

BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 35139

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,

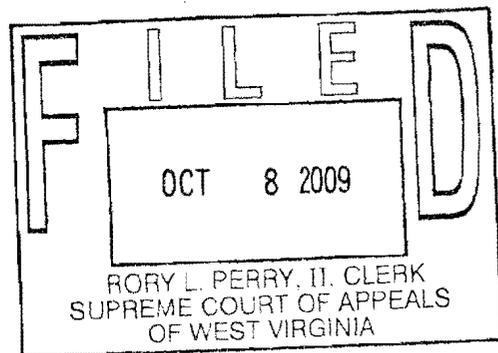
Appellee.

Appeal from the Circuit Court of Fayette County, West Virginia

BRIEF OF APPELLANTS

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Appeal from the Circuit Court of Fayette County, West Virginia

BRIEF OF APPELLANTS

I. Kind of Proceeding and Nature of Ruling Below

This case arises out of the death of a twenty-four year old logger named Clarence T. Coleman, who sometimes is referred to in the depositions as "Amos." On December 2, 2003, Mr. Coleman, a logger employed by Appellee R. M. Logging, Inc., was killed when a felled maple tree lodged in the top of another tree dropped approximately 20 feet and struck him on the left temple and occipital area of his head. Mr. Coleman was survived by his daughter Summer, who was two and one-half years old at the time of his death, and by his parents, Appellants Clarence Coleman and

Helen M. Adkins. In June, 2005, Appellants filed a deliberate intent wrongful death suit in the Circuit Court of Fayette County, against Appellees R. M. Logging, Inc., and its manager, John Robinson, as well as Clonch Industries Inc.¹

This is the **second** time Appellants have appealed the summary judgment dismissal of their deliberate intent wrongful death case to this Court. The first appeal resulted in this Court reversing the trial court's order granting summary judgment and remanding this case "for a ruling upon the appellees' motion to exclude the evidence of safety consultant Homer S. Grose, for the entry of an order permitting the appellants a reasonable time period for discovery with regard to Kelcey Nicholas,² and for further proceedings consistent with this opinion." *Coleman v. R.M. Logging, Inc.*, 222 W.Va. 357, 365, 664 S.E.2d 698, 706 (2008).

Following the remand, Mr. Nichols was deposed, Mr. Grose, Appellants' liability expert, died, and James Dougovito, Appellants' new expert on liability, issued a report and was deposed. With this additional evidence combined with the multiple safety violations found by the Occupational Safety and Health Administration (OSHA), Appellants respectfully submit more than sufficient facts were developed to meet every element of this deliberate intent claim against Appellee R. M. Logging, Inc. However, after developing this new evidence from Mr. Nichols and Mr. Dougovito, filing new briefs, and arguing the same summary judgment issues again, the Honorable

¹In the first summary judgment ruling, Clonch was dismissed as a defendant and Appellants chose not to appeal that decision.

²The correct last name for the only eyewitness to the accident involved in this case was Kelcey Nichols, not Nicholas.

Judge Paul M. Blake, Jr., once again granted summary judgment to Appellees.³

In an order entered February 10, 2009, the lower court denied Appellees' motion to exclude Appellants' expert. However, in another order entered that same day, Judge Blake granted Appellees' motion for summary judgment finding that Appellants' had not satisfied the subjective realization and intentional exposure elements of the deliberate intent statute, despite expert testimony and other evidence to the contrary. It is from this summary judgment order that Appellants once again appeal. The lower court also entered a separate order that same day which found that only two of the eleven OSHA citations would be admissible. Because this issue will be relevant, in the event this Court reverses the summary judgment ruling, Appellants also seek a reversal of this decision as well.

II. Statement of the Facts

R. M. Logging, Inc., and its foreman, John Robinson were engaged in the business of timber removal in the Cannelton Hollow area near Smithers, West Virginia. *Coleman Estate Ex Rel Coleman v. R.M. Logging, Inc.*, 222 W. Va. 357, 664 S.E. 2d 698 (2008). After trimming and cutting into logs, the timber was transported to a sawmill operated by Clonch Industries, Inc. One of the timber cutters employed by R. M. Logging, Inc., was Clarence T. Coleman, age 24.

