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**IN THE SUPREME COURT OF APPEALS  
STATE OF WEST VIRGINIA**

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**APPEAL NO. 33452  
CIVIL ACTION NO. 05-C-182-V**

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**CLARENCE T. COLEMAN ESTATE by  
Co-Administrators, CLARENCE  
COLEMAN and HELEN M. ADKINS,**

Appellants,

v.

**R. M. LOGGING, INC., a West Virginia  
Corporation, CLONCH INDUSTRIES, INC.,  
a West Virginia Corporation, and JOHN ROBINSON,  
individually,**

Appellees.

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**FROM THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA**

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**REPLY BRIEF OF DEFENDANTS, R.M. LOGGING, INC. AND JOHN ROBINSON**

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**IN THE SUPREME COURT OF APPEALS**  
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**CLARENCE T. COLEMAN ESTATE**  
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v.

**R.M. LOGGING, INC.,**  
**a West Virginia Corporation, and**  
**CLONCH INDUSTRIES, INC.,**  
**a West Virginia Corporation, and**  
**JOHN ROBINSON, individually,**

**Appellees.**

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*Appeal from the Circuit Court of Fayette County, West Virginia*

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**APPELLEES' RESPONSE BRIEF**

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

On June 17, 2005, Plaintiffs filed the current civil action against R.M. Logging and Mr. Robinson under W.Va. Code §23-4-2(d)(ii) claiming that Defendants deliberately intended to subject Mr. Coleman to an unsafe working condition resulting in his death. From that time, the parties engaged in standard discovery and evidence development, including exchanges of written interrogatories and requests for production, expert retention and evaluation, and depositions. As this matter neared trial, both R.M. Logging and John Robinson presented motions for summary judgment on August 15, 2006, and August 22, 2006, respectively. In its motion, R.M. logging

argued that the evidence submitted by Plaintiffs was not sufficient to sustain an action based on the requirements of The West Virginia Workers' Compensation Act. Specifically, R.M. Logging argued that Plaintiffs failed to produce any evidence relating to the subjective realization and appreciation requirements of W.Va. Code §23-4-2(d)(ii). *See Generally, R.M. Logging's Motion for Summary Judgment.* Mr. Robinson joined in R.M. Logging's motion and additionally submitted his own motion for summary judgment asserting that he was not a proper party. *See Generally, John Robinson's Motion for Summary Judgment.* Plaintiffs filed a Motion to Continue on August 24, 2006. The next day, on August 25, 2006, the Circuit Court of Fayette County held a hearing wherein the parties presented oral arguments on both R.M. Logging and John Robinson's motions. The Circuit Court took the matter under advisement. Thereafter, the Court requested that each of the parties submit proposed orders for consideration. After reviewing the proposed order offered by Plaintiffs, Defendants jointly filed a written reply setting forth its objections dated September 6, 2006. Lastly, on September 20, 2006, the Circuit Court entered a memorandum order granting summary judgment for both R.M. Logging and John Robinson and dismissing all of Plaintiffs' claims. It is from this order that Plaintiffs' have appealed.

## II. STATEMENT OF FACTS

Plaintiffs in this matter, Clarence Coleman and Helen Adkins, are the parents and co-administrators of the estate of Clarence "Amos" Coleman (hereinafter also referred to as Mr. Coleman or decedent). *See Plaintiffs' Complaint* at ¶1. In 2003, Mr. Coleman was an employee of Defendant, R.M. Logging, Inc. (hereinafter also referred to as R.M. Logging). *Id.* at ¶6. R.M. Logging was a closely held corporation engaged in the business of timber removal and owned wholly by Michelle Robinson. *See Deposition of John Robinson* at pp. 6, 8-10. Mrs. Robinson's

husband and certified logger, John Robinson, operated and oversaw the daily activities of R.M. Logging. *Id.* R.M. Logging is no longer in business. *Id.* Mr. Robinson knew Mr. Coleman's family, and hired Mr. Coleman after requests from his father. *Id.* at 43-44. Prior to hiring Mr. Coleman, Mr. Robinson talked to his previous boss at Nicholas Logging, where Mr. Coleman had been cutting timber. *Id.* at 43-46. Mr. Robinson believed that Mr. Coleman had worked as a cutter for over a year before coming to R.M. Logging. *Id.* at 75-76. Mr. Robinson was also responsible for training R.M. Logging employees, including an initial two week on-the-job training session for each new employee. *Id.* at 38-43.

On December 2, 2003, Mr. Coleman was working for R.M. Logging on a timbering site located near the town of Smithers in the Cannelton Hollow area of Clay County. *See Occupational Safety & Health Administration Investigation Report* (hereinafter OHSA Investigation), at pp. 4-5. On that day, Mr. Coleman initially cut a large maple tree; the maple tree fell to the ground across a nearby logging road. *Id.* Mr. Coleman next cut a 15-inch diameter hickory tree, which fell, but became lodged on a limb approximately 20 feet in the air. *Id.* He then proceeded to cut yet another tree, an 18-inch diameter hickory, which also became stuck and did not fall to the ground. *Id.* Mr. Coleman then proceeded to walk back toward the fallen maple. *Id.* In doing so, Mr. Coleman unfortunately walked directly beneath the butt end of the first hanging hickory. *Id.* Mr. Coleman was fatally wounded when the supporting limb snapped and the 15-inch diameter hickory stuck him with a glancing blow to the head. *Id.*

