

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STANLEY STEVENSON, II,

Plaintiff/Appellee,

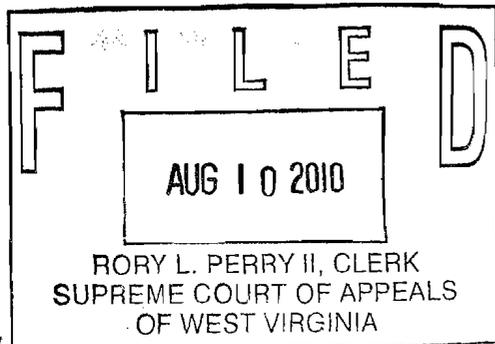
v.

Appeal No.: 35592  
(Circuit Court of Boone County,  
West Virginia  
Civil Action No. 06-C-72  
Judge William S. Thompson)

INDEPENDENCE COAL COMPANY,

Defendant/Appellant

**BRIEF ON BEHALF OF APPELLEE**  
**STANLEY STEVENSON, II**



Counsel for Plaintiff/Appellee

Mark A. Atkinson (WVSB #184)  
John J. Polak (WVSB #2929)  
ATKINSON & POLAK, PLLC  
P.O. Box 549  
Charleston, WV 25322-0549  
(304) 346-5100

Harry M. Hatfield (WVSB #1635)  
Matthew M. Hatfield (WVSB #8710)  
HATFIELD & HATFIELD, PLLC  
P.O. Box 598  
Madison, WV 25130  
(304) 369-1162

**TABLE OF CONTENTS**

Table of Contents ..... i

Table of Authorities ..... iii

**I. KIND OF PROCEEDING AND NATURE OF THE RULING OF THE CIRCUIT COURT ..... 1**

**II. STATEMENT OF FACTS ..... 3**

**III. STANDARD OF REVIEW .....15**

**IV. DISCUSSION OF LAW**

**A. THE CIRCUIT COURT PROPERLY DENIED APPELLANT’S SUMMARY JUDGMENT MOTION AND APPELLANT’S MOTION AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW ..... 20**

**B. THE CIRCUIT COURT DID NOT ERR IN ADMITTING CERTAIN EVIDENCE PROFFERED BY THE PLAINTIFF**

**1. THE CIRCUIT COURT DID NOT ERR IN ALLOWING TESTIMONY ABOUT INOPERABLE RADIOS ..... 31**

**2. THERE WAS NO ERROR IN THE CIRCUIT COURT’S RULING REGARDING ROCKY BURNS’ TESTIMONY ..... 33**

**3. THE CIRCUIT COURT PROPERLY PERMITTED TESTIMONY ABOUT APPELLANT’S POST-ACCIDENT INVESTIGATION ..... 33**

**C. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING CERTAIN EVIDENCE PROFFERED BY THE APPELLANT**

**1. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING CHARLES KEENEY’S PROPOSED TESTIMONY ..... 35**

**2. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING THE PLAINTIFF’S COMPLAINT ..... 37**

**3. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE PROPOSED TESTIMONY OF DOCTOR NASHER ..... 38**

<b>D. THE CIRCUIT COURT DID NOT ERR IN INSTRUCTING THE JURY</b>	
<b>1. THERE WAS NO ERROR IN THE GIVING OF CERTAIN       OF PLAINTIFF'S JURY INSTRUCTIONS .....</b>	<b>39</b>
<b>2. THERE WAS NO ERROR IN REFUSING TO GIVE       CERTAIN OF APPELLANT'S JURY INSTRUCTIONS .....</b>	<b>40</b>
<b>E. APPELLANT'S COMPLAINTS ABOUT THE COMMENTS OF    PLAINTIFF'S COUNSEL ARE WITHOUT MERIT .....</b>	<b>41</b>
<b>F. ANY ERROR WAS HARMLESS .....</b>	<b>43</b>
<b>G. PLAINTIFF'S CROSS ASSIGNMENT OF ERROR – THE    CIRCUIT COURT ERRED IN FAILING TO ALLOW THE ISSUE OF    PUNITIVE DAMAGES TO GO TO THE JURY .....</b>	<b>44</b>

## TABLE OF AUTHORITIES

### West Virginia Supreme Court Cases

<u>Addair v. Huffman</u> , 156 W. Va. 592, 195 S.E.2d 739 (1973) .....	44-45
<u>Alkire v. First National Bank of Parsons</u> , 197 W. Va. 122, 475 S.E.2d 122 (1996) .....	44
<u>Anderson v. Moulder</u> , 183 W.Va. 77, 394 S.E.2d 61 (1990) .....	28, 30
<u>Arnazzi v. Quad/Graphics, Inc.</u> , 218 W.Va. 36, 621 S.E.2d 705 (2005) .....	21
<u>Arnold Agency v. West Virginia Lottery Com'n</u> , 206 W.Va. 583, 526 S.E.2d 814 (1999) .....	37
<u>Black v. Peerless Elite Laundry Co.</u> , 113 W.Va. 828, 169 S.E. 447 (1933) .....	42
<u>Cline v. Joy Mfg.Co.</u> , 172 W. Va. 769, 310 S.E.2d 835 (1983) .....	45
<u>Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.</u> , 223 W.Va. 209, 672 S.E.2d 345 (2008) .....	17
<u>Estep v. Price</u> , 93 W.Va. 81, 115 S.E. 861 (1923) .....	40
<u>Evans v. Farmer</u> , 148 W.Va. 142, 133 S.E.2d 710 (1963) .....	24, 28
<u>Findley v. State Farm Mut. Auto. Ins. Co.</u> , 213 W.Va. 80, 576 S.E.2d 807(2002) .....	15
<u>Fredeking v. Tyler</u> , 224 W.Va. 1, 680 S.E.2d 16 (2009) .....	15, 16
<u>Gentry v. Mangum</u> , 195 W.Va. 512, 466 S.E.2d 171 (1995) .....	18
<u>Harbaugh v. Coffinbarger</u> , 209 W.Va. 57, 543 S.E.2d 338 (2000) .....	27
<u>Hatten v. Mason Realty Co.</u> , 148 W.Va. 380, 135 S.E.2d 236 (1964) .....	21
<u>Henderson v. Meredith Lumber Co.</u> , 190 W.Va. 292, 438 S.E.2d 324 (1993) .....	21
<u>Ilosky v. Michelin Tire Corp.</u> , 172 W. Va. 435, 307 S.E.2d 603 (1983) .....	19

<u>In re State Public Bldg. Asbestos Litigation,</u> 193 W.Va. 119, 454 S.E.2d 413 (1994), <i>cert. denied sub nom. W. R. Grace &amp; Co. v. West Virginia</i> , 515 U.S. 1160 (1995) .....	18
<u>Jennings v. Smith,</u> 165 W.Va. 791, 272 S.E.2d 229 (1980) .....	19
<u>Jones v. Setser,</u> 224 W.Va. 483, 686 S.E.2d 623 (2009) .....	43
<u>Keesee v. General Refuse Service, Inc.,</u> 216 W. Va. 199, 604 S.E.2d 449 (2004) .....	19
<u>Kerns v. Slider Augering &amp; Welding, Inc.,</u> 202 W.Va. 548, 505 S.E.2d 611 (1997) .....	21
<u>Kocher v. Oxford Life Ins. Co.,</u> 216 W. Va. 56, 602 S.E.2d 499 (2004) .....	45
<u>Laslo v. Griffith,</u> 143 W.Va. 469, 102 S.E.2d 894 (1958) .....	17
<u>Mays v. Chang,</u> 213 W.Va. 220, 579 S.E.2d 561 (2003) .....	20
<u>McCloud v. Salt Rock Water Public Service Dist.,</u> 207 W.Va. 453, 533 S.E.2d 679 (2000) .....	17
<u>McCoy v. CAMC, Inc.,</u> 210 W.Va. 324, 557 S.E.2d 378 (2001) .....	35
<u>Miller v. Warren,</u> 182 W.Va. 560, 390 S.E.2d 207 (1990) .....	23
<u>Morrison v. Sharma,</u> 200 W.Va. 192, 488 S.E.2d 467 (1997) .....	19
<u>Painter v. Peavy,</u> 192 W.Va. 189, 451 S.E.2d 755 (1994) .....	21
<u>Pasquale v. Ohio Power Co.,</u> 187 W.Va. 292, 418 S.E.2d 738 (1992) .....	43
<u>Peters v. Rivers Edge Min., Inc.,</u> 224 W.Va. 160, 680 S.E.2d 791 (2009) .....	18
<u>Richmond v. Ellenbogen,</u> 205 W.Va. 240, 517 S.E.2d 473 (1999) .....	17
<u>Robertson v. LeMaster,</u> 171 W. Va. 607, 301 S.E.2d 563 (1983) .....	29
<u>Rodriguez v. Consolidation Coal Co.,</u> 206 W.Va. 317, 524 S.E.2d 672 (1999) .....	16

<u>Sanders v. Georgia-Pacific Corp.</u> , 159 W.Va. 621, 225 S.E.2d 218 (1976) .....	17, 21
<u>Shaffer v. Acme Limestone Co., Inc.</u> , 206 W.Va. 333, 524 S.E.2d 688 (1999) .....	22
<u>Sias v. W-P Coal Co.</u> , 185 W.Va. 569, 408 S.E.2d 321 (1991) .....	16, 17
<u>Spencer v. McClure</u> , 217 W.Va. 442, 618 S.E.2d 451 (2005) .....	20
<u>Skibo v. Shamrock Co., Ltd.</u> , 202 W.Va. 361, 504 S.E.2d 188 (1998) .....	42
<u>Starcher v. South Penn Oil Co.</u> , 81 W.Va. 587, 95 S.E. 28 (1918) .....	44
<u>State v. Crouch</u> , 191 W.Va. 272, 445 S.E.2d 213 (1994) .....	18
<u>State v. Frazier</u> , 162 W.Va. 935, 253 S.E.2d 534 (1979) .....	35
<u>State v. Guthrie</u> , 194 W.Va. 657, 461 S.E.2d 163 (1995) .....	38
<u>State v. O'Donnell</u> , 189 W.Va. 628, 433 S.E.2d 566 (1993) .....	36
<u>State v. Rodoussakis</u> , 204 W.Va. 58, 511 S.E.2d 469 (1998) .....	18
<u>Stone v. Rudolph</u> , 127 W. Va. 335, 32 S.E.2d 742 (1945) .....	45
<u>Sydenstricker v. Mohan</u> , 217 W.Va. 552, 618 S.E.2d 561 (2005) .....	27
<u>Taylor v. Sears, Roebuck and Co.</u> , 190 W.Va. 160, 437 S.E.2d 733 (1993) .....	21
<u>Tennant v. Marion Health Care Found., Inc.</u> , 194 W.Va. 97, 459 S.E.2d 374 (1995) .....	17, 39
<u>Torrence v. Kusminsky</u> , 185 W.Va. 734, 408 S.E.2d 684 (1991) .....	44
<u>Walls v. McKinney</u> , 139 W.Va. 866, 81 S.E.2d 901 (1954) .....	40
<u>Wehner v. Weinstein</u> , 191 W.Va. 149, 444 S.E.2d 27 (1994) .....	28, 29
<u>West Virginia Dept. of Highways v. Delta Concrete Co.</u> , 165 W.Va. 398, 268 S.E.2d 124 (1980) .....	36

