

BEFORE THE SUPREME COURT OF APPEALS

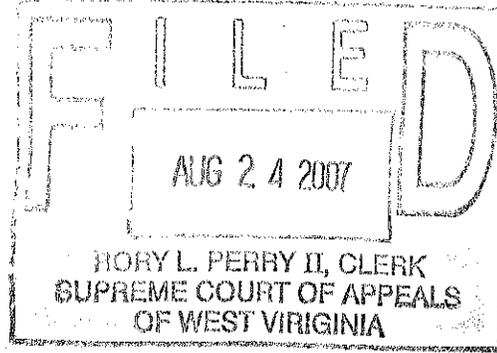
OF WEST VIRGINIA

No. 33452

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

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**APPELLANT'S REPLY BRIEF**

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**INTRODUCTION**

On December 2, 2003, twenty-four year old Clarence T. Coleman, or "Amos" lost his life. He left behind his one and a half year old daughter, Summer Coleman, among other family including his parents, the co-administrators. Appellees have set forth in their memorandum how they interpret the facts surrounding Amos' untimely death. Not surprisingly, their recitation is in the light most favorable to lack of culpability and ultimately lack of financial accountability. Although Appellees would be free to argue to a jury their interpretation of the facts, the error here lies in the fact that the lower court adopted this view and granted Appellees summary

judgment, while wholly discounting all evidence proffered by Appellant.

Appellees' arguments remain a far cry from demonstrating the absence of disputed material facts. Rather, they have interpreted all facts in their favor in an effort to justify the lower court's grant of summary judgment. Appellees' arguments rely on disputed facts which the lower court viewed in the light most favorable to them. While Appellees' self-serving desire to escape liability by setting forth facts in a light most favorable to them is understandable, it is simply inappropriate given the standard in granting a motion for summary judgment.

### **APPELLEES APPLY THE WRONG LEGAL STANDARD**

Appellees have set forth a false standard for reviewing an award of summary judgment in deliberate intent cases. They claim that "[o]n appeal, Deliberate Intent actions are subject to increased scrutiny at summary judgment." Appellees' brief at p. 5. Whatever basis in law Appellees claim supports this position is unknown as neither the case cited, *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 511 S.E. 2d 117, 120 (1998), nor the statute, W. Va. Code §23-4-2(d)(2)(iii)(B), provides any support whatsoever for this assertion. Moreover, Appellants have been unable to locate any authority which would suggest that a deliberate intent cause of action is subject to increased scrutiny by this Court. In fact, this Court has already noted that deliberate intention causes of action have no higher standard of proof. *See, Mayles v. Shoney's, Inc.*, 185 W. Va. 88, 97, 405 S.E. 2d 15, 24 (1990). Thus, in reviewing the lower court's order granting summary judgment, this Court applies a *de novo* standard. Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E. 2d 755 (1994).

**THE LOWER COURT ERRED IN RESOLVING FACTUAL  
DISPUTES IN FAVOR OF APPELLEES**

The lower court in its Order, and Appellees in their brief, have the inferences raised by the facts, as well as the standard of review completely wrong. Rather than construe all facts in favor of the non-moving party, the lower court resolved all factual disputes in a light most favorable to Appellees. The improper resolution of disputed facts likewise forms the basis for Appellees' arguments.

On December 2, 2003 Amos had cut at least two trees which, instead of falling, had become lodged in neighboring trees. Under OSHA regulations, Amos should have been trained to stop cutting and cease doing work in the area around the lodged tree when the first one became lodged. However, Appellees never provided this training, and Amos was not trained to recognize the risks associated with continuing work in the area. As a result he proceeded to cut the second tree, which also became lodged in neighboring trees. Unaware of the OSHA standards, he continued work in the area around these two danger trees. One of the trees fell and struck him in the head, causing mortal injuries. The only eyewitness to this incident was not able to be deposed during discovery.<sup>1</sup>

Throughout the lower court's order, factual issues are repeatedly resolved in favor of Appellees. Appellees likewise take liberties with the facts of this case in order to spin the evidence in a light most favorable to them. For instance, the lower court stated in its order, and Appellees claim throughout their brief that Amos was merely "standing directly beneath a large

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<sup>1</sup> As noted by Appellant in their earlier filed brief, a motion was made to continue the trial date to afford an opportunity to take this individual's deposition as he had only recently been located. However, the lower court rejected this request and granted summary judgment to Appellees.

suspended tree.” Appellees’ brief at p. 9. However, the evidence clearly establishes that he was “work[ing] under and around” the tree. OSHA report at p. 6. Appellees gloss over this distinction. Simply stated, the lower court impermissibly resolved this disputed fact in Appellees’ favor in summary fashion, without *any* support from the record.

