohio Farmers in June, 2000, and Westfield in March, 2002, alleging the insurers' intentional or negligent destruction of the Camry and the alarm system. ASCO and the individual Toyota Defendants cross-claimed against Ohio Farmers and Westfield for indemnity or contribution. The Bennetts later joined the Chemetronics Defendants, alleging their product liability.

D. The only firm evidence was the presence of multiple potential causes.

The only evidence on the cause of the fire showed multiple potential causes, including the Camry, the gasoline can beside it, and the gasoline-powered equipment. The Bennetts' experts could not testify to any Camry defect that originated before the Camry left the Toyota factory; one testified affirmatively that the alleged defect arose after the Camry left the factory. Peter Vallas Depo. 7/24/03, at 312-13; John Sandy Depo. 7/22/03, at 256-57. Another Bennett expert testified that the alarm system might have failed because of ASCO's installation error, or a servicing error, or a manufacturing defect, or a design defect. Jeffrey Zwirn Depo. at 70, 81, 98, 101-03, 110-11, 114-17, 156.

All Defendants moved for summary judgment on the Bennetts' claims. The Circuit Court has not ruled on ASCO's, Ohio Farmers', or Westfield's motions, but it granted final summary judgment for the Toyota Defendants and the Honeywell Defendants on the merits. It dismissed the Chemetronics Defendants under the statute of limitations. The Bennetts

appeal the 12/11/03 Orders, but they did not timely file Plaintiffs' Appellate Brief.

POINTS AND AUTHORITIES

A. Dismissal of the untimely Plaintiffs' Appeal Brief is appropriate.

W. Va. R. App. P. 10

B. Spoliation is not before the Court. Summary judgment is mandated on the product liability claims.

1. The 12/11/03 Orders are subject to *de novo* review.

Williams v. Precision Coil, Inc., 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995)

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)

W. Va. R. Civ. P. 56

Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)

2. There is a simple lack of evidence, not spoliation.

Hannah v. Heeter, 213 W.Va. 704, 584 S.E.2d 560 (2003)

Morningstar v. Black & Decker Mfg. Co., 162 W.Va. 857, 253 S.E.2d 666 (1979)

Anderson v. Chrysler Corp., 184 W.Va. 541, 403 S.E.2d 189 (1991)

Beatty v. Ford Motor Co., 121 W.Va. 471, 574 S.E.2d 803 (2002)

W. Va. R. Civ. P. 56

Celotex, 477 U.S. at 325

Anderson, 477 U.S. at 248

Williams, 194 W.Va. at 60, 459 S.E.2d at 337

ARGUMENT

A. Dismissal of the untimely Plaintiffs' Appeal Brief is appropriate.

An appellant must file the appeal brief “[w]ithin thirty days of the date of the notice of the filing of the appellate record, or within thirty days of the receipt of the granting order establishing a briefing schedule[.]” W. Va. R. App. P. 10(a). Should an appellant fail to meet the filing deadline, the Court may “impos[e] the following sanctions: refusal to hear the case, denying oral argument to the derelict party, dismissal of the case from the docket, or such other sanctions as the Supreme Court may deem appropriate.” W. Va. R. App. P. 10(e).

Here, the Court received the record and issued its scheduling order on Friday, January 14, 2005. The Bennetts should have received the written Order by Tuesday, January 18, 2005, making their brief due February 17, 2005. They did not seek an extension of time, yet they did not file Plaintiffs' Appeal Brief until February 22, 2005. Absent extenuating circumstances, dismissal of Plaintiffs' Appeal Brief is appropriate. W. Va. R. App. P. 10(e).

B. Spoliation is not before the Court. Summary judgment is mandated on the product liability claims.

1. The 12/11/03 Orders are subject to *de novo* review.

The Court reviews a summary judgment order *de novo*. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E.2d 329, 335 (1995) (citing Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), among others). Summary judgment is required if “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as

a matter of law.” W. Va. R. Civ. P. 56(c)).

The movant’s burden “may be discharged by ‘showing’--that is, pointing out to the [Court]--that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmovant “may not rest upon his mere allegations[,]” W. Va. R. Civ. P. 56(e), but must establish facts on which a reasonable jury could base a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337 (citation omitted); *Painter*, 192 W.Va. at 192 n. 5, 451 S.E.2d at 758 n. 5.

2. There is a simple lack of evidence, not spoliation.

Since this action was filed, the Court has recognized the tort of intentional spoliation by parties or third parties. Syl. Pt. 9, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003). It recognized the tort of negligent spoliation only by a third party, but the complaining party must establish the third party’s “special duty” to preserve the evidence, Syl. Pts. 2, 5, *id.*, since third parties have “no general duty to preserve evidence[.]” *Id.* at 712, 584 S.E.2d at 568 (citations omitted).

