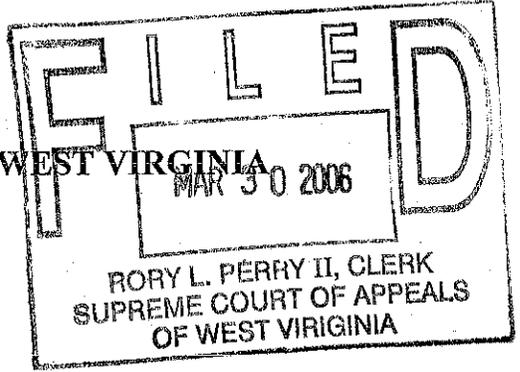


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SUPREME COURT OF APPEALS OF WEST VIRGINIA

WILLIAM L. SEDGMER, JR.,  
Personally and as next friend  
of his natural children, Jacob A.  
Sedgmer, Lucas D. Sedgmer and  
Elizabeth A. Sedgmer and  
William L. Sedgmer, III, Individually,

Appellants/Plaintiffs,

vs.

Supreme Court No.: 051309

McELROY COAL COMPANY,  
CONSOLIDATION COAL COMPANY,  
CONSOL, INC., EUGENE L.  
SAUNDERS, Individually and as agent  
of the aforementioned corporations,

Appellees/Respondents.

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**APPELLANTS' BRIEF**

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March 29, 2006

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**APPELLANTS' BRIEF**

**I. KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL:**

This is a civil action for money damages to compensate Appellants for the personal injuries of William L. Sedgmer, Jr., and his children, for their loss of parental consortium. The claim is against Mr. Sedgmer's employer, McElroy Coal Company, its agent, a foreman, Eugene L. Saunders, and joint venturers, Consolidation Coal Company and Consol, Inc.. Appellants have alleged that Defendants are liable for "deliberate intention" as set forth in West Virginia Code, §23-4-2(c)(2)(ii)(A-E) (1994). The Circuit Court ruled that Petitioners could not prove the existence of a specific unsafe working condition [Factor 1, i.e. W.Va. Code, §23-4-2(c)(2)(ii)(a)] and granted the Defendant's Motion for Summary Judgment by Memorandum Order entered January 31, 2005.

**II. STATEMENT OF THE FACTS OF THE CASE:**

**A. Undisputed Facts:**

(1) On October 21, 1987, Consolidation Coal Company issued an Inter Office Communication that was distributed to William Blackwell, safety manager at McElroy Coal Company, as a result of the "recent rail haulage fatality at Osage Mine. . ." See Exhibit 1. The Inter Office Communication states as follows:

When clearing up or waiting in a passing track in order to allow trips of loads or empties to pass, all **individuals are required to dismount all rail equipment** smaller than 38 ton locomotives and position themselves in a safe location; e.g., crosscut, shelter hole, unless such equipment is parked in a designated safe area or oncoming traffic is traveling with the switch. See Exhibit 1. [Emphasis added.]

(2) In October, 1988, Respondent, McElroy Coal Company, Division of Consolidation Coal Company adopted "Haulage Safety Rules and Procedures" which at Paragraph 17 states as follows:

Vehicles stopped waiting for clearance - are to make sure they are back in a switch at a safe location. When clearing up or waiting in a passing track, in order to allow trips of loads or empties to pass, **all individuals are required to dismount all rail equipment** smaller than a 38 ton locomotive and position themselves in a safe location - crosscut shelter hole unless equipment is parked in a designated safe area or oncoming traffic is traveling with the switch. See Exhibit 2 attached. [Emphasis added.]

(3) In 1989, Phillip Anderson was involved in an incident at the McElroy Mine when he was operating a motor pulling a train of coal cars that derailed. The cause of the derailling was a plank in one of the cars that inadvertently hit and engaged a toggle switch hanging from the roof of the mine causing the track to switch, the train to derail and wreck into the portal, knocking out power to a section of the mine which caused a cessation of production.

(4) McElroy Coal Company replaced the toggle switch involved in the 1989 incident with a "paw" or "palm" button type switch. The Affidavit of Phillip Anderson is attached hereto as

Exhibit 3.

Mr. Anderson was deposed in this case and swore under oath that the allegations in his Affidavit were accurate.

(5) On July 28, 1994, Eugene Saunders, a section foreman for McElroy Mine, directed the lead of three "man buses" into the mine. The "man buses" were smaller than 35 ton locomotives. Mr. Saunders was directed by the dispatcher to wait in the 3 North passway as a train loaded with coal was sent out of the mine on the main line. Mr. Saunders was to again proceed after the loaded train of coal had passed and he had been given clearance by the dispatcher. Mr. Saunders had all three man buses park in the 3 North passway, however, he did not require the workers to get out of the man buses and position themselves in an area of safety, either in a shelter hole or a crosscut.

(6) A piece of tubing in the thirteenth or fourteenth coal car that was passing the 3 North passway inadvertently hit the toggle switch and the track switched from the main line haulage into the 3 North passway.

(7) Coal cars near where the switch in the track occurred became uncoupled. Those attached to the locomotive motor continued along the mainline haulage, however, those that became detached, seventeen total, became a runaway train in the 3 North passway traveling toward the parked man buses.

(8) Mr. Saunders was in the first man bus closest to the switch where the run away train was coming into the 3 North passway. The other two man buses were parked behind him and William L. Sedgmer, Jr. was inside the second man bus, seated in the rear innermost seat of the bus, facing the rear of the bus.

(9) Mr. Saunders, the foreman, was watching the loaded train cars go by and saw a light

at the switch turn from green to yellow and knew immediately that the men had to get out of the buses. He turned around and starting screaming for everyone to get out of the buses. He testified that he tried to leave the bus and throw a switch so that the runaway train would follow another track into another area of the mine, but was unable to reach the switch in time.

