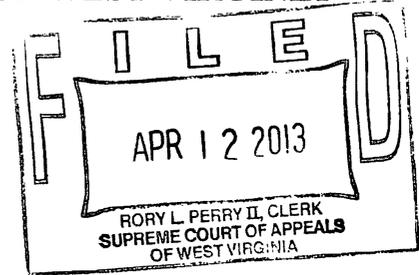


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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**Petitioners' Reply  
Brief**

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## PROCEDURAL STATEMENT

The Response brief asserts a Cross Assignment of Error. Under the original briefing schedule, this Reply was due twenty days after the filing of the response brief, or April 4, 2013. However, Rule 10(g) of the West Virginia Rules of Appellate Procedure states that when a respondent raises a cross assignment of error, a petitioner has thirty days to file a reply and is allotted an additional twenty pages. This Reply is submitted in accordance with Rule 10(g).

## INTRODUCTION TO THE REPLY

Respondent's strategy is clear: (1) avoid the defense verdict by contriving a jury scandal with baseless accusations against Petitioners' counsel; and (2) reinvent his deliberate intent case against parent company employees, who were never even present during the events giving rise to the underlying action, in the face of an undisputed and clear record that the on-site management never believed that the workers, or themselves, were exposed to conditions very likely to cause serious injury or death. This *Reply* primarily focuses on these two overarching issues, while also addressing many other inadequacies in the Response.

### **(1) REPLY TO RESPONDENT'S ARGUMENTS REGARDING THE COURT'S GRANT OF A NEW TRIAL DUE TO JUROR MISCONDUCT**

#### **A. Respondent's Dramatic Characterization of Events is Grossly Overstated.**

A brief, friendly and customary exchange between members of the same rural area does not result in a second bite at the apple after losing at trial. There is no question that the case law, even the long line of cases cited by the Respondent, recognizes that all juror contact does not automatically result in a new trial. As 58 Am Jur. 2d New Trial § 210 explains:

Parties and attorneys connected with a case on trial should carefully avoid private communications with jurors, but whether a new trial should be ordered because of such misconduct rests in the sound discretion of the court. A new trial generally will be ordered whenever it appears that such a communication has tended to create bias or prejudice in the minds of the jurors. On the other hand, where the

circumstances do not indicate prejudice, wrongful intent, or unfairness resulting from the improper communication, a new trial will not be granted. Courts generally recognize that it is not unusual for a party or for an attorney to engage in a casual conversation with a juror, and in many cases, such a casual communication will not constitute a sufficient ground for a new trial absent evidence that there was an improper discussion of the case.

(emphasis added).

Accordingly, in order for the Respondent to prevail on the alleged juror misconduct issue, he must make a mountain out of a molehill. The result is an elevation of the events of this case to, literally, the level of a John Grisham bestselling legal fiction. (Resp't Br. 13). The Respondent actually asserts that the entire issue with Juror No. 6 was an "intentional act"<sup>1</sup> on behalf of the Petitioners in order to "substitute the alternate juror [who was] favorable to their industry." (Resp't Br. 13).

The Respondent attempts to offer the following tale: the Petitioner/Defendant below believed it was going to lose the trial; the Petitioners' lawyers devise a scheme to have their trial representative intentionally wait for a member of the jury to come back from lunch; the trial representative offers Juror No. 6 a job, with the intention to get caught and the end result to get Juror No. 6 excused; Petitioners' counsel feigns a desire to keep Juror No. 6 on the jury, but really intends for Juror No. 6 to be removed so that a former mine foreman will participate in deliberations; and that the new mine foreman juror would take over deliberations and rescue the case from the five other jurors who were going to render a verdict in favor of the Plaintiff. As is self-evident, this tale is nonsensical.

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<sup>1</sup> The Respondent alleges conduct which would be a violation of Rule 3.5 of the West Virginia Rules of Professional Conduct. This rule states that a lawyer shall not seek to influence a juror or prospective juror by means prohibited by the law, shall not communicate ex parte with a juror, and shall not engage in conduct intended to disrupt a tribunal. If the Respondent *truly* believed the conduct was an intentional act on behalf of Counsel for Petitioner, then he presumably would have filed a complaint with the Office of Disciplinary Counsel. The fact that Respondent has not proves their narrative, as described, is only half-hearted rhetoric.

A few additional factual observations must be made in response to Respondent's concocted account. First, there is nothing in the appeal record to support the repeated assertion that Juror No. 7 was a former mine foreman. This fact should not be considered by the Court without the proper support in the appeal record. However, if the Court desires a complete picture of Juror No. 7, he revealed during *voir dire*<sup>2</sup> that he was also a disabled coal miner that had injured his back on two separate occasions.

Second, counsel for the Petitioners wanted to *keep* Juror No. 6 on the jury during the hearing in chambers (A.R. 511-512), but ultimately acquiesced to Respondent's desire to replace the juror, as Petitioners' main goal was to get the case to the jury. (A.R. 633). Third, the Respondent essentially accuses the Petitioner's trial representative of offering Juror No. 6 a job despite the clear fact that no such offer was extended.<sup>3</sup> (Resp't Br. 12). Juror No. 6 even testified that he did not consider it a discussion about going to work for the Petitioner. (A.R. 506).