<u>West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.,</u> 222 W.Va. 688, 671 S.E.2d 693 (2008) .....	18
---	----

**Other Cases**

<u>Delbrel v. Doenges Bros. Ford, Inc.,</u> 913 P.2d 1318 (Okl. 1996) .....	26
--	----

<u>Derdiarian v. Felix Contracting Corp.,</u> 51 N.Y. 2d 308, 414 N.E.2d 666, 434 N.Y.S.2d 166 (1980) .....	29
--	----

<u>Humphery v. Duke Energy Indiana, Inc.,</u> 916 N.E.2d 287 (Ind.App. 2009) .....	28
---	----

<u>Lawrence v. Bridgestone/Firestone, Inc.</u> 963 F.Supp. 685 (N.D. Ill. 1997) .....	24-25
--	-------

<u>Mack v. Ford Motor Co.,</u> 669 N.E.2d 608 (Ill. App. 1996) .....	26
---	----

<u>McGuire v. Ford Motor Co.,</u> 360 F.Supp. 447 (D.C.Wisc. 1973) .....	25
---	----

<u>Titus v. Titus,</u> 154 N.W.2d 391, 393 (N.D. 1967) .....	40
---	----

<u>Wright v. General Motors Corp.,</u> 479 F.2d 52 (7 <sup>th</sup> Cir. 1973) .....	25
---	----

**Other Authorities**

W. Va. Code §21-3-1 .....	22
---------------------------	----

W. Va. Code § 22A-2-38(b) .....	22, 32
---------------------------------	--------

W. Va. C.S.R. §36-18-4.1 .....	23
--------------------------------	----

W.Va. R.Civ.P. 8(e)(2) .....	37
------------------------------	----

W.Va. R.Civ.P. 15(b) .....	37
----------------------------	----

W.Va. R.Civ.P. 61 .....	19, 44
-------------------------	--------

Rule 10(f), <i>West Virginia Rules of Appellate Procedure</i> .....	44
---	----

Rule 401, <i>West Virginia Rules of Evidence</i> .....	39
--	----

Rule 402, <i>West Virginia Rules of Evidence</i> .....	39
--	----

Rule 403, <i>West Virginia Rules of Evidence</i> .....	39
--	----

I J. Weinstein & M. Berger, <i>Weinstein's Evidence</i> .....	38
---	----

**I. KIND OF PROCEEDING AND NATURE  
OF THE RULING OF THE CIRCUIT COURT**

Plaintiff/Appellee Stanley Stevenson, II, was an employee of Spartan Mining Company who was injured while working at Independence Coal Company's Justice No. 1 Mine in Boone County, West Virginia on January 31, 2005. As a result of his injury, plaintiff filed a workers compensation claim which was ruled compensable, and received both medical and disability benefits.

On April 21, 2006, plaintiff filed this lawsuit in the Circuit Court of Boone County, West Virginia, against two defendants, Spartan Mining and Independence Coal. Plaintiff's Complaint asserted negligence and deliberate intent claims against both defendants. At a pretrial hearing on the defendants' motions for summary judgment, the plaintiff withdrew his deliberate intent claim against Spartan Mining. After denial of Independence Coal's motion for summary judgment, the case proceeded to trial solely against Independence Coal on a simple negligence theory.

With leave of the Circuit Court, an Amended Complaint was filed by the plaintiff on February 25, 2009, alleging that Independence Coal's conduct was sufficiently egregious to justify an award of punitive damages to the plaintiff. Trial commenced on February 25, 2009.

At the close of plaintiff's case-in-chief, Independence Coal moved for entry of a judgment as a matter of law on the grounds that plaintiff had failed to prove that any negligence on the part of Independence Coal had proximately caused his injury. The Circuit Court denied the motion. At the close of its case-in-chief, Independence Coal renewed its motion for judgment as a matter of law and the Circuit Court again denied the motion. The Circuit Court also refused to let the issue of punitive damages go to the jury.

After the thirteen day trial, the jury found that Independence Coal was negligent and that its negligence was the proximate cause of the permanent, life-altering injury suffered by the plaintiff. The jury also found that the plaintiff was not guilty of any negligence relating to the injury. The underlying facts of the case, and the inferences to be drawn from those facts, and the credibility of each side's witnesses were vigorously contested by the parties over the course of that trial. In short, this case presented a classic example of why our system uses juries to resolve civil disputes.

After listening to the evidence, receiving proper instruction from the Circuit Court and due deliberation, the jury found that the plaintiff was entitled to the exact amount of economic loss that his witnesses and evidence supported. The jury awarded no non-economic damages to the plaintiff. A judgment order incorporating the jury's verdict was entered by the Circuit Court on March 25, 2009.

Independence Coal thereafter filed post-trial motions, renewing its motion for judgment as a matter of law and alternatively moving for a new trial. By Orders dated September 22, 2009 the Circuit Court denied the appellant's motions. This appeal followed.<sup>1</sup>

Having failed to convince the jury that it did no wrong to Stanley Stevenson, Independence Coal now seeks to re-argue the facts of the case to this Court in this appeal and have this Court substitute its judgment of the contested facts for the judgment of the jury. That, of course, is not the role of an appellate court.

---

<sup>1</sup> Independence Coal seeks to portray the trial court as being out of control and allowing volumes of inadmissible and irrelevant evidence at trial. That is simply not so, as the record amply demonstrates and as the trial court itself observed. *See Order Denying Defendant's Renewed Motion for A New Trial at 2-3.*

Moreover, in its attempt to do so, Independence Coal seeks to stand the laws and principles of appellate review, as well as the law and principles of negligence and proximate cause, on their head. In support of this appeal, Independence Coal presents snippets of testimony from a nearly three-week long trial that it deems favorable to itself. In doing so, Independence Coal asks this Court to give the losing party the benefit of credibility determinations and to view the evidence in the light and with all reasonable inferences most favorable to the party who failed to secure the jury's verdict. Likewise, the appellant's appeal brief suggests that questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of law for the courts to decide. That, quite simply, is not the law.

Despite the appellant's best efforts to attack Stanley Stevenson and portray him as a malingerer, a drug user and an incompetent coal miner (an effort that continues with both the appellant's petition for appeal and its appeal brief), the jury did not accept the appellant's position. There was ample evidence to support the jury's verdict. The Circuit Court committed no reversible errors and there are no grounds for this Court to reverse the judgment obtained by the plaintiff in this case.

## **II. STATEMENT OF FACTS**

Stanley Stevenson was injured on January 31, 2005, at approximately 12:15 a.m., just after the start of the third shift at Independence Coal's Justice No. 1 Mine, when his right wrist/arm became fouled in a Brookville mantrip brake mechanism. Stevenson started the third shift, a maintenance shift, on January 30, 2005, at 11:00 p.m., at the Independence Coal, Justice No. 1 Mine, located at Robinson, Boone County, West

Virginia. Stevenson was employed by Spartan Mining Company, an entity which provided contract hourly labor to appellant Independence Coal, and was assigned to work at the Justice No. 1 Mine. Stevenson was assigned to the “glory hole” at the Justice Mine, where coal was fed from the surface down an approximate 300 ft. drop to an underground conveyor belt system. As an underground belt man Stevenson’s job was to tend the belt.

Stevenson rode the Brookville 00 mantrip to get to and from his remote work site. Independence Coal owned and controlled the mantrip at issue and provided the mine management. *Order Denying Appellant’s Renewed Motion for Judgment As A Matter of Law at 5 n.2.* The mantrip ran on rails, like a small locomotive. (3/3/09 Transcript at 20.) Stevenson’s work site at the glory hole was approximately five to seven miles from the mine’s elevator portal. (3/2/09 Transcript at 65.) He was not hauling supplies at the time of the accident, but was using the mantrip solely as a means of transportation.

For weeks prior to the accident, Stevenson, Rocky Burns, and other miners had complained about the 00 mantrip’s brakes (and, in fact, the brakes on all the Brookville mantrips). The Brookville mantrips had a braking system which consisted of two parts: the park brake and the service brake. The battery-powered mantrip could also be slowed, but not completely stopped, by using the regenerative system. Rocky Burns was a fire boss at the Justice Mine and in that capacity, he was an appropriate person to receive safety complaints. Rocky Burns testified that Stevenson complained about having problems with the braking system of the mantrip “probably every shift.” (2/27/09 Transcript at 82.) Prior to the Stevenson’s injury, Burns even “dangered off” the 00

mantrip because of the braking system problems, to warn others of the potential hazard. (2/27/09 Transcript at 85, 126, 127.)

On January 30, just after the 11:00 p.m. start of the third shift, Michael "Mickey" Hughes (a salaried certified electrician) and his two-man vulcanizing crew, Brian Williamson and Danny Williams, both Spartan Mining hourly employees, were hitching a ride to their work site with Stevenson, who was operating the 00 mantrip. (3/3/09 Transcript at 15, 16.) Hughes testified that, on the way, at approximately 11:15 p.m., the occupants heard a loud rattling noise and stopped the mantrip. Hughes testified that "[t]he brake head came loose on the mantrip." (3/3/09 Transcript at 18.) Because of the brake problem, Stevenson pulled the mantrip off the mainline track onto a spur and Hughes and Stevenson "tightened the bolts" on the mantrip's brakes (3/3/09 Transcript at 19), a process which took "about 15 or 20 minutes." (3/3/09 Transcript at 21.) After completing this repair, Stevenson dropped off Hughes and his crew at their work site and continued on alone towards the "glory hole."