On December 2, 2003, Mr. Coleman, using a chainsaw, cut three trees immediately prior to the accident at issue. The first, a large maple tree, fell to the ground. The second, a 15-inch diameter

³For purposes of this appeal, Appellants are only challenging the summary judgment granted to Appellee R. M. Logging, Inc. As reflected in the February 10, 2009 order granting summary judgment to Defendant John Robinson, counsel for Appellants had advised the trial court that they do not believe Defendant Robinson is a necessary defendant in this action. Consequently, Appellants are not appealing that portion of the trial court's rulings. Appellants dispute and in no way are conceding that an individual defendant cannot be held liable for a deliberate intent claim under W.Va.Code §23-4-2(2)(ii).

hickory tree, fell in part, leaving its butt end lodged approximately 20 feet above the ground upon a 4 to 6 inch limb. The third tree, an 18-inch hickory, fell but also remained partly lodged above the ground. Mr. Coleman then proceeded back toward the maple tree and walked under the butt end of the 15-inch diameter hickory. At that moment, the 4 to 6-inch limb failed, and the 15-inch diameter hickory tree fell striking Mr. Coleman on the head. Although Mr. Coleman was wearing a hard hat, his injuries were fatal. Based on the direction in which the cut tree was “notched” Appellants’ expert, James Dougovito, was surprised at the direction in which the tree fell. (Depo. of James Dougovito at 19-20).

The only eyewitness to this accident is Kelcey Nichols, who was not a certified logger. (Depo. of Defendant Robinson at 53-54). Due to difficulties locating Mr. Nichols, his deposition was not able to be taken until **after** this case was remanded. Mr. Nichols testified although he witnessed Mr. Coleman working in and around danger trees, he did not do anything to stop Mr. Coleman from continuing to work. (Depo. of Kelcey Nichols at 29). He testified Mr. Coleman first cut a hickory about a foot and a half across that landed on a chestnut limb such that the butt of the tree was about twenty feet in the air and the other end was on the ground, like a see-saw. The decedent then proceeded to cut two more trees. One of those trees also lodged. (*Id.* at 25-29).

Mr. Nichols saw the decedent proceed to top the trees that had fallen. Mr. Nichols testified he did not see anything wrong with what Mr. Coleman was doing and did not attempt to stop him. (*Id.* at 29-30). Nichols watched the decedent come back through and under the tree, when it fell hitting him from behind. (*Id.* at 29).

Despite Mr. Nichols’s assertions to the contrary, Appellants’ expert, Mr. Dougovito, testified that Mr. Nichols would have stopped Mr. Coleman from working in the unsafe working condition

had Mr. Nichols himself been properly trained. (Depo. of James Dougovito at 37, 46). Specifically, he testified that:

[I]t was my opinion that Mr. Nichols observed Amos felling at least two of these trees and he saw the one that was suspended in the air. And in his testimony, he stated that Amos topped the maple that was on the ground. And topping isn't just a simple matter of going up where the merchantable diameter ends and cutting the tree off. That encompasses limbing as well. So from the time that tree hit the ground, the limbing and the topping, if Kelcey [Nichols] was well trained and trained to watch for hazards as well, he should have gotten off and warned Amos to get out, because not only was one tree already hung up, then another one was suspended in the air. And he sat there and did nothing, and that's why I said that he did do nothing. So to me that was an accepted practice of doing that type of thing.

(Depo. of James Dougovito at 22-23). Based on his review of the evidence, he opined that both Mr. Coleman and Mr. Nichols were not properly trained and properly supervised:

Q. And you're basing your opinion upon the fact that he continued cutting after one was hung?

A. No. After two was hung, after two trees were hung. One is -- get into terminology -- one butt was suspended about 20 feet in the air, so that's just like a hung tree. So the fact that he continued to work in the immediate area after the first one was hung and, in addition, suspended another tree and then was working on a third in the immediate area, the training that he received was inadequate. And over the course of the months that he worked for the firm, that appeared that there's no supervision. Supervision should have corrected that.

Q. How do you know that he would have ever done that, hung a tree and not stopped, before this date that he died?

A. Well, because if he did it before, if that was part of his training and ingrained in his training and that's what the company wanted him to do and it was reinforced through training and through supervision, then after that first tree, he would have been out of the area. And if the training, in fact, did take place, then Nichols would have stopped. So you have two individuals that, if they were properly trained -- they were kind of -- I look at them as a team because you have a

skidder operator and a sawyer or a timber feller. Both of them look out for one another all the time on all jobs. So if they were trained properly, if one was doing something that was incorrect, the other should have impacted, if they were trained properly.

