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BOONE COUNTY
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KATHY ZICKEFOOSE

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

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STANLEY STEVENSON, II,

Plaintiff,

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v. 06-C-72

INDEPENDENCE COAL CO., INC.,
A West Virginia corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR A NEW TRIAL

On a prior day came the Plaintiff, Stanley Stevenson, II, by counsel, Mark A. Atkinson, John J. Polak, and Harry M. Hatfield, and came the defendant, Independence Coal Company, Inc. ("Independence"), by counsel, A.L. Emch and Gretchen M. Callas, for a hearing on defendant's Motion for a New Trial.

Following a full and complete review of the relevant evidence, an examination of defendant's motion (and the memoranda both for and against), consideration of the evidence of the case, an inspection of relevant portions of the Court file, argument of counsel and analysis of the issues presented, the Court finds and concludes as follows: Pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure, Independence has moved for a new trial after the jury returned a verdict for the plaintiff. In considering the defendant's motion under Rule 59, this Court has the authority to weigh the evidence and consider the credibility of the witnesses. In order to set aside the verdict, the 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, the Supreme Court of Appeals 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 Court's consideration of the defendant's motion for a new trial is 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.

The Supreme 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).

It was argued to this Court by the defendant that the rulings in this case were slanted in favor of the plaintiff. Upon hearing that argument and inference by the defendant, this Honorable Court took it upon itself to review the entire trial transcript line

by line to determine whether it had in fact ruled so liberally as argued by the defense counsel. After the review of the record, line for line, word for word, this Honorable Court has determined that the Court actually made rulings in favor of the defendant and considers that the rulings it made in this trial to be quite correct. The rulings that were in favor of the defendant start with the ruling that the defense may show the jury evidence of the plaintiff's prescription drug use and culminate with the ruling that punitive damages, a standard that favors presentation to the jury, shall not be presented to the jury. One of the few rulings that the defendant could conceivably call liberal and plaintiff oriented is the ruling that this Court did not allow the defense to call the plaintiff a drug addict, a ruling that on Day 2, page 35, line 9, was rendered moot when counsel for the plaintiff mentioned drug addict in his opening statement.

In order to grant a new trial, this Honorable Court is held to a standard higher than disagreeing with the outcome of the trial. Sometimes juries are unpredictable and that is the reason that often time settlements are in the best interests of both parties. In the current action, it is clear that the finders of fact, the jury, believed that Independence was negligent and that it must pay for its negligence. This Court finds that the rulings that it made during the course of trial not only were fair and impartial, but in fact this Court granted many motions made by the defense. It is a simple fact, however, that the facts in this case were considered by the jury to be in favor of the plaintiff. It is for this reason that this Honorable Court cannot grant the motion for new trial but does hereby DENY the defendant's motion for a new trial. In support of its decision, this Honorable Court does hereby state the following.

In its pleadings, Independence first argues that the Court erred in excluding the testimony of Dr. Daniel Thistlethwaite related to the issue of causation. The February 25, 2009 deposition of Dr. Thistlethwaite, contained in the record of this case, contains the following colloquy with counsel:

Q. So if I understand you, you didn't make a conclusion that he [Stanley Stevenson] was abusing this, you just said that's a possibility?

A. Right. He was using it. He was taking them. Now, was he using it abusively? Don't know for sure.

***

Q. Do you know on the date of this accident how much medication was in his system?

A. No.

***

Q. I take it you cannot say scientifically how much it affected him because you can't say how much medication was in his body that day?

A. And not only can I not say that, but I also can't tell you based on a comparison, you know, what he's doing.

Thistlethwaite Deposition at 32-33, 52, 54. In his pretrial testimony as quoted above, Dr. Thistlethwaite candidly admitted that he didn't know whether Stanley Stevenson was abusing the prescription drugs that he was receiving, that he didn't know how much (if any) medication Stanley Stevenson had taken at the time of the

accident and that he had no scientific basis to opine on how the medication taken by Stanley Stevenson would have affected the plaintiff on the day of the accident. The West Virginia Supreme Court has stated that:

> in all cases of expert testimony, Rule 104(a) requires a circuit court to make a preliminary determination "concerning the qualification of a person to be a witness, [and] ... the admissibility of evidence." Thus, we believe that when a circuit court is faced with a proffer of expert testimony, there must be a preliminary determination as to all of the elements of Rule 702. These preliminary determinations are intended to ensure the reliability of the expert testimony as well as its relevance.