Just after midnight on January 31 after dropping the Hughes crew off, Stevenson, now alone, experienced a reoccurrence of the brake malfunction. Stevenson testified that he again heard a loud rattle and "smell[ed] the brakes getting real hot again," but he managed to get the mantrip stopped within twenty to thirty feet of a spur, where he planned on backing the mantrip off the main line track (the only line in and out of the mine) into the spur, leaving the disabled mantrip for an electrician to later repair. (3/5/09 Transcript at 67-68.) The spur was located in a cross-cut and on a downhill grade. Stevenson used a mine phone (the phone on the mantrip was nonfunctional) to call the

dispatcher to send a mechanic, but was told that “it would be quite awhile ... probably several hours” before one could be available. (3/5/09 Transcript at 70.)

Because Stevenson did not want to block the main line track (the only line in and out of the mine), Stevenson attempted to repair the brakes himself “to get the brakes [functional] enough to pull it [the mantrip] back into [the] spur and unblock the track.” (3/5/09 Transcript at 73.) Using the wrenches that were made available to him, Stevenson intended to tighten the bolts in a similar fashion to what he and Hughes had done earlier. At that same time, William McCloud, a beltman, and Jeff Davis, a beltman, both hourly workers who had finished their second shift, were trying to leave the mine on their mantrip. Because Stevenson’s disabled mantrip was blocking the main line track, Davis and McCloud were forced to stop their mantrip on the track in front of the 00 machine. Davis testified that he and McCloud could not have gotten their mantrip out of the mine because of the fact that Stevenson’s mantrip was disabled on the main line track. (3/4/09 Transcript at 14.)

Davis testified that he could “[s]mell the brakes [on Stevenson’s mantrip]. You knew they was getting hot.” (3/4/09 Transcript at 15.) After stopping their mantrip, Davis and McCloud were “kind of standing around to see if [Stevenson] could tighten his brakes.” (Id.) As Stevenson was attempting to line up and tighten the bolts, the brake system shifted, trapping Stevenson’s right wrist/arm and injuring him. Stevenson testified that “it just come down and pinned my arm and moved it a pretty good bit.” (3/5/09 Transcript at 78.)

Davis was standing “no more than four feet” from Stevenson. (3/4/09 Transcript at 17.) Davis testified as follows:

Q. His [Stevenson's] arm was actually in between brake parts and the mantrip?

A. Right. Right.

Q. You actually had to lift the brake parts of [sic] his hand for him to get his arm off; is that correct?

A. Yeah. I reached in and pulled it to the left a little bit so he could pull his arm out.

Q. Could you tell at that point whether Stanley had suffered any type of injury to his wrist, or his arm, or his hand?

A. You could tell. You know, his whole hand was already starting to get red, and it was kind of swollen a little bit. You could tell it was going to swell.

(3/4/09 Transcript at 18.)

Davis used his mantrip to push Stevenson's disabled mantrip into a spur and

Davis then took the injured Stevenson out of the mine. (3/4/09 Transcript at 20.)

Stevenson was then transported by ambulance to Boone Memorial Hospital in Madison, where he was seen in the emergency room on January 31, 2005, at 1:38 a.m., by Ernesto Yutiamco, M.D. Dr. Yutiamco testified at trial that he did not believe Stevenson was intoxicated or had engaged in any drug usage prior to that emergency room visit.

(3/16/09 Transcript at 24-25.) In fact, not one of Stevenson's supervisors or co-workers testified that he ever appeared intoxicated at work. Fire Boss Rocky Burns (2/27/09 Transcript at 78-79), hourly worker Brian Williamson (3/3/09 Transcript at 99), Shift Foreman/Manager John Bowling (3/4/09 Transcript at 77), Safety Director Brian Keaton (3/4/09 Transcript at 116-117), Belt Coordinator/Superintendent James "Tattoo" Hawkins (3/2/09 Transcript at 28-29), salaried electrician Michael "Mickey" Hughes (3/3/09 Transcript at 9-10), and hourly worker Jeff Davis (3/4/09 Transcript at 28) all testified that Stevenson was always sober. As a result of the injury to his dominant right arm, Stevenson never worked again.

Lewis Sheppard, an Independence Coal management employee, was the Third Shift Maintenance Chief at the mine and a certified electrician. (3/2/09 Transcript at 33, 45.) Part of his responsibilities at the mine included the maintenance, repair and safety of the mantrips. (3/2/09 Transcript at 44.) Sheppard was also appellant Independence Coal's representative at trial and sat at counsel table throughout the trial.

Company records indicated that, on the shift that ran from 11:00 p.m. on January 30, 2005 to 8:00 a.m. on January 31, 2005, extensive repairs were performed on the 00 mantrip. According to Sheppard, the records showed that “[w]e worked on 00-5 man, re -- had to rebolt rad back in place. All the bolts were out. Had to rebolt brake disc back on using Loctite on repairs. Replaced one bad drive line and U-joints. Replaced two service brakes. Replaced one park brake, and bled system.” (3/2/09 Transcript at 69.) Sheppard estimated that these repairs took “45 or 50 minutes” to complete. (3/2/09 Transcript at 78.) Sheppard agreed that if the 00 mantrip had been in service with these problems, it should have immediately been taken out of service until the repairs were made. (3/2/09 Transcript at 83.) Likewise, Brian Keaton, who was the safety director at Independence Coal in January 2005, agreed that the repair record showed that a significant amount of work on the brakes needed to be done and that the mantrip should not be in use in that condition. (3/4/09 Transcript at 104-105.)

Maintenance Chief Sheppard also agreed that (contrary to the appellant's responses to requests for admission) on January 31, 2005, the braking system on the 00 mantrip “was malfunctioning or otherwise not working properly.” (3/2/09 Transcript at 112.) Sheppard further agreed that the 00 mantrip “needed pretty extensive repairs.” (Id.)

At trial, Sheppard testified that he was uncertain as to whether the repairs on the 00 mantrip that were referenced in the records were done before or after Stanley Stevenson's 12:15 a.m. injury. (3/2/09 Transcript at 91.) Sheppard was then confronted with a timeline based on his own estimates of the time necessary to perform the repairs. The timeline indicated that, if the repairs were done at the beginning of the shift (before Stevenson set off to his worksite on the 00 mantrip) Sheppard's maintenance crew could not have completed the repairs on the 00 mantrip until approximately 12:20 a.m. (3/2/09 Transcript at 169.) That, of course, would indicate that it would not have been possible for the repairs to have been done on the 00 mantrip before Stevenson got hurt at 12:15 a.m. However, instead of conceding that the extensive repairs had to have been made after Stevenson's injury, Sheppard stated in his redirect examination on day three of the trial, for the first time, and contrary to his discovery deposition, that his "opinion" was that Stanley Stevenson might have been using "a different ride than the 00" on the morning of January 31, 2005. (3/2/09 Transcript at 170.) Nonetheless, Sheppard did agree that "if Stanley Stevenson was on the 00 mantrip, [the] repairs had to be done after [Stevenson's] injury." (Id.)

Sheppard's newfound "opinion" that Stevenson was using a different mantrip on January 31 was contrary to and inconsistent with other witnesses' testimony and all the company records, and was even contrary to the assertion of Independence Coal's counsel in opening statement that "Stevenson was using the 00-5 mantrip." (2/27/09 Transcript at 41.) Safety Director Brian Keaton testified that the 00 mantrip was the machine involved in the incident. (3/4/09 Transcript at 96, 98.) John Bowling was a third shift belt foreman for Independence Coal in January 2005, and Stevenson's immediate supervisor

at the time of the injury. (3/4/09 Transcript at 50.) Bowling completed a “Supervisor’s Immediate Accident Investigation Report” as a result of Stevenson’s injury. (Plaintiff’s Exhibit 13, 3/4/09 Transcript at 60.) At trial, Bowling gave the following testimony:

Q. Do you have an opinion as to what mantrip Stanley Stevenson was on when he got hurt?

A. What do you mean an opinion? I know which mantrip it was.

...

Q. Which one was it?

A. 00.

Q. So if anybody says it was anything other than the 00; they’re wrong?

A. Correct.

(3/4/09 Transcript at 67-68.)

Michael “Mickey” Hughes, the salaried electrician who assisted Stevenson in tightening the bolts on the mantrip brakes in the braking incident which occurred prior to Stevenson’s injury, also testified as follows:

Q. Was it represented to you that the 00 mantrip was the one involved in this injury?

A. I knew it was supposed to have been the one.

Q. The company told you that; didn’t they?

A. Yeah.

...

Q. Again Mickey, I ask you, which mantrip did the company tell you that Stanley Stevenson was hurt on?

A. The 00.

Q. The 00 mantrip; is that right?

A. Yes.

(3/3/09 Transcript at 75, 91.)

Independence Coal’s retained liability expert witness, Robert O. Thomas, was even informed prior to the trial by Independence Coal and its counsel that hired him that the mantrip involved in the Stevenson accident was the 00 mantrip. He testified that:

Q. Which mantrip were you told was involved?

A. The Double 05.

Q. The Double 0? You went there twice to look at it, right?

A. Right.

Q. When you went there, which mantrip did the coal company roll out for you to see?

A. The Double 0, five man.

(3/13/09 Transcript at 104.)<sup>2</sup>

Testimony was also presented at trial, such as by James “Tattoo” Hawkins, the Independence Coal belt coordinator/Superintendent, that Independence Coal’s company policy dictated that only certified mechanics and electricians should perform brake repairs on mantrips. (3/2/09 Transcript at 9.) However, several witnesses, further discussed below, testified that there were not enough electricians and mechanics to service the mantrips. Directly contrary to Mr. Hawkins’ position on the issue, Safety Director Brian Keaton testified that a beltman, like Stevenson, was not necessarily disqualified from working on mantrip brakes. (3/4/09 Transcript at 107-108.) And, just prior to his injury, Stevenson had done the brake repairs with salaried electrician, Michael “Mickey” Hughes.

Stevenson testified that he believed Independence Coal expected him to repair the mantrip brakes and keep the mainline track, the only way in and out of the mine, clear.