(10) The runaway train hit Mr. Saunders' man bus first which then hit the man bus carrying Mr. Sedgmer. Mr. Sedgmer tried but did not have time to get completely out of the bus and was severely and permanently injured.

(11) Immediately after the runaway train wreck on July 28, 1994, McElroy Coal Company replaced the toggle switch with a paw button and made similar replacements of toggle switches with paw buttons throughout the McElroy Mine. This was the same type of change made from a toggle switch to a paw button that was made in 1989, after Phillip Anderson's train wreck.

(12) The train wreck that Phillip Anderson was involved in was caused by the inadvertent activation of a toggle switch from a plank protruding out of a coal car, and the cause of a July 28, 1994, train wreck was a piece of ventilation tubing protruding out of a coal car that inadvertently activated a toggle switch.

(13) Brian Mills, the West Virginia Mine Safety District Inspector who investigated the July 28, 1994, runaway train wreck, cited McElroy Coal Mine for violating "West Virginia Administrative Regulation Title 36, Series 33, Section 4.1." 36 C.S.R.33-4.1 states as follows:

When in the vicinity of a switch, all persons shall get into an area of safety, either in a shelter hole, or in a crosscut, when trips are approaching. See Exhibit 4 attached.

(14) The term "inby" means deeper into the mine and the term "outby" means closer to the portal to the surface.

(15) William L. Sedgmer, Jr. Suffered severe permanent physical and emotional injuries in the runaway train wreck.

**B. Material Contested Facts:**

(1) The distance that Eugene Saunders parked his man bus from the track switch is disputed.

(2) That 36 C.S.R.33-4.1 was violated for failure to have the men get out of the bus and into either a shelter hole or crosscut when the loaded coal cars were passing the inby switch to the 3 North passway.

(3) That Eugene Saunders knew (had a subjective realization and appreciation) of the unsafe working condition of failing to have the men get out of the buses and into a shelter hole or crosscut when the loaded train was passing the inby switch of the 3 North passway.

**III. THE ASSIGNMENTS OF ERROR RELIED UPON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL:**

A. The Circuit Court erred by granting summary judgment as the evidence created a genuine issue material fact that a specific unsafe working condition existed, i.e., parking an occupied man bus too close to a railroad track switch in an underground mine.

B. The Circuit Court erred by granting summary judgment as the evidence created a genuine issue of material fact as to whether the Defendants had a subjective knowledge and appreciation of the existence of the specific unsafe working condition.

C. The Circuit Court erred by granting summary judgment as the evidence created a genuine issue of material fact as to whether the specific unsafe working condition violated a specific safety regulation, i.e., 36 C.S.R. 33-4.1.

#### **IV. POINTS AND AUTHORITIES RELIED UPON, A DISCUSSION OF LAW AND RELIEF PRAYED FOR**

##### **A. Points and Authorities Relied Upon**

1. West Virginia Code:
  - (a) §23-4-2(c)(2)(ii)(C)
  - (b) §23-4-2(c)(2)(ii)(A)
  - (c) §23-4-2(c)(2)(ii)(A-E)
  
2. Cases:
  - (a) Arnold Agency v. West Virginia Lottery Commission, 206 W.Va. 583, 526 S.E.2d 814 (1999)
  - (b) Cecil v. D & M, Inc., 205 W.Va. 162, 517 S.E.2d 27, 33 (1999)
  - (c) Deskins v. S.W. Jack Drilling Co., 2004 W.L. 323202 (February 19, 2004)
  - (d) Nutter v. Owens-Illinois, Inc., 209 W.Va. 608, 550 S.E.2d 398 (2001)
  - (e) Sias v. W-P Coal Co., 185 W.Va. 569, 575, 408 S.E.2d 321, 327 (1991)
  - (f) Tolley v. AFC Industries, 212 W.Va. 548, 575 S.E.2d 158 (2002)
  
3. Other:
  - (a) West Virginia Administrative Regulation 36 C.S.R. 33-4.1

##### **B. Discussion of Law**

[W]hile a plaintiff may choose to introduce evidence of prior similar incidents or complaints to circumstantially establish that an employer has acted with deliberate intention, evidence of prior similar incidents or complaints is not mandated by West Virginia Code, §23-4-2(c)(2)(ii) [1994]. Syl. Pt. 2, in part Nutter v. Owens-Illinois, Inc., 209 W.Va. 608, 550 S.E.2d 398 (2001), Syl. Pt. 4, Tolley v. AFC Industries, 212 W.Va. 548, 575 S.E.2d 158 (2002).

[A] plaintiff attempting to impose liability on the employer must present sufficient evidence, especially with regard to the requirement that the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition. This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge. Syl. Pt. 5, Tolley v. AFC Industries, 212 W.Va. 548, 575 S.E.2d 158 (2002).

## 1. SPECIFIC UNSAFE WORKING CONDITION

Appellees, Consolidation Coal Company and McElroy Coal Company knew about the specific dangers related to underground rail transportation, including the specific danger of waiting in a passing track in order to allow trips of loaded coal cars to pass while they were going in the opposite direction. The entire company had communicated that knowledge on October 21, 1987 (Exhibit 1), and by October, 1988, McElroy Coal Company expressly adopted a safety rule (Exhibit 2, Rule 17) for this exact situation.

Appellants assert that "parking an occupied man bus too close to a railroad track switch in an underground mine" is a specific unsafe dangerous working condition. The fatality at the Osage Mine in 1987 (Exhibit 1) resulting in the Haulage Safety Rules and Procedures (Exhibit 2) expressly being incorporated at the McElroy Mine in 1988 indicates that the Defendants knew that the same specific type of track haulage safety concerns existed at the McElroy Mine.

