IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 082318

KYLE D. RAMEY and
TRINA RAMEY,

Plaintiffs and Appellants,

v.

CONTRACTOR ENTERPRISE, INC.,

Defendant and Appellee.

On Appeal from the Circuit Court of Logan County
Civil Action No. 07-C-65

BRIEF OF APPELLEE CONTRACTOR ENTERPRISE, INC.

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

The instant appeal stems from a deliberate intent action filed on March 2, 2007 by the Plaintiffs below and Appellants herein against Contractor Enterprise, Inc., ("Contractor Enterprise"), the Appellee herein. The Circuit Court of Logan County granted summary judgment to Contractor Enterprise by Order entered June 27, 2008 based upon Appellants' failure to make the mandatory factual showing required by *West Virginia Code* § 23-4-2(d)(2)(ii)(B)and (D).

As of the April 1, 2008 discovery cutoff set forth in the Circuit Court's Time Frame Order, Appellants had failed to produce any evidence sufficient to support a finding in the Appellants favor on Parts (B) and (D) of the five-part deliberate intent statute,[1] and Contractor Enterprise submitted a Motion for Summary Judgment. On April 16, 2008, Appellants filed a Response asking the Circuit Court for more time to respond as their expert was recuperating from surgery. Subsequently, the Appellants were granted additional time to fully respond to the Motion for Summary Judgment and filed their Response on May 9, 2008. On May 14, 2008, oral argument was held before the Honorable Judge Roger L. Perry who, after considering all of the evidence presented in the briefs and oral arguments, ultimately ruled that even when viewed in the light most favorable to the Appellants, the Appellants had failed to demonstrate the existence of a genuine issue of material fact on Parts (B) and (D) of the deliberate intent statute. Accordingly, Judge Perry granted Contractor Enterprise's Motion for Summary Judgment.

In reaching his decision, Judge Perry concurrently found that the unsafe working condition which ultimately caused this accident was created by Mr. Ramey himself when he

[1] It should be noted that in the thirteen (13) months between the filing of Complaint and the discovery cutoff, Plaintiffs' took no depositions and issued one set of discovery, received by counsel for Contractor Enterprise on March 31, 2008, the day before the discovery cutoff, and the day before Summary Judgment Motions were due. The Plaintiffs did not file a Motion to Extend Discovery, nor did they file a Rule 56(f) Motion seeking more time to appropriately respond to the Motion for Summary Judgment.

parked the highwall drill less than two (2) feet from the edge of an eighty-five (85) foot highwall cliff and inexplicably exited the drill toward the cliff. This act was done in direct contravention of his training, experience, and common sense and, as is undisputed in the record below, wholly unbeknownst to Contractor Enterprise. Furthermore, Judge Perry found that Contractor Enterprise "could not have made a conscious decision to require him [Mr. Ramey] to work in a situation that it had specifically trained him not to do." *See* Order Granting Summary Judgment, attached hereto as "Exhibit A", pp. [7-8], ¶ 15. Commenting on the case generally, Judge Perry noted that "it is not reasonable to place an absolute burden on employers or regulatory agencies to prevent employees from bringing harm on themselves." *Id.* at p. [7], ¶ 12.

On October 24, 2008, the Appellants filed in this Court a Petition for Writ of Error to appeal the Circuit Court's Summary Judgment Order. This Court granted the Petition on April 8, 2009, and Contractor Enterprise timely files this brief in response to the brief of Appellant.

STATEMENT OF FACTS

A. THE ACCIDENT

On the morning of March 2, 2005, Kyle Ramey, an experienced drill operator, was assigned to operate an Ingersol-Rand DML 50 Highwall Drill ("the drill") on the Stockton bench at Contractor Enterprise's Snap Creek No. 1 surface mine in Rita, West Virginia. After working that morning for approximately two (2) hours, Mr. Ramey inexplicably moved the drill to within twenty-three (23) inches of the highwall's edge, parked with the access ladder facing the highwall and then exited the drill. The ground was covered with nearly four (4) inches of snow, and after exiting, Mr. Ramey slipped and fell over the edge of the highwall into the Coalburg Pit approximately eighty-five (85) feet below.

The Mine Safety & Health Administration ("MSHA") investigated the accident and found that the drill was positioned in an unsafe location by Mr. Ramey during the shift, and was

not located in close proximity to the highwall when the shift started. *See* MSHA Report, attached hereto as Exhibit B. Summarizing Mr. Ramey's movement of the drill that morning, the MSHA investigation report noted that Mr. Ramey had drilled one row of holes and moved the drill to the next section, prior to moving the drill to the unsafe location at the edge of the highwall. *Id.* Notably, MSHA district manager Jesse P. Cole aptly described the cause of the accident as follows:

> The drill operator did not follow normal operating procedures by positioning the drill parallel with an existing highwall. This action exposed the drill operator to a hazard of falling over the highwall. If the drill had been positioned as the ground control plan stated, the drill would have been at least six (6) feet from the highwall.

Id. at 2. As noted by the MSHA report, Mr. Ramey had four (4) years experience as a drill operator at both mining and construction sites including nearly two (2) years experience specifically in mining. *Id.*

Markedly, the record is wholly devoid of any evidence suggesting the following: (1) that Contractor Enterprise had any knowledge that Mr. Ramey would exit the drill close to the edge of the highwall; (2) that Contractor Enterprise was aware that Mr. Ramey had moved the drill into an unsafe location in contravention of the Ground Control Plan;[2] and (3) that Contractor Enterprise was aware that Mr. Ramey, after placing himself in such position, would exit the drill. The circuit court therefore correctly found in favor of Contractor Enterprise on all three issues.

