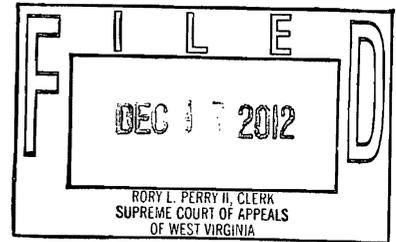


WEST VIRGINIA SUPREME COURT OF APPEALS

IN CHARLESTON



**MASTER MECHANICAL
INSULATION, INC.,**

Petitioner,

v.

**CASE NO.: 12-1206
(Cabell County Circuit Court # 06-C-0133)**

RICHARD SIMMONS,

Respondent.

MASTER MECHANICAL INSULATION, INC.'S BRIEF

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III. ASSIGNMENTS OF ERROR

The Circuit Court of Cabell County, West Virginia entered an Order on September 18, 2012 certifying three (3) questions to this Court for review and consideration. They are as follows:

1. Is Simmons' claim against Master Mechanical governed by the 2005 amendment to the deliberate intent statute, W.Va. Code §23-4-2(d)(2)(ii), pursuant to Roney v. Gencorp, 431 F.Supp. 2d 622 (S.D.W.Va. 2006) and Corley v. Eastern Assoc. Coal Corp., 2009 U.S. Dist. LEXIS 22080 (N.D. W.Va. 2009)?

The Circuit Court answered this question "Yes." Petitioner asserts that the Circuit Court's ruling was correct.

2. In light of the Supreme Court of Appeals' decision in Roberts v. Consolidation Coal Co., 539 S.E. 2d 478 (W. Va. 2000) and the facts as set forth above, is an employer prohibited from introducing evidence or testimony, or arguing that an employee's conduct in the performance of the work for the employer was the proximate cause of the plaintiff's injury?

The Circuit Court answered this question "Yes." Petitioner asserts that the Circuit Court's ruling constitutes error and essentially removes an element of the deliberate intent claim and lessens an employee's statutory burden of proof, contrary to the requirements of West Virginia Code Section 23-4-2 and the West Virginia Workers' Compensation Act.

3. In light of the Supreme Court's ruling of September 19, 2008 that Simmons' injury was compensable under the West Virginia Worker's Compensation Act, is Master Mechanical precluded from arguing that Simmons was at the site of his own volition, and voluntarily agreed to remove the decontamination unit from the second floor of Building B?

The Circuit Court answered this question "Yes." Petitioner asserts that the Circuit Court's ruling constitutes error because it provides an employee with an opportunity to improperly and unfairly present his case by prohibiting an employer from discussing its employees' actions and direction to the injured employee.

IV. STATEMENT OF THE CASE

A. Procedural Background

This case arises from injuries sustained by Mr. Simmons (“Respondent”) on Friday, April 9, 2004 at an apartment complex in Portsmouth, Ohio. Following Respondent’s workplace accident, he filed a Workers’ Compensation claim concerning his injuries. The claim was initially denied on compensability grounds, but was ultimately successfully appealed. On September 19, 2008, this Court entered an Order granting compensability for Respondent’s workplace injury. In the meantime, on February 27, 2006, Respondent filed the instant lawsuit against Petitioner pursuant to a negligence theory. *See* Appendix, pp. 6-8. After the aforementioned grant of compensability by this Court, Respondent amended his complaint to assert deliberate intent theory on or about January 26, 2010. *See* Appendix, pp. 15-18.

Petitioner and Respondent engaged in discovery and filed cross-motions for summary judgment regarding the elements of the deliberate intent statute. On September 18, 2012, Judge F. Jane Husted of the Circuit Court of Cabell County certified three questions to this Court for review and consideration.

B. Factual Background

The order certifying question contained the following statement of facts¹:

1. Richard Simmons was injured on Friday, April 9, 2004 in Portsmouth, Ohio.
2. The site where Simmons was injured was an apartment complex for senior citizens, which was being demolished.

¹ The statement of facts included in the order certifying questions was agreed to by the parties, consistent with the restrictions under W. Va. Code §58-5-2 that the Court has no jurisdiction to determine questions of fact on certified questions. *State v. Stout*, 142 W. Va. 182, 95 S.E.2d 639 (1956).

