

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-0631

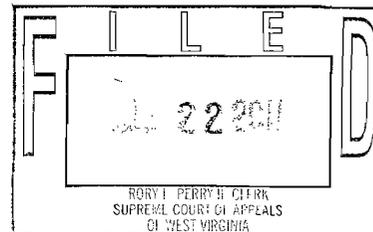
ROBERT L. MEADOWS, II and
RHONDA K. MEADOWS, his wife,

Plaintiffs below, Petitioners,

v.

MASSEY COAL SERVICES, INC., and
INDEPENDENCE COAL COMPANY, INC.,

Defendants below, Respondents.



(Civil action No. 08-C-185)
(Boone County Circuit Court)

PETITIONERS' BRIEF

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I. ASSIGNMENTS OF ERROR

- A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING INDEPENDENCE COAL COMPANY, INC.'S SUMMARY JUDGMENT WHERE THE APPELLANT DEMONSTRATED BY COMPETENT EVIDENCE THAT THERE WERE GENUINE ISSUES OF MATERIAL FACT SHOWING THAT THE COAL COMPANY WAS LIABLE FOR INJURIES SUSTAINED BY THE APPELLANT IN HIS DELIBERATE INTENT ACTION AGAINST THE COAL COMPANY.**

II. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

This civil action was filed on September 26, 2008, in the Circuit Court of Boone County. The case proceeded through discovery and on January 11, 2011, Independence Coal Company, Inc. ("Independence") filed its motion for summary judgment. By order entered March 21, 2011, the Circuit Court granted Independence's motion for summary judgment.

2. STATEMENT OF FACTS

The defendants' deliberate intent conduct in this case begins on April 26, 1999. Harold Osborne, the designated agent for Independence testified and produced a printout titled "Mine Accidents" from the United States Department of Labor, Mine, Safety and Health Administration which disclosed an April 26, 1999 accident at this same Independence mine site involving a rock truck backing through a berm at a dump site and overturning. (*See* Osborne Dep., p. 12; AR at 130) (*See* Osborne Depo. Exh. 13, AR at 156). The same information provided by Independence's designated agent also disclosed an October 30, 2004, accident at

the same Independence mine site involving a 777 D rock truck backing through a berm at a dump site and overturning.

On July 18, 2007, Joey Fowler and Roy Howell, the plaintiff's superiors and Independence foremen, ordered Robert Meadows, II, to dump a 777 D rock truck at a dumpsite with an admittedly illegal berm, no spotter, and inadequate illumination. Despite prior complaints of the plaintiff to his supervisors of the lack of illumination and the need for a spotter, Mr. Meadows was ordered to dump the rock truck at this potentially deadly dump site. The defendants affirmatively pulled the spotter, Brian Hutchison, from the dump site on the subject evening and did not replace him. Mr. Hutchison was to man a truck, production not safety is the defendants main directive. (*See Fowler Dep.*, pp 39-43, 65-69; AR at 166-167, 173-174); (*See Howell Dep.*, pp. 21-28, 30, 38; AR at 195-197, 199); (*See Hutchison Dep.*, pp. 4-6, 8-9; AR at 207-209); and (*See Meadows Dep.*, pp. 12-17, 25-26; AR at 220-222, 224).

Mr. Meadows followed orders of his superiors so as not to be fired, because he felt objection to his bosses' unsafe order would meet with termination. (*See Meadows Dep.*, pp. 56-57; AR at 231-232). When Mr. Meadows backed his rock truck toward the berm, there was no spotter present, and no light plant illuminating the dump site despite it being 1:00 a.m. The berm was inadequate in that it did not restrain the rock truck or provide an adequate guide because it was too low and too poorly constructed and the truck plummeted nearly 150 feet to the bottom of the fill pit. The account of how the truck backed

through the inadequate berm is further illustrated by the deposition testimony of Brian Hicks, Joseph Fowler and Harold Osborne.

Brian Hicks, at the time of this wreck, was the regional HR director for eight subsidiaries of Massey. (*See Hicks Dep.*, p. 5; AR at 258). Mr. Hicks investigated the wreck pursuant to Massey protocols and found the following:

"You know, obviously, Robert had backed over the berm and his truck had flipped." (*Id.* at 22; AR at 262)

Joseph Fowler, Mr. Meadows' foreman at the time of the wreck, prepared the accident report for this wreck and found that the rear wheels were through the berm and the truck went over the dump. Mr. Fowler further stated in his deposition that he could tell what happened by looking at it and, "he backed in and wasn't square with his berm, and he back his offside wheels through the berm, and then the truck sat down." (*See Fowler Dep.*, p. 66; AR at 173).

