

IN THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 35139

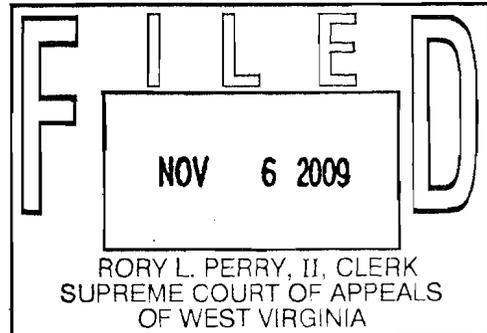
CLARENCE T. COLEMAN ESTATE
by Co-Administrators, **CLARENCE**
COLEMAN and HELEN M. ADKINS,

Appellants,

v.

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

Appellees.



**DEFENDANT, R.M. LOGGING INC.'S RESPONSE TO
BRIEF OF APPELLANTS**

Appeal from the Circuit Court of Fayette County, West Virginia

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QUESTIONS PRESENTED

1. Whether the trial court correctly granting the Defendant's Motion for Summary Judgment where (1) The Court held that Plaintiffs' evidence of OSHA citations and expert witness testimony was insufficient to sustain a cause of action for deliberate intention under W.Va. Code § 23-4-2(d)(2)(ii); and (2) The trial court concluded, under the applicable standard for hearing a summary judgment motion, that the evidence in the record is directly contrary to the elements needed to satisfy a deliberate intention claim?
2. Whether the trial court correctly ruled that nine of the OSHA citations issued to the Defendant are irrelevant and inadmissible evidence?

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
NATURE AND TYPE OF PROCEEDING	1
STATEMENT OF FACTS	3
STANDARD OF REVIEW.....	5
SUMMARY OF THE ARGUMENT	6
ARGUMENT	6
I. In a Deliberate Intent Action, a Plaintiff must set forth Prima Facie Evidence of Each of the Five Statutory Elements. Appellants failed to meet their required burden on proof and summary judgment was rightfully granted.	6
A. Summary Judgment Standard for Deliberate Intent Cases.....	6
B. Appellants Did Not Present Prima Facie Evidence of R.M.	8
C. Mr. Dougovito’s Opinion is Insufficient to Prove that R.M. Logging had a Subjective Realization of an Unsafe Working Condition Based on a Theory of Inadequate Training or Supervision	10
D. The OSHA Violations Received as a Result of the Accident are Not Evidence of Subjective Realization of a Specific Unsafe Working Condition Sufficient to Support a Claim of Deliberate Intention.	15
E. Comparison to <i>Ryan v. Clonch Industries Inc.</i> is not appropriate.	18
1. The Regulation at Issue in this Case is Distinct from the Regulations at issue in <i>Ryan v. Clonch Industries, Inc.</i> Requiring Hazard Assessments.	18
2. Unlike the Defendant in <i>Ryan v. Clonch Industries, Inc.</i> , R.M. Logging did not Wholly Ignore the Regulation at Issue and Provided Training Covered by the Regulation.	20
II. The Circuit Court’s Decision to Exclude Nine OSHA Citations was not an Abuse of Discretion.	21

PRAYER.....24
CERTIFICATE OF SERVICE26

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

Blake v. John Skidmore Truck Stop, Inc., 201 W.Va. 126, 493 S.E.2d 887 (1997)8

Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 408 S.E.2d 385 (1991)8-11, 13, 17

Coleman v. R.M. Logging, Inc., 222 W. Va. 357, 664 S.E.2d 698 (2008)2

Craddock v. Watson, 197 W.Va. 62, 475 S.E.2d 62 (1996)22

Deskins v. S.W. Jack Drilling Co., 215 W.Va. 525, 600 S.E.2d 237 (2004)8

Doe v. Wal-Mart Stores, Inc., 210 W. Va. 664, 558 S.E.2d 663 (2001)5

Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).....5, 22

Hanks v. Beckley Newspapers Corp., 172 S.E.2d 816, 817 (W. Va. 1970).....7

Helmick v. Potomac Edison Co., 185 W.Va. 269, 406 S.E.2d 700 (1991).....9

Marcus v. Holley, 217 W. Va. 508, 520, 618 S.E.2d 517, 529 (2005)7

Mumaw v. U.S. Silica Co., 204 W.Va. 6, 511 S.E.2d 117 (1998)7, 8, 12

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)5-6

Ryan v. Clonch Industries, Inc, 219 W. Va. 664, 639 S.E.2d 756 (2006)18-21

Sedgmer v. McElroy Coal Company, 220 W. Va. 66, 640 S.E.2d 129 (2006).....8

State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994)22

Tudor v. Charleston Area Medical Center, Inc., 203 W. Va. 111, 506 S.E.2d 554 (1997)5

WEST VIRGINIA STATUTES AND REGULATIONS

W.Va. Code § 23-4-2(d)(2)(ii).....1, 22

W.Va. Code § 23-4-2(d)(2)(ii)(B)17-20

W.Va. Code § 23-4-2(d)(2)(iii)(B)7

OTHER AUTHORITY

29 C.F.R. § 1910.132(d)(1).....18
29 C.F.R. § 1910.266(h)(1)(vi).....4, 15
29 C.F.R. § 1910.266(i)(3)(iii).....4, 15, 19, 20
29 U.S.C. § 666(k) (2008)16
Ch. III, C. 2.b., http://www.osha.gov/Firm_osh_data/100007.html16
Ch. III, C. 2.d., http://www.osha.gov/Firm_osh_data/100007.html16, 17
W.Va. R. Civ. P. 56(c).....6, 7
W.Va. R. Evid. 401 (2008)21-23
W.Va. R. Evid. 402 (2008)21-23
W.Va. R. Evid. 403 (2008)23