Stevenson testified as follows:

Q. And you wouldn’t have been working on that mantrip if you didn’t feel like you had to under the circumstances?

A. No, I wouldn’t.

Q. Because you had the main line blocked?

A. That’s right.

Q. Tell this jury again why you didn’t just pull on into the spur and stop and get off the main line when you first stopped at the final location where you got hurt?

---

<sup>2</sup> Plaintiff’s expert witness, Bob Moreland, was also permitted during the discovery process to visit the mine site and view the involved mantrip. At the appellant’s mine, plaintiff’s expert ‘was presented with the 00-5 mantrip’ to photograph and inspect. (3/10/09 Transcript at 143.) Independence Coal also filmed a “reenactment” of the Hughes brake repairs, using the 00-5 mantrip. (3/3/09 Transcript at 35, 74.)

A. The spur was on a downhill grade and I was afraid that if I pulled down in there with the brakes not working right I was afraid it would run off the track and into the belt lines.

Q. If you would have taken out the belt system what would have happened to Stanley Stevenson?

A. I imagine I would have been fired.

(3/10/09 Transcript at 116-117.)

Stanley Stevenson's testimony also indicated that the phone (also referred to as the radio) on the 00 mantrip did not work. (3/5/09 Transcript at 68-69.) Safety Director Keaton testified that a mantrip should not be in use if its radio does not work. (3/4/09 Transcript at 106.) Likewise, Maintenance Chief Sheppard testified that a mantrip should never have left the portal with a nonfunctioning phone on the machine. (3/2/09 Transcript at 83.)

Plaintiff presented expert testimony from Bob Moreland, a retired MSHA accident investigator. Mr. Moreland opined that mantrips were required to have a working, functioning brake system, both service and park brakes, and that, if the 00 mantrip needed the amount of work that was performed by Sheppard's crew on January 31, 2005, "[i]t should have been taken out of service immediately." (3/11/09 Transcript at 24.) Moreland also opined that, "[i]f the brakes hadn't been defective on the mantrip, [Stevenson] wouldn't have been in the position to get injured." (3/11/09 Transcript at 52.) Indeed, Moreland testified that the precise nature of how Stevenson injured his arm was irrelevant, correctly concluding that "... the wrench could have slipped, the part could have slipped, he could have slipped, but the bottom line is why was he in there to start with? The brake was defective on the mantrip, putting him in that position." (3/11/09 Transcript at 123.)

Moreland also opined that Independence Coal was required to task train Stevenson on how to do brake repairs if it expected him to work on the brakes (3/10/09 Transcript at 158 and 3/11/09 Transcript at 140, 142) and have enough electricians to make the equipment safe for the people who were working at the mine. (3/10/09 Transcript at 152.) Appellant's management agreed that Independence Coal did not have a sufficient mechanic/electrician staff to service the mantrips. When asked whether "there [were] enough electricians and mechanics there to cover what needed to be covered to fix these mantrips," Fire Boss Rocky Burns said "no." (2/27/09 Transcript at 105.) When asked if he had "an adequate number of electricians and mechanics," Maintenance Chief Lewis Sheppard (the Independence Coal representative at trial) said, "[w]ell that's kind of subjective. There's always need for as many people as you can get, but, you know, what the budget costs were and what I want is two different things." (3/2/09 Transcript at 93.) When asked if "the Independence Mine [was] adequately staffed with electricians," hourly worker Brian Williamson answered "no, sir." (3/3/09 Transcript at 112.) When asked if "there [were] an adequate number of electricians on the shirt shift," salaried electrician Michael "Mickey" Hughes said "[n]o, there was never enough really." (3/3/09 Transcript at 10-11.) When asked if there were enough electricians, hourly worker Jeff Davis said "[t]he place was just too big. We could never have enough." (3/4/09 Transcript at 22.)

Moreland further testified that both State and Federal law require a mantrip to have an operating phone and that the mantrip was not suppose to be moved without one. (3/10/09 Transcript at 158.)

J. K. Lilly, III, M.D. of Charleston, an anesthesiologist with sub-specialty training in pain management, was Stevenson's treating physician. In his videotaped evidentiary deposition, Dr. Lilly described Stevenson's injury as "... a crush injury and it occurred at or about the lateral portion of the wrist, that the nerve involved was the ulnar nerve and it resulted in ... a chronically painful condition due to the nerve injury ...." (Lilly Dep. at 12.) The right (Stevenson's dominant hand) wrist injury was diagnosed as Complex Regional Pain Syndrome, Type II, Causalgia (Lilly Dep. at 51), also known as Reflex Sympathetic Dystrophy (RSD), and resulted in "... a significant temperature difference in the hand. There was also some blanching, mottling of the skin, coldness, unusual swelling, limitation of motion, slow motion, a term called bradykinesia ...". (Lilly Dep. at 13.) Many evaluating physicians (Drs. Murthy, Bachwitt, Bolano, Biasas, Schmidt, Guberman, and Nasher) agreed with Dr. Lilly's diagnosis and only Dr. Mukkamala disagreed with the RSD diagnosis. In fact, counsel for Independence Coal admitted the validity of the RSD diagnosis in closing argument. (3/17/09 Transcript at 140-141.) Dr. Lilly opined within a reasonable degree of medical certainty that Stevenson's injury was permanent and unlikely to improve (Lilly Dep. at 59) and he was limited to a sedentary exertional level of employment.

Errol Sadlon, a professional rehabilitation counselor, appeared at trial and opined within a reasonable degree of certainty in his field of expertise that Stevenson "... most likely was totally disabled for all employment." (3/11/09 Transcript at 183.) Mr. Sadlon also testified that Stevenson intended on working until his normal retirement age (67 years of age), was limited to a sedentary exertional level of work as opined by Dr. Lilly and confirmed by a functional capacity evaluation (3/11/09 Transcript at 185) and was

granted his Social Security disability by the Social Security Administration, with an onset date of disability found to be January 31, 2005. (3/11/09 Transcript at 184.) Mr. Sadlon opined that Stevenson's lost earning capacity, had the mine injury never happened, was \$48,000 per year, which opinion was adopted by Dan Selby, CPA, Stevenson's economic expert. Selby opined that Stevenson's lost earning capacity and lost household services, due to the mine injury, reduced to a net present worth, was \$1,780,914. (3/12/09 Transcript at 78.) In its verdict, the jury awarded this amount for plaintiff's lost earning capacity and household services. The appellant did not offer the testimony of either a vocational expert or economist at the trial of this matter.

### **III. STANDARD OF REVIEW**

In Syllabus Point 1 of Fredeking v. Tyler, 224 W.Va. 1, 680 S.E.2d 16 (2009), this Court recently held that “[t]he appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure [1998] is *de novo*.” Likewise, in Syllabus Point 1 of Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807(2002), the Court held that: “This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.”

However, the Court also held that, “[w]hen this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented.

Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.” Syllabus Point 2, Fredeking, supra.

With regard to the standards to be applied by the Circuit Court, this Court has indicated that a motion under Rule 50(b) may only be granted when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. Where there is sufficient conflicting evidence, or insufficient evidence to establish conclusively the movant's case, a motion under Rule 50(b) should not be granted. In considering the motion, the trial court must view the evidence in the light and with all reasonable inferences most favorable to the party who secured the jury's verdict. Sias v. W-P Coal Co., 185 W.Va. 569, 577, 408 S.E.2d 321, 329 (1991). *See also* Rodriguez v. Consolidation Coal Co., 206 W.Va. 317, 325, 524 S.E.2d 672, 680 (1999) (“In considering whether a motion under Rule 50(b) of the West Virginia Rules of Civil Procedure should be granted, the evidence should be considered in the light most favorable to the plaintiff. The motion can be granted only if plaintiff’s evidence fails to establish a *prima facie* right to recover.”) Such a motion should not be granted in a case where the evidence is such that the jury could have properly found for either party upon the factual issues. The trial court should not substitute its own opinion for the opinion of the jury on evidence giving rise to inferences about which reasonable minds could differ.

Sias, 185 W.Va. at 578, 408 S.E.2d at 330.<sup>3</sup>

In summarizing how a court should review an argument that the evidence presented at trial was insufficient as a matter of law, this Court has stated: “In determining whether there is sufficient evidence to support a jury verdict, the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.” Syllabus Point 2, Richmond v. Ellenbogen, 205 W.Va. 240, 517 S.E.2d 473 (1999). *See also* Syllabus Point. 4, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958) (“When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.”).

When reviewing a Circuit Court's decision on a motion for a new trial, this Court has held that:

The ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.” Syl. pt. 4, in part, Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976). Syl. pt. 2, Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc., 223 W.Va. 209, 672 S.E.2d 345 (2008). Accord Tennant v. Marion Health Care Found.,

---

<sup>3</sup> Rule 50 of the West Virginia Rules of Civil Procedure was amended in 1998, and the term “directed verdict” was replaced with the phrase “judgment as a matter of law.” The amendment did not, however, affect either the standard by which a trial court reviews motions under the rule or the standard by which an appellate court reviews a trial court's ruling. McCloud v. Salt Rock Water Public Service Dist., 207 W.Va. 453, 457 n.1, 533 S.E.2d 679, 683 n.1 (2000).

Inc., 194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995) (“We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.”). *See also State v. Crouch*, 191 W.Va. 272, 275, 445 S.E.2d 213, 216 (1994) (“The question of whether a new trial should be granted is within the sound discretion of the trial court and is reviewable only in the case of abuse.”).

Peters v. Rivers Edge Min., Inc., 224 W.Va. 160, 172-73, 680 S.E.2d 791, 803-04 (2009).

In West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc., 222 W.Va. 688, 693-94, 671 S.E.2d 693, 698-99 (2008) the Court reiterated that “[t]his Court has made clear that ‘[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). As a result of such deference, ‘[a] trial court’s evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.’ Syl pt. 4, State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998).”

In considering the appellant’s motion under Rule 59, the Circuit Court had the authority to weigh the evidence and consider the credibility of the witnesses. In order to set aside the verdict, however, the Circuit Court must find that the verdict was against the clear weight of the evidence, was based on false evidence or would result in a miscarriage of justice. In re State Public Bldg. Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994), *cert. denied sub nom. W. R. Grace & Co. v. West Virginia*, 515 U.S. 1160 (1995). In discussing these standards, this Court has stated that, “a trial judge should rarely grant a new trial.... Indeed, a new trial should not be granted unless it is

reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.” Morrison v. Sharma, 200 W.Va. 192, 194, 488 S.E.2d 467, 469 (1997) (quotations omitted).