Gentry v. Mangum, 195 W.Va. 512, 524 n.16, 466 S.E.2d 171, 183 n.16 (1995). Under Gentry, the Court was required to make a preliminary determination of the reliability and relevance of any proposed expert testimony from this witness. "It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to 'scientific knowledge' and, in doing so, to analyze not what the experts say, but what basis they have for saying it. Syllabus point 6, in part, Gentry v. Mangum, supra. *See also* State ex rel. Jones v. Recht, 221 W.Va. 380 655 S.E.2d 126 (2007), applying the dictates of Wilt v. Buracker, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert. denied,* 511 U.S. 1129 (1994) to medical testimony.

Faced with Dr. Thistlethwaite's deposition testimony and the record as a whole, the Court was within its discretion to conclude that any attempt by Dr. Thistlethwaite to give specific opinion testimony about Stanley Stevenson's condition on the date of the accident would be without a factual basis, unreliable, and based on speculation. As the Supreme Court of Appeals held in Helmick v. Potomac Edison Co., 185 W.Va. 269, 406 S.E.2d 700, *cert. denied,* 502 U.S. 908 (1991): "The admissibility of testimony by an

expert witness is a matter within the sound discretion of the trial court." Independence was otherwise given wide latitude to present testimony about the plaintiff's use of prescription drugs. This Court's ruling regarding Dr. Thistlethwaite's testimony concerning causation was not erroneous. As appropriately stated during oral argument by plaintiff's counsel Mr. Atkinson, "As to causation, he (Dr. Thistlethwaite) doesn't even know what medications he (Stanley Stevenson) had in him. It's like saying if somebody is an alcoholic, but you don't know what he had to drink that day, you can't charge him with DUI based on that."

Next, Independence argues that the Court erred in excluding the testimony of Dr. Muhammed Samer Nasher-Alneam related to prescriptions written by him for the plaintiff In December 2004 and January 2005. The Court's adherence to its pretrial ruling on this evidence was correct. The record demonstrates that prior to the injury of January 31, 2005, the plaintiff suffered from pre-existing complex migraine headaches and a surgically repaired 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. Dr. Samer Nasher continued to see the plaintiff until November 30, 2006.

Independence sought to have the jury hear evidence that Stanley Stevenson's pharmacy showed having filled drug prescriptions from Dr. Samer Nasher that the doctor cannot account for. What little probative value that might exist as a result of this proposed testimony was far exceeded by its prejudicial effect. There is no evidence that the plaintiff forged any prescription and any inferences that the defendant 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.

Further, defendant's argument that the plaintiff "opened" the door to the introduction of this proposed testimony is unconvincing. The mere fact that plaintiff testified that all of his prescriptions were from a licensed physician does not change the above-noted analysis of the proposed testimony. This Court's ruling regarding Dr. Samer Nasher's testimony was not erroneous.

Independence further argues that the Court erred in excluding the testimony of witness Charles Keeney because he was not listed as a witness on the witness list required by the Court. The exclusion of this witness was fully in accord with the 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 defendant, while suggesting that a continuance of the trial was necessary because of the Court's ruling regarding Mr. Keeney, did not move for a continuance. Most importantly, any testimony by Mr. Keeney would have been cumulative. Witness Brian Williamson provided the same testimony that Kenney would have provided; that is, that Stanley Stevenson said that he slipped then hurt his wrist.

Independence spent much time introducing evidence that the plaintiff's version as to how the accident occurred changed and the Court did not otherwise prohibit the

defendant from doing so. This Court's ruling excluding Charles Keeney's testimony was not erroneous.

Independence asserts that the Court's refusal to admit certain summary exhibits presented by the defendant was error. Rule 1006 of the West Virginia Rules of Evidence governs the admission of summaries of records. The Rule provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place in advance of trial. The court may order that they be produced in court.

In discussing the similar federal rule, the First Circuit has observed that, "[i]t is hard to imagine an issue on which a trial judge enjoys more discretion than as to whether summary exhibits will be helpful." Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 67 (1st Cir. 2002). The Court allowed the defendant to introduce a large volume of summary exhibits over the plaintiff's objection and defense counsel were given substantial leeway to argue all of this evidence.

The Court's rulings on summary exhibits presented by Independence were well within its discretion and were not unfair to the defendant. Independence asserts that the Court's refusal to admit portions of a DVD video taken by the defendant was error. The DVD at issue was an attempted recreation of the brake adjustment on the mantrip, done above ground, in daylight, two years after the injury. The DVD was never shown to plaintiff's counsel until during the trial. The Court indicated that the defendant could use the DVD, but that the defendant had to make a mantrip available to the plaintiff's counsel

for their own video, at the defendant's expense. This ruling was fair and equitable under the circumstances and, in any event, was well within the Court's discretion and was not error.