COURT DOCUMENTS

Deposition of Gary Moore13, 18, 20
Deposition of James Dougovito11- 13
Deposition of John Robinson3, 14, 20
Deposition of Kelcey Nichols13-14, 20, 23
Occupational Safety & Health Administration Investigation Report3
Order Granting R.M. Logging, Inc. 's Motion for Summary Judgment2
OSHA Citations4-5, 15-16, 22
Complaint3
Brief of Appellants17-18
Plaintiffs' Response to Defendants, R.M. Logging, Inc. and John Robinson's

Motion in Limine to Exclude OSHA Citations24

NATURE AND TYPE OF PROCEEDING

Now comes R.M. Logging, Inc., by and through counsel, pursuant to Rule 10(b) of the West Virginia Rules of Appellate Procedure, and hereby submits its appellate brief. Appellee respectfully requests that this Court affirm the lower court's February 10, 2009, Order granting it summary judgment and excluding nine OSHA citations.

The underlying action was commenced on June 17, 2005. The Appellants filed the civil action against R.M. Logging and its manager, John Robinson, under W. Va. Code § 23-4-2(d)(2)(ii) claiming that the Defendants deliberately intended to subject Mr. Coleman, Appellants' decedent, to an unsafe working condition resulting in his death. The circuit court has granted R.M. Logging and John Robinson summary judgment **twice** in this matter finding that Appellants have failed to satisfy the elements of deliberate intent.

The Appellants appealed the first award of summary judgment on January 19, 2007. This Court reversed and remanded the case back to the Circuit Court of Fayette County in June of 2008. In reversing the case, this Court did not find that Appellants had presented genuine issues of material fact. Rather, the Court found that the testimony of Mr. Nichols (referred to in the order as Nicholas), an employee of R.M. Logging and eye witness to the accident, may present a genuine issue of material fact. Specifically, this Court stated:

While Nicholas' testimony is speculative at this point, he may be able to shed light upon such matters as: (1) the nature of the safety meetings conducted at the work site, (2) the manner and substance of any communications among the employees on the day of the accident and (3) the immediate facts surrounding Coleman's death. Accordingly, this Court concludes that the appellants were justified in characterizing the evidence of Kelcey Nicholas as pertaining to the "material facts in this case."

Coleman v. R.M. Logging, Inc., 222 W. Va. 357, 364-5, 664 S.E.2d 698, 705-6 (2008).

So, the case was remanded so the lower court could rule on (1) the pending motion to continue the trial in order to take the deposition of a key witness, Kelcey Nichols, and (2) the unresolved motion to exclude the testimony of the Appellants' expert, Homer S. Grose.

Upon remand, these issues were adequately addressed by the Circuit Court. First, the deposition of Kelcey Nichols, the sole eyewitness to the accident, was taken on August 13, 2008. Second, before the motion to exclude Homer S. Grose could be heard, he died. After Mr. Grose's death, the Circuit Court entered an order allowing the Appellants additional time to retain a new expert. The Appellants retained James P. Dougovito, whose deposition was taken on December 18, 2008. The Defendants filed their second motions for summary judgment on January 5, 2009.

On February 10, 2009, the Circuit Court granted both R.M. Logging's and John Robinson's motions for summary judgment. *See* February 10, 2009, Summary Judgment Order. Thus, the circuit court found that the testimony of Mr. Nichols did not present a genuine issue of material fact. It is from this Order that the Appellants now appeal.¹

On the same day, a separate Order was entered excluding nine of the eleven OSHA citations as irrelevant and inadmissible.² The Appellants also appeal the Order excluding the citations.

R.M. Logging respectfully requests that this Court affirm the circuit court's Orders.

¹ Appellants are not appealing the summary judgment motion granted to Defendant John Robinson.

² In this Court's previous Order, it stated in dicta that these excluded citations "did not directly concern the accident of December 2, 2003." *Coleman*, 222 W. Va. at 360.

STATEMENT OF FACTS

The Appellants in this matter, Clarence Coleman and Helen Adkins, are the parents and co-administrators of the estate of Clarence “Amos” Coleman (hereinafter also referred to as Mr. Coleman or decedent). *See Complaint*, at ¶ 1. In 2003, Mr. Coleman was an employee of the Defendant, R.M. Logging, Inc. *Id.* at ¶ 6. R.M. Logging was a closely held corporation engaged in the business of timber removal and owned wholly by Michelle Robinson. *See Deposition of John Robinson*, at pp. 6, 8-10. R.M. Logging is no longer in business. *Id.* Mrs. Robinson’s husband and certified logger, John Robinson, operated and oversaw the daily activities of R.M. Logging. *Id.* Mr. Robinson knew Mr. Coleman’s family, and hired Mr. Coleman after requests from his father. *Id.* at 43-44. Prior to hiring Mr. Coleman, Mr. Robinson talked to his previous boss at Nicholas Logging, where Mr. Coleman had been cutting timber. *Id.* at 43-46. Mr. Robinson believed that Mr. Coleman had worked as a cutter for over a year before coming to R.M. Logging. *Id.* at 75-76. Mr. Robinson was also responsible for training R.M. Logging employees, including an initial two week on-the-job training session for each new employee. *Id.* at 38-43.