### III. ISSUES PRESENTED

*Whether the Circuit Court erred in granting Appellees' Motion for Summary Judgment where (1) The Court held that Plaintiffs' evidence of OSHA citations and expert testimony was insufficient to sustain a cause of action for deliberate intention; (2) Plaintiffs' evidence was held to be insufficient to show that there was any genuine issue of material fact on whether Defendant had subjective realization of a specific unsafe working condition; and (3) Appellants claim to have been unable to depose the only eyewitness to the accident, but despite being a late addition to the case, Defense counsel was able to locate and depose this non-party witness*

### IV. ARGUMENT

*The Circuit Court correctly granted Defendants' Motion for Summary Judgment where (1) It correctly applied the summary judgment standard in this deliberate intention action, determining that all evidence, even when viewed in the light most favorable to Plaintiff, was insufficient to support their deliberate intention claim; (2) Evidence of OSHA citations issued following the accident and testimony of Plaintiffs' expert are insufficient to suggest any genuine issue of material fact on whether Defendants had subjective realization of any unsafe working condition; and (3) Any deficiencies in Plaintiffs' discovery were caused by their own lack of diligence*

#### A. Standard of Review in lower court proceedings

The underlying causes of action were concluded in the lower court with the entry of an order granting summary judgment in favor of Defendants, R.M. Logging and John Robinson. Rule 56 of the West Virginia Rules of Civil Procedure governs motions for summary judgment wherein section 56(c) provides in pertinent part, as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law.

This Court has clarified the rule regarding summary judgment by expressing:

Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 4, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994).

Further, "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.* at 192-93 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202, 214 (1986)). The party opposing summary judgment:

[m]ust identify specific facts in the record and articulate the precise manner in which that evidence supports its claims. As to material facts on which the nonmovant will bear the burden at trial, the nonmovant must come forward with evidence which will be sufficient to enable it to survive a motion for directed verdict at trial. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted.

*Bowers v. Wurzburg*, 528 S.E.2d 475, 488 (1999) (Davis, J., dissenting) citing *Nebraska v. Wyoming*, 507 U.S. 584, 590, (1993) and *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 879 (W.Va. 1996).

Once a nonmovant has offered its purported evidence to the court:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995).

**B. On appeal, Deliberate Intent actions are subject to increased scrutiny at summary judgment**

Appellants initiated this suit against R.M. Logging and Mr. Robinson under the deliberate intention exception to the statutory immunity granted by the West Virginia Workers' Compensation Act codified in W.Va. Code §23-4-2. Specifically, Appellants alleged that Appellees are liable because they lost their legislative mandated immunity by way of W.Va.

Code §23-4-2(d)(ii)<sup>1</sup>. Pursuant to W.Va. Code §23-4-2(d)(2)(ii) an employer can only be deprived of its immunity if:

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace, which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and an appreciation of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C), inclusive, of this paragraph, the employer nevertheless thereafter exposed an employee to the specific unsafe working condition intentionally; and

(E) That the employee exposed suffered serious injury or death as a direct and proximate result of the specific unsafe working condition.

*W.Va. Code §23-4-2(d)(2)(ii)*

In addition to the standards set forth above, an action brought under the theory of deliberate intention requires increased scrutiny and courts are required to consider that “in order to withstand a motion for summary judgment, a plaintiff must make a prima facie showing of dispute on each of the five factors.” *Mumaw v. U.S. Silica Co.*, 511 S.E.2d 117, 120 (W. Va.

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<sup>1</sup> Prior to July 1, 2003, the relevant portion of the Workers Compensation Act was codified in West Virginia Code §§23-4-2(c)(2)(ii), and as a result many of the prior decisions referenced in this Response reference the former Code section. In 2003, the Legislator redesignated subsections (b) through (d) of W.Va. Code §23-4-2 to subsections (c) through (e).

1998). Indeed, the text of the Workers' Compensation Act itself mandates a more stringent review of the evidence forwarded in deliberate intention cases and explicitly expresses the legislature's intent that summary judgment be utilized to resolve issues regarding employer immunity.

B) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to rule 56 of the rules of civil procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not exist ...

W.Va. Code §23-4-2(d)(2)(iii)(B)

**C. The Circuit Court did not violate the summary judgment standard by failing to view evidence in the light most favorable to Appellants**

In their Brief, Appellants assert that the lower Court inappropriately applied summary judgment standard by failing to consider evidence in the light most favorable to them as the nonmoving party. This assertion is untrue because the lower court clearly analyzed all evidence presented by Appellants and determined that, even if viewed in the light most favorable to Appellants, the evidence was nonetheless insufficient to support a deliberate intent claim.

On appeal, Appellants state, "The lower court completely disregards the fact that OSHA issued citations to R.M. Logging and Robinson as a result of this incident which specifically state that this incident was caused, in part, by lack of training." *Appellant's Brief* at 9. This assertion is later contradicted where Appellants quote a portion of the lower court's decision from its Order granting summary judgment. Appellants quote the following portion:

Although OSHA issued several citations to R.M. Logging, Inc. as a result of this accident, the Court finds that OSHA citations do not equate with lack of training or with subjective realization. Further, such citations do not equate to a finding of deliberate intention on the part of R.M. Logging to injure the Decedent. *Id.* quoting *Order* at ¶ 7.

This portion of the lower court's ruling undeniably shows that the court did not "disregard" the OSHA citations, but rather, that the court decided the citations were simply not sufficient to support a deliberate intent cause of action against Defendants.