Independence next asserts that the Court erred by refusing to admit plaintiff's complaint into evidence. The complaint, however, was not verified by the plaintiff. 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, 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 at length. The Court's ruling in this regard was not error.

Independence argues that the Court erred by refusing to admit prior decisions by the Social Security Administration, which were reversed by the Agency's final order, into evidence. Independence cites no authority to support this proposition. Once the plaintiff was granted his award, the prior denials of plaintiff's Social Security disability claim were of no force and effect and were essentially meaningless. The West Virginia Supreme Court has stated that "the significant discretion retained by a trial court to make determinations regarding the admissibility of prior relevant administrative findings has been widely heralded." Brooks v. Galen of West Virginia, Inc., 220 W.Va. 699, 706, 649 S.E.2d 272, 279 (2007). This ruling was clearly within the Court's discretion and was not error.

Furthermore, Independence argues that the Court erred in refusing to take judicial notice of the fact that three of plaintiff's prescribing physicians had been subject to disciplinary action. The prejudicial effect of admitting such evidence would be substantial and it would have no probative value at all. There was no evidence presented by the defendant, which suggested that any disciplinary action directed toward any of the physicians in question was related to the treatment of Stanley Stevenson. This ruling was clearly within this Court's discretion and the Court properly excluded this evidence.

Next, Independence argues that the Court erred in permitting Rocky Burns to testify regarding his lawsuit against the defendant. The Court finds that the limitations imposed on Rocky Burns' testimony in the Court's disposition of defendant's pretrial motion in limine were proper and appropriate. A primary issue in this case was whether Independence Coal complied with its obligations under Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976), 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.

Similarly, the plaintiff asserted that independence failed to comply with its specific duties under 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.") and W. Va. C.S.R. §36-18-4.1 ("Mine operators shall maintain equipment in safe operating condition."), as well as with 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."). The circumstances surrounding Rocky Burns' termination were relevant to the issue of whether Independence Coal complied with these duties and were not "other acts" as contemplated by Rule 404(b), but were instead specifically relevant to the safe-work place and safe equipment issues. The Court's pretrial ruling on limiting Mr. Burns' testimony was proper.

Next, Independence argues that the Court erred in permitting testimony related to the defendant's post-accident investigation and mantrip radio. The Court concludes that evidence about these issues was relevant for multiple reasons. As noted above, Independence 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 defendant's post-accident investigation demonstrated a lack of proper concern by Independence about safety. More significantly, counsel for Independence repeatedly challenged Mr. Stevenson's version of events. As such, the defendant itself made the investigation relevant because the jury was called upon to decide whether the defendant's attack was based in fact and was credible. It was appropriate for the jury to hear evidence that the people who drafted the reports (John Bowling and Brian Keaton) did not know how Stanley Stevenson's injury occurred because they never discussed the accident with any eyewitnesses.

The evidence at trial indicated that both Jeff Davis and William McCloud were present when the injury occurred. Because of the defendant's own arguments, it was permissible for plaintiff's counsel to attack the investigative reports which outlined the defendant's version as to how the injury occurred. The eyewitnesses and the plaintiff

testified that the injury occurred differently than the defendant's investigative report suggested. The evidence presented also established that the radios on the mantrips did not work. Hourly and salaried witnesses testified to this. A mantrip is not allowed to be in operation if the communication system does not work under MSHA regulations. This evidence was relevant to defendant's duties under Sanders and also was relevant to the general condition of the mantrips. *See* W. Va. Code § 22A-2-38(b) and W. Va. C.S.R. §36-18-4.1.

In contrast, Independence also was permitted to offer testimony through its own expert witness that the radios not working had nothing to do with the plaintiff's accident and injury. Significantly, the jury was also instructed that Independence had no duty to do any investigation beyond that required by MSHA regulations. The jury heard all of this evidence and weighed the same accordingly. The Court committed no error in admitting this evidence.

