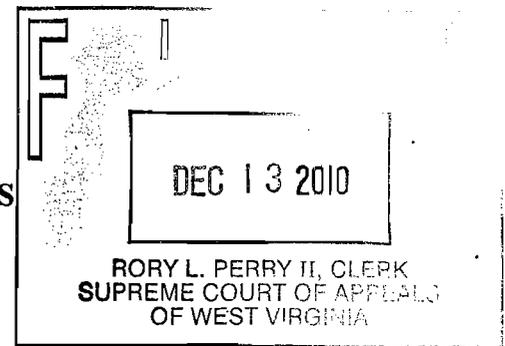


**IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA**



DAVID SNYDER and MARY SNYDER.
Personal Representatives of the
ESTATE OF MICHAEL C. SNYDER,
deceased,

Petitioners (Plaintiffs below),

v.

Record No. 101580
Civil Action No. 06-C-243
Circuit Court of Jefferson County
Judge David H. Sanders

Huntfield, L.C., a limited liability company;
Ryan Incorporated Central, a Wisconsin corporation;
CHS Traffic Control Services, Inc., a Maryland corporation;
V.I.P. Limousine Services, Ltd., a Maryland corporation;
Glen M. Lee dba V.I.P. Limousine Ltd., a West Virginia
sole proprietorship; Sharon K. Wilson; Heather L. Strachan;
Lee James Crawford; and Corporation of Charles Town,
West Virginia

Defendants.

v.

Insurance Brokers of Maryland,
Selective Way Insurance Company,
National Union Fire Insurance Company
of Pittsburgh, PA,

Third Party Defendants

**RESPONSE TO LEE CRAWFORD'S PETITION FOR APPEAL
BY DEFENDANT/RESPONDENT HUNTFIELD, LC**

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Table of Contents

I. Summary of Argument	3
II. Procedural History	3
III. Facts Relevant to This Petition	4
IV. Authorities Relied Upon	8
V. Points of Argument	9
VI. Discussion	10
A. The Jury's finding on proximate cause should not be disturbed.	10
B. The Petitioners failed to show their entitlement to the two month extension due to their failure to timely request transcript and the Trial Court abused its discretion in granting a three month extension which is not authorized by statute or the rules of this court	11
C. The Petitioner's failure to order a transcript of the Trial Court's ruling on their principal point of error merits refusal of the petition.	11
VII. Conclusion and Relief Requested.	12

COMES NOW your respondent Huntfield, L.C., by counsel, and responds to the petition for appeal filed by David and Mary Snyder as personal representatives of the Estate of Michael C. Snyder, deceased, on November 12, 2010, seven months after an order denying post-trial motions.

SUMMARY OF ARGUMENT

The principal defense offered in this case was proximate cause -- a jury question. Petitioners cannot point to any error relating to this primary defense. The jury's finding does not allow this Court to discern whether they decided on duty or proximate cause. The verdict should not be construed to infer error; rather, the verdict should be supported where no contest is made over the question of proximate cause. The Petitioners were afforded every consideration, including an unlawful extension of time to appeal to seven months after the order denying post trial motions.

PROCEDURAL HISTORY

This suit arises from a fatal automobile pedestrian accident which occurred July 19, 2004. This action was filed on July 18, 2006. After three years of discovery, the matter came to pretrial on November 25, 2009 and trial on December 1, 2009. After nine days of trial a verdict was rendered wherein the jury was asked, "Do you find by a preponderance of the evidence that the Defendant Huntfield was guilty of negligence which proximately caused or contributed to the death of Michael Snyder?" Jury answered this question no.

The Petitioner here inject error and personal attack but cannot address the issue of whether any act of Huntfield, wrongful or not, proximately caused or contributed to the death of Michael Snyder. The Plaintiff's hired two experts on liability neither of whom could render an

opinion that the signage or a blinking light was a cause in fact of the accident. Your respondent hired one whose sole opinion was that signage did not cause or contribute to the accident. A review of the excerpt of the closing argument will show that proximate cause was the primary issue in which the case was defended. The Respondent Huntfield most surely objects and descends from the self-serving incomplete factual summary but would posit to this Court that the issue does not deserve the attention because the fundamental defense on which the case was tried proximate cause has been ignored by the Petitioner.