Id. at 36-37.

Appellants' expert also opined why Mr. Coleman would have walked underneath the suspended tree:

Q. And he didn't know it [the suspended tree] was there simply because he had a helmet on?

A. Yes. Well, let me say this. He knew that he hung - - that he hung one tree and he suspended another, but when he's working, the skidder is not that far away. It's running. He's trying to clean up that work and get out so the skidder can come and pull the trees down. When he's moving around like that, your orientation is a little bit off. With that restriction above, he didn't see that he walked underneath that.

Q. You're assuming that he didn't see it, he was unaware of what he was doing?

A. Yes. Not unaware of what he was doing, but unaware of what was above him, the hazard above him, yes. I firmly believe that.

(*Id.* at 25-26).

Mr. Dougovito also testified that he could tell Mr. Coleman was inadequately trained based on the stumps of the trees that Mr. Coleman had cut. (*Id.* at 27, 28). According to Defendant Robinson, he learned that Appellants' decedent had been injured when Mr. Nichols yelled to him that Mr. Coleman had been hit by a tree. (Depo. of Defendant Robinson at 56-57). After asking another employee to call an ambulance, Defendant Robinson administered CPR until the ambulance arrived. (*Id.*)

As a result of a subsequent investigation into this incident, OSHA issued eleven (11) citations

against Appellee R. M. Logging, Inc., for violations of mandatory regulations. (*Id.*) Six of the eleven violations were identified as serious, which means “there is a substantial probability that death or serious physical harm could result” and that the employer knew, or should have known of the hazard. 29 U.S.C. § 666(k).

Specifically, OSHA issued serious violations against Appellee R. M. Logging, Inc., for the following:

- a. Employee training did not consist of the recognition of safety and health hazards associated with the employee’s specific work tasks, in violation of 29 CFR 1910.266(i)(3)(iii);
- b. Failure to remove dangerous lodged or snagged trees before work was commenced in an area, in violation of 29 CFR 1910.266(h)(1)(vi);
- c. Neither hand signals nor audible contact were used whenever noise, distance, restricted visibility, or other factors prevented clear understanding of normal voice communications between workers, in violation of 29 CFR 1910.266(d)(7)(I);
- d. Flammable and combustible liquids were not stored, handled, transported, and used in accordance with the regulations, in violation of 29 CFR 1910.266(d)(9)(I);
- e. Each machine manufactured after August 1, 1996, did not have a cab that was fully enclosed with mesh material with openings no greater than 2 inches, in violation of 29 CFR 1910.266(f)(3)(vii);
- f. Employer failed to assure that each employer, including supervisors, received first aid and CPR training, in violation of 29 CFR 1910.266(i)(7)(I);
- g. Employer failed to provide first aid kits at each work site where trees were being cut, at each active landing, and on each employee’s transport vehicle, in violation of 29 CFR 1010.266(d)(2)(I);
- h. The first aid kits failed to include all of the required items, in violation of 29 CFR 1910.266(d)(2)(ii);
- i. Employer failed to develop, implement, and/or maintain at the workplace a written hazard communication program, in violation of 29 CFR 1910.1200(e)(1);
- j. Employer failed to maintain copies of the required material safety data sheets for

each hazardous chemical in the workplace, in violation of 29 CFR 1910.1200(g)(8); and

- k. Employees were not provided information and training on hazardous chemicals in their work areas, in violation of 29 CFR 1910.1200(h).⁴

Prior to the subject incident, Defendant Robinson had not received any training himself into the OSHA regulations relevant to the logging industry. (Depo. of Defendant Robinson at 16).

Appellants' safety expert, James Dougovito provided a written report and testified in support of Appellants' "deliberate intent" claims against Appellee R. M. Logging, Inc., and John Robinson. Mr. Dougovito owns a company called Superior Forestry, which performs consulting services to the forestry industry. (Depo. of Mr. Dougovito at 5). He has also worked for over ten years as a safety trainer in the forest products industry. (*Id.* at 8-9). Additionally, he has worked as an instructor to industry workers on Logging Standards. (*Id.*).