B. EVIDENCE IN THE RECORD

Appellants' Petition and Brief to this Court make numerous unsupported factual assertions and stretches in an effort to create an issue of fact and therefore, a thorough review of

[2] At the time of this accident, Contractor Enterprise had an MSHA approved Ground Control Plan in place which required all equipment, including drills, to be at least four (4) feet from the highwall edge. A Ground Control Plan is a document which is required to be submitted to, and approved by, MSHA prior to the commencement of mining operations which outlines the methods the operator will utilize to mine safely (including a list of approved equipment, approved mining methods, and approved procedures for ensuring safe mining). *See* 30 C.F.R. § 77.1000.

the evidence in the record in necessary. Appellants' allege that Contractor Enterprise exposed Mr. Ramey to three unsafe working conditions by (1) failing to properly train Mr. Ramey, (2) failing provide Mr. Ramey with proper safety equipment, and (3) working Mr. Ramey too close to the highwall edge.

In response to Appellants' allegations, Contractor Enterprise produced the following to support its Motion for Summary Judgment;

1. MSHA Report of Investigation
2. Deposition of Kyle Ramey
3. MSHA Newly Hired Experienced Miner Training Certificate for Kyle Ramey
4. MSHA Drill / Truck Task Training Certificate for Kyle Ramey
5. MSHA Annual Refresher Training Certificate for Kyle Ramey
6. Contractor Enterprise Tool Box Safety Meeting Sign-in Sheet
7. Daily On-Shift Reports for March 2, 2005
8. Pre-shift Mine Examiners Report for March 2, 2005

This evidence confirmed that Mr. Ramey had four (4) years of drilling experience, nearly two (2) years of mining experience and in fact had operated this precise type of drill for Contractor Enterprise on a road construction job in Ohio. Further, Mr. Ramey was task trained twice on the proper operation of the drill. Specific highwall safety training was not only a part of his experienced miner training and annual refresher training courses, but along with the ground control plan, highwall safety was covered in Contractors Enterprise's weekly safety meetings.

This documentary evidence demonstrates, contrary to Appellants' bald, conclusory assertions, that Mr. Ramey was "trained on the specific drill that he was operating," that Contractor Enterprise's Ground Control Plan "required all drill operators to be at least four (4) feet away from the edge of the highwall," that Contractor Enterprise performed that all mandatory highwall examinations and that Contractor Enterprise held mandatory safety meetings covering "highwall safety and the ground control plan." *See* Exhibit A, p. [2], ¶¶ 4, 7-8, 11. Accordingly, the circuit court properly found that Appellants failed to carry their burden to come

forward with more than a mere scintilla of evidence and concluded that the "factual showing made by the Defendant in its supported motion has not been successfully rebutted by the Plaintiff to show the existence of a genuine issue of material fact with respect to the disputed elements of the five part test." *Id.* at 8, ¶ 19.

In response to the documentary evidence submitted to the Circuit Court by Contractor Enterprise, the Appellants produced the following *after* the discovery cutoff in an attempt to salvage their case;

1. Rule 26 Expert Disclosure of Homer Grose
2. Affidavit of Mark Kennedy

Appellants presented this evidence along with Mr. Ramey's testimony in an effort to support the existence of their alleged unsafe working conditions. It should first be noted that due to the severe head injury that he suffered, Mr. Ramey has no recollection of the facts and circumstances surrounding his accident and no recollection of why he placed his drill so close to the edge.[3] However, even though his memory of his pre-accident training was vague and limited at best, Mr. Ramey acknowledged receiving training on the drill.[4]

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[3] The testimony regarding the accident is as follows:

> Q: So I understand it, at least in December of '05, you didn't have any recollection of this incident from two days before – until you were almost out of the hospital; is that correct?
> A. Yeah.
> Q. Is that the same way you are today?
> A. Yeah. I don't remember nothing about that day.

See Portions of Kyle Ramey Deposition, attached hereto as "Exhibit D", pp. 7-8.

[4] As to the training on the drill that Mr. Ramey recalls, the testimony is as follows;

> Q: What did they do with the drill to sort of show you how to run it?
> A: They let me – because I worked night shift. So I'd come in like an hour early for three days, and Mike Pinson would show me. He let me ride an hour with him each day for three days.
> ...

Despite Mr. Ramey's unqualified admission that he had no recollection of the day of the accident and the training documents produced by Contractor Enterprise demonstrating Mr. Ramey's significant experience with the specific drill at issue and highwall safety, Appellants' mining expert espoused the following opinions; (1) that Mr. Ramey was not properly trained and instructed on the safe operation of the drill; (2) that adequate worksite inspections were not performed;[5] (3) that a safety belt and line were not provided to Mr. Ramey;[6] and (4) that Contractor Enterprise failed to follow the Ground Control Plan. *See* Homer Grose Report, attached hereto as "Exhibit C."

As the Circuit Court recognized, the expert disclosure is inherently unreliable and simply wrong as it is based solely upon Mr. Ramey's absent memory. Mr. Grose's disclosure makes no mention of the evidence produced by Contractor Enterprise, no mention of the records of training for Mr. Ramey, and no mention of the MSHA investigation report which specifically finds that training had been conducted in accordance with 30 C.F.R. Part 48. *See* Exhibit C. Further, Mr.