Finally, and most importantly, the Respondent actually suggests that the delay in starting jury deliberations and the replacement of one juror was the reason Petitioners obtained a favorable verdict. The Respondent calls this their "primary prejudice." (Resp't Br. 17). The truth is, the jury deliberated for approximately one hour and returned a verdict by unequivocally answering "NO" on four of the five deliberate intent elements for all three defendants. (A.R. 550 – 551). Respondent did not lose at trial because of some eleventh hour premeditated scheme by the Petitioner to alter the jury. Respondent lost at trial because the jury did not believe his

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<sup>2</sup> The transcript from this portion of trial was not prepared because the Petitioners did not anticipate the background of Juror No. 7 would be a central focal point of Respondent's arguments, and Respondent did not request any additional portions in response to the Petitioners' Transcript Request Form.

<sup>3</sup> In fact, Mr. Cline's statement was about the general state of the coal industry. The exchange would have been very different had Mr. Cline stated that Pay Car Mining Company (his current employer) would be hiring red hat miners soon, or if he invited him to submit an application. (A.R. 501, 506)

implausible case – a case that should have been dismissed prior to trial pursuant to summary judgment or as a matter of law at trial under Rule 50 of the West Virginia Rules of Civil Procedure.

**B. Respondent fails to rebut the facts that (1) he did not move for a mistrial; (2) there is no prejudice when a juror does not participate in deliberations; and (3) the Court relied on facts not supported in the record.**

Respondent either disingenuously avoids, or altogether ignores, several salient points in the Petition for Appeal. First, the Respondent states that while he did not move for a mistrial, he nonetheless objected that “he was prejudiced regardless of whether the juror was replaced with the alternate or not” and that “there was no way to eliminate the prejudice to plaintiff under any circumstances.” (Resp’t Br. 20). However, these positions were never raised during the hearing in chambers prior to the verdict, and were only made in *post-verdict* motions. (A.R. 659-660). Moreover, the Respondent surprisingly claims that he moved to remove Juror No. 6 “prior to realizing that the alternate juror was the mine foreman . . . .” (Resp’t Br. 20). Within seconds of moving to disqualify Juror No. 6, Respondent began to express his strong desire to have Juror No. 8 participate in deliberations despite the previously agreed-to procedure and law. (A.R. 511 – 513). Obviously, the Respondent was aware of the jurors’ background contemporaneous with the motion to disqualify, or he would have no reason to request a different juror.

Second, the Respondent did not address the Petitioners’ argument that prejudice can be rebutted by striking the juror in question prior to deliberations. The multiple cases cited by the Petitioners all stand for this proposition. Respondent only attempts to distinguish these cases on weak factual grounds, without ever addressing the overarching point of law. There is no question that a juror misconduct issue can be remedied prior to deliberations without ever threatening the integrity of the jury verdict.

Third, the Respondent adopts the trial court's reliance on a clearly erroneous factual finding that Juror No. 6 discussed his exchange with Mr. Cline with other members of the jury. The Respondent embraces this inaccuracy without even addressing the factual testimony in the record that directly contradicts the trial court's narrative of events. Juror No. 6 offered straightforward testimony that he had not told the other jurors about the incident. (A.R. 508). The Respondent does not explain his rationale that this testimony should be disregarded; likely because he has no explanation.

**(2) REPLY REGARDING THE DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW AGAINST BLUESTONE INDUSTRIES, INC. AND BLUESTONE COAL CORPORATION**

**A. Respondent fails to address Petitioners' arguments regarding the vicarious liability theories of joint venture, alter ego, and veil piercing, and therefore cannot establish a prima facie case that should have survived a Motion for Judgment as a Matter of Law.**

The Respondent has no interest in trying to satisfy his burden of proof regarding the vicarious liability theories of joint venture, alter ego, and veil piercing. If he did, Respondent would have actually attempted to discuss the law and requisite elements of each. Instead, the Respondent broadly proclaims that "Bluestone ran their subsidiaries as divisions and departments," and that "[o]bviously, Frontier was simply a satellite mine and not a separate corporation." (Resp't Br. 1, 2). However, as recently reiterated by this Court, "a skeletal argument, really nothing more than an assertion, does not preserve a claim." Smith v. Apex Pipeline Services, Inc., fn. 16, No. 11-1610, --- W. Va. ---, ---S.E.2d. --- (April 4, 2013).

The undisputed evidence in the case establishes that Bluestone Industries, Inc., Bluestone Coal Corporation, and Frontier Coal Company are separately incorporated legal entities. (A.R. 872 - 891). A ruling to the contrary would require abandoning the most central tenant of business formation: "[t]he 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). Because Bluestone Industries, Inc., Bluestone Coal Corporation, and Frontier Coal Company are distinct legal entities, they must be considered separate corporations until the Respondent proves that the corporate form should be disregarded. The Respondent cannot simply conclude otherwise, and then ask that the Court take him at his word without first filtering his legal conclusion through the elements of each theory. The Response contains no mention or application of the elements of these theories, nor does it even attempt to rebut the legal conclusions made in the Petition for Appeal.