FACTS RELEVANT TO THIS PETITION

Huntfield is a residential real estate developer. It was in the process of constructing a subdivision outside the city of Charles Town in Jefferson County, West Virginia when due to the volume of traffic entering and exiting from the subdivision, a turn lane was required by local planning authorities. In order to construct the turn lane as required, the City of Charles Town directed Huntfield to expand Augustine Avenue to accommodate left turning vehicles proceeding from 340 towards Charles Town. This required entry upon the roadway for construction purposes and thus a permit was required from the West Virginia Department of Highways as the owner of the real estate on which the work was being done.

The permit, which is in the record, does contain a number of requirements. In order to meet these requirements, Huntfield hired CHS Traffic Control, Inc., an expert in the field of traffic control for the purpose of protecting employees of the general contractor as well as motorists lawfully upon the highway. Transcript of Proceedings December 3, 2009 at p. 249.

CHS employed the Plaintiff's decedent, Michael Snyder, who was a college educated and trained traffic control manager and on the day in question, Mr. Snyder was the

person responsible for setting out signs for the day's work. Transcript of Proceedings December 4, 2009 at pp. 25-27. Ironically, it is the sign selected by the Plaintiff's decedent, Michael Snyder, to place adjacent to the roadway which forms the sole basis of Plaintiff's contentions as to Huntfield. Id. at page 27. Petitioners contend that Huntfield had a non delegable duty to assure that Michael Snyder did his job correctly under pain of being strictly liable if the Plaintiff's decedent failed to do his job and that not even the Plaintiff's own personal failure to set out the proper signage would excuse the hiring party, Huntfield, from Plaintiff's failure to perform.

Plaintiffs also rely upon the Traffic Control for Streets and Highways Construction and Maintenance Operations (hereinafter, the "West Virginia Manual"). The argument and evidence before the jury were selections from the West Virginia Manual which showed and which the jury could have accepted that the traffic control pattern set forth in the manual are guidelines and not the conduct of the construction done day to day required certain signs to be placed in affixed and other signs to be taken out and put away after each day's work. It was one the signs which was put out and taken away each day according to the work schedule which is the primary source of Plaintiff's alleged negligence as to Huntfield. The details of this are less important than the facts of this case did not lend themselves to any signage assisting Mr. Crawford and correctly assessing the risk and hazards before him. Mr. Crawford testified both at deposition and again at trial that he saw Michael Snyder standing in the road 300 feet in advance. That he proceeded at a speed of 55 miles per hour. Undisputed expert testimony states that Mr. Crawford could have stopped twice within the sight distance upon seeing Mr. Snyder. Transcript of Proceedings December 3, 2009 at p. 41. He elected instead of reducing the speed of his vehicle and maintaining control, he elected instead to search for a spit cup for his chewing

tobacco. The argument to the jury was that the signage was not a cause of the accident whether it was correct or not because Mr. Crawford was not looking at signage, he was looking for his spit cup. Transcript of Proceedings December 10, 2009 at p. 17-18.

Mr. Crawford also candidly acknowledged that he knew he was in a work zone. Deposition of Mr. Crawford taken April 12, 2007, at p. 92-93 (excerpt admitted at trial). Mr. Crawford also admitted seeing Mr. Snyder standing in the road 300 feet before he struck him. Deposition of Mr. Crawford taken April 12, 2007, at p. 185 (excerpt admitted at trial). The investigating police officer who walked the scene just after the fatal accident noted that the site was well marked as a construction site. A construction supervisor for Ryan Central Incorporated also walked the site just after the collision and found also that it was well marked to warn oncoming motorists. Transcript of Proceedings December 7, 2009 at p. 13. There were signs to indicate the presence of a flagman and other obvious indications that there were people in the road, which again Mr. Crawford candidly acknowledged existed prior to the collision. Mr. Crawford was prosecuted for his negligence and at the insistence of Plaintiff's representatives was incarcerated for a period as a result of his willful neglect in failing to properly control his vehicle so as to avoid striking a person on the highway. (This was conceded by Mr. Crawford's Counsel in opening statement, which was not transcribed). This overwhelming and clear case of negligence against Mr. Crawford satisfied the jury that there was one undeniable cause of this accident and that was Mr. Crawford and not the existence of a blinking light, or a particular sign within a few feet of the accident site.

The trial judge appreciating that causation was a live and vital issue to the case refused to enter summary judgment at the pretrial which has not been transcribed, notwithstanding the fact that it is now the primary contention of error made by the Plaintiffs.