Based upon his review of the facts, including the facts found by OSHA in their investigation of Appellee R. M. Logging, Inc., Mr. Dougovito concluded that Mr. Coleman had not been provided the specific training required by OSHA regulations in the logging industry, and had not received adequate supervision. (Mr. Dougovito report, at 2-3). These gross deficiencies manifested themselves in a situation wherein Mr. Coleman was working in an unsafe working environment. (*Id.* at 3).

In expanding on these opinions, Mr. Dougovito testified:

Because it is kind of like a flashing red light. It's just glaring from the experience that I have had in the woods, and it wouldn't necessarily have to be a fatality. If I saw this type of information, it

⁴ Although several of these serious violations involved issues not directly relating to the death of Mr. Coleman, these violations nevertheless are indicative of Appellee R.M. Logging, Inc.'s failure to comply with the applicable rules and regulations governing workplace safety.

would be like a flashing light, because there's more than one tree hung and continued to work. So that's a flashing red light. This stump pull off of there is a flashing red light. Continuing to work around two trees that are hung up is a flashing red light. A skidder operator watching the individual limbing and topping in and around two trees that are hung up is a flashing red light. All extremely serious. And, yes, it's a short period of time, but it indicates a pattern, and not a pleasant pattern. I think there's an accepted practice to do this very same thing all the time.

(*Id.* at 71-72).

III. Issues Presented

A.

Whether the trial court erred in granting Appellee's motion for summary judgment where (1) The OSHA citations, expert witness testimony, and other evidence developed created a genuine issue of material fact on all five elements of W. Va. Code §23-4-2(c)(ii); and (2) The trial court applied the wrong standard and resolved these genuine issues of material fact in favor of Appellee, rather than leaving them for the jury to decide?

B.

Whether the trial court erred in ruling that only two of the eleven OSHA citations issued against Appellee as a result of the investigation conducted into this accident are relevant and admissible in evidence?

IV. Argument

A.

The trial court erred in granting Appellee's motion for summary judgment because (1) The OSHA citations, expert witness testimony, and other evidence developed created a genuine issue of material fact on all five elements of W. Va. Code §23-4-2(c)(ii); and (2) The trial court applied the wrong standard and resolved these genuine issues of material fact in favor of Appellee, rather than leaving them for the jury to decide

A. Standard of Review

In reviewing a circuit 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). "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 the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E. 2d 770 (1963). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus Point 3, *Painter v. Peavey*, 192 W. Va. 189, 451 S.E. 2d 755 (1994). Evidence related to a material fact should be viewed in the light most favorable to the nonmoving party. *See, Gentry v. Magnum*, 195 W. Va. 519, 466 S.E. 2d 451 (1995).

B. The Circuit Court Erred in Granting Summary Judgment By Failing to Look at the Evidence in the Light most Favorable to Appellants

Rather than examine the evidence presented as to genuine issues of material fact in the light most favorable to the nonmoving party, here Appellants, the lower court essentially turned the summary judgment standard on its head and resolved all disputes in favor of Appellee, and completely ignored all evidence Appellants presented. In the OSHA investigation following this incident, it was specifically found that "Employees are not trained in the recognition of safety and health hazards in their work area. The employees have never been shown the requirements of this standard." OSHA specifically found that the fact that this incident occurred, showed this lack of training.

Despite OSHA's findings, the lower court found:

The Court **CONCLUDES** that the record in this case *is completely*

devoid of evidence of the existence of the requirements of §23-4-2(c)(ii)(B) or (D), at the least. As stated above, there is no evidence that R.M. Logging, Inc. had the subjective realization that Mr. Coleman would choose, *contrary to his training*, to walk under trees suspended in the air, (the specific condition that led to the decedent's death), (§23-4-2 (c)(ii)(B)), or that R.M. Logging, Inc., or its agent, forced, directed, or encouraged the decedent to walk under suspended trees, (§23-4-2(c)(ii)(D) [sic]. The Court **CONCLUDES** that the evidence in the record is *directly contrary* to these two conditions. For example, (1) the decedent worked for two weeks with a certified logger, (2) *the decedent was properly trained*, and (3) the decedent was not directed to do as he did - but for the decedent's own negligence, the accident would not have occurred. Order at Conclusion of Law ¶25 (emphasis added in bolded italics).