Additionally, Appellants' interpretation of the applicability of the OSHA citations is also seriously misdirected. This is evident when Appellants state "the lower court substituted its own judgment for that of OSHA in finding that training was unnecessary." *Appellant's Brief* at 10-11. OSHA is not charged with making judgments upon matters of law at issue in this case. The court's role was not to determine whether OSHA regulations were adhered to, but to review all evidence, including that of the OSHA citations, and to determine whether this evidence was sufficient to support a deliberate intent cause of action.

Upon hearing all evidence of OSHA citations, the court concluded that, "such citations do not equate to a finding of deliberate intention on the part of R.M. Logging to injure the Decedent." *Order* at ¶ 7. From this portion of the lower court's ruling, it is clear that the OSHA citations were not disregarded as Appellants contend, but that the court fully considered these citations. After fully considering the OSHA citations, the court determined that they were insufficient evidence to indicate subjective realization of a specific unsafe working condition, and therefore, unable to support a deliberate intent claim.

Moreover, Appellants also incorrectly assert that the lower court erred in concluding, "Training is not required for a person of ordinary intelligence to recognize the hazard of walking under a tree suspended in the air by the limb of another tree." *Appellant's Brief* at 10 quoting *Order* at Conclusion of Law ¶ 11. Appellants state that this conclusion is contrary to an OSHA standard stating:

Each danger tree shall be felled, removed, or avoided. Each danger tree, including lodged trees and snags, shall be felled or removed using mechanical or other techniques that minimize employee exposure before work is commenced in the area of the danger tree. 29 C.F.R. 1910.266(h)(vi).

Defendants incorrectly argue that the lower court's legal conclusion "directly contradicts the requirements established by OSHA regulations, or, at the very least treats these legal requirements as unnecessary." *Appellant's Brief* at 10.

This argument is based on the circuitous reasoning that the court should not have made this conclusion of law simply because there is an OSHA regulation that encompasses the danger of working under lodged trees. Clearly, this OSHA regulation stands for more than the fact that it is dangerous for an employee to stand beneath a lodged tree. The regulation states that employees are to use "mechanical or other techniques" before returning to work in areas where there are "danger trees" or "lodged trees." "Danger trees" are actually defined within the OSHA regulations as:

A standing tree that presents a hazard to employees due to conditions such as, but not limited to, deterioration or physical damage to the root system, trunk, stem or limbs, and the direction and lean of the tree. 29 C.F.R. § 1910.266(c)

This regulation warns employees that they are to use "mechanical or other means" to remove dangerous trees, which contemplates an entire range of trees, and happens to include "lodged" trees, which are simply defined as "A tree leaning against another tree or object which prevents it from falling to the ground." *Id.* This regulation clearly was meant to convey that employees are to take special care to remove an entire range of trees covered by the regulation that may present a hazard. In no way can such a regulation be said to preclude the legal conclusion that a person of average intelligence would be aware of the danger of standing directly beneath a large suspended tree that could fall at any time. Certainly a regulation such as this, which contemplates a broad range of circumstances in which non-conventional means should be used to

remove dangerous trees, is not rendered "unnecessary," as Appellants contend, by the Circuit Court's conclusion that an average person does not require training to recognize the danger of standing directly beneath a large suspended tree.

**D. The Circuit Court correctly concluded that OSHA violations do not equate to or evidence subjective realization of a specific unsafe working condition sufficient to support a claim of deliberate intent.**

While it is a fact that citations were issued, one of which was for training, neither the citations themselves nor the OSHA Investigation provide any evidence into Defendants' actual knowledge. Contrary to Plaintiffs' assertions, a 'serious' OSHA violation classification does not aid a trier of fact in the determination of an employer's subjective realization and appreciation regarding an unsafe condition. 29 U.S.C. 666(k) defines 'serious' violations and reads in full:

(k) Determination of serious violation

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a **substantial probability that death or serious physical harm could result from a condition which exists**, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment **unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.** (emphasis added)

The language of the defining statute makes clear that in order for an employer to avoid issuance of a serious violation it must both (1) not know of the violation **and** (2) not have been able to know of the violation with the exercise of reasonable diligence. Therefore, it is likely for an employer to be issued a 'serious' violation even in the event he did not know of the violation. As a practical matter, it is impossible to distinguish between those employers with actual knowledge and those without actual knowledge of a violation based solely on the 'serious' categorization. Further, nothing in the OSHA investigation points to any degree of subjective realization by R.M. Logging or Mr. Robinson as to the existence of an unsafe condition. At most, information

contained in the OSHA citations and Investigation can only be inferred to indicate that Defendants 'should have known' of the training violation<sup>2</sup>.

The requirements for the issuance of a 'serious' violation simply do not amount to an actual knowledge on the part of the employer. And short of an explicit statement in the investigation that R.M. Logging "actually knew" of the unsafe working condition and its potential for serious injury, the OSHA citation alone can only leave a trier of fact guessing. It is the legal equivalent of flipping a coin. Appellants themselves have paraphrased this violation standard as meaning that the employer "knew, or should have known of the hazard." See, *Plaintiff's Petition for Appeal* at p. 4. Use of an OSHA violation, by itself to show a subjective realization of an unsafe condition, therefore, is exactly the type of evidence that this Court first cautioned against in Syllabus Point 3 of *Blevins v. Beckley Magnetite, Inc.*, 185 W.Va. 633, 408 S.E.2d 385 (W. Va. 1991) (holding that the subjective realization "requirement is *not* satisfied merely by evidence that the employer reasonably *should have known* of the specific unsafe working condition) (emphasis added).