On December 2, 2003, Mr. Coleman was working for R.M. Logging on a timbering site located near the town of Smithers in the Cannelton Hollow area of Clay County. *See Occupational Safety & Health Administration Investigation Report* (hereinafter OSHA Investigation), at pp. 4-5. On that day, Mr. Coleman initially cut a large maple tree; the maple tree fell to the ground across a nearby logging road. *Id.* Mr. Coleman next cut a 15-inch diameter hickory tree, which fell, but became lodged on a limb approximately 20 feet in the air. *Id.* He then proceeded to cut yet another tree, an 18-

inch diameter hickory, which also became stuck and did not fall to the ground. *Id.* Mr. Coleman then proceeded to walk back toward the fallen maple. *Id.* In doing so, Mr. Coleman unfortunately walked directly beneath the butt end of the first hanging hickory. *Id.* Mr. Coleman was fatally wounded when the supporting limb snapped and the 15-inch diameter hickory struck him with a glancing blow to the head. *Id.*

Following the accident, OSHA inspected and issued eleven citations. Upon a motion in limine, the lower court decided that only two of the citations were admissible.

The following are the two citations the circuit court found relevant to this action:

Citation 1 Item 1a: 29 CFR 1910.266(h)(1)(vi): Each danger tree, including lodged trees and snags were not removed or avoided before work was commenced in the area:

(a) Cannelton Hollow Road logging site: A timber cutter continued work in the immediate area of an 18 inch diameter tree, approximately 50-60 feet in height, that was previously felled and became lodged (hung) in the top of another tree while still attached to the stump by hinge wood, on or around December 3, 2003.

(b) Cannelton Hollow Road logging site. A timber cutter continued work under and around a 15 inch diameter hickory tree, approximately 45-50 feet in length, that had been felled but was suspended in air due to a 4 to 6 inch diameter limb that prevented the tree from falling to the ground, on or about December 3, 2003.

Citation 1 Item 1b: 29 CFR 1910.266(i)(3)(iii): Employee training did not consist of the recognition of safety and health hazards associated with employee's specific work tasks:

(a) Cannelton Hollow Road logging site. Safety and health hazards were not recognized on the job as evidenced by a lodged (hung) 18 inch diameter hickory tree left in this position while continuing work in the immediate area, on or about December 3, 2003.

(b) Cannelton Hollow Road logging site. Safety and health hazards were not recognized on the job as evidenced by a timber cutter continuing work under and around a 15 inch diameter hickory tree, approximately 45-50 feet in length, that had been

felled but was suspended in air due to a 4 to 6 inch diameter limb that prevented the tree from falling to the ground on or about December 3, 2003.

See Osha Citations at p. 5 and 6.

As aforementioned, the lower court excluded nine citations finding such citations irrelevant to the contested issues of the case. The citations include violations for an improper gas container (Citation 1-3), lack of proper meshing on a bull dozer cabin (Citation 1-4), failure to certify all employees in first aid and CP (Citation 1-5a), improper location and contents of first aid kits (Citations 1-5b,5c), lack of hazard stickers and material safety data sheets (Citations 1-6a,6b), lack of training on handling fuel (Citation 1-6c), and a lack of a communication device between teams of workers (Citation 1-2).

See Osha Citations.

STANDARD OF REVIEW

As this Court has repeatedly held, review of a grant of summary judgment is *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

Regarding the exclusion of the OSHA citations, “A party challenging a circuit court's evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court.” *Gentry v. Mangum*, 195 W. Va. 512, 518 S.E.2d 171 (W. Va. 1995). Orders excluding or admitting evidence are reviewed under an abuse of discretion standard. *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001); Syl. Pt. 9, *Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997). Accordingly, abuse of discretion is the appropriate standard of review for the Order excluding nine OSHA citations.

SUMMARY OF THE ARGUMENTS

In a deliberate intent case, the plaintiff must establish prima facie evidence of each of the five elements in order to withstand summary judgment. Appellants did not establish prima facie evidence of subjective realization. Appellants' evidence of subjective intent is essentially their expert's conjecture that Mr. Coleman must have hung trees before while working with R.M. Logging's manager, John Robinson, and OSHA citations based upon the very incident leading to Mr. Coleman's death. No evidence, however, was presented that John Robinson or R.M. Logging was aware of prior incidents in which Mr. Coleman had walked under a hung tree or that he had ever hung a tree. The after-the-fact evidence that Appellants rely upon is not sufficient to establish a genuine issue of fact regarding R.M. Logging's subjective intent. Therefore, the grant of summary judgment was appropriate.

Regarding the OSHA citations, the circuit court had broad discretion to decide whether to admit or exclude the citations. The excluded citations do not have even an arguable causal link to the accident; therefore, the lower court's decision to exclude the citations as irrelevant is reasonable and not tantamount to an abuse of discretion.

ARGUMENT

I. In a Deliberate Intent Action, a Plaintiff must set forth Prima Facie Evidence of Each of the Five Statutory Elements. Appellants failed to meet their required burden on proof and summary judgment was rightfully granted.

A. Summary Judgment Standard for Deliberate Intent Cases

Rule 56 of the West Virginia Rules of Civil Procedure provides that when "there is no genuine issue as to any material fact" a party is entitled to summary judgment if the applicable substantive law so provides. Syl. Pt. 2, *Painter v. Peavy*, 451 S.E.2d 755 (W.