Howard Osborne, the designated agent of Independence, stated that Mr. Dillon, a safety tech for Independence, showed him pictures of the wreck scene where tire marks were shown through the berm. "It wasn't squared on the berm, and it went through the bump." (*See Osborne Dep.*, p. 33; AR at 135).

History repeated itself on July 18, 2007, from April 26, 1999 and October 30, 2004. If only MSHA standards had been followed such tragedy could have been avoided.

No pre-shift or on-shift safety inspection was ever performed on the dumpsite. Roy Howell was cited by his employer for this. (*See* Written Warning Memorandum, AR at 254).

The berm was of inadequate height and integrity by the defendants own admission and Roy Howell and Brian Hutchison were cited by the defendants for this. (*See* Written Warning Memorandum, AR at 254) (*See* Verbal Warning Memorandum; AR at 255).

Adequate illumination was noted as being a preventative measure by the defendants which could have prevented the subject wreck. (*See* Incident Report; AR at 256) (*See* Hicks Dep., pp. 26-31; AR at 263-264).

The MSHA "Dump-Point Inspection Handbook" requires in relevant part that berms are required to be provided to prevent overtravel and overturning at dumping locations. Berm is defined as a pile of material capable of restraining a vehicle. (*See* MSHA Dump-Point Inspection Handbook, p. 8; AR at 282).

After Mr. Meadows was located at the bottom of the dump pit, he was restrained with a neck brace and backboard and was sent via ambulance to the hospital. Pursuant to defendants' policy a coal company representative was dispatched to the hospital to persuade the injured worker to not accept time off from work. (*See* Meadows Dep., pp. 49-52; AR at 230). This was what happened to Mr. Meadows. The company benefits from this concession by the injured and vulnerable employee because then the company has fabricated evidence to support a decision to not report the incident to MSHA and to hide the continued

bad conduct of the company. The Court will note that no report of this incident was made to MSHA despite the same type accidents being reported from April 26, 1999 and October 30, 2004.

Recently discovered information confirms that this illegal scheme existed for a long period of time with the defendants, although the defendants have unilaterally prevented discovery in this area. (*See* Article; AR at 283-285).

Mr. Meadows has become permanently disabled as a result of the July 18, 2007 truck wreck.

III. SUMMARY OF ARGUMENT

When the trial court decided summary judgment, the only findings that it made in its Order granting Independence's summary judgment was:

"Addressing Count II, deliberate intent, Plaintiffs identified the inadequacy of the dump site's berm, the illumination of the site, and the absence of a spotter as their three specific unsafe working conditions. There were no other specific unsafe working conditions alleged by the Plaintiffs. Plaintiffs must carry at least one of the unsafe working conditions through all five of the elements of a deliberate intent claim listed in *W.Va. Code* § 23-4-2(d)(2)(ii). Examining Plaintiffs' arguments for the three conditions against each of the five elements reveals that no one condition meets all five elements.

The Plaintiffs cannot prove that any of the conditions identified proximately caused Mr. Meadows' injuries. The Plaintiff's own testimony he stated, "As I backed that truck up going toward the berm, it sunk in and gave way, fell in front of the berm, before the berm." *R. Meadows Dep.* at 64. The Court takes Plaintiff's own words to be the truth. Therefore, the three specific unsafe working conditions, inadequacy of the dump site's berm, inadequate illumination, and the absence of a spotter, could not have been a direct and proximate cause of Plaintiff's injuries, required by *W.Va. Code* § 23-4-2(d)(2)(ii)(E). Plaintiff's injuries

would have occurred even if all three specific unsafe working conditions had been remedied. A higher berm, more lighting, and a spotter would not have prevented the dump site from caving in, and more importantly, the Plaintiff's injuries. Therefore, the action for deliberate intent fails as a matter of law with respect to proximate cause. (*See* Order entered March 21, 2011, AR at 366-367).

The Court further noted in footnote 2:

"The Court acknowledges conflicting testimony by other witnesses. However, even when viewing facts in light most favorable to the Plaintiffs, the Court takes Robert Meadows' testimony as true. If not, Plaintiffs would be forced into the unenviable position of impeaching Plaintiff's own testimony. Therefore, there is no genuine issue of material fact with respect to where the truck fell into the pit." (*Id.*; AR at 366-367).