The Circuit Court’s consideration of the appellant’s motion for a new trial was also governed by Rule 61 of the *West Virginia Rules of Civil Procedure* which states:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

This Court has also observed that it “has consistently adhered to the doctrine of harmless error... ‘Errors that are harmless or do not affect the substantial rights of the parties do not require reversal’” Ilosky v. Michelin Tire Corp., 172 W. Va. 435, 450, 307 S.E.2d 603, 618 (1983), *quoting* Jennings v. Smith, 165 W.Va. 791, 795, 272 S.E.2d 229, 231 (1980).

To the extent this Court is “asked to decide if a jury received the proper instructions in a given trial [its] review is *de novo*. As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contract, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Keese v. General Refuse Service, Inc., 216 W. Va. 199, 205, 604 S.E.2d 449, 455 (2004).

#### IV. DISCUSSION OF LAW

##### A. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S SUMMARY JUDGMENT MOTION AND APPELLANT'S MOTION AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Independence Coal Company's primary argument on appeal is that the Circuit Court erred in failing to grant its motion for summary judgment under Rule 56(b), and its motions for judgment as a matter of law under Rule 50(b). Independence argues that it is entitled to judgment as a matter of law because the plaintiff failed to present sufficient evidence to establish proximate cause. The appellant's argument is a fundamentally incorrect analysis of both the facts and the law and is clearly wrong. Proximate cause was a jury question. The Circuit Court did not err in denying these motions.

As the Circuit Court noted, in Spencer v. McClure, 217 W.Va. 442, 618 S.E.2d 451 (2005), this Court reiterated long-standing West Virginia law that "the proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred," and that "proximate cause must be understood to be that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred." Id. at Syllabus Points 3 and 4. *See also Order Denying Appellant's Renewed Motion for Judgment As A Matter of Law at 3-4.*

In Mays v. Chang, 213 W.Va. 220, 224, 579 S.E.2d 561, 565 (2003) this Court observed that "questions of proximate cause are often fact-based issues reserved for jury resolution. 'Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that

reasonable men may draw different conclusions from them.’ Syllabus Point 5, Hatten v. Mason Realty Co., 148 W.Va. 380, 135 S.E.2d 236 (1964).” See also Arnazzi v. Quad/Graphics, Inc., 218 W.Va. 36, 39, 621 S.E.2d 705, 708 (2005) (“It is well established in West Virginia that ordinarily the issue of proximate cause is a jury question to be decided based upon the totality of the evidence.”).

Summary judgment to the appellant was properly denied by the trial court. “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. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994). As discussed more fully herein, there clearly was “a genuine issue for trial.”

Although it involved a workplace injury, this case proceeded as a simple negligence case because Stanley Stevenson was not an employee of Independence Coal, but rather was an employee of an independent contractor. In Syllabus Point 2 of Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976), this Court held that: “The owner or occupier of premises owes to an invitee such as a non-employee workman or an independent contractor the duty of providing him with a reasonably safe place in which to work and has the further duty to exercise ordinary care for the safety of such persons.”<sup>4</sup>

---

<sup>4</sup> In Syllabus Point 3 of Taylor v. Sears, Roebuck and Co., 190 W.Va. 160, 437 S.E.2d 733 (1993), this Court held that: “The ‘reasonably safe place to work’ theory may not be used against the owner of a place of employment when the owner exercises no control over the equipment provided by the contractor for use by the contractor’s employees.” Likewise, in Kerns v. Slider Augering & Welding, Inc., 202 W.Va. 548, 555, 505 S.E.2d 611, 618 (1997), this Court observed that it had “also generally recognized that the owner who provides a reasonably safe place to work cannot be held liable unless the owner continues to exercise control over the workplace,” citing Syllabus Point 2 of Henderson v. Meredith Lumber Co., 190 W.Va. 292, 438 S.E.2d 324 (1993). Such was clearly not the case in this action as the evidence unequivocally demonstrated that Independence Coal was in control of and responsible for the Brookville mantrip that plaintiff was operating.

Consistent with this long-standing principle of West Virginia law, the jury was properly instructed that Independence Coal had a duty to provide Stanley Stevenson with a reasonably safe place to work and to exercise ordinary care for his safety. (3/17/09 Transcript at 67.) The jury was also instructed that, if it found that Independence Coal “failed to maintain its property in a reasonably safe condition,” then the jury could find that the appellant was negligent. (3/17/09 Transcript at 67.) Further, the jury was properly instructed that:

It was the duty of the appellant, Independence Coal Company, Inc., to maintain its equipment in safe operating condition and not to expose Stanley Stevenson to perils or hazards against which he could be guarded by proper diligence on its part. More specifically, the appellant had a duty under the law to provide the plaintiff with a mantrip that was safe and in good mechanical condition. If you find that the appellant failed to maintain its equipment, including its mantrips, in a safe operating condition, then you may find that it was negligent.

(3/17/09 Transcript at 67-68.) This instruction was consistent with the specific requirements of W. Va. Code § 22A-2-38(b) (“Cars on the man trip shall not be overloaded, and sufficient cars in good mechanical condition shall be provided.”), as well as the general requirements of W. Va. Code §21-3-1 (“Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render employment and the place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees.”).<sup>5</sup> Likewise, the instruction properly reflected the

---

<sup>5</sup> West Virginia cases “have long held that, customarily, a violation of a statute is *prima facie* evidence of negligence.” Shaffer v. Acme Limestone Co., Inc., 206 W.Va. 333, 346, 524 S.E.2d 688, 701 (1999), citations omitted.

requirement of W. Va. C.S.R. §36-18-4.1 that “[m]ine operators shall maintain equipment in safe operating condition.”<sup>6</sup>

When viewing the evidence presented at trial in the light most favorable to the plaintiff, the jury clearly could have concluded that the mantrip provided to Stanley Stevenson by Independence Coal was not “safe and in good mechanical condition.” The jury certainly could have rejected Lewis Sheppard’s eleventh hour “opinion” that Stanley Stevenson was not using the 00 mantrip on January 31, 2005 and instead concluded (consistent with the substantial preponderance of the evidence) that the appellant provided the plaintiff with the defective 00 mantrip by to use on the night in question. After concluding that Stevenson was in fact using the 00 mantrip, the jury could also have readily concluded that the repairs to that mantrip were not done before Stevenson’s injury, but rather were done after his injury. Independence Coal’s own witnesses agreed that, in its pre-repair condition, the mantrip should have immediately been taken out of service until the repairs were made (3/2/09 Transcript at 83) and should not have been in use. (3/4/09 Transcript at 104-105.)

Such a conclusion by the jury would have established a violation of a duty imposed by law on Independence Coal and a negligent act on the part of the appellant. Furthermore, the jury could have very reasonably concluded that Independence Coal’s failure to provide the plaintiff with a safe and operational mantrip was the last negligent act contributing to Stanley Stevenson’s injury and without which the injury would not have occurred. Despite Independence Coal’s protestations, it is a fact that, but for the

---

<sup>6</sup> Failure to comply with a regulation can constitute *prima facie* negligence, if an injury proximately flows from the non-compliance and the injury is of the sort the regulation was intended to prevent. Miller v. Warren, 182 W.Va. 560, 390 S.E.2d 207 (1990).

appellant's failure to provide Stanley Stevenson with a properly functioning mantrip, the plaintiff would not have been forced to attempt to deal with the malfunctioning equipment and would not have suffered an injury. An act of negligence "which sets off a chain of events or creates a situation ultimately resulting in injury," may very well constitute the proximate cause or a proximate cause of the injury. Evans v. Farmer, 148 W.Va. 142, 154, 133 S.E.2d 710, 717 (1963). In any event, however, these were clearly questions of fact for the jury, not questions of law for the court.<sup>7</sup>

Cases from other jurisdiction with similar facts to this case make clear that proximate cause is a jury question. Arguments similar to those made by appellant in this case were made by the defendant and rejected by the court in Lawrence v. Bridgestone/Firestone, Inc. 963 F.Supp. 685 (N.D. Ill. 1997). The plaintiffs in Lawrence had purchased four new tires for their pickup truck at a Firestone store which were installed by store employees. Shortly thereafter, the right rear tire and wheel disengaged from the truck while Mr. Lawrence was driving. Mr. Lawrence steered the car into a nearby parking lot and brought it safely to a stop. Mr. Lawrence tried to put the wheel back on the pickup, rather than calling a tow truck. While he was attempting to place the wheel over the lug bolts the truck fell off the jack, injuring his hand which was pinned between the tire and the fender. In denying the appellant's motion for summary judgment, the district court concluded that proximate cause was a jury question because, "[a] reasonable jury could find the appellant's alleged negligence not to be proximate cause of plaintiff's injury. It could also find Mr. Lawrence's attempt to reattach the wheel

---

<sup>7</sup> The Circuit Court correctly concluded that the same analysis could be applied to other potential acts of negligence about which the jury was instructed. See *Order Denying Appellant's Renewed Motion for Judgment As A Matter of Law at 7-8*.

to be foreseeable and appellant's negligence to be a proximate cause of his injury, whether or not they find plaintiff also to be negligent." 963 F.Supp. at 689. As in this case, the defendant in Lawrence argued that the plaintiff should have "left well enough alone." But that argument did not absolve the defendant as a matter of law in Lawrence, nor can it do so in this case. In short, proximate cause in both cases was a jury question.

Many other cases have reached a similar conclusion. In Wright v. General Motors Corp., 479 F.2d 52 (7<sup>th</sup> Cir. 1973), the plaintiff was attempting to make emergency repairs on a disabled vehicle stopped on a public highway and was struck by another oncoming vehicle. The vehicle was allegedly disabled as a result of a transmission defect caused by the manufacturer and seller of the plaintiff's truck. The Seventh Circuit refused to conclude as a matter of law that the defendant's conduct was not a proximate cause of plaintiff's injuries. Instead the court held that the issue of whether the plaintiff's conduct interrupted the chain of causation was a question of fact for the jury to resolve.