3. Master Mechanical had a contract to perform asbestos abatement activities at the site. Simmons was a member of the Asbestos Worker's Union Local 207 who was employed from time to time by Master Mechanical.
4. Prior to April 9, 2004 Simmons had worked at the site performing asbestos abatement activities for Master Mechanical with his last day working there prior to his injury being April 6, 2004.
5. Simmons worked at a different site for Master Mechanical on April 7 and 8, 2004.
6. Both Simmons and Mike Plants had completed 40 hours of work for Master Mechanical by the end of the work day on April 8, 2004.
7. While Mike Plants is a member of the Asbestos Worker's Union, he is a Supervisor for Master Mechanical. He is paid by the hour and is owed overtime when appropriate.
8. On April 8, 2004, Mike Plants phoned the main Supervisor Richard Meckstroth to discuss additional work that week.
9. During the conversation, Mike Plants told Rick Meckstroth that since Meckstroth was sending Joe Plants and another worker to Portsmouth the following day to get ready for the next week's work, Mike Plants was going to go to the site also to make sure that everything was in order for the following week. After Mike Plants got off the phone with Meckstroth, Simmons asked if he could ride with Mike Plants to the job site.
10. Consistent with his conversation with Meckstroth the day before, Mike Plants went to the site the next day to confirm that the site would be prepared for the following week's work.
11. Master Mechanical hourly employees Joe Plants and Mike Plants on occasion perform work-related activities without charge to Master Mechanical.
12. Simmons traveled to the Portsmouth, Ohio site on April 9, 2004 with Mike Plants. When Mike Plants worked for Master Mechanical, he was a supervisor, including on April 9, 2004.
13. Neither Simmons nor Mike Plants were paid for any work on April 9, 2004.
14. Joe Plants and Eddie Borden were working at the site for Master Mechanical on April 9, 2004. Joe Plants and Eddie Borden also act as Supervisors on occasion.
15. Simmons has testified that when he arrived at the work site he helped to unload supplies.

16. Later in the day Mike Plants had a discussion with Joe Plants, Eddie Borden and Richard Simmons.

17. In the presence of Simmons, Mike Plants told Joe Plants to remove a decontamination unit from Building B of the site, and place it in Building C for work that was to begin Monday.

18. A decontamination unit is a temporary structure which is used in asbestos abatement to remove asbestos dust from work clothes. A complete decontamination unit consists of three chambers which are made of PVC pipe and plastic sheeting. A single decontamination unit measures approximately 3 feet square and 6 feet tall.

19. Master Mechanical had completed its asbestos abatement work in Building B prior to April 9, 2004 except for removing the decontamination unit.

20. On April 9, 2004, the railings had been removed from the balcony of Building B.

21. The decontamination unit was located on the second floor balcony of Building B.

22. The second floor of Building B had a balcony that was in excess of 10 feet off the ground.

23. After Mike Plants told Joe Plants to retrieve the decontamination unit from Building B, Simmons accompanied Joe Plants to Building B.

24. When they arrived at Building B, Simmons went to the second floor of the building, while Joe Plants stayed on the ground.

25. Simmons and Joe Plants understood that the decontamination unit would be removed from the building by coming over the edge of the second floor of the building.

26. The decontamination unit was at least 10 feet from the edge of the balcony.

27. Simmons went to the second floor of Building B to remove the decontamination unit.

28. At the time of the accident, Master Mechanical did not provide Mr. Simmons with any fall protection.

29. Plaintiff Simmons fell off the edge of the balcony while removing the decontamination unit².

² The lower Court's answer to the second certified question was prompted by a dispute between the testimony of the Respondent Simmons and Joe Plants as to how Simmons fell from the balcony, and the right of the Petitioner to argue that Simmons was the proximate cause of his own injury.

Simmons testified that he carried the decontamination unit vertically, took multiple steps, walked more than ten feet, and simply walked off of the edge of the balcony. Joe Plants testified that as he waited on the ground level, he saw Simmons attempt to slide the unit off of the edge of the balcony when the unit became stuck on the edge of the

30. Simmons suffered injuries in the fall.
31. Simmons filed a claim for worker's compensation benefits, which was denied. The denial of benefits was upheld by the Office of Judges and the Board of Review.
32. On September 19, 2008, The West Virginia Supreme Court of Appeals ultimately found that the injuries sustained by Simmons were compensable injuries under the West Virginia Worker's Compensation Act.
33. Once Simmons' injuries were found to be compensable, the plaintiff amended his negligence complaint on January 26, 2010 to assert a deliberate intent claim against Master Mechanical pursuant to W. Va. Code §23-4-2, and dismissed his negligence count.

V. SUMMARY OF ARGUMENT

A. The 2005 Amendments to the Deliberate Intent Statute are Applicable to This Case

The 2005 amendments to West Virginia Code Section 23-4-2(d) are applicable to both injuries occurring after July 1, 2005 and to lawsuits filed after July 1, 2005. *See* W.Va. Code §23-4-2(f); Corley v. Eastern Associated Coal Corp., 2009 U.S. Dist. LEXIS 22080 (N.D.W.Va. 2009); *and* Roney v. Gencorp, 431 F.Supp. 2d 622 (S.D.W.Va. 2006). The plain language of the amendment indicates that if a claim is filed after July 1, 2005, then the amendment applies to the case. In the instant case, Respondent's deliberate intent claim was filed on or about January 26, 2010, approximately four and a half years (4 ½) after the July 1, 2005 effective date of the statute. Therefore, the 2005 amendments apply to Respondent's deliberate intent claim.

B. Evidence, Testimony and/or Argument Regarding Proximate Cause are Appropriate to Analysis of a Deliberate Intent Claim

balcony. Joe Plants told Mr. Simmons to "flip it up" or "give it little push." Instead, Mr. Plants recalls that Mr. Simmons picked the unit up, backed up, and ran toward the edge of the balcony with the unit in an apparent attempt to force it over the edge. *See* Appendix, p. 378. Joe Plants testified that he started to yell out to Mr. Simmons to stop what he was doing, but that the events occurred so quickly that he could not get the words out of his mouth before Mr. Simmons ran off of the edge of the balcony.

