

No. 082318

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

**KYLE D. RAMEY and
TRINA RAMEY,**

Appellants, Plaintiffs-Below,

vs.

CONTRACTOR ENTERPRISE, INC.,

Appellee, Defendant-Below

BRIEF OF APPELLANTS

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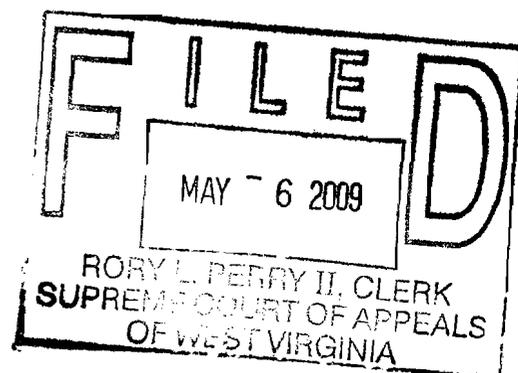


TABLE OF CONTENTS

	<u>Page</u>
I. KIND OF PROCEEDING	1
II. ISSUES ON APPEAL	2
III. RESTATEMENT OF FACTS	2
IV. THE STANDARD OF REVIEW	5
V. ARGUMENT	6
VI. CONCLUSION	13
EXHIBITS	APPENDIX

TABLE OF CASES AND AUTHORITIES

	<u>Page</u>
<u>Hager v. Marshall</u> , 202 W.Va. 577, 505 S.E.2d 640 (1998).....	5
<u>Painter v. Peavy</u> , 192 W.Va. 189, 451 S.E.2d 755 (1994).....	5
<u>Aetna Cas. & Sur. Co. v. Federal Ins. Co. Of New York</u> , 148 W.Va. 160, 133 S.E.2d 770 (1963).....	5,6,11
<u>Alpine Prop. Owners Assn. V. Mountaintop Dev. Co.</u> , 179 W.Va. 12, 365 S.E.2d 57 (1987).....	6
<u>Williams v. Precision Coil, Inc.</u> , 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995).....	6
<u>Ryan v. Clonch Industries, Inc.</u> , 219 W.Va. 664, 639 S. E. 2d 756 (2006).....	10

OTHER AUTHORITIES

West Virginia Code 23-4-2(d)(2)(ii)(A)-(E).....	1,2,3,8,9,11
W.Va. R. Civ. Pro. 56(c).....	5
30 CFR 77.1710 (g).....	3
30 CFR 77.1713.....	9,10

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I. KIND OF PROCEEDING

Petitioners, Kyle D. Ramey and Trina Ramey filed suit against Defendant Contractor Enterprise, Inc. for serious injuries sustained by Kyle D. Ramey while working as drill operator at Defendant's mine in Logan County, West Virginia, alleging violation of the "deliberate intent" statute as set forth in West Virginia Code 23-4-2(d)(2)(ii)(A)-(E).

Defendant Employer filed a Motion for Summary Judgment alleging that Petitioners had not shown sufficient facts to show that the Employer had actual knowledge of the unsafe working

condition, as required by subsection (B) of the statute and that Petitioner had not shown sufficient facts to show that the Employer had intentionally exposed Petitioner Kyle Ramey to the known specific unsafe working condition as required by subsection (D) of the statute.

The trial judge granting Summary Judgment in favor of the Defendant on June 27, 2008.

It is from this order the Petitioners appeal.

II. ISSUES ON APPEAL AND RELIEF REQUESTED

Whether the trial judge erred by failing to construe the evidence in the light most favorable to the Plaintiffs Appellants, the nonmoving parties, in granting Summary Judgment to the Defendants; and whether the trial judge erred in finding no genuine issue of fact exists as to elements (B) and (D) of the Deliberate Intent Statute, West Virginia Code 23-4-2 (D) (ii) (A)-(E). It is respectfully requested the order of the Circuit Court of Logan County of June 27, 2008 be reversed and the Court hold, as a matter of law, that Plaintiffs Appellants are entitled to a trial on all issues before a jury.

III. RESTATEMENT OF THE FACTS

On March 2, 2005 Petitioner Kyle D. Ramey was employed by Defendant Contractor Enterprise, Inc. as a highwall drill operator at Defendant's Snap Creek No. 1 Mine located near Rita, Logan County, West Virginia. Kyle Ramey apparently slipped on the snow covered ground falling approximately 80 feet and sustaining serious injuries including a broken right leg and knee, head trauma, loss of smell, facial deformity, loss of his left eye and loss of cognitive functions. He was 23 years old at the time of the accident and has received combined impairment ratings of 58.1% from West Virginia Workers' Compensation and he has been deemed totally disabled by the Social Security Administration.

