

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1610

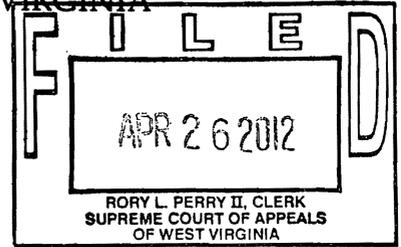
JASON J. SMITH

Plaintiffs below, Petitioners,

v.

APEX PIPELINE SERVICES, INC.,  
a West Virginia corporation,

Defendants below, Respondent.



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**PETITIONER'S REPLY BRIEF**

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Comes now the Petitioner, by counsel in reply to Respondent's response and respectfully requests that the Court reverse the ruling of the Circuit Court of Kanawha County and remand this case so that the Petitioner may proceed to trial.

The order entered in this case was prepared and written by Apex, the respondent, and lacks competent consideration of the facts presented by the petitioner. Indeed the order reviews the facts presented in a light most favorable to Apex, the moving party. Such a review is impermissible under West Virginia law.

When this Court reviews the facts in a light favoring the non-moving party, Smith, it is clear that questions of material fact exist which favor denial of summary judgment and a trial on the merits. This is not a complex issue as the respondents would have the Court believe. The petitioner presented admissible evidence on each issue raised for summary judgment and created at the very least a question of material fact as to each issue. The respondent's response makes no mention of any evidence presented by the petitioner as being inadmissible but only claims its side of the story is more persuasive. This line of argument does not carry the day on a motion for summary judgment.

Mr. Smith presented a written document from the defendant which acknowledged termination of Mr. Smith for filing a workers compensation claim. In addition to the document it is undisputed that the respondent refused to rehire Mr. Smith after his filing of a workers compensation claim. Despite submission of this evidence, summary judgment was granted in favor of Apex on the petitioner's Workers Compensation discrimination claim because respondent's claimed they made a mistake.

Their excuse does not rise to the level that summary judgment would be proper. It only creates a question of material fact. This ruling was clearly wrong.

Mr. Smith submitted evidence that his supervisor was present at the time of his injuries, oversaw and directed the work under working conditions which violated OSHA regulations and yet summary judgment was granted with regard to the issues of knowledge of the employer, existence of a specific unsafe working condition, intentional exposure to the unsafe working conditions and violation of OSHA regulations which caused the injury. This order was clearly wrong.

Questions of material fact existed as to all of the elements of Mr. Smith's claims but were improperly ignored and summary judgment was unjustly granted. Mr. Smith requests that this Court reverse and remand the trial court's order and direct that a trial on the merits be held.

#### Argument

- A. The trial court committed reversible error by granting summary judgment in favor of the respondent where the petitioner demonstrated by competent evidence that his claim of workers compensation discrimination was meritorious and that at the very least questions of material fact existed with regard to the claim that a jury should have decided.**

In this case the petitioner's employer refused to put Jason Smith back to work despite the fact that he was released to work without restriction from an injury he sustained while working for Apex and after Mr. Smith filed workers compensation claim for this injury.

In this case, Jason Smith informed the West Virginia Unemployment Office that he was discharged because he filed a workers compensation claim. Apex informed the unemployment office that he was discharged because he filed a workers compensation claim. Apex's communication was done in writing and is attached hereto at AR 26.

A question of material fact exists with regard to the discrimination against Mr. Smith for filing a workers compensation claim. The petitioner requests that the Court reverse the circuit court's grant of summary judgment on petitioner's workers compensation discrimination claim and remand the case for trial.

**B. The trial court committed reversible error by granting summary judgment in favor of the respondent where the petitioner demonstrated by competent evidence a meritorious deliberate intent claim and that genuine issues of material fact existed demonstrating that the respondent was liable for injuries sustained by the petitioner in his deliberate intent action against the respondent.**

**(1) Specific Unsafe Working Condition**

The petitioner has proven through expert testimony and reports the specific unsafe working conditions presented at the time of this incident.

Dr. Nelson presented through his report and deposition specific OSHA regulations that were violated by Apex.

