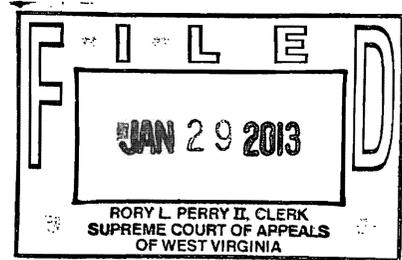


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-1337

Bluestone Industries, Inc.,  
a West Virginia Corporation; Bluestone  
Coal Corporation, a West Virginia  
Corporation; and Frontier Coal Company,  
a Delaware Corporation,



Petitioners/Defendants Below,

v.

Appeal from a final order of  
the Circuit Court of Wyoming  
County (No. 08-C-256)

Timothy Keneda,

Respondent/Plaintiff Below.

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## Petitioner's Brief

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## **ASSIGNMENTS OF ERROR**

- (1) THE CIRCUIT COURT ERRED BY SETTING ASIDE THE VERDICT AND ORDERING A NEW TRIAL
- (2) THE CIRCUIT COURT ERRED BY DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON CLAIMS ARISING FROM W. Va. CODE § 23-4-2(d)(2)(ii)
- (3) THE CIRCUIT COURT ERRED BY DENYING DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON VICARIOUS LIABILITY CLAIMS AGAINST BLUESTONE INDUSTRIES, INC. AND BLUESTONE COAL CORPORATION

## **STATEMENT OF THE CASE**

This appeal stems from a defense verdict in a deliberate intent case in the Circuit Court of Wyoming County. Mr. Keneda asserted claims of deliberate intent, alter ego/veil piercing, and joint venture against Frontier Coal Company, Bluestone Industries, Inc., and Bluestone Coal Corporation. After a seven day trial, the jury found that the Respondent failed to establish elements (B) through (E) of the five part test found in W. Va. Code § 23-4-2(d)(2)(ii).

The deliberate intent action arose out of a workplace accident that occurred on February 10, 2008 at Frontier Coal Company's ("Frontier") new Double Camp No. 1 Mine in Wyoming County, West Virginia. (A.R. 669-670). Mr. Keneda was also permitted to maintain a deliberate intent action against Frontier Coal Company's parent corporation, Bluestone Industries, Inc., and a related entity, Bluestone Coal Corporation, through claims of alter ego, joint venture, and piercing the corporate veil. (A.R. 46, 667-668).

### **(1) Summary of Facts Regarding the Accident**

On February 10, 2008, Mr. Keneda and six co-workers gathered at the newly established Frontier mine site to continue work building a mine portal canopy for the No. 4 Entry. (A.R. 81, 135). Mine portal canopies are placed at the outside entrance of underground coal mines to

protect workers from failing material as they enter and exit the coal mine. (A.R. 664). The canopy at issue was previously damaged when a portion of the highwall slid down the face of the highwall and onto the canopy. (A.R. 35, 131). At that time, the mine was not yet in production and the Mine Safety & Health Administration (MSHA) entered an order requiring the mine to rebuild all of its canopies prior to continuing development work. (A.R. 58).

Certified mine foreman Lanny “Bruno” Cline and Chief Electrician Jeff Compton, both mine management, primarily supervised the canopy rebuilds. (A.R. 61, 67, 75). Jeff Compton and trainee electrician Caleb Lester were both experienced welders. (A.R. 85, 160) Timothy Keneda and George Jude were underground roof bolter operators assisting in the work. (A.R. 327, Jude 209). “Outside man” Clayton Morgan, and endloader operator, Anthony Lester, also helped with the project that day. Mine superintendent Randall Lester was at the mine prior to the accident, but was not present when the accident occurred. (A.R. Lester 2, 64). Randall Lester is Caleb Lester’s father. (A.R. Lester 86).

To construct the new canopy, the crew welded six inch steel “I-beams” on one and a half foot (1.5’) centers to create the “studs” on the canopy wall. (A.R. 663). The wall was five feet (5’) high and approximately twenty-five feet (25’) long. (A.R. 65-66) The plan was to construct the two sides while the wall was lying on the ground, and then lift the two sides upright, brace them in place, and then attach the canopy roof. (A.R. 74)

At some point that morning, the crew used the endloader to raise one wall. (A.R. 86). The erected wall was then welded onto two beams running perpendicular to the wall lying on the ground. (A.R. 64, 287). The wall was then braced by welding two beams at an angle, with one on each side of the wall (A.R. 109-110), between one-half and one-quarter of the way up (A.R. 109-110, 138, 165, 167, 175). Jeff Compton welded the braces to the wall. (A.R. 138, 198)

Timothy Keneda and George Jude did not perform any welding on the braces. (A.R. 220 - 221). Jeff Compton shook the wall to ensure it was secure. (A.R. 139, 176).

Jeff Compton and Caleb Lester spent the morning performing most of the welding, including all primary and most important “root passes.”<sup>1</sup> (A.R. 178). Once the wall was erected, braced, and the root passes made, Compton and Lester alternated with Timothy Keneda and George Jude to go back over the welds to add strength and “fill in holes.” (A.R. 184, 198-199, 214). Compton and Lester switched out with Keneda and Jude approximately two or three times that morning. (A.R. 222). Bruno Cline did not weld, but spent considerable time working around the upright wall. (A.R. 150). This included hitting the wall with a hammer to knock off slag. (A.R. 139).

Approximately five minutes before the wall fell, Jeff Compton switched out with George Jude. (A.R. 222). Bruno Cline and Jeff Compton climbed up the nearby stacker belt<sup>2</sup> to perform some work while George Jude and Timothy Keneda continued to go over the welds. (A.R. 185). Despite the bracing, a huge and unexpected gust of wind (A.R. 145-146, 171, 185, 226) blew one side of the canopy wall over onto Mr. Jude and Mr. Keneda.

The wind that knocked the wall over was an unanticipated and extraordinary gust, much stronger than any prior wind. (A.R. 145, 186). The wind was so strong that it shook and buckled the coal stacker belt, scaring Bruno Cline and Jeff Compton into thinking it was either going to tip over or that they were going to be blown off. (A.R. 146-147, 185-186). Jeff Compton described the wind as sounding like a “jet engine”, and told how he could hear it “coming out of

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<sup>1</sup> The root pass welds are the most crucial part of the weld and is the weld that primarily bonds the two pieces of metal. The remaining welds are simply “filling in” and adding additional strength. (A.R. 178)

<sup>2</sup> A coal stacker belt is the high point on the line belt in which the coal is piled up for transport. At its highest point, it is approximately 40 feet above ground. (A.R. 82, 665)

the head of the holler.” (A.R. 185). In fact, Mr. Cline testified that if he thought such a wind gust would be forthcoming, he would not even have climbed up the stacker belt. (A.R. 145-146).

As a result of the accident, Mr. Keneda and Mr. Jude<sup>3</sup> both filed deliberate intent suits against Frontier Coal Company, Bluestone Industries, Inc., and Bluestone Coal Corporation for their injuries. (A.R. 666).

On the eve of trial, Mr. Keneda dismissed claims of negligence against all defendants. (A.R. 547-548). The trial court, over Petitioners’ objection, permitted the corporate claims to go forward. The case proceeded to a jury trial on the deliberate intent and corporate liability theories. (A.R. 51, 548). At the close of Mr. Keneda’s case and again at the close of all the evidence, the Defendants moved for judgment as a matter of law, which the trial Court denied. (A.R. 401, 427). At the conclusion of the seven day trial, the Wyoming County jury entered a verdict in favor of the Defendants, finding that Mr. Keneda failed to satisfy elements (B) through (E) of the deliberate intent statute. (A.R. 549-551).

## **(2) Summary of Facts Regarding Issue of Alleged Juror Misconduct**

Prior to jury deliberations, an issue arose with Juror No. 6. On the seventh and final day of trial, the Court dismissed the jury and the parties for lunch prior to beginning jury deliberations (A.R. 488). Towards the end of the lunch recess, Bruno Cline, who was present as the trial representative of Frontier Coal Company, was standing on the stairs to the main entrance

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<sup>3</sup> George Jude and Constance Jude, Plaintiffs v. Bluestone Industries, Inc., Bluestone Coal Corporation, and Frontier Coal Company, Wyoming County Circuit Court Civil Action No.: 09-C-207. Jude was originally set for trial on May 14, 2012, but the Circuit Court entered an April 30, 2012 Order continuing the trial date and all corresponding deadlines indefinitely. The Jude case is a companion case to the Keneda matter and was consolidated for the purposes of discovery. Both plaintiffs are represented by the same counsel, both complaints allege verbatim theories of liability against the same defendants, both cases share the same liability experts offering the same opinions, and both cases share identical witnesses and exhibits. Defendants’ filed a motion to combine the trial for purposes of liability, but the trial court denied this motion.

of the Wyoming County Courthouse before court resumed. (A.R. 498). Juror No. 6 was walking in from lunch. (A.R. 498, 505) There is some discrepancy over who initiated the conversation, but regardless, a very brief exchange ensued in the plain view of many, where Juror No. 6 and Mr. Cline discussed the hot weather (A.R. 499), the juror's current job (Id.), and the general downturn in the coal job market (A.R. 500). Juror No. 6 advised that he had his "red hat" card and Mr. Cline stated that he believed the hiring would pick back up soon. (A.R. 500).