The Court will not, and cannot see because the transcript has not been ordered, the trial judge's reasoning in refusing to enter summary judgment. The fact that there is, was and continues to be a vigorous debate over whether the signage played any role whatsoever in this accident caused the judge to refuse to enter summary judgment. While Defendant Huntfield does vigorously defend the nature and extent of the duty imposed by the guidelines, which are the West Virginia Manual, the fact that the signage simply played no role in this accident is dispositive of petitioner's request for relief here. The issued carried through to their experts yielded interesting results. Robert Holsinger, a Plaintiff hired expert on the issue of the standard of care for the signage, could not state that the existence or lack of existence of a sign was a cause in fact of the accident. The case in fact is required before a party can state actionable negligence.

The accident reconstruction expert hired by the Plaintiffs just weeks after the accident occurred similarly could not state to a reasonable degree of certainty in his field that the existence or lack of existence of a sign was the but for cause of the fatal accident involving Mr. Snyder. Transcript of Proceedings December 3, 2009 at p. 47-48. The reason for this is simple and straightforward. Mr. Crawford was looking for his spit cup; he was not looking at the signs. The signs could have said anything and would not change Mr. Crawford's behavior once he has made the election to look for a spit cup as opposed to mind the person standing in the road.

The Respondent does not, by the brevity of this argument, concede the points raised by the Petitioner or yield to Petitioner's personal attacks upon its counsel and should the Court accept this case, the matter will be more fully briefed.

There is one last issue that your Respondent feels compelled to bring to the attention of the Court and that is the extraordinary length of time it took to get the petition filed. The Court will undoubtedly note that the petition was filed on November 12, 2010. The denial of the post-trial motions on the judgment from which an appeal is taken was entered on April 9, 2010. The span of seven months is accounted for by a motion filed on July 27, 2010 by the Plaintiffs. Petitioners did not include their transcript request. Petitioners sent a letter on the 30th day (by their calculation) “requesting a transcript.” Petitioners did not file the form required by the Supreme Court until July 27, 2010, 109 days after the order complained of was entered. Nevertheless the Court granted an extension of not two but three months from the end of the applicable period in violation of both the statute and the rule permitting extensions of time to file a petition.

AUTHORITIES RELIED UPON

Statutes	
W. Va. Code § 58-5-4	11
Rules	
Rule 3(a), W. Va. Rules of Appellate Procedure.	11
Cases	
<i>Barefoot v. Sundale Nursing Home</i> , 193 W. Va. 475, 457 S.E.2d 152 (1995)	10
<i>Cox v. Galigher Motor Sales, Inc.</i> , 158 W. Va. 685, 213 S.E.2d 475 (1975)	10
<i>Cunningham v. West Virginia-American Water Company</i> , 193 W. Va. 450, 457 S.E.2d 127 (1995)	12
<i>Kendall v. Allen</i> , 148 W. Va. 666, 137 S.E.2d 250 (1964)	10
<i>Pozzie v. Prather</i> , 151 W. Va. 880, 157 S.E.2d 625 (1967)	12

POINTS OF ARGUMENT

- A. The Jury's finding on proximate cause should not be disturbed.
- B. The Petitioners failed to show their entitlement to the two month extension due to their failure to timely request transcript and the Trial Court abused its discretion in granting a three month extension which is not authorized by statute or the rules of this court.
- C. The Petitioner's failure to order a transcript of the Trial Court's ruling on their principal point of error merits refusal of the petition.

DISCUSSION

A. The Jury's finding on proximate cause should not be disturbed.

The jury has the final word on proximate cause. Syl. Pt. 5, *Kendall v. Allen*, 148 W. Va. 666, 137 S.E.2d 250 (1964). The jury found that Huntfield was not guilty of any negligence which proximately caused the accident in question. The jury's verdict is consistent in that they found no contributory fault on Mr. Snyder as the person responsible for setting up the jobsite for day of the accident. The jury's verdict should be construed to validate it, as opposed to undermine the jury's judgment. *Cox v. Galigher Motor Sales, Inc.*, 158 W. Va. 685, 694, 213 S.E.2d 475, 480 (1975); *See also*, Syl. Pt. 9, *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995) (general verdict sustained by validity of one or more alternative theories).

We don't know if the jury gets to the issue raised by the Plaintiff's challenge because the jury was asked whether Huntfield was guilty of any negligence which "proximately caused" the accident. Since Petitioners had an obvious failure of proof on this issue, the gnashing of teeth over the standard of care is of no moment.

B. The Petitioners failed to show their entitlement to the two month extension due to their failure to timely request transcript and the Trial Court abused its discretion in granting a three month extension which is not authorized by statute or the rules of this court.