> Q: Let's go back. When Mike Pinson came in with you and let you run the drill early three days, was that on the road-crew job [a different job] or was that on the surface mine [site of this accident]?
> A: That was on the surface mine.
> Q: Okay. Tell me what types of things that he went over with you as far as those three days you came in early to run the drill.
> A: Let's see. As far as all I can remember, just you know, showed me what levers done what, and that was all.

See Exhibit D, pp. 24-25. As to the highwall safety, the testimony is as follows;

> Q: Do you have any recollection as to what instructions you got as to how to act and what to do when you are near the highwall, either from the top or the bottom?
> A: No. I don't know.
> Q. You just don't recall that?
> A: No.

Id. at 33.

[5] 30 C.F.R. § 77.1713(a)

[6] 30 C.F.R. § 77.1710(g)

Grose's opinion utterly ignores the evidence that highwall safety was covered in the weekly safety meetings and ignores the pre-shift records showing that the very inspections he opines were not performed, were in fact performed in compliance with 30 C.F.R. § 77.1713 (a). Despite the fact that Mr. Grose's opinions were unsupported and ignorant of the evidence in the record, the Circuit Court considered the expert disclosure prior to issuing the Order underlying this appeal.

Lastly, Appellants produced the Affidavit of Mark Kennedy. *See* Affidavit, attached hereto as "Exhibit E." Notably, Mr. Kennedy stopped working for Contractor Enterprise six (6) weeks before Mr. Ramey's fall and **personally crossed out** the pertinent section of the pre-prepared Affidavit:

> That he operated a drill for Contractor Enterprise at Snap Creek No. 1 Mine for a short period of time. He complained to his supervisor about the safety practices of working too close to the highwall edge and he was placed back on a rock truck.

Id. The remained of the Affidavit, i.e. the portion to which the Affiant actually testified, plainly fails to demonstrate the existence of a genuine issue of material fact on Parts (B) and (D) of the five-part test. Both the Affidavit, although signed stricken of the sole potential scintilla of testimony, and produced after the motion in which it was first referenced, and the expert disclosure of Homer Grose, although unsupported and filed after the discovery cut-off, were considered by the Circuit Court prior to its granting summary judgment to Contractor Enterprise.

Based on the foregoing, the only reliable evidence available on review in this matter is the evidence developed by Contractor Enterprise and provided to the Circuit Court, as the Appellants' case relies entirely on Mr. Ramey's uncorroborated, admittedly absent of actual recognition, and self-serving testimony and their expert's unsupported, and factually inaccurate, opinions. Appellants' reliance on and the Circuit Court's consideration and rejection of this evidence are illustrative of the flaws in this case.

Even when viewing the above evidence in the light most favorable to the Appellants, Appellants' contention that Contractor Enterprise had actual knowledge that Mr. Ramey would exit his drill after placing the ladder within two (2) feet of the snow-covered edge of the highwall and no evidence that Contractor Enterprise intentionally exposed Mr. Ramey to a known unsafe working condition is bare of any factual support. Therefore, the Circuit Court's decision is properly based on the facts in the record and the law, as Appellants have not established the existence of a material issue of fact and cannot present a prima facie case of deliberate intent.

APPLICABLE LAW AND STANDARD OF REVIEW

C. APPLICABLE LAW

To establish a deliberate intent action under *West Virginia Code* § 23-4-2(d)(2)(ii), the Appellants must prove:

> (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, 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 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, as demonstrated by competent evidence of 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 condition.

W. Va. Code § 23-4-2(d)(2)(ii) (A)-(E).

B. STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo.* Syl. Pt. 1, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994).

ARGUMENT OF LAW

The West Virginia Legislature has expressly stated that in crafting the deliberate intent statute it was its "intent to promote prompt judicial resolution of the question of whether a suit prosecuted under [§ 23-4-2] is or is not prohibited by the immunity granted [under the West Virginia Workers' Compensation statute]." W. Va. Code § 23-4-2(d)(2)(iii)(B) emphasis added). That intent is evident by the statutory language indicating "the court shall dismiss the action upon motion of 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 . . ." *Id.* (emphasis added); *see also Sedgmer v. McElroy Coal Co.*, 220 W. Va. 66 (2006) (noting that "to underscore the exceptional nature of 'deliberate intention' claims, the Legislature also expressly encouraged the summary disposition of such claims on motion absent an employee's ability to meet the requisite showing of proof on each and every statutory requirement for maintenance of a 'deliberate intention' action.")

Appellants' assignments of error in the instant Appeal are a vain attempt to resuscitate a claim in which the Circuit Court properly applied the facts to the heightened standard of a deliberate intent claim. Even when viewed in the light most favorable to the Appellants, the

evidence confirms that Contractor Enterprise did not have actual knowledge of any unsafe working condition and likewise did not intentionally expose Mr. Ramey to a known unsafe working condition. For these reasons, Contractor Enterprise asks this Court to uphold the summary judgment ruling of the Circuit Court of Logan County.

E. THE CIRCUIT COURT PROPERLY EVALUATED THE FACTS IN THE RECORD, AS THE EVIDENCE INDICATES THAT CONTRACTOR ENTERPRISE PERFORMED THE REQUIRED WORKPLACE INSPECTIONS AND PROPERLY TRAINED MR. RAMEY ON THE HIGHWALL DRILL AND ON HIGHWALL SAFETY, INCLUDING THE GROUND CONTROL PLAN.