However, spoliation is not at issue in this appeal because the Circuit Court has not yet addressed it. The Bennetts’ citation of their expert’s opinion on spoliation, Plaintiffs’ Appeal Brief at 16, is irrelevant because none of the 12/11/03 Orders mentioned spoliation.³

³Recovery for intentional spoliation requires proof that an action or potential action existed; that the spoliator knew of it, yet willfully destroyed evidence “vital” to the other party’s claim with specific intent to defeat the claim; and that as a result, the complaining party cannot prevail in the action. Syl. Pts. 10, 11, *Hannah*, 213 W.Va. 704, 584 S.E.2d 560. Mr. Bennett did not believe he

Rather, the Toyota Order and the Honeywell Order applied the law to the undisputed facts. According to the Bennetts' experts, any alleged Camry defect must have occurred after the Camry left the Toyota factory. Vallas Depo. at 312-13; Sandy Depo. at 256-57. There were multiple potential causes for the alarm system's alleged failure. Zwirn Depo. at 70, 81, 98, 101-03, 110-11, 114-17, 156. Regardless of the availability of the Camry's charred remains, the Bennetts could not recover from the Toyota Defendants without *both* evidence of the manufacture or sale of a defective product and elimination of competing potential causes of the fire. Regardless of the availability of the alarm system's remains that Mr. Bennett caused to be destroyed, the Bennetts could not recover from the Honeywell Defendants without *both* evidence of the manufacture or sale of a defective product and elimination of competing potential causes of the fire. *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979); Syl. Pt. 3, *Anderson v. Chrysler Corp.*, 184 W.Va. 541, 403 S.E.2d 189 (1991); Syl. Pts. 3, 4, *Beatty v. Ford Motor Co.*, 121 W.Va. 471, 574 S.E.2d 803 (2002) (citations omitted).

Summary judgment was and is proper as a matter of law for the Toyota Defendants

had any viable claims until nearly two (2) years after the fire; he did not tell the insurers of an alarm system problem, and the evidence convinced Ohio Farmers and Westfield that they had no subrogation claims against Toyota. The evidence could not support any alleged specific intent by either insurer to defeat the Bennetts' product liability claims.

Negligent spoliation is inapplicable because Ohio Farmers and Westfield are parties to this action. Syl. Pt. 2, *id.* Even if the insurers were deemed "third parties," Ohio Farmers did not possess or control the Camry or the alarm system; it had no ability or duty to preserve either. Syl. Pts. 5, 8, *id.* (citations omitted). Westfield handled the Camry, but the Bennett Family never asked about it after Westfield paid for and took title to it. Based the evidence that could not support a subrogation claim, Westfield had every reason to close its claim file and "'control the costs of preservation[.]'" but no duty to preserve the Camry. *Id.* at 72, 584 S.E.2d at 568 (citation omitted).

and the Honeywell Defendants. W. Va. R. Civ. P. 56(c)), (e); *Celotex*, 477 U.S. at 325; *Anderson*, 477 U.S. at 248; *Williams*, 194 W.Va. at 60, 459 S.E.2d at 337; *Painter*, 192 W.Va. at 192 n. 5, 451 S.E.2d at 758 n. 5. Plaintiffs' Appeal Brief states no ground for reversal of the Toyota Order or the Honeywell Order.⁴

PRAYER FOR RELIEF

Appellees Ohio Insurance Company and Westfield Insurance Company ask the Court to affirm summary judgment for Appellees Toyota Motor Corporation, Toyota Motor Manufacturing of Kentucky, Inc., Toyota Motor Manufacturing, U.S.A., Inc., Toyota Motor Sales, U.S.A., Inc., Cobb and Coulson Auto Sales, Inc., d/b/a C & C Dodge Toyota, ADEMCO Group, Pittway Corporation, System Sensor, and Honeywell, Inc., as a matter of law.

Respectfully submitted,

OHIO INSURANCE COMPANY AND
WESTFIELD INSURANCE COMPANY

By Counsel



Brent K. Kesner (WV Bar #2022)
Ellen R. Archibald (WV Bar #5183)
Kesner, Kesner & Bramble, PLLC
Post Office Box 2587
Charleston, WV 25329
(304) 345-5200

⁴Even with a statute of limitations defense, *see Chemetronics Order*, the same facts and law would obviate the Bennetts' product liability claims against the Chemetronics Defendants.

CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for Defendants Ohio Farmers Insurance Company and Westfield Insurance Company, certify that the foregoing **RESPONSE OF OHIO FARMERS INSURANCE COMPANY AND WESTFIELD INSURANCE COMPANY TO PLAINTIFFS' APPEAL BRIEF** was served on counsel of record this 21st day of **March, 2005**, by depositing a true copy thereof, postage prepaid, addressed as follows:

Marvin W. Masters, Esquire
Richard A. Monahan, Esquire
Masters & Taylor, L.C.
Fourth Floor - Peoples Building
181 Summers Street
Charleston, WV 25301
Counsel for Plaintiffs

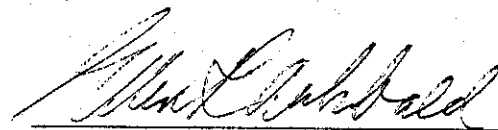
Daniel A Ruley, Jr., Esquire
Pullin Fowler & Flanagan
300 N. Kanawha Street
Beckley, WV 25801
Counsel for ASCO Services, Inc.

John C. Bogut, Jr., Esq.
Wayman, Irvin & McAuley, LLC
Suite 1624 Frick Building
437 Grant Street
Pittsburgh, PA 15219-6101
*Counsel for Chemtronics Caribe, Inc. and
Kidde-Fenwal, Inc.*

Andrew B. Cooke, Esquire
Flaherty, Sensabaugh & Bonasso
P.O. Box 3843
Charleston, WV 25338-3843
Counsel for Toyota Defendants

George W. Flynn, Esq.
Flynn, Gaskins & Bennett, L.L.P.
333 S. Seventh Street - Suite 2900
Minneapolis, MN 55402
National Counsel for ADEMCO Group

Richard A. Hayhurst, Esquire
Law Offices of Richard Hayhurst
414 Market Street
Parkersburg, WV 26101
Counsel for ADEMCO Group



Ellen R. Archibald (WV Bar #5183)