A year later in 1989, a derail incident of loaded coal cars occurred at a track switch at the McElroy Mine as stated in the Affidavit of Phillip Anderson attached as Exhibit 3.

In the present case the Defendant's Motion for Summary Judgment did not argue the lack of "a specific unsafe working condition". The Court found that sua sponte. However, that finding was in error. In addition to the facts presented, West Virginia Administrative Regulation 36 C.S.R. 33-4.1 states as follows:

**When in the vicinity of a switch, all persons shall get into an area of safety, either a shelter hole or a crosscut when trips are approaching. See Exhibit 4.**

36 C.S.R. 33-4.1 was effective April 11, 1988. This is evidence that state lawmakers knew that when loaded coal cars were approaching a switch that it was dangerous working condition and

required that "all persons shall get into an area of safety." 36 C.S.R. 33-4.1. Parking an occupied man bus too close to a switch in an underground mine is a specific unsafe working condition. It is the same unsafe working condition as standing too close to the switch. When loaded coal cars are passing a switch the only areas of safety close to the switch are "a shelter hole or a crosscut." 36 C.S.R. 33-4.1.

Brian Mills, the West Virginia Mine Safety District inspector who investigated the July 28, 1994 runaway train wreck explained why the vicinity of a switch was a specific unsafe working condition when a train was passing.

Q. Why is it important that he get in a shelter hole while the vehicle is going through the switch?

A. Well, you shouldn't be in an area where if something would happen, that track vehicle would jump track and it would hit the guy or he would fall into the vehicle.

Q. Is there a susceptibility to derailments at switches?

A. Yes, sir.

Mills Depo., Pg. 56, Lines 16-22, Exhibit 14 attached.

Trigg Combs, Appellants' coal mine expert, gave his opinion concerning the specific unsafe working condition as follows:

My opinions are that an unsafe workplace existed in the vicinity of the 3 North passway inby switch where three portol buses, the men failed to take a safe position where the three portol buses were parked.

Combs Depo., Pg. 71, Line 22 - Pg. 72, Line 2, Exhibit 11.

Q. What was in that unsafe place?

A. The men in the portol buses were parked too close to that switch at the time a loaded trip was coming out.

Combs Depo., Pg. 73, Lines 8-11, Exhibit 11.

The testimony of a qualified mining expert, Trigg Combs, is evidence of a specific unsafe working condition. The testimony of the uninterested third party witness, Brian Mills, the West Virginia Mine Safety Inspector, is evidence of a specific unsafe working condition. The evidence from these competent witnesses creates a genuine issue of material fact that precludes Summary Judgment.

Another genuine issue of material fact that precludes Summary Judgment in this case is the distance from the switch where the man bus was parked. If the man bus had been parked in the switch or two feet away from the switch, Appellants presume that the Circuit Court would not have found the lack of a specific unsafe working condition. The Circuit Court noted expressly on page 6 of its Memorandum Order granting Summary Judgment that “Defendant Saunders parked his car at a **disputed distance** from the mainline.” [Emphasis added.] This “disputed distance” is critical to this case. The mainline was where the switch was located. Appellees/Defendants have taken the position that the man cars were parked a sufficient distance from the switch to be in a “designated safe area” as set forth in Rule 17 of the Haulage Safety Rules and Procedures. See Exhibit 2. However, the distance from the switch is disputed and a map of the McElroy Mine, attached hereto as Exhibit 5, is helpful.

Exhibit 5 is a highlighted drawing of the McElroy Mine. The 3 North passway is highlighted in yellow, whereas, the main haulage line is highlighted in orange. Both run laterally on the map, or East to West. The significance of the map is that the area of impact is disputed between the company representatives (400 feet from the switch) and the union representatives (**150 to 200 feet from the switch**). The reason the difference is significant is that between the company’s impact area and the union’s impact area, is the “Old Main East Empty Track Switch” (3 North Construction).

The Old Main East Empty Track Switch (3 North Construction) is designated on Exhibit 5 and appears to be a railroad track running North and South or vertically on the map. Appellees' position is that "outby" the Old Main East Empty Track Switch (3 North Construction) is the designated safe area.

It is the Appellants' position, the union witnesses' position and State Inspector Brain Mills' position that the man buses were parked too close to the switch, "inby" the Old Main East empty Track switch (3 North Construction), rather than "outby" as Appellees contend. When the coal cars derailed there and came into the passway, it was only 200 to 250 feet before impact with the man buses. However, the Appellees have taken a position that the area of impact was 400 feet from the switch at the inby end of the 3 North passway, which is alleged to be the designated safe area. That area could only be "safe" if another switch was thrown for the Old Main East Empty Track Switch (3 North Construction) so that a runaway train would not continue to through the 3 North passway, but instead be diverted to the Old Main East Empty Tract (3 North Construction).

Attached hereto as Exhibit 6 are the Affidavits of union workers Mike Usenick and Randy Mulvey, indicating that the area of impact was not in the designated safe area, but "inby" of the Old Main East Empty Track Switch (3 North Construction).

Mr. Sedgmer testified that the man buses were parked past or "inby" the "safety switch" of the Old Main East Empty Track Switch (3 North Construction) as follows:

Q. What should he (Eugene Saunders) have done?

A. There is a safety switch in a crosscut, and you should park behind that safety switch because its put there just in case of such an accident. You throw the safety switch, and that way if the cars break loose and come through there, they are shot right into the rib of the coal mine, and they all pile up, and that's where the accident is.

