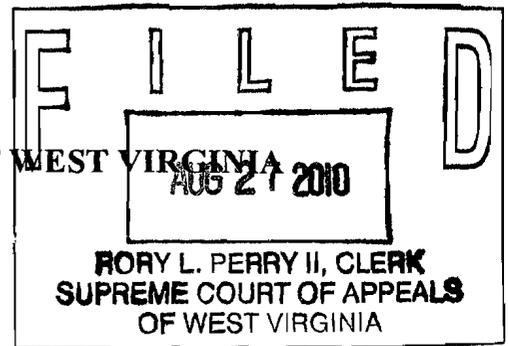


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STANLEY STEVENSON, II,

Plaintiff/Appellee,

v.

APPEAL NO. ~~100366~~ 35592
Civil Action No. 06-C-72
Circuit Court of Boone County
Judge William S. Thompson

INDEPENDENCE COAL COMPANY, INC.,

Defendant/Appellant.

REPLY BRIEF

INDEPENDENCE COAL COMPANY, INC.
Defendant Below and Appellant
Before This Court

By Counsel

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I. INTRODUCTION

Independence Coal Company, Inc. (“Independence”) filed its Appeal Brief on 6 July 2010. In response, Stanley Stevenson, II (“Stevenson”) asserted for the first time in a cross-assignment that the Circuit Court of Boone County, West Virginia (“Lower Court”), had erred in failing to permit the jury to consider awarding punitive damages. [See Br. Of Appellee, pp. 44-5.] Independence replies to Stevenson’s alleged error herein, as well as a few other points raised by Stevenson in the Brief of Appellee, as all other matters Independence wishes to submit for this Court’s consideration have already been fully set forth and analyzed in its Appeal Brief. Importantly, however, nothing in Stevenson’s response alters the only viable conclusion to be reached upon reviewing the evidence presented to the Stevenson jury: Independence is entitled to judgment as a matter of law.

II. ARGUMENT

A. **STEVENSON HAS FAILED TO PROVE THAT ANY ACT OR OMISSION ON THE PART OF INDEPENDENCE WAS THE PROXIMATE CAUSE OF HIS INJURIES, AND THEREFORE, INDEPENDENCE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.**

Circuit courts are required to grant judgment as a matter of law to a defendant “[w]here the plaintiff’s evidence, considered in the light most favorable to him, fails to establish a prima facie right to recovery.” Syl. pt. 1, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996). Contrary to Stevenson’s assertions, proximate causation does not become an issue for the jury unless and until the trial court makes an initial determination that sufficient evidence has been proffered to create an issue for the jury’s consideration. *Id.* [See Br. Of Appellee, pp. 20-27.] In this instance, none of the events Stevenson references that the jury may have relied upon when finding liability in any way establishes proximate causation (i.e., the mantrip was unsafe, the mantrip was defective, and/or the failure to have a sufficient number of mechanics available

to perform repairs.).¹ Therefore, Stevenson has failed to create a prima facie right to recovery due to the absence of evidence establishing that Independence could have proximately caused his injuries (both at trial and on appeal), and therefore, Independence was and remains entitled to judgment as a matter of law.²

B. STEVENSON'S CLAIMS THAT INDEPENDENCE FAILED TO OBJECT TO ROCKY BURNS' TESTIMONY REGARDING HIS WRONGFUL TERMINATION LAWSUIT AGAINST INDEPENDENCE ARE FALSE.

On 4 February 2009, Independence filed a motion *in limine* related to the anticipated testimony of Rocky Burns regarding a wrongful termination suit he had filed against Independence alleging, *inter alia*, that he was retaliated against for making safety complaints while working as a fireboss. [Motion *in Limine* To Prohibit Evidence of or Reference to the Termination of Rocky Burns, filed on 2/4/09.] The Lower Court ruled that evidence as to the Burns' jury verdict was excluded, but that Stevenson, by way of Mr. Burns, could proffer testimony regarding the lawsuit itself. [Pre-Tr. Mt. T., 2/19/09, pp. 65-67; *see also* Tr. T., 2/27/09, pp. 5-7.] Independence renewed its objections to Mr. Burns' testimony about his lawsuit on the morning that he was called to testify at trial, at which time a lengthy discussion was held regarding the nature of Independence's objections. [Tr. T., 2/27/09, p. 5-11.] Ultimately, however, over Independence's objection, the Lower Court permitted Mr. Burns to testify that he had filed a lawsuit against Independence alleging that he had been illegally fired for making safety complaints related to the Justice No. 1 Mine. [Tr. T., 3/27/09, p. 105.] Thus,