Pursuant to the lower Court's answer to certified question number 2, Joe Plants will be prohibited from offering testimony as to what he saw at the time the Plaintiff fell off the balcony.

Causation is an essential element of a deliberate intent claim pursuant to West Virginia law. *See* West Virginia Code Section 23-4-2(d)(2)(ii)(E). An employee's conduct is entirely relevant to the existence of proximate cause and the determination of liability. The jury, as trier of fact, must be permitted to consider argument, evidence and testimony concerning the employee's conduct for this element to be properly and fairly considered. Exclusion of this type of testimony would effectively rewrite the deliberate intent statute by essentially lessening one of its elements and concomitantly, an employee's statutory burden of proof. Such a result is not proper and is contrary to West Virginia law.

C. Evidence, Testimony and/or Argument Regarding Why Respondent Was On-site and What He Was Told and/or Volunteered To Do Must Be Allowed for Presentation at Trial to Prevent Exclusion of Testimony Regarding the Elements of His Deliberate Intent Claim

As with the previous argument, exclusion of testimony and argument on why Respondent was on-site, what Respondent agreed to do, and what Respondent was told prevents testimony relevant to the elements of the deliberate intent claim and defenses at issue. As a result, if exclusion of such information is allowed, Respondent would be provided with an unfair opportunity to improperly and unfairly present his case because Petitioner would be prohibited from discussing its employees' actions and the elements of the deliberate intent statute. Such a result is not proper and is contrary to West Virginia law.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure is appropriate in this case. Three (3) questions have been certified to this Court for review. At least one of the questions presents a matter of first impression before this Court, *i.e.* Certified Question No. 1 related to the applicability of the 2005 amendments to West Virginia Code Section 23-4-2 (commonly referred to as the "deliberate intent" statute) for cases

involving injuries that occurred before the effective date of the amendments, but when the claim was filed after the effective date of the amendments.

Petitioner takes the position that the two remaining questions present matters of public importance concerning the deliberate intent statute, the specific requirements and elements of the statute, and the evidence appropriate for consideration by the jury in reviewing the statute. For these reasons, Petitioner hereby requests oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure.

VII. ARGUMENT

A. Legal Standard for Review of Certified Questions

The issues presented in this matter involve questions of law certified to this Court. In such cases, the review of the issues is plenary. *See State v. Bostic*, 229 W.Va. 513, 729 S.E.2d 835, 840 (W.Va. 2012). “The appellate standard of review of questions of law answered and certified by a circuit court is de novo.” *Id. citing* Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996); Syl. pt. 1, *Wilson v. Bernet*, 218 W.Va. 628, 625 S.E.2d 706 (W.Va. 2005). *See also* Syl. pt. 1, *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (W.Va. 1999) (“This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court.”); Syl. pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (W.Va. 1998). This Court has indicated the same “de novo” standard applies to legal questions presented by the circuit courts. *See Aikens v. Debow*, 208 W.Va. 486, 490, 541 S.E.2d 576, 580 (W.Va. 2000).

However, “this Court has ‘traditionally maintained that upon receiving certified questions, we retain some flexibility in determining how and to what extent they will be answered.’” *See Martin v. Hamblet*, 2012 W.Va. LEXIS 904 (W.Va. 2012) *citing Calabrese v. City of Charleston*,

204 W.Va. 650, 655 n.4, 515 S.E.2d 814, 819 n.4 (W.Va. 1999) (*quoting City of Fairmont v. Retail, Wholesale, & Department Store Union*, 166 W.Va. 1, 3-4, 283 S.E.2d 589, 590 (1980)).

B. Is Simmons' Claim Against Master Mechanical Governed By the 2005 Amendment to the Deliberate Intent Statute, W.Va. Code §23-4-2(d)(2)(ii), Pursuant to Roney v. Gencorp, 431 F.Supp. 2d 622 (S.D.W.Va. 2006) and Corley v. Eastern Assoc. Coal Corp., 2009 U.S. Dist. LEXIS 22080 (N.D. W.Va. 2009)?

The 2005 amendments to West Virginia Code Section 23-4-2(d) are applicable to both injuries occurring after July 1, 2005 **and** to lawsuits filed after July 1, 2005. *See* W.Va. Code §23-4-2(f); Corley v. Eastern Associated Coal Corp., 2009 U.S. Dist. LEXIS 22080 (N.D.W.Va. 2009); *and* Roney v. Gencorp, 431 F.Supp. 2d 622 (S.D.W.Va. 2006). Therefore, the 2005 amendments apply to Respondent's deliberate intent claim. Respondent, however, contends that statutory language contained in a prior version of the statute is applicable because his workplace injury occurred prior to the effective date of the amendment. Respondent's argument is an effort to lessen the burdens of the statutory elements contained in the 2005 amendments. Specifically, he argues he need only prove that Joe Plants and/or Master Mechanical, Inc. (sometimes referred to as "MMI") possessed a "subjective realization" and an "appreciation of the existence of an unsafe working condition" in order to satisfy the requirements of the deliberate intent statute.³ Respondent's argument is not supported by West Virginia law.