Following this terrible incident, OSHA conducted an investigation of the work site. Based on its investigation, it issued a detailed report which clearly and unambiguously found that the workers at the R.M. Logging site were not trained to recognize the risks associated with their work. R.M. Logging did not appeal this decision. Rather, it paid the fine, in effect admitting its guilt. Appellants’ expert concurred with the OSHA findings and found that Appellees’ training was woefully inadequate. In fact, OSHA gave Appellees eleven (11) citations, six (6) of which were labeled as “serious.”

Despite all this evidence, indeed, despite Appellee’s implicit admission of guilt, the lower court granted summary judgment finding that training was unnecessary. OSHA regulations specifically require work to stop in areas around lodged trees. 29 CFR 1910.266(h)(1)(vi). They further require employers to train employees to recognize the hazards and risks associated with the work tasks. 29 CFR 1910.266(i)(3)(iii). Had Amos been trained as required, he would not have been exposed to these hazardous conditions. Appellees ignored their duties under these regulations, and the lower court disregarded all of this evidence by finding that training was not necessary to prevent this incident.

Appellees have responded in their brief that “[i]n 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.” Appellees’ brief

at p. 9. This statement alone illustrates the liberties Appellees have taken with the facts of this case. As discussed, there is no proof that Amos was just standing idly under the tree when it fell. Moreover, Appellees claim that training in this regard is not necessary *as a matter of law*. Whether an untrained individual performing timber cutting on an active job site is able to recognize and avoid hazardous conditions and appreciate the gravity of a particular situation is a factual issue, not a legal one, especially given the extensive evidence presented demonstrating Amos's lack of training. Resolution of the matter in conclusory fashion is completely contrary to the standard in granting summary judgment.<sup>2</sup>

Appellees make a tortured argument in an attempt to distinguish the acts in issue from those required by the OSHA standards. Namely, they seem to assert that since a "danger" tree could encompass more than merely a lodged tree, it is unnecessary to train employees specifically as to safe working practices around trees such as the one that caused Amos's death. *Id.* Again, this argument is in direct contravention of the OSHA regulations. OSHA standards specifically state:

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. If the danger tree is not felled or removed, it shall be marked and

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<sup>2</sup> Appellees have devoted a substantial portion of their brief criticizing Appellants for pointing out that evidence favorable to Appellants was disregarded. They claim that since the lower court mentioned some of the evidence in the Order, that *ipso facto* the lower court viewed it in a light most favorable to Appellants. Appellants respectfully asserts that a mere recitation of the summary judgment standard along with the evidence presented does not mean that the lower court reviewed the evidence consistent with the summary judgment standard. Lip service to evidence without proper consideration does not satisfy a lower court's duties at the summary judgment stage. Simply because something was mentioned, does not mean that it was considered in the light most favorable to the non-moving party, as Appellees assert.

no work shall be conducted within two tree lengths of the danger tree unless the employer demonstrates that a shorter distance will not create a hazard for an employee.

29 C.F.R. 1910.266(h)(vi). OSHA specifically recognizes this hazard, and further recognizes the necessity for employers to train employees to understand, appreciate and prevent these hazards.

. . . At a minimum, training shall consist of the following elements: . . . (iii) *Recognition of safety and health hazards associated with the employee's specific work tasks, including the measures and work practices to prevent or control these hazards.*

29 C.F.R. 1910.266(i)(3)(iii)(emphasis added). The very circumstances recognized by OSHA as creating a hazardous situation, and thus requiring specific safety training, are those that resulted in decedent's untimely death. For Appellees to now argue that training is unnecessary as a matter of law flies in the face of these standards.