¹ *See* Br. Of Appellee, pp. 23, 24, 26, and 27.

² Stevenson attempts to create some urgency surrounding a supposed need to remove the mantrip from the tracks once he had safely stopped the mantrip and contacted the dispatcher about an electrician. These assertions are unsupported by the evidence proffered at trial and should be ignored. At no time was Stevenson directed to move the mantrip from the track. Further, no testimony was elicited at trial supporting the notion that the failure to move the mantrip created a dangerous situation.

Independence's objection to Mr. Burns' testimony regarding his wrongful termination suit was very well obviously and fully preserved.

As to the nature of Mr. Burns' testimony on this point, there is no question but that its *sole* purpose was to inflame the jury against Independence. Mr. Burns' termination and lawsuit were several months subsequent to Stevenson's accident, thereby rendering those events entirely irrelevant to the issue of whether any negligent acts or omissions of Independence proximately caused Stevenson's injury. As expected, Mr. Burns' testimony was later raised before and emphasized to the jury by Stevenson's counsel during closing arguments when he stated:

Three weeks before the accident, the 00 [mantrip] is dangered off by Rocky Burns. That's the guy who was later fired for making safety complaints.

[Tr. T., 3/17/09, p. 88.] Mr. Burns' testimony about his suit was prejudicial to Independence and irrelevant to whether Independence should be held liable for Stevenson's injuries. Hence, Mr. Burns' testimony on that matter should have been excluded from trial and the Lower Court erred in failing to do so.

C. CHARLES KEENEY'S TESTIMONY WAS UNIQUE AND CRITICAL TO INDEPENDENCE'S DEFENSE AND THE LOWER COURT ERRED IN EXCLUDING HIS TESTIMONY.

The manner in which Stevenson was injured was a hotly contested issue at trial. Independence asserted that Stevenson was injured when he slipped and fell in the mine, thereby lodging his hand inside the mantrip; whereas Stevenson asserted that something slipped within the mantrip while he was attempting to tighten bolts. Independence sought to call Charles Keeney to testify at trial because he spoke with Stevenson the day immediately following the incident at issue, at which time Stevenson told Mr. Keeney that he had slipped and fallen and

injured himself in the mine. [Tr. T., 3/12/09, p. 125.]. Mr. Keeney's conversation with Stevenson strongly supported Independence's theory of causation surrounding Stevenson's injuries and the only reason the Lower Court excluded him as a witness was because Mr. Keeney did not appear on Independence's witness list, which was filed prior to Independence learning about Mr. Keeney's conversation with Stevenson. [Tr. T., 3/12/09, p. 125-127.]

No other witness called by Independence, or Stevenson for that matter, was in Mr. Keeney's unique position of having spoken with Stevenson the day after he was injured, when Stevenson's recollection of the events leading up to the incident at issue were most immediate, vivid, and unclouded by his eventual suit against Independence. No other witness was capable of telling the jury about Stevenson's mindset and interpretation of events regarding his injuries within hours of those injuries having occurred, except for Mr. Keeney. Mr. Keeney's testimony cannot be characterized as cumulative even though Stevenson also told friend and fellow beltman Brian Williams that he slipped and fell in the mine because he did so approximately one week after being injured, as opposed to the day immediately following the incident at issue. [Tr. T., 3/3/09, pp. 10, 101, 125, 126.] Besides, his expected testimony would only have taken 5 or 10 minutes—hardly a significant investment of time in a 3 week trial—and was critical, not because it was cumulative, but because it was *consistent* with Mr. Stevenson's story prior to filing suit.