Similarly, in McGuire v. Ford Motor Co., 360 F.Supp. 447 (D.C.Wisc. 1973), the plaintiffs purchased a new automobile manufactured by Ford which stalled on the road in the early morning hours. While waiting for assistance, the plaintiffs proceeded to push the stalled automobile and were struck by another vehicle. Ford argued that its negligence, if any, in the design, manufacture or sale of the automobile did not operate as the proximate cause of the plaintiffs' injuries. In rejecting Ford's argument, the court stated that it was "unable to conclude as a matter of law that the appellant Ford's conduct was not a proximate cause of the plaintiffs' injuries. Whether the plaintiffs' conduct in attempting to move their stalled vehicle, and their being struck by another oncoming

vehicle while so engaged, interrupted the chain of causation set in motion by the appellant Ford's alleged wrongful conduct is a question over which ... reasonable minds might reach differing conclusions.” 360 F.Supp. at 449.

In Mack v. Ford Motor Co., 669 N.E.2d 608 (Ill. App. 1996) the appellate court reversed a summary judgment ruling in a wrongful death action brought against a car manufacturer and a car dealership after a pedestrian who had helped move a disabled car to the highway shoulder was struck and killed by another car. The court stated that “[t]he proximate cause of an injury can become a question of law only when the facts are not only undisputed but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them.” Id. at 612-613. In this case, of course, the facts were disputed and there clearly were differences in the arguments of the parties as to the inferences that could be drawn from those facts.

Likewise, in Delbrel v. Doenges Bros. Ford, Inc., 913 P.2d 1318 (Okl. 1996), the court held that, whether an automobile dealer's negligent repairs to a vehicle were the proximate cause of a passenger's injuries, was a question of fact for the jury in a negligence action arising when the passenger was struck by another vehicle while pushing the stalled vehicle off of the roadway.

These cases demonstrate that proximate cause in this case was clearly a jury question. These cases also demonstrate that the mere fact that Stanley Stevenson was able to bring the mantrip to a stop did not mean that the mantrip was properly maintained by the appellant and did not absolve Independence Coal from negligence. The jury in this case could certainly have reasonably concluded that a mantrip with brakes that “rattled,” “smelled,” “got hot,” and “came loose,” and that needed to be stopped on the

track twice within a short period of time because of those problems, was not safe and was not properly operating. Likewise, the jury in this case could have reasonably concluded that Independence Coal's failure to provide the plaintiff with a safe and properly operating mantrip was the "cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred."

Moreover, the jury could have also concluded that Independence Coal breached its duty to the plaintiff to have enough fully-trained mechanics available to fix the problems associated with the mantrip. Indeed, as noted above, the evidence was virtually uncontested that appellant did not have enough available mechanics or electricians and, as a result thereof, plaintiff was left stranded on the track with a non-functioning piece of equipment.

Appellant focuses a substantial portion of its proximate cause arguments on the actions of Stanley Stevenson. When distilled to its core, Independence Coal's argument that its actions or omissions could not be the proximate cause of the plaintiff's injuries is based on its assertion that Stanley Stevenson's own conduct once the mantrip came to a stop on the rail was an intervening cause of his injury. Intervening cause "can be established only through the introduction of evidence by a defendant that shows the negligence of another party or a nonparty." Sydenstricker v. Mohan, 217 W.Va. 552, 559, 618 S.E.2d 561, 568 (2005). "[T]he function of an intervening cause [is that of] severing the causal connection between the original improper action and the damages." Harbaugh v. Coffinbarger, 209 W.Va. 57, 64, 543 S.E.2d 338, 345 (2000). Significantly, this Court has noted that "the intervening cause, in order to insulate the original tort-

feasor against liability, must operate independently of anything else.” Evans v. Farmer, 148 W.Va. 142, 155, 133 S.E.2d 710, 718 (1963).

This Court has also held that: “An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury.” Syllabus Point 3, Wehner v. Weinstein, 191 W.Va. 149, 444 S.E.2d 27 (1994). *See also*, Syllabus Point 2, Evans (“The questions of negligence, contributory negligence, proximate cause, intervening cause and concurrent negligence are questions of fact for the jury where the evidence is conflicting or when the facts, though undisputed, are such that reasonable men draw different conclusions from them.”).

In Anderson v. Moulder, 183 W.Va. 77, 89, 394 S.E.2d 61, 73 (1990), this Court also observed that:

The general rule in this regard is that a tortfeasor whose negligence is a substantial factor in bringing about injuries is not relieved from liability by the intervening acts of third persons if those acts were reasonably foreseeable by the original tortfeasor at the time of his negligent conduct.

...  
[T]he original negligence continues and operates contemporaneously with an intervening act which might reasonably have been anticipated so that the negligence can be regarded as a concurrent cause of the injury inflicted. One who negligently creates a dangerous condition cannot escape liability for the natural and probable consequences thereof although the act of a third person may have contributed to the final result.

Citations and internal quotations omitted. *See also* Humphery v. Duke Energy Indiana, Inc., 916 N.E.2d 287, 295 (Ind.App. 2009) (stating that “the fundamental test of proximate cause remains reasonable foreseeability where there is an independent

intervening act” and holding that, whether the appellant could have reasonably foreseen the intervening act, was a question of fact for the jury.); Derdiarian v. Felix Contracting Corp., 51 N.Y. 2d 308, 315, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169-70 (1980) (“If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the appellant’s conduct, it may well be a superseding act which breaks the causal nexus. . . . Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve.”).

This Court’s opinion in Wehner v. Weinstein, supra, is particularly instructive with regard to these issues. In Wehner, the Court found the Circuit Court did not err in allowing the jury to decide whether a pizza delivery driver’s negligence in blocking the driveway to a fraternity house where he was making a delivery was a proximate cause of injuries to pedestrians who were struck by the car after a fraternity member entered the car and disengaged the brake, causing the car to roll down a hill and strike the plaintiffs. The Court stated that, “it was for the jury to determine whether it was reasonably foreseeable under the circumstances that some person would attempt to move the vehicle to gain access to the driveway.” 191 W. Va. at 154, 444 S.E.2d at 33. *See also*, Robertson v. LeMaster, 171 W. Va. 607, 301 S.E.2d 563 (1983) (Whether conduct of motorist’s employer in requiring motorist to work over 27 hours before allowing him to drive home created an unreasonable risk of harm to others that was foreseeable was a jury question.)

In this case, the jury was properly instructed about foreseeability. (3/17/09 Transcript at 72.) Moreover, it was certainly foreseeable to the appellant that a coal miner whose disabled mantrip was blocking the only way in and out of the mine and who was told that it may be hours before the mantrip could be repaired, would take steps to move the mantrip out of the way. Indeed, the consequences of the breakdown of Stevenson's mantrip on the main line track manifested themselves within minutes when Davis and McCloud came upon the disabled mantrip and were unable to proceed out of the mine. The jury could have reasonably concluded that, by providing Stanley Stevenson with a defective mantrip, Independence Coal created a dangerous condition and that Stevenson's attempt to repair and move the mantrip was a natural and probable consequence of Independence Coal's negligent act.

Finally, it should be noted that this Court has also held that: "Whether and to what extent the plaintiff in a civil action was contributorily negligent are ordinarily questions of fact to be resolved by the jury." Syllabus Point 10, Anderson, supra. Thus, whether Stanley Stevenson's actions constituted contributory or comparative negligence was also a jury question. The jury was properly instructed on this issue and fully considered the question of Stevenson's own culpability for his injury.

Quite simply, the case-law overwhelmingly demonstrates that these matters were questions for the jury to resolve. Significantly, the jury, after hearing all of the evidence and arguments of counsel, concluded that the plaintiff was not negligent. Therefore, any conduct on the part of Stanley Stevenson would not be the "last negligent act contributing to the injury" and would not be the proximate cause of the injury, nor would Stevenson's conduct qualify as an intervening cause under the applicable case-law.

Independence Coal's arguments in support of this appeal are all based on its own self-serving interpretation of the facts. The jury, however, was properly instructed on the concepts of credibility, negligence, comparative negligence, assumption of risk, foreseeability and, most importantly, proximate cause and intervening cause. Appellant's counsel were given and took advantage of every opportunity to make the same arguments to the jury that they now make to this Court. The jury did not accept Independence Coal's arguments. It was not the Circuit Court's position nor can it be this Court's position to substitute its judgment for the jury's in resolving these factual disputes.

None of appellant's arguments give rise to entitlement to judgment as a matter of law. Moreover, granting appellant's motions would have required the Circuit Court to ignore the directives of the governing case-law to consider the evidence in the light most favorable to the plaintiff and to assure that all conflicts in the evidence were resolved by the jury in favor of the plaintiff. The Circuit Court's rulings on these motions were correct.

**B. THE CIRCUIT COURT DID NOT ERR IN ADMITTING CERTAIN EVIDENCE PROFFERED BY THE PLAINTIFF**

**1. THE CIRCUIT COURT DID NOT ERR IN ALLOWING TESTIMONY ABOUT INOPERABLE RADIOS**

The evidence presented established that the radios on the mantrips did not work. Both hourly and salaried witnesses testified to this. More specifically, the evidence was undisputed that the radio on the mantrip that Stanley Stevenson was using on January 31, 2005 did not work. A mantrip is not allowed to be in operation if the communication system does not work under both state and federal regulations. Both the Independence

Coal Safety Director and the Maintenance Chief testified that a mantrip should never have left the portal with a nonfunctioning radio. (3/4/09 Transcript at 106, 3/2/09 Transcript at 83.)

This evidence was relevant to the appellant's duties under Sanders to provide a safe work place. It was also was relevant to the general condition of the mantrips. *See* W. Va. Code § 22A-2-38(b) ("Cars on the man trip shall not be overloaded, and sufficient cars in good mechanical condition shall be provided." Emphasis added.).

Independence Coal's counsel elicited testimony from plaintiff's own expert that the lack of an operating radio in and of itself did not cause plaintiff's injury. (3/11/09 Transcript at 89.) Independence Coal also offered testimony through its own expert witness that the lack of a working radio had nothing to do with the plaintiff's accident/injury. (3/13/09 Transcript at 79.)

Most importantly, the Circuit Court sustained the appellant's objection to the plaintiff's proposed jury instruction number 14 which stated that "it was the duty of the defendant, Independence Coal Company, Inc., to have an operable two-way radio on the mantrip the plaintiff was using on January 31, 2005. If you find that the defendant failed to provide an operable two-way radio on the mantrip plaintiff was using on January 31, 2005, then you may find that the defendant was negligent." In refusing to give this instruction the Court stated: "I don't have any problem with what you argue, it's just not going to be the law." (3/17/09 Transcript at 32.)