The question of material fact as to causation is one for the jury where as the Court in this case acknowledged there is conflicting evidence on the issue. *Stevenson v. Independence Coal Co., Inc.*, 709 S.E.2d 723, 731 (W.Va. 2011) and *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236, Syl. Pt. 5 (W.Va. 1964).

The issue before the Court was whether there were genuine issues of material fact as to what caused the rock truck to fall into the valley fill. If the evidence is conflicting as to what caused the truck to tumble, the question becomes one for the jury. *Thompson v. Stuckey*, 171 W.Va. 483, 300 S.E.2d 295 (W.Va. 1983). And the trial court is required to view all facts and inferences in the light most favorable to plaintiffs, the nonmoving party. *Miller v. City Hosp., Inc.*, 197 W.Va. 403, 475 S.E.2d 495 (W.Va. 1996).

The conflicting testimony in this case comes from the defendant's witnesses who were in a much better position and mental state to determine

what caused the wreck. Mr. Meadows backed into the dumpsite in the dark and without the assistance of a spotter or of an adequate berm to judge distance if he could see it. Mr. Meadows also suffered a head injury in the wreck. All of these facts were made known to the Court.

Mr. Hicks, Mr. Fowler, and Mr. Osborne had the benefit of light, cameras, and seeing the wreck scene immediately after the wreck. Mr. Meadows was rushed from the scene by ambulance on a backboard.

Brian Hicks, at the time of this wreck, was the regional HR director for eight subsidiaries of Massey. (*See Hicks Dep.*, p. 5; AR at 258). Mr. Hicks investigated the wreck pursuant to Massey protocols and found the following:

"You know, obviously, Robert had backed over the berm and his truck had flipped." (*Id.* at 22; AR at 262)

Joseph Fowler, Mr. Meadows' foreman at the time of the wreck, prepared the accident report for this wreck and found that the rear wheels were through the berm and the truck went over the dump. Mr. Fowler further stated in his deposition that he could tell what happened by looking at it and, "he backed in and wasn't square with his berm, and he back his offside wheels through the berm, and then the truck sat down." (*See Fowler Dep.*, p. 66; AR at 173).

Howard Osborne, the designated agent of Independence, stated that Mr. Dillon, a safety tech for Independence, showed him pictures of the wreck scene where tire marks were shown through the berm. "It wasn't squared on the berm, and it went through the bump." (*See Osborne Dep.*, p. 33; AR at 135).

The evidence here overwhelmingly proved that the truck backed through the berm not that the dump collapsed before the berm. When the plaintiff is given the benefit of all of the above facts and inferences, it is clear that the trial court was in error in granting summary judgment. It was error to rule there was no genuine issue of material fact as to causation of the wreck.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be set for Rule 20 argument since it is a case involving issues of fundamental public importance. The issues presented deals with mining safety and compliance with certain rules, duties and requirements designed to protect West Virginians engaged in an industry which defines much of the state's image.

V. ARGUMENT

1. STANDARD OF REVIEW

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (W.Va. 1994). Thus, in undertaking a *de novo* review, this Court applies the same standard for granting summary judgment that is applied by the circuit court. That standard is as follows:

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buchannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

“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, supra*.

In considering a motion for summary judgment, the Court is to view all facts and inferences in the light most favorable to the nonmovant. *Miller v. City Hosp., Inc.*, 197 W.Va. 403, 475 S.E.2d 495 (W.Va. 1996).

2. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING INDEPENDENCE COAL COMPANY, INC.'S SUMMARY JUDGMENT WHERE THE APPELLANT DEMONSTRATED BY COMPETENT EVIDENCE THAT THERE WERE GENUINE ISSUES OF MATERIAL FACT SHOWING THAT THE COAL COMPANY WAS LIABLE FOR INJURIES SUSTAINED BY THE APPELLANT IN HIS DELIBERATE INTENT ACTION AGAINST THE COAL COMPANY.

It should be noted that the Court obviously issued its order granting summary judgment because the Court chose to weigh the evidence and determine the truth of the matter. This is impermissible given the conflicting evidence in this case.

The question of material fact as to causation is one for the jury where as the Court in this case acknowledged there is conflicting evidence on the issue. *Stevenson v. Independence Coal Co., Inc.*, 709 S.E.2d 723, 731 (W.Va. 2011) and *Hatten. v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236, Syl. Pt. 5 (W.Va. 1964).