Additionally, Respondent has never attempted, whether during discovery, at trial, or on appeal, to explain how each theory uniquely applies to Bluestone Industries, Inc. and Bluestone Coal Corporation as two distinct legal entities, or to otherwise distinguish between the two corporations. This is because the Respondent simply wishes to ignore that they are separate entities. Instead, he casually refers to them as a fictional defendant called “Bluestone” without any regard to which Bluestone entity was actually responsible for the conduct Respondent alleges. “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). This Court should not “pierce the veil” of Bluestone Industries, Inc. or Bluestone Coal Corporation without specific evidence of why that particular entity should forfeit its corporate form. To do otherwise would violate the clear law that such forfeiture should only be done on limited occasions, and only with the support of very specific facts regarding “exceptional circumstances.”

Because Respondent fails to even respond to Petitioners’ legal arguments regarding joint

venture, alter ego, and veil piercing, this Court should hold that these theories are effectively withdrawn by the Respondent, and that he likewise cannot establish a prima facie case to survive a motion for judgment as a matter of law. See State v. LaRock, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996)(“Although [this Court] liberally construe[s] briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”). Therefore, this Court should reverse the trial court’s failure to grant Petitioners’ Motion for Judgment as a Matter of Law on all claims of joint venture, alter ego, and veil piercing against Bluestone Industries, Inc. and Bluestone Coal Corporation.

**B. The only remaining theory against “Bluestone,” a direct liability claim of deliberate intent, fails as a matter of law.**

There are two methods for pursuing a direct claim against a parent or affiliated corporation. The first method is widely accepted by courts, and involves a negligence claim against the parent or affiliated company based on theories such as “assumption of duty” or “independent acts of negligence.” See e.g. Muniz v. National Can Corp., 737 F.2d 145 (1st Cir. 1984)(assumption of duty); Loredo v. Solvay Am. Inc., 2009 WY 93, 212 P.3d 614 (2009)(same); Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979)(independent negligent acts). The Respondent chose not to pursue any of these generally recognized claims, and instead voluntarily dismissed all claims for negligence with prejudice. (A.R. 547-548). As such, the Respondent wagered his entire direct liability case on the allegation that “Bluestone” was the employer of all the workers at the Double Camp No. 1 Mine, and was therefore transformed into a deliberate intent defendant.

A claim for deliberate intent is not a standalone, common law cause of action. It is a unique legislative creation to determine whether an employer loses its immunity<sup>4</sup> from civil suit for workplace injuries. The sole purpose of the deliberate intent statute is to create a “legislative standard for loss of [employer] immunity.” W. Va. Code 23-4-2(d)(1). An essential first step in accepting Respondent’s claim that a parent company can be a “deliberate intent” defendant is a corresponding acknowledgement that the parent company can be a statutory employer. By default, this would also mean that a parent company is likewise immune from injured employee common law suits via W. Va. Code §23-2-6.

However, this is a theoretical first step that the vast majority of jurisdictions have expressly rejected. For example, in the Pennsylvania case of Kiehl v. Action Manufacturing Co., 517 Pa. 183, 535 A.2d 571 (1987), an employee of Action Manufacturing’s wholly owned subsidiary Amcon Inc. attempted to sue Action under a theory of independent acts of negligence. Action defended the case on the grounds that it was the plaintiff’s “employer” and was therefore entitled to the protection of Pennsylvania’s workers compensation immunity. The Kiehl court analyzed the issue using the exact same “control” arguments the Respondent seeks this Court to apply. In fact, Action even argued, just as the Respondent, that “as the parent it ultimately controls Amcom so as to reduce the subsidiary to a mere division of the parent.” Id. at 190, 574. The Pennsylvania Supreme Court rejected this argument, and held that under Pennsylvania law “a parent corporation and its subsidiary must be regarded as separate entities in regards to the Workmen’s Compensation Act.” Id. In its analysis, the Court relied heavily on the fact that

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<sup>4</sup> W. Va. Code §23-2-6 provides that “[a]ny employer subject to this chapter who subscribes and pays into the workers’ compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee . . . .”

“[w]hen faced with this argument, jurisdictions throughout the country<sup>5</sup> have characterized parent corporations as separate entities from their subsidiaries, and thus, not immunized by workmen’s compensation.” Id. at 191, 575.

Therefore, this Court should reject Respondent’s argument that it can maintain a “deliberate intent” lawsuit directly against “Bluestone.” As the only remaining theory of liability against “Bluestone,” this Court should reverse the trial court’s denial of its Motion for Judgment as Matter of Law and dismiss Bluestone Industries, Inc. and Bluestone Coal Corporation.

**(3) REPLY REGARDING THE COURT’S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING DELIBERATE INTENT.**

As an initial matter, the Response interchanges “Frontier” and “Bluestone” at will, as if to pretend that there was no such thing as Frontier Coal Company. This is not how deliberate intent law works; the five part deliberate intent test must apply to a specific unsafe working condition, known by a specific supervisor, at a specific entity. In the end, and with all obfuscation aside, Respondent fails to make a valid deliberate intent claim against any defendant.