Independence argues that the Court erred in admitting the deposition testimony of Brian Keaton. Under Rule 703 of the West Virginia Rules of Evidence, an expert witness may testify about facts he reasonably relied upon to form his opinion even though such facts would otherwise be inadmissible as hearsay. The defendant did not ask for any limiting instruction about such testimony. Independence challenges the conduct of plaintiff's counsel at trial in its motion for a new trial. The Supreme Court of Appeals 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). Counsel for both parties were given substantial leeway to vigorously represent their respective clients' interests in the trial of this case. Both plaintiff's and defendant's counsel were obligated to challenge the credibility of the other party and the opposing witnesses. The Court does not accept the defendant's assertion that plaintiff's counsel exceeded appropriate bounds but, in any event, the defendant's argument has been waived by the failure of defense counsel to request a curative instruction.

Independence asserts that the Court erred in the giving or failure to give certain 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, defendant 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." Jury Charge at 19. This instruction was sufficient to properly inform the jury about Mr. Stevenson's own duties while he was on the job on January 31, 2005.

With regard to plaintiff's instruction No. 13, the Court finds 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." Therefore, this instruction accurately stated the law in West Virginia and there was no error in giving the instruction.

Independence also asserts that the Court should have given a curative instruction after the Court declined to allow the plaintiff to pursue punitive damages. In this case the jury only awarded plaintiff the special damages that he sought. No general damages at all were awarded. Although the verdict was substantial, there is no suggestion in the jury's verdict that it was confused or prejudiced and was somehow attempting to improperly punish the defendant. While the jury rejected the defendant's arguments about negligence and causation, that fact alone does not indicate confusion by the jury as a result of any references to punitive damages in plaintiff's counsel's opening statement. There was no error in failing to give such an instruction.

As the Court has previously found above, references by plaintiff's counsel to defendant's post-accident investigation were relevant and appropriate and any further instructions beyond those given were unnecessary. The jury was properly instructed that the defendant had no duty to do any investigation beyond that required by MSHA regulations. The Court further finds that the jury was adequately instructed on the issue of proximate cause. Defendant's additional proposed instructions were inaccurate and unnecessary and the Court did not err in refusing them.

Independence argues that the jury's award of lost earnings was contrary to the clear weight of the evidence. The defendant had an adequate opportunity to cross-examine plaintiff's experts Sadlon and Selby and point out any alleged flaws in their respective opinions to the jury. Independence also had the opportunity to present its own vocational and economic experts and chose not to do so. It is not grounds for a new trial that the jury did not accept the defendant's challenges to these experts.

Independence also challenges the jury's finding of 100% negligence on the part of the plaintiff and no negligence on the part of the plaintiff as against the clear weight of the evidence. The law in West Virginia in this regard indicates that: "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). Plaintiff presented evidence supporting a multitude of different ways in which the defendant could be found to be negligent. The defendant had its chance to convince the jury that it was not negligent and/or that the plaintiff was. The jury was properly instructed. Simply put, the jury did not agree with the defendant and its counsel. That is not grounds for a new trial.

Independence also argues that a new trial is warranted because the Plaintiff failed to prove the proximate cause of his injury was a negligent act or omission of the defendant. The Court has addressed this issue in its "Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law," which Order is incorporated by reference herein.

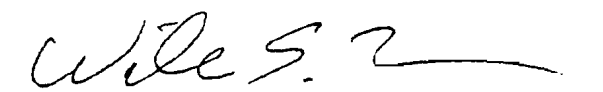
Finally, the Court finds and concludes that, to the extent there may have been error in any of the Court's rulings, it was harmless error as defined by West Virginia Rule of Civil Procedure 61, in that it did not affect the substantial rights of the parties. The Court further finds and concludes that setting aside the verdict, modifying it or granting a new trial would be inconsistent with substantial justice. "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." Syllabus Point 7, Starcher v. South Penn Oil Co., 81 W.Va. 587, 95 S.E. 28 (1918); Syllabus Point 7, Torrence v. Kusminsky, 185 W.Va. 734, 408 S.E.2d 684 (1991). While this case was vigorously contested, the Court cannot find and conclude that the jury's verdict was against the clear weight of the evidence, was based on false evidence or would result in a miscarriage of justice.

WHEREFORE, for the above-stated reasons, the Court does **ORDER** that defendant's Motion for a New Trial be and hereby is **DENIED**.

The Court notes the objections of the defendant to this **ORDER**.

The Clerk is directed to send certified copies of this **ORDER** to all parties or counsel of record.

Entered this 22nd day of September 2009.



WILLIAM S. THOMPSON, Judge

A COPY ATTEST
Sue Ann Zickefoose
CIRCUIT COURT

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STANLEY STEVENSON, II,

Plaintiff,

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CIVIL ACTION NO.: 06-C-72
(Judge Thompson)

INDEPENDENCE COAL COMPANY, INC.,
a West Virginia corporation,

Defendant.

