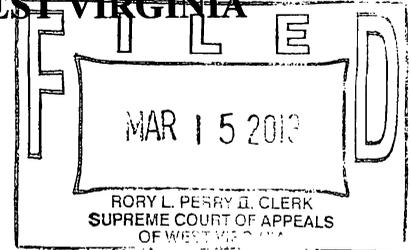


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

(Civil Action No. 08-C-256)
Honorable Warren McGraw

TIMOTHY KENEDA,

Respondent/Plaintiff Below.

RESPONDENT'S BRIEF
and
RESPONDENT'S CROSS ASSIGNMENT OF ERROR

Marvin W. Masters
West Virginia State Bar No. 2359
Christopher L. Brinkley
West Virginia State Bar No. 9331
The Masters Law Firm lc
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
Counsel for Respondent/Plaintiff Below

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STATEMENT OF THE CASE

(1) Summary of Facts Regarding the Accident

On February 10, 2008, while Timothy Keneda was kneeling, straddling a steel beam, a 3000 lb. steel I-beam structure, held by two totally inadequate braces, tack-welded in place, fell on top of him pinning him between the I-beam of the wall and the I-beam he was straddling. (A.R. 149-151.) He could not breathe and was seriously injured. (A.R. 333-336.) The employees could not get the beam off of him for a considerable time during which he believed he was going to die. (A.R. 333-336.) The reason Mr. Keneda was working on the wall on a Sunday, and his son's birthday, was because Defendants had been shut down by MSHA's "K" order for a previous defective canopy which had failed.

Mr. Keneda's injury occurred at Bluestone's Frontier mine in Wyoming County. Bluestone Industries, Inc. owned all the stock of Bluestone Coal Corporation and Frontier Coal Company. Bluestone ran their subsidiaries as divisions and departments. In fact, as set out below, it was proven at trial that Bluestone was the actual employer of the miners and supervisors at Frontier Coal Company.

Petitioners claim in their brief that Respondent's claims are limited to alter ego and joint venture, but the complaint and evidence demonstrate that Respondent alleged a "deliberate intent" case against Bluestone Industries, Inc. and Bluestone Coal Corporation from the outset. (See Complaint, Count I; A.R. 0670-0676.)

The Frontier mine superintendent testified that all of the records of Bluestone and records of supposed Frontier employees would show that the superintendent and Mr. Keneda and "any other employee there at Frontier" were employees of Bluestone. (A.R. 0029.) Further, the supervisor and employees at Frontier mine testified that they worked for Bluestone. Mr. Randall

Lester, Superintendent at Frontier, considered himself to be employed at Bluestone and Frontier. (A.R. 4-8.) Mr. Lester considered Kenny Lambert of Bluestone in Beckley to be his boss. (A.R. 2-5 & 115.) Mr. Lester was Mr. Keneda's boss, and Mr. Lester considered Mr. Keneda to be an employee of Bluestone. (A.R. 29.) Mr. Bruno Cline, foreman at the Frontier site, also was hired at Bluestone's facility, as was Jeff Compton, the chief electrician. (A.R. 126-127, 130, 158-159 & 163.) Also, George Jude, a roof bolter like Mr. Keneda, stated that he was employed by Bluestone. (A.R. 193-194.) Another employee, Billy Trent, testified that he worked for Bluestone. (A.R. 371-372.) Pat Graham, Safety Director at Bluestone, filed a memo listing Mr. Keneda as a Bluestone employee. (A.R. 24.) Mr. Keneda's health insurance and hospital admission records all listed Bluestone as his employer. (A.R. 27-28.) Therefore, Defendants' argument that Bluestone was not an employer of Mr. Keneda is simply not accurate. Obviously, Frontier was simply a satellite mine and not a separate corporation. Frontier could not even do its own budget. Bluestone prepared Frontier's budget and Mr. Lester had to follow it. (A.R. 11-12 & 40.) All of human resources were handled by Bluestone. (A.R. 23.) Mr. Lester had no safety director and did not have the authority to hire one; neither could he hire a construction company. (A.R. 21-22.) Nevertheless, Defendants took the position with the Supreme Court in their Petition for Writ of Prohibition and with the Circuit Court and during the trial that Frontier was a stand-alone, independent subsidiary.

Prior to February 10, 2008, when the canopy fell on Mr. Keneda at the mine site, a defective canopy collapsed on February 5, 2008, which could have injured miners if they were under it. (A.R. 29-30 & 34-36.) MSHA cited Defendants for the violations. (A.R. 37-38.) The citations were issued to Randall Lester, Superintendent, and Pat Graham, Safety Director at Bluestone. (A.R. 37-38.) The MSHA inspector made a finding that the violation of having an

improper canopy “was highly likely to have caused someone to be seriously injured” and, therefore, MSHA issued a “K” order which prohibits the operator from doing anything in the underground mine or within 25 feet of it. (A.R. 0035-0037.) This proved that Frontier personnel did not know how to build a canopy that complied with safety rules. MSHA found they were not substantially constructed. (A.R. 0038.) The Petitioners could have purchased a canopy but chose to save money. Bluestone decided to have its unqualified employees build an even bigger canopy to satisfy MSHA. (A.R. 0039-0040.)