Va. 1994). The Supreme Court of Appeals of West Virginia has stated that summary judgment is favored in appropriate circumstances and plays an important role in litigation in this state. *Id.* at 758 n.5. Although the facts and inferences must be viewed in a light most favorable to the non-moving party, that party must produce "concrete" evidence which would allow a reasonable finder of fact to return a verdict in its favor. *Id.* at 759. The purpose of Rule 56 is to permit courts to promptly dispose of controversies on their merits without resort to trial when there is no real dispute of salient facts or if only a question of law exists. *Hanks v. Beckley Newspapers Corp.*, 172 S.E.2d 816, 817 (W. Va. 1970).

The West Virginia Workers' Compensation Act envisions the use of summary judgment to efficiently resolve matters brought under the deliberate intention exception of the statute. The legislature explicitly directs the trial court to scrutinize such claims and grant summary judgment when a plaintiff offers insufficient evidence as to any one of the above five factors. West Virginia Code § 23-4-2(d)(2)(iii)(B), provides in pertinent part:

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

Interpreting the statute the West Virginia Supreme Court of Appeals has held that "in order to withstand a motion for summary judgment, a plaintiff must make a prima facie showing of dispute on each of the five factors." *Marcus v. Holley*, 217 W. Va. 508, 520, 618 S.E.2d 517, 529 (W. Va. 2005) (citing *Mumaw v. U.S. Silica Co.*, 204 W.Va. 6, 9, 511 S.E.2d 117, 120 (1998)).

B. Appellants Did Not Present Prima Facie Evidence of R.M. Logging's Subjective Realization

Appellants have failed to satisfy an essential element under the deliberate intention exception: subjective realization. Appellants rely upon OSHA citations and their expert's opinion; the foundation for both is Mr. Coleman's performance on the day of the accident. As explained below, the evidence is insufficient to prove subjective realization.

The West Virginia Supreme Court of Appeals has consistently held that the "subjective realization" element is not satisfied by evidence that the employer **reasonably should have known** of the specific unsafe working condition and the strong probability of death or serious injury presented by that condition. Syl. pt. 3, *Blevins v. Beckley Magnetite, Inc.*, 408 S.E.2d 385 (W. Va. 1991)(emphasis added); *See also Blake v. John Skidmore Truck Stop, Inc.*, 201 W.Va. 126 (1997); *Deskins v. S.W. Jack Drilling Co.*, 215 W. Va. 525 (2004). Rather, it must be shown that the employer actually possessed such knowledge. *Id.* "This is a high threshold that cannot be successfully met by speculation or conjecture." *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 12, 511 S.E.2d 117, 123 (W. Va. 1998). This requirement is most often satisfied by evidence of prior complaints (whether formal or informal), prior injuries on the same equipment, or prior, unabated citations by federal or state agencies. Singular incidents have been held insufficient to prove subjective realization. *Sedgmer v. McElroy Coal Co.*, 220 W. Va. 66, 640 S.E.2d 129 (2006).

In *Deskins v. Jack Drilling Co.*, 600 S.E.2d 237, 243 (W. Va. 2004) (per curiam), the Court affirmed the circuit court's grant of summary judgment to the defendant employer stating that:

In the case at bar, the appellant has not presented any evidence to show that the appellees possessed actual knowledge that their employees were improperly supervised and that there was a high degree of risk and a strong probability of serious injury. ***To be specific, the appellant has produced no evidence of prior injuries, employee complaints, or citations from any regulatory or governmental agency*** arising from the use of a dozer to set up the pipe rack and pipe tub or the lack of supervision during that operation. The appellant simply has not offered any evidence remotely suggesting that the appellees knew that their supervision of the appellant or any of their employees was inadequate. At best, the appellant might be able to prove ordinary negligence on the part of the appellees. However, 'the 'deliberate intention' exception to the Workers' Compensation system is meant to deter the malicious employer, not to punish the stupid one.' *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 274, 406 S.E.2d 700, 705 (1991)." (emphasis added).

In *Blevins v. Beckley Magnetite*, the trial court granted the employer judgment notwithstanding the verdict in a deliberate intent action. That case involved an employee who was severely injured while cleaning up ore spillage around a self-cleaning conveyor tail pulley. The employee was shoveling material onto the conveyor belt when his coveralls got caught, and he was pulled into the machine. The employee claimed that his employer told him not to shut off the conveyor belt when performing such task. No other witness testimony corroborated that they had received such an instruction. The evidence showed that the employees who worked at the plant during the relevant time-frame were advised to shut off the power to the conveyor and that no prior injuries had occurred. The former employees presented by the Plaintiff, all of whom worked prior to the gate being installed as a guard, testified that they received no instruction regarding whether the conveyor should be turned off while performing the task. Moreover, the Court found no evidence that the employer was put on notice of the particular unsafe working condition alleged, cleaning spillage while the conveyor belt was running. The Court upheld the lower court's decision finding that an unsafe working condition existed only upon the

plaintiff's failure to comply with safety procedures and that plaintiff failed to prove subjective realization.