The petitioner through admissible expert testimony has shown that specific unsafe working conditions existed which could cause serious injury or death. At the very least a question of material fact exists with regard to the first element.

**(2) Knowledge**

The petitioner has proven the knowledge of Apex by showing that the respondent's supervisor was present at the time of the incident, directed the work to be done and the manner in which it was done. Moreover, Apex failed to perform a reasonable evaluation to identify hazards in the workplace.

For the foregoing reasons, a question of material fact exists at the very least with regard to the question of the employer's knowledge. A question of material fact exists as to the knowledge of Apex on this issue.

(3) Violation of Standard

The petitioner has presented competent evidence that safety standards were violated. It is undisputed that this worksite consisted of an open excavation. Dr. Nelson opined among other OSHA regulations that were violated the following:

1926.651 -- Specific Excavation Requirements

1926.651(j) -- Protection of employees from loose rock or soil.

1926.651(j)(2) -- Employees shall be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations. Protection shall be provided by placing and keeping such materials or equipment at least 2 feet (.61 m) from the edge of excavations, or by the use of retaining devices that are sufficient to prevent materials or equipment from falling or rolling into excavations, or by a combination of both if necessary.

The pipe was unsecured and not re-secured under the jobsite supervisor's direction. The pipe rolled into the excavation, striking Mr. Smith and causing serious injury.

For the foregoing reasons the petitioner requested that the Court deny the respondent's motion for summary judgment with regard to violation of a safety

standard because a question of material fact existed on this issue. It was error for the trial court to grant summary judgment on this issue.

(4) Intentional Exposure

It is uncontroverted that Mr. Smith's supervisor instructed him to work in the trench below the unsecured pipe and as a result the Mr. Smith received multiple injuries including a broken back.

Despite Apex's knowledge of safety violations and hazards as described earlier in the brief Mr. Smith was ordered into the trench by Robert "Bob" Keaton his boss. Mr. Smith testified.

Q. Okay. Why did you get down in that ditch next to a pipe that was uncribbed? Who told you to do that?

A. Bob wanted us to get everything set up.

Q. Okay, so you did that --

A. And he was there.

Q. You did that at the direction of Bob Keaton?

A. Right.

Q. Okay, and Bob Keaton was there at the time you went down into the ditch?

A. Exactly.

Q. Okay.

A. Yes he was.

Q. All right.

A. I mean, if there was something unsafe, he should have said something to us right there and right then.

Q. Okay.

A. I mean, he was -- he is the boss over that job.

See Smith deposition at pp. 117--118., AR 288.

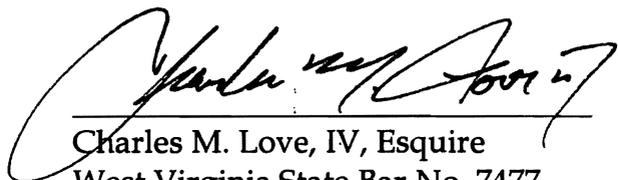
For the foregoing reasons, the petitioner requested that the Court deny the respondent's motion for summary judgment on intentional exposure due to the existence of a question of material fact on the issue.

### Conclusion

The respondent failed to prove that no questions of material fact remain with regard to petitioner's claims for workers compensation discrimination and deliberate intent. The trial court erred by granting summary judgment, and this Honorable Court should reverse the trial court's order granting Apex's motion for summary judgment on the workers compensation discrimination and deliberate intent action and remand the case for trial on the merits. The petitioner requests that the Court grant all other relief it deems just and appropriate.

JASON J. SMITH

By Counsel



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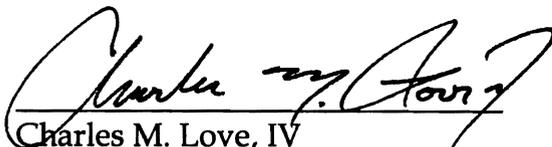
Respondent.

**CERTIFICATE OF SERVICE**

I, Charles M. Love, IV, counsel for Petitioners do hereby certify that true and exact copies of the foregoing "Petitioner's Reply Brief" were served upon:

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via hand delivery this 26th day of April, 2012.

  
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