Because of the MSHA “K” order, further progress in opening the mine was slowed, which disturbed Defendants because “[i]f we didn’t run coal, we didn’t have a job.” (A.R. 58, 169, 204 & 216-218.) Importantly, Frontier’s mine site had no safety director or safety professional and did not have an engineer to design or build a canopy. Pat Graham and Derek O’Neal, the Safety Director and Chief Engineer of Bluestone were responsible for providing safety and engineering direction, training and supervision at Frontier. (A.R. 17, 24, 40, 42-43 & 77-78.)

Derek O’Neal, Bluestone’s Chief Engineer, provided a drawing to Superintendent Lester for constructing the canopy without any instructions whatsoever as to how to build it. (A.R. 42-44, 55, 141 & 169-170.) The safety director did not advise, train or describe a safe manner to construct the canopy. (A.R. 55.) Mr. Lester was first told to “build it,” and he was required to build it with people that he had at the mine site. Bluestone knew the people that were on hand to build it and knew they were not qualified. (A.R. 66-67.) Mr. Lester then ordered the materials for the canopy, even though neither Mr. Lester nor anyone else on site had ever built one the size ordered. (A.R. 65-66 & 663.) The facts are that no one, not even the supervisor, the electrician or the foremen at the site were trained or experienced to build the canopy. The reason they were

building it themselves was to save the cost of a certified, pre-fabricated one. (A.R. 40-41.) The manner of constructing the canopy was devised by unqualified and untrained foremen at the mine site who had no experience with a wall this size.

(2) Summary of Facts Regarding Improper Juror Contact by a Party

The facts leading up to the hearing in chambers concerning the Defendants' corporate representative's contact with Juror #6 is summarized in the trial court's order setting aside the verdict and ordering a new trial.

The trial of this deliberate intent case began on April 24, 2012, and was concluded on May 2, 2012, with a jury verdict in favor of Defendants. On May 2, 2012, the last day of this near two-week trial, counsel for the parties concluded all closing arguments and the trial court concluded instructing the jury. Since it was near lunch time, the trial court instructed the jury, in open court, in the normal manner, with all parties present, that the evidence and all proceedings had been concluded and it was time for the jury to be given the case for deliberation. After closing arguments were concluded, the jury was advised that they would be allowed to go to lunch and when they returned at 1:00 p.m. they would be given the verdict form to begin their deliberation. As was done multiple times throughout the trial, the trial court instructed the jury not to discuss the case with anyone. This had been done repeatedly by the trial court throughout the two-week trial. (A.R. 656.)

Immediately after the lunch period, Plaintiff's counsel informed the court that one of Plaintiff's counsel upon returning from lunch had observed the Defendants' corporate representative engaged in a conversation with a sitting juror. After observing this, Plaintiff's counsel approached the corporate representative and advised him and the juror that it was not

proper. Plaintiff's counsel moved the trial court to conduct an inquiry into what had transpired between the corporate representative and the juror.

In the court's chambers, Plaintiff's counsel reported that the juror involved was Juror #6, who was conversing with Bruno Cline, the corporate representative. Mr. Cline had been in the courtroom at the defense counsel table throughout the trial. Three defense counsel participated in the trial and were at counsel table also during the entire trial. The trial court found good cause, granted Plaintiff's motion and undertook an inquiry into the conduct of the corporate representative and Juror #6. Defense counsel then requested the court for an opportunity to discuss the situation with their client, Bruno Cline. The trial court granted Defendants' motion and defense counsel and Mr. Cline left chambers and conversed. Upon their return to chambers, the court called for the corporate representative, Mr. Bruno Cline, to be sworn and allowed Plaintiff's counsel to inquire of him as to how the conversation came about and what was said during the conversation. (A.R. 656-657.)

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

apparent to the jury during the trial that he was a person of importance and influence with the companies and, further, it was his conduct which was at issue in the trial. (A.R. 657.)

The corporate representative's account of how the contact took place and who initiated it differed from the juror's account. First, the juror frankly admitted that he was aware that he was not to have conversations with the parties. (A.R. 505.) According to Juror #6, the conversation was initiated by Mr. Cline as Juror #6 was coming back from lunch: "Well I was just coming back in from lunch and he was just standing out there and **he just asked me where I worked,** you know. I told him, 'Wal-Mart.' And I didn't think nothing of it. I mean I probably should have, yes. I said, 'Well.' And then **I just asked him if he was in the coal mines and I told him I had my apprentice card. And he said, 'Well, you know, it won't be, you know, long probably before you can get you a job....'**" (A.R. 505-506, emphases added.)