Almost every single fact cited in the lower court's opinion in support of summary judgment is a fact in dispute that the lower court resolved in favor of Appellee. First, as noted, OSHA issued citations which found Mr. Coleman was not properly trained to recognize the danger of hazardous hinged trees. The failure to recognize this danger was confirmed by the only eyewitness, Mr. Nichols, who saw the hung trees, but did not take any action to address this hazard. Further, Appellants' expert opined that based on his review of the OSHA citations, Mr. Coleman's cutting style, pleadings, discovery and deposition testimony, that Mr. Coleman was not properly trained or supervised. Yet, the trial court completely resolved this matter in favor of Appellee stating that, contrary to Appellants' evidence, not only was Mr. Coleman properly trained, but that he was acting contrary to his training. Incredibly, Appellee was unable to produce any records of what Mr. Coleman's training consisted of. In actuality, the record is "devoid" of any evidence that Mr. Coleman was properly trained, except for the self-serving testimony of Defendant Robinson, who was only able to speak generally as to how he normally trains his employees.

Finally, the lower court ruled, "[f]urther, the Court notes that specialized training is not required for a person of ordinary intelligence to recognize the hazard of walking under a tree

suspended in the air by a limb of another tree.” The lower court is substituting its own judgment for that of OSHA’s. Contrary to the lower court’s assertion, OSHA mandates that employees must be **trained** not to walk under snagged or lodged trees. Further, OSHA found that Appellee violated this standard. Basically, the lower court is finding that certain OSHA regulations are not necessary.

The lower court completely disregards the fact that OSHA issued citations to Appellee as a result of this incident, and which specifically state that this incident was caused in part by lack of training. As evidenced by OSHA issued citations, training is needed to recognize hazardous situations such as this, specifically the danger of lodged and snagged trees. However, the lower court simply disregarded OSHA’s findings, and resolved all factual disputes in favor of Appellee.

C. The Circuit Court Erred in Granting Summary Judgment Where Genuine Issues of Material Fact Remained in Dispute as To Appellee’s Subjective Realization of an Unsafe Working Condition and Intentional Exposure

This Court recently ruled on the precise issue governing this appeal. Namely, the lower court ruled that Appellants had not presented sufficient evidence to show that Appellee had a subjective realization of the unsafe working condition. As this Court ruled in Syllabus Point 5 of *Ryan v. Clonch Industries, Inc.*, 219 W.Va. 664, 639 S.E.2d 756 (2006), whether an employer has a subjective intent must typically be proved by circumstantial evidence from which conflicting inference may be drawn:

“Under [W. Va. Code § 23-4-2(c)(2)(ii)], 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 *Ryan*, the plaintiff had been rendered blind in one eye when a sharp piece of metal binding

struck him in the eye. *Id.* At the time of the occurrence, plaintiff was not wearing safety glasses, and defendant did not require the use of safety goggles. *Id.* Defendant argued that plaintiff was unable to produce evidence that any Clonch supervisor believed that this was an unsafe working condition that posed a high degree of risk and a strong probability of serious injury. *Id.*

In rejecting this argument, this Court found that defendant's were under a mandatory duty to perform hazard evaluations. *Id.* Defendants' failure to perform its mandatory duty to perform a hazard evaluation pursuant to OSHA regulations, along with defendant's admission of the same, was sufficient to satisfy the subjective realization requirement. *Id.* This Court found that defendant's conduct in simply ignoring its mandatory duty to perform hazard evaluations, and then claiming it had no subjective realization to be unconscionable. *Id.* Had defendant complied with the requirement of performing a hazard evaluation, it would either have had documented evidence to support its claim that the activity was not hazardous, or it would have discovered hazards and would have been under a duty to provide protective measures. *Id.* Defendants chose to disregard its duty to perform hazard evaluations, and chose to conduct itself, as this Court noted, "like the proverbial ostrich who sticks his head in the sand to avoid seeing the obvious . . ." *Id.* (quoting, *State ex rel. League of Women Voters of West Virginia v. Tomblin*, 209 W. Va. 565, 578, 550 S.E. 2d 355, 368 (2001)). Accordingly, defendant was estopped from claiming it had no subjective realization of an unsafe working condition. *Id.*

Similarly, in this case, Appellee is under a mandatory duty to train employees on the specific hazards associated with their work. Specifically, 29 CFR 1910.266(i)(3)(iii) provides, "At a minimum, training *shall* consist of the following elements: . . . Recognition of safety and health hazards associated with the employee's specific work tasks, including the use of measures and work

practices to prevent or control those hazards . . .” Appellee was found to be in violation of this provision after OSHA’s investigation of the incident.⁵ Specifically, the OSHA report stated “Employees are not trained in the recognition of safety and health hazards in their work area. The employees have never been shown the requirements of this standard.” Accordingly, as in *Ryan*, adequate proof establishes that Appellee failed to perform a mandatory duty under OSHA’s provisions and Appellee is now estopped from claiming it had no subjective realization of the unsafe working condition.