In the case at bar, there is no evidence of any prior complaints, no evidence of any prior injuries, and no evidence of any similar prior citations from federal or state agencies. Simply put, there is no evidence whatsoever to suggest that R.M. Logging had "actual knowledge" of the alleged high risk of serious injury or death associated with the purported unsafe working conditions identified by Appellants. The Appellants' expert's opinions are also based solely upon the "singular incident" and are likewise not probative of R.M. Loggings knowledge prior to the accident. In the same vein, the OSHA citations upon which Appellants attempt to rely were issued after-the-fact and, thus, cannot go towards the issue of R.M. Loggings knowledge at the time of the accident. As in *Blevins*, the unsafe condition here is the employee's failure to comply with safety regulation. Further, in both cases no evidence, either circumstantial or direct, has been set forth that the employer had any actual, prior knowledge of the employee's failure to comply with safety regulations. Accordingly, Appellants did **not** present prima facie evidence of subjective intent in order to withstand a motion for summary judgment.

C. Mr. Dougovito's Opinion is Insufficient to Prove that R.M. Logging had a Subjective Realization of an Unsafe Working Condition Based on a Theory of Inadequate Training or Supervision.

The Appellants argue that Mr. Coleman was not properly trained to recognize the hazards of the worksite and that R.M. Logging knew he was not properly trained. This reasoning is defective because at most, such a fact, if proven, would only tend to show that R.M. Logging "should have known" Mr. Coleman would walk under the tree. This is

clearly not sufficient to sustain the action according to the WVSCA's holding in *Blevins*.
See Syl. Pt. 3, *Blevins*, 185 W.Va. 633.

Further, the Appellants have failed to demonstrate that Mr. Coleman was inadequately trained or supervised, as their only offer of proof for this allegation is the occurrence of the accident itself. As illustrated by their expert, Mr. Dougovito's, testimony, he bases his opinion on Mr. Coleman's training and supervision solely on the activities during the short period of time after lunch, immediately preceding the accident. During his deposition, Mr. Dougovito seemed unsure whether Mr. Coleman received inadequate training or supervision.

Q. If you take Mr. Robinson's testimony and Mr. Moore's testimony about the training, and even Kelcey Nichols testified about training, then – I know you're critical of the lack of documentation, but if you just take their testimony that there was training and the amount of training that they testified to, would that be adequate training?

A. No.

Q. Why not?

A. You need supervision. Adequate training – it's clear, very clear, by looking at two out of three trees hung up right after lunch that the training wasn't adequate on cutting, felling trees properly. And then working in and around a hung tree, which should have been part of that training, didn't take hold. So there was a lack of supervision to reinforce that training. So that didn't occur.

Q. **So you're just looking at the result and saying that as a result of what happened that one day, then what follows in your mind is lack of training, lack of supervision, on down the road?**

A. **Well, not lack of training.** I have to take them at their word that they did, in fact, train him, that they did, in fact, train him as they said they did, although, of course, by law, it's not documented.

See Deposition of James Dougovito, at pp. 56-57.

Appellants' expert admits that he does not know the extent of on-the-job training provided to Mr. Coleman by R.M. Logging or by any prior employers.

Q. You don't have any information to know exactly what training Mr. Coleman received, other than what was testified to in the deposition of Nichols and Robinson and, I think his name was, Moore?

A. Moore. No, I didn't -- No, there was no other indication in the information, other than looking at what transpired, cutting three trees after lunch and hanging two, that whatever training that he had was inadequate.

Id. at pp. 35-36.

In fact, Appellants' expert never reviewed anything about Mr. Coleman's training. Instead, despite admitting that even experienced loggers can hang a tree, Mr. Dougovito simply jumps to the unfounded conclusion that Mr. Coleman was not adequately trained merely because two out of three trees he cut hung up during the incident in question. *See Id.* at p. 35. This narrow result-oriented approach is not a proper basis for supporting a claim under the deliberate intention exception, which has a "high threshold that cannot be successfully met with speculation or conjecture." *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 12, 511 S.E.2d 117, 123 (2004).

Appellants also argue there was a lack of supervision on the part of R.M. Logging, but this too is insufficient as evidence of a subjective realization of the unsafe working condition, which was ultimately caused by Mr. Coleman's own bad judgment. Appellants have not produced an iota of evidence that Mr. Coleman's choice to continue cutting in the presence of a hung tree and to walk under the hung tree had occurred before. Yet, Appellants' expert alleges that, because Mr. Coleman hung up trees on the day of the accident, he hung them up regularly.

Q. So your opinions in this case are based upon your assumption that Amos Coleman hung trees up on days before the day he was killed and

that he didn't have them mechanically removed and he continued working around hung trees and this was his normal way of working and supervision was aware of it and they didn't stop him?

A. Yes.

Q. But if you were to assume that Amos Coleman didn't work around hung trees on any other day but this day and normally had a hung tree mechanically removed before continuing to cut, then your opinion would be different?

A. Hypothetically, if that was the case, yes.

Id. at pp. 51-52.

Similar to his conclusion as to training, Appellants' expert relies on impermissible hindsight and the result of the accident to conclude that R.M. Logging's supervision of Mr. Coleman was lacking. As explained above, it is not enough to merely assert R.M. Logging did not supervise Mr. Coleman and therefore "should have known" he would walk beneath the hickory. *See* Syl. Pt. 3, *Blevins*, 185 W.Va. 633.

The Appellants' expert's conclusions are contrary to the only evidence about training in this case, i.e. the testimony of Mr. Robinson, Mr. Moore, and Mr. Nichols, all of whom worked directly with Mr. Coleman for an extended period of time.