**E. Comparison to *Ryan v. Clonch Industries Inc.* is inappropriate**

In their Brief, Appellants attempt to forge a connection between the current litigation and a recent decision by this Court in a deliberate intention action; however, the testimonial evidence of John Robinson and Gary Moore make this case inapposite to *Ryan v. Clonch Industries, Inc.*, 219 W. Va. 664, 639 S.E.2d 756 (W. Va. 2006). This Court is undoubtedly aware of the principles and legal analysis comprising its recent opinion in *Ryan*. In *Ryan*, the defendant employer, Clonch Industries, Inc. (hereinafter Clonch) attempted to avail itself of the protection of W.Va. Code §23-4-2(d)(2)(ii)(B), while at the same time completely neglecting to perform a

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<sup>2</sup> Defendants do not admit that the violations or the investigation indicate that Defendants should have known of a violation, but present this position for the purpose of argument only.

hazard assessment as mandated by OSHA regulation codified at 29 C.F.R. §1910.132(d)(1) (2007). Clonch literally “conceded that it failed to perform the hazard evaluation.” *Id.*

**1. The regulation at issue in this case is distinct from the regulations requiring hazard assessments**

There is a distinct difference between the type of regulation that was at issue in *Ryan* and the regulation propounded as relevant by Appellants in this matter. The regulation in *Ryan* was one requiring a hazard assessment, the principle purpose of which is obviously to identify potential unsafe or dangerous conditions. This goes directly to the knowledge of the employer, and as a result, necessarily applies to the requirements of W.Va. Code §23-4-2(d)(2)(ii)(B). Put another way, although completion of the hazard assessment does not guarantee discovery (i.e. knowledge) of an unsafe condition regarding Personal Protective Equipment (PPE) by the employer, complete and total violation of the regulation somewhat ensures that the employer remains ignorant. Therefore, fundamental fairness dictates that such an employer is estopped from claiming it lacked the subjective realization via violation of the regulation. This Court clearly explained this principle in comparing such an argument by Clonch to “... the proverbial ostrich who sticks his head in the sand...” *Id.* at 766.

In contrast, R.M. Logging has not handled itself like the ill-fated ostrich. First, the regulation championed by Plaintiffs throughout this appeal, 29 C.F.R. §1910.266(i)(3)(iii), is one concerning training<sup>3</sup>. Unlike, the hazard assessment requirement used in *Ryan*, violation of the training regulation does not create a ready-made defense for employers under the subjective realization mandate of W.Va. Code §23-4-2(d)(2)(ii)(B). 29 C.F.R. §1910.266(i)(3)(iii) is not inseparability connected to the employer’s actual knowledge. This Court recognized that

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<sup>3</sup> This regulation reads: “(3) Content. At a minimum, training shall consist of the following elements:” including “(iii) Recognition of safety and health hazards associated with the employee’s specific work tasks, including the use of measures and work practices to prevent or control those hazards.”

violations of statutes, rules or regulations dealing with mandatory hazard evaluations, as in the *Ryan* case, are unique. Accordingly, this Court explicitly fashioned its ruling in *Ryan* such that only violations of statutes, rules, or regulations concerning such mandatory evaluations will result in estoppel of an employer's defense that it lacked subjective realization. This precise point is evident in Syllabus Point 6 which provides:

...where the defendant employer has failed to perform a **reasonable evaluation to identify hazards in the workplace in violation of a statute, rule or regulation imposing a mandatory duty to perform the same**, the performance of **which may have readily identified certain workplace hazards**, the defendant employer is prohibited from denying that it possessed "a subjective realization" of the hazard asserted in the deliberate intent action, and the employee, upon demonstrating such violation, is deemed to have satisfied his or her burden of proof with respect to showing "subjective realization" pursuant to W. Va. Code § 23-4-2(c)(2)(ii)(B).

*Ryan*, 219 W. Va. 664, 639 S.E.2d 756 (2006) (emphasis added).

Thus, a violation of a training regulation, as opposed to a regulation directing a hazard assessment, does not automatically estop the employer from asserting a legitimate and statutorily sanctioned defense under W.Va. Code §23-4-2(d)(2)(ii)(B).

## 2. Defendants provided training covered by the regulation

Further, R.M. Logging did not wholly ignore 29 C.F.R. §1910.266(i)(3)(iii), whereas the employer in *Ryan* admittedly did nothing required by the OSHA regulation relating to PPE hazard assessments. *Id.* at 765. Both John Robinson and Gary Moore indicated that R.M. Logging did train its workers. *See Deposition of John Robinson* at pp.38-43 and *Deposition of Gary Moore* at pp. 10-13. Mr. Robinson actually noted many of the subjects covered with each new cutter during the first two weeks of employment, including chainsaw safety, hinging, escapeways, and hung timber. These subjects are in line with the general requirements of 29 C.F.R. §1910.266(i)(3)(iii) for training in hazard recognition. Therefore, the uncontroverted

testimony demonstrates the stark contrast between the actions of R.M. Logging and the inactions of the employer in *Ryan*. The unique circumstances that resulted in this Court's decision to preclude the *Ryan* employer from asserting its absence of subjective realization of an unsafe condition simply do not exist in this matter.

**F. Appellants have not provided appropriate circumstantial evidence to infer subjective realization**

Plaintiffs have also presented an argument based on the Syllabus point 5 of *Ryan* which in part states:

Under the statute, whether an employer has a 'subjective realization and appreciation' of an unsafe working condition and its attendant risks, and whether the employer intentionally exposed an employee to the hazards created by the working condition, requires an interpretation of the employer's state of mind, and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn.