The testimony of Defendant Robinson, Mr. Dougovito, and Mr. Nichols, the fact that Mr. Coleman was essentially a novice timber cutter, and the serious violations issued by OSHA after investigating this accident lend further support to Appellee’s subjective realization of an unsafe working condition. As in *Ryan*, Defendant Robinson conceded that it would be an unsafe working condition to send an untrained person to perform work in the logging industry.

Mr. Dougovito concluded that Appellee’s failure to train the employees properly and to supervise their work created an unsafe working condition. Mr. Dougovito further opined that Appellants had satisfied all five elements found in the deliberate intent statute. OSHA’s issuance of at least six serious violations as a result of this accident, including violations regarding the lack of safety training provided by Appellee R. M. Logging, Inc., and Robinson, clearly establishes that an unsafe working condition existed.

Further, the lower court ruled:

The Court **CONCLUDES** that the OSHA citation at issue is not

⁵ Appellee was actually given eleven (11) citations after OSHA’s investigation. While a number of these citations also demonstrate Appellee’s subjective realization of an unsafe working condition, Appellants will not address each separately.

evidence of subjective realization. While it is a citation related to training, it is not evidence of a subjective realization on the part of the employer that Mr. Coleman was not trained regarding work around suspended trees and walking under trees suspended in the air. Such a citation alone is not sufficient evidence of subjective realization on the part of the employer of the existence of a working condition that carries a high risk or [sic] injury or death. *Id.* at ¶20.

It is clear from the lower court's order, that it is completely disregarding the OSHA citations in this regard. However, the lower court's error is compounded by the fact that the very citation dealing with training is labeled as "serious." OSHA cannot issue a citation labeled as "serious" "unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C.A. §666(k). OSHA specifically found that Appellee either did not know or *could not* have known. This finding is indicative of subjective realization on the part of Appellee. The lower court, however, misconstrues the definition of a "serious" violation. The lower court ruled:

Unlike a "willful" violation, a "serious" violation issued for failure to train and supervise may be issued when it cannot be determined that the employer had actual knowledge of the unsafe condition. See 29 U.S.C. §666(k)(2009). *Id.* at ¶19.

It is not that OSHA cannot determine the employer had actual knowledge of the unsafe condition. Rather, if OSHA found that Appellee specifically did not or could not have known of the unsafe working condition, then it could not have issued a "serious" violation. In short, contrary to the lower court's ruling, OSHA's findings are certainly indicative of Appellee's subjective realization.

Despite the evidence presented illustrating Appellee's subjective realization of this unsafe working condition, Judge Blake ruled in his order that "The Court concludes, as a matter of law, that there is no evidence in this case to meet the requirement of subjective realization, as there is no evidence that R.M. Logging, Inc. was aware of the suspended tree, and that Decedent would walk underneath it." See order at p. 5, ¶ 7. Nowhere in his order does the lower court explain why it is

disregarding Appellants' evidence, why it is disregarding the fact that Defendant Robinson admits that utilizing an untrained worker is dangerous, or why it is disregarding OSHA's findings.

The lower court's legal analysis construes the requirements too narrowly. Appellants are not required to prove that Appellee had knowledge of the actual tree which was suspended. The lower court ruled:

Plaintiffs have failed to produce any evidence that R.M. Logging, Inc., through its supervisor, John Robinson, was aware that Decedent had felled a tree which became stuck and that Decedent would choose to walk under that tree. Further, no evidence was produced showing that it was the custom, habit or practice of R.M. Logging to require its employees to routinely pass under suspended trees.