**He parked past the safety switch, which is legal to do, but what he does by**

**doing this is designate the crash point with the portal bus. That's also legal.**

**But if he does it that way, then he has to take and remove the men from the portal bus and put them in a safe crosscut where they are out of harms way, which he didn't do.**

William Sedgmer Depo. Page 183, Lines 1-16, attached as Exhibit 7. [Emphasis added.]

Q. What did the operator of the portal bus do incorrectly?

A. They went past the safety switch and didn't stop beside a crosscut.

William Sedgmer Depo. Page 253, Lins 17 - 20, attached as Exhibit 7.

Q. Do you believe that the operator of the portal bus, then, should not have passed, that is, gone past the safety switch in 3 North passway?

A. Well, I believe that if he'd have gone past -- if he did go past the safety switch, which he was designating a new place for the wreck if something happened, then to notify the rest of the crew to have them to get out of the portal bus and go to a safe crosscut would have been the proper procedure in that case.

**It's not that you're not allowed to park past the safety switch, but if you do so choose, then you should also take the men's safety into effect and take them to a safe area where they can stand out of harm's way, give them a chance.**

William Sedgmer Depo. Page 257, Lines 10 - 21, attached here to as Exhibit 7, (Emphasis added).

To the contrary, the company witnesses, Eugene Saunders, William Blackwell, Edmund Korsnick, and John Bess, all identified the impact area as being "outby" the Old Main East Empty Track Switch (3 North Construction). Copies of the exhibits from their depositions where they indicate that area are attached hereto as Exhibit 8.

The impact area is contested, which creates a genuine issue as to a material fact, because as matter of fact and law a specific unsafe working condition exists in the vicinity of any switch in an underground mine when loaded coal cars are passing. The exact location of the impact is material. As that location was contested, Summary Judgment was inappropriate.

## 2. SUBJECTIVE REALIZATION AND APPRECIATION

The Circuit Court agreed with the Appellees that Appellants had failed to prove that the Appellees/Defendants had a subjective realization and appreciation of the specific unsafe working condition. As indicated in Exhibit 1 and 2, attached, Haulage Safety Rules and Procedures were established in 1988 to require men to get into areas of safety, either a shelter hole or crosscut, when loaded trips were approaching a switch. This was due to the death of a miner in 1987.

Further, Eugene Saunders, the foreman involved in determining where the man buses would park on the day of Mr. Sedgmer's injury, July 28, 1994, knew he was not in the designated safe area. Although Mr. Saunders denied this knowledge, his actions circumstantially prove otherwise.

When Mr. Saunders was sitting in the man bus, waiting in the 3 North passway, he had his eyes trained directly on the inby switch where the loaded train was passing. While he was waiting, circumstances show that he knew that if there was a derail and the train came into the 3 North passway, that he and his men would be in danger.

Although Section Foreman Eugene Saunders denied knowing of any danger, his conduct suggests otherwise. The subjective realization element of this claim may be proven by circumstantial evidence as it requires proof of the thought process of the employer, or the employer's authorized agent, like Foreman Saunders.

Mr. Saunders was "focused" on the passing coal cars and when he saw something wrong he immediately began "screaming". He was watching for a reason. That was safety. When something went wrong, he warned the other workers, including Mr. Sedgmer, by **screaming**. He did not wait and say, "I think we are far enough back that we can avoid the danger." Instead he immediately screamed repeatedly "Get out of the buses." Mr. Saunders testified as follows:

...as I pulled in the passway, I stopped and they proceeded to start pulling loads. I'm sitting in the front bus, I got my lights on, got my cap light on and I'm watching the light, its green, then, all of a sudden, I see the light turn yellow. When I seen the light turn yellow I seen loads which appeared to be coming in the passway. I turned around and started screaming for people to get out of the bus. I was yelling, "Get out of the bus", Get out of the bus", loads were coming. I turned around and looked to make sure everybody was getting out. I jumped off the bus, I ran up to try to throw the switch to divert the cars. At that point, the cars were there and I jumped up in the pillar. The loads were too close for me to throw the switch, so I jumped up in the pillar, and just as I got up in the pillar the loads come by.

Saunders Depo, Page 6, Lines 17 - Page 7, Line 7. See Exhibit 9, (Emphasis added).

This testimony not only shows that Mr. Saunders knew that it was dangerous to sit there, assuming *arguendo* he was "outby" the Old Main East Empty Track Switch (3 North Construction), he knew that it was dangerous to sit there without having the switch thrown for the Old Main East Empty Track Switch (3 North Construction). He states that he ran to try to throw the switch. The switch he should have thrown when he parked to make the area safe.

Consolidation Coal Company's investigation report confirms the part of Mr. Saunders' testimony about screaming:

As the loads passed the inby switch, Saunders, with the head light on, focused on them, and the switch directional indicator lights in the distance. He heard motorman Mulvey say on the radio that he thought that he had a car off in the trip, and almost simultaneously noticed that the directional lights had changed. He heard a loud noise and noticed that the loads (13 cars in the trip) were coming into the passway.

Saunders began to scream which alerted all the crews to exit their vehicles.  
[Emphasis added.]

See Exhibit 10, at Page 1, attached hereto.

There is nothing in Exhibit 10 or any other corroborating testimony or evidence that Mr. Saunders tried to throw the safety switch. Appellants assert his testimony about trying to throw the safety switch is a recent fabrication. The man buses were parked past the safety switch so throwing

it would not have accomplished anything - the switch was behind the man buses, not between the man buses and the runaway train.

Trigg Combs, Appellants' liability expert, testified regarding Mr. Saunders' knowledge:

Q. Okay. And on what do you base your belief that Mr. Saunders knew about the unsafe condition?

A. From his deposition, principally.

Q. And what about that? What about his testimony?

A. The testimony in his deposition indicates that he was watching the loaded cars go by. And the only reason he was watching them is to make sure that they don't come in on him.

