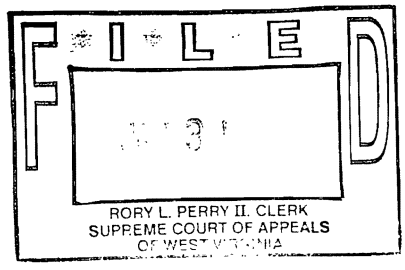
WEST VIRGINIA SUPREME COURT OF APPEALS



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 REPLY BRIEF

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I. ARGUMENT

A. Respondent's Arguments Establish That Circuit Court Answered the First Certified Question Correctly.

It is clear that the West Virginia Legislature intended the 2005 Amendments to West Virginia Code Section 23-4-2(d) to be applicable to both injuries occurring after July 1, 2005 **and** to lawsuits filed after July 1, 2005. The specific language of the effective date provision is as follows:

> (f) The amendments to this section enacted during the two thousand five session of the Legislature shall apply to all injuries occurring and all actions filed on or after the first day of July, two thousand five.

See W.Va. Code §23-4-2(f). Here, Respondent's lawsuit was filed after July 1, 2005. Therefore, the 2005 amendments apply to Respondent's deliberate intent claim.

In his brief, the Respondent states "Mr. Simmons submits that the first certified question should be answered in the negative, because the West Virginia Legislature expressed its clear intention that the 2005 amendment be prospectively applied to those cases **where both the injury occurs after July 1, 2005 and the civil action is filed after July 1, 2005.** *Brief of Respondent, Richard* Simmons, pp. 9-10. That statement sets forth the logical inconsistency of Respondent's position. If an injury occurs after July 1, 2005 which gives rise to a claim under W. Va. Code §23-4-2 for deliberate intent, ***the civil action for that injury will by necessity be filed after July 1, 2005.*** Absent clairvoyance, an injured employee could not have filed a civil action before July 1, 2005 for an injury occurring after July 1, 2005.

By Respondent's rationale, the Legislature utilized the language "The amendments... shall apply to all injuries occurring and all actions filed on or after the first day of July, two thousand five" to make clear that it only intended for the amendments to be applied to actions where the injuries occurred after July 1, 2005. However, because an action for an injury that

occurred on or after July 1, 2005 can only be filed on or after July 1, 2005, the language "all actions filed" is superfluous, per the Respondent's argument. If the Respondent's argument is to be followed, that language is extraneous and can be ignored by the Court as it is redundant.

However, and as noted by the Respondent in his brief, "This Court generally operates 'under the presumption that the Legislature attaches specific meaning to every word and clause set forth in a statute." *Brief of Respondent, Richard Simmons*, p. 11. Respondent cites to State ex re. City of Huntington v. Lombardo, 149 W. Va. 671, 698, 143 S.E. 2d 535, 551 (1965) for the proposition that "a cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, **clause, word or part of a statute**". *Id.* Lombardo further states:

> Under the usual and elementary rules of construction, the language of the statute must be construed so as to give that language some meaning where it is possible to do so, without doing violence to the clear intent and purpose of the enactment. It is one of the fundamental rules of construction of statutes that the intention of the legislature is to be gathered from a view of the whole and every part of the statute taken and compared together, giving to every word and every part of the statute, if possible, its due effect and meaning, and to words used in their ordinary and popular meaning, unless it plainly appears that they were used in some other sense. If the intention of the Legislature can thus be discovered, it is not permissible to add or subtract from the words used in the statute. **Every part of an act is presumed to be of some effect and it is not to be treated as meaningless unless absolutely necessary**. (Emphasis added)

Id. at 551-552.

In order to accept Respondent's position on the first certified question, this Court must treat the words "and all actions filed" as meaningless, and accept that the Legislature added that additional language solely to make clear that the amendment applied ONLY to incidents which occurred after July 1, 2005. To do so ignores long-standing precedent concerning statutory

construction, as set forth in Lombardo. As a result, this court must reject Respondent's position on the first certified question and uphold the Circuit Court's answer.

For the foregoing reasons and those more fully set forth in Petitioner's initial brief, Petitioner requests that the first 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.

B. Second Certified Question:

Respondent's Arguments Cannot Support the Circuit Court's Erroneous Response To The Second Certified Question.

The Respondent's entire position on the second certified question can be summed up in one sentence from his brief: "...Mr. Simmons' conduct has no probative value with respect to the five part test in this case". *Brief of Respondent, Richard Simmons,* p. 16[1]. Such a broad, blanket statement is inconsistent with prior rulings of this Court, and essentially limits an employer's ability to defend against allegations that its conduct intentionally exposed and proximately caused an employee's injury.