Furthermore, Independence was under no obligation to request a continuance of the trial when Mr. Keeney's testimony was excluded. Under West Virginia law, the court may consider whether a continuance should be granted in light of excluding a witness' testimony, but the party on whose behalf the witness is excluded is not required to seek a continuance. *See West Virginia Dept. of Transportation v. Parkersburg Inn, Inc.*, 222 W.Va. 688, 699, 671 S.E.2d

693, 704, n.16 (2008) (“[i]f there is a violation of the duty to seasonably supplement information regarding an expert under Rule 26(e)(1), the factors that the court should consider in determining whether the evidence should be excluded [include] the possibility of a continuance.”) (citing Cleckley, et al., *Litigation Handbook* § 26(e)(1)).

The Lower Court excluded Mr. Keeney’s evidence on the 10th day of a 13 day trial and seeking a continuance at that point in the proceedings could have been more detrimental to Independence than the exclusion of Mr. Keeney’s testimony. Rather, Mr. Keeney should have been permitted to testify and Stevenson’s counsel could have sought a recess if additional time was needed to prepare to cross-examine him. In actuality, however, Stevenson’s counsel did not require a recess because they were notified about Mr. Keeney prior to trial, were permitted to interview Mr. Keeney within hours of Independence’s counsel having found out about his proposed testimony, and had ample opportunity to depose Mr. Keeney had they desired to do so. [Tr. T., 3/12/09, p. 125-127.] Moreover, Independence intended to call Mr. Keeney for only one very narrow purpose—to relate his conversation with Stevenson about slipping and falling and injuring himself in the mine—of which Stevenson’s counsel was well aware prior to trial. Stevenson’s counsel were not surprised by Mr. Keeney’s testimony and would not have been prejudiced in any way had the Lower Court permitted Mr. Keeney to testify. By comparison, Mr. Keeney’s testimony was unique and critical to Independence’s defense, which suffered detrimental harm from the Lower Court’s decision to exclude his testimony. Therefore, the Lower Court erred in excluding it.

D. THE CIRCUIT COURT PROPERLY GRANTED INDEPENDENCE'S MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO STEVENSON'S PUNITIVE DAMAGES CLAIM DUE TO THE ABSENCE OF EVIDENCE SUPPORTING SUCH AN AWARD AND THE UTTER LACK OF PROXIMATE CAUSATION.³

Absolutely nothing in the record established below could possibly be characterized as supporting a punitive damages award against Independence. One need look no further than Stevenson's own brief to reach that conclusion, which is virtually devoid of factual analysis as to why Stevenson's punitive damages claim should have been submitted to the jury for consideration. [See Br. Of Appellee, pp. 44-5.] Clearly, Independence was entitled to judgment as a matter of law as to Stevenson's punitive damages claim and the Lower Court properly granted judgment in Independence's favor.⁴

Punitive damages are intended to punish past conduct and deter future conduct of a similar nature. In *Leach v. Biscayne Oil and Gas Co., Inc.* 169 W.Va. 624, 289 S.E.2d 197

³ Stevenson raises on cross-assignment of error the argument that the Lower Court erred in refusing to permit the jury to consider awarding punitive damages, and now seeks a new trial on the issue of punitive damages alone. [See Br. Of Appellee, pp. 44-5.] Stevenson did not raise this issue below even though permitted to do so under Rules 50(c)(2) and 59(a) of the West Virginia Rules of Civil Procedure. Furthermore, Rule 59(f) provides that "[i]f a party fails to make a timely motion for a new trial, after a trial by jury in which judgment as a matter of law has not been rendered by the court, *the party is deemed to have waived all errors occurring during the trial* which the party might have assigned as grounds in support of such motion." (Emphasis added). Having elected not to bring this issue to the Lower Court, which was in the best position to assess his argument, Independence submits Stevenson's "new trial" argument was waived. See Syl. pt. 3, *Miller v. Triplett*, 203 W.Va. 351, 507 S.E.2d 714 (1998) (ruling that Rule 59(b) "is designed to give trial courts the opportunity to correct errors made at trial and to obviate the need for appeal."). The only possible issue with regard to Stevenson's cross-appeal would be whether the Lower Court properly granted Independence judgment as a matter of law as to Stevenson's punitive damages claim.