A lodged tree is a "danger tree." OSHA standards require training to recognize and safely deal with dangerous situations caused by these hazardous trees. Despite these facts, Appellees argue that a legal conclusion finding it unnecessary to train employees to stop work near lodged trees is consistent with the regulations. *Id.* This argument lacks any semblance of logic, and essentially allows Appellees to arbitrarily pick and choose what training it will provide under the OSHA standards.

Appellees' brief spins the evidence in their favor not only as to these issues, but also in their claim that Amos was properly trained. However, in the light most favorable to Appellants, these assertions are completely contradicted. OSHA sets forth regulations requiring employees to be trained to recognize the specific danger present in this case. Both OSHA and Appellants' expert found that Appellees failed to provide this necessary training. Obviously, this is a jury

issue.

**APPELLANTS HAVE DEMONSTRATED APPELLEES' SUBJECTIVE  
REALIZATION OF THE UNSAFE WORKING CONDITION**

***1. Ryan v. Clonch Industries, Inc. Controls This Case***

Next, Appellees assert there is insufficient evidence of a subjective realization of the unsafe working condition. In *Ryan v. Clonch Industries, Inc.*, 219 W. Va. 664, 639 S.E. 2d 756 (2006) this Court discussed the subjective realization requirement of the deliberate intention statute in cases such as this. Appellees' effort to distinguish *Ryan* is one of semantics rather than substance. They assert that the appellees in *Ryan* violated a provision which required them to conduct hazard assessments. As this case involves a complete lack of training, Appellees argue that *Ryan* does not apply. This "distinction" is illusory.

Appellees argue lack of training does not equate with lack of hazard evaluations because hazard evaluations speak directly to employer knowledge while training does not. This is ridiculous; failing to provide mandatory training before sending an employee to do hazardous work is no less culpable than failing to do a hazard evaluation, and both involve employer knowledge. Through proper training, employers are able to inform employees as to the specific hazards of the job, as well as learn how a particular employee will conduct themselves on the job. As admitted by Appellee Robinson, allowing an untrained employee to work as a logger is an unsafe working condition. Robinson Depo. at p. 66. By his own admissions, Appellee Robinson was aware of the specific unsafe condition created by sending an untrained logger in to perform cuts. Appellees argue that *Ryan* is distinguishable since in that case the appellees admitted their failure to perform hazard evaluations. There is no distinction to be made; here Appellees admit that sending untrained workers to cut is dangerous.

If, as here, an employee is not trained as mandated by OSHA standards, the employer is exposing that employee to mortal harm. In *Ryan*, the employer failed to conduct hazard evaluations, despite regulations requiring such an assessment. As a result, it consciously disregarded dangerous conditions which existed at the job site. This Court found that deliberate indifference to discovery of such hazards could not be used to defeat the subject realization requirement of the deliberate intent statute. Appellees cannot consciously turn a blind eye to the multiple dangers presented by deliberately sending untrained employees to work in hazardous situations.

**2. *Appellants have Demonstrated through Direct and Circumstantial Evidence Appellees' Subjective Knowledge of the Unsafe Working Condition***

Even assuming that this matter is not controlled by *Ryan*, there is still sufficient evidence to present to a jury as to Appellees' subjective realization of the unsafe working conditions. Appellees argue they did not possess a subjective realization of the risks which caused Amos's death, despite the fact that OSHA cited them six (6) separate times for serious violations; meaning that the employer knew or should have known of the unsafe working condition. 29 U.S.C. §666(k). Their entire argument in this regard rests on the assertion that the definition of a serious violation encompasses violations the employer knew or should have known existed at the job site. Appellees' brief at p. 10. They claim that "it is likely for an employer to be issued a 'serious' violation even in the event he did not know of the violation." *Id.* Given the evidence of record however, whether or not Appellees knew of the violation is a question of fact for a jury, not one to be disposed of through summary judgment.

In Syllabus Point 2 of *Nutter v. Owens Illinois, Inc.* 209 W.Va. 608, 550 S.E.2d 398 (2001), this Court made it abundantly clear that under W.Va.Code §23-4-2(c)(2)(ii), an

employer's "subjective realization and appreciation" of an unsafe working condition and "intentional exposure" of its employee to that condition are ordinarily factual issues predicated on circumstantial evidence:

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.