This entire conversation took only moments before one of Mr. Keneda's counsel, Pamela Lambert, observed the exchange as she returned to the court house. (A.R. 507). She advised them they should not be speaking to each other. (Id.). Ms. Lambert then brought the incident to the court's attention, and the court held a hearing in chambers to determine how to proceed. During this hearing, the Respondent's counsel questioned both Mr. Cline and Juror No. 6. At the conclusion of the questioning, Respondent's counsel specifically moved that Juror No. 6 be dismissed and that Alternate Juror No. 8 be moved into his place. (A.R. 511). At no time prior to the defense verdict did Respondent's counsel move for a mistrial based on the alleged jury misconduct issue.

The Court dismissed Juror No. 6 and moved Alternate Juror No. 7 into his place based on the procedure agreed to by the parties prior to the trial, and consistent with the West Virginia Rules of Civil Procedure. (A.R. 512, 515). The Court resumed in open session and the Court dismissed Jurors No. 6 and No. 8 without public explanation (A.R. 518). The Jury then immediately began its deliberations and returned a defense verdict a short time later. (A.R. 486, 549-551).

On May 14, 2012, Plaintiff filed his Motion to Set Aside the Verdict and Order a New Trial. In support of his Motion, Plaintiff raised four issues: (1) alleged improper contact between

Juror No. 6 and Defendants' trial representative; (2) defense counsel's reference to the Mandolidis v. Elkins Industries, Inc. 161 W. Va. 695, 246 S.E.2d 907 (1978) case during closing arguments; (3) Defendants' jury instruction regarding intervening cause; and (4) Defendants' jury instruction advising that deliberate intent was more than negligence. (A.R. 559-562). After briefing by both parties and a hearing on Respondent's motion, the lower court entered an Order on September 28, 2012 setting aside the verdict and granting a new trial solely on the juror contact issue. (A.R. 654-662). The court expressly declined to decide the remaining three questions.<sup>4</sup> (A.R. 655). It is from this Order that the Petitioners now appeal.

### SUMMARY OF ARGUMENT

The trial court erred in granting a new trial on the grounds of juror misconduct for three reasons. First, the trial court properly remedied any possibility of prejudice by replacing the juror in question with an alternate prior to deliberations. Despite this action, the Court still misapplied the law of juror misconduct and failed to find actual prejudice, instead finding only the "appearance of" or "opportunity for" prejudice. Second, Respondent waived any right to move for a mistrial because it was only after the Respondent received an adverse jury verdict that he claimed that the alleged misconduct warranted a new trial. Third, the court erred by reaching factual findings plainly contradicted by the record. Based on the law of juror misconduct in West Virginia, the court should have denied the Respondent's motion for a new trial and respected the jury's verdict.

Regardless of the juror misconduct issue, this case should not have proceeded to a jury in the first place. Petitioners moved for judgment as a matter of law at the conclusion of

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<sup>4</sup> If this Court determines that the alleged juror misconduct was not sufficient to warrant a new trial, this Court should refrain from remanding the case for further consideration of the remaining questions. Remanding would result in the high likelihood of serial, piecemeal appeals in this case, and result in the parties appearing before this Court again in the future.

Respondent's case-in-chief. The Respondent failed to prove "actual knowledge" or a violation of a rule, regulation, or statute, and therefore did not establish a prima facie case of deliberate intent pursuant to W. Va. Code § 23-4-2(d)(2)(ii). Specifically, the fact that several members of the mine's management and the superintendent's son worked directly next to Mr. Jude and Mr. Keneda in the moments leading up to the accident conclusively proved that mine management did not believe that the work area was unsafe or that the working conditions presented a high degree of risk and strong probability of serious injury or death.

Also, safety rules and regulations relied upon by Respondent are not specifically applicable to the work and working condition involved. MSHA "task training" regulations are not applicable because task training is only required for tasks that a miner will perform as part of his or her regular duties. West Virginia rules regarding construction on surface areas of coal mines do not apply because the laws are intended to apply to large scale construction projects and not "yard work" type fabrication. Finally, as this work occurred on a surface area of an underground coal mine, MSHA regulations require only an "on shift" examination at an unspecified time, but do not require a "pre-shift" examination.

Finally, the allegations against Frontier Coal Company's parent corporations, Bluestone Industries and Bluestone Coal Corporation, fail as a matter of law<sup>5</sup> and should have been dismissed at the conclusion of Respondent's case. The Respondent voluntarily dismissed negligence claims against the Bluestone entities prior to trial. Therefore, the only viable avenue of relief left is a corporate "veil piercing" type theory. However, an unjust result is a required element for veil piercing. The Respondent did not establish any evidence of even the prospect of an unjust result, nor did they prove anything more than that these companies were related and

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<sup>5</sup> Because the allegations against Bluestone Industries, Inc. and Bluestone Coal Corporation fail as a matter of law, these claims should have been dismissed, as the Petitioners moved the court to do, before trial even began.

shared some office space, employee benefits, and a safety department. Finally, the legal theory of “joint venture” is not possible in a parent-subsidary relationship due to the required elements of equal management and profit sharing.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Petitioners request oral argument in this matter pursuant to Rule 20 of the Revised Rules of Appellate Procedure. This case presents several issues of first impression. Specifically, the assignments of error raise issues of whether a party waives its right to a new trial based on juror misconduct when it fails to move for a mistrial at the time the conduct was brought to the court’s attention; whether a deliberate intent suit can be maintained when the evidence establishes a supervisor knowingly exposed him or herself to the same working conditions that a plaintiff alleges after-the-fact constituted a high degree of risk and strong probability of serious injury or death; whether a “veil piercing” theory is available to sue a parent corporation in a tort/deliberate intent action with no prospect or evidence of an unjust result; and whether a parent corporation can be sued under a joint venture theory of liability for the conduct of a subsidiary.

### **ARGUMENT**

#### **(1) THE CIRCUIT COURT ERRED BY SETTING ASIDE THE VERDICT AND ORDERING A NEW TRIAL**

##### **A. Standard of Review**

This Court applies a two-pronged deferential standard of review to determine whether a trial court’s decision to grant a new trial was appropriate. For rulings by the circuit court concerning a new trial and its conclusions as to the existence of reversible error, this Court applies an abuse of discretion standard. Syl pt. 1, Phares v. Brooks, 214 W. Va. 442, 590 S.E.2d 370 (2003). For underlying factual findings, this Court applies a clearly erroneous standard. Id.

Questions of law are subject to de novo review. Id. “Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court’s ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.” Syl. pt. 2, Id.

**B. The trial court misapplied the law of juror misconduct by not finding actual prejudice.**

In its order granting a new trial, the trial court misapplied the law of juror misconduct and failed to find the necessary elements required for a new trial. Specially, the court found that even though it had “no authoritative narrative to assign blame or infer prejudicial motive,” the conduct resulted in “an ample opportunity for the prejudicial effect of that conversation to compromise the remaining jurors who delivered the verdict in question.” (A.R. 662). The court also found that it could not “ignore the appearance of prejudice created by the circumstances.” (A.R. 661-662).

However, West Virginia law requires a showing of prejudice before a new trial can be ordered. Under West Virginia law regarding jury misconduct:

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; and 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 defendant to the extent that he has not received a fair trial.**

Syl. Pt. 2, State v. Sutphin, 195 W. Va. 551, 466 S.E.2d 402 (1995)(emphasis added).

Although the question of whether a juror was improperly influenced is left to the discretion of the trial court, influence must be “clear and convincing to require a new trial.”

Haight v. Goin, 176 W. Va. 562, 565, 346 S.E.2d 353, 356 (1986)(citing Syl. Pt. 7, State v. Johnson, 111 W. Va. 653, 164 S.E. 31 (1932)). Therefore, “proof of mere opportunity to influence the jury [is] insufficient.” Id. In other words, prejudice, and not just the *appearance* of prejudice or the *opportunity* to influence, must be established.