Appellants' initial assignment of error is that Judge Perry failed to construe the evidence in the light most favorable to the Appellants below. However, a review of the evidence submitted confirms that the Judge Perry did not err and consequently, this Court should uphold the decision of the Circuit Court of Logan County.

i. The Circuit Court properly found that Kyle Ramey was trained on the drill and the ground control plan.

Appellants' position that Mr. Ramey was not properly trained on the highwall drill or on the ground control plan, and their opinion that the Circuit Court erred for holding otherwise, are incorrect, and moreover, untenable positions. As this Court is well aware, to satisfy Parts (B) and (D) of the five-part deliberate intent test, Appellants must prove that Contractor Enterprise had **actual knowledge** of the specific unsafe working condition(s) alleged and thereafter intentionally expose Mr. Ramey to the known unsafe condition(s). W. Va. Code § 23-4-2 (d)(2)(ii)(B)-(D). Appellants' failure to satisfy <u>even one</u> of the five elements required that the case be dismissed at the summary judgment stage. W. Va. Code § 23-4-2 (d)(2)(iii)(B).

In support of the improper training assertion, Appellants state:

> 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[sic] 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.

See Appellants' Brief, pp. 6-7. Appellants' assertion is implausible and ignorant of record created in this case. *Id.* at 7. Not only does this assertion completely ignore the training records produced by Contractor Enterprise, but it purposefully skews Mr. Ramey's testimony which nowhere states that he was improperly trained on the drill or on highwall safety. *See supra* notes 3, 4. [7]

Specifically, Mr. Ramey acknowledged that he received training on the drill and testified that he had four (4) years experience operating this drill from previously working for Contractor Enterprise on another job. Similarly, Appellants' assertion that Mr. Ramey was not trained on the ground control plan and on working close to the highwall edge is equally untenable as it is based solely on Mr. Ramey's testimony that he did not recall this type of training. *See* Appellants' Brief, pp. 6-7. Having no recollection of training is vastly different actually having no training – especially in light of the task specific training records produced by Contractor Enterprise.

On this topic, the Circuit Court properly and correctly noted that the Appellants failed to produce evidence that Mr. Ramey was improperly trained. Specifically, after a review of the evidence in the record, the Circuit Court found:

> The facts show that Plaintiff was in fact trained on the specific drill that he was operating. Training documents have been supplied to the court to sustain that fact and further, Plaintiff admits that he was trained for at least three hours on the proper operation of said drill.

See Exhibit A, p. [2], ¶ 4.

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[7] Appellants also cursorily mention that Contractor Enterprise failed to provide Mr. Ramey with a safety harness and this created an unsafe working condition. First, there is no law requiring safety harnesses for highwall drill operators as drill operators are not supposed to be out of their drills in and around the highwall edge. Second, had the plaintiff followed Contractor Enterprise's ground control plan in place at the time of the accident, he would have been four (4) feet away from the edge and not in need of a harness. *See* 30 C.F.R. § 77.1710(g).

Viewing this evidence in the light most favorable to the Appellants brings about the conclusion that Mr. Ramey simply does not recall the specifics of the training that he received. However, this position is easily clarified by the evidence in the record indicating that (1) he had operated this drill for four (4) years, (2) he had worked for Contractor Enterprise on this drill on two (2) separate jobs, (3) he had been task trained on this drill twice, (3) he had safely operated this specific drill up to the date of the accident, and (4) he had the training statutorily required by MSHA.[8] Based upon this evidence, the circuit court correctly concluded that Contractor Enterprise had conclusively substantiated its position that Mr. Ramey was in fact trained and that Appellants failed to produce evidence to the contrary.

ii. The Circuit Court properly found that Contractor Enterprise performed all mandatory highwall inspections.

Like the training argument above, the Appellants' assertion Contractor Enterprise exposed Mr. Ramey was exposed to dangerous highwall conditions ignores the evidence in the record. On this issue, Appellants state that their expert "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." *See* Appellants' Brief, p. 10. Interestingly, at the time this opinion was authored, Appellants' expert was completely unaware that these inspections had in fact been performed and documented.

An expert, whose opinion is ignorant of the documentary evidence when drafted, is similar to the employer in *Ryan v. Clonch* (discussed at length below); both have their heads in the sand like the ill-fated ostrich and are guaranteed to remain oblivious to the truth. After finding that Contractor Enterprise had in fact performed the necessary inspections, Judge Perry,

[8] *Compare Arnazzi v. Quad/Graphics, Inc.*, 218 W.Va. 36, 621 S.E.2d 705 (2005) (noting that the unsafe working condition which the plaintiff was exposed to was the lack of legally-required training. Viewing the evidence in that case, this Court noted that, "[t]he Appellant had no experience operating a forklift, no prior training in forklift operation, and was not certified as a forklift operator. Appellant was put to work operating a forklift on his first day of work." *Id.* at 38.)

commented on the disconnect between the actual evidence and Appellants' expert opinion, "[t]he Plaintiff performed no discovery in this case written or through deposition, to ascertain any factual information for which their expert to rely on." *See* Exhibit A, p. [3], ¶15. Viewing this evidence in the light most favorable to the Appellant leads to the conclusion that Appellants' expert issued a disclosure without the benefit of the documentary evidence in the record. Based on the foregoing, and on the evidence in the record, it is apparent that the Circuit Court properly granted summary judgment to Contractor Enterprise as there is no evidence of dangerous highwall conditions or Contractor Enterprise's knowledge thereof.

iii. The Circuit Court correctly found that Contractor Enterprise did not have actual knowledge of any specific unsafe working condition.

