

12-1337

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

TIMOTHY AND SHANNON KENEDA,
Plaintiffs,

v.

Civil Action No. 08-C-256

BLUESTONE INDUSTRIES, INC., ET AL.,
Defendants.

FINAL JUDGMENT ORDER

On May 2, 2012, a verdict for the defense was returned in the above-styled matter by a duly empaneled petit jury. Said verdict was unanimous and was rendered after the parties rested upon completion of presentation of their respective cases and rebuttal in a trial-by-jury that commenced on April 24, 2012.

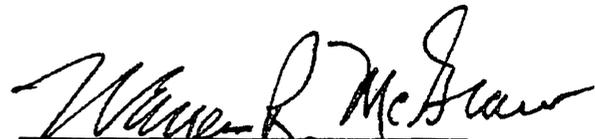
In its verdict, the jury made findings via special interrogatories, including, *inter alia*, that "On February 8, 2008, [there was] an unsafe working condition that existed at Mr. Keneda's workplace which presented a high degree of risk and a strong probability of serious injury or death" and that Mr. Keneda did not "suffer a serious compensable injury as a direct and proximate result of the specific unsafe working condition." The jury found no defendant herein liable for the matters asserted in the plaintiff's case.

Accordingly, the jury verdict is hereby adopted and incorporated herein and the above-styled matter is **DISMISSED**.

The Circuit Clerk is directed to forward an attested copy of this Order to any counsel or unrepresented party of record herein.

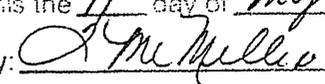
IT IS SO ORDERED.

Entered on this, the 3 day of May, 2012.


Warren R. McGraw, Judge

A TRUE COPY, ATTEST.
L. "BUGS" STOVER, CLERK

This the 11 day of May, 2012

By: 
Deputy.

IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

TIMOTHY KENEDA,
Plaintiff,

v.

Civil Action No. 08-C-256

BLUESTONE INDUSTRIES, INC.,
a West Virginia corporation;
BLUESTONE COAL CORPORATION,
a West Virginia corporation; and
FRONTIER COAL COMPANY,
a Delaware corporation,
Defendants.

ORDER TO SET ASIDE VERDICT AND GRANT A NEW TRIAL

On the 1st day of August, 2012, came the parties on plaintiff's motion for mistrial and to set aside the verdict and award plaintiff a new trial based upon the following four bases: (1) That the defendants' corporate representative made improper contact with a sitting juror after the jury was instructed and arguments of counsel just prior to jury deliberation; (2) That defense counsel made improper closing arguments to the jury which were contrary to the Court's instructions; (3) That the Court granted defendants' instruction on intervening cause as a defense to the plaintiff's injury when there was no legal or factual basis for the instruction which introduced a confusing set of legal and judicial circumstances into the case; and (4) That the Court granted defendants' instruction as to the definition of negligence into the case which introduced a confusing legal argument and which misled the jury.¹

¹ Plaintiff withdrew his fourth basis for a new trial, a negligence instruction.

The facts surrounding this case are that plaintiff was a coal miner who was working on a mine site in Wyoming County, West Virginia. There were factual issues as to whether he worked solely for Frontier Coal Company or whether he was working for all three defendants; however, the Court ruled that the jury would decide those issues. Plaintiff complained that he was ordered to do welding at the base of an approximate 5' high x 20' long steel wall, weighing approximately 3000 lbs., being constructed near the face of the mine entrance. Plaintiff complained that due to various intentional acts and omissions of defendants, including their corporate representative, Bruno Cline, the wall fell over on top of plaintiff causing him numerous and serious injuries. The plaintiff offered evidence that defendants failed to train him or follow safety rules during construction, which met the five elements of W.Va.Code, § 23-4-2, entitling him to damages.

Defendants claimed that the cause of the steel wall falling on the plaintiff was due to a strong gust of wind and that no safety rules applicable to the circumstances were violated or caused the wall to fall. For purposes of this Court's ruling on plaintiff's motion for new trial, discussion of the above assertion is not necessary.

DISPOSITION OF THE NON-DETERMINATIVE ISSUES

After a review of the record and consideration of the parties' oral arguments made before the Court, the Court finds that the plaintiff's objections to the following are non-determinative issues as they relate to the Court's final decision on this matter: (1) the defense counsel's improper closing arguments to the jury, (2) the defendants' instruction on intervening cause as a defense to the plaintiff's injury, and (3) the defendants' instruction as to the definition of negligence in the case. The Court makes no formal decision as to the validity or weight of these issues.

DETERMINATIVE ISSUE OF IMPROPER JUROR CONTACT

The Court makes the following findings of fact with respect to the circumstances giving rise to the plaintiff's claim that the defendants' corporate representative made improper juror contact.