An investigation of the accident was conducted by state and federal mine safety agencies (attached as Exhibit A). The accident report included enforcement action against the Employer under CFR 77.1710(g) for failure to equip Mr. Ramey with a safety belt and line. The report also noted that Mr. Ramey had placed his drill too close to the highwall, in contravention of Defendant's Ground Control Plan for the mine.

Petitioner Kyle D. Ramey and his wife, Trina Ramey, filed suit against the Defendant alleging that the Defendant Employer failed to equip Mr. Ramey with proper safety equipment and failed to properly train him to prevent the accident. The Complaint also alleged that the Defendant Employer had intentionally exposed Mr. Ramey to a specific unsafe working condition, working too close to the highwall edge with the knowledge that the unsafe condition presented a high degree of risk and a strong probability of serious injury or death. Trina Ramey also maintained a claim for loss of consortium.

Defendant filed its Motion for Summary Judgment on or about April 1, 2008. Defendant contended it was entitled to Summary Judgment because Petitioners had failed to produce evidence sufficient to establish elements (B) (actual knowledge) and (D) (intentional exposure) of the deliberate intent statute (W.Va. Code 23-4-2(d)(2)(ii)). In support of its motion Defendant submitted Petitioner's Complaint, a copy of the MSHA report, copies of three (3) "Certificates of Training" for Kyle D. Ramey from 2003 and 2004, a copy a "Tool Box Safety Meeting" from 2004 purportedly signed by Kyle Ramey, and portions of Kyle Ramey's deposition. No affidavits or testimony was offered by Defendant with regard to the nature or specific subject matter of the safety meeting or training session, nor did the Defendant Employer submit into evidence its Ground Control Plan or any affidavit or testimony as to what instruction, if any, it had provided to Kyle Ramey as to said

plan.

Petitioners filed their response to the Motion for Summary Judgment and submitted therewith the deposition testimony of Kyle Ramey, the Rule 26 disclosure of opinions held by H.S. Grose, Mine Safety expert, and the affidavit of Mark Kennedy (Exhibit B), who had been identified by Petitioners on their Answers to Interrogatories. Mr. Kennedy worked at the Snap Creek No. 1 Mine at the same time as Petitioner Kyle Ramey, although he quit approximately six (6) weeks prior to Mr. Ramey's accident. Mr. Kennedy swore that he had seen highwall drilling machines placed so close to the highwall edge that the curtains of the machines could be seen from below. He also swore that on his last day of work he complained to his supervisor that the company was working people too close to the highwall edges without any regard to safety. He further told the supervisor someone was going to get hurt or killed. Expert witness Mr. Grose (See Exhibit C) stated that adequate examinations by a certified person were not conducted "as often as necessary" for safety at the drill bench and that adequate examinations would have discovered problems with adherence to the Ground Control Plan. Mr. Grose would further opine that it is the Defendant Employer's responsibility to ensure compliance with the Ground Control Plan and that, based upon the testimony of Kyle Ramey, Mr. Ramey was not properly trained and instructed in the operation of the highwall drill near the highwall. Mr. Grose also noted that during the period of time Defendant Employer operated the Snap Creek No. 1 Mine, lost time injuries at said mine occurred at a rate of three (3) times the national average.

Kyle Ramey's deposition testimony (Exhibit D) set forth that his "training" on this particular drilling machine consisted of coming in early for one (1) hour on three separate days to learn its operation (Kyle Ramey DP p. 24/25). He also testified that the so-called safety meetings allegedly

conducted by Defendant Employer did not involve safety discussions (DP. p. 29) and that he never had anyone tell him not to get that close to the highwall (DP p. 38) while operating his machine. He also testified that he never remembers going through the Ground Control Plan for the strip mine (DP p. 38/39) nor does he recall any instructions or discussions of the general safety plan for the mine (DP p. 39).

In reply to Petitioners' Response, Defendant Employer offered the morning and evening pre-shift Mine Examination Report and Daily and Onshift report for the subject mine indicating that the highwall was "Stable at Present". Defendant Employer offered no affidavits or testimony to rebut the sworn testimony set forth in the deposition of Kyle Ramey or the affidavit of Mark Kennedy. Furthermore, Defendant Employer offered no evidence disputing the citation by MSHA for the failure to provide Kyle Ramey with a safety harness.

IV STANDARD OF REVIEW

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required when the record reveals that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.Va. R. Civ. Pro. 56(c); *see Hager v. Marshall*, 202 W.Va. 577, 505 S.E.2d 640 (1998). In examining a trial court's entry of summary judgment, this Court applies a *de novo* standard of review. *See* Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*").