⁴ As previously stated, circuit courts are required to grant judgment as a matter of law "[w]here the plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right to recovery." Syl. pt. 1, *Brannon*. The standard of review for determining whether a motion for judgment as a matter of law was properly granted is *de novo*. See Syl. pt. 1, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009). Furthermore, when determining whether a motion for judgment as a matter of law was properly granted, this Court is tasked with determining "whether the evidence was such that a reasonable

(1982), this Court stated that “[p]unitive or exemplary damages are damages which together with and in reasonable proportion to the amount of compensatory damages will punish the defendant and in the judgment of the jury be sufficient to deter others from engaging in like course of conduct.” Syl. pt. 3, 169 W.Va. 624, 289 S.E.2d 197 (1982) (citing Syl. pt. 5, *Spencer v. Steinbrecher*, 152 W.Va. 490, 164 S.E.2d 710 (1968)”). In determining whether to submit punitive damages to a jury, the “trial court ... must first evaluate whether the conduct of the defendant toward the plaintiff entitled the plaintiff to a punitive damages award.” *Perrine v. E.I. DuPont De Nemours and Company*, 225 W.Va. 482, 694 S.E.2d 815, 882-883 (2010) (citing *Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); Syl. pt. 4, *Alkire v. First Nat’l Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996)). In tort actions, this requires a showing of “gross fraud, malice oppression, or wanton willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it.” *Id.*

A review of the trial testimony regarding the events that occurred on the night Stevenson was injured and the theories of causation Stevenson advanced at trial demonstrates that he was not entitled to punitive damages—just as he was not entitled to a finding of negligence given the absence of proximate causation. *See Karpacs-Brown v. Murthy*, 224 W.Va. 516, 686 S.E.2d 746 (2009) (finding insufficient evidence on the record to support punitive damages award and affirming trial court’s granting of motion for directed verdict on cross-assignment); *Stafford v. Rocky Hollow Coal Company*, 198 W.Va. 593, 482 S.E.2d 210 (1996) (holding same); *Shrewsbury v. Aztec Sales & Service Co., Inc.*, 191 W.Va. 312, 445 S.E.2d 253 (1994) (holding same).

trier of fact might have reached the decision below.” *Id.* at Syl. pt. 2. Under a *de novo* standard, the Lower Court’s ruling was correct and should be affirmed.

First and foremost, it cannot be sufficiently emphasized that Stevenson and Stevenson alone made every critical decision about the use and operation of the mantrip on the night that he was injured: 1) Stevenson performed the required pre-operation check of the mantrip [Tr. T., 3/5/09, p. 58.]; 2) Stevenson inspected the mantrip's engine compartment and tested its brakes as part of the pre-operation check [Tr. T., 3/5/09, p. 59.]; 3) Stevenson found no problems with the mantrip during the inspection, except that the two-way radio was not working, and decided to drive the mantrip into the mine [Tr. T., 3/5/09, pp. 68-69; Tr. T., 3/10/09, pp. 51, 82.]; 4) Stevenson easily and safely brought the mantrip to a stop on five separate occasions over the course of the evening prior to calling the dispatcher to request an electrician [Tr. T., 3/10/09, p. 56.]; 5) Stevenson decided to tighten the bolts, believing he was qualified to do so, after being informed that that an electrician would be sent but it would be "quite a while" [Tr. T., 3/5/09, p. 70; Tr. T., 3/10/09, pp. 60; 72; 88.]; and 6) Stevenson testified during the trial that he and he alone was making all of the decisions regarding the mantrip and how best to proceed. [Tr. T., 3/10/09, p. 83.]