Q. And who did you see him [John Robinson] train?

A. All the timber cutters that we ever employed.

Q. Okay.

A. He'd be right with them to make sure that they'd know what to and what not to do.

See Deposition of Gary Moore, at p. 12.

Q. Tell me what kind of training you got when you came on the job at R.M.

A. When I came on to the job he [John Robinson] asked me what I could do. I explained to him what all I had experience doing. He took me on the hill where we was working and he worked with me, showed me how

everything worked, then let me show that I could do what I needed to do. He trained me to run the dozer and the skidder.

See Deposition of Kelcey Nichols, at p. 10.

Q. What kind of training did you do?

A. Exactly what the State teaches me on chainsaw safety, to properly hinge trees, how to properly make sure you got escapeway away from the trees, how to properly cut.

Q. Now, how did you give this training?

A. I personally – every timber cutter I hire, I cut with them for two weeks right beside of them and make sure that we got overall these things, the same way the State went over them for me.

See Deposition of John Robinson, at pp. 38-39.

There is no testimony whatsoever that Mr. Coleman had hung up trees before, let alone on a daily basis. There is no testimony or evidence that establishes that Mr. Coleman had inadequate training or supervision.

Appellants have the ultimate burden to establish, through testimony and/or documentation, that R.M. Logging had a subjective realization of the unsafe working condition. No such evidence exists. Appellants have failed to show that R.M. Logging knew anything about the hanging tree or Mr. Coleman's choice to walk under it until after the accident took place. Appellants' assertions of faulty training and supervision are sweeping conclusions based only on Mr. Coleman's actions immediately preceding the accident, which are contrary to the sworn testimony of the employees actually present at the accident and who are knowledgeable about training and supervision. Such conclusions are unproven and insufficient to assign R.M. Logging with any degree of actual knowledge. Therefore, Defendant R.M. Logging was properly granted summary judgment as a matter of law.

D. The OSHA Violations Received as a Result of the Accident are Not Evidence of Subjective Realization of a Specific Unsafe Working Condition Sufficient to Support a Claim of Deliberate Intention.

Appellants contend that the OSHA citations received by R.M. Logging is evidence of its subjective realization of specific unsafe working condition, namely improper training. As shown below, the citations upon which Appellants rely are based solely upon the actions of the decedent on the day of the accident:

Citation 1 Item 1a: 29 CFR 1910.266(h)(1)(vi): Each danger tree, including lodged trees and snags were not removed or avoided before work was commenced in the area:

(a) Cannelton Hollow Road logging site: A timber cutter continued work in the immediate area of an 18 inch diameter tree, approximately 50-60 feet in height, that was previously felled and became lodged (hung) in the top of another tree while still attached to the stump by hinge wood, on or around December 3, 2003.

(b) Cannelton Hollow Road logging site. A timber cutter continued work under and around a 15 inch diameter hickory tree, approximately 45-50 feet in length, that had been felled but was suspended in air due to a 4 to 6 inch diameter limb that prevented the tree from falling to the ground, on or about December 3, 2003.

Citation 1 Item 1b: 29 CFR 1910.266(i)(3)(iii): Employee training did not consist of the recognition of safety and health hazards associated with employee's specific work tasks:

(a) Cannelton Hollow Road logging site. Safety and health hazards were not recognized on the job **as evidenced by a lodged (hung) 18 inch diameter** hickory tree left in this position while continuing work in the immediate area, on or about December 3, 2003.

(b) Cannelton Hollow Road logging site. Safety and health hazards were not recognized on the job **as evidenced by a timber cutter continuing work under and around a 15 inch diameter hickory tree**, approximately 45-50 feet in length, that had been felled but was suspended in air due to a 4 to 6 inch diameter limb that prevented the tree from failing to the ground on or about December 3, 2003.

See Osha Citations at p. 5 and 6.

The citation regarding training indicates that Mr. Coleman's job performance on the day of the accident is the basis for the citation rather than a review of the actual training.³

Moreover, neither the citations nor the OSHA Investigation provides any evidence into the R.M. Logging's actual knowledge. Contrary to the Appellants' assertions, a 'serious' OSHA violation classification does not aid a trier of fact in the determination of an employer's subjective realization and appreciation regarding an unsafe condition. Citations issued by OSHA are categorized by the inspector as either (1) other than serious, (2) serious, or (3) willful. The OSHA Field Inspection Reference Manual outlines the meaning of each category of violation:

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

Ch. III, C. 2.b., http://www.osha.gov/Firm_osh_data/100007.html (emphasis added); 29 U.S.C. § 666(k) (2008).

A willful violation exists under the Act where the evidence shows either an intentional violation of the Act or plain indifference to its requirements.

Ch. III, C. 2.d., http://www.osha.gov/Firm_osh_data/100007.html.

The language of the defining statute makes clear that an employer can be issued a serious violation without actual knowledge of the violation because it adopts a "should have known" threshold standard. As a practical matter, it is impossible to distinguish

³ Appellants' expert's testimony appears to be inconsistent with the OSHA citation which sets forth the Mr. Coleman did not recognize the hazard of walking under the tree. Mr. Dougovito opines that Mr. Coleman's

between those employers who have actual knowledge and who fall into the “should have known” category based solely on the ‘serious’ designation. The requirements for the issuance of a ‘serious’ violation simply do not amount to a finding of actual knowledge on the part of the employer. The Appellants themselves have paraphrased this violation standard as meaning that the employer “knew, or should have known of the hazard.” See *Brief of Appellants*, at p. 7. Use of an OSHA violation, by itself, to show a subjective realization of an unsafe condition, therefore, is exactly the type of evidence that this Court first cautioned against in Syllabus Point 3 of *Blevins v. Beckley Magnetite, Inc.*, 185 W.Va. 633, 408 S.E.2d 385 (W. Va. 1991) (holding that the subjective realization “requirement is *not* satisfied merely by evidence that the employer reasonably *should have known* of the specific unsafe working condition) (emphasis added).