*Ryan*, 219 W. Va. 664, 639 S.E.2d 756 (2006); Syllabus point 2, *Nutter v. Owens-Illinois, Inc.*, 550 S.E.2d 398 (2001).

Plaintiffs offer this statement of law as a basis for their appeal, but fail to provide indication from the record of any actual circumstantial evidence. In *Nutter*, the leading case on this syllabus point, the claimant employee was exposed to exhaust fumes. 550 S.E.2d at 400-401. There had been no prior complaints or incidents concerning excessive carbon monoxide levels with equipment used by that plaintiff. *Id.* at 400, 402. This Court found however, the evidence indicated the employer was aware, through inspection, of other equipment producing high levels of the fumes and also that elevated levels of the dangerous gas were detected in offices not used by plaintiff. *Id.* at p. 403-404. This was determined to be proper circumstantial evidence to preclude summary judgment on the issue of subjective realization and appreciation. *Id.*

No circumstantial evidence similar to the type presented in *Nutter* is given by Appellants in this case. There is absolutely no evidence to suggest that either Mr. Robinson or R.M logging had knowledge of any employee walking under a hung timber, that they believed their training was inadequate in any way, or that they had knowledge of any employee engaging in other unsafe work practices. There is also no evidence that they were aware of any untrained employee cutting timber<sup>4</sup>. Plaintiffs only point again to the testimony of Mr. Grose and the OSHA citations.

As mentioned above, both the testimony of Mr. Grose and the OSHA citations are insufficient to fulfill the mandatory requirements of proof pursuant to W.Va. Code §23-4-2(d)(2)(ii)(B), which requires that an employer possessed a subjective realization and appreciation of the alleged unsafe working condition. By itself, such evidence, even when viewed in a light most favorable to Plaintiffs, can only prove that Defendants **should have known** of Mr. Colman's alleged lack of training. As more fully set forth below, this Court has repeatedly warned that this type of proof cannot cause an employer to lose immunity through a deliberate intent action.

**G. Evidence of subjective realization is essential and evidence tending to show only that an employer should have known of an unsafe condition cannot sustain an action for deliberate intention**

Proof of an employer's subjective realization and appreciation for a claimed unsafe working condition is not only a required element of proof that a Plaintiff must show in a deliberate intent action, but is one that this Court has classified as essential.

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<sup>4</sup> There is also no indication that Mr. Robinson had reason to believe Mr. Coleman was untrained prior to employment with R.M. Logging despite Appellants' position that Mr. Colman was a novice cutter. Mr. Robinson expressed that he believed Mr. Coleman had previously worked as a cutter for least a year before coming to work for R.M. Logging. See *Deposition of Robinson* at pp. 75-76. He also indicated that he believed that Mr. Coleman was trained by his earlier employer. *Id.*

In a previous case that affirmed a judgment notwithstanding the verdict by the circuit court, this Court explained the significance of W.Va. Code §23-4-2(d)(2)(ii)(B) expressing:

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....

Syl. pt. 3, *Blevins v. Beckley Magnetite, Inc.*, 408 S.E.2d 385 (W. Va. 1991); Also See Sly. Pt. 4, *Ryan*, 639 S.E.2d 756 (W. Va. 2006); Syl. Pt. 8, *Marcus v. Holley*, 618 S.E.2d 517 (W.Va. 2005); Sly. Pt. 5, *Deskens v. S.W. Jack Drilling Co.*, 600 S.E.2d 237 (W.Va.2004); Syl. Pt. 5, *Tolley v. ACF Indus. Inc.*, 212 W. Va. 548 (2002); Sly. Pt. 4 *McBee v. U.S. Silica Co.*, 517 S.E.2d 308 (W.Va. 1999); Syl. Pt. 5, *Kerns v. Slider Augering & Welding, Inc.*, 505 S.E.2d 611 (W.Va.1997).

This Court went on to include an explanation of the type of evidence that would not satisfy the requirements necessary to prove subjective realization and appreciation:

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

As further guidance in the high level of proof needed to satisfy the mandate of W.Va. Code §23-4-2(d)(2)(ii)(B) this Court held, “the ‘deliberate intention’ exception to the Workers’ Compensation system is meant to deter the malicious employer, not to punish the stupid one.” *Helmick v. Potomac Edison Co.*, 406 S.E.2d 700, 705 (W. Va. 1991). The statute itself also speaks to the elevated degree of proof requisite in deliberate intent actions before an employer is deprived of its tort immunity:

[I]n enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct.

W.Va. Code §23-4-2(d)(1).

As set forth throughout this Response, and by the record previously developed in the Circuit Court, Appellants' references to the testimony of Mr. Grose and to the OSHA citations do not reach the threshold necessary to propel this action beyond summary judgment. Appellants have the responsibility of showing that Appellees were more than negligent, more than willful, even more than wanton and reckless. Only evidence demonstrating that Appellees had actual knowledge of an unsafe condition and actual knowledge of its potential for serious harm will warrant anything but dismissal of this action. No matter how strong, evidence that merely implies that Defendants *should have known* is not enough. Syl. pt. 3, *Blevins*, 408 S.E.2d 385. As proposed to and accepted by the trial court, Appellants have the ultimate burden to establish, through testimony and/or documentation, that Defendants had an actual subjective realization and appreciation of the claimed unsafe working condition. No such evidence exists.