**A. “Bluestone” could not have “actual knowledge” of a specific unsafe working condition because it had no supervisors present to control the canopy assembly.**

Respondent’s argument regarding “Bluestone’s” alleged deferral of supervision to Frontier and its supervisors during the canopy assembly creates a “Catch-22” scenario that the Respondent cannot overcome. On one hand, the Respondent allocates multiple pages of his brief arguing *ad nauseum* that “Bluestone” controlled every detail at this mine to the point that Frontier was only a “satellite mine” and not “an independent subsidiary.” Then, in an about-

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<sup>5</sup> See, e.g., Muniz v. National Can Corp., 737 F.2d 145 (1st Cir. 1984) (Puerto Rico law); Boggs v. Blue Diamond Coal Co., 590 F.2d 655 (6th Cir. 1979)(Kentucky law); First Nat’l Bank v. Tracor, Inc., 851 F.2d 212 (8th Cir. 1988) (Arkansas law); Love v. Flour Mills, 647 F.2d 1058 (10th Cir. 1981) (Oklahoma law); Gregory v. Garrett Corp., 578 F. Supp. 871 (S.D.N.Y. 1983) (Connecticut and North Carolina law); Peterson v. Trailways, Inc., 555 F. Supp. 827 (Colo. 1983); Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 314 (C.D. Cal. 1980) (Texas law), *remanded on other grounds*, 711 F.2d 1431 (9th Cir. 1983); Croxtan v. Crowley Maritime Corp., 817 P.2d 460 (Alaska 1991).

face, the Respondent bases an entire deliberate intent case on “Bluestone’s” absence the day of the accident. At its core, the Respondent alleges that Bluestone *controlled* the mine to such an extent as to abdicate its corporate formalities, but then is liable in this case because it *failed to control* the assembly of this canopy.

However, “Bluestone” is not capable of possessing actual knowledge because it did not have anyone present controlling the work prior to the accident. This Court analyzed the issue of whom must possess the “actual knowledge” to satisfy the deliberate intent statute in Ramey v. Contractor Enters., 225 W. Va. 424, 693 S.E.2d 789 (2010), and determined that it must be a supervisor with responsibility over the particular aspect of the work. In Ramey, a worker fell over a mining highwall during drilling operations. The plaintiff submitted an affidavit of a coworker that alleged he told “a supervisor” that the employer was working people too close to the highwall. This Court analyzed the affidavit and determined that it was not sufficient to establish actual knowledge. In its analysis, this Court focused on the fact that:

[T]he affidavit does not reveal if the unnamed supervisor had any role in supervising the *drilling* operations at the mine site or the extent of the supervisor's authority or area of responsibility. The statement could have been made to a supervisor having no real knowledge or responsibility regarding mining operations.

Id. at 430, 795. (emphasis in original).

In other words, actual knowledge cannot be held by *any* supervisor. Instead, it must be held by *the* supervisor having authority or responsibility regarding the particular unsafe working condition. This same reasoning applies to the current case.

Respondent argues repeatedly that Bluestone “did not send qualified personnel . . . to the mine to oversee the endeavor.” (Resp’t Br. 25). Respondent’s counsel argued during closing that “[Bluestone] had control of everything that went on there *except* for the actual labor and the

supervision of the labor at a particular time.” (A.R. 430)(emphasis added). The Response even admits that Frontier foreman Mr. Cline “was the foreman whose conduct was at issue in the trial” (Resp’t Br. 5), and that “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.” (Id.).

By Respondent’s own arguments, no one at “Bluestone” had any role in supervising the canopy assembly.<sup>6</sup> Instead, Frontier supervisors, especially Frontier foreman Bruno Cline, were in complete control of the canopy assembly. No one at “Bluestone” had any control of this work area, or the ability to direct and supervise the workers on the project. By Respondent’s own admission, this entire authority was vested solely in the superintendent, mine foreman, and the chief electrician at Frontier. There are no facts in the record to show otherwise. With no presence at the mine site, and accordingly without any ability to direct or supervise the work, no one at “Bluestone” possessed “actual knowledge” to satisfy the deliberate intent standard.

**B. “Bluestone” did not have “actual knowledge” that Frontier’s fabrication of the canopy created a high degree of risk and strong probability of serious injury or death.**

The Respondent now claims that “Bluestone” had “actual knowledge” that “the people that were on hand to build [the canopy] were not qualified” to perform the work. (Resp’t Br. 3). As the only support for this allegation, the Respondent relies on an MSHA citation issued five days prior.

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<sup>6</sup> Respondent may argue that the superintendent, Mr. Lester, testified at trial that he worked for “Bluestone.” (Resp’t Br. 1) (“the supervisor and employees at Frontier mine testified that they worked for Bluestone.” First, a workers’ employment status within the legal context creates many nuances unknown to lay people. The answer of these individuals alone should not establish employment. Regardless, Mr. Lester testified he was the superintendent of Frontier, and was always paid by Frontier when he worked there. (A.R. 8 & 10).

By way of background, on February 5, 2008, a large amount of rock slid off the mine's highwall and damaged the previously built canopy on the Number 1 Entry (A. R. 910). MSHA cited Frontier, stating that the canopies were not "substantially constructed"<sup>7</sup> to withstand a highwall collapse. (Id.). The handwritten MSHA notes from February 7, 2008 added that "[t]he operator did not know that the canopies were not constructed **of material heavy enough** to sustain a highwall rock fall." (A.R. 918)(emphasis added). MSHA also required an engineer to "certify **the materials** used to construct the canopies." (A.R. 941)(emphasis added).