Furthermore, the Appellants fail to address the fact that ‘willful’ OSHA violations, which were not issued in this case, provide a direct correlation to the requirements of the West Virginia Workers’ Compensation Act. “A willful violation exists under the Act where the evidence shows either an intentional violation of the Act or plain indifference to its requirements.” OSHA Field Inspection Reference Manual, Ch. III, C. 2.d., http://www.osha.gov/Firm_osh_data/100007.html. The West Virginia Workers’ Compensation statute requires the employer to have “a subjective realization and *an appreciation of the existence of the specific unsafe working condition*” for deliberate intent to apply. W.Va. Code § 23-4-2(d)(2)(ii)(B) (2008) (emphasis added).

The ‘serious’ violation, on the other hand, allows an employer to be unaware of the violation, providing that it could have known through reasonable diligence of the

hardhat, rather than inadequate training, prevented him from seeing the tree. See *Deposition of James Dougovito*, at pp.25 and 58.

violation. Thus, the ‘serious’ violation is not compatible with the “appreciation” requirements of the statute and does not indicate that an employer acted intentionally to expose an injured employee to an unsafe condition. Therefore, the citations are not prima facie evidence of R.M. Logging’s subjective realization.

E. Comparison to *Ryan v. Clonch Industries, Inc.* is not appropriate.

In their Appellants’ Brief, the Appellants attempt to forge a connection between the current litigation and a recent decision by this Court in a deliberate intention action; however, the testimonial evidence of John Robinson, Gary Moore, and Kelcey Nichols makes this case inapposite to *Ryan v. Clonch Industries, Inc.*, 219 W. Va. 664, 639 S.E.2d 756 (2006). In *Ryan*, the defendant employer, Clonch Industries, Inc. (hereinafter Clonch), attempted to avail itself of the protection of W.Va. Code § 23-4-2(d)(2)(ii)(B), while at the same time completely neglecting to perform a hazard assessment as mandated by an OSHA regulation codified at 29 C.F.R. § 1910.132(d)(1) (2007). Clonch literally “conceded that it failed to perform the hazard evaluation.” *Id.* As described more fully in subsections one and two directly below, *Ryan* is highly distinguishable from the case at bar because the regulations at issue in the two cases as well as the employers’ efforts at compliance. Thus, *Ryan* is not authoritative in this matter.

1. The Regulation at Issue in this Case is Distinct from the Regulations at issue in *Ryan v. Clonch Industries, Inc.* Requiring Hazard Assessments.

There is a distinct difference between the type of regulation that was at issue in *Ryan* and the regulation propounded as relevant by the Appellants in this matter. The regulation in *Ryan* required a hazard assessment, the principle purpose of which is

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

In contrast, R.M. Logging has not handled itself like the ill-fated ostrich. First, the regulation championed by the Appellants throughout this appeal, 29 C.F.R. § 1910.266(i)(3)(iii), is one concerning training.⁴ Unlike the hazard assessment requirement used in *Ryan*, violation of the training regulation does not create a ready-made defense for employers under the subjective realization mandate of W.Va. Code § 23-4-2(d)(2)(ii)(B). 29 C.F.R. § 1910.266(i)(3)(iii) is not inseparably connected to the employer’s actual knowledge. This Court recognized that violations of statutes, rules or regulations dealing with mandatory hazard evaluations, as in the *Ryan* case, are unique. Accordingly, this Court explicitly fashioned its ruling in *Ryan* such that only violations of statutes, rules, or regulations concerning such mandatory evaluations will result in estoppel of an employer’s defense that it lacked subjective realization. This precise point is evident in Syllabus Point 6, which provides:

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

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

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

2. Unlike the Defendant in *Ryan v. Clonch Industries, Inc.*, R.M. Logging did not Wholly Ignore the Regulation at Issue and Provided Training Covered by the Regulation.

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

⁴ This regulation reads: “(3) Content. At a minimum, training shall consist of the following elements:” including “(iii) Recognition of safety and health hazards associated with the employee’s specific work

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

II. The Circuit Court's Decision to Exclude Nine OSHA Citations was not an Abuse of Discretion.

Trial courts are given broad discretion to admit or exclude evidence, and such decisions are overturned only upon finding that the court committed an abuse of discretion. Here, the circuit court's order excluding nine of the OSHA citations was reasonable given the lack of relevance of the citations and the prejudicial effect of their introduction and is not tantamount to an abuse of discretion.

The West Virginia Rules of Evidence support the exclusion and prohibition of any introduction, reference to the OSHA citations to R.M. Logging because they are irrelevant to the issues being litigated, extremely prejudicial to the Defendant, R.M. Logging, confusing and misleading to the jury, and would result in undue delay and waste of time.

West Virginia Rule of Evidence 401 defines the nature of relevant evidence as: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." W.Va. R. Evid. 401 (2008). Further, Rule 402 states, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of West Virginia, by these rules, or by other rules adopted by the Supreme Court of Appeals. Evidence which is not relevant is not admissible." W.Va. R. Evid. 402 (2008).

tasks, including the use of measures and work practices to prevent or control those hazards."