**H. There is no issue of material fact to support Appellants' claim that Appellees had any subjective realization of an unsafe condition**

**1. The training issue**

Appellants have asserted that the Circuit Court's ruling is in error because genuine issues of material fact remained in dispute, and that such issues related to Defendants' subjective realization and appreciation of an unsafe working condition. Specifically, Appellants seek to focus their appeal on inadequate training as the unsafe working condition leading to Mr. Coleman's death<sup>5</sup>. Appellants point toward two sources for their conclusion that material issues of fact remain with respect to Mr. Coleman's alleged lack of training<sup>6</sup>.

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<sup>5</sup> Defendants retain their argument that the unsafe working condition was created solely by the misjudgment of Mr. Coleman to walk under a hanging tree and refer this Court to Section A of Defendant R.M. Logging, Inc.'s Memorandum Of Law In Support Of Its Motion For Summary Judgment for supporting legal analysis.

<sup>6</sup> Additionally, in footnote 8 of their Brief, Appellants attempt to use *Mayles v. Shoney's, Inc.*, to stand for the proposition that deliberate intention actions are partially supported by lack of training; however, the ruling clearly states that the **unsafe working condition** in *Mayles* was "the manner in which the defendant disposed of hot grease." 185 W. Va. 88, 94, 405 S.E. 2d 15, 21 (1990).

The first is the report and testimony of their expert Homer Grose, and the second is the mere issuance of OSHA citations. Appellants fail to acknowledge that both of these sources cited as evidence are irreparably deficient in a factual foundation for making the conclusion that there was a lack of training and that Defendants' actually had knowledge of any unsafe condition.

Part of the Circuit Court's grant of summary judgment in favor of Defendants centers on Appellants' inability to produce sufficient evidence that the decedent was not properly trained. In that regard, the Circuit Court, after having an opportunity to review the evidence forwarded by Plaintiffs, ruled:

Plaintiffs' conclusion or allegation that Decedent was not properly trained simply because an accident occurred is insufficient proof as a matter of law.

*Circuit Court Order at p. 6.*

...Plaintiffs have no evidence to offer the Court concerning what training Decedent actually had. Plaintiffs assert that because this tragic accident occurred that, ipso facto, the Decedent was not properly trained.

*Circuit Court Order at p. 3.*

Not only do Plaintiffs have the burden of showing that Mr. Coleman was in fact improperly trained, they must also offer a showing that Defendants unquestionably knew of this alleged unsafe working condition and appreciated its potential for serious injury or death. W.Va. Code §23-4-2(d)(2)(ii)(B). The Circuit Court also addressed this in its opinion, holding that:

Plaintiffs have failed to satisfy the requirements of W.Va. Code §23-4-2(d)(2)(ii), in failing to produce any evidence of subjective realization and appreciation of the existence of a specific unsafe working condition.

*Circuit Court Order at p. 6.*

It is clear that neither R.M. Logging nor John Robinson had any indication of any improper training. As previously noted, in the depositions of John Robinson and Gary Moore,

Appellees provided training to employees focusing on a variety of safety issues. Appellants have made no showing of how this training was inadequate other than citing the aforementioned testimony of their expert, Homer Grose, and OSHA citations, neither of which shows any subjective realization of improper training.

**2. Appellants' expert does not evidence subjective realization and lacks sufficient factual foundation for his conclusions**

**a. Homer Grose is inexperienced in both OSHA regulations and logging**

Other than the OSHA citations, Appellants' only evidence is derived from the opinion and testimony of their expert, Homer Grose. It is clear that their reliance on this testimony is no more persuasive in their current Appeal than it was when the Circuit Court made the rulings noted above<sup>7</sup>. Plaintiffs have overstated both the qualifications of their expert and the factual basis for his opinions. Mr. Grose has only been a qualified outreach trainer for OSHA since 2004, just two years prior to his evaluation of this matter. *See CV of Homer Grose*. The bulk of his experience, both as an expert and in practice, has been in the mining industry under MSHA regulations rather than in logging or the timbering industry under OSHA regulations. *Id.* In fact, this case represents Mr. Grose's very first attempt at evaluating similar accidents in litigation, as he has never before testified or been deposed in a case involving OSHA and logging operations. *See Deposition of Homer Grose* at 9. Mr. Grose has never given any OSHA training regarding the logging industry. *Id.* at 7. Moreover, he admits that he has never taught a 30-hour OSHA certification class and that his only OSHA training endeavor consisted of informally talking to six or eight individuals working in the farming and road construction business about the material contained in a 10-hour brief course. *Id.* at 5-6. His practical experience with logging is also

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<sup>7</sup> Appellants assert in footnote 7 of their brief that any attack on the qualifications of their expert is inappropriate, and yet, they cite their expert's opinion throughout their brief. It is imperative that Appellees demonstrate that Appellants have relied upon and cited the opinion of an unqualified expert.

greatly limited, as he has never worked in the timbering industry and has only participated personally in logging operations for individuals<sup>8</sup>. *Id.* at 22.

On several occasions, Mr. Grose displayed a lack of knowledge regarding safety standards in the logging industry. During his deposition, Mr. Grose was questioned as to whether Mr. Coleman was required to be a certified logger. He responded, "Yes." *Id.* at 16. This is simply not true. Logger certification requirements are set forth in §22-3-3 of the West Virginia Code of State Rules, which provides:

any individual engaged in the supervision of a logging crew shall be certified as a certified logger by the director. Logging crew members not involved in supervision may be certified, but certification is not mandatory.