The West Virginia Legislature amended the deliberate intent statute during the 2005 legislative session. As a part of its amendments, the Legislature replaced the phrase, "subjective realization" in West Virginia Code Section 23-4-2(d)(2)(ii)(B) with the now controlling phrase "actual knowledge." The Legislature expressly stated that the 2005

³ The 2005 amendments also increased other burdens for an employee plaintiff. For example, the prior version of the deliberate intent statute only required the alleged specific unsafe working condition to be a violation of a "commonly accepted or well-known safety standard," whereas, the 2005 amendments required the violation to be of a "written" safety standard. Upon information and belief, Respondent does not make argument regarding this point.

amendments applied to “all injuries occurring and all actions filed on or after the first day of July, Two Thousand Five.” W.Va. Code §23-4-2(f). In other words, the amendments apply to: (1) any claim arising from an injury occurring after July 1, 2005; and (2) any civil action **filed after** July 1, 2005, regardless of when the injury occurred. There can be no doubt as to the legislative intent of the effective date of the statute. The Legislature clearly intended for the revised statute to take effect for any and all matters arising under the deliberate intent statute beginning July 1, 2005.

The West Virginia Supreme Court of Appeals has not addressed the applicability of the 2005 amendments in this context. However, the United States District Courts for both the Southern and Northern Districts of West Virginia, applying West Virginia law, have both concluded that the 2005 amendments apply to any civil action **filed after** July 1, 2005. *See Roney*, 431 F.Supp. 2d at 622 and *Corley*, 2009 U.S. Dist. LEXIS 22080 at 1.

In *Roney*, an employee died of cancer in 2003 after exposure to certain chemicals in the course of his employment. *See Id.* at 627. The executor of the estate did not file a civil action until September 23, 2005, nearly three (3) months following the effective date of the 2005 amendments. *Id.* at 626. Plaintiff contended that because the employee’s death occurred prior to July 1, 2005, the 2005 amendments did not apply. *Id.* at 629. Judge Chambers of the District Court for the Southern District of West Virginia concluded that “[t]he plain meaning of the language indicates the Legislature’s intention to make the new provisions apply to both injuries occurring after July 1, 2005, and also to **actions filed after** July 1, 2005,” and concluded that the 2005 amendments applied because the plaintiff did not file the action until after July 1, 2005. *Id.* (Emphasis added).

In *Corley*, an employee died in the course of his employment on April 7, 2005. *Corley*, 2009 U.S. Dist. LEXIS 22080 at 1. The Administratrix of the estate filed a deliberate intent claim

against the employer on April 20, 2007. *Id.* at 1-2. The estate contended that the 2005 amendments did not apply to the case because the employee's death preceded their effective date. *Id.* at 6. Consistent with the Southern District's decision in Roney, Judge Keeley in the District Court for the Northern District of West Virginia held that the 2005 amendments applied because the civil action was not filed until April 2007 – nearly two (2) years following the effective date of the 2005 amendments. *Id.* at 9.

It is important to note that, like the instant matter, both Corley and Roney involved lawsuits filed after July 1, 2005 where the underlying workplace injuries had occurred prior to the effective date of the 2005 amendments. Moreover, no argument exists that the retroactive nature of the amendment is not permissible. This Court previously held that Workers' Compensation statutes may apply retroactively when the Legislature clearly intends to do so. *See generally Wampler Foods, Inc. v. Workers' Compensation Div.*, 216 W.Va. 129, 136, 602 S.E.2d 805, 823 (W.Va. 2004). In Wampler Foods,⁴ this Court determined there was no due process violation even when a statute that affected all workers' compensation awards was applied to cases where the underlying injury occurred before the effective date of the Legislative amendment. *Id.* at 216 W.Va. 147, 602 S.E.2d at 823.

In the instant matter, Respondent initially filed this lawsuit as a negligence claim on February 27, 2006, several months after the effective date of the 2005 amendments to the deliberate intent statute. After litigation regarding whether the subject accident occurred while Respondent acted in the course and scope of his employment with MMI, Respondent amended his complaint to assert this deliberate intent claim on January 26, 2010, approximately four and a half (4 ½) years after the July 1, 2005 effective date. The filing of each of

⁴ Wampler Foods involved three consolidated cases that dealt with appeals to four statutory changes to Workers' Compensation provisions. Each of the cases asked whether the statutory changes could constitutionally be applied retroactively to cases filed before the effective date of the statute. *See* 216 W.Va. at 136, 602 S.E.2d at 812.

Respondent's complaints occurred well after the effective date of the 2005 amendments. Accordingly, any potential argument that Respondent may raise that the 2005 amendments to the deliberate intent statute are not applicable and/or that Petitioner need not have actual knowledge of the existence of an unsafe working condition is simply wrong.