ORDER DENYING DEFENDANT'S RENEWED MOTION
FOR JUDGMENT AS A MATTER OF LAW

On a prior day came the Plaintiff, Stanley Stevenson, II, by counsel, Mark A. Atkinson, John J. Polak, and Harry M. Hatfield, and came the defendant, Independence Coal Company, Inc. ("Independence"), by counsel, A.L. Emch and Gretchen M. Callas, for a hearing on defendant's Renewed Motion for Judgment as a Matter of Law.

Following a full and complete review of the relevant evidence, an examination of defendant's motion (and the memoranda both for and against), consideration of the evidence of the case, an inspection of relevant portions of the Court file, argument of counsel and analysis of the issues presented, the Court finds and concludes as follows:

1. Pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure, Independence has renewed its Motion for Judgment as a Matter of Law, after the jury returned a verdict for the plaintiff.

2. The applicable language of Rule 50 states:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

West Virginia Rule of Civil Procedure 50(a)(1).

3 The Supreme Court of Appeals of West Virginia has made clear 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). The defendant's 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 may not substitute its own opinion for the opinion of the jury on evidence giving rise to inferences about which reasonable minds could differ. Id. at 578, 408 S.E.2d at 330. A defendant's motion under Rule 50(b) can be granted only if the plaintiff's evidence failed to establish a *prima facie* right to recover. Rodriguez v. Consolidation Coal Co., 206 W.Va. 317, 325, 524 S.E.2d 672, 680 (1999). As the Court has stated:

> Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the

> testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence.

Syllabus Point 1, Jividen v. Legg, 161 W.Va. 769, 245 S.E.2d 835 (W.Va. 1978) (emphasis added).[1]

4. In summarizing how a trial court should review an argument that the evidence presented at trial was insufficient as a matter of law, the West Virginia Supreme Court has held: "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).

5. In its motion, the defendant argues that the evidence presented by the plaintiff "did not establish a proximate cause relationship between any act or omission of Independence and the injury to plaintiff." *Motion at 2.* When applying the above-referenced standards of review, it is clear that this Court must conclude that the defendant's argument must fail.

6. In Spencer v. McClure, 217 W.Va. 442, 618 S.E.2d 451 (2005), the Court reiterated long-standing West Virginia law that "the proximate cause of an injury is the

[1] 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 the standard by which a trial court reviews motions under the rule. McCloud v. Salt Rock Water Public Service Dist., 207 W.Va. 453, 457 n.1, 533 S.E.2d 679, 683 n.1 (2000).

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.

7. The Supreme Court of Appeals has held that: "A *prima facie* case of actionable negligence is that state of facts which will support a jury finding that the defendant was guilty of negligence which was the proximate cause of plaintiff's injuries, that is, it is a case that has proceeded upon sufficient proof to the stage where it must be submitted to a jury and not decided against the plaintiff as a matter of law." Syllabus Point 6, Morris v. City of Wheeling, 140 W.Va. 78, 82 S.E.2d 536 (1954); Syllabus Point 3, Mueller v. American Elec. Power Energy Services, Inc., 214 W.Va. 390, 589 S.E.2d 532 (2003). Significantly, the Court observed in Mays v. Chang, 213 W.Va. 220, 224, 579 S.E.2d 561, 565 (2003) 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,* Syllabus Point 2, Evans v. Farmer, 148 W.Va. 142, 133 S.E.2d 710 (1963) ('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.')."

8. In this case, the jury was properly instructed that Independence Coal had a duty to provide the plaintiff with a reasonably safe place to work and to exercise ordinary care for the plaintiff's safety. *See* Syllabus Point 2, Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976). ("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.") [2]

9. The jury was also properly instructed that:

> It was the duty of the defendant, 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 defendant 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 defendant failed to maintain its equipment, including its mantrips, in a safe operating condition, then you may find that it was negligent.

10. 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 with 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

[2] There was no dispute that Stanley Stevenson was an employee of an independent contractor and was not employed by Independence when he was injured on January 31, 2005 on the premises of the Justice No. 1 Mine that was operated by Independence. Likewise, there was no dispute that Independence owned and controlled the mantrip at issue. *See* Syllabus Point 3, Taylor v. Sears, Roebuck and Co., 190 W.Va. 160, 437 S.E.2d 733 (1993) ("The 'reasonably safe place to work' theory may not be used against the owner of a

other thing reasonably necessary to protect the life, health, safety, and welfare of such employees.") 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.