In *Sias v. W-P Coal Co.*, 185 W. Va 569, 575, 408 S.E.2d 321, 327 (1991), this Court noted:

(t)he fact finder ... reasonably may infer the intentional exposure if the employer acted with the required specific knowledge ("subjective realization" and appreciation of a specific unsafe working condition violative of a specific safety standard) and intentionally exposed the employee to the specific unsafe working condition. *Handley v. Union Carbide Corp.*, 620 F. Supp. 428, 439 (S.D. W.Va. 1985), (Haden, C.J.) *fd*, 804 F.2d 265 (4th Cir. 1986) (Sprouse, J., writing for three-judge panel).

Moreover, failure of an employer to provide the safety training required by OSHA has been found sufficient to sustain a claim under the deliberate intent statute. For example, in *Arnazzi v. Quad/Graphics, Inc.*, 218 W.Va. 36, 621 S.E.2d 705 (2005), this Court reversed a summary judgment order granted in a case where the employer had failed to provide safety training to a forklift operator that was required by OSHA regulations. Similarly, in the present case, OSHA cited Appellees for failing to provide adequate employee training designed to teach these employees to recognize and avoid the specific safety and health hazards associated with the logging industry.

As demonstrated by the foregoing facts and legal precedent, coupled with the expert

testimony regarding the unsafe working condition and the very specific OSHA regulations and accepted safety standards violated by Appellees, it is abundantly clear Appellant has established subjective realization of the unsafe working condition, either directly or circumstantially.

**3. *Appellees' Assertions that it Provided Training are Contrary to the Evidence Presented, and Ultimately Present a Jury Question***

The only evidence Appellees can cite in support of their position that Amos was properly trained is the testimony of Appellee Robinson who testified as to general training topics, and his *belief* that Amos had previous experience and training as a timber cutter. Appellees' brief at p. 13, 15. Moreover, they argue that Appellees did not believe their training to be inadequate, and that they had no knowledge of the workers engaging in any other unsafe work practices. *Id.* at 15. Given that OSHA issued eleven (11) citations, six (6) of them serious following this accident, Appellees' struggle to distinguish themselves from the "ill-fated ostrich" this Court recognized in *Ryan v. Clonch Industries*, 219 W. Va. 664, 639 S.E. 2d 756 (2006) is unconvincing. How an employer can be operating under so many dangerous conditions at one time and still argue that it was blissfully unaware of the hazards presented is unbelievable.

Appellees Robinson's testimony is in direct conflict with the OSHA standards and expert testimony finding that Amos was not trained properly. In short, Appellees' only evidence of training comes from the mouth of Appellee Robinson himself. On the other side of the scale is the OSHA findings, and Appellant's expert testimony. Appellees' evidence does not justify summary judgment.

**4. *Appellant has Presented Prima Facie Evidence of Appellees' Subjective Realization***

Appellees claim that the evidence is insufficient as the "serious" violations issued by OSHA merely establish that the employer knew or should have known of the unsafe working

condition. Appellees seek to hold Appellants to a much higher standard of proof than that which is necessary to survive summary judgment. Namely, they argue that Appellants “must also offer a showing that Defendants *unquestionably* knew of this alleged unsafe working condition.” Appellees’ brief at p. 18 (emphasis added). There is absolutely no authority which would support such a proposition, and the authority to the contrary is legion, to say the least. Rather, Appellants must only make a *prima facie* showing. *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 9, 511 S.E. 2d 117 (W. Va. 1998).

Moreover, *Ryan* disposes of this argument through its recognition that an employer cannot merely turn a blind eye to hazards presented at the work place in order to prevent having knowledge of a specific unsafe work place. As noted, OSHA found training in the very circumstance which resulted in Amos’s death to be inadequate, a finding bolstered by Appellant’s expert. Given the evidence presented, whether or not Appellees had actual knowledge of the specific unsafe working condition is a question of fact for a jury. Appellants have made the required *prima facie* showing.