Respondent will likely cite to Legg v. Jones, 126 W. Va. 757, 30 S.E.2d 76 (1944), for the proposition that when a party participates in the misconduct, an examination of prejudice is not required. This argument is rooted in the language of the opinion which states:

Upon a clear and satisfactory showing of misconduct by a juror induced, or participated in, by an interested party, no proof is required that the misconduct resulted in prejudice to the complaining party. Prejudice is presumed and unless rebutted by proof the verdict will be set aside.

Id. at 763, 80.

However, this argument is a misreading of the law. Legg states that prejudice may be rebutted by proof. In this case, prejudice was rebutted by questioning, and then ultimately removing, Juror No. 6 prior to deliberations.

**C. The trial court erred in assuming prejudice when the assumption was clearly rebutted and when any possibility of prejudice was remedied by the dismissal of Juror No. 6 prior to deliberations.**

Any potential prejudice to the Respondent is rebutted by the factual testimony of Juror No. 6, and was further eliminated by the fact that Juror No. 6 never participated in the deliberations.

The trial court brought both the Juror and Mr. Cline in to conduct a hearing to determine whether any improper influence had occurred. During the hearing in chambers, Juror No. 6 testified:

Q: Does the fact that you had this conversation and what went on in the conversation make you feel like that you have any obligation or worry about how you might decide the case, or would it bother to fully deliberate the case?

A: Ah.... No. No, I was doing - - no, I'm going by the evidence. You know look over all of it and you know I'd make my choice to which case would win, which party would win the case.

\* \* \* \*

Q: Would you hold it against Mr. Keneda that fact that you've come in and been asked to explain what happened?

A: No, sir.

Q: During deliberations?

A: No, not against him.

Q: You might hold it against her [plaintiff's counsel], huh?

A: No.

\* \* \* \*

Q: Did you consider the conversation to be something casual?

A: Yeah, just casual. We was talking.

Q: Did you consider it to be innocent?

A: Yeah, innocent.

Q: Okay. Has the fact that you've talked with him influenced you at all in this case?

A: No, I still .... You know, all the evidence and all I'd still make the right decision in what to do in it.

(A.R. 507, 509-510)

Both parties had the opportunity to inquire about the facts and the mindset of both individuals. Based on the clear testimony of Juror No. 6, it is obvious that the exchange had no impact on his ability to decide the case fairly and impartially. The Juror viewed the exchange for exactly what it was; a harmless and casual conversation in front of the courthouse and in purview of everyone returning. The Juror did not view the conversation as discussing an employment

opportunity or any other improper motive as subsequently contended by the Respondent. (A.R. 506). This testimony rebuts the prejudice that is presumed because a party participated in the contact.

Regardless, no matter how the alleged influence on Juror No. 6 is analyzed, the possibility of prejudice was eliminated when Juror No. 6 was removed from the panel before deliberations began. In Flesher v. Hale, 22 W. Va. 44 (1883), a juror was noticeably under the influence of alcohol and sleeping during the morning of the final day of trial. Counsel for both parties and the court discussed what to do with the juror. At that time, all agreed that the case would be better tried with the remaining eleven jurors. When court resumed that afternoon, the juror took his place in the jury box, and counsel agreed that it was “immaterial” what happened to the juror at that point. The jury deliberated for several days and returned a verdict against the defendant. Afterwards, the defendant moved for a new trial. This Court held that the defendant waived his right to complain of the conduct because he agreed to allow the juror to remain on the panel. In its analysis, the Flesher court stated “had [the defendant] made the objection and insisted on it, the court could, under our statute, have had another juror sworn in his place.” Id. at 50. Had this occurred, “[t]he objection . . . could have been obviated at that time.” Id. In other words, the juror misconduct issue could have been avoided by simply replacing the juror.

Cases from other jurisdictions provide similar guidance. For example, in United States v. Marshall, 767 F.2d 293 (6th Cir. 1985), the Sixth Circuit examined a case where a juror had a telephone conversation with the brother of a government witness. The juror’s supervisor was the brother of a police officer testifying against the defendant. The supervisor contacted the juror and asked about the status of the case and whether his brother had testified yet. The juror

notified the court and, after a hearing, the court denied the defendant's motion for a mistrial. Instead, the court dismissed the juror and replaced him with an alternate.

On appeal, the defendant relied heavily on Budoff v. Holiday Inns, Inc., 732 F.2d 1523 (6th Cir. 1984)<sup>6</sup>, which states that improper juror contact "so taints the trial that the appearance of impropriety compels a new trial as a prophylactic rather than remedial measure." Id. at 1525-26. However, the Sixth Circuit upheld the trial court's denial of the motion for a mistrial and distinguished Budoff. In its analysis, the court held that

[I]n Budoff the charge of jury taint was made because the juror there remained on the jury; he participated in the deliberations as the elected foreman. The possibility that the contact would in some manner affect the jury deliberations and verdict was therefore quite distinct. Here, the District Court immediately replaced the juror with an alternate. The juror who had been contacted took no part in any deliberations. The District Court essentially erected a wall between the potential for taint and the remaining jurors.

Marshall, 767 at 296.

The Sixth Circuit concluded that removing the juror in question prior to deliberations remedied any possible prejudice, and therefore did not warrant a new trial.

Other cases have reached similar conclusions. For example, in United States v. Doherty, 867 F.2d 47, 72 (1st Cir. 1989), the First Circuit determined that *ex parte* communication between the judge and a juror (which is still subject to a rebuttable presumption of prejudice, Id.) was not prejudicial because the juror was excused and had no further contact with the remaining jurors and did not participate in further deliberations. Likewise, the Ninth Circuit held that a judge's *ex parte* communication with a juror on the second day of trial was not prejudicial because the juror was replaced prior to deliberation. United States v. Lustig, 555 F.2d 737, 746

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<sup>6</sup> In Budoff, a paralegal from plaintiff's counsel's firm contacted the son of a juror, whom she had a previous friendship with, and purposefully discussed various aspects of the case. The defendant moved for a mistrial prior to deliberations, but the court denied this motion. The defendant did not move to strike the juror on strategic grounds, and the juror was eventually elected foreman and participated in deliberations. The facts of Budoff are clearly very different from the facts of our case.

(9th Cir. 1977). In its reasoning, the court concluded that “[i]t is difficult to see what prejudice could result from placing an alternate juror, approved by the defendants [during voir dire], on the jury in place of a juror who cannot fairly perform his duties. The opposite would have been prejudicial.” *Id.* Finally, in an unpublished opinion, the Second Circuit held that a juror who attempted to ask a prosecuting attorney a question in an elevator was not prejudicial because the juror was eventually dismissed prior to deliberations and because there were no issues with the court’s refusal to immediately dismiss the juror “based on [the defendant’s] speculation that some conceivable prejudice might somehow have spread to the other jurors.” United States v. Massey, 2003 U.S. App. LEXIS 6292 (2nd Cir. 2003).

Similar to the above cited cases, the Respondent cannot establish prejudice that warrants a new trial, because the Court dismissed Juror No. 6 prior to deliberations.

**D. Respondent waived his right to a new trial when he did not move for a mistrial at the time the alleged juror misconduct issue was discovered.**

Even if the trial court was correct in its conclusion that perceived or potential prejudice warranted a new trial, and that this prejudice was not remedied by removing Juror No. 6 prior to deliberations, the Respondent still should have moved for a new trial before deliberations began. “[A party] cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct.” United States v. Jones, 597 F.2d 485, 488 n. 3 (5th Cir. 1979). However, this is exactly what Respondent chose to do during the trial of this case. The Respondent, likely for strategic reasons, did not move for a mistrial or a new trial upon the discovery of the alleged jury misconduct. Instead, in his request for relief, the Respondent specifically stated:

The Court: Motions?

Counsel: The Plaintiff moves to disqualify Juror Number Six and place instead the alternate. The reason being that – the reason being that he testified that this contact was made by Mr. Cline and they discussed jobs and as I said Mr. Cline is in a position to offer him a job. This is certainly not the way that we wished the case had been submitted to the jury, but that's where we are.

(A.R. 511).