For the foregoing reasons, Petitioner requests that this certified question be answered in the affirmative and that the 2005 amendments to the deliberate intent statute be held applicable to this case and to Respondent's claims.

C. In Light of the Supreme Court of Appeals' Decision in Roberts v. Consolidation Coal Co., 539 S.E. 2d 478 (W. Va. 2000) and the Facts as Set Forth Above, is an Employer Prohibited from Introducing Evidence or Testimony, or Arguing that an Employee's Conduct in the Performance of the Work for the Employer was the Proximate Cause of the Plaintiff's Injury?

An employee's conduct is entirely relevant to the determination of liability pursuant to West Virginia's "deliberate intent" statute, West Virginia Code Section 23-4-2, and a jury should be permitted to consider argument, evidence and testimony concerning the employee's conduct as a proximate cause of the injury. Any order that precludes the jury from considering the employee's conduct as a proximate cause strips the employer of defenses and essentially rewrites the deliberate intent statute by lessening an employee's statutory burden of proof. Such a result is not proper and is contrary to West Virginia law.

- 1. This Court recognized the propriety of testimony and argument concerning the employee's decision making and conduct in Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 408 S.E.2d 385 (W.Va. 1991) and Deskins v. S.W. Jack Drilling Co., 215 W.Va. 525, 600 S.E.2d 237 (W.Va. 2004), both before and after the Roberts decision.**

The employer is entitled to have the jury decide whether the employee's actions created the alleged specific unsafe working condition and/or whether the employer had actual knowledge of the existence of the alleged specific unsafe working condition prior to the occurrence of the

accident. The law of West Virginia, both before and after Roberts, permits the jury to consider the employee's conduct in determining if the employee can meet the five-part test. See Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 408 S.E.2d 385 (W.Va. 2000) and Deskins v. S.W. Jack Drilling Co., 215 W.Va. 525, 600 S.E.2d 237 (W.Va. 2004). In Deskins, this Court recognized the propriety of testimony and argument on the employee's role in the incident four (4) years after deciding Roberts v. Consolidation Coal Co., 208 W.Va. 218, 539 S.E.2d 478 (W.Va. 2000), identified for purposes of this certified question.

In the instant case, the Circuit Court concluded that Petitioner is not allowed to present evidence regarding the Respondent's conduct in a deliberate intent claim, pursuant to this Court's decision in Roberts. The Petitioner concedes that the decision in Roberts is clear that the defense of contributory negligence is unavailable in a deliberate intent case; Petitioner has not advocated that comparative fault is appropriate. However, the Circuit Court erred in concluding that the Respondent's conduct is not appropriate for the jury's consideration as a defense to the Respondent's proof of his deliberate intent action. Roberts does not provide controlling authority for the issues presented; rather, the controlling authority for this issue comes from Deskins and Blevins, 185 W.Va. at 639, 408 S.E.2d at 391, which allowed an employer to discuss the employee's conduct in the context of the five elements of the deliberate intent statute.

Roberts involved a situation where the employer included the defense of contributory negligence as an affirmative defense in its answer. *Id.* at 208 W.Va. at 230, 539 S.E.2d at 490. At trial, the employer was allowed to assert a "hybrid contributory negligence/deliberate intention defense." *Id.* at 208 W.Va. at 236, 539 S.E.2d at 496. This Court determined that the circuit court's ruling allowing such a defense was improper and constituted error. *Id.* The Court granted

a new trial to the employee due to the effect the improper ruling would have had on the admission and exclusion of evidence and likely on the ultimate verdict. *Id.*

In the instant matter, Petitioner's arguments are directed at the existence and/or timing of the actual elements of Respondent's deliberate intent claim. Four (4) years after the Roberts decision, this Court determined that evidence of the employee's conduct is appropriate and is a "proper part" of the analysis of the deliberate intent claim. *See* Deskings, 215 W.Va. at 531, 600 S.E.2d at 243.

In Deskings, the plaintiff was injured when assisting his work crew with placement of a pipe tub and a pipe rack for a new mobile drilling rig on a new well site. *Id.* at 215 W.Va. 527-528, 600 S.E.2d 239-240. Immediately prior to plaintiff's injuries, plaintiff's intermediate supervisor was using a bulldozer to move the pipe rack and the pipe tub. *Id.* at 215 W.Va. 530, 600 S.E.2d 242. Before pushing the tub and the rack together, the supervisor stopped and directed the workers in the vicinity of the tub and rack to move away. *Id.* All of the workers, including plaintiff, stepped away. *Id.* However, plaintiff then moved back between the equipment just as the supervisor pushed the two components together. *Id.* Plaintiff's foot was caught and crushed between the rack and the tub. *Id.*

This Court concluded that by stepping between the moving equipment, the plaintiff created an unsafe working condition that "only existed when [he] went into the area between the pipe rack and the pipe tub as the equipment was being moved into position by the dozer." *Id.* at 215 W.Va. 531, 600 S.E.2d 243. The plaintiff's conduct caused the accident, and because his own conduct was the sole cause of the accident, the employer could not have anticipated the plaintiff's action or resulting injuries. *Id.*

Likewise, the facts had bearing on the subjective realization element of the deliberate intent statute.⁵ This Court agreed with the circuit court’s findings and held that the employer “had no knowledge that the [employee] went into the dangerous area...” and that

“[o]bviously, an unsafe condition that develops or first springs into existence close in time to the accident presents less of an opportunity for the employer to realize and appreciate the risk. Thus, the circuit court’s consideration of the unexpected occurrence of the unsafe working condition was merely a part, and a proper part, of its analysis of the subjective realization requirement of the statute.