However, the unsafe working condition is not this particular suspended tree. Rather, as noted by both Appellants' expert as well as the OSHA investigation, the unsafe working condition consisted of **the lack of training**. The suspended tree is the manifestation of this lack of training. It is this lack of training which creates not only this specific unsafe working condition, but also undoubtedly countless other dangerous working conditions. Not only was he untrained, but he was unsupervised. However, the lower court never addresses this argument, focusing instead on knowledge of the particular hung tree. Clearly, Appellants presented sufficient evidence to raise genuine issues of material fact as to Mr. Coleman's lack of training and supervision. In resolving this issue, the lower court was bound to resolve all inferences in favor of the non-moving party, Appellants. However, the lower court erred in resolving all inferences in favor of Appellee. It essentially disregarded Appellants' evidence.

This Court has recognized, on multiple occasions, that litigants can fulfill the subjective realization requirement contained in W. Va. Code § 23-4-2 through circumstantial evidence. In *Nutter v. Owens Illinois, Inc.* 209 W.Va. 608, 550 S.E.2d 398 (2001), this Court reversed the circuit

court's award of summary judgment to a defendant who contended that the plaintiff could not prove a subjective realization and appreciation of the unsafe condition or that the defendant had intentionally exposed the plaintiff to it. In *Nutter*, it was asserted that because there had been no prior incidents or complaints about the dangerous condition of the equipment, which had produced elevated carbon monoxide levels, injuring the plaintiff, the "subjective appreciation" and "intentional exposure" elements were missing. The Court, however, found the requisite elements proven by circumstantial evidence that the defendant knew some of its equipment was putting out excessive levels of carbon monoxide and that elevated levels had previously been found in offices adjoining (but not in) the area where plaintiff was required to work.

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.) *f'd*, 804 F.2d 265 (4th Cir. 1986) (Sprouse, J., writing for three-judge panel).

As noted in *Costilow v. Elkay Mining Co.*, 200 W. Va. 131, 134, 466 S.E.2d 406, 409 (1997), the leading case of *Mayles v. Shoney's Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990), establishes that the subjective realization requirement of W.Va.Code §23-4-2(c)(2)(ii), may be satisfied by showing that company managers were aware of an unsafe practice yet failed to take remedial action. Further *Mayles* and its progeny establish that an employer's common practice may amount to intentional exposure. See *Cecil v. D & M, Inc.* 205 W.Va. 162, 170, 517 S.E.2d 27, 35 (1999).

The 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 Appellee R. M. Logging, Inc., for failing to provide adequate employee training designed to teach these employees to recognize the specific safety and health hazards associated with the logging industry. This decision provides further support for Appellants' claim that summary judgment was inappropriate under these facts.⁶

As demonstrated by the foregoing facts, coupled with the expert testimony regarding the unsafe working condition and the very specific OSHA regulations and accepted safety standards violated by Appellee R. M. Logging, Inc., and Robinson, it is abundantly clear that the subjective realization and intentional exposure elements of W.Va.Code § 23-4-2(c)(2)(ii) are met, either directly or circumstantially. Accordingly, summary judgment was inappropriate.

D. The Circuit Court Erred in Excluding Nine of the Eleven OSHA Citations

In a separate Order entered the same day as the summary judgment order, the lower court ruled that Appellants would only be permitted to introduce two of the eleven citations issued by OSHA following this incident. As grounds for this exclusion, the lower court found that the remaining citations were not relevant.

⁶ The lower court's order cites to several prior opinions finding no subjective realization in support of its decision. However, each of these cases dealt with far less, or even no evidence of subjective realization. *Blevins v. Beckley Magnetite, Inc.*, 408 S.E. 2d 385 (W. Va. 1991)(no expert testimony regarding subjective realization, and no OSHA citations); *Mumaw v. U.S. Silica Co.*, 511 S.E. 2d 117 (W. Va. 1998)(co-worker warned the plaintiff three times of the dangerous condition but the plaintiff ignored the warnings); *McBee v. U.S. Silica Co.*, 517 S.E. 2d 308 (W. Va. 1999)(no OSHA citations); *Deskens v. S.W. Jack Drilling Co.*, 600 S.E. 2d 237 (W. Va. 2004)(undisputed that the plaintiff disobeyed directions); *Trolley v. ACF Industries, Inc.*, 575 S.E. 2d 158 (W. Va. 2002).