Not all relevant evidence, however, is appropriate for presentation to a jury and Rule 403 provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” W.Va. R. Evid. 403 (2008). Furthermore, the Rule 403 balancing test is essentially a matter of trial conduct and the lower court’s discretion will not be overturned absent a showing of clear abuse. *See State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). “[A] circuit court has considerable latitude under the West Virginia Rules of Evidence in determining whether to admit evidence as relevant under Rules 401, 402 and 403, and decisions concerning relevancy are reviewed under an abuse of discretion standard.” *Craddock v. Watson*, 197 W.Va. 62, 66, 475 S.E.2d 62, 66 (1996). “A party challenging a circuit court’s evidentiary rulings has an onerous burden because a reviewing court gives special deference to the evidentiary rulings of a circuit court.” *Gentry v. Mangum*, 195 W.Va. 512, 518, 466 S.E.2d 171, 177 (1995).

The Appellants’ action against R.M. Logging makes claims arising from an exception to the immunity granted under the Workers’ Compensation Act. The Act grants immunity to employers and individual employees unless a plaintiff can show that defendants acted with deliberate intention. As a result, only evidence tending to prove the appropriate statutorily required elements under 23-4-2(d)(2)(ii) is relevant to the claims against R.M. Logging.

Only two of the eleven individual citations issued by OSHA against R.M. Logging following the December 3, 2003, accident are in any way connected to the injuries sustained by Mr. Coleman. *See OSHA Citations*, issued Jan. 16, 2004. Citation 1-

1a and Citation 1-1b both directly reference the hanging timber which killed Mr. Coleman. *See id.* The nine other citations issued by OSHA to R.M. Logging are clearly irrelevant to the issues of this action. The citations include violations for an improper gas container (Citation 1-3), lack of proper meshing on a bull dozer cabin (Citation 1-4), improper location and contents of first aid kits (Citations 1-5b, 5c), lack of hazard stickers and material safety data sheets (Citations 1-6a, 6b), lack of training on handling fuel (Citation 1-6c), and a lack of a communication device between teams of workers (Citation 1-2). *See id.* Each of these violations had no influence or impact on the death of Mr. Coleman by a hanging tree falling on him. Even if these violations did not exist, Mr. Coleman still would have been killed by the tree. Thus, these citations were properly omitted as irrelevant under West Virginia Rules of Evidence 401 and 402.

Citation 1-5a, issued to R.M. Logging for each employee on site not being certified in first aid and CPR, was also properly excluded as irrelevant. *See id.* Mr. Coleman's partner that day, Kelcey Nichols, had the required first aid and CPR training. *See Deposition of Kelcey Nichols*, at p. 16. He tried to save Mr. Coleman after the tree fell. *Id.* at p. 32. Thus, the violation was unrelated to the accident at issue in this matter. The inclusion of this citation could mislead jurors to erroneous inferences that would greatly prejudice the Defendant. As such, this citation should be excluded from the trial. Thus, the Circuit Court correctly ordered the exclusion and prohibition of any introduction, reference or mention of the issuance of OSHA citations against R.M. Logging, Inc. before the jury in this matter.

The Appellants' own assertions regarding the OSHA citations demonstrate how the Appellants could mischaracterize the evidence to unfairly prejudice the Defendant

and mislead and confuse the jury. Appellants' assertions expand the scope of the OSHA citations, most of which were unrelated to Mr. Coleman's death, to reach a misleading and sweeping generalization of inadequate training and supervision. By the Appellants' own admission, many of the OSHA citations do not even relate to Mr. Coleman's death. *See Plaintiffs' Response to Defendants, R.M. Logging, Inc. and John Robinson's Motion in Limine to Exclude OSHA Citations*, p. 6. Furthermore, Appellants rely on the statement from their expert that 11 citations is excessive, claiming that the pure number of violations demonstrate "a pattern of conduct by Defendant." This is exactly the type of prejudicial generalization the rules of evidence aim to exclude.

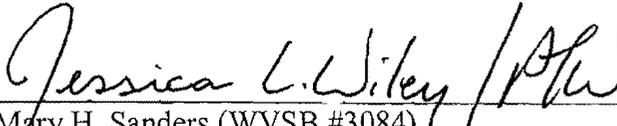
Accordingly, the presentation or mere mention of multiple OSHA citations, whether relevant or not, could mislead the jury to incorrect negative inferences toward R.M. Logging and would be highly prejudicial. Given the lack of relevance and the highly prejudicial nature of the evidence, the circuit court's decision to exclude the nine citations was reasonable and is not tantamount to an abuse of discretion. Therefore, the Court must uphold the lower court's decision to exclude the citations.

PRAYER

No evidence has been presented in this litigation to support the Appellants' claim that the decedent was injured as a result of deliberate intention of the Defendant, R.M. Logging. In fact, the only evidence that the Appellants have been able to produce consists of the OSHA citations given to the Defendant after the accident occurred, and the testimony of an expert who based his opinion solely on the fact that the accident occurred. This evidence cannot be held to be sufficient to support a deliberate intent action against an employer because it does not show a subjective realization of an unsafe

working condition. For the foregoing reasons stated in this Response, R.M. Logging, Inc. respectfully requests this Court to uphold the lower court's decision granting summary judgment and excluding nine OSHA citations.

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