Once Plaintiff's counsel had confronted the corporate representative and the juror on the steps, Juror #6 immediately went to the jury room where the other jurors were waiting to deliberate. The juror stated, "Yeah, it was a mistake on my part, you know, even saying something to him after he asked me where I worked." (A.R. 506.) "After that, what did you do?" "I went to the restroom and went back upstairs. I went to the jury room." (A.R. 507.) The juror stated, "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." (A.R. 509, emphasis added.) The juror clearly testified that it wasn't him who initiated the conversation: "You did not initiate the conversation?" "A: No, sir." (A.R. 509.) He also disputed Mr. Cline's account that the initial

comment had to do with the weather. “Did -- was the first thing that Mr. Cline said to you, did he ask you was it hot outside?” “A: No.” (A.R. 510.)

The corporate representative’s testimony differed significantly with the juror’s. Mr. Cline indicated that he did not initiate the conversation but that it was the juror who initiated the conversation. Mr. Cline said he was standing on the steps to enter the courthouse leaning against the rail when the juror came up the steps and rubbed his head and said, “Shooo,” supposedly because it was hot. Mr. Cline then claimed he said, “It’s too hot to be in the courthouse; ain’t it?” Mr. Cline related that the following conversation took place: The Juror said, “Yes, I hope to go back to work tomorrow.” Mr. Cline said, “Where do you work?” The juror then said, according to Mr. Cline, “I work at Wal-Mart.” (A.R. 499-500.) Mr. Cline completed his recount of the conversation as follows: “He said, ‘I’d like to go back to work.’ I said, ‘Where do you work?’ He said, ‘I work at Wal-Mart.’ And he said ah ... he said, **‘I’ve been trying to get a job in the mines.’** He said, **‘I have my red hat card.’** He said -- and **I told him, I said, ‘Right now is a bad time for coal industry.’ I said, ‘It may pick up at the end of the year.’** And then he said ah ... he said, ‘Well I’ve done had to redo my card once,’ and then Pam come up. And that’s pretty well word-for-word right there.” (A.R. 501, emphases added.)

The corporate representative testified that he did not know he could not talk to the jury as long as it was not “about the case.” (A.R. 499, & 501-502.) Mr. Cline was represented by three well-qualified attorneys during the entire trial. Mr. Cline testified that he did not know that he could not talk to the jury so long as he “wasn’t talking to him about the case.” (A.R. 498-499.) When asked whether his attorneys advised him not to talk to the jurors he stated: “I spoke to him. I mean I didn’t know that I couldn’t speak to somebody.” (A.R. 499.) When asked

whether he had spoken to any other juror besides Juror #6, he stated: “No, **I haven’t seen them.**” (A.R. 499, emphasis added.)

After Juror #6 testified in Chambers, he went back into the jury room. The trial court explained that while the court undertook the inquiry and dealt with these issues, the remaining jurors were left in the jury room for about two extra hours while the court took testimony and heard arguments of counsel. During this period, Juror #6 was brought to chambers to testify and then returned to the jury room with the other jurors.

The trial court then heard arguments of counsel concerning Mr. Cline’s conversation with the juror. Upon learning of the incident, Plaintiff’s counsel advised the trial court of the limited information they were aware of at that time and that Mr. Cline had talked to his lawyer after he was confronted. (A.R. 489.) “I don’t know how anybody would not understand that they weren’t to talk to jurors because the Court admonished the jury in front of everybody, and Mr. Cline, that ... the jury is not to talk to anybody.” (A.R. 469.)

Defendants’ counsel’s first position was that the matter had “nothing to do with Mr. Cline”. (A.R. 0490.) Defendants’ position was that the trial court should only call in the juror to determine whether it affected him. “It doesn’t matter what he [Mr. Cline] thinks or said.” (A.R. 0491.) Over Defendants’ objection, the trial court allowed Plaintiff’s counsel to call Mr. Cline and examine him. But, first, Defendants’ counsel was given a break to allow Mr. Cline and his counsel time to discuss the matter outside the Plaintiff’s and court’s presence. (A.R. 486-487.)

Juror #6 was asked: “Q. ...you’ve heard the Court admonish the jury, or advise the jury not to have any conversation with any of the parties....You’ve heard that; right? A: Yes sir.” (A.R. 505.) When he was asked whether it “bothered” him that Plaintiff’s counsel has brought

the incident to the attention of the judge, Juror #6 stated “not really, **not much.**” (A.R. 508 & 509, emphasis added.)

Plaintiff moved to disqualify the juror and then, once realizing that the first alternate was a mine foreman and that Mr. Cline was a mine foreman himself, the prejudice extended to the remedy of substituting yet another mine foreman as a Juror #6. The trial court denied Plaintiff’s motion to use the second alternate instead. Nevertheless, Plaintiff objected and stated that it was Plaintiff’s position that, regardless, Plaintiff had been prejudiced by the intentional contact with the juror. (A.R. 513 & 515.) The trial court stated, “Plaintiff’s counsel vigorously objects to the replacement of Juror #6, a sitting juror, with Alternate Juror #1 because Alternate #1 was a former mine foreman....” Therefore, over Respondent’s objection, the former mine foreman was seated in place of Juror #6. Plaintiff further objected, claiming there was no way to eliminate the prejudice to Plaintiff under any circumstances. (A.R. 667-668.)