**2. THERE WAS NO ERROR IN THE CIRCUIT COURT'S RULING REGARDING ROCKY BURNS' TESTIMONY**

Appellant argues that the Circuit Court erred in permitting Rocky Burns to testify regarding his post-accident termination and lawsuit against the appellant. The limitations imposed on Rocky Burns' testimony in the Circuit Court's disposition of the appellant's pretrial motion in limine were proper and appropriate.

Significantly, the testimony at issue consisted of three questions:

Q. And did you quit on your own, or were you fired?

A. I was fired.

Q. You were fired. And did you then file a lawsuit yourself about you being fired?

A. Yes, I did.

Q. Did you file that lawsuit with the basis of that because you had made safety complaints yourself?

A. That's true.

(2/27/09 Transcript at 105.) That was the entirety of the alleged "highly prejudicial" evidence. More significantly, defense counsel did not object to the miniscule reference to Mr. Burns' termination in plaintiff's counsel's closing argument. This alleged point of error is simply a non-issue.

**3. THE CIRCUIT COURT PROPERLY PERMITTED TESTIMONY ABOUT APPELLANT'S POST-ACCIDENT INVESTIGATION**

When arguing about jury instructions about the appellant's duties to investigate Stanley Stevenson's injury, defense counsel stated that a proposed defense instruction was "not precluding them [plaintiff's counsel] from arguing about the investigation or the report" and "[w]hat we're saying is the legal requirement was met, and Mr. Moreland agreed with that, for this investigation. They can argue if they want that it was

inadequate ...” (3/17/09 Transcript at 40.) Now, however, appellant complains about the fact that the plaintiff’s counsel argued that the appellant’s investigation was inadequate.

Evidence about appellant’s post-accident investigation was relevant for multiple reasons. As noted above, Independence Coal was required to provide the plaintiff and others with a reasonably safe place in which to work and to exercise ordinary care for the safety of such workers. The jury could have reasonably concluded that appellant’s post-accident investigation showed a lack of interest in that duty.

More significantly, the appellant repeatedly challenged Stanley Stevenson’s version of events. As such, the appellant itself made the investigation relevant because the jury was called upon to decide whether the appellant’s attack was based in fact and was credible.

In this regard it was particularly relevant that the people who drafted the reports (John Bowling and Brian Keaton) did not know how Stanley Stevenson’s injury occurred as they never discussed the incident with any eyewitnesses. As noted above, both Jeff Davis and William McCloud were present when the injury occurred, yet they were not interviewed. Plaintiff’s counsel had to attack the investigative reports which outlined the appellant’s version as to how the injury occurred because the eyewitnesses and the plaintiff testified that the injury occurred differently than the appellant’s investigative report suggested.

Moreover, the jury was also instructed that the appellant had no duty to do any investigation beyond that required by MSHA regulations. (3/17/09 Transcript at 74.) The jury was not instructed that an inadequately performed post-accident investigation

could constitute negligence. The jury heard all of this evidence and weighed the same accordingly. The Circuit Court committed no error in this regard.

**C. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING  
CERTAIN EVIDENCE PROFFERED BY THE APPELLANT**

**1. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING  
CHARLES KEENEY'S PROPOSED TESTIMONY**

The exclusion of proposed witness Charles Keeney was fully in accord with the Circuit Court's discretion to control litigation and manage its docket. Rule 16 of the West Virginia Rules of Civil Procedure directs trial courts to enter scheduling orders governing discovery and vests in trial courts the discretion to modify the scheduling order. It is clearly within the trial court's discretion to refuse to allow a party to designate a witness after the expiration of the deadline set forth in the scheduling order. McCoy v. CAMC, Inc., 210 W.Va. 324, 557 S.E.2d 378 (2001). Moreover, counsel for the appellant did not move for a continuance.

More importantly, any testimony by Keeney would have been cumulative. Independence Coal asserts in its appeal brief that Keeney's proposed testimony (that Stanley Stevenson told Keeney that Stevenson had hurt himself when he slipped and fell) was "unique and critical testimony." *Appellant's Brief at 50*. Yet that same brief states that witness Brian Williamson testified that Stanley Stevenson said that he was hurt when he slipped and fell and that Stevenson "told co-worker Charles Keeney the same story." *Appellant's Brief at 20*. Keeney's proposed testimony was neither unique nor critical.

This Court has defined "cumulative evidence" as "additional evidence of the same kind to the same point." State v. Frazier, 162 W.Va. 935, 941, 253 S.E.2d 534,

537 (1979). In Syllabus Point 2, State v. O'Donnell, 189 W.Va. 628, 433 S.E.2d 566 (1993), this Court stated: "To be cumulative, newly-discovered evidence must not only tend to prove facts which were in evidence at the trial, but must be of the same kind of evidence as that produced at the trial to prove these facts. If it is of a different kind, though upon the same issue, or of the same kind on a different issue, the new evidence is not cumulative."

Keeney's proposed testimony was "the same kind of evidence" as Williamson's existing testimony and was proffered to attempt to prove the same "facts" which were already in evidence through Williamson. The proposed testimony was clearly "additional evidence of the same kind to the same point."

Under Rule 403 of the West Virginia Rules of Evidence, a trial court may exclude evidence because "its probative value is substantially outweighed by ... considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Independence Coal spent much time introducing evidence that the plaintiff's version as to how the accident occurred changed and the Circuit Court did not prohibit the appellant from doing so. Keeney's proposed testimony had little, if any probative value, but would certainly have been cumulative evidence.

"The admission of evidence merely cumulative is within the sound discretion of the trial court, and unless the court abuses such discretion, the admission or exclusion of such evidence will not constitute error." Syllabus Point 1, West Virginia Dept. of Highways v. Delta Concrete Co., 165 W.Va. 398, 268 S.E.2d 124 (1980).

## 2. THE CIRCUIT COURT DID NOT ERR IN EXCLUDING THE PLAINTIFF'S COMPLAINT

Appellant also complains about the refusal to admit plaintiff's complaint into evidence. Of course, the complaint was drafted by counsel, not by Stanley Stevenson, and would be of questionable probative value. This is particularly so because "[a] party is normally permitted to make inconsistent factual allegations in [his] pleadings." Arnold Agency v. West Virginia Lottery Com'n, 206 W.Va. 583, 595, 526 S.E.2d 814, 826 (1999). *See also* W.Va. R.Civ.P. 8(e)(2). Moreover, Rule 15 contemplates that a party may liberally amend his pleadings, even if necessary "to conform to the evidence." *See* W.Va. R.Civ.P. 15(b). With these rules in mind, it makes little sense to conclude that a complaint could have any evidentiary value.

Furthermore, the admission of a complaint at trial would lead to juror confusion. In this case, for example, the complaint contained a deliberate intent allegation against Spartan Mining Company, Stevenson's employer. That claim was dropped by the plaintiff prior to the trial. Attempting to explain that to the jury would result in unfair and potentially prejudicial confusion.

Additionally, to the extent that defense counsel desired to convince the jury that the plaintiff changed his version of events after filing this lawsuit, they were permitted to do so and did so *ad nauseam*. The Circuit Court's ruling in this regard was not error.

### **3. THE CIRCUIT COURT DID NOT ERR WITH REGARD TO THE PROPOSED TESTIMONY OF DOCTOR NASHER**

The Circuit Court correctly ruled about the potential testimony of Dr. Muhammed Samer Nasher-Alneam. Prior to the injury of January 31, 2005, the plaintiff suffered from pre-existing complex migraine headaches and a permanently injured left knee. Dr. Samer Nasher commenced treatment of Mr. Stevenson for the migraine headaches on December 1, 2004 (two months prior to the mine injury), and kept him off work during the time period of December 14 - 27, 2004. He continued to see the plaintiff until November 30, 2006. Appellant sought to have the jury hear evidence that Stanley Stevenson's pharmacy showed having filled drug prescriptions from Dr. Samer Nasher that the Doctor could not account for.

What little probative value that might exist as a result of this "evidence" was far exceeded by its prejudicial effect. This Court has observed that, "[e]vidence is unfairly prejudicial if it has 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.' Advisory Committee's Note, Fed.R.Evid. 403. Succinctly stated, evidence is unfairly prejudicial if it 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.' 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 403[03] at 403-15 to 403-17 (1978)." State v. Guthrie, 194 W.Va. 657, 683 n.37, 461 S.E.2d 163, 189 n.37 (1995).

There is no evidence that the Plaintiff forged any prescription and any inferences that the appellant sought to have the jury draw as a result of the doctor's proposed

testimony would be rank speculation. Accordingly, this evidence was properly excluded from the trial of this matter pursuant to Rule 401, 402 and 403 of the *West Virginia Rules of Evidence*. The appellant was otherwise given wide latitude to present testimony about the plaintiff's use of prescription drugs, notwithstanding the fact that not a single witness testified that they observed Stanley Stevenson to be under the influence of narcotics on the night of his injury or at any time while the plaintiff was on the job at the Justice No.1 Mine.

**D. THE CIRCUIT COURT DID NOT ERR IN INSTRUCTING THE JURY**

**1. THERE WAS NO ERROR IN THE GIVING OF CERTAIN OF PLAINTIFF'S JURY INSTRUCTIONS**

“The formulation of jury instructions is within the broad discretion of a circuit court... A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.” Syllabus Point 6, Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995).

With regard to plaintiff's instruction Nos. 2 and 3, appellant complains that the jury was not adequately instructed about the equipment operator's duty to exercise reasonable care in the operation of the equipment. Yet, the jury was instructed about the plaintiff's obligation “to exercise reasonable care for his own safety.” (3/17/09 Transcript at 71.) The jury was also properly instructed about the elements of comparative negligence.

With regard to plaintiff's instruction No. 13, it is clear that the instruction was a fair and accurate statement of the law regardless of whether the cited regulations mentioned "a 'duty' to provide proper tools." In Syllabus Point 1, Walls v. McKinney, 139 W.Va. 866, 81 S.E.2d 901 (1954), the Court held: "Generally, it is a master's duty to provide his servants reasonably safe and suitable tools and appliances sufficient for the work intended, and the servant may assume that the master has performed that duty; and whether the master has been negligent in that duty is generally a question for the jury under all the facts and circumstances." *Accord* Estep v. Price, 93 W.Va. 81, 115 S.E. 861 (1923). *See also* Titus v. Titus, 154 N.W.2d 391, 393 (N.D. 1967) ("The employer must furnish his employees with reasonably safe machinery, tools, and appliances.").