It is important to examine the Circuit Court's ruling on the second certified question for what it is – a blanket ruling excluding evidence or argument concerning the Plaintiff's conduct in the immediate timeframe of the accident. Unlike this Court's ruling in Roberts v. Consolidation Coal Co., 208 W.Va. 218, 539 S.E.2d 478 (W. Va. 2000), which concerned the employer's

[1] In the "Statement of the Case" of his brief, Respondent castigates the Petitioner for information contained in footnote 2 in Petitioner's brief, saying that the information in footnote 2 was "immaterial to the Court's answer to the second certified question". *Brief of Respondent, Richard Simmons*, p. 7. Respondent overlooks the fact that the Circuit Court's response to the second certified question was required because the Respondent and Petitioner have differing accounts of how Richard Simmons fell from the balcony. The Statement of Facts in the Order Certifying Questions establishes that Simmons was on the balcony without fall protection to retrieve a decontamination unit that was 10 feet from the edge of the balcony, but does not contain any indication as to what caused him to fall. The differing eyewitness accounts of the incident, as set forth more fully in footnote 2 of Petitioner's brief, explain the impetus for the Circuit Court's answer to the second certified question.

assertion of the defense of contributory negligence, the Circuit Court's ruling on the second certified question prohibits the Petitioner from introducing evidence of the Respondent's conduct at or near the time of the injury. Eliminating evidence that would be probative of the issues submitted to the jury, as would occur under the Circuit Court's answer to the second certified question, is error.

Respondent has not cited any authority where this Court has held that the employee's conduct is not relevant to a determination of the elements of a deliberate intent claim. To the contrary, the two cases which Respondent decries, Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 408 S.E.2d 478 (W.Va. 1991) and Deskins v. S.W. Jack Drilling Co., 215 W.Va. 525, 600 S.E.2d 237 (W.Va. 2004), contain extensive discussion of the conduct of the employee in the analysis of the propriety of the employee's claim under W. Va. Code 23-4-2(d)(2)(ii). In both cases, employers presented evidence of the employee's conduct and how it related to the accident because, as in the instant matter, the employee's conduct was relevant to the elements of the deliberate intent statute, how the accident occurred, and the defense set forth by the employer.

Respondent essentially argues, contrary to Blevins and Deskins, that none of the actions of the employee, other than self-infliction of the injury and/or intoxication of the employee should be considered by the trier of fact. Rather, Respondent asserts that only the employer's conduct should be considered because "subjective realization"[2] and causation can be "established by proof of MMI's conduct." (Emphasis omitted.) *See Brief of Respondent, Richard Simmons* at p. 17. Respondent attempts to make the presentation of evidence an unfair and "one-sided" story of the facts and events giving rise to the subject accident.

[2] Respondent asserts that the 2005 Amendments are not applicable and the old "subjective realization" formulation applies to this case instead of the 2005 Amendments' "actual knowledge" element. Petitioner asserts the "actual knowledge" formulation contained in the 2005 Amendments is the proper standard in this case.

If this Court accepts the Respondent's argument and the Circuit Court's answer to the second certified question, an employee could prove liability when merely in the vicinity or presence of an alleged specific unsafe working condition; causation would no longer be an element of any significance in the deliberate intent statute for the trier of fact's review. A review of his brief establishes that is exactly what Respondent is arguing – that by allowing Simmons onto the balcony, to retrieve a decontamination unit 10 feet from the edge of the balcony, Petitioner is *prima facie* liable under W. Va. Code §23-4-2 for Simmons' injuries, notwithstanding any facts relating to how Simmons went over the balcony. In essence, that argument takes the burden of proof for a deliberate intent action under W. Va. Code §23-4-2 and makes it into a worker's compensation claim. Under the Respondent's argument, causation is never an issue because the employer cannot present any defense in opposition to a link between the specific unsafe working condition alleged and the injury. This result is clearly contrary to the burden imposed under the deliberate intent statute and in conflict with the grant of immunity to employers for workplace injuries. This Court has held that the employee bears the ultimate burden of proof to prove the existence of the five statutory elements of a deliberate intent claim in order to pierce the immunity afforded to employers through the West Virginia Workers' Compensation Act. *See generally* Mumaw v. U.S. Silica Co., 204 W.Va. 6, 511 S.E.2d 117 (W.Va. 1998).

Respondent also suggests that because certain evidence, testimony, and/or argument may be impermissible for one purpose, then it must necessarily be impermissible for all purposes. This argument is clearly not true pursuant to West Virginia law because the West Virginia Rules of Evidence and case law make it clear that evidence, testimony, and/or argument may have

more than one purpose and that a prohibition on use for one purpose is not a prohibition for all purposes.

The West Virginia Rules of Evidence are replete with situations where evidence of a given type cannot be used to prove or disprove one issue, but can still be presented for purposes of proof on other issues. For example, evidence of liability insurance cannot be admitted as part of a presentation concerning whether a party acted negligently or wrongfully, but the same or similar facts can be used when offered for another purpose, such as proof of agency, ownership, control, bias, or prejudice. *See* W.Va. R. Evid. 411. Similarly, evidence that may be hearsay when presented in an effort to prove a given fact, may be admitted for other non-hearsay purposes. *See* W.Va. R. Evid. 801 *and* 802; State v. Morris, 227 W.Va. 76, 705 S.E.2d 583 (W.Va. 2010). Other examples include evidence of habit, subsequent remedial measures, and compromise and offers to compromise. *See generally* W. Va. R. Evid. 406, 407, *and* 408. Here, argument related to contributory negligence and/or comparative negligence should be precluded pursuant to the Roberts decision. Nevertheless, similar evidence, testimony, and/or argument are completely proper when presented in relation to the causation element of a deliberate intent claim. Additionally, if concern exists that the jury as trier of fact may use certain evidence and/or testimony for an improper purpose, the trial court could exercise its discretion and issue a limiting instruction directing the jury to only use the subject evidence and/or testimony for a given purpose. *See* W.Va. R. Evid. 105.