Counsel's motion was an acknowledgment on his part, prior to the verdict, that the appropriate remedy was to replace the juror. If any prejudice existed after the jury verdict, it also equally existed prior to deliberations. In other words, the same prejudice that Respondent argues now warrants a new trial should have been equally present at the time of Respondent's motion. However, at the time, Respondent apparently did not believe the misconduct warranted a mistrial. The Respondent now argues that the *only* way to alleviate the alleged misconduct is via a new trial. However, the Respondent should not be permitted to seek a new trial on these grounds now that he disagrees with the verdict. To allow the Respondent to now argue otherwise would allow for inconsistent positions depending on the posture of Respondent's case.

The trial court granted that relief and removed Juror No. 6 from the panel before the jury began its deliberations. (A.R. 512) The only disputed issue was *which* alternate to seat. The court advised that it planned to move Alternate No. 7 into the panel. (A.R.513). Respondent's counsel stated his "preference" that Alternate No. 8 be used instead (Id.), and argued, because he viewed this as an "intentional act," that he should get to pick the alternate. (Id.). In its ruling, the trial court denied this motion because the purpose of replacing the juror "was not to punish" and because the parties agreed prior to trial that alternates would be utilized in the order in which they were called. (A.R. 515).

This is exactly the procedure prescribed by Rule 47(c) of the West Virginia Rules of Civil Procedure:

(c) *Alternate jurors.* — The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. **Alternate jurors in the order in which they are called shall replace jurors who become or are found to be unable or disqualified to perform their duties....**

(emphasis added)

Therefore, the only relief the Respondent did not receive was contrary to both the established procedure agreed upon by the parties and the Rules of Civil Procedure. As such, this ruling is the only trial court ruling that the Respondent should have any grounds to challenge. To allow a party to get the relief they request, and still request a “re-do” only after their strategy fails, would destroy both judicial efficiency and disrespect the finality of a jury verdict.

West Virginia does not have any law directly on point, but the same rationale was applied in a similar juror misconduct case and should be equally applicable. In Legg v. Jones, *supra.*, a member of the jury spent the night at the home of a law partner of defense trial counsel on the last night of trial. The juror’s wife and the law partner’s wife were friends and the juror lived far from the location of trial. When the juror’s wife called her family to inform them she would not be home that night, the telephone message was eventually relayed to someone who knew plaintiff’s counsel, who then informed plaintiff’s counsel of the issue. After the jury began deliberations, but before a verdict was returned, plaintiff’s counsel informed his co-counsel and plaintiff of the information, but the plaintiff did not bring the issue to the attention of the court until after the jury rendered its verdict.

On appeal, the Court held that when

“a new trial is asked on account of irregularity or misconduct of the jury, it must appear that the party so asking called the attention of the court to it as soon as it

was first discovered or as soon thereafter as the course of the proceedings would permit, and if he fail or neglect to do so, he will be held to have consented [or] to have waived all objections to such irregularity or misconduct, and, unless it be a matter which could not have been waived, or which could not have been remedied or obviated, if attention had been called to it at the time it was first discovered, he will be estopped from urging it as a ground for a new trial."

126 W. Va. at 765, 30 S.E.2d at 80.

While in the present case the Respondent brought the matter to the Court's attention as soon as the alleged misconduct was discovered, the Legg court's analysis provides significant guidance in this case: "[t]he rationale of this rule is that a party will not be permitted to remain silent hoping for a satisfactory verdict from the jury, and then complain when he is disappointed therein." Id.

The same rationale should apply to the present case. Respondent made a strategic decision not to move for a mistrial during the hearing on the alleged juror misconduct. Instead, he sought a remedy in the form of replacing Juror No. 6. The Court obliged this request and followed agreed procedure and the Rules of Civil Procedure to replace the juror. It was only after the jury returned an unfavorable result that the Respondent claimed that the misconduct warranted a new trial.

**E. The trial court relied on clearly erroneous factual findings to support its grant of a new trial.**

The trial Court made clearly erroneous factual findings that are alone sufficient to overturn its grant of a new trial. First, in the Court's order, it relied heavily on the finding that "[a]t a minimum, the Jury was aware that some sort of contact occurred to Juror #6 and that the juror was being questioned and removed." (A.R. 661). The Court described the factual basis for this finding in Paragraph 8, which states:

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.) . . . .

(emphasis and citations<sup>7</sup> in original).

This description of events and resulting factual finding is clearly erroneous and not supported by the facts developed during the hearing. The Court believed Juror No. 6 told the remaining jurors about the conversation. This is completely contrary to a direct question and answer from the juror. Instead, Juror No. 6 testified unequivocally:

Q: All right. Have you had any other conversations – have you talked to any other jurors about the case or anything like that?

A: No.

Mr. Hanna [Counsel for the Defendant]: Do you mean about the conversation?

Q: Yeah. Yeah, I mean about the conversation?

A: No, I ain’t told none of them nothing.

(A.R. 508)

Instead of accepting this straightforward testimony, the court cites several unrelated quotations from three different pages of the record out of context. The resulting factual description reads like a chronological narrative and results in the incorrect conclusion that the juror walked upstairs, told the other jurors he made a mistake, went to the restroom, went back into the jury room, and then told the jurors that “I’m the one they’re gonna blame for a mistrial.” This chronology is simply not what happened.

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<sup>7</sup> These citations are to the original transcript and do not correspond to the Appendix on appeal.

First, the statement “it was a mistake on my part” came from a response to the question: “Do you want to describe [to the Judge] how it came about that you had that conversation?” In response, Juror No. 6 described his version of the events, and then concluded by testifying: “Pam [one of Respondent’s trial counsel] come along and said, ‘You all can’t be talking.’ Well we went on about our business and I come on back inside. I said ‘Yeah, it was a mistake on my part, you know, even saying something to him after he asked me where I worked.’” (A.R. 505-506). Based on the context of this testimony, the Juror made the statement to Respondent’s counsel Pamela Lambert as they were going inside.

Second, the statement “I went back to the restroom and went back upstairs. I went to the jury room” was in response to the question “What did you do after [Ms. Lambert came by]?” This testimony was isolated and not in sequential order as the Court’s description would lead one to believe.

Finally, the remainder of Juror No. 6’s testimony, taken in context, shows that he was simply describing his state of mind at the time of questioning. The entire context of the testimony is as follows:

Q. Okay. So it doesn’t bother you that this conversation took – that Ms. Lambert saw this conversation going on and reported to the Judge?

A. Ah... not really, not much. I know, you know, she seen me so... that’s about it. And I said, “Well I’ve really messed up now.” I’m the one they’re going to 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. It’s been a little rough on me, two weeks. And I don’t want to go to be the one to goof it up.”

(A.R. 509)(emphasis added).

When the above described testimony is read in context, and especially taken in light of the direct testimony that Juror No. 6 had not told the remaining jurors about the conversation, it

is evident that the Court's factual determinations and findings were clearly erroneous. Even though the trial court is granted discretion in awarding a new trial, the court must rely on facts in the record and is not allowed leeway to rely on inconsistent factual conclusions. The Court erred when it reached these factual conclusions and relied on these conclusions to find that the remaining jury "was tainted by prejudice" based on "the Jury [being] aware that some sort of contact occurred to Juror #6 and that the juror was being questioned and removed." Such error is grounds to overturn the Court's order granting a new trial.

**F. Conclusion regarding grant of new trial on the grounds of juror misconduct.**

The fact of the matter is that this was simply a very short casual exchange between two friendly people, on the steps of the entrance to the courthouse, in the middle of the day, with any number of individuals witnessing the brief exchange. It was certainly not wise<sup>8</sup> or ideal, but any chance of impropriety was remedied when the Juror was removed. The remaining jury was unaware of the conversation and therefore fully able to deliberate the evidence fairly. Without prejudice and without a proper motion for a new trial prior to the unfavorable jury verdict, the Court's order granting a new trial should be overturned and the original verdict reinstated.

**(2) THE CIRCUIT COURT ERRED IN DENYING PETITIONERS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON CLAIMS ARISING FROM W. Va. CODE § 23-4-2(d)(2)(ii).**

Regardless of the outcome of the alleged jury misconduct question, this is a case that should not have proceeded to a jury in the first place. At the close of Respondent's case,<sup>9</sup> the

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<sup>8</sup> Mr. Cline testified during the hearing that he heard the trial court advise the jury not to talk to any party or attorney, but also stated that he only thought they could not talk "pertaining to the case." (A.R. 498-499) ("I wasn't talking to him about the case. I didn't know I couldn't speak to people."). While this does not justify his actions, it demonstrates that this was an honest misunderstanding on his part and not some intentional act carried out with ill will. Mr. Cline's misunderstanding is further supported by the literal instruction given by the court to the jurors "Do not discuss [the case] with anyone. Do not permit them to discuss [the case] with you." (See e.g. A.R. 483).