SUMMARY OF ARGUMENT

(1) Respondent’s Injury

Bluestone Corporation argues that they should have been dismissed because Respondent did not prove alter ego or joint venture. That is not true since the evidence is overwhelming that Frontier was nothing but a mine site and Bluestone ran everything to do with Frontier. More importantly, however, the employees and supervisors at Bluestone testified that they were employees of Bluestone. Further, Bluestone’s engineer and safety director were in charge of engineering and safety at the Frontier site.

Petitioners claim that Respondent did not offer evidence of safety rules that were violated. Respondent offered testimony from a former MSHA inspector and supervisor that several written MSHA and state safety rules were violated by Petitioners. In addition, the

Petitioners, including Frontier, had provided MSHA with their written safety program, which was essentially federal or state safety rules applicable to this site. In addition, Petitioners' supervisor testified to the same safety rules that Respondent's expert testified to and agreed. On the other hand, Petitioners' expert incredibly claimed there were no safety rules applicable to the building of the 3000 lb. wall. Also, Petitioners' safety director and engineer knew that the men at the Frontier mine did not know how to build a canopy and that there were absolutely no employees qualified to inspect the project to see if it was safe to work on the wall or to train the employees to do it safely.

Petitioners also claim that there was no proof of actual knowledge. Certainly Petitioners had actual knowledge of the fact that no inspectors or trainers were there before or during the day Mr. Keneda was injured. Mr. Keneda was a roof bolter, not a welder. Petitioners knew that and Billy Trent warned Petitioners the day before the wall fell that, if they did not brace it, it was going to fall and hurt someone.

The trial court, therefore, did not commit error by denying Petitioners' motion for directed verdict.

(2) Improper Juror Contact

Trial Court Rule 4.09 leaves no doubt. It "prohibits" any contact of any nature by a party or their attorney with a juror during a trial. Here, the offending parties' corporate representative, who had become familiar with the jurors in the eight-day trial, parked himself outside the courthouse door where jurors came and went for lunch and, according to the juror, initiated a conversation with him. He then stated to the juror, a Wal-Mart employee who had qualified for his red-hat, that "Well, you know, it won't be, you know, long probably before you can get you a

job.” He was talking about a job in the mines, and Petitioners employ hundreds of miners in the area.

The trial court found that the contact and the events created by the contact were prejudicial to Mr. Keneda “to the extent that he has not received a fair trial.” Petitioners argue that this was nothing more than a casual conversation and that the trial court abused its discretion in finding that Mr. Keneda was prejudiced.

It cannot be seriously argued that this was not an intentional contact by a party with a juror just prior to entering deliberations; that the sitting juror was compromised; that the compromised juror went from his conversation to the jury room with the other jurors; that he then was pulled out of the jury room and examined by Mr. Keneda’s attorneys and then went back to the jury room where he stayed for about two additional hours; that a former mine foreman was the first alternate and was objected to by Mr. Keneda, the Respondent; that over Mr. Keneda’s objection, a juror with whom he was satisfied was compromised and in his place the Wal-Mart employee was replaced by a former mine foreman. Of course, after all that, the offending party won a defense verdict, which was the ultimate prejudice after an expensive eight-day trial.

This Court should never countenance this conduct. To hold that this trial court was required to stop the trial process and investigate the juror contact and investigate the remaining jurors is playing into the hands of the offending party. If the offending party believes they are going to lose the case, a mistrial is welcome, or if they want to substitute a favorable alternate for an unfavorable juror or less favorable juror, disqualifying a juror is also welcome. In this case, clearly, Petitioners helped themselves. A Wal-Mart employee for a mine foreman and a jury

which knows one of its members was kicked off due to the Respondent's attorneys decided the case. And, of course, there are other things no one will ever know.

Respondent objected and preserved the error. It was the trial court's discretion to review the facts and determine whether a new trial was warranted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for Rule 20 argument since there are issues related to the integrity of the judicial process and the facts are complex with respect to some and the legal issues.

ARGUMENT

(1) THE RESPONDENT WAS ENTITLED TO A NEW TRIAL AFTER PETITIONERS' CORPORATE REPRESENTATIVE DISCUSSED A JOB WITH A JUROR JUST PRIOR TO DELIBERATIONS WHEN PETITIONERS PREVAILED IN THE VERDICT.

(A) Standard of Review

In reviewing the trial court's exercise of discretion in ordering a new trial, the West Virginia Supreme Court applies a two-pronged deferential review: factual findings are reviewed under the clearly erroneous standard and questions of fact are reviewed de novo. Syl.Pt. 1, State v. Dellinger, 225 W.Va. 736, 696 S.E.2d 38 (2010).

A trial judge has authority to set aside a jury verdict and order a new trial if the judge finds that the verdict will result in a miscarriage of justice, even if the verdict was supported by substantial evidence. Syl.Pt. 1, In re State Public Building Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1994). Accordingly, the trial court's decision "is not subject to appellate review unless the trial judge abuses his or her discretion." Id. Furthermore, that discretion is "very broad." Id. at 124, 418 (citing Wright & Miller, Federal Practice and Procedure §2801 at 118 (1973)).