Furthermore, no one, even Stevenson, ever explained at trial how he was injured beyond concluding "if he had not been there, he would not have been hurt." Neither Stevenson nor his liability expert could explain at trial how the brake assembly could have possibly shifted as Stevenson described. Indeed, Stevenson's liability expert, Bobby Gene Moreland, testified that a number of things could have caused Stevenson's injuries, including Stevenson simply slipping and/or losing his balance. [Tr. T., 3/11/09, p. 117.] Importantly, Mr. Moreland also admitted that the legally foreseeable hazards associated with improperly maintained brakes, i.e., an inability to slow or stop the mantrip, were eliminated when Stevenson easily and safely brought the mantrip to a stop for the fifth and final time on the night he was injured. [Tr. T.,

3/11/09, pp. 101-102; *see also* Tr. T., 3/11/09, p. 112.] This testimony indisputably demonstrates that there was insufficient evidence to permit the jury to consider punitive damages.

Moreover, Stevenson's assertions on cross-appeal that Mr. Moreland's brief reference to potential "criminal sanctions" in the event that the right circumstances were present (not that they were present, but *if* they were present) provides no basis for permitting the jury to award punitive damages. [See Br. Of Appellee, pp. 44-5; Tr. T., 3/11/09, p. 146.] In *Carter v. City of Miami*, the court stated that:

[i]t bears repeating that *a mere scintilla of evidence does not create a jury question*. Motions for directed verdict and for judgment notwithstanding the verdict need not be reserved for situations where there is a complete absence of facts to support a jury verdict. Rather, *there must be a substantial conflict in evidence to support a jury question.*"

870 F.2d 578 (11th Cir. 1989) (emphasis added). Furthermore, this Court in *Adams v. Sparacio*, stated:

[i]t is well established in this and other jurisdictions that a plaintiff, in order to successfully maintain an action based on negligence, bears the burden of proving by a preponderance of the evidence that the defendant was guilty of primary negligence and that such negligence was the proximate cause of the injury of which the plaintiff complains. A mere scintilla of evidence is insufficient to carry the case to the jury.

156 W.Va. 678, 684, 196 S.E.2d 647, 652 (1973) (citing *Davis v. Cross*, 152 W.Va. 540, 164 S.E.2d 899 (1968); *Donnally v. Payne*, 89 W.Va. 585, 109 S.E. 760 (1921); *Ketterman v. Dry Fork Railroad Co.*, 48 W.Va. 606, 37 S.E. 683 (1900); and *Alexander v. Jennings*, 150 W.Va. 629, 149 S.E.2d 213 (1966); *Mabe v. Huntington Coca-Cola Bottling Company*, 145 W.Va. 712, 116 S.E.2d 874 (1960); *Fleming v. Hartrick* 100 W.Va. 714, 131 S.E. 558 (1926)) (emphasis added).

Practically speaking, the proof that this jury believed Stevenson's case overall was weak and certainly not one sufficient to "punish" Independence is reflected in its decision not to award *any* amount of pain and suffering damages. [See Verdict Form.] The jury awarded zero dollars for pain and suffering, even though Stevenson put on a great deal of evidence about the pain and suffering he has experienced and may continue to experience into the future—a decision Stevenson chose not to challenge, by the way. Accordingly, the evidence adduced at trial was wholly insufficient to support an award of punitive damages, the Lower Court properly granted Independence's motion for judgment as a matter of law, and Stevenson's cross-assignment of error should be denied.

III. CONCLUSION

For the reasons set forth herein, as well as those raised in its Appeal Brief, Independence Coal Company, Inc. respectfully requests that this Court enter judgment in its favor and deny Stanley Stevenson's cross-appeal.

Respectfully submitted,

By Counsel



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v.

APPEAL NO. 100366

INDEPENDENCE COAL COMPANY, INC.,

Defendant/Appellant.

CERTIFICATE OF SERVICE

I, Amber L. Hoback, one of counsel for defendant/appellant, Independence Coal Company, Inc., do hereby certify that I have served the within *Reply Brief* on the plaintiff/appellee by causing a true and exact copy thereof to be served upon plaintiff/appellee's counsel by United States Mail, first class postage paid, on this the 27th day of August, 2010.

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