W.Va. C.S.R. § 22-3-3.

Mr. Grose again evidenced an incomplete understanding of OSHA regulations and even general safety practice when he suggested and recommended domino cutting. He expressed that timber not only could be, but should be cut so as to produce a domino effect. Mr Grose was asked:

- Q. ...what would be the proper method for them to go about doing this job?  
A. ...like I say you could use a domino effect... (answering in part)

*See Deposition of Homer Grose at 27.*

Plaintiffs' expert opined that the use of domino felling was preferred and a safer practice than that used on the day of the accident. *Id.* at 50. Despite Mr. Grose's recommendations, domino felling is so dangerous that it has been explicitly prohibited by OSHA. OSHA Regulation codified at 29 C.F.R. 1910.266(h)(1)(ix) states in full "domino felling of trees is prohibited."

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<sup>8</sup> Defendants also refer this Court to its *Motion to Exclude the Testimony of Plaintiffs' Expert* filed August 15, 2006,

Mr. Grose's lack of experience coupled with his misstatements concerning the applicable safety regulations raise serious concerns about his opinions and conclusions.

**b. Appellants' Expert does not forward facts to adequately support his opinions, and as such, his opinions are not reflective of Defendants' subjective realization**

More importantly, Plaintiffs' expert does not present any facts on which to base his conclusions that Mr. Coleman was inadequately trained or that Defendants had any subjective realization as required by W.Va. Code §23-4-2(d)(2)(ii)(B). Plaintiff's expert essentially formed all his opinions by considering just two pieces of information; the citations issued by OSHA and the fact that an accident occurred<sup>9</sup>. On numerous occasions during his deposition Plaintiffs' expert confirms that he did not know what training was provided to Mr. Coleman. *Id.* at pp. 30, 46, 47, 48, 51, 57, 60. Specifically, Mr. Grose gave the following testimony:

- Q: Tell me what you know about RM Logging's training.  
A: Nothing that's not in the information that is shown that I reviewed.  
Q: So you don't have any information about what their training was?  
A: No, I never did find their training—

*Id.* at pp. 47-48.

Q: But you don't know anything about the training program that RM Logging had do you?

A: No, I know – I have no reason to question the validity of the citation.

*Id.* at 46.

A: Anybody that walks under a suspended tree, he's not properly trained I don't think to recognize the hazards associated with the industry.

*Id.* at 51.

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for more discussion on Mr. Grose's qualifications and noted misunderstandings in OSHA regulations.

<sup>9</sup> It is important to note that the OSHA citations and OSHA Investigation, on which Mr. Grose so heavily relies, provide literally no specific details or description regarding Mr. Coleman's training other than to generally say that it was lacking. See *Generally OSHA Citations and OSHA Investigation*. Plaintiffs' own description of the OSHA investigation explains, "OSHA specifically found that the fact that this incident occurred, showed this lack of training" See *Plaintiffs' Petition for Appeal* at p. 9.

Q: Do you know that he [Mr. Coleman] did work for other companies before he worked for RM Logging?

A: That was my understanding.

Q: But you don't know who they were or what kind of training they provided him?

A: No.

*Id.* at 57.

Q: So in your opinion all his training is based solely on that citation there?

A: Yeah, the citation I think makes it clear that the training wasn't given and the fact he had very limited experience in the timber industry.

*Id.* at 60.

Q: So you don't have any knowledge of Mr. Coleman's training, what training he had, or if he had one year of experience, what that training was?

A: Just what come out of the investigation that OSHA did ...

*Id.* at 30.

The inactions of Mr. Grose also demonstrate that his opinions are not grounded on a sound foundation of facts, as he did not perform any type of independent investigation of the accident. He never talked with anyone that was on the scene when the accident occurred and no site inspection was ever conducted. *Id.* at pp. 26, 27, 67. Mr. Grose acknowledges that he failed to look into R.M. Logging's safety record. *Id.* at 45. Possibly the most disturbing deficiency in Mr. Grose's report is the absence of any consideration of the depositions testimony of John Robinson or Gary Moore. *See, Expert Report of Homer Grose*, listed materials considered.

Although, Appellants and their expert now seemingly forward a position that Mr. Coleman received virtually no training whatsoever, they neglect to point out unchallenged evidence in the record indicating otherwise. John Robinson explained that he personally gave each employee, including Mr. Coleman, at least two weeks of on-the-job training. *See Deposition of John Robinson* at pp.38-43. Mr. Robinson, a certified logger, worked and cut timber along side each new employee giving instruction and conveying specific information to the employee on chainsaw safety, hinging, escapeways, and hung timber. *Id.* Mr. Robinson

stated that he trained the new employees just as the State trained him, and that all employees were given copies of the State-authored tape and handbook<sup>10</sup>. *Id.* Gary Moore, the brother-in-law of John Robinson and former employee of R.M. Logging, confirmed that each cutter received personal on-the-job training. *See, Deposition of Gary Moore* at pp. 10–13. Mr. Grose never reviewed this testimony and in fact, never reviewed anything about Mr. Coleman’s training.

Rather than a comprehensive evaluation of the underlying facts, Plaintiffs’ expert founded a conclusion that Mr. Coleman was not adequately trained merely because he walked under the hanging tree and OSHA issued a citation. As a result, Mr. Grose’s testimony and report offer no indication of Mr. Coleman’s actual training and certainly offer no insight into the subjective realization of Appellees<sup>11</sup>.