Put another way, a trial court's decision to grant a new trial "is entitled to great respect and weight" and will not be reversed on appeal unless the trial court acted under a misapprehension of the law or the evidence. Syl.Pt. 4, Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976).

(B) Respondent Is Entitled to a New Trial

Petitioners argue that they did nothing wrong when their corporate representative discussed a job with Juror #6 as he was minutes from joining his fellow jurors to begin deliberations after an eight-day trial. And Petitioners claim that, regardless, any prejudice was cured when the trial court impaneled a former mine foreman, the alternate, to replace the Wal-Mart employee sitting on the jury of six.

Alternate jurors are not seated for the purpose of allowing a party to change the composition of the jury during trial or to "pick" from in order to improve a party's chances of a favorable verdict. Alternate jurors are there in the event one of the main jurors becomes ill or has a personal situation that requires them to be excused. To allow this verdict to stand under these circumstances would endorse the concept, not only in this case but in future cases as well, that a party may engage in jury misconduct in order to pick a more favorable alternate juror and do so without adverse consequences.

Reminiscent of John Grisham's book, The Runaway Jury, where the defendant played chess with the jury by finding ways to disqualify unfavorable jurors who were on the official jury in favor of alternates, Petitioners here benefited by having the first alternate juror, a former mine foreman, deliberate on and decide this case. In effect, the Petitioners not only altered the composition of the original jury, but, as a result of their wrongful conduct, effectively substituted the alternate juror, one who was favorable to their industry.

West Virginia Trial Court Rule 4.09 specifically states that “[n]o party, nor his agent or attorney, shall communicate or attempt to communicate with any member of the jury...until that juror has been excused from further service for a particular term of court” without first receiving an order allowing such communication. (Emphases added.) It is noteworthy that Rule 4.09 does not merely prohibit communication with a juror about the case, but in fact prohibits ANY communication with a juror. There is no dispute that the Petitioners’ corporate representative violated Rule 4.09 in this case.

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

In any case where there are allegations of any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties; it is the duty of the trial judge upon learning of the alleged communication, contact, or tampering, to conduct a hearing as soon as is practicable, with all parties present; a record made in order to fully consider any evidence of influence or prejudice; and thereafter to make findings and conclusions as to whether such communication, contact, or tampering was prejudicial to the [affected party] to the extent that he has not received a fair trial.

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

The Corpus Juris Secundum states:

Where a prevailing party attempts to corrupt or improperly influence the action of any of the jurors in a case, a new trial should, as a matter of sound public policy, be granted, without reference to the question whether or not the attempt was successful and even though the court reproved the party and the jurors.

66 C.J.S. New Trial § 85.

In a civil case, “[u]pon 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.” Legg v. Jones, 126 W.Va. 757, 30 S.E.2d 76, 80 (1944).

Although there is no West Virginia case law addressing the specific issue of the effect of a party’s contact with a juror during trial, there is ample persuasive authority demonstrating the extreme impropriety of such interaction. Contact between a party and a juror is the most serious form of improper contact with a juror. Budhoff v. Holiday Inns, Inc., 732 F.2d 1523, 1527 (6th Cir. 1984). In addition, where a party has engaged in improper conduct towards a juror with the goal of influencing the verdict, then the verdict will be set aside as a punishment to the offending party. Sexton v. Lelievrrre, 44 Tenn. 11, 13-14 (1867)(*cited with approval in Budhoff v. Holiday Inns, Inc.*, 732 F.2d 1523, 1527 (6th Cir. 1984)).

The misconduct does not have to be successful in order for a new trial to be proper. Courts from other jurisdictions have followed the Corpus Juris Secundum’s reasoning to hold that an attempt to corrupt or influence a juror does not have to be successful in order for a new trial to be proper. Del’Ostia v. Strasser, 798 So. 2d 785, 787-88 (Fla. Dist. Ct. App. 2001); Peart v. Jones, 159 Ohio St. 137, 141, 111 N.E.2d 16, 19 (1953).

Further, the United States Supreme Court has weighed in on the subject holding that private communications between jurors and third persons or witnesses is forbidden. Mattox v. U. S., 146 U.S. 140, 150, 13 S. Ct. 50, 53, 36 L. Ed. 917 (1892). In Mattox, the Court stated:

Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.

Mattox v. U. S., 146 U.S. 140, 150, 13 S. Ct. 50, 53, 36 L. Ed. 917 (1892).

The misconduct of a party does not have to relate to the facts or evidence of the case in order for a new trial to be necessary. Pekar v. United States, 315 F.2d 319, 322 (5th Cir. 1963).

In Pekar, the Court stated:

It is not surprising that very few cases can be found in the Federal Courts where this subject is discussed. This is because such conduct is rare. However, the language used by the Supreme Court in Mattox v. United States, 146 U.S. 140, at page 150, 13 S.Ct. 50, at page 53, 36 L.Ed. 917, sets the standard. 'Private communications possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear.'