<sup>9</sup> Petitioners also renewed this motion at the conclusion of all the evidence. (A.R. 427)

Petitioners moved for judgment as a matter of law<sup>10</sup> on several different grounds,<sup>11</sup> including the failure to prove a prima facie case of “deliberate intent” under W. Va. Code §23-4-2(d)(2)(ii). The trial court denied this motion, and it is from this denial that the Petitioners appeal.

If a circuit court denies a party’s motion for a directed verdict at trial, that party may raise the denial as error on an appeal subsequent to the entry of a final order. See Dixon v. American Industrial Leasing, 162 W. Va. 832, 253 S.E.2d 150 (1979). The standard of review for a directed verdict motion is de novo. Adkins v. Chevron, USA, 199 W. Va. 518, 522; 485 S.E.2d 687, 691 (1997).

**A. The West Virginia Legislature encourages prompt judicial resolution of Deliberate Intent claims via a motion for judgment as a matter of law.**

“When the plaintiff’s evidence, considered in light most favorable to him, fails to establish a prima facie right to recovery, the trial court should direct a verdict in favor of the defendant.” Syl. pt. 1, Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996). Within the context of “deliberate intent” claims filed pursuant to W. Va. Code § 23-4-2(d)(ii), the West Virginia Legislature specifically declares:

[C]onsistent with the legislative findings of intent to **promote prompt judicial resolution** of issues of immunity from litigation under this chapter... the court **shall dismiss** the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find each and every one of the facts required to be proven by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision.

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<sup>10</sup> Defendants moved for judgment pursuant to Rule 50 of the West Virginia Rules of Civil Procedure. Defendants titled the motion a “Motion for Directed Verdict” and are now referring to it under the correct phrase of a “Motion for Judgment as a Matter of Law.” However, because existing case law refers to a “Motion for Directed Verdict,” the Petitioner uses the terms interchangeably in this brief for clarity on the application of legal precedent.

<sup>11</sup> In addition to arguments made during oral arguments, the Defendants submitted a written brief explaining their arguments. (A.R. 401-426, 526-546).

(emphasis added)

Courts should dismiss deliberate intent actions when it finds insufficient evidence to satisfy all five deliberate intent elements. The trial court failed to meet this standard by denying the Petitioners' Motion for Judgment as a Matter of Law at the conclusion of Respondent's case, and again at the close of all evidence.<sup>12</sup>

**B. To establish a prima facie case of “deliberate intention,” the plaintiff must prove all five elements contained in W. Va. Code § 23-4-2(d)(2)(ii).**

Because the Petitioners are employers<sup>13</sup> with workers' compensation coverage, it is entitled to the statutory immunity provided by § 23-2-6 of the West Virginia Workers' Compensation statute. The Petitioners lose that immunity only if the Respondent satisfies the five elements of W. Va. Code § 23-4-2(d)(ii)(the “Deliberate Intent Statute”). Each element and sub-element of the five-part test must be proven. The two elements relevant to this appeal are parts (B) and (C), which state:

- (B) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;
- (C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;

W. Va. Code § 23-4-2(d)(2)(ii)(B)-(C).

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<sup>12</sup> In reality, the trial court should have dismissed this action at the summary judgment phase. Instead, the court summarily denied the Petitioners' motion for summary judgment orally, and without explanation and without making any findings of facts or conclusions of law.

<sup>13</sup> Respondents brought this action alleging “deliberate intent” against each Petitioner, claiming all three were his “employer.”

If the Plaintiff fails to satisfy even one of the five elements, the statute directs that the court shall dismiss the action upon a motion for a directed verdict. W. Va. Code § 23-4-2(d)(2)(iii)(B). When a plaintiff utilizes the five requirements of § 23-4-2(d)(2)(ii), “his evidence must be strong enough that it essentially equates to a showing that ‘the employer . . . against whom liability is asserted acted with ‘deliberate intention.’” Blevins v. Beckley Magnetite, 185 W. Va. 633, 641, 408 S.E.2d 385, 393 (1991) (citations omitted).

Finally, a plaintiff must satisfy all five elements for each and every specific unsafe work condition alleged. “In other words, he could not prove element number one applicable to one condition, element number two applicable to another, and so on. All five elements must be proven for each unsafe condition, or any one unsafe condition before liability may be put to the jury.” Handley v. Union Carbide Corp., 620 F. Supp. 428, 436 (S.D.W.V., Haden, J. 1985).

**C. The Respondent failed to prove a prima facie right of recovery under the deliberate intent statute.**

(1) The Respondent failed to prove any “actual knowledge” on behalf of the Petitioners.

Element (B) of the five-part test requires a plaintiff to show that “the employer, prior to the injury, had actual knowledge of the specific unsafe working condition . . .” W. Va. Code § 23-4-2(d)(2)(ii)(B). In order to satisfy part (B) of the deliberate intent test, a plaintiff must “present sufficient evidence, especially with regard to the requirement that the employer had [actual knowledge] of the existence of such specific unsafe working condition and the strong probability of serious injury or death presented by such specific unsafe working condition.” Syl. Pt. 5, Deskins v. S.W. Jack Drilling Co., 215 W. Va. 525, 600 S.E.2d 237 (2004)(internal citations omitted). “This requirement is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong

probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possesses such knowledge.” *Id.* “The standard . . . to satisfy [the deliberate intention statute] is ‘actual’ knowledge. This is a high threshold that cannot be successfully met by speculation or conjecture.” Mumaw v. U.S. Silica Co., 204 W. Va. 6, 12, 511 S.E.2d 117, 123 (1998).

This Court has identified several methods of proving “actual knowledge”<sup>14</sup> through direct evidence. These options include prior similar accidents involving the same unsafe working condition; prior citations or admonishments by regulatory agencies for the specific unsafe working condition; and prior employee complaints regarding the specific unsafe working condition: Deskins, *supra*; see also Mayles v. Shoneys, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990); Blevins, *supra*; and Bell v. Vecellio and Grogan, Inc., 191 W. Va. 577, 477 S.E.2d 269 (1994).

When examples of the above direct evidence are not available, a plaintiff is left to prove “actual knowledge” through circumstantial evidence. Under the statute, “whether an employer has [actual knowledge] of an unsafe working condition and its attendant risks, and whether the employer intentionally exposed an employee to the hazards created by the working condition, requires an interpretation of the employer's state of mind, and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn.” Syl. pt. 6 (in part), Coleman v. R.M. Logging, Inc., 226 W. Va. 199, 700 S.E.2d 168 (2010).

Circumstantial evidence can also disprove the existence of “actual knowledge.” Common sense affirms the fact that an individual will not intentionally expose themselves or a loved one to a high degree of risk and a strong probability of serious injury or death. This Court

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<sup>14</sup> It is also worth noting that the actual knowledge must be held by a supervisor having authority and responsibility over the particular work involved in the alleged specific unsafe working condition. Ramey v. Contractor Enters., 225 W. Va. 424, 430, 693 S.E.2d 789, 796 (2010).

acknowledged this fact of life in Sedgmer v. McElroy Coal Company, 220 W. Va. 66, 640 S.E.2d 129 (2006). In Sedgmer, an underground coal miner was injured when a man bus on which he was a passenger collided with an accidentally diverted coal car on an underground rail. His foreman was also sitting on the man bus, but was able to jump to safety prior to impact. The man bus was parked on a spur rail line waiting for loaded coal cars to pass on the adjacent mainline. Because of a prior fatality, the mine had a policy requiring miners to disembark man buses and wait at specific locations while waiting for coal cars to pass on the mainline. The Supreme Court affirmed the trial court's granting of summary judgment on a number of grounds. However, as part of its analysis, the Court noted:

We observe that [Defendant], Eugene Saunders, who was [Plaintiff's] foreman, was exposed at all relevant times herein to the same potential risks as the [Plaintiff]. There is no indication that can be gleaned from the record that Mr. Saunders intended himself or anyone else to be injured.

Id. at 70, 133, fn. 3

In the current case, the same observation must be made. On the day of the accident, two Frontier management employees, Lanny Cline and Jeff Compton, supervised the construction of the canopy. The undisputed evidence developed in the case shows that both men were consistently exposed to the same working conditions that the Plaintiffs allege caused this accident, even mere minutes before the accident happened.

Mine Forman Bruno Cline and Chief Electrician Jeff Compton were both considered management at the mine and were responsible for the work being performed on the day of the accident. (A.R. 61, 67). Mr. Compton spent a significant amount of time working directly next to the raised wall. (A.R. 171, 182-183). In fact, had Mr. Jude not relieved him approximately five minutes before the accident, the wall would have likely fallen on him and not Mr. Jude. (A.R. 184).