As his primary evidence<sup>8</sup> supporting "actual knowledge," Respondent asserts that "Bluestone was aware of the situation requiring the construction of a new canopy given that safety director Pat Graham had received a copy of the citations from the February 5, 2008 highwall fall." (Resp't Br. 25). However, this citation, even with all reasonable inferences allowed, does not support the conclusion regarding "actual knowledge" Respondent now attempts to derive.

Actual knowledge requires "a conscious awareness of the unsafe working conditions." Ramey, 225 W.Va. at 431, 693 S.E.2d at 796. In the same vein, actual knowledge may not be based on mere "speculation or conjuncture." Mumaw v. U.S. Silica Co., 204 W. Va. 6, 12, 511 S.E.2d 117, 123 (1998). This Court recently applied these requirements to another case in Smith v. Apex Pipeline Services, Inc., No. 11-1610, --- W. Va. ---, ---S.E.2d. --- (April 4, 2013). In

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<sup>7</sup> The term "substantially constructed" is not defined anywhere in coal mining law. The regulations provide no guidance regarding the capacity standards, materials, and most importantly, who can and cannot construct them.

<sup>8</sup> The Respondent argued that Mr. Keneda complained about the unsafe condition prior to the accident. The only testimony in the record is that "I'm thinking I might have said something" (A.R. 334), without any details regarding to whom the comment was made or what was said. The Billy Trent testimony can be easily disregarded as well because Mr. Trent testified that he said the day prior that the wall was not braced at all. Not only does this contradict every other witness in the case that said the wall in question was not even raised until Sunday, but even if taken as true, Frontier braced the walls after Mr. Trent allegedly raised his concerns that the mine "should brace it up, put some legs on it . . . ." (A.R. 374)

Smith, the plaintiff fought summary judgment by relying on his expert's opinion that the employer

doubtlessly knew about [the unsafe condition] as such knowledge cannot be realistically or credibly denied as being universally known by workplace managers [or] they otherwise reasonably possessed a conscious awareness and understanding of [the unsafe condition] by virtue of their industry position, business operation, and related circumstances.

Id. at 18.

After examining the factual record, this Court concluded that the expert's argument lacked "specific or substantive reference to any facts demonstrating that, before [the accident], [the employer] had actual knowledge of the specific unsafe working condition." Id. This Court affirmed summary judgment, finding that the testimony made "absolutely no reference to specific facts" showing that the employer "actually knew of the existence of the specific unsafe working condition, and that the unsafe condition presented a high degree of risk and strong probability of serious injury." Id. (emphasis added) Instead, the entire evidence showing actual knowledge was based only on speculation that the employer "reasonably should have known" of the unsafe condition. Id.

Just like in Apex, the Respondent cannot point to specific or substantive facts in the record demonstrating "Bluestone's" actual knowledge. Instead, the Respondent only speculates as to what "Bluestone" should have known, because no one from "Bluestone" testified in this matter.

The February 5, 2008 citation proves, at the most, that Bluestone and Frontier were aware that the *materials* used on the prior canopies needed to be stronger. The issue with the February 5 highwall fall had nothing to do with *method* or the *quality* of the fabrication work or Frontier's

ability to work *safely*.<sup>9</sup> The handwritten MSHA notes from February 7, 2008 confirm that the reason MSHA believed the canopies were not substantially constructed was because of the strength of the materials. In fact, the canopy involved in the highwall collapse buckled under the heavy weight of large rocks, but did not completely collapse. (See picture of damaged canopy, A.R. 912).

This citation had nothing to do with the quality of the work, the safety practices used during assembly, or whether Frontier used allegedly unqualified workers to complete the work. There is simply no evidence to piece together a contention that a citation regarding canopy *materials* would have given Bluestone actual knowledge that Frontier employees building the canopy created a high degree of risk and strong probability of serious injury or death. The analytical gap is far too wide and too unreasonable to support the inference that the Respondent asks this Court to accept.

In fact, what is in the record is that the mine superintendent, Mr. Lester, has overseen the construction of approximately forty canopies over his thirty-nine year mining career without any incidents, including all five canopies that were previously constructed at this mine. (A.R. 54, 76). Mr. Lester also testified that he took on the responsibility of making the work safe for his men and did not feel the need to reach out to “Bluestone” for instructions on how to perform the work safely. (A.R. 55-56).

Mr. Lester’s experience stands in stark contrast to the unsupported assertions in the Response that “Bluestone” had personnel experienced in “surface construction” and that

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<sup>9</sup> In reality, this violation should not have even been admitted into evidence. In the context of deliberate intent, only evidence of prior accidents or violations that are “sufficiently similar” to the incident at issue are admissible to satisfy the Deliberate Intent elements. McBee v. U.S. Silica Co., 205 W. Va. 211, 215, 517 S.E.2d 308, 312 (1999). As explained above, a violation for inadequate material is not sufficiently similar to this accident. Petitioner objected to the admission of this violation in a pretrial motion in limine and again at trial. (A.R. 32-33). The Court allowed this evidence over Petitioners’ objection.