Pekar v. United States, 315 F.2d 319, 322 (5th Cir. 1963).

Although Pekar and Mattox are criminal cases, the Fifth Circuit later held in United States v. Harry Barfield Co. that jury integrity was no less important in civil cases than in criminal cases. United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966).

Pekar and Mattox are criminal cases but the integrity of the jury system is no less to be desired in civil cases. Our system of trial by jury presupposes that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence. Any conduct which gives rise to an appearance of evil must be scrupulously avoided. What occurred in this case exceeded the bounds of propriety and will not do. The case must be reversed for a new trial.

United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966) (emphasis added).

Additionally, the Supreme Court of Ohio has held that an impartial and unbiased jury is a substantial right. Pittsburg, C. & St. L.R. Co. v. Porter, 32 Ohio St. 328, 333 (1877). In Porter, the court stated:

That the right of the parties in a jury trial, to have an impartial and unbiased jury, is a substantial right, cannot be questioned; and it is equally clear, that any tampering with jurors, during the adjournments of a trial, for the purpose of influencing their decision, where it has that effect, materially affects that right. Moreover, any attempt of a party to corrupt the jurors is an invasion of the other party's right; for he ought not to be subjected to the hazard of having them biased against him; nor to the task of proving that he has been prejudiced thereby, for,

from the nature of the case, it might be impossible to be shown otherwise than by the jurors themselves, who, for reasons of public policy, are in general only competent as witnesses to sustain, and not to invalidate their verdict. *Weis v. The State*, 22 Ohio St. 486.

Pittsburg, C. & St. L.R. Co. v. Porter, 32 Ohio St. 328, 333 (1877); *see also* Noble v. McAllister Dairy Farms, Inc., 52 O.O. 52, 114 N.E.2d 540, 541-42 (Com. Pl. 1952).

The cases cited by the Petitioners are distinguishable from the present case. In United States v. Marshall, 767 F.2d 293, 295-296 (6th Cir. 1985), the juror was contacted by a witness as opposed to a party. In United States v. Doherty, 867 F.2d 47, 71-72 (1st Cir. 1989), the judge properly excused a juror *ex parte* as a result of sudden family crisis and the only claimed prejudice was that the party did not get to participate in a hearing on the issue. In United States v. Lustig, 555 F.2d 737, 745-746 (9th Cir. 1977), the judge properly excused a juror *ex parte* where the juror had come into possession of information about the defendant's guilt and, again, the only claimed prejudice was that the defendant did not get to participate in a hearing on the issue. In United States v. Jones, 597 F.2d 485 (5th Cir. 1979), a convicted defendant alleged that the jury was tampered with in a manner which would have benefited the defendant and failed to offer any evidence that he was not connected with the alleged tampering.

The Petitioners' actions affected the composition of the jury. The Petitioners interfered with the duly selected and empaneled jury, and, in fact, the entire trial. The Petitioners created a substantial delay after the case was sent to the jury following instructions because the trial court was required to hold a hearing on these events. The jury was obviously aware Juror #6 was called away from the panel and then excused. Of course, the primary prejudice was that Petitioners were successful in obtaining a verdict in their favor. The integrity of the impartial jury system was destroyed as soon as the corporate representative for the Petitioners initiated his conversation with Juror #6. Courts around the country agree that allowing this type of

misconduct to occur without mistrial sanctions is against public policy and is not to be acceptable.

Petitioners' response to Plaintiff's motions characterizes this incident as one of "juror misconduct." However, it was not the juror's misconduct; it was by the Petitioners' own designated corporate representative. This mischaracterization began prior to the trial court taking the *in camera* testimony, when Petitioners' counsel brazenly stated "It has nothing to do with Mr. Cline...It doesn't matter what Mr. Cline thinks or thought or said or did...It doesn't matter what he thinks or said." (Id. at 611-612.)

Respondent, therefore, moved the court to at least allow Respondent the option of having Juror #8 be appointed as the replacement juror. By following the pre-trial order of things, Juror #7 was to be the first replacement. However, the consequence of following that sequence was that Petitioners were able to replace a juror who otherwise Respondent believed was fair-minded with one whom had a prior employment history like Mr. Cline. The bottom line was that there was no fair remedy particularly when Juror #6 had spent considerable time in the jury room with the other jurors after Respondent's counsel confronted Mr. Cline and also after he gave his testimony. As stated in Pittsburg, C. & St. L.R. Co. v. Porter, 32 Ohio St. 328, 333 (1877), for reasons of public policy, jurors are generally only competent to sustain, not invalidate, their verdict.

Petitioners argue that the trial court erred in granting Respondent's motion to set aside the verdict due to Petitioners' contact with Juror #6 on the basis that (1) the trial court must find "actual prejudice" first before setting the verdict aside, (2) Petitioners' evidence rebutted evidence of any prejudice which was cured by the alternate juror, (3) Respondent failed to move for mistrial, (4) the trial court relied on erroneous facts in support of its ruling, and (5) the Petitioners' contact with Juror #6 was as a brief, casual conversation.