Combs Depo, Page 146, Line 25 - Page 147, Line 10. See Exhibit 11.

Q. Does that action of him going to throw the switch indicate to you that he knew that there was a danger approaching him?

Mr. Puz: Objection.

The Witness: Of course.

Q. Did he warn anybody about the cars coming in?

A. After they came in he saw them, he told them to get into the cross cut.

Q. So when he warned the other men, does that indicate to you that he had knowledge of a danger?

A. Sure.

Combs Depo, Page 166, Line 18 - Page 167, Line 7. See Exhibit 11.

Warnings are only legitimately given when actual danger is perceived.

Mr. Saunders actions in focusing on the coal cars moving by and immediately warning others of danger upon seeing the coal cars enter the 3 North passway, circumstantially proves that he knew

that there was a danger and that he knew that the danger of a runaway train would reach him and the others. The circumstances do not corroborate his allegation that he thought he was parked far enough away to avoid danger. At the very least the circumstances create a genuine issue of material fact that precludes Summary Judgment.

Subjective realization, like any state of mind, must be shown usually by circumstantial evidence, from which, ordinarily, conflicting inferences reasonably can be drawn. Sias v. W-P Coal Co., 185 W.Va. 569, 575, 408 S.E.2d 321, 327 (1991) and Deskins v. S.W. Jack Drilling Co., 2004 W.L. 323202 (February 19, 2004).

Mr. Saunders "subjective realization" may be imputed to the coal mine, as Mr. Saunders was a Section Foreman. However, McElroy and Consolidation Coal Company had knowledge of a prior similar incident, that of Philip Anderson in 1989, where a toggle switch was inadvertently thrown by material hanging out of a coal car (a plank) which caused a train derailment and wreck. When trains derail they can either wreck or, if there is another rail available, become runaways. The fact of a prior similar occurrence is more evidence of subjective realization of the danger associated with the track switches.

Coupled with Mr. Anderson's incident in 1989, was the fact that the toggle switch that activated was replaced with a "paw" switch immediately after Mr. Sedgmer's injury on July 28, 1994. The company knew what the danger was in 1989 and knew how to rectify it. They had the materials available to immediately make the changes. It just took five years from Anderson's 1989 wreck to Saunders' 1994 wreck to do it.

On page 6 of the Circuit Court's Memorandum Order at footnote 1, it states as follows:

Undisputed facts demonstrate that the switches are guarded by "levelers."  
However, the flexible fiberglass tubing in the case at bar is purported to has

smacked the leveler, bent, then sprung back up and struck the switch.

The finding by the Circuit Court is in error. The "leveler" is actually at the loading point for the coal cars. The "leveler" is a wooden 2 x 4 under which the coal cars pass to level the load of coal. The point of the coal car loading is between one-quarter mile and one-half mile from where the switch is to the 3 North Passway involved in this litigation.

Other direct evidence of the company's subjective realization and appreciation comes from the testimony of the union president, Hoya Clemons. For clarification, the toggle switches were sometimes called "dick" switches, and the "paw" switches were sometimes called "palm" buttons.

Mr. Clemons testified as follows:

Q. What did you discuss to prevent a reoccurrence?

A. **The dick switches had to go. That was something I had championed for before, and I asked them to take the damn things out, and it was not against the law to have them, I guess, but it was poor mining practice to have those things there because we had had trouble with them before. But in any case, they were taken out and palm buttons were put in immediately after this incident.**

Q. Palm what?

A. Palm buttons.

Q. Now you said there was trouble before with these dick switches?

A. Yes, ma'am.

Q. Do you recall what trouble you had before with these dick switches?

A. Yeah. Again it was an overcast construction cite. I believe Phil Anderson was involved in it. I'm not absolutely certain. You will ask Mr. Anderson that, but it was at the portal switch, and some debris that was taken through the portal switch where there was another toggle switch, another dick switch, and this debris activated a transfer rail. There was a huge pileup.

Q. Were folks hurt there too?

A. I don't believe there was any lost time or any sutures involved. Some bruising, I think.

Clemons Depo. Page 52, Lines 20 - Page 54, Line 1, attached as Exhibit 12.

A. Those two incidents come to mind because one was production related. The company took a hit on production time, I believe, with the one with Mr Anderson, and, of course, Mr. Sedgmer got some severe damage over the one we are discussing now.

Clemons Depo. Page 54, Lines 7 - 22, attached as Exhibit 12.

Q. And ultimately McElroy then replaced all of these dick switches with palm buttons, correct?

A. Yes, ma'am.

Clemons Depo. Page 55, Lines 6 - 9. Exhibit 12, attached.

Circumstances indicate that Mr. Saunders had knowledge of the dangerous situation. There was a prior incident with Mr. Anderson in 1989 that gave McElroy and Consolidation Coal Company notice so that they knew of the dangerous situation whereby a toggle switch could be inadvertently activated and cause a runaway train. Union President Hoya Clemons complained or "championed" "to take the damn things out." McElroy and Consolidation Coal Company had enough knowledge to know that the replacement of the toggle switches should be done, which they were prepared to do, but unfortunately accomplished only after Mr. Sedgmer received his severe injury. McElroy and Consolidation knew of the fatality at the Osage Mine in 1987 that gave rise to the Hanlage Safety Rules and Procedures in 1988.

On page 9 of the Circuit Court's Memorandum Order, the Court states as follows:

Plaintiff tries to further support this claim by presenting evidence of subsequent remedial measures taken by the Defendant in another mine where it replaced all "electric switch throw boxes" with "palm switches".