“Bluestone did not send qualified personnel, such as the safety director Mr. Graham or the engineer Mr. O’Neal, to the mine to oversee the endeavor.” (Resp’t Br. 25) Remarkably, both of these factual representations were made to this Court without any support in the record.

There is no support in the record that Mr. Graham or Mr. O’Neal would have been anymore “qualified” to perform this work than the Frontier employees working that day because neither Mr. Graham nor Mr. O’Neal have ever testified (at either deposition or at trial) in this matter. There is no evidence in the record about what Mr. Graham, Mr. O’Neal, or anyone else at “Bluestone” for that matter, actually knew or did not know. Instead, the crux of Respondent’s entire case against “Bluestone” is rooted in what “Bluestone” “should have known” based on an unrelated MSHA citation.

Without this leap, the Respondent does not have any evidence to support the allegation that “Bluestone” had actual knowledge that Frontier’s workers were allegedly unqualified. Without this requisite evidence, judgment as a matter of law for the deliberate intent claim against “Bluestone” should have been granted by the trial court.

**C. Respondent’s attempt to apply Ryan v. Clonch Industries, Inc., to either Frontier or “Bluestone” disregards the basic elements of that case.**

In their final attempt to establish “actual knowledge” on behalf of *either* “Bluestone” or Frontier, Respondent attempts to persuade this Court that it does not even need evidence of actual knowledge under the principles set forth in Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756 (2006). In Clonch, the plaintiff was cutting metal at a sawmill when a piece of metal struck his left eye, causing permanent blindness. Clonch Industries failed to perform a hazard assessment in violation of OSHA regulations that would have revealed the hazards. This Court concluded that Clonch acted like the proverbial ostrich who sticks its head in the sand to avoid seeing the obvious. In a new syllabus point, the Court held that:

Where an employee has instituted a deliberate intent action against an employer under [the Deliberate Intent Statute], and where the defendant employer has failed to perform a reasonable evaluation to identify hazards in the workplace in violation of a statute, rule or regulation imposing a mandatory duty to perform the same, the performance of which may have readily identified certain workplace hazards, the defendant employer is prohibited from denying that it possessed "[actual knowledge]" of the hazard asserted in the deliberate intent action, and the employee, upon demonstrating such violation, is deemed to have satisfied his or her burden of proof with respect to showing "actual knowledge" pursuant to [the Deliberate Intent Statute].”

Syl. pt 6, Clonch Industries, Inc.

Therefore, in order for Clonch to apply, three elements must first be proven: (1) a statute, rule, or regulation must impose a mandatory duty to perform a hazard inspection; (2) the employer must have failed to perform a reasonable evaluation to identify hazards in violation of the mandatory duty; and (3) the hazard must have been “readily” identifiable.

(i) *Clonch does not apply because there is no evidence in the record establishing that Frontier failed to perform a mandatory hazard evaluation.*

Clonch presented a unique factual scenario where the employer directly admitted that it had never conducted a hazard assessment at its facility. Id. at n. 7. Unlike Clonch, there is no evidence in the record of this case that Frontier failed to perform a mandatory hazard evaluation. As this was not underground mining, a “pre-shift examination” was not legally required. 30 C.F.R. § 75.360. Therefore, the only question is whether Frontier failed to perform an “on-shift examination” as required by mining law.

Respondent alleges that Mr. Cline did not perform an on-shift examination prior to the accident. (Resp. p. 25). In support, the Respondent cites to five pages in the appeal record. None of the cited testimony says that Mr. Cline failed to perform an on-shift examination. Mr. Cline explained his understanding of the on-shift requirements, and discussed how on-shift examinations are performed while the men are working. (A.R. 140). Neither he, nor anyone

else, testified that an on-shift examination was not performed. To the contrary, Mr. Lester pointed out during his testimony that mine inspectors reviewed the Pre-Shift and On-Shift inspection books the day after the accident, did not issue any citations, and that “if [the books] hadn’t been filled out properly there would have been a citation written on them.” (A.R. 63-64).

Respondent’s liability expert testified that he did not hear any witness testify that they performed an “on-shift” examination (A.R. 263), but that does not mean the inverse is likewise true. Simply put, the failure to perform a reasonable evaluation in violation of a mandatory legal requirement, which is a core element of Respondent’s Clonch argument, is nowhere to be found in the record. For this reason alone, Clonch should not apply.

(ii) *Foreman Mr. Cline was qualified to perform any mandatory on-shift examination required by applicable mining law.*

Respondent’s entire Clonch argument hinges on the assumption that Petitioners did not have anyone qualified to perform the hazard examination found in the West Virginia Office of Miners’ Health, Safety, and Training’s (OMHST) rules regarding Surface Construction Operations within the Coal Mining Industry. W. Va. C.S.R. § 36-23-1 et seq. As explained in the Petition for Appeal, Petitioners strongly disagree that these specific construction regulations apply<sup>10</sup> to building a five foot high canopy based on the definition of “construction work” and the disproportionate level of detail found in the 160 page long section of the Code of State Rules. However, Petitioners will assume they apply *arguendo* to rebut Respondent’s specific allegations.