(1) The trial court found actual prejudice.

The trial court made the following finding:

“...the Court FINDS that in the interest of maintaining the quality and impartiality of juries in this jurisdiction, the juror contact was prejudicial to the Plaintiff **to the extent that he has not received a fair trial.**” (A.R. 662, emphasis added.)

The trial court pointed out that the jury was aware that contact had occurred and that the jury had at least “two hours to discuss the conversation and its effects. (A.R. 661.) What Petitioners are saying is that the trial court should have stopped the trial and held an inquiry to question all the jurors.

Can any judge or attorney fully comprehend the situation in which the trial court was placed at the end of an eight-day trial? Is the trial court supposed to stop the trial first when the jury is about to deliberate and investigate the jury? What the trial court did was the best it could with this horrible situation. As set out below, it is not necessary for the trial court to stop the trial and hold a second trial of the jury to determine whether Defendants’ misconduct was “actually” prejudicial.

(2) The prejudice was not rebutted.

Petitioners argue that it rebutted any evidence of prejudice when Juror #6 was replaced by the first alternate, a former mine foreman, just like the corporate representative was a mine foreman. How many times has a trial lawyer wished for the alternate to take the place of an existing juror after trial was nearing completion? The alternate replaced Juror #6 over Respondent’s objection. Nothing could have cured this problem and certainly replacing a Wal-Mart employee with a mine foreman was not curing the problem for a miner whose suit was against a mine foreman.

Further, the trial court found prejudice with the remaining jurors, having conversed for two hours with Juror #6 two separate times, once after Plaintiff's counsel confronted the corporate representative and again after he was examined by Plaintiff's counsel in the Judge's Chambers.

- (3) Respondent immediately brought the Petitioners' misconduct to the attention of the trial court and objected and preserved his objection to the misconduct and the consequence.**

As set forth below, a party adversely affected by the adversary's intentional contact with a juror under these circumstances is not required to move for mistrial. The party does have the affirmative duty to bring it to the trial court's attention as soon as practicable.

Respondent confronted the offending party and requested a hearing and objected on the record to the action and the remedy. The trial court made the following finding with respect to Respondent's objection:

"Plaintiff argued that he was prejudiced regardless of whether the juror was replaced by an alternate or not." (A.R. 659-660.)

"Plaintiff's counsel vigorously objected to the replacement of Juror #6, a sitting juror, with Alternate Juror No. 1 because Alternate No. 1 was a former mine foreman." (A.R. 660.)

"Plaintiff further objected, claiming there was no way to eliminate the prejudice to plaintiff under any circumstances." (A.R. 660.)

Further, Petitioners claim that Respondent was granted the relief he requested, quoting Respondent's motion to disqualify. Obviously, the juror had to be removed. This motion was prior to realizing that the alternate juror was the mine foreman and that the prejudice to the remaining jurors was ongoing. Respondent added, "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, Petitioner's Brief at p. 15.)

Petitioners cite the case of Legg v. Jones, 126 W.Va. 757, 30 S.E.2d 76 (1944), as authority for their waiver argument. Legg does not hold what Petitioners claim. The facts in Legg were substantially different. There, the aggrieved party did not mention this misconduct to the trial court and, therefore, the trial court had no opportunity to take testimony or determine whether the error could be remedied.

(4) The trial court did not rely on erroneous facts in support of its ruling.

The trial court must weigh evidence, and it was the trial court that was observing the witness during his testimony. Contrary to Petitioners' assertion, the witness did not say he was talking to Respondent's counsel when he made the statements concerning what they were saying in the jury room. It is interesting that this gentleman was aware that, "I'm the one they're gonna blame for a mistrial." Where did he get that information? The jury room? He certainly did not have this discussion with Ms. Lambert who had just confronted Mr. Cline for having a conversation with the juror and, moments before, stated that he could not talk to parties.

(5) Characterizing this conversation which happened to be observed by a Respondent's counsel as a brief, casual conversation is outrageous.

A corporate representative, a mine foreman, telling a red-hat-eligible Wal-Mart employee, "Well, you know, it won't be, you know, long probably before you can get a job" is not a causal conversation under any definition, particularly at this state of the trial.

(2) THE CIRCUIT COURT DID NOT ERR IN DENYING PETITIONERS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON CLAIMS ARISING FROM W.VA.CODE §23-4-2(D)(2)(ii)

(A) Standard of Review for the Denial of a Motion for Judgment as a Matter of Law

The West Virginia Supreme Court of Appeals' standard of review for a trial court's denial of a motion for judgment as a matter of law, formerly known as a motion for directed

verdict, is *de novo*. Adkins v. Chevron, USA, Inc., 199 W.Va. 518, 522, 485 S.E.2d 687, 691 (1997).