Not only do the Appellants have the burden of demonstrating a genuine issue of material fact exists showing that Mr. Ramey was exposed to the specific unsafe working conditions alleged above, but the Appellants also must show that Contractor Enterprise actually knew of the alleged unsafe working conditions and appreciated the potential to cause serious injury or death. W. Va. Code § 23-4-2(d)(2)(ii)(B). Addressing this issue, the circuit court stated:

> In the instant case, the Plaintiff shows no genuine issue of material fact with respect to the Defendants having any **actual knowledge of any unsafe working condition** beyond danger inherent to the job such as exposure to high places, highwalls, and machinery.

See Exhibit A, p. [5], ¶5. (emphasis added).

Appellants' assertion that Mr. Ramey was insufficiently trained in any manner has no support in the record and is contrary to MSHA's finding that "training had been conducted in accordance with 30 C.F.R. Part 48." *See* Exhibit B, p. 2. Similarly, Appellants' contention that Mr. Ramey was exposed to unsafe highwall conditions is bare of even a mere scintilla of factuall support.

However, even assuming *arguendo* that Mr. Ramey was insufficiently trained, either on the drill or highwall safety, Appellants' deliberate intent claim still fails as no evidence exists to show that Contractor Enterprise had **actual knowledge** of the existence of these specific unsafe working conditions. This is necessarily the case because the unsafe working condition was created by Mr. Ramey himself when he parked the drill less than two (2) feet from the highwall. This critical link is missing in Appellants' case as the mere assertion of an unsafe working condition does not automatically satisfy Parts (A) and (B) and the statute. Rather, Appellants must show that Contractor Enterprise actually knew of that specific unsafe working condition and thereafter exposed Mr. Ramey to it. The facts of this case demonstrate that this is legally and logically impossible, and summary judgment is proper.

The essence of a deliberate intent claim is that the employer exposes an employee to a known unsafe working condition. Regardless of whether Mr. Ramey was properly trained and failed to follow that training, or insufficiently trained and incapable of recognizing the fall hazard associated with exiting a drill within two (2) feet of a snow covered highwall edge, Appellants' "improper training" argument fails because there is absolutely no evidence that Contractor Enterprise knew that Mr. Ramey was insufficiently trained.[9] For Appellant to proceed and assert improper training as the unsafe working condition, Appellants must simultaneously present evidence that Contractor Enterprise knew Mr. Ramey was improperly trained, which they cannot and did not.

Putting aside the fact that the only evidence in the record shows that Mr. Ramey was in fact properly trained, the Appellants presented no evidence to carry their burden of proof that Contractor Enterprise **knew** Mr. Ramey was insufficiently trained. No where in the record and

[9] For example, in *Arnazzi*, the employer required the plaintiff/employee to operate a forklift on his first day of work with no training and no experience. *See Arnazzi*, 218 W. Va. at 36. This is absolutely not the case here.

no where in Appellants Brief is any there any evidence suggesting that Contractor Enterprise actually knew that Mr. Ramey was insufficiently trained. Based on the foregoing and on the evidence in the record, it is apparent that the Circuit Court properly granted summary judgment to Contractor Enterprise as there is no evidence from which the Circuit Court could conclude that that Contractor Enterprise actually knew that Mr. Ramey was insufficiently trained.

F. THE CIRCUIT COURT CORRECTLY FOUND THAT THE SOLE UNSAFE WORKING CONDITION WAS CREATED BY MR. RAMEY EXITING THE DRILL WHICH HE PARKED WITHIN TWO FEET OF THE EDGE OF THE HIGHWALL.

The true unsafe working condition which caused this accident was Mr. Ramey's act of exiting the highwall drill which he had parked within twenty-three (23) inches of the highwall's edge. This act was contrary to Mr. Ramey's training, experience, and common sense, and was created wholly without the knowledge of Contractor Enterprise. This Court has repeatedly held that "where an **employee creates a specific unsafe working condition by not following expected procedures**, a deliberate intention action cannot be maintained against the employer." *Deskins v. S.W. Jack Drilling, Co.*, 215 W. Va. 525, 600 S.E.2d 237, 242 (2004); *see also Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 511 S.E.2d 117 (1998); *Blevins v. Beckley Magnetite*, 185 W. Va. 633, 641, 408 S.E.2d 385, 393 (1991).

In *Deskins,* this Court was presented with a scenario where an employee created the unsafe condition which caused his injuries by jumping between two pieces of equipment after being instructed to remain clear of the area. Relying on *Blevins*, this Court held that the specific unsafe working condition was created only when the employee acted in contravention of his training and instruction and that it was impossible for the employer to have had a subjective realization as to that specific unsafe working condition. *Deskins*, 215 W. Va. at 531.