The trial court in this case acknowledged conflicting testimony by other witnesses stating in the Order at issue:

"The Court acknowledges conflicting testimony by other witnesses. However, even when viewing facts in light most favorable to the Plaintiffs, the Court takes Robert Meadows' testimony as true. If not, Plaintiffs would be forced into the unenviable position of impeaching Plaintiff's own testimony. Therefore, there is no genuine issue of material fact with respect to where the truck fell into the pit." (*See* Order entered March 21, 2011; AR at 366-367).

The conflicting testimony from Hicks, Fowler and Osborne was:

Brian Hicks, at the time of this wreck, was the regional HR director for eight subsidiaries of Massey. (*See* Hicks Dep., p. 5; AR at 258). Mr. Hicks investigated the wreck pursuant to Massey protocols and found the following:

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The only factual finding that the Court based its Order on was:

The Plaintiffs cannot prove that any of the conditions identified proximately caused Mr. Meadows' injuries. The Plaintiff's own testimony he stated, "As I backed that truck up going toward the berm, it sunk in and gave way, fell in front of the berm, before the berm." *R. Meadows Dep.* at 64. The Court takes Plaintiff's own words to be the truth. Therefore, the three specific unsafe working conditions, inadequacy of the dump site's berm, inadequate illumination, and the absence of a spotter, could not have been a direct and proximate cause of Plaintiff's injuries, required by W.Va. Code § 23-4-2(d)(2)(ii)(E). Plaintiff's injuries would have occurred even if all three specific unsafe working conditions had been remedied. A higher berm, more lighting, and a spotter would not have prevented the dump site from caving in, and more importantly, the Plaintiff's injuries. Therefore, the action for deliberate intent fails as a matter of law with respect to proximate cause. (*See* Order entered March 21, 2011, AR at 366-367).

The Court thereby determined the truth of the conflicting testimony on its own. This is in contravention of the law of this state. "The circuit court's function at the summary judgment stage is not weigh the evidence and determine the truth of the matter but is to determine whether there is a genuine issue for trial." *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755, Syl. Pt. 3 (W.Va. 1994).

The conflicting testimony in this case comes from the defendant's witnesses who were in a much better position and mental state to determine what caused the wreck. Mr. Meadows backed into the dumpsite in the dark and without the assistance of a spotter or of an adequate berm to judge distance if he could see it. Mr. Meadows also suffered a head injury in the wreck. All of these facts were made known to the Court.

Mr. Hicks, Mr. Fowler, and Mr. Osborne had the benefit of light, cameras, and seeing the wreck scene immediately after the wreck. Mr. Meadows was rushed from the scene by ambulance on a backboard.

Plaintiffs' expert, Richard Allen, a former MSHA inspector opined that the berm was in violation of MSHA law, that the inadequate illumination was a cause of the accident and that failure to have a spotter on the site was a violation of industry standards. Mr. Allen also opined that failure to inspect the berm by the foreman was a cause of this wreck. (*See Allen Dep.*, pp. 38-40, 77-82, and 89-94; AR at 295, 305-306 and 308-309).

The testimony of Hicks, Fowler and Osborne supports the plaintiffs' contention that the truck backed through the berm. A jury could easily determine from the testimony of the witnesses that the Plaintiff backed the truck through the berm. Factual discrepancies and conflicting testimony create genuine issues of material fact ripe for jury resolution. This is precisely the situation in which summary judgment should not be utilized. *Kelly v. City of Williamson*, 221 W.Va. 506, 655 S.E.2d 528, 535 (W.Va. 2007).

The factual scenario in this case certainly is sufficient to submit the question to the jury.

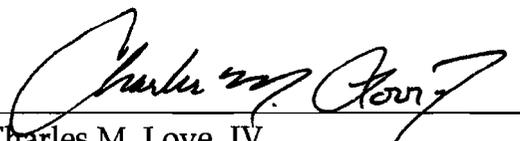
VI. CONCLUSION

There is overwhelming evidence that the truck backed through the berm in this case. The defendant failed to prove that no issue of material fact as to causation existed. The trial court erred by granting summary judgment, and this

Honorable Court should reverse the trial court's order granting Independence's motion for summary judgment on the deliberate intent action and remand the case for trial on the merits.

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and RHONDA K. MEADOWS,
his wife,

By Counsel



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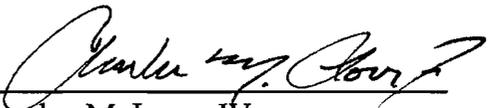
Defendants below, Respondents.

CERTIFICATE OF SERVICE

I, Charles M. Love, IV, counsel for the Plaintiffs below, Petitioners, do hereby certify that a true and exact copy of the foregoing "Petitioners' Brief" and "Appendix Record" was served upon:

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