Mr. Compton did not believe the braced wall created a high degree of risk or strong probability of serious injury or death. Mr. Compton testified that the wall was sturdy in his mind (A.R. 176); that there was no indication it was going to fall (A.R. 184); and that it seemed perfectly safe to him (Id.). To test the braces, Mr. Compton testified that he shook the wall to make sure it was sturdy. (A.R. 176). Perhaps the most telling testimony came in the following question and answer:

Q: At the time you were down there, did you have any concerns about that wall falling on you?

A: No. I wouldn't have been there myself if I had thought it was unsafe.

(A.R. 183).

Foreman Bruno Cline offered similar testimony. Mr. Cline, although not welding, worked regularly next to the wall while he knocked the slag off with a hammer, and was standing next to the wall just moments before it fell over (A.R. 139, 150).

The actions of superintendant Randall Lester also demonstrate that he believed the wall was safely supported. Before Mr. Lester left the worksite that morning, he saw the wall was braced and walked over to look at it. (A.R. 64). He did not see anything that he thought was a hazard (A.R. 86), and testified that "I thought it was safe." (A.R. 112). When he left, Mr. Lester was aware that his son would be welding on the wall while he was gone. (A.R. 86). As Mr. Lester testified:

Q: Did you think the wall wasn't braced well enough for your son to be there welding?

A: If I had thought they was in imminent danger, somebody was going to get hurt, you know I would have done something right there – especially, with my son down there with the welding shield on welding.

(Id.).

The fact that Mr. Lester's son, Caleb Lester, also welded on the wall and worked directly where Mr. Keneda was injured further proves that Mr. Lester believed the wall was adequately braced. Had Mr. Lester believed that the wall was inadequately braced, no father would allow his son to be intentionally exposed to a "high degree of risk and strong probability of serious injury or death."

In addition to the testimony regarding the perceived adequacy of the bracing, the fact that Bruno Cline and Jeff Compton proceeded onto the coal stacker belt, approximately forty feet in the air on a narrow piece of equipment, establishes that neither man anticipated the huge wind gust would ensue. (See A.R. 665). Bruno Cline testified that he is "scared of heights" and that he "wouldn't have been up there" if the wind had blown that hard at any point prior to the accident that day. (A.R. 145-146). Jeff Compton also testified that he would not have gone up the stacker belt if he knew the wind was going to be that strong. (A.R. 186).

The undisputed circumstantial evidence offered at trial establishes that all three management individuals responsible for the work on the day of the accident believed the wall was adequately braced and was safe. Just as in Sedgmer, there is no indication that can be gleaned from the record that the on-hand management employees, Mr. Cline or Mr. Compton, intended themselves or anyone else to be exposed to a high risk of serious injury or death. The same is equally true for Mr. Lester, who would certainly not intentionally expose his son to a similar risk. No reasonable jury could have concluded, even allowing Respondent all reasonable inferences, that Lanny "Bruno" Cline or Jeff Compton intentionally exposed themselves to a wall that they knew was inadequately braced, or that Randall Lester would allow his son to weld on the wall had he known of the risk presented. Therefore, the trial court should have granted the

Petitioners' motion for a directed verdict on Element "B" (actual knowledge) of the deliberate intent statute.

- (2) The Respondent failed to prove any violation of a safety statute, rule, regulation, or commonly accepted written safety standard.

Element "C" of the deliberate intent statute requires the Plaintiff to prove the alleged specific unsafe working condition,

[W]as a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions.

W. Va. Code § 23-4-2(d)(2)(ii)(C)

As an initial matter, "an expert witness may not testify as to questions of law such as the principles of law applicable to a case, the interpretation of a statute, the meaning of terms in a statute, the interpretation of case law, or the legality of conduct. It is the role of the trial judge to **determine, interpret and apply the law applicable** to a case." Syl pt. 10, France v. Southern Equipment Co., 225 W. Va. 1, 689 S.E.2d 1 (2009)(emphasis added). By combining the clear holding in France to the language of Element "C," the resulting legal principle is this: In deliberate intent cases, it is the role of the trial court to determine whether the state or federal rule, regulation, or statute "was specifically applicable to the particular work and working condition involved." It is up to the jury, as the finder of fact, to determine whether a defendant's conduct violated that specific law.

In this case, the Respondent introduced an exhaustive list of state and federal law that it believes are "specifically applicable" to the work being performed on February 10, 2008. It is

difficult to keep track of the various provisions as the Respondent's theory of liability changes each time they are asked to explain.<sup>15</sup> Regardless, the Petitioners will address every law raised in this case and explain why each is not "specifically applicable to the particular work and working condition involved."

**(a) 30 C.F.R. 48.27 ("Task Training")**

Respondent alleges the Petitioners violated 30 C.F.R. 48.27 by not providing "task training" to Mr. Jude and Mr. Keneda prior to welding. Generally, task training is required before a miner operates mobile equipment, or begins a new permanent job classification in the mine. 30 C.F.R. 48.27(c) states:

(c) Miners assigned a new task not [covered in the section involving mobile equipment] shall be instructed in the safety and health aspects and safe work procedures of the task, including information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program, prior to performing such task.

For the purpose of this subsection, 30 C.F.R. 48.22(f) defines a "task" as "a work assignment that includes duties of a job that occur **on a regular basis** and which requires physical abilities and job knowledge."

Federal mine regulators interpret the phrase "regular basis" to mean exactly what it says. In Bridger Coal Company v. MSHA, 23 FMSHRC 887 (2001), an experienced miner was killed while operating ("bumping") a bridge crane in the mine's maintenance shop. The miner was classified as a "mine service operator" and was primarily assigned to move mining equipment around the mine property. On the day of the accident, the miner was assigned to assist heavy

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<sup>15</sup> For example, Respondent relied extensively on W. Va. C.S.R. § 36-23-1 (Rules and Regulations Governing Surface Construction Operations Within Coal Mining Industry within the State of West Virginia) at trial to support Element "C" of the deliberate intent claim. However, this rule section was never cited or otherwise disclosed in the Respondent's expert's disclosure or in specific written discovery on the issue (A.R. 245, 274-275). Regardless, the trial court allowed Respondent to use the un-disclosed expert opinion over Petitioner's objection.

equipment mechanics in changing out the tracks on a bulldozer. During the operation, a chain slipped and fatally injured the miner.

MSHA cited Bridger Coal Company under 30 C.F.R. 48.27(c) on the ground that the operator never “tasked trained” the miner in “bumping” the bridge crane. Bridger Coal Company acknowledged it did not train the miner, but argued that the job was not performed on a “regular basis.” Significantly, the evidence in that case showed the job of “bumping” the crane was performed “occasionally” and the deceased miner had personally performed the same job in the past. The Federal Mine Safety and Health Review Commission<sup>16</sup> analyzed the requirements of both 30 C.F.R. 48.27(c) and 30 C.F.R. 48.22(f) and held that

“[The miner’s] assignment to bump did not occur on a regular basis. Hence, based on the clear language of Section 48.22(f), I find that the assignment of [the miner] to bump on [the day of the accident] **did not constitute a task.** Accordingly, since Bridger’s training obligations under Section 48.27(c) is required only when miners are assigned a new task, and [the miner’s] assignment did not fall with this category as it did not meet the definition in Section 48.22(f), Bridger was not required to provide him with training under Section 48.27(c).”

The Respondent will likely contend that the Petitioners interpretation of a “regular basis” is incorrect. Specifically, the Respondent will probably argue that the phrase “job that occurs on a regular basis” means a job that is performed regularly at a coal mine, not that a specific employee performs the job regularly. However, this interpretation misses the basic facts of Bridger. In that case, the job of operating the bridge crane was performed regularly at the mine. In fact, the mine even had a task training requirement on the operation of the bridge crane. The miner that was fatally injured even performed the task of operating the bridge crane in the past. Regardless of all of these facts, the FMSHRC still held that the mine was not required to task

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<sup>16</sup> The Federal Mine Safety and Health Review Commission (FMSHRC) is the independent adjudicative agency with the United States Department of Labor that provides trial and appellate review of legal disputes arising under MSHA regulations. It is the highest level of administrative law judges that interpret federal mining regulations.

train the miner, because *that* miner's assignment to operate the crane did not occur on a regular basis.