The Circuit Court's finding is erroneous. The "electric switch throw boxes" were replaced

with "palm switches" at the **McElroy Mine** immediately after Mr. Sedgmer's injury on July 28, 1994. It was the same mine where union president Hoya Clemons had been complaining about the "electric switch throw boxes" or "dick switches" for years.

Significant issues of material fact relating to Defendants' subjective knowledge and appreciation exist which require a trial and reversal of the Circuit Court's Order granting the Defendants' Motion for Summary Judgment.

### **3. VIOLATION OF SPECIFIC SAFETY STANDARD OR INDUSTRY STANDARD**

The Circuit Court is of the opinion that there was no evidence of a violation of a specific safety regulation because there was no proof of a specific unsafe working condition. See Memorandum Opinion at page 8. However, a violation of a specific safety regulation was shown.

The West Virginia Board of Coal Mine Health & Safety Legislative Rules state that:

When in the vicinity of a switch all persons shall get into an area of safety, either in a shelter hole, or a crosscut, when trips are approaching. See Exhibit 4 attached. 36 C.S.R.33-4.1.

Brian Mills, the West Virginia Coal Mine District Inspector that investigated this runaway train wreck, issued a Notice of Violation. A copy of that Notice of Violation is attached hereto as Exhibit 13. It cites "West Virginia Administrative Regulation Title 36, Series 33, Section 4.1."

Appellees had argued that the citation was subsequently withdrawn upon review by the West Virginia Coal Mine Safety Board of Appeals. However, that withdrawal by the West Virginia Coal Mine Safety Board of Appeals is not "collateral estoppel" in this case. Mr. Sedgmer was not a party to that case and could not have contested the withdrawal of the citation. See Arnold Agency v. West Virginia Lottery Commission, 206 W.Va. 583, 526 S.E.2d 814 (1999). Further, the record of that proceeding at the Coal Mine Safety Board indicates its unreliability.

After a citation is issued, then there is an assessment conference. If the violation and assessment are agreed to by the coal mine operator, then the penalty is paid. If a violation and assessment are not agreed to by the coal mine operator, then they go to a hearing. If the violation is to be vacated, it requires the consent of an authorized miners' representative. In this case, the signature of an authorized miners' representative to vacate the violation was not obtained at the assessment conference level and this assessment went forward to a hearing.

Thereafter, at the hearing level the Order of Withdrawal and Agreement was signed by counsel for Consolidation Coal Company and counsel for the West Virginia Office of Miner's Health, Safety & Training. There was no signature of any miners' representative consenting to the withdrawal. See Exhibit 13 at Page 4 (Page 2 of the Order of Withdrawal and Agreement.)

The most enlightening part about the Order of Withdrawal and Agreement is that although it vacates the violation of 36 C.S.R. 33-4.1, Consolidation Coal Company specifically agreed to have a safety meeting on that very same section, 36 C.S.R. 33-4.1. The Order of Withdrawal and Agreement states as follows:

3. Consolidation agrees to conduct a safety meeting within thirty (30) days of entry of this Agreement regarding the violation of 36 C.S.R. 33-4.1 at the McElroy Mine. See Exhibit 13 at Page 4 (Page 2 of the Order of Withdrawal and Agreement).

It is incredible that the violation of 36 C.S.R. 33-4.1 was withdrawn but Consolidation Coal Company was required to have a safety meeting about it. It is suspect as the "plea bargain" occurred without any consent from any miners' representative. Finally, the fact that the violation was withdrawn at the administrative level is not binding on to this case.

West Virginia Code § 23-4-2(c)(2)(ii)(C)(1994) requires that Mr. Sedgmer prove, "That the specific unsafe working condition was a violation of a state or federal safety statute, rule, or

regulation, whether cited or not, ...”[Emphasis added.]

Brian Mills, the District Inspector, has now been elevated to Classified Inspector at Large - Region One for the West Virginia Office of Miners Health, Safety & Training. Mr. Mills explained why he gave the violation and that he still believes that the safety regulation was violated. Mr. Mills testified as follows:

Q. And was it your belief that that regulation had been violated here?

A. Yes, sir, I cited that section of the regulation.

Mills Depo. Page 52, Lines 21- 22, Exhibit 14, attached.

A. ...I felt at the time that because we had a derailment, the vehicles may have been parked where they were but **the violation of law was that the people in the vicinity of the switch should be in a shelter hole or in a crosscut when there is a trip oncoming.**

Q. Okay, what constitutes being in the vicinity of a switch?

A. In the vicinity of a switch, I took it during this situation that they were close enough to be struck by oncoming traffic and had they been in the crosscut or a shelter hole, that there wouldn't have been an accident.

Mills Depo, Page 53, Lines 8 - 18, Exhibit 14, attached. [Emphasis added].

Q. How close were they to the switch in this case?

A. **I believe 300 feet.** [Emphasis added.]

Q. And to you that constitutes being in the vicinity of the switch. Is that correct?

A. **It did, yes, that's why I issued the violation.** [Emphasis added.]

Mills Depo, Page 53, Lines 4 - 8.

Q. Why is it important that he get in a shelter hole while the vehicle is going through the switch?

A. Well, you shouldn't be in an area where if something would happen, that track vehicle would jump track and it would hit the guy or he would fall into the vehicle.

Q. Is there a susceptibility to derailments at switches?

A. Yes, sir.

Mills Depo, Page 56, Lines 16 - 22.

Q. So one violation we know is that it is your belief that McElroy violated the regulation we have been talking about and for which you issued a Notice of Violation. That is one opinion, isn't it?

A. Yes, sir.

Q. Do you continue to hold that opinion today?

A. Based upon what I know now, and what I knew then about how far the cars could travel, yes, I think they violated the law because they were not in a shelter hole or crosscut.