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<sup>10</sup> Respondent characterizes Petitioners’ defense on these issues as saying NO safety rules applied to this work. This is not true. 30 C.F.R. Part 77 includes an entire subchapter of regulations regarding “Mandatory Safety Standards, Surface Coal Mines and Surface Work Areas of Underground Coal Mines.” There is no evidence the Respondent violated any of the almost 300 sections of safety regulations found in Part 77. Petitioners’ position in this case is that *these* specific state rules regarding construction on coal properties do not apply.

The section of the Surface Construction Operations rules relevant to Respondent's argument is W. Va. C.S.R. § 36-23-9, which states that "[t]he supervisor or competent person shall examine within the first (4) hours of a working shift...." Respondent's argument is based on the fact that a "certified construction supervisor" was not present during the canopy assembly, citing W. Va. C.S.R. § 36-23-7 ("Employment of Certified Supervisors"), which provides:

The employer shall designate at least one (1) certified construction supervisor for each surface construction project at each specific mine where the employer employs (10) or more employees or at least (1) competent person is designated for each surface construction project to perform the duties required of the certified construction foreman at each site employing less than ten (10) persons.

The evidence in this case established that a "Certified Construction Supervisor" was not required because less than ten Frontier employees worked on the canopy assembly. The construction supervisor requirement is intended to apply if a company has more than ten employees working at any particular surface construction project. Other sections of the rule define "employee" as "a person employed by the employer at a surface construction project." W. Va. C.S.R. § 36-23-3.13. Therefore, employees not working "at a surface construction project" are not within the scope of these specific definitions.

The record is very clear that no more than eight men were ever present at the jobsite during the fabrication work at issue in this case. (A.R. 135). As such, instead of a "certified construction supervisor," Frontier was only required to have a "competent person," which is defined as someone capable of "identifying existing and predictable hazards in the surrounding working conditions which are unsanitary, hazardous or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." W. Va. C.S.R. §36-23-3.7. No special certification or specific background is required. As an experienced and certified mine

foreman, Bruno Cline would certainly meet the requirements to be a “competent person.” (A.R. 90).

(iii) *The working condition relied upon by the Respondent was not “readily identifiable” as a hazard.*

The final element of Clonch requires that the hazard created by the specific unsafe working condition be “readily identifiable” during the mandatory hazard assessment. Ramey v. Contractor Enterprises, Inc., 225 W. Va. 424, 693 S.E.2d (2010)(“The [Clonch] case involved an employer who admitted that it had failed to perform a mandatory hazard inspection which would have revealed the unsafe working condition that resulted in the injury on which the deliberate intent action was based.”). It is not enough that the working condition is known; rather the working condition must be considered a *hazard* in the eyes of the person performing the inspection.

The clear and consistent testimony offered at trial established that the wall was braced before it fell. It was braced by welding it to two beams running perpendicular to the wall lying on the ground (A.R. 64, 287), and by welding two beams at an angle, with one on each side of the wall (A.R. 109-110). The testimony also proves that none of the management responsible for supervising the work viewed the method of bracing as a hazard. (A.R. 86, 112, 139, 150, 176, 183-184), Proof of this mental status is found in the fact that the mine foreman, the chief electrician, and the mine superintendent’s son all relied on the bracing and thought it was safe all morning. (A.R. 86, 139, 150, 183)

Again, Respondent resorts to arguments that the supervisors *should have*<sup>11</sup> recognized the method of bracing the wall was unsafe. In the best possible factual scenario available to the Respondent, foreman Mr. Cline and chief electrician Mr. Compton knew the method by which the wall was braced. That is as far as all reasonable inferences based on the evidence at trial will take them. The method of bracing the wall was not some hidden hazard that requires a systematic analysis to detect. Its method was known to everyone working on the job that day. What the evidence plainly shows is that Mr. Cline, Mr. Compton, and Mr. Lester viewed the bracing as sufficient and safe prior to the fall. Therefore, the “hazard” of the braces was not “readily apparent” before the accident.

As hard as the Respondent may try to argue to the contrary, the clear evidence in the case shows, and all reasonable inferences affirm, that the individuals charged with supervising the work at the mine at the time of the accident all viewed the bracing, and believed it was safe for their men, themselves, and their family members. Therefore, Clonch does not apply to this case.

**D. 30 C.F.R. § 77.1713(b) and W. Va. Code § 22A-1-15 are irrelevant to this Court’s analysis of the Motion for Judgment as a Matter of Law as neither section was relied upon below.**

Even in the appeal stage of this litigation, the Respondent still cites to new and previously undisclosed mining law. The Response cites to the “imminent danger” standards found in 30 C.F.R. §77.1713(b) and W. Va. Code §22A-1-15. As these laws were never argued or advanced below, this Court should disregard these provisions. Regardless, these sections require a coal

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<sup>11</sup> Clonch is not intended to punish employers for negligently performing an inspection by failing to identify a hazard. Clonch is not a license to argue negligence, or what the employer *should have* identified, in a deliberate intent case. Syl. pt 4 of Clonch reaffirmed the well known point of law that “[actual knowledge] 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 possessed* such knowledge.”

operator to remove workers from a work area if an “imminent danger” hazard is discovered during an examination. For these rules to apply there must be a recognition by the mine of a known hazard. For the many reasons already discussed, there is no evidence in this case establishing that the braces on the wall were a known hazard.