Id. Evidence indicating how a workplace accident occurred, how an employee’s action(s) may have caused the accident, and what was included in an employer’s knowledge of the facts and circumstances prior to the accident are relevant and crucial to the defense of an employee’s deliberate intent claim. Evidence, testimony, and argument on these issues must be allowed to be presented to the jury if the evidence otherwise meets the standards for admissibility.

Even prior to Deskins, this Court had held that evidence indicating an employee created a specific unsafe working condition through his/her own actions was relevant and a proper defense to a deliberate intent claim. In Blevins, the plaintiff was required to clean spilled ore three to four times per shift in an area with moving machinery parts. *See Blevins*, 185 W.Va. at 635, 408 S.E.2d at 387. A gate had been installed as a guard in the vicinity of a running conveyor, but the tail assembly of the conveyor belt and its associated pinch points remained unguarded. *Id.* at 185 W.Va. at 635, 408 S.E.2d at 387-88. The employer instructed its employees, including the plaintiff, to “lock out” the machinery prior to entering the area with unguarded moving parts. *Id.* The plaintiff entered the area without turning off the machinery and sustained injuries when he became caught in the conveyor. *Id.* The plaintiff alleged that the specific unsafe working

⁵ Deskins was filed and decided prior to the enactment of the 2005 amendments to West Virginia Code Section 23-4-2. Therefore, the statutory language contained the “subjective realization” formulation as opposed to the “actual knowledge” requirement included in the 2005 amendments.

condition in the workplace was working in and around an unguarded tail pulley and corresponding pinch points on an operating conveyor belt assembly. *Id.* 185 W.Va. at 639, 408 S.E.2d at 391.

In considering the existence of a specific unsafe working condition, the Court in Blevins noted that the conveyor system was guarded in a manner which had been accepted by OSHA, and that it only became unsafe when the plaintiff placed himself in proximity to the pinch points without turning off the machinery. *Id.* 185 W.Va. at 639-640, 408 S.E.2d at 391-392. Accordingly, this Court concluded that plaintiff was not entitled to recovery because his own conduct created the specific unsafe working condition. *Id.*

Here, Respondent has asserted that an unguarded balcony constituted an unsafe working condition, that Petitioner had knowledge of the condition's existence, and that Petitioner allowed the Respondent to be exposed to the unguarded balcony, resulting in injury. In defense of those claims, Petitioner intends to offer the testimony of Joe Plants, who testified that Respondent, after getting the decontamination unit stuck on the edge of the balcony while trying to get the unit to the ground, stepped back and ran with the unit and fell off the edge. *See* Appendix, p. 378. From this evidence, the jury could properly conclude that Respondent proximately caused own his injuries.

Based upon the clear decisions of this Court, Respondent's conduct is entirely relevant in this case with regard to the defense to specific elements of his deliberate intent cause of action. It is well settled that there is a clear distinction between a defense of contributory and/or comparative negligence and whether an employee's conduct, in whole or in part, created a specific unsafe working condition, if the employer had actual knowledge of that alleged specific

unsafe working condition, and the cause of Respondent's injuries. Petitioner must be allowed to present evidence and argue that Respondent's conduct serves as a defense to his claims.

2. Exclusion of evidence, testimony, and/or argument regarding the employee's conduct would effectively lessen Respondent's burden in proving his deliberate intent case.

Plaintiff maintains the burden of proving each of the five necessary elements in a deliberate intent action under W. Va. Code 23-4-2(d)(2)(ii).⁶ To the extent that Plaintiff establishes issues of material fact on the five elements, the burden of proof shifts to the defendant to rebut the allegations. Lester v. Flanagan, 145 W. Va. 166, 170, 113 S.E. 2d 87, 89 (1960)(“...the term “burden of proof”, particularly in civil cases, may denote the obligation devolving upon the defendant, and perhaps passing from one party to the other as the case progresses to meet a *prima facie* case made by the opposing party. The latter meaning of the term is perhaps more accurately described as the necessity of going forward with the evidence”).

The Circuit Court's ruling, which will prohibit Petitioner from going forward with the evidence, testimony, and/or argument regarding the Respondent's conduct in removing the decontamination unit, will strip the Petitioner of its defense to one of the elements of Plaintiff's case of action. The testimony of Joe Plants supports Petitioner's defense that the Respondent's conduct, in trying to force the decontamination unit over the side by running with it, was the proximate cause of the Respondent's injury. *See* Appendix, p. 378.