1. The trial of this deliberate intent case began on April 24, 2012, and was concluded on May 2, 2012, with a jury verdict in favor of defendants. On May 2, 2012, the last day of this near two-week trial, counsel for the parties concluded all closing arguments and the Court concluded instructing the jury. Since it was near lunch time, the Court instructed the jury, in open court, in the normal manner, with all parties present, that the evidence and all proceedings had been concluded and it was time for the jury to be given the case for deliberation. After closing arguments were concluded, the jury was advised that they would be allowed to go to lunch and when they returned at 1:00 p.m. they would be given the verdict form to begin their deliberation. The Court instructed the jury not to discuss the case with anyone. The jury had been similarly instructed to do so throughout the trial.

2. Immediately after the lunch period, plaintiff's counsel informed the Court that one of plaintiff's counsel, upon returning from lunch, had observed the defendants' corporate representative engaged in a conversation with a sitting juror. After observing this, plaintiff's counsel approached the corporate representative and advised him and the juror that it was not proper. Plaintiff's counsel moved the Court to conduct an inquiry into what had transpired between the corporate representative and the juror.

3. In the Court's chambers, plaintiff's counsel reported that the juror involved was Juror #6, who was conversing with Bruno Cline, the corporate representative. Mr. Cline had been in the courtroom at the defense counsel table throughout the trial. Three defense counsel

participated in the trial and were at counsel table also during the entire trial. The Court found good cause, granted plaintiff's motion and undertook an inquiry into the conduct of the corporate representative and Juror #6. Defense counsel then requested the Court for an opportunity to discuss the situation with their client, Bruno Cline. The Court granted defendants' motion and defense counsel and Mr. Cline left chambers and conversed. Upon their return to chambers, the Court called for the corporate representative, Mr. Bruno Cline, to be sworn and allowed plaintiff's counsel to inquire of him as to how the conversation came about and what was said during the conversation.

4. Mr. Cline, the corporate representative, was present throughout the entire trial from jury selection to conclusion. There were three defendant corporations, Bluestone Industries, Inc., Bluestone Coal Corporation, and Frontier Coal Company. Mr. Cline exclusively represented them all in the trial. He was the mine foreman at the time when plaintiff was injured and he still remained a mine foreman for these companies when the trial was being conducted. He also testified during the trial for the defendants. Mr. Cline, therefore, was the foreman whose conduct was at issue in the trial. Plaintiff alleged at trial that Mr. Cline deliberately exposed plaintiff to the unsafe condition and violated W.Va.Code, § 23-4-2, which resulted in the plaintiff's injuries and which entitled plaintiff to recover against defendants. It was, therefore, apparent to the jury during the trial that he was a person of importance and influence with the companies and, further, it was his conduct which was at issue in the trial.

5. Mr. Cline testified that he did not know that he could not talk to the jury so long as he "wasn't talking to him about the case." (Trial Transcript at pp. 619-120.) When asked whether his attorneys advised him not to talk to the jurors he stated: "I spoke to him. I mean I

didn't know that I couldn't speak to somebody." (*Id.* at 620.) When asked whether he had spoken to any other juror besides Juror #6, he stated: "No, I haven't seen them." (*Id.*)

6. Mr. Cline indicated that he did not initiate the conversation but that it was the juror who initiated the conversation. Mr. Cline said he was standing on the steps to enter the courthouse leaning against the rail when the juror came up the steps and rubbed his head and said, "Shooo," supposedly because it was hot. Mr. Cline then claimed he said, "It's too hot to be in the courthouse; ain't it?" Mr. Cline related that the following conversation took place: The Juror said, "Yes, I hope to go back to work tomorrow." Mr. Cline said, "Where do you work?" The juror then said, according to Mr. Cline, "I work at Wal-Mart." (*Id.* at 620-621.) Mr. Cline completed his recount of the conversation as follows: "He said, 'I'd like to go back to work.' I said, 'Where do you work?' He said, 'I work at Wal-Mart.' And he said ah ... he said, 'I've been trying to get a job in the mines.' He said, 'I have my red hat card.' He said -- and I told him, I said, 'Right now is a bad time for coal industry.' I said, 'It may pick up at the end of the year.' And then he said ah ... he said, 'Well I've done had to redo my card once,' and then Pam come up. And that's pretty well word-for-word right there." (*Id.* at 622, emphases added.)

7. The juror's account differed from the corporate representative's account. First, the juror frankly admitted that he was aware that he was not to have conversations with the parties. (*Id.* at 626.) According to Juror #6, the conversation was initiated by Mr. Cline as Juror #6 was coming back from lunch: "Well I was just coming back in from lunch and he was just standing out there and he just asked me where I worked, you know. I told him, 'Wal-Mart.' And I didn't think nothing of it. I mean I probably should have, yes. I said, 'Well.' And then I just asked him if he was in the coal mines and I told him I had my apprentice card. And he

said, 'Well, you know, it won't be, you know, long probably before you can get you a job....'" (*Id.* at 626-627, emphases added.)