11. This instruction also properly reflected the requirement of W. Va. C.S.R. §36-18-4.1 that "[m]ine operators shall maintain equipment in safe operating condition." 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).

12. 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 was not "safe and in good mechanical condition." For example, Lewis Sheppard, the defendant's own Maintenance Chief, said the mantrip was unsafe and unfit for usage by Stanley Stevenson (or any other miner) at the time the plaintiff was using it. Similarly, plaintiff's expert, Bobby G. Moreland, testified that the mantrip should have been taken out of service. Several witnesses also testified that Independence did not have enough qualified electricians who could provide sufficient expertise to keep the mantrips properly repaired and functional.

13. Such a conclusion by the jury would have established a violation of a duty imposed by law on Independence and a negligent act on the part of the defendant. Then, the jury could have very reasonably concluded that the defendant's failure to provide the plaintiff with a safe and operational mantrip was the last negligent act contributing to

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place of employment when the owner exercises no control over the equipment provided by the contractor for use by the contractor's employees.")

Stanley Stevenson's injury and without which the injury would not have occurred. The jury could reasonably have concluded that, but for the defendant'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 vehicle and would not have suffered an injury. Thus, the jury could reasonably conclude that the defendant's failure to provide the plaintiff with a safe and mechanically sound 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."

14. Furthermore, while Independence focuses a substantial portion of its proximate cause arguments on the actions of Stanley Stevenson, it is significant that 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 Mr. Stevenson would not be the "last negligent act contributing to the injury" and would not be the proximate cause of the injury. *See* Syllabus Points 3, Spencer v. McClure, supra.

15. This same analysis can be applied to other potential acts of negligence about which the jury was instructed. In accord with the requirements of W. Va. C.S.R. §36-18-5, the jury was properly instructed that it was the duty of Independence Coal, once a mantrip had been determined to be unsafe, to take the mantrip out of service and tag it until the unsafe condition was corrected. Sufficient evidence was presented to allow the jury to conclude that the defendant was negligent by failing to take the mantrip out of service.

16. Additionally, the jury was properly instructed that "the defendant had a duty under the law to provide the plaintiff with the training and equipment necessary to

fix the brakes on the mantrip if he was required to perform that task." Evidence was presented that permitted the jury to find that the defendant required the plaintiff to attempt to fix the brakes on the mantrip, and that the defendant did not train the plaintiff to safely perform this task and/or failed to provide the proper tools and, accordingly, the jury could have concluded that the defendant was negligent.

17. Any or all of these acts and omissions by Defendant could reasonably have been found by the jury to be negligent and to be the last negligent act contributing to the injury and without which the injury would not have occurred. This would clearly satisfy the plaintiff's obligation to provide evidence of proximate cause sufficient under West Virginia law.

18. Defendant's arguments in support of this motion are all based on its own interpretation of the facts. Defendant was free to and did in fact make these same arguments to the jury. However, the jury, which was properly instructed on the concepts of credibility, negligence, comparative negligence, assumption of risk, foreseeability and, most importantly, proximate cause and intervening causes, heard and rejected those same arguments.

19. It is not for this Court to substitute its own judgment on the proper resolution of factual disputes in this case. Sias v. W-P Coal Co., supra. That was the function of the jury and the jury resolved those disputes in favor of the plaintiff. None of the defendant's arguments give rise to entitlement to judgment as a matter of law. Moreover, granting defendant's motion would require this Court to ignore the directives of the Rule 50(b) case-law to consider the evidence in the light most favorable to the

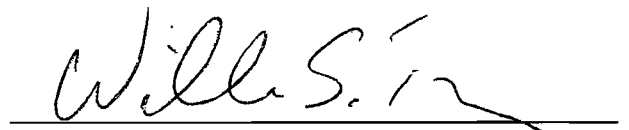
plaintiff and to assure that all conflicts in the evidence were resolved by the jury in favor of the plaintiff.

WHEREFORE, for the above-stated reasons, the Court does **ORDER** that defendant's Renewed Motion for Judgment as a Matter of Law be and hereby is **DENIED**.

The Court notes the objections of the defendant to this **ORDER**.

The Clerk is directed to send certified copies of this **ORDER** to all parties or counsel of record.

Entered this 22nd day of September, 2009.



THE HONORABLE WILLIAM S. THOMPSON
Judge of the Circuit Court of
Boone County, West Virginia

A COPY ATTEST

CIRCUIT COURT