Mills Depo, Page 69, Lines 2 - 10, Exhibit 14, attached.

Contrary to Mr. Mills investigation and his testimony of 300 feet, the Defendants, McElroy's and Consolidation Coal Company's, Haulage Incident Report indicated that the impact area was 400 feet from the inby switch of the 3 North passway. See Exhibit 10 at page 2.

By measurement on the attached map, Exhibit 5, Consolidation Coal Company's 400 feet would put the area of impact outby the Old Main East Empty Track Switch (3 North Construction). However, by measurement of 300 feet as indicated by Mr. Mills, the impact area would have been inby the Old Main East Empty Track Switch (3 North Construction). See Exhibit 5 attached.

If parking inby the Old Main East Empty Track Switch (3 North Construction), the men should have exited the busses and gone to a shelter hole or crosscut pursuant to 36 C.S.R. 33-4.1.

If parking outby the Old Main East Empty Track Switch (3 North Construction), Mr. Mills recommended that the Old Main East Empty Track Switch (3 North Construction) be thrown as a safety device as a runaway train would then be diverted up the Old Main East Track instead of

continuing through the 3 North passway. Mr. Mills testified as follows.

A. That refers to the switch just inby where the accident occurred, the Main East switch; that from the time of the accident on, when trips were approaching the 3 North inby switch and vehicles were parked in the passway, that Old Main East switch would be thrown forward on the Old Main East track as an additional safety precaution.

Q. Okay.

A. That way if a trip would break loose that the 3 North inby switch, like happened in the case of the accident, that the loads would come down and go in that spur instead of continuing on into the passway.

Q. Okay.

A. And no loads would be pulled with people parked in there until the safety switch or that switch for Main East was thrown.

Mills Depo, Page 95, Lines 17 - Page 96, Line 7. See Exhibit 14.

If the Old Main East Track Switch (3 North Construction) was thrown and the runaway train did not follow it, the runaway would have derailed. Trigg Combs, Appellants' coal mine expert, testified that there should have been positive acting stop blocks or a derail in the 3 North Passway which was a violation of West Virginia Code, §22A-2-37(w).

Q. What I am referring to is West Virginia Code Section 22A-2-37(w). It's a small W that's in parenthesis. Would you review that and tell me when you have had an adequate opportunity to have read it?

A. Okay.

Q. The second sentence in that, I believe, states, **positive acting stop blocks or derails shall be used where necessary to protect persons from danger of runaway haulage equipment.**

Is that an accurate reading?

A. Yes.

KASSERMAN - COMBS (CROSS-EXAMINATION)

Q. In this situation there could have been derails placed in the 3 North Passway in situations where a haulage load was being taken out of the mine?

A. Yes.

Q. **If there were no derails, do you have an opinion whether this code section in this instance regarding Williams [sic] Sedgmer's injuries could also have been violated by the defendants?**

MR PUZ: Objection, that's outside.

THE WITNESS: Yes.

MR. PUZ: Wait, let me make my objection. That's outside the scope of the opinions of Mr. Combs as they have been presented.

MR. KASSERMAN: You may answer the question.

THE WITNESS: Yes, they could have been employed.

BY MR. KASSERMAN:

Q. And, yes, that code provision was violated?

**A. Yes, it was violated.**

Combs Depo. Page 167, Line 14 - Page 168, Line 25, Exhibit 11. [Emphasis added.]

This code section is significant as the West Virginia Supreme Court of Appeals has acknowledged that another plaintiff in a coal mine "deliberate intention" case against the same Appellee, Consolidation Coal Company, had "generally maintained that a specific unsafe working condition because the lack of a derail device on the B-right section of track and that the lack of the derailed device resulted in Mr. Cecil's injuries." See Cecil v. D & M, Inc., et al., 205 W.Va. 162, 517 S.E.2d 27, 33 (1999).

Mr. Cecil was injured on January 13, 1993, in Consolidation's Amonate Mine in McDowell County, West Virginia. Mr. Sedgmer was injured July 28, 1994 in Consolidation's McElroy Mine

in Marshall County, West Virginia. Like the case at bar, there had been other runaway trains in the Cecil case. Like the case at bar, there was evidence from an expert mining engineering consultant, Anthony Sharkey, that West Virginia Code, §22A-2-37(w) was violated. Cecil, supra at 33-34. The similarities in the case at bar and the Cecil case are significant. However, in Cecil the Circuit Court permitted the case to go to trial which resulted in the verdict for the employee which was affirmed on appeal. In the case at bar, the Appellants are requesting a trial.

Whether the man buses were parked on one side or the other of the Old Main East Empty Track Switch (3 North Construction), is disputed, however, there is no dispute that the collision occurred. Appellants' liability expert, Trigg Combs, testified that without a derail device in the 3 North passway, that the runaway train would have hit the buses had they been parked anywhere in that passway. Mr Combs calculated the weight of the coal cars, the rolling resistance of the cars, haulage speeds and velocity to calculate the stopping distance of the runaway train. At a normal hauling speed of 15 miles per hour, the stopping distance was 1,210 feet, and at 10 miles per hour, the stopping distance was 538 feet. See Trigg Combs Deposition Exhibit 7, at page 2, attached hereto as Exhibit 15.

Mr. Combs testified that the 10 mile per hour speed was the minimum speed he would consider as he was conservatively accepting the 400 feet point of impact as indicated by Consolidation Coal Company, plus the fact that the coal cars then traveled another 69 feet for a total of 469 feet, including the fact that the cars struck three 20 ton man trip vehicles which were propelled 100 feet, as stated in Consolidation Coal Company's Haulage Incident Report. See Exhibit 10, attached.