8. The juror indicated that after the conversation he came back inside and made statements apparently to the other jurors as follows: "Yeah, it was a mistake on my part, you know, even saying something to him after he asked me where I worked." (*Id.* at 627.) "After that, what did you do?" "I went to the restroom and went back upstairs. I went to the jury room." (*Id.* at 628.) "Well I've really messed up now. I'm the one they're gonna blame for a mistrial in this case now. It's already been this far. That was the only thing on my mind because I mean they was talking in the jury room what you couldn't do you know over there bailiffing and I hope this ain't something I've goofed up." (*Id.* at 630, emphasis added.) The juror clearly testified that it wasn't him who initiated the conversation: "You did not initiate the conversation?" "A: No, sir." (*Id.*) He also denied that Mr. Cline's initial comment had to do with the weather. "Did -- was the first thing that Mr. Cline said to you, did he ask you was it hot outside?" "A: No." (*Id.* at 631.)

9. The Court FINDS that while the Court undertook the inquiry and dealt with these issues, the remaining jurors were left in the jury room for about two extra hours while the Court took testimony and heard arguments of counsel. During this period, Juror #6 was brought to chambers to testify and then returned to the jury room with the other jurors.

10. Defense counsel argued that the contact was innocent and casual which was not prejudicial to plaintiff. Plaintiff's counsel argued that Mr. Cline, on behalf of all three corporate defendants, made an intentional contact with the juror just before deliberations were to begin, that the conversation was about a job as a coal miner, no doubt in defendants' coal mines, and

that defendants routinely employ coal miners. Plaintiff argued that he was prejudiced regardless of whether the juror was replaced by an alternate or not.

11. The Court found Juror #6 disqualified by virtue of the conversation he had with Mr. Cline as described above.

12. Two alternate jurors were selected in the case and the Court proceeded to determine the proper course of action. Plaintiff's counsel vigorously objected to the replacement of Juror #6, a sitting juror, with Alternate Juror #1 because Alternate Juror #1 was a former mine foreman. The Court overruled plaintiff's objection and found that the initial procedure was for replacement of a disqualified juror with the alternate in the order as seated during the jury selection process. Therefore, the former mine foreman was seated in place of Juror #6. Plaintiff further objected, claiming there was no way to eliminate the prejudice to plaintiff under any circumstances.

The Court, having reviewed the facts surrounding this incident, **FINDS** that West Virginia Trial Court Rule 4.09 specifically states that **"No party, nor his agent or attorney, shall communicate or attempt to communicate with any member of the jury...until that juror has been excused from further service for a particular term of court"** without first receiving an order allowing such communication. (Emphasis added.) Rule 4.09 does not merely prohibit communication with a juror about the case, but prohibits any communication with a juror.

A motion for new trial based upon improper jury contacts is addressed to the discretion of the trial court. Syl.Pt. 1, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995).

In any case where there are allegations of any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury not made in pursuance of known rules of the court and the

instructions and directions of the court made during the trial with full knowledge of the parties; it is the duty of the trial judge upon learning of the alleged communication, contact, or tampering, to conduct a hearing as soon as is practicable, with all parties present; a record made in order to fully consider any evidence of influence or prejudice; and thereafter to make findings and conclusions as to whether such communication, contact, or tampering was prejudicial to the [affected party] to the extent that he has not received a fair trial.

Syl.Pt. 2, *Sutphin*, 195 W.Va. 551, 466 S.E.2d 402.

The Court **FINDS** that the narrative of either Mr. Cline or Juror #6 lead to the inevitable conclusion that prohibited juror contact occurred, regardless of Mr. Cline's or Juror #6's intentions for the contact. While the implementation of Rule 47(c) of the *West Virginia Rules of Civil Procedure*, which necessitated Juror #6's replacement by alternate jurors as they were called, was the proper solution for the problems that would have arisen from Juror #6's continued service. However, regardless of which version of the conversation in question is true, the Court is left with the appearance of a jury tainted by prejudice. At a minimum, the Jury was aware that some sort of contact occurred to Juror #6 and that the juror was being questioned and removed. In addition, after the contact between Juror #6 and Mr. Cline, Juror #6 and the Jury had at least two hours to discuss the conversation and its effects. Therefore, this Court cannot ignore the appearance of prejudice created by the circumstances.

As Defendant's counsel stated during the hearing on the plaintiff's motions, a civil litigant is entitled to the same standard of jury as a criminal defendant. The conflicting narratives offered to the Court leave it with no authoritative narrative from which to assign

blame or infer prejudicial motive. What the Court is left with is a conversation which is in clear violation of both statute and precedent and an ample opportunity for the prejudicial effect of that conversation to compromise the remaining jurors who delivered the verdict in question.

It is for these reasons that the Court **FINDS** that, in the interest of maintaining the quality and impartiality of juries in this jurisdiction, the juror contact was prejudicial to the plaintiff to the extent that he has not received a fair trial.

It is therefore, **ORDERED, ADJUDGED, and DECREED** that the plaintiff's Motion to Set Aside the Verdict and Order a New Trial, is hereby **GRANTED**.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

IT IS SO ORDERED.

Entered on this, the 28 day of Sept., 2012.


Warren R. McGraw, Judge

A TRUE COPY ATTEST.
DAVID "BUGS" STOVER, CLERK

This the 28th day of Sept., 2012

By  Deputy.