Furthermore, the instruction specifically stated that appellant only had a duty to provide training and equipment to the plaintiff to perform a task "if he was required to perform that task." (3/17/09 Transcript at 69, emphasis added.) If, as appellant argues, the jury believed that "no one directed or asked Stevenson to attempt to tighten the bolts on the brake mount," (*See* Appeal Brief at 63) then the instruction would indicate that Independence had no such duty. There was no error in giving the instruction.

## **2. THERE WAS NO ERROR IN REFUSING TO GIVE CERTAIN OF APPELLANT'S JURY INSTRUCTIONS**

As already discussed, references by counsel to appellant's post-accident investigation were relevant and appropriate and any further instructions beyond those given were unnecessary. The Circuit Court modified appellant's proposed instruction No. 9 so that the jury was instructed that the appellant had no duty to do any investigation

beyond that required by MSHA regulations. (3/17/09 Transcript at 50, 74.) The jury was also specifically instructed that “the incident involving Mr. Stevenson was not an accident as defined in the MSHA regulations; it was an occupational injury.” (3/17/09 Transcript at 74.) Whether the appellant complied with the applicable MSHA regulations was a question of fact. Moreover, the jury was not instructed that an inadequately performed post-accident investigation could constitute negligence.

Appellant’s proposed instruction Nos. 23, 24 and 25 were properly refused by the Circuit Court because they were not accurate statements of law. As amply discussed above, the mere fact that Stanley Stevenson was able to bring the mantrip to a stop did not mean that the mantrip was properly maintained by the appellant and did not absolve Independence Coal from negligence. Moreover, the giving of these proposed instructions (and particularly proposed instruction No. 25) would have required the judge to decide proximate cause as a matter of law. The trial court recognized that it could not and should not do so. As the trial court stated, “I’m going to let you argue that to a jury, but I’m not going to instruct the law on it.” (3/17/09 Transcript at 45.) *See also* (3/17/09 Transcript at 46) (“I think [proposed instruction No. 25] is a proximate cause argument as well.”). The jury was adequately instructed on the issues of proximate cause. The proposed additional instructions were inaccurate and unnecessary.

**E. APPELLANT’S COMPLAINTS ABOUT THE COMMENTS OF PLAINTIFF’S COUNSEL ARE WITHOUT MERIT**

During the trial, counsel for the appellant repeatedly suggested that, after Stanley Stevenson hired counsel to pursue this litigation, Stanley “changed his story” about how

the accident at issue occurred and how serious his injuries were. Indeed, in its Petition for Appeal and its appeal brief the appellant continues to do so. *See Petition Section III.D. (“Plaintiff ‘Shifts’ His Version Of Events When He Files Suit”); Brief Section III.D. (same); Petition Exhibit A (Accident Description Timeline comparing descriptions of injury before and after lawsuit filed); Brief Exhibit A (same).* That was fair game inasmuch as defense counsel was obligated to challenge the credibility of the plaintiff and his witnesses. Plaintiff’s counsel made no complaint that such an argument implied that plaintiff’s counsel was “influencing” the plaintiff’s testimony, even though it surely did.

Apparently, however, defense counsel believes that these rules are not reciprocal. Appellant complains about the unremarkable fact that the plaintiff’s counsel pointed out similar issues with defense witnesses. More remarkably, appellant complains that plaintiff’s counsel argued that the appellant’s witnesses were not telling the truth. Witness credibility is an issue in every trial conducted in this state and in this country. These arguments are simply frivolous but, in any event, they have been waived by the failure of defense counsel to submit a curative instruction. Although the Circuit Court indicated its willingness to do so, defense counsel never submitted nor specifically asked for any such instruction.

This Court has made clear that errors predicated upon the abuse of counsel of the privilege of argument will not be considered “unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper remarks and duly excepted to such refusal” by the Court. Syllabus Point 4, Skibo v. Shamrock Co., Ltd., 202 W.Va. 361, 504 S.E.2d 188, (1998); Syllabus Point 1, Black v. Peerless

Elite Laundry Co., 113 W.Va. 828, 169 S.E. 447 (1933); Syllabus Point 10, Pasquale v. Ohio Power Co., 187 W.Va. 292, 418 S.E.2d 738 (1992), emphasis added.

The Court's recent opinion in Jones v. Setser, 224 W.Va. 483, 686 S.E.2d 623 (2009), cited by the appellant as controlling, does not (and cannot as a *per curiam* opinion) overrule these cases or otherwise change this requirement. Moreover, in Jones, plaintiff's counsel moved for a mistrial as a result of the alleged improper comments in closing argument. In this case, even though it now complains about plaintiff's counsel's comments in closing argument, the appellant did not move for a mistrial and did not object to any of the referenced arguments.

As the Circuit Court stated, "[c]ounsel for both parties were given substantial leeway to vigorously represent their respective clients' interests in the trial of this case. Both plaintiff's and appellant's counsel were obligated to challenge the credibility of the other party and the opposing witnesses." *See Order Denying Appellant's Renewed Motion for A New Trial at 13*. "The discretion of the trial court in ruling on the propriety of argument by counsel before the jury will not be interfered with by the appellate court, unless it appears that the rights of the complaining party have been prejudiced, or that manifest injustice resulted therefrom." Syllabus Point 1, Jones, *supra*. There was certainly no error in the Circuit Court's handling of this "issue."

#### **F. ANY ERROR WAS HARMLESS**

The Plaintiff asserts that none of the appellant's complaints about the rulings of the Circuit Court support the appellant's claims of reversible error. However, to the

extent there may have been error it was harmless error as defined by Rule 61, in that it did not affect the substantial rights of the parties and setting aside the verdict, modifying it or granting a new trial would be inconsistent with substantial justice. Further, “[a] judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby.” Syl.pt.7, Starcher v. South Penn Oil Co., 81 W.Va. 587, 95 S.E. 28 (1918); Syl.pt.7, Torrence v. Kusminsky, 185 W.Va. 734, 408 S.E.2d 684 (1991).

**G. PLAINTIFF’S CROSS ASSIGNMENT OF ERROR – THE  
CIRCUIT COURT ERRED IN FAILING TO ALLOW  
THE ISSUE OF PUNITIVE DAMAGES TO GO TO THE JURY**

Pursuant to Rule 10(f) of the *West Virginia Rules of Appellate Procedure*, plaintiff cross assigns the failure of the Circuit Court to allow the issue of punitive damages to go to the jury, as error.

In Alkire v. First National Bank of Parsons, 197 W. Va. 122, 475 S.E.2d 122 (1996), this Court framed the analysis of this issue as follows:

Do the facts and inferences in this case point so strongly and overwhelmingly in favor of the [defendant] to the extent that it did not act so maliciously, oppressively, wantonly, willfully, recklessly, or with criminal indifference to civil obligations that no reasonable jury could have reached a verdict against the [defendant] on the issue of punitive damages?

Id. at 129, 475 S.E.2d at 129.

In this case, the jury heard evidence of repeated complaints about problems with the mantrip braking systems, and expert testimony suggesting that the Appellant’s conduct was worthy of criminal sanctions. (See 03/17/09 Transcript at 6-14.) In Addair

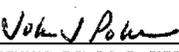
v. Huffman, 156 W. Va. 592, 603, 195 S.E.2d 739, 746 (1973), this Court stated that, “[t]he foundation of an inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular individual.” *See also Cline v. Joy Mfg.Co.*, 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983) (“The usual meaning assigned to ‘wilful,’ ‘wanton’ or ‘reckless’ . . . is that the actor has *intentionally* done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probably that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they shall follow; and it has been said that this is indispensable.” (emphasis in original)); Stone v. Rudolph, 127 W. Va. 335, 345-46, 32 S.E.2d 742, 748 (1945) (defining “willful negligence” as “impl[ying] an act intentionally done in disregard of another’s rights, or omission to do something to protect the rights of another after having had such notice of those rights as would put a prudent man on his guard to use ordinary care to avoid injury” (internal quotations and citation omitted)).

A reasonable jury certainly could have found that the conduct of Independence Coal was willful, wanton, reckless or malicious or undertaken with criminal indifference to its civil obligations under these standards. The Circuit Court erred in not permitting the jury to consider the issue of punitive damages. This Court can and should remand this case to the Circuit Court solely for a trial on the issue of punitive damages. *See Kochoer v. Oxford Life Ins. Co.*, 216 W. Va. 56, 602 S.E.2d 499 (2004) (remanding case for a new trial solely on the issue of punitive damages).

## CONCLUSION

Plaintiff's claims were properly supported by the evidence offered at trial. Additionally, the evidence at trial was properly admitted by the trial court. The jury's verdict in favor of the plaintiff was fully supported by the facts and by the law. There was no error in the Circuit Court's rulings against the appellant. The Circuit Court's only error was in failing to allow the issue of punitive damages to go to the jury. For these reasons, the judgment of compensatory damages granted to plaintiff and the post-trial orders of the Circuit Court should be affirmed and the case should be remanded solely for a trial on the issue of plaintiff's entitlement to punitive damages.

STANLEY STEVENSON, II  
By Counsel,

  
\_\_\_\_\_  
MARK A. ATKINSON (WV Bar No. 184)  
JOHN POLAK (WV Bar No. 2929)  
ATKINSON & POLAK, PLLC  
300 Summers Street, Suite 1300  
P. O. Box 549  
Charleston, West Virginia 25322-0549  
(304) 346-5100

HARRY M. HATFIELD (WV Bar No. 1635)  
MATTHEW M. HATFIELD (WV Bar No. 8710)  
HATFIELD & HATFIELD, PLLC  
221 State Street, Suite 101  
P. O. Box 598  
Madison, West Virginia 25130  
(304) 369-1162

**CERTIFICATE OF SERVICE**

I, John J. Polak, counsel for Appellee, do hereby certify that service of the "Brief of the Appellee, Stanley Stevenson, II" was made upon the parties listed below by mailing a true and exact copy thereof to:

A.L. Emch, Esquire  
Gretchen M. Callas, Esquire  
JACKSON KELLY, PLLC  
P.O. Box 553  
Charleston, WV 25322  
*Counsel for Appellant*

on this 9<sup>th</sup> day of August, 2010.

  
\_\_\_\_\_  
John J. Polak (WV Bar No. 2929)