Multiplying by a safety factor of 4, which engineers use when human lives are in question, the minimum stopping distance for a safe area from the inby switch of the 3 North passway is 2,151 feet.

See Exhibit 11, at page 2, attached.

A simple measurement of the map on Exhibit 5, attached, with its scale of 1 inch equaling 250 feet, shows that the 3 North passway is approximately six inches long on the map, or 1,500 feet. Accordingly, no place in the 3 North passway would be a safe place to be when there was a runaway train, unless you were in a shelter hole or a cross cut. Mr. Combs testified:

A. No, 3 North passway all the more reason you should get off the bus. There is nothing safe on the 3 North passway.

Q. So you are saying that 3 North passway in its entirety is not a safe place to stop with an outbound trip of cars coming, is that correct?

A. With an outbound trip of cars coming, that is correct.

Combs Depo, Page 140, Lines 13 - 21, Exhibit 11.

A. My opinions are that an unsafe work place existed in the vicinity of the 3 North passway inby switch where three portal busses, the men failed to take a safe position where the three portal busses were parked.

Q. Okay.

A. And that unsafe condition was known to McElroy Mine.

Q. Okay.

A. And that the unsafe condition was a violation of state and federal mining law or industry standards. And that despite this Mr. Sedgmer was exposed to that unsafe mining condition which ultimate caused his injury.

Combs Depo, Page 71, Line 22 - Page 72, Line 11, Exhibit 11.

Q. What was in that unsafe place?

A. The men in the portal busses were parked too close to that switch at the time a loaded trip was coming out.

Combs Depo, Page 73, Lines 8 - 11, Exhibit 11.

Q. Okay, now what state law was the workplace condition a violation of?

A. It violated the section 36, the one that was subsequently vacated, 36-33-4, I think.

Q. What federal law did the workplace condition violate?

A. I know of no federal law. I meant to say, if I mis-spoke, federal, state or industry standards.

Q. What industry standard did it violate?

A. You don't, when you have men in a danger zone, you put them in the shelter holes or cross cuts.

Combs Depo, Page 109, Lines 14 - 25. See Exhibit 11 attached.

The union president, Hoya Clemons further confirmed the standard of the industry to enter a shelter hole while waiting for coal cars to pass, stating he had done it over a hundred times.

Clemons Depo. Page 133, Line 11 - 12, Exhibit 12, attached. Mr. Clemons detailed his experience stating as follows:

I'm not going to sit there when that stuff is going to go by. You can exit the vehicle. If there is not a trip device in front of you, a derail, you exit the vehicle, you walk by 60 foot, 100 foot, whatever it takes, and you get in a shelter hole, a cross cut, and then if things go wrong, they go wrong. You might destroy a piece of equipment, but you are not tearing up tissue. That was the option in that passway, for them guys to leave the vehicle and get to the shelter holes. Clemons Depo. Page 132, Lines 3 - 14. See Exhibit 12 attached.

Mr. Sedgmer similarly testified regarding the industry standard where he had been required to get into a cross cut when loads were passing, and that it was the proper procedure.

A. I have been on portal busses where the boss has sent us in the cross cut when the loads or the empties were coming by, and we had went past the safety switch and he had us get out of the portal busses and go back in the cross cut behind the cribs.

Q. Was it your understanding that that is the safe procedure?

A. That is the proper procedure, yes.

Sedgmer Depo, Page 262, Lines 11 - 18. See Exhibit 7, attached.

Brian Mills, the State Mine Inspector, confirmed the standard of the industry was to get out of the man trip and seek shelter when loaded coal cars were going by. Mr. Mills testified as follows:

Q. Well, if you had seen these men waiting there in the 3 North passway...

A. And the trip was coming?

Q. When the trip was coming.

A. What I would have done was say, hey, guys there is a trip coming, get out of the way, get in a safe area. **I do it every time I'm in the mines.** [Emphasis added.]

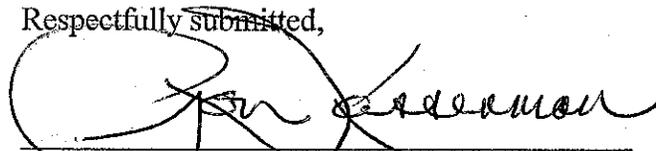
Mills Depo, Page 141, Lines 3 - 9. See Exhibit 9.

It is clear that there was a genuine issue of material fact as to whether state safety rules or a standard of the industry was violated. The issue of the violation regarding parking the man bus too close to the vicinity of the switch without making the men get into a cross cut or shelter hole, and the standard of the industry of doing so, is sufficiently contested to create a genuine issue of material fact precluding Summary Judgment.

**C. Relief Prayed For:**

Appellants pray that the Circuit Court's Memorandum Order of January 31, 2005, granting Defendants' Motion for Summary Judgment be reversed and this case be remanded for a jury trial.

Respectfully submitted,



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**SUPREME COURT OF APPEALS OF WEST VIRGINIA**

WILLIAM L. SEDGMER, JR.,  
Personally and as next friend  
of his natural children, Jacob A.  
Sedgmer, Lucas D. Sedgmer and  
Elizabeth A. Sedgmer and  
William L. Sedgmer, III, Individually,

Appellants,

vs.

Supreme Court No.: 051309

McELROY COAL COMPANY,  
CONSOLIDATION COAL COMPANY,  
CONSOL, INC., EUGENE L.  
SAUNDERS, Individually and as agent  
of the aforementioned corporations.

Appellees.

**CERTIFICATE OF SERVICE**

Service of the foregoing Appellants' Brief was had upon the Appellees herein by mailing a true and correct copy thereof by regular United States mail, postage prepaid and properly addressed, to their counsel of record, this 29<sup>th</sup> day of March 2006, as follows:

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