This Court has repeatedly stated that "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins.*

Co. Of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963). In syllabus point four of *Aetna Casualty*, this Court explained: “If there is no genuine issue as to any material fact summary judgment should be granted but such judgment must be denied if there is a genuine issue as to a material fact.”

In determining whether a genuine issue of material fact exists, this Court construes the facts in the light most favorable to the party against whom summary judgment was granted. *Alpine Prop. Owners Assn. V. Mountaintop Dev. Co.*, 179 W.Va. 12, 365 S.E.2d 57 (1987). Syllabus point six of *Aetna Casualty* also explains: “A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.”

With regard to determination of a summary judgment motion, this Court had stated that “[t]he essence of the inquiry the court must make is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995) (citations omitted).

V ARGUMENT

I. THE TRIAL JUDGE FAILED TO CONSTRUE THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONERS, THE NON-MOVING PARTY, IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANT

In determining whether a genuine issue of fact exists for the purpose of summary judgment, the trial court is obligated to construe the facts in the light most favorable to the non-moving party. Here, Petitioners submitted deposition testimony of Kyle D. Ramey that he was not properly instructed with regard to working close to the highwall edge nor was he instructed as to the Ground

Control Plan of the mine or the general safety plan for the mine. Defendant Employer has offered only vague documentary evidence of some sort of trainings or safety meeting in 2003 or 2004. Defendant Employer failed to offer any evidence by testimony or affidavit to rebut Mr. Ramey's specific testimony.

Petitioners also submitted the sworn affidavit of former co-worker Mark Kennedy. Mr. Kennedy's affidavit sets forth that he has witnessed drilling machines at the subject mine placed so close to the highwall edge that their skirts were visible from below. He also stated that when he left work after being exposed to working near a dangerous highwall with a bulldozer, he told his supervisor that the company was working people too close to the highwall without regard to safety and that someone was going to get hurt or killed. Mr. Kennedy made this concern known to the Employer approximately six (6) weeks prior to Kyle Ramey's accident. Mr. Kennedy further stated that his concern for Kyle's safety were so grave that he went to Kyle's father to get him away from Snap Creek No. 1. Mine. Defendant Employer has submitted no evidence or testimony to rebut or refute Mr. Kennedy's affidavit.

Not only did the trial judge failed to construe this evidence most favorably for Petitioner, the Court went to extraordinary lengths to refute Mr. Kennedy's affidavit even though the Defendant Employer has offered no rebuttal to the affidavit to even create a conflict in the evidence. The trial court also rejected the testimony of Kyle Ramey as to inadequate nature of his "training". Again, rather than construe the conflicting nature of the evidence in favor of the Petitioners, the Court found that he had been "specifically trained" not to park close to the highwall. Furthermore, the trial court reached this conclusion absent any testimony, by deposition or otherwise, that Kyle Ramey had been "specifically trained" as to the operation of a drill near a highwall, as to the ground control plan for

the mine, or as to the general safety plan for the mine.

Properly construed, the evidence presented by the Kennedy affidavit sets forth that, in fact, drilling machines were operated so near the edge of the highwalls at Snap Creek No. 1 that the skirts of the machine were visible from below; that Kennedy warned the Defendant Employer, through his supervisor, that Defendant was working people too close to the highwall and that someone would get hurt or killed; that the so-called safety meetings held by Defendant were inadequate; and that his warning to the Employer was made approximately six weeks prior to the accident.

This evidence alone is sufficient to require the matter be resolved by a jury. The affidavit establishes prior knowledge of the dangerous condition by the Employer and no evidence exists to suggest corrective measures were taken. In fact, at Page 11 of its Memorandum of Law in Support of its Motion for Summary Judgment, Defendants concedes “[i]t is true that Contractors, by and through its supervisors, instructed Kyle Ramey to run the highwall drill that morning . . .”, thus intentionally exposing Kyle Ramey to a specific unsafe condition made aware to the Defendant by Mark Kennedy.

Clearly, the trial judge simply ignored Plaintiffs’ evidence and the inferences fairly drawn therefrom, and improperly granted Summary Judgment.

II. THE TRIAL JUDGE ERRED IN FINDING THAT NO GENUINE ISSUE FACT ON ELEMENTS (B) AND (D) OF THE DELIBERATE INTENT STATUTE, W.VA. CODE 23-4-2 (D)(ii)(A)-(E)

Petitioner must prove five elements under West Virginia 23-4-2(d)(2)(ii), as follows:

- (A) That a specific unsafe working conditions existed in the workplace which present a high degree of risk and a strong probability of serious injury and death;
- (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury and 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, as demonstrated by competent written standards or guidelines which reflect a consensus safety standard in the industry or business, 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, intentionally thereafter exposed an employee to the specific unsafe working condition; and
- (E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working conditions. W.Va. Code 23-4-2(d)(2)(ii).