In essence, the Circuit Court's ruling has improperly lessened an element of the Respondent's burden of proof. By prohibiting Petitioner from referring to Respondent's conduct as a cause of the incident, the Circuit Court will allow the Respondent's case to proceed by

⁶ By design, a deliberate intent action presents a very high burden of proof to an employee. The West Virginia legislature has made clear that if an employee cannot meet the criteria necessary to sustain a claim under §23-4-2(d)(2)(ii)(A)-(E), that summary judgment is appropriate. W. Va. Code §23-4-2(d)(iii)(B); Smith v. Monsanto Co., 822 F.Supp. 327 (S.D.W.Va. 1992).

establishing only four of the five elements under W. Va. Code §23-4-2(d)(ii)(A)-(E), with proximate cause becoming a given. Under the Circuit Court’s ruling, the Respondent’s proximity to the unguarded balcony becomes the causative factor of his injury. With the jury barred from hearing evidence of how Respondent conducted himself around the unguarded balcony, particularly that he backed up and ran with the decontamination unit in an effort to force it over the edge, Petitioner will be hamstrung in arguing its defenses. *See* Appendix, p. 378. West Virginia Code Section 23-4-2(d)(2)(ii)(E) specifically requires that for an employee to prevail, the employee must prove, among other enumerated items, that the workplace accident and his injury occurred as a “direct and proximate result of the specific unsafe working condition.” Any change in the statutory elements and/or burdens of proof, whether made directly or indirectly, is not appropriate given the statutory scheme of the West Virginia Workers’ Compensation Act and the deliberate intent claim’s relative location in it.

The deliberate intent statute is clear regarding the Respondent’s burden of proof and the manner in which he must prove his case. This portion of the statute states:

(2) The immunity from suit provided under this section...may be lost only if the employer or person against whom liability is asserted acted with “deliberate intention.” This requirement may be satisfied only if:

* * *

(ii) The **trier of fact** determines, either through specific findings of fact made by the **court in a trial without a jury**, or through special interrogatories to the **jury in a jury trial**, that **all** of the following facts are proven....(Emphasis added.)

W.Va. Code §23-4-2(d)(2)(ii). The five elements of the deliberate intent claim immediately follow this provision.

The statutory language is clear and unambiguous and indicates that the employer (Petitioner) may lose its Workers’ Compensation immunity only when the trier of fact makes

findings of fact or answers special interrogatories indicating that **each** of the five elements of the statute have been proven. Because of the immunity provision, the employee bears the burden of proof on each of the five elements. Additionally, the statute indicates that cases should be dismissed and/or summary judgment should be granted when an employee cannot prove “one or more” of the five elements. *See* W.Va. Code §23-4-2(d)(2)(iii). Moreover, the statute does not provide for, and this Court has held, that the five elements of the statute cannot be proven in piecemeal fashion. *See generally* Syl. pt. 6, Marcus v. Holley, 217 W.Va. 508 (2005) *and* Syl. pt. 3, Mumaw v. U.S. Silica Co., 204 W.Va. 6 (1998). In short, Respondent must prove all five elements in regard to a given alleged specific unsafe working condition to avoid his employer’s immunity under the West Virginia Workers’ Compensation Act.⁸ Exclusion of evidence, testimony, or argument offered by the Petitioner which is contrary to Respondent’s allegations would effectively remove causation issues and West Virginia Code Section 23-4-2(d)(2)(ii)(E) from the jury’s analysis. Accordingly, exclusion of this information would lessen Respondent’s burden of proof and would conflict with the purpose of the Workers’ Compensation employer immunity provisions and the deliberate intent statute. This result is contrary to West Virginia law and must be prevented.

For the foregoing reasons, Petitioner requests that this certified question be answered in the negative indicating that an employer may present evidence or testimony regarding proximate cause and an employer is not prohibited from introducing evidence or testimony, or arguing whether an employee created a specific unsafe working condition and/or whether the employer had actual knowledge of the alleged unsafe working condition allegedly created by the employee.

⁸ Arguably, exclusion of evidence of this type should result in dismissal of Respondent’s deliberate intent claim. If Petitioner is precluded from arguing causation issues, Respondent should be too. If Respondent cannot argue causation, then he cannot prove the fifth element of the deliberate intent statute.

D. In Light of the Supreme Court's Ruling of September 19, 2008 That Respondent's Injury Was Compensable Under the West Virginia Worker's Compensation Act, is Petitioner Precluded from Arguing that Respondent Was at the Site of His Own Volition, and Voluntarily Agreed to Remove the Decontamination Unit from the Second Floor of Building B?

Respondent seeks a ruling that would prohibit Petitioner from arguing that Respondent was present at the worksite on the day in question of his own volition, and voluntarily agreed to remove the decontamination unit from the second floor of Building B because the West Virginia Supreme Court held that Respondent sustained injuries in the course of and resulting from employment within the meaning of West Virginia Code Section 23-4-1, and was entitled to benefits. Exclusion of testimony and argument concerning why Respondent was on-site, what Respondent agreed to do, and what Respondent was told, provides him with an opportunity to improperly and unfairly present his case. Petitioner would be barred from contesting Respondent's allegations that he was intentionally exposed to an unsafe working condition through testimony that Respondent volunteered to go into the building to retrieve the decontamination unit.