This line of cases is directly on point with the matter *sub justice*. Certainly Mr. Ramey can be expected to operate the highwall drill in accordance with the MSHA approved ground

control plan, and certainly Mr. Ramey had the common sense to recognize the hazardous situation that he put himself in by parking the drill so close to highwall edge and getting out in four (4) inches of snow. Even viewing the evidence in the light most favorable to the Appellant, there is no explanation for why Mr. Ramey exited the drill after parking it so close to the highwall edge and certainly no evidence that Contractor Enterprise had actual knowledge of this situation created by Mr. Ramey alone. On this point, the circuit court stated that "it is not reasonable to place an absolute burden on employers or regulatory agencies to prevent employees from bringing harm on themselves." *See* Exhibit A, p. [7], ¶12. Similarly, this Court has long held that an employer has no duty to instruct an employee as to dangers that are obvious to a person of ordinary intelligence. *See De Francesco v. Piney Mining Co.*, 76 W. Va. 756, 86 S.E. 777 (1915)(employer not liable for its failure to anticipate that a miner of ordinarily intelligence would remove dynamite from a drill hole after it was lit and inflict injury upon himself).[10]

Based upon an independent and immediate investigation, MSHA district manager Jesse P. Cole concluded that, "Ramey positioned himself between the highwall drill and the edge of highwall when he slipped and fell." *See* Exhibit B, p. 3. Commenting on Mr. Ramey's actions that day, the MSHA report noted, "The drill operator did not follow normal operating procedures by positioning the drill parallel with an existing highwall. This action exposed the drill operator to a hazard of falling over the highwall. If the drill had been positioned as the ground control plan stated, the drill would have been at least six feet from the highwall." *Id.* at 2.

[10] Additionally, in *Smith v. United Fuel Gas Co.*, 91 W. Va. 52 112 S.E. 205 (1922), an employer was not liable for an injury that occurred while a repairman performed work on a gas engine. The court noted that, "[a]lthough comparatively inexperienced in that kind of work, [plaintiff] was a mature, and, presumptively, an ordinarily intelligent, man fully capable of apprehending and duly appreciating ordinary dangers such as the one he encountered." *Id.* at 207.

Because the Mr. Ramey created the specific unsafe working condition without Contractor Enterprise's knowledge, the circuit court properly found that summary judgment was appropriate as "[p]arking so close to the highwall is clearly the act of the Plaintiff and there is no evidence that anyone told him to park in such a way." *See* Exhibit A, at p. [7], ¶15. As is apparent, the evidence submitted confirms that Kyle Ramey acted in contravention of his training, experience, and good common sense by positioning his drill within two feet of the edge of the highwall with the exit ladder facing the highwall.

G. THE CIRCUIT COURT CORRECTLY FOUND THAT NO EVIDENCE EXISTS SHOWING THAT CONTRACTOR ENTERPRISE DIRECTED OR REQUIRED MR. RAMEY TO WORK IN A KNOWN UNSAFE CONDITION.

Appellants' assert that the trial judge erred in finding that no genuine issue of material fact exists on the "intentional exposure" element of the deliberate intent test. W. Va. Code § 23-4-2(d)(2)(ii)(D). As this Court is well aware, Part (D) of the statutory test requires the Appellant to prove that the employer "exposed [him] to such specific unsafe working condition intentionally." *Id.* This Court's decision in *Tolley v. ACF Industries, Inc.,* 212 W. Va. 548, 575 S.E.2d 158 (2003), noted that to meet Part (D) of the test "there . . . must be some evidence that, with conscious awareness of the unsafe working condition . . . **an employee was directed to continue working in that same harmful environment."** *Id.* (emphasis added). In other words, "where a **conscious decision**" is made to "**to require an employee to work in a situation that [presents] an unsafe working condition**" the element of intentional exposure is met. *Id.* Conversely, when a plaintiff fails to demonstrate a genuine issue of material fact on the existence of such a conscious decision, the deliberate intent claim fails.

In support of their assertion that the trial court erred, Appellants argue that since Contractor Enterprise admitted to instructing "Kyle Ramey to run the highwall drill that morning ...". Contractor Enterprise intentionally exposed Mr. Ramey to a known unsafe working

condition. *See* Appellants' Brief, p. 8 (*citing* Defendants Memorandum of Law in Support of its Motion for Summary Judgment). Had Appellants provided this Court with a complete cite, it would be clear that Contractor Enterprise did not admit to intentionally exposing Mr. Ramey to any unsafe condition. The complete citation from Contractor Enterprise's Memorandum of Law reads as follows;

> It is true that Contractors, by and through it supervisors, instructed Kyle Ramey to run the highwall drill that morning, **but there is no evidence, and never will be any evidence to support a claim that they asked him to run that dill knowing that he would work with inches of the highwall edge.**

Expectedly, Appellants' position is unsupported by the evidence. Certainly there are no "factual discrepancies and conflicts between [the] documents submitted by the Defendant and [the] testimony offered by [the] Petitioners" as Appellants indicate; rather, Appellants have produced no evidence that Contractor Enterprise directed or required Mr. Ramey to operate the high wall drill in the manner he did.

Likewise, Appellants' assertion that "the trial judge simply ignored Plaintiffs' evidence" and committed error in doing is patently false. Judge Perry's Order, aside from noting that Appellants engaged in no discovery prior to the close of discovery, actually considered and analyzed the post-discovery evidence submitted by the Appellants which he could have wholly disregarded. In all actuality, Judge Perry considered Appellants' unreliable, post-discovery evidence and found they failed to carry their burden in resisting Contractor Enterprise's properly supported motion.

For example, Judge Perry considered the Affidavit of Mark Kennedy and deemed it insufficient to sustain the Appellants' burden. Indeed, the most pertinent fact that could arguably go to the actual knowledge claim was personally crossed out by the Affiant from the draft Affidavit almost certainly prepared by Appellants. Additionally, the circuit court considered the

expert report of Homer Grose. As previously noted, the opinions of Mr. Grose rely completely on the uncorroborated testimony of Mr. Ramey, do not address Parts (B) and (D) of the five-part test, and utterly ignore the documentary evidence.