For the foregoing reasons and those discussed in its initial brief, Petitioner requests that the second certified question be answered in the negative indicating that an employer may present evidence, testimony, and/or argument 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 specific unsafe working condition allegedly created by the employee.

C. Third Certified Question:

The Circuit Court's Response to The Third Certified Question is Not Sustainable.

The Circuit Court erred by answering the Third Certified Question in the affirmative, finding that this Court's ruling on the compensability of the Respondent's injury had a preclusive impact on testimony that he was at the worksite voluntarily. This Court's ruling on the compensability of Respondent's Workers' Compensation claim does not contain any evidentiary rulings characterizing Respondent's conduct on the date of the injury; in fact, it only states that the claim is compensable. *See Appendix,* P. 386-387.

In essence, the Circuit Court's answer to the third certified question finds that Petitioner is collaterally estopped from introducing evidence that Respondent volunteered to be at the worksite and to enter the building where the accident occurred. Collateral estoppel is designed to foreclose relitigation of issues in a second suit that could be determined in an earlier suit, even if there are differences in the cause of action. Conley v. Spiller, 171 W. Va. 584, 588, 301 S.E. 2d 216, 220 (1983). The September 19, 2008 decision, on which the Circuit Court answered the third certified question, does not contain any information which would permit either the Circuit Court or this Court to find that the Plaintiff's volunteer status had been asserted, litigated and rejected. Further, the fact that Respondent's claim was compensable does not limit Petitioner from offering evidence to disprove any element of Respondents' deliberate intent claim. Respondent still bears the burden of proving the five elements under W. Va. Code §23-4-2(d)(2)(ii), and Petitioner has the right to offer evidence to contradict that Simmons was not intentionally directed and exposed to unsafe working condition, but rather volunteered to go the

second floor balcony, if the evidence is otherwise admissible. This Court's ruling on the compensability of Respondent's injury did not and does not have a preclusive impact on the testimony concerning the Respondent's motivations on the day of the injury.

Respondent suggests that these issues constitute an attempt "to open the door for [Petitioner's] continuing efforts to cast blame or fault upon [Respondent]." *See Brief of Respondent, Richard Simmons* at p. 23. Respondent's assertion is incorrect. The purpose of evidence, testimony, and/or argument concerning 1) why Respondent was present or 2) what he agreed to do is to provide the trier of fact with a complete picture of the facts surrounding Petitioner's injury and to avoid only piecemeal information being provided or submitted to the trier of fact. Respondent's position here, similar to his position regarding proximate cause, attempts to limit evidence, testimony, and/or argument in a manner that would unfairly present the case to the trier of fact by only providing the trier of fact, with one side of the story of his workplace accident, and to further arguments that Respondent was acting under compulsion rather than voluntarily.

In every case there are facts that a party would prefer were excluded; relevant evidence is generally prejudicial to one party or another. Franklin D. Cleckley, Vol. 1, Handbook on Evidence for West Virginia Lawyers, §4-3(B)(1)(4th ed. 2000). Mechanisms and provisions are in place to deal with these issues, through motion practice, when they arise. W. Va. R. Evid. 103. That said, Respondent seeks to go beyond the typical exclusion of evidence tactics and seek to exclude all contrary, but relevant, information which may shed light on whether the Respondent was intentionally exposed to an unsafe working condition. He attempts to use these mechanisms and these certified questions to exclude relevant information about the incident and injury to prevent Petitioner from presenting an opposing position on the statutory deliberate

intent elements. This position is improper, particularly given the high burden of proof required for a successful deliberate intent claim.

Arguably, the matters presented by this certified question are more properly dealt with by the trial court through motions *in limine* and after having heard the manner and purpose for which given testimony is presented. Likewise, a wholesale exclusion of evidence without the context of purpose would be unduly prejudicial upon the Petitioner.

For the foregoing reasons and those discussed in its initial brief, Petitioner requests that the second certified question be answered in the negative and that the employer be able to present evidence, testimony, and/or argument indicating Respondent was at the site of his own volition and that he voluntarily agreed to remove the decontamination unit from the second floor of Building B.

IV. CONCLUSION

For the foregoing reasons and those set forth in its initial brief, 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.

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CERTIFICATE OF SERVICE

I, Robert H. Sweeney, Jr., hereby certify that on the 30th day of January 2013, a copy of the foregoing **"Master Mechanical Insulation, Inc.'s Reply Brief"** was hand delivered to counsel below:

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