**APPELLANTS’ EXPERT IS MORE THAN QUALIFIED TO TESTIFY, AND ANY ATTACK ON HIS QUALIFICATIONS IN THIS FORUM IS INAPPROPRIATE**

Homer S. Grose is the safety expert retained by Appellants to provide opinions in support of the “deliberate intent” claim against Appellees R.M. Logging, Inc., and John Robinson. Mr. Grose runs a company called Health & Safety Services and provides expert testimony on a regular basis involving work place safety and is certified by OSHA to train others on safety issues. For approximately 40 years, Mr. Grose has worked in safety around logging and timbering operations and has received specific training on regulations governing logging.

Appellees argue that his qualifications are insufficient to allow him to render an expert opinion in this matter. Even assuming that this is the proper forum for Appellees to raise such an argument, under well-established West Virginia law, his testimony is admissible. Initially, West Virginia adheres to the principle that admissibility of expert testimony is to be construed liberally. *Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 404, 524 S.E. 2d 915, 920 (1999). Moreover, West Virginia courts have repeatedly concluded that *Daubert* does not require an expert to have experience in a particular industry to be qualified to testify. (*Watson v. Inco Alloys International, Inc.*, 209 W. Va. 234, 545 S.E. 2d 294 (2001) and *Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E. 2d 915 (1999)).

Appellees argument against the admissibility of Mr. Grose's testimony stems from their belief that he is a safety expert in coal mining, not timbering. This same argument has been raised, and rejected by this Court in *Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E. 2d 915 (1999). In *Jones*, the lower court had ruled that the plaintiff's expert testimony was inadmissible since he was an aeronautic engineer, and the subject matter of the law suit concerned mining operations. In reversing this decision, this Court initially noted that the expert was testifying as to a safety issue, rather than merely a mining issue. *Jones*, 206 W. Va. at 405, 524 S.E. 2d at 921 recognized that an expert does not have to have experience in a particular industry to qualify to testify.

In *Watson*, the plaintiff had sought to introduce the testimony of their engineering expert to testify that the plaintiff's decedent's injuries were caused by or enhanced by certain defects in a forklift he was operating at the time of the accident leading to his death. *Watson*, 209 W. Va. 234, 545 S.E.2d 294 (2001). The trial court had ruled that such testimony was inadmissible. *Id.*

In reversing this ruling, this Court held the trial court had abused its discretion in that Mr. Severt's testimony was not based on medical theories or diagnosis, but rather on his experiences in accident investigation and knowledge he possessed regarding the force a human body is exposed to in a fall such as the one at issue. *Watson*, 209 W. Va. at 246, 545 S.E. 2d at 306. As such, this Court found that Mr. Severt's proposed testimony was within his relevant field of expertise.

Similarly, in *Jones v. Patterson Contracting, Inc.*, 206 W. Va. 399, 524 S.E. 2d 915 (1999) (per curiam), this Court held the circuit court had abused its discretion in directing a verdict against the plaintiff after striking the testimony of his expert witness. In *Jones*, the plaintiff was injured while cleaning a rock crusher chute. As part of the plaintiff's case, he sought damages under a products liability theory. His primary evidence of defective design of the rock crusher chute was introduced at trial through the expert testimony of a licensed professional engineer and a certified safety professional. The circuit court struck his testimony stating that the expert had an "obvious unfamiliarity with the industry." *Id.* at 403, 919. In reversing this decision, this Court noted "[t]he failure of an expert to be able to explain all aspects of a case or a controlling principle in a satisfactory manner is relevant only to the witness's credibility." *Id.* at 405, 921.

Any perceived shortcomings in Mr. Grose's knowledge of the subject matter at issue can be adequately addressed on cross-examination. "Any lack of knowledge . . . goes to the weight of the testimony and not its admissibility. Once [an expert] testifies . . . the [opposing party] can cross-examine [the expert] and reveal any weaknesses in his opinion." *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E. 2d 769, 775 (1999) (quoting *Cargill v. Balloon*

*Works, Inc.*, 185 W. Va. 142, 147, 405 S.E. 2d 642, 647 (1991)). “One knowledgeable about a particular subject need not be precisely informed about all the details of the issues raised in order to offer an opinion but merely possess enough information to assist the jury.” *Watson v. Inco Alloys International, Inc.*, 209 W. Va. at 246, 545 S.E. 2d at 304. Rule 702 “cannot be interpreted to require . . . that the experience, education, or training of the individual be in complete congruence with the nature of the issue sought to be proven.” *Watson v. Inco Alloys Int’l, Inc.*, 545 S.E. 2d 294, 306 (W. Va. 2001) (emphasis in original) (quoting *Cargill v. Balloon Works, Inc.*, 185 W. Va. 142, 146-47, 405 S.E. 2d 642, 646-47 (1991)).