In the case at hand, Mr. Jude and Mr. Keneda were welding prior to the accident. This welding project was an isolated project. Unlike the Bridger case, Mr. Keneda never performed this task at the mine prior to this accident. The evidence is clear that welding and constructing the canopy was not part of Mr. Jude and Mr. Keneda's "regular" job assignment. This does not mean that a coal operator can assign anyone to a one-time task without providing training. It simply means that this is not a violation of the specific "**task** training" MSHA regulations.

As welding and constructing a metal canopy was not a work assignment that occurred "*on a regular basis*," it is therefore not a "task" under federal mining regulations. Because the regulations are not specifically applicable to the work or working condition involved, 30 C.F.R. 48.27 is not applicable to this case and no "task training" violation occurred.

**(b) W. Va. C.S.R. § 36-23-1, et seq. ("Rules and Regulations Governing Surface Construction Operations Within Coal Mining Industry Within the State of West Virginia")**

W. Va. Code of State Rules 36-23-1 applies to construction operations on surface areas within the coal mining industry. W. Va. C.S.R. § 36-23-3.8 defines "Construction Work" as "the building, rebuilding, alteration, or demolition of any facility or addition to existing facility at a surface mine or surface area of an underground mine, including painting, decoration or restoration associated with such work, but excluding shaft and slope sinking and work performed on the surface incidental to shaft or slope sinking."

Fabricating a canopy does not meet the definition of "construction work" for several reasons. First, a five foot tall canopy is not a "facility" as contemplated by the rules. The rules, which are approximately 160 pages in length, were intended to address larger construction

projects on coal mines such as building preparation plants, load-outs, or tipples. Under the interplay between federal MSHA regulations and OSHA regulations, OSHA regulations do not apply on MSHA bonded coal properties. Therefore, OSHA's construction rules would equally not apply to large scale construction projects on mine sites. To address this situation, the West Virginia Office of Miner Health, Safety, and Training (WVOMHST) promulgated W. Va. C.S.R. § 36-23-1, et seq. to provide for safety regulations for construction sites. The regulation was never intended to govern common "yard work" performed on the surface areas of coal mines that is frequently performed by coal miners.

Although the question of whether a citation was issued is not determinative for Element C, the fact that State mine inspectors investigated the accident and did not issue any citation, under W. Va. C.S.R. § 36-23-1, et seq., or otherwise, is persuasive that the state construction rules do not apply. During the time between the original highwall collapse and the canopy rebuilds, inspectors from the WVOMHST visited the worksite. (A.R. 276-277). After the subject accident, inspectors from the WVOMHST conducted an investigation of the accident. (Id.). However, at no time did the WVOMHST cite Frontier for violating the surface construction regulations. (Id.) Had the WVOMHST considered the surface construction regulations applicable, or had there been a violation, Frontier would have been cited. Because the rules are not specifically applicable to the work or working condition involved, W. Va. C.S.R. § 36-23-1 is not applicable to this case.

**(c) 30 C.F.R. § 75.360 ("Pre-shift Examinations")**

Respondent argued that Frontier Coal Company should have performed a "pre-shift examination" of the working area prior to beginning work. However, this is an inaccurate statement of MSHA regulations. The Code of Federal Regulations regarding coal mine safety

and health (Subchapter O) is split into several parts. Part 75 covers “underground coal mines.” Part 77 covers “Surface coal mines and surface work areas of underground coal mines.” 30 C.F.R. 77.1713(a) states:

(a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

In other words, operators are required to perform “on shift” examinations of working areas on the surface of underground coal mines, but not a “pre-shift” examination. In this instance, the Court should have determined that 30 C.F.R. 77.1713 is the pertinent regulation to this case and that 30 C.F.R. § 75.360 is not specifically applicable to the work and working conditions involved in this case.

For these reasons, the trial court should have granted the Defendants’ motion for a directed verdict on Element “C” (violation of law) of the deliberate intent statute.

**(3) THE CIRCUIT COURT ERRED BY DENYING DEFENDANTS’ MOTION FOR A DIRECTED VERDICT ON VICARIOUS LIABILITY CLAIMS AGAINST BLUESTONE INDUSTRIES, INC. AND BLUESTONE COAL CORPORATION**

The entire body of evidence introduced regarding the relationship between Frontier Coal Company and Bluestone is as follows: The Respondent, and other employees, went to Bluestone’s office in Beckley to fill out paperwork during his application. (A.R. 327). Bluestone transferred employees from one subsidiary mine to another during idling. (A.R. 4). Randall Lester considered Bluestone employee Kenny Lambert his “boss.” (A.R. 3). Bluestone employee Pat Graham served as safety director (Id.), but only visited Frontier once prior to the accident (A.R. 128). Randall Lester referred to Bluestone as the “mother company” (A.R. 8). Bluestone pays for “everything.” (A.R. 11). Bluestone approves Frontier’s budget. (A.R. 11-12).

Bluestone engineer Derek O'Neal prepared the schematic for the canopy design (A.R. 42-42). Bluestone's name appeared on employee health insurance and other benefit forms (A.R. 38).

The above describes a fairly typical parent-subsidary corporate relationship. Parent companies frequently provide human resource, technical, accounting, and safety support services for the subsidiary while also equally respecting necessary corporate formalities. Further, because the negligence claims were dismissed against the Bluestone entities, Respondent must satisfy the elements necessary for "veil piercing" from this evidence in order for liability to attach. However, the proffered evidence does not establish a prima facie case to warrant submission to a jury.

**(A) The Respondent did not establish a prima facie case to "pierce the corporate veil" and make Bluestone vicariously liable for Frontier Coal Company's actions.**

"The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders." Syl pt. 3, Southern Elec. Supply Co. v. Raleigh County Nat'l Bank, 173 W. Va. 780, 320 S.E.2d 515 (1984). In other words, "[t]he mere showing that one corporation is owned by another or that they share common officers is not a sufficient justification for a court to disregard their separate corporate structure." Southern States Coop. v. Dailey, 167 W. Va. 920, 930, 280 S.E.2d 821, 827 (1981).

This legal principle applies equally in the parent-subsidary context. As the United States Supreme Court wrote in United States v. Bestfoods, "[i]t is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." 524 U.S. 51, 56 (1998). Practically speaking, this means "a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary will not be penalized by a judicial determination of liability for the legal obligations

of the subsidiary.” *Id.* (internal citations omitted). West Virginia has affirmed this principle of law as well. Syl pt. 1, in part, First Huntington Nat’l Bank v. Guyan Mach. Co., 121 W. Va. 589 (1939)(“A parental corporation is not necessarily liable for the acts of its subsidiary because of parental control.”). As Frontier and Bluestone are all separately incorporated businesses, the law presumes they are separate and distinct legal entities. The simple fact that they share common ownership is not enough to impute liability.

West Virginia law recognizes an equitable remedy that allows claimants to “pierce the corporate veil.” This is a narrow exception to the general rule of limited liability. In rare instances, “[j]ustice may require that courts look beyond the bare legal relationship of the parties to prevent the corporate form from being used to perpetrate injustice, defeat public convenience or justify wrong.” Southern States Coop., 167 at 930. However, “piercing the corporate veil” may only be done in “exceptional circumstances” and corporate formalities should “never be disregarded lightly.” Laya v. Erin Homes, Inc., 177 W. Va. 343, 347, 352 S.E.2 93, 98 (1986). **“The burden of proof is on a party soliciting the court to disregard a corporate structure.”**

*Id.* (internal citations omitted)(emphasis added).

Laya v. Erin Homes, Inc. is the seminal case on veil piercing in West Virginia. Laya established a two-part test to determine whether the corporate veil should be pierced in a given case. Before the corporate form can be disregarded, a plaintiff must prove:

(1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement) **and (2) an inequitable result would occur if the acts are treated as those of the corporation alone** (a fairness requirement).

Syl pt. 3, *Id.* (emphasis added)

In other words, even if two corporations completely disregarded appropriate corporate

form, there still must be some inequitable result in order to treat the two entities as one. As the Laya court explained, "[t]he essence of the fairness test is simply that an individual [business person] cannot [be allowed to] hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." Id. at 351, 105 (internal citations omitted).

Regardless of how the jury interprets the various "control" related issues, there was no evidence offered to support a conclusion that any inequitable result will occur if these companies are not treated as two independent entities. Therefore a directed verdict should have been granted in favor of Bluestone Industries, Inc. and Bluestone Coal Corporation.