In granting summary judgment to Defendant, the trial court held that Petitioners had failed to submit sufficient evidence to prove elements (B), (actual knowledge) and (D) (intentional exposure). In so ruling, the trial judge dismisses the unrefuted affidavit of Mark Kennedy that he had witnessed drills placed too close to the highwall and had specifically registered complaints about the practice to his supervisor, thereby placing the Defendant employer on notice of the specific unsafe working condition some six (6) weeks prior to Kyle Ramey's accident.

Likewise, the trial judge ignored the proffered opinions of Petitioners' mine safety expert H.S. Grose as to the Employer's duties with regard to safety. Mr. Grose referenced MSHA regulation 30 CFR 77.1713 which places upon the Employer the mandatory duty to do the following:

- "A. At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person . . . for hazardous conditions and any hazardous conditions noted during such examination shall be reported to the operator and shall be corrected by the operator."
- B. If any hazardous condition noted during an examination . . . creates an imminent danger, the person conducting such examination shall notify the operator and the operator shall withdraw all persons from the area affected. . . until the danger is abated."

Mr. Grose opined that the examinations required by a certified person were not conducted as often as necessary, particularly in light of the snowy conditions existing on March 2, 2005. This opinion is particularly relevant in light of the Kennedy affidavit that placed the employer on notice that drilling machines were being placed too close to the highwall, and that information was provided to employer approximately six (6) weeks prior to Mr. Ramey's accident.

While Plaintiffs-Appellants contend that the factual issues presented by the Kennedy Affidavit and Kyle Ramey's testimony are sufficient to create genuine issues of fact for a jury, Defendant's failure to conduct examinations as often as necessary, as required by 30 CFR 77.1713 would prohibit the Defendant from denying that it possessed a subjective realization of the hazard. *Ryan v. Clonch Industries, Inc.*, 219 W.Va. 664, 639 S.E. 2d 756 (2006). Here, in addition to the specific complaints of an unsafe condition voiced by Mr. Kennedy, the Defendant Employer had a duty to conduct inspections as often as necessary for safety, which it failed to do.

The trial judge rejected this evidence and instead, relied on the "factual showing made by Defendant" which was not "successfully rebutted" by the Plaintiffs (Appellants). As set forth above, this so-called "factual showing" consists of scant documentary evidence and is wholly absent of any testimony to rebut the factual assertions of Kyle Ramey, Mark Kennedy or H.S. Grose.

Viewing the evidence in the light most favorable to Petitioners, a jury could find that Kyle Ramey was not properly trained or provided with adequate instruction or protective equipment at the work site; a jury could also find that Mark Kennedy advised Defendant Employer's supervisor of the unsafe operation of equipment too close to the highwall edges several weeks prior to Mr. Ramey's accident, thus establishing Employer's actual knowledge of the unsafe workplace condition and, by failing to address the situation or conducting adequate inspections to enforce the ground control plan,

Employer intentionally exposed Kyle Ramey to the unsafe condition by ignoring the warning of Mark Kennedy or by failing to conduct inspections as necessary, or both.

Even giving the Defendant the benefit of its evidence, the factual discrepancies and conflicts between documents submitted by the Defendant and testimony offered by Petitioners, create genuine issues of material fact ripe for jury resolution. This is precisely the situation in which summary judgment should not be utilized.

CONCLUSION

A motion for summary judgment must be denied if varying inferences may be drawn from the evidence. *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Here, genuine issues of fact have been raised by the sworn testimony of the Kyle Ramey, the sworn affidavit of Mark Kennedy, and the expert opinions of mine safety expert H.S. Grose. This evidence, construed most favorably to Petitioners, the non-moving parties, establishes sufficient facts for a jury to find that Petitioners have proven each element of the deliberate intent statute, West Virginia Code 23-4-2(c)(2)(ii)(A)-(E). Accordingly, the trial court erred in granting summary judgment to Defendant and the order of June 27, 2008 should be reversed and this case remanded for trial.

KYLE D. RAMEY and TRINA RAMEY,

By Counsel



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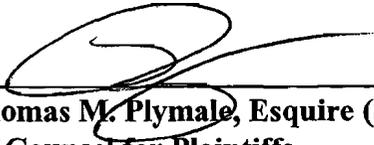
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CERTIFICATE OF SERVICE

I, Thomas M. Plymale, counsel for Plaintiffs, do hereby certify that a true copy of the foregoing Brief of Appellants was served upon the following individuals this 5th day of May, 2009, by placing the same in an envelope, properly addressed with postage fully paid and depositing a true copy thereof in the United States Mail.

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EXHIBITS

ON

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