Notably, this Court has held that "[s]elf-serving assertions without factual support in the record will not defeat a motion for summary judgment" but that a "[p]arty opposing summary judgment must satisfy the burden of proof by offering more than a scintilla of evidence." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60-61, 459 S.E. 2d 329 (1995). Similarly, an expert opinion based solely on the unsupported testimony of a plaintiff is similarly unreliable and insufficient to defeat summary judgment. *See Rohrbough v. Wyeth Laboratories, Inc.*, 719 F. Supp. 470 (N.D. W. VA. 1989) (noting that "an expert opinion, submitted in opposition to a summary judgment motion, may be disregarded if it is not supported by facts." *Id.* at 474.) [11]

Ultimately the facts remain that Mr. Ramey drove the drill, Mr. Ramey positioned the drill, and Mr. Ramey exited the drill knowing where he had parked it and knowing the bench and highwall edge were snow-covered. This evidence led the Circuit Court to find that "there is no evidence that anyone affirmatively did anything to direct the Plaintiff to do something potentially dangerous." *See* Exhibit A, p. [7], ¶15 (internal citations omitted). In total, the Appellants presented **no evidence** to support a finding in their favor on Parts (B) or (D) of the five-part deliberate intent test and Contractor Enterprise can not, as a matter of law, be held to have had the requisite level of knowledge for the Appellants to sustain their deliberate intent claim.

[11] *See also Viterbo v. Dow Chemical Co.*, 826 F.2d 420 (refusing to admit an expert opinion because it "is no more than [the plaintiff's] testimony dressed up and sanctified as the opinion of an expert."); *Talmage v. Trust*, 871 F. Supp. 1577, 1585 (E.D.N.Y. 1994) (finding that the "conclusory assertions" of plaintiff's expert, "in light of the evidence submitted by defendants, are not sufficient to raise a genuine issue of material fact.")

H. THE CIRCUIT COURT PROPERLY CONCLUDED THAT THIS COURTS DECISION IN *RYAN V. CLONCH* IS INAPPLICABLE TO THE NSTANT CASE.

In defending against the Motion for Summary Judgment, the Appellants relied almost exclusively on *Ryan v. Clonch Industries*, 219 W. Va. 664, 639 S.E.2d 756 (2006) in support of their claim that issues of fact remained on Parts (B) and (D) of their deliberate intent claim. The Appellants' likewise cursorily assert this argument in their Brief.

As Appellants' Petition did not mention *Ryan,* or raise the Circuit Court's conclusion that the *Ryan* case was not applicable as an assignment of error, this misguided argument advanced below should be deemed abandoned. "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syl. pt. 6, *Addair v. Bryant,* 168 W. Va. 306, 284 S.E.2d 374 (1981); *see also, Ohio Cellular RSA Ltd. P'ship v. Bd. of Public Works*, 198 W. Va. 416, 481 S.E.2d 722 (1996). However, as Appellants' Brief fleetingly mentions the *Ryan* case on appeal and almost exclusively relied upon it below, prudence requires that Contractor Enterprise address Appellants' Ryan argument herein.

Appellants' *Ryan* argument claims that Homer Grose's opinion that Contractor Enterprise did not perform a mandatory workplace inspection designed to identify unsafe working conditions permits this Court to find in their favor based on the imputed knowledge theory espoused in *Ryan.*[12] *See* Appellants' Brief, p. 10. Interestingly, it should be noted that not only did the circuit court conclude that proper inspections **had** been performed, but MSHA independently reached the same conclusion. Ultimately, Mr. Grose's opinion that Contractor

[12] Even after the Appellants sought leave of the Circuit Court for additional time to confer with their expert and get his opinions on the record, the Appellants were forced to misguidedly assert *Ryan* because there was no evidence on Parts (B) and (D). This flawed argument is dissected below, but ultimately, *Ryan* was only raised in defense of the Summary Judgment Motion because the Appellants had no evidence to support their case.

Enterprise should have performed inspections more frequently is a negligence-based opinion which has no application in a deliberate intent case. *See Tolly*, 212 W. Va. 548.

As this Court is well aware, the *Ryan* holds that an employer cannot claim lack of knowledge of an unsafe condition after admittedly failing to perform a required hazard evaluation designed to identify that unsafe conddition. *Ryan*, 219 W. Va. 664.

The imputed knowledge theory espoused in *Ryan,* and inaccurately asserted by Appellants, is a manner by which knowledge can be imputed to the employer for its **admitted failure to perform a mandatory hazard inspection**. *Id.* (emphasis added). In *Ryan*, the defendant employer attempted to claim that it had no knowledge of the unsafe working condition and therefore should benefit from the protections offered to employers by *West Virginia Code* § 23-4-2(d)(2)(ii)(B), while simultaneously admitting that it had ignored a mandatory OSHA regulation requiring a hazard assessment that, if performed, would have lead to the discovery of the unsafe working condition.[13] Specifically, the *Ryan* opinion states:

> While we agree with [the employer] that [the plaintiff's] evidence with respect to [the employer's] actual subjective knowledge of an unsafe working condition was lacking, we nevertheless find that Mr. Ryan's evidence that [the employer] violated its mandatory duty to perform a hazard evaluation pursuant to [OSHA regulations], **along with [the employer's] admission of the same**, requires greater scrutiny of the issue.

Id. at 765 (emphasis added).