Mr. Grose noted that Amos was not a certified logger and he did not have much experience in the timber industry. Based upon his review of the facts, including the facts found by OSHA in their citations issued against Appellee R.M. Logging, Inc., Mr. Grose concluded that Amos had not been provided the specific training required by OSHA regulations in the logging industry. When asked why Amos walked under the tree that was lodged in another tree, Mr. Grose concluded, based upon the evidence reviewed, that Amos had not been trained as to the hazards presented in that situation.

In this Court, an attack on Mr. Grose’s credentials is not germane to the issues presented. Under the liberal rules governing admissibility of expert testimony, Mr. Grose is entitled to present his expert opinion as to the cause of Amos’s death. The record reveals that Mr. Grose has testified that Amos received inadequate training. As the lower court never ruled on Appellees’ motion to strike, that testimony must be construed in the light most favorable to Appellants. Mr. Grose’s testimony, coupled with the OSHA investigation reveals that Appellants have met their burden of presenting a *prima facie* case. Accordingly, summary

judgment was inappropriate.

**APPELLANTS WERE NOT NEGLIGENT IN TRYING TO LOCATE THE  
ONLY EYEWITNESS**

Finally, Appellants were not derelict in their efforts to locate Mr. Nichols, an ex-employee of Appellee Robinson, and the only eyewitness to this incident. In fact, as Appellees' ex-employee, they represented to Appellants that they were seeking him out in response to Appellants' requests to take his deposition. By letter dated May 24, 2006 for example, counsel for Appellees informed Appellants' counsel that Mr. Nichols still had not been located. As the end of discovery neared, Appellants took the initiative to attempt to locate Mr. Nichols through use of a private investigator. On August 7, 2006 once he was located, Appellants were informed that any deposition would have to be conducted before August 15, 2006, which would have made it impossible to subpoena non-party witnesses and would not have been workable for counsel on such short notice in any event.

Despite Appellees' bald assertions of dilatory conduct, the first time Appellants were even offered the opportunity to depose Mr. Nichols, Appellees only agreed to conduct the deposition within one week. See Affidavit of John Mitchell. Appellees pat themselves on the back for making Mr. Nichols available, yet fail to inform the Court as to the efforts undertaken by Appellant to locate him, or Appellees' unreasonable demand that Mr. Nichols be deposed on an impossibly tight time frame. Appellees' "attempts" to arrange for his deposition were simply a sham. Appellants on the other hand, wrote numerous times requesting to depose Mr. Nichols. Appellees should not be allowed to complain now that Appellants failed to take Mr. Nichols'

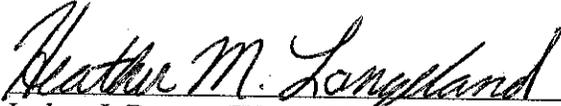
deposition when the inability to do so was caused by Appellees' own inflexible and unreasonable conduct.

### CONCLUSION

For all the foregoing reasons, Appellants respectfully ask the Court to reverse the order of Judge Blake granting Defendants' Motion for Summary Judgment, and to remand this case to the trial court for jury consideration.

**CLARENCE T. COLEMAN ESTATE** by  
Co-Administrators, **CLARENCE**  
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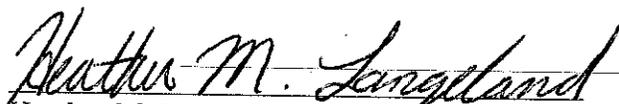
  
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**CERTIFICATE OF SERVICE**

I, Heather M. Langeland, do hereby certify that on the   24th   day of August, 2007, a copy of the foregoing **BRIEF OF APPELLANTS** was served on counsel of record through the United States Postal Service, to the following:

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