The Petitioners filed a motion to extend their time to file a petition for appeal on July 27, 2010. Upon request, Respondent was provided with a letter faxed to the court reporter and an order for the transcript. See Exhibit B to Defendant Huntfield, L.C.'s Response to Plaintiff's Motion to Extend Time to Prepare Petition for Appeal, filed July 29, 2010. The text of the transcript order form, available on this Court's website, states that unless this form is completed and filed within 30 days of the offending order, the aggrieved party will not be

entitled to file a motion for additional time to complete a petition for appeal. Your Respondent objected to the extension of time, but the Trial Court nevertheless granted an extension of three months, over the objection of counsel, beyond the time permitted by Rule or Statute. W. Va. Code § 58-5-4; Rule 3(a), West Virginia Rules of Appellate Procedure.

W. Va. Code § 58-5-4 provides:

No petition shall be presented for an appeal from any judgment rendered more than four months before such petition is filed with the clerk of the court where the judgment being appealed was entered: Provided, That the judge of the circuit court may, prior to the expiration of such period of four months, by order entered of record extend and reextend such period for such additional period or periods, *not to exceed a total extension of two months*, for good cause shown, if the request for preparation of the transcript was made by the party seeking such appellate review within thirty days of the entry of such judgment, decree or order.

Emphasis added. *See also*, Rule 3(a), W. Va. Rules of Appellate Procedure.

This Court has made clear in its transcript request form that in order to earn any extension of time from the ordinary four month period for filing petitions for appeal one must request a transcript on the form prescribed by the Supreme Court within 30 days of the order complained of. Petitioners did not do this. Not only did the Court enter an order permitting an extension without the required request for transcript being filed, a mandatory condition for obtaining the extension, it extended the time for filing petition a full month beyond that permitted by the rules. This error can be easily remedied by refusing to consider the petition here and the Court should be satisfied that this matter was tried fully, with every consideration toward the Plaintiff's claim. The Trial Court certainly showed great compassion to the Petitioners during the trial as will be obvious from review of the transcript.

C. The Petitioners failure to order a transcript of the Trial Court's ruling on their principal point of error merits refusal of the petition.

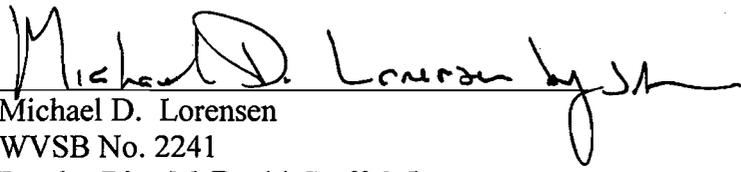
The Petitioners did not request the transcript of the pretrial at which time the Trial Court announced its ruling on the Petitioner's summary judgment motion. The Trial Court ruled that it could not enter summary judgment because, among other things, whether Huntfield's actions or failures to act caused any harm was a question of fact for the jury. *Cunningham v. West Virginia-American Water Company*, 193 W. Va. 450, 455, 457 S.E.2d 127, 132 (1995) (proximate cause alone is sufficient justification to refuse a summary judgment). This Court should not hear of an error where the offending ruling has not been presented for this court's review. The Trial Court entertained the Petitioners' motion for summary judgment, gave consideration and made a ruling on the record November 25, 2010. No transcript of this has been requested. The presumption should be that the Trial Court correctly ruled in the absence of affirmative evidence to the contrary. Syl. Pt. 4, *Pozzie v. Prather*, 151 W. Va. 880, 157 S.E.2d 625 (1967)

VI. CONCLUSION AND RELIEF REQUESTED

The fact that the key issue in the defense of the case cannot bear mention and the Plaintiff's petition speaks volumes as they have found or tried to find ways to resist every defense argument placed in front of the Court. The one argument that they cannot discuss because there is no explanation for it is what difference would it make in this accident. The answer is none. That is what the jury found and the jury's findings in this case should not be disturbed. Your Respondent asks that this petition be refused.

Respectfully submitted,

HUNTFIELD, L.C.
Respondent.



Michael D. Lorensen

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Third Party Defendants

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing **RESPONSE TO LEE CRAWFORD'S PETITION FOR APPEAL BY DEFENDANT/RESPONDENT HUNTFIELD, LC**, was served upon the below named counsel or party on the date indicated by depositing a true and correct copy of the foregoing in the United States Mail, first class postage prepaid to them at their addresses as follows:

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Dated this 13th day of December, 2010.

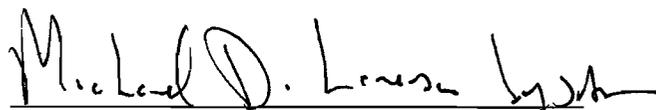
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