The *Ryan* decision may forever be known as the "ostrich case" in West Virginia based on the Court compared the employer's defense to an ostrich putting its head in the sand. Appalled at the "ostrich defense," the Court opined that if an employer admittedly fails to perform a required hazard evaluation, then prior knowledge of the unsafe condition is imputed to the employer for intentionally hiding its head in the sand, and the employer is precluded from

[13] *See* 29 C.F.R. § 1910.132(d)(1)(2006).

denying that it had prior knowledge. *Id.* Put another way, while performing a hazard assessment does not guarantee discovery (i.e. actual knowledge) of an unsafe condition, a complete failure to perform the assessment basically ensures that the employer remains ignorant.

In light of the fact that there is no evidence supporting the knowledge prong of their deliberate intent claim, the Appellants ask the Court to apply the reasoning of *Ryan* for the purpose of trying to impute such knowledge. By submitting this argument below and in the instant appeal, Appellants essentially admit that they have no documentary, testimonial, or other evidence to support a finding that Contractor Enterprise had actual knowledge of the unsafe working conditions alleged.

The Appellants' argument for application of the *Ryan* decision was soundly defeated by evidence in the record. Contractor Enterprise never ignored its duty to perform a hazard inspection of the highwall, and in fact, placed evidence in the record that the inspections were indeed performed.[14] In fact, less than two (2) hours prior to Mr. Ramey's fall, a pre-shift inspection of the highwall was performed.

Therefore, despite their unsupported assertion to the contrary, Appellants have produced no evidence to support application of the *Ryan* decision to the instant case. The unique admission of the defendant in *Ryan* simply does not exist in this matter, and the *Ryan* "ostrich defense" claim asserted below by the Appellants is not applicable and the circuit court's grant of summary judgment was appropriate.

CONCLUSION

The Circuit Court of Logan County did not err in granting summary judgment to Contractor Enterprise, as there is no genuine issue of fact on Parts (B) or (D) of the five-part

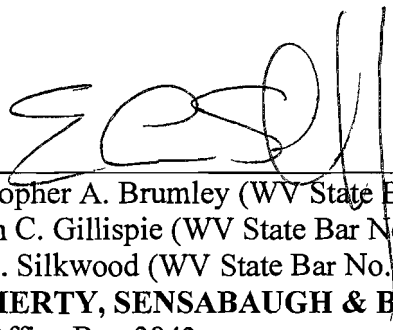
[14] Had the Appellants issued timely discovery, or taken even a single deposition in an attempt to prove their case and form a foundation upon which to build their burden of proof, they would have discovered that pre-shift and on-shift inspections were performed on the morning of the accident in accordance with all applicable mining regulations.

deliberate intent test sufficient to remove Contractor Enterprise's immunity from suit under *West Virginia Code* § 23-4-2(d)(2)(ii).

The only unsafe working condition that existed was Mr. Ramey's act of parking the drill less than two (2) feet from the highwall and exiting the drill **which he parked** unbeknownst to Contractor Enterprise. Training is not required for a person of even moderate intelligence to recognize the danger and hazard associated with stepping out onto the snow-covered lip of the highwall edge. Ultimately, despite Appellants' attempts to manufacture an issue of fact following the close of discovery, not one scintilla of evidence exists to suggest that Contractor Enterprise was aware that Mr. Ramey would park his drill within two (2) feet of the highwall edge and exit, and when fully apprised of such fact, then made a decision to require or permit Mr. Ramey to exist his drill toward the highwall.

The Circuit Court properly considered all applicable questions of law and fact, applied the appropriate legal standard, and properly granted summary judgment in favor of Contractor Enterprise, Inc. For the foregoing reasons, Contractor Enterprise, Inc., respectfully requests that this Honorable Court uphold the Circuit Court of Logan County's June 27, 2008 Order granting Summary Judgment to Contractor Enterprise, Inc.

CONTRACTOR ENTERPRISE, INC.,
By Counsel,



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

APPEAL NO. 082318

KYLE D. RAMEY and TRINA RAMEY
Plaintiffs and Appellants,

V.

CONTRACTOR ENTERPRISE, INC.
Defendants and Appellee.

CERTIFICATE OF SERVICE

I, the undersigned, counsel for defendant, Contractor Enterprise, Inc., do hereby certify that I have served the "Brief of Appellee, Contractor Enterprise, Inc." to counsel of record this 5TH day of June, 2009, by depositing a true copy in the United States mail, postage prepaid, addressed as follows:

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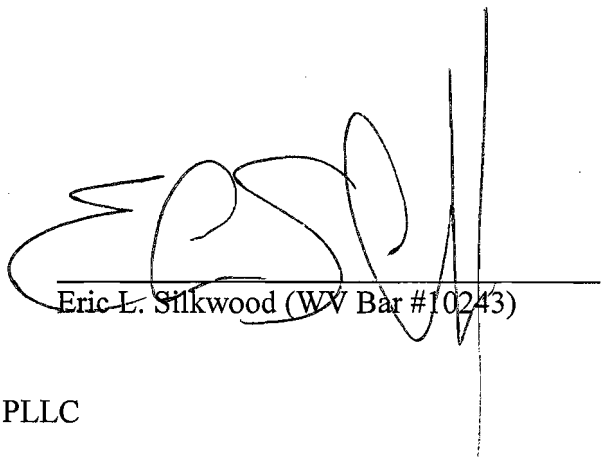

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EXHIBITS

ON

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