**(B) The Respondent did not establish a prima facie case that Bluestone and Frontier are "alter-egos."**

In addition to the "piercing the corporate veil," the Respondent also argues that Frontier Coal Company and Bluestone were "alter egos" of one another. As this Court explained:

The alter ego doctrines, alternatively "instrumentality", "identity", "agency", "piercing the corporate veil", or "disregarding the corporate fiction", are designed to prevent injustice when the corporate form is interposed to perpetrate an intentional wrong, fraud or illegality . . . . We recognize that each of these names designates a slightly different doctrine, but they have similar intent and effect. Courts use some of them interchangeably.

Southern Electric Supply Co., 173 W. Va. at 786 – 787, 320 S.E. 2d at 521-522; & fn. 9.

Therefore, even though Respondent attempts to describe the same basic allegation using a variety of legal terms, the end results are all the same. For this reason, a directed verdict in favor of Bluestone Industries, Inc. and Bluestone Coal Corporation on the issue of "alter ego" was proper.

(C) **Joint venture, as a matter of law, is not a proper claim for relief in the parent-subsidary context. However, even if it claim is viable, the Respondent did not establish a prima facie case that Bluestone and Frontier operated in a “joint-venture.”**

"A joint venture or, as it is sometimes referred to, a joint adventure, is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied." Syl pt. 5, Armor v. Lantz, 207 W. Va. 672, 535 S.E.2d 737 (2000).

"An **essential element** of a partnership or joint venture **is the right of joint participation in the management and control of the business.** . . . Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer." Id. at 680, 745 (internal citations omitted)(emphasis added). Therefore, before a joint venture can be established, there must be sufficient evidence of "joint control and management of the property used in accomplishing its aims." Id. (internal citations omitted). Importantly, "the control required for imputing negligence under a joint enterprise theory is not actual physical control, but the **legal right to control** the conduct of the other with respect to the prosecution of the common purpose." Id. (internal citations omitted)(emphasis added); 46 Am. Jur. 2d. Joint Ventures § 13 ("To form a joint venture, there must be not only a joint interest in the objects and purposes of the undertaking, but also either an express or implied right of each member of the joint venture to direct and control the other with respect to all aspects of the alleged enterprise.").

"A partnership relates to a general business . . . while a joint adventure relates to **a single business transaction.**" Armor, at 743, 678. *See also* Lilly v. Munsey, 135 W. Va. 247, 254, 63 S.E.2d 519, 523 (1951) (joint venture "is sometimes called a limited partnership; not limited as

to liability, but as to its scope and duration") (citation omitted); Gelwicks v. Homan, 124 W. Va. 572, 578, 20 S.E.2d 666, 669 (1942) ("Joint adventure is akin to partnership, and one of the distinctions is that, whereas a partnership relates to a general business of a certain type, joint adventure relates to a single business transaction.")(citing Kaufman v. Catzen, 100 W. Va. 79, 130 S.E. 292 (1929)).

Finally:

“[a]n agreement, express or implied, for the sharing of profits is generally considered essential to the creation of a joint adventure, and it has been held that, at common law, **in order to constitute a joint adventure, there must be an agreement to share in both the profits and the losses.**”

Armor, at Id. (emphasis added)

A simple reading of the above law regarding joint venture in West Virginia shows why a joint venture would not apply in the standard parent-subsidary relationship. First, it requires as an essential element: a “**right** of joint participation in the management and control of the business.” Subsidiary companies never have the legal right to manage or control a parent corporation. While the subsidiary may be responsible for day-to-day operations, the parent has the sole right for strategic management decisions, such as whether to idle a mine, expand production, invest capital, or even create, dissolve, or sell the subsidiary. The subsidiary has no legal *right* to joint control of these matters.

Second, a joint venture requires a “single business transaction.” Parent-subsidaries interact daily with multiple business transactions. Finally, a joint venture requires both entities to “equally share in profits and losses.” As the owner of the subsidiary, the parent never shares profits or losses with the subsidiary entity. The parent company takes all profits and distributes funds to its shareholders. The subsidiary never receives any of this profit, because its sole shareholder is the parent entity. Likewise, the parent’s shareholders bear the sole burden of

losses incurred by a subsidiary. It is an entirely different arrangement than two unrelated entities splitting a profit equally, or being jointly liable for losses.

Veil piercing is the correct avenue of relief in the parent-subsidary context when a claimant seeks to impute the subsidiary's liability onto the parent corporation. Joint venture is the corresponding remedy when a claimant seeks to impute the liability of two otherwise unrelated entities that are operating jointly in a single business enterprise. Based on the basic elements of joint venture, it is clear that joint venture is, as a matter of law, not appropriate in the parent-subsidary context in this case. See 46 Am. Jur. 2d. Joint Ventures § 60 (“there is authority<sup>17</sup> to the effect that when individuals determine to conduct business through a corporation, there can no longer be a joint venture since such individuals cannot simultaneously be joint venturers and stockholders, fiduciaries and nonfiduciaries, or personally liable and not personally liable.”).

Regardless of whether joint venture is even a viable legal claim in the parent-subsidary context, the Respondent failed to prove a prima facie case regarding the existence of a joint venture between Bluestone Industries, Inc., Bluestone Coal Corporation, and Frontier Coal Company. There was no evidence that Frontier shared profits and losses with Bluestone Coal Corporation and Bluestone Industries, Inc., that the companies jointly had the right to control the Double Camp No. 1 Mine, or that operating the mine was a single business transaction.

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<sup>17</sup> “Courts will not imply a joint venture where the evidence indicates the parties created a different business form. The unequivocal existence of a definite business form is the most reliable expression of the relationship among the parties.” Ritter v. BJC Barnes Jewish Christian Health Sys., 987 S.W.2d 377, 387 (Mo. Ct. App. 1999); “[T]he rule is well settled that a joint venture may not be carried on by individuals through a corporate form. The two forms of businesses are mutually exclusive, each governed by a separate body of law. When parties adopt the corporate form, with the corporate shield extend over them to protect them against personal liability, they cease to be partners and have only the rights, duties and obligations of shareholders. They cannot be partners *inter sese* and a corporation as to the rest of the world.” Westman v. Awnair Corp. of America, 3 N.Y. 2d 444, 449, 144 N.E.2d 415, 418 (N.Y. 1957)(internal citations omitted).

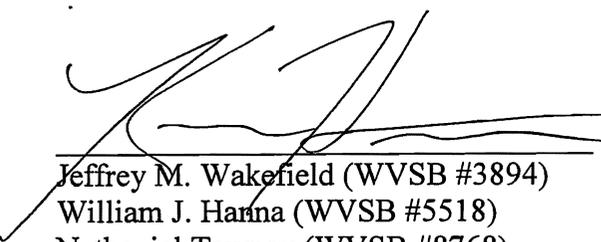
Therefore, a directed verdict was proper in favor of Bluestone Coal Corporation and Bluestone Industries, Inc. on the issue of “joint venture.”

**CONCLUSION AND PRAYER FOR RELIEF**

Petitioners respectfully request that the trial court order setting aside the verdict and granting a new trial be reversed, and the original verdict reinstated. Additionally, the Petitioners request that this Court overturn the trial court’s denial of the motion for judgment as a matter of law with regard to the deliberate intent claims, and the veil piercing/joint venture claims against Bluestone Industries, Inc. and Bluestone Coal Corporation. In overturning the denial of the motions for judgment as a matter of law, the Petitioners request that this Court enter judgment in favor of the Petitioners in lieu of remanding the case for further proceedings.<sup>18</sup>

**BLUESTONE INDUSTRIES, INC.,  
BLUESTONE COAL CORPORATION,  
and FRONTIER COAL COMPANY,**

BY COUNSEL,



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<sup>18</sup> This Court can overturn a denial of a directed verdict motion and enter judgment here in favor of a petitioner/defendant. *See Dixon v. American Indus. Leasing Co.*, 162 W. Va. 832, 838, 253 S.E.2d 150, 154 (1979).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 12-1337

Bluestone Industries, Inc.,  
a West Virginia Corporation; Bluestone  
Coal Corporation, a West Virginia  
Corporation; and Frontier Coal Company,  
a Delaware Corporation,

Petitioners/Defendants Below,

v.

Appeal from a final order of  
the Circuit Court of Wyoming  
County (No. 08-C-256)

Timothy Keneda,

Respondent/Plaintiff Below.

**CERTIFICATE OF SERVICE**

I, Keith R. Hoover, counsel for defendants, Bluestone Industries, Inc., Bluestone Coal Corporation, and Frontier Coal Company, do hereby certify that on the 29<sup>th</sup> day of January 2013, the foregoing “**Petitioner’s Brief**” and “**Appendix**” were served upon counsel of record:

Via hand delivery to:

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