On September 18, 2008, this Court held that Respondent's Workers' Compensation claim from this incident was compensable. This decision proves only that the circumstances of Respondent's injury are within the parameters of West Virginia Code Section 23-4-1, *i.e.* that "benefits shall be paid ... [to workers] who have received personal injuries in the course of and resulting from covered employment." Simple compensability determinations do not involve questions regarding unsafe conditions, an employer's knowledge, whether an employer intentionally exposed an employee to an unsafe condition, or whether an unsafe condition caused a plaintiff to sustain an injury.

The West Virginia Workers' Compensation Act is a no-fault system. In order to receive benefits, a claimant need not resort to civil court to prove an employer's liability. The deliberate intent statute, on the other hand, constitutes an exception to the general rule and the employer immunity, so that workers injured in the course of and resulting from covered employment may not sue his or her employer in tort. In that regard, the simple compensability requirements of West Virginia Code Section 23-4-1 are drastically different than the five part deliberate intent test found at West Virginia Code Section 23-4-2. Respondent must not be allowed to use the compensability of his Workers' Compensation claim to prove any element of the deliberate intent statute, or lessen his burden to establish intentional exposure. These are separate issues with separate elements and separate burdens of proof.

Whether Respondent appeared at the work site voluntarily to retrieve scrap for his personal use, and whether Respondent volunteered to retrieve the decon unit as he concedes in his deposition, are relevant to the elements of his deliberate intent claim. Respondent's actions bear upon whether an unsafe condition existed, what risks were associated with any alleged unsafe condition, what Petitioner actually knew about such unsafe conditions and risks, and whether Petitioner intentionally exposed Respondent to an unsafe condition considering that Respondent volunteered to retrieve the unit, and was not directed, instructed, or ordered to approach the edge of the balcony.

Simply put, the reason that Respondent was at the site, and Respondent's concession that he voluntarily agreed to remove the decon unit without direction from Petitioner are the facts of the case and they bear directly upon the elements of Respondent's claim against Petitioner. *See* Appendix, pp. 303-304, 377. The fact that Respondent was later determined to have sustained an injury in the course of and resulting from his employment does not establish any other element of

his claim against Petitioner, and should not operate as an end-around to prevent the jury from hearing material evidence related to the incident.

For the foregoing reasons, Petitioner respectfully requests that this certified question be answered in the negative and that it be allowed to present evidence, testimony, and argument indicating Respondent was at the site of his own volition, and voluntarily agreed to remove the decontamination unit from the second floor of Building B.

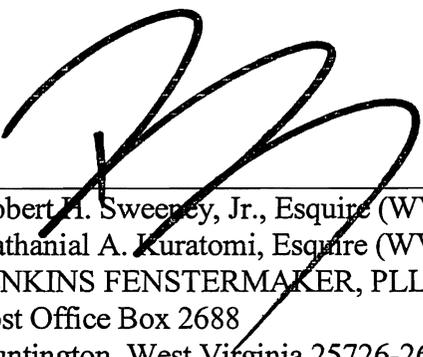
VIII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court uphold the Circuit Court of Cabell County's decision as to Certified Question No. 1 finding that the 2005 amendments to the deliberate intent statute, West Virginia Code Section 23-4-2, are applicable to this lawsuit. Petitioner further requests that this Court reverse the Circuit Court of Cabell County's decisions regarding Certified Question No. 2 and Certified Question No. 3 and hold that an employer is not precluded from presenting causation evidence and/or evidence indicating that an employee voluntarily took certain actions that caused and/or contributed to his workplace accident. Petitioner further requests that this matter be remanded to the Circuit Court of Cabell County for further handling consistent with this decision and/or for any such further and/or alternative relief as this Court deems appropriate.

Respectfully submitted,

MASTER MECHANICAL INSULATION, INC.

By Counsel



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WEST VIRGINIA SUPREME COURT OF APPEALS

IN CHARLESTON

**MASTER MECHANICAL
INSULATION, INC.,**

Petitioner,

v.

**CASE NO.: 12-1206
(Cabell County Circuit Court # 06-C-0133)**

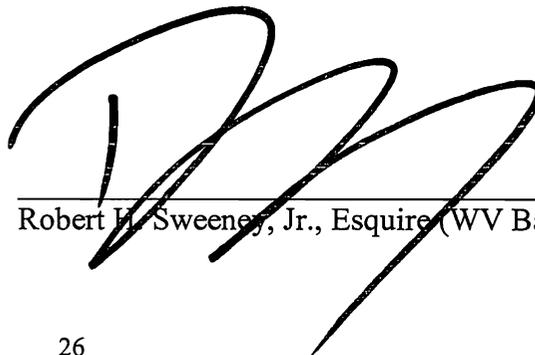
RICHARD SIMMONS,

Respondent.

CERTIFICATE OF SERVICE

I, Robert H. Sweeney, Jr., hereby certify that on the 17th day of December 2012, a copy of the foregoing "**Master Mechanical Insulation, Inc.'s Brief**" was hand delivered to counsel below:

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