**E. Issues related to task training cannot establish a deliberate intent claim.**

In response to Petitioners’ explanation of the Bridger Coal Co. v. MSHA, 23 FMSHRC 887 (2001) case regarding task training, the Respondent only claims that the case is “very poorly reasoned.” (Resp’t Br. 32., fn. 3). The case is not poorly reasoned and simply applies the plain language of the regulation, but regardless, Bridger Coal Co. is federal mining law precedent regarding task training. The Respondent, and all other miners assigned to work the mine at the time of the accident, had received all legally required training. Furthermore, issues regarding welding training or experience are not relevant to the deliberate intent analysis because the record is clear that Mr. Compton, who was a certified welder, performed the welding on the braces that broke and caused the accident. (A.R. 138, 198). Finally, the Respondent misquotes Frontier’s OMHST-approved Comprehensive Mine Safety Program to argue that “employees assigned to a new job, including surface jobs, to be given a minimum of eight hours by an experienced supervisor.” (Resp’t Br. 32). The Respondent conveniently leaves out the rest of the relevant sentence, which states:

Workers assigned to a new job are trained by experienced workers in that job for a minimum of 8 hours **or until the experienced man is convinced that the new man can perform the job effectively and safely.**

(A.R. 901)(emphasis added).

Certified welder and chief electrician Jeff Compton observed Mr. Jude and the Respondent weld, and determined that both men knew what they were doing. (A.R. 180 – 182).

For these reasons, the training issues relied upon are insufficient to form a deliberate intent claim.

**(4) REPLY TO CROSS ASSIGNMENT OF ERROR**

The trial court deferred ruling on the “intervening cause” instruction and placed all the participants to this appeal in a difficult spot by failing to address all of Respondent’s grounds for a new trial. To keep the parties from appearing again before this Court in the near future on the remaining undecided issues, this Court should either determine that the other grounds are not a basis for a new trial, or reverse the denial of the Motion for Judgment as a Matter of Law, and enter judgment at this level in favor of the Petitioners.<sup>12</sup>

Nevertheless, Respondent’s cross-assignment is without merit. The Jury Instruction at issue, Jury Instruction No. 16, included the following language:

However, if it is more likely or equally likely that **Mr. Keneda’s injuries** were not directly or proximately caused by his exposure to the unsafe working condition but, rather, was the direct and proximate result of some intervening cause which is equally or more likely to **have caused the injuries complained of**, including conditions outside of the Defendants’ control, you may find that this element has not been proven and you must find for the Defendants.

(emphasis added).

Respondent claims that Jury Instruction No. 16 was given in error because the wind at the time of the accident did not satisfy the legal definition of an intervening cause. (Resp’t Br. 34). However, the Respondent misrepresents the nature of the instruction. This instruction addressed the cause of the Respondent’s injuries. There was an issue at trial that a subsequent underground mining rock fall in a third-party’s mine caused the Respondent’s more recent right shoulder pain and disability. (A.R. 346-347). There was also evidence that the same shoulder problems pre-

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<sup>12</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).

dated the accident. (A.R. 458 – 460). This jury instruction, and all relevant arguments, was focused solely on the medical causation issue. (A.R. 457 – 460). Petitioners have never argued the wind was an intervening cause, but did argue that the severe wind gust was *unforeseen* relevant to the actual knowledge standard. (A.R. 464 – 465).

Finally, under the harmless error standard,

Courts may not grant a new trial, set aside a verdict, or vacate or modify a judgment or order on the basis of any error or defect or anything done or omitted by the trial court “unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”

Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 72, 479 S.E.2d 561, 582 (1996).

Jury Instruction No. 16 only related to the fifth and final element of the deliberate intent claim. Prior to addressing the fifth element, the Jury determined that the Respondent failed to establish elements B, C, and D. Thus, regardless of the Jury’s findings as to the fifth element, the Respondent’s claim fell far short of satisfying a deliberate intent statute in the eyes of the jury. Therefore, any error which resulted from the giving of Instruction No. 16 was harmless.

For these reasons, this Court should rule that the Respondent’s Cross Assignment of Error regarding Jury Instruction No. 16 is not a ground for a new trial.

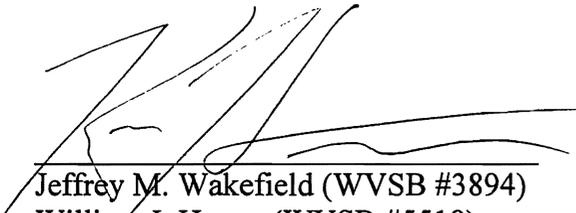
### **CONCLUSION AND PRAYER FOR RELIEF**

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 against all Petitioners, 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, or in the alternative, remand the case with specific instructions for disposition.

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

BY COUNSEL,



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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 12<sup>th</sup> day of April 2013, the foregoing "**Petitioner's Reply Brief**" was served via regular U.S. Mail to the following:

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