**I. Appellants’ lack of diligence was the cause of any insufficiencies in their discovery**

Appellants’ final argument focuses on an alleged inability to conduct enough discovery. Appellants claim that they were denied the opportunity to depose the only eyewitness to the accident, Kelcey Nichols. In their brief, Appellants state, “Mr. Nicholas [sic] was not located until the end of July, 2006, shortly before the dispositive motion deadline.” *See Appellant’s Brief* at 17, footnote 9. However, the record clearly indicates that Appellants’ failure to depose

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<sup>10</sup> Plaintiffs’ repeated insistence in the importance of Mr. Robinson’s agreement that to send an untrained person to perform work in the logging industry **would be** an unsafe working condition is simply misleading. *Brief of Appellant* at pp. 7, 13, 14. Mr. Robinson gave this statement in response to mere a hypothetical and Plaintiffs’ use of his answer is taken out of context. The exact question posed to Mr. Robinson is as follows “You agree that it **would be** an unsafe working condition to send a man in to do a logging job without training him, don’t you?” Mr. Robinson agreed; however, it is evident from his testimony in the same deposition that he believed that Mr. Coleman was trained.

<sup>11</sup> Mr. Grose’s lack of investigation and independent review of facts also apply to his opinions concerning supervision. *See* Section B. of Defendant R.M. Logging’s Motion for Summary Judgment. Further, Plaintiffs’ mention of lack of supervision as a possible unsafe condition is misplaced, as there were no OSHA citations issued against defendants relating to supervision nor have Plaintiffs ever cited a statute, rule, or regulation regarding supervision.

Mr. Nichols was due to their own lack of diligence. Appellants' initially filed this action in June of 2005, yet never purported, neither to the Circuit Court nor to defense counsel, to be unable to proceed to trial without Mr. Nichols' deposition until the eve of trial and after the submission of Defendants' Motions for Summary Judgment. Appellants request that this Court now reverse and assign as error the Circuit Court's ruling, is misguided.

R.M. Logging had ceased doing business and Mr. Nichols no longer had any connection with either R.M. Logging or Mr. Robinson. Appellants have evidenced no attempts of their own to contact or find this non-party witness. This Defense counsel was a late addition to this case and first became involved in April, 2006. *See Order granting Substitution of Counsel entered April 4, 2006.* Unlike Appellants, who had remained idle for over nine months, this Defense counsel employed the use of a private investigator to find Mr. Nichols. Appellants were immediately notified that Mr. Nichols had finally been located and Defendants made several attempts to arrange for his deposition. *See Affidavit of David Joe Bolyard attached to Defendants reply to the Court dated September 6, 2006.*

Appellants assert that Mr. Nichols' deposition is vital to their case, yet offer no position as to what information or potential evidence they hope to obtain. Appellants' case is one of deliberate intent, and the insufficiencies leading to the grant of summary judgment involve the subjective realization of Defendants. Nowhere in the Appellants' Brief is it mentioned how the testimony of Mr. Nichols can or might result in a different outcome.

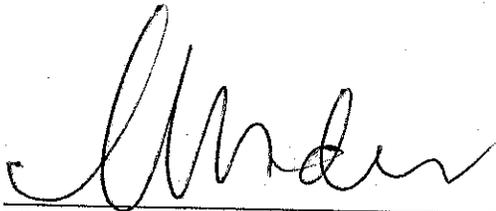
The trial court properly considered Plaintiffs' Motion to Continue of August 24, 2006, and chose not to inappropriately shift Plaintiffs' burden to produce evidence in support of their claims to Defendants. Appellants had over a year to locate Mr. Nichols, including nine months

before this counsel was even involved. Appellants cannot simply remain dormant in their attempts to obtain and develop evidence and then assert the resulting lack of discovery as error.

## V. CONCLUSION

There is no evidence in the present litigation to support Appellants' claim that the decedent was injured as a result of deliberate intention of Appellees, John Robinson and R.M. Logging. In fact, the only evidence that Appellants have been able to produce consists of the OSHA citations given to Appellees after the accident occurred, and the testimony of an expert who clearly has no experience or expertise in the logging industry. This evidence cannot be held to be sufficient to support a deliberate intent action against an employer because it does not show a subjective realization of an unsafe working condition. For the foregoing reasons stated in this Response, R.M. Logging and John Robinson respectfully ask this Court to affirm the holding of the Circuit Court granting summary judgment to Defendants.

**R.M. Logging, Inc. and John Robinson**  
*By Counsel*



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CLARENCE T. COLEMAN ESTATE  
by Co-Administrators, CLARENCE COLEMAN  
and HELEN M. ADKINS

Plaintiffs,

Civil Action No. 05-C-182(V)

v.

Appeal No. 33452

R. M. LOGGING, INC.,  
a West Virginia Corporation, and  
CLONCH INDUSTRIES, INC.,  
a West Virginia Corporation, and  
JOHN ROBINSON, individually

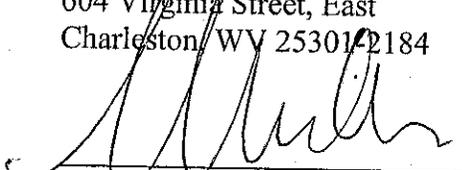
Defendants.

CERTIFICATE OF SERVICE

I, Mary H. Sanders, Counsel for Defendants, do hereby certify that I have served a copy of the foregoing *Appellees' Response Brief* upon the following counsel of record, this the 9<sup>th</sup> day of August, 2007, via hand delivery, addressed as follows:

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