Contrary to the lower court's ruling, the citations are directly relevant to these proceedings. James Dougovito, Appellants' expert witness, testified in his deposition that the sheer number of OSHA violations, even those unrelated to this specific accident, "shows me that there was a disregard for safety in the workplace, some of them very simple to take care of and yet they weren't." Dougovito deposition at 63. Thus, Appellants have expert testimony demonstrating that all eleven OSHA citations in this case are relevant to the issues to be decided by the jury.

Moreover, the OSHA citations speak directly to the employer's loss of immunity from suit by clearly satisfying the following requirement:

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. W.Va. Code § 23-4-2(c)(2)(ii) (C).

This Court in *Ryan* 219 W.Va. 664, 639 S.E.2d at 765, declared the language of W.Va. Code § 23-4-2(c)(2)(ii)(C) to be unambiguous and held as follows:

. . . the violation of a statute, rule, regulation or standard is a proper foundation for the element of deliberate intent found at W. Va. Code § 23-4-2(c)(2)(ii)(C) (1994) (Repl.Vol.1998), where such statute, rule, regulation or standard imposes a specifically identifiable duty upon an employer, as opposed to merely expressing a generalized goal, and where the statute, rule, regulation or standard asserted by the employee is capable of application to the specific type of work at issue.

The lower court found that even if the citations are relevant, they are prejudicial. West Virginia Rule of Evidence 403 makes it clear that evidence can be excluded only when its "probative

value is substantially outweighed by the danger of *unfair* prejudice.” This Court has elaborated on this concept:

We have defined undue prejudice as ‘a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.’ Under Rule 403, ‘unfair prejudice does not mean damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggests [sic] decision on an improper basis.

State v. Donley, 216 W. Va. 368, 376, 607 S.E. 2d 474, 482 (2004)(internal citations omitted).

There is absolutely nothing about the OSHA report that is anything less than highly probative, and no risk of prejudice identified by Appellee or the lower court that is in any way unfair.

It was an investigation conducted by safety professionals in the immediate aftermath of a fatality. As is evident from the report itself and the video recordings made during the investigation, the relevant witnesses and employees were interviewed, the site inspected, and documents obtained. The OSHA report is, indeed, the best available evidence of Appellee’s safety practices and how they relate to Mr. Coleman’s death.

Although some of the violations cited by OSHA may not have been directly related to the death of Mr. Coleman, those violations are nevertheless relevant because they show the abject and total failure of Appellee R. M. Logging, to comply with the applicable regulations governing workplace safety, and further reveal a pattern of conduct by Appellee. This pattern is further revealed through the testimony of Appellants’ expert, James Dougovito who testified that in all the safety audits he has performed, no site has ever received eleven citations. (Depo. of Mr. Dougovito at 63). Mr. Dougovito has opined that this pattern and practice of working in unsafe working conditions reveals the lack of training and supervision that caused the death of Amos Coleman. Each

of the citations bears on this pattern and practice and should therefore be admissible. Finally, whether the violations were causally related to Mr. Coleman's death is an issue for the jury, consistent with the general rule that questions of proximate cause are generally for the jury. Syllabus Point 7, *Stewart v. George*, 216 W.Va. 288, 607 S.E.2d 394 (2004).

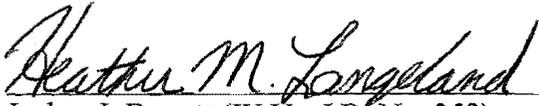
The sheer number of citations reflects the significant failure of Appellee to perform the duties owed to its employees. Although each and every violation in and of itself may not directly bear upon the circumstances surrounding the untimely death of Amos Coleman, taken as a whole the OSHA investigation paints a clear picture of Appellee, who chose to turn a blind eye to the inherent dangers faced by an untrained and novice timber cutter. It is a fact that Appellee agreed to all eleven (11) of the violations and paid the associated fines. The jury must be allowed to consider Appellee's actions in their totality and decide whether Appellants have met their burden under the deliberate intent statute.

V. Conclusion

For all the foregoing reasons, Appellants respectfully ask the Court to grant the **BRIEF OF APPELLANTS**, to schedule this appeal on the argument docket, to reverse the order of Judge Blake granting Defendants' Motion for Summary Judgment and excluding certain OSHA citations, and to remand this case to the trial court for jury consideration.

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CERTIFICATE OF SERVICE

I, Heather M. Langeland, do hereby certify that on the 7th day of October, 2009, 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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