However, in performing this review, this Court must adhere to “the same stringent decisional standards” that the trial court was required to apply in ruling on the motion. Syl.Pt. 3, Alkire v. First National Bank of Parsons, 197 W.Va. 122, 475 S.E.2d 122 (1996). “[E]very reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence.” Syl., Nichols v. Raleigh-Wyoming Coal Co., 112 W.Va. 85, 163 S.E. 767 (1932). Furthermore, only if “the plaintiff’s evidence, considered in the light most favorable to him, fails to establish a *prima facie* right to recovery” should the trial court direct a verdict in favor of the defendant. Syl.Pt. 3, Roberts ex rel. Roberts v. Gale, 149 W.Va. 166, 139 S.E.2d 272 (1964).

Accordingly, this Court, after considering the evidence in the light most favorable to the plaintiff, may reverse the denial of a motion for a directed verdict “when only one reasonable conclusion as to the verdict can be reached.” See Syl.Pt. 3, Adkins v. Chevron, USA, Inc., 199 W.Va. 518, 485 S.E.2d 687 (1997). “But if reasonable minds could differ as to the importance and sufficiency of the evidence,” a trial court’s denial of a motion for directed verdict will be upheld. Id.

(B) Deliberate Intent Actions under W.Va.Code §23-4-2(d)(2)(ii)

Under W.Va.Code §23-4-2(c), an injured employee may recover for damages in excess of his Workers’ Compensation benefits where the employer acted with “deliberate intention” if he can prove the five elements of W.Va.Code §23-4-2(d)(2)(ii). Petitioners argue that Respondent failed to offer a *prima facie* case with respect to two of the five part test: (i) critical

knowledge of the existence of an unsafe working condition and of the high degree of risk and strong predictability of serious injury or death, W.Va.Code §23-4-2(d)(2)(ii); (ii) the violation of a safety statute rule or regulation which satisfies the requirements of the third element W.Va.Code §23-4-2(d)(2)(ii)(C).

Petitioners took the ridiculous position that there was absolutely no safety rule of any kind that applied to the surface construction at the face of this mine and they offered an “expert” to testify to it. Of course, the mine superintendent and Respondent’s expert knew the rules did apply to that area.

An employer possesses actual knowledge of an unsafe working condition if that information is held by any supervisor who is supervising the employee or who has authority or responsibility for the work being done. *See Ramey v. Contractor Enterprises, Inc.*, 225 W.Va. 424, 430, 693 S.E.2d 789, 795 (2010); *Ryan v. Clonch Industries, Inc.*, 219 W.Va. 664, 673, 639 S.E.2d 756, 765 (2006).

Furthermore, while the “actual knowledge” and “intentional exposure” elements require more than mere speculation or conjecture, because they require an interpretation of the employer’s state of mind, they are ordinarily proven by circumstantial evidence. *Coleman Estate v. R.M. Logging, Inc.*, 226 W.Va. 199, 207-208, 700 S.E.2d 168, 176-177 (2010). Due to the very nature of circumstantial evidence, conflicting inferences may be reasonably drawn from such evidence. *Sias v. W-P Coal Co.*, 185 W.Va. 569, 575, 408 S.E.2d 321, 327 (1991).

The West Virginia Supreme Court of Appeals has held that deliberate intent may be proven by demonstrating that the employer failed to perform a reasonable evaluation to identify workplace hazards, if that failure was in violation of a statute, rule, or regulation imposing a duty to perform such an evaluation and the performance of the evaluation may have readily identified

the hazards. Syl.Pt. 6, Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756 (2006). Under such circumstances, the employer is prohibited from denying that it possessed a subjective realization of the hazard and the employee, upon proving such a failure, is deemed to have carried his burden of proof with respect to the employer's subjective realization.¹ Id.

Similarly, the West Virginia Supreme Court has also held that an employer's knowledge that an employee is not adequately trained for the job to which he is assigned, can constitute an unsafe working condition to which the employer has knowingly and intentionally exposed the employee. Coleman Estate v. R.M. Logging, Inc., 226 W.Va. 199, 207, 700 S.E.2d 168, 176 (2010).

(C) Respondent Tim Keneda Proved a *Prima Facie* Case under the Deliberate Intent Statute

As set out in the Statement of the Case, *supra*, Bluestone directed the Frontier mine site and it had the only safety director and engineer which had the assignments to handle the mine. The engineer prepared the one-page sketch, without any direction as to assembly, and sent it to Frontier and Pat Graham, Safety Manager, who had the specific responsibility of safety on that mine site, particularly since he was aware that the site had absolutely no one there qualified to inspect the job site for safety, task train or for that matter to even safely construct the canopy.

While Randall Lester and Bruno Cline were certified mine foremen, they were not certified in surface construction. (A.R. 22, 130.) Nor did either of them know how to weld. (A.R. 55, 132.) Similarly, although Jeff Compton, the mine's chief electrician, was a certified

¹ Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 667, 639 S.E.2d 756, 759 (2006) applied the 1994 version of W.Va.Code. §23-4-2. The West Virginia Supreme Court of Appeals specifically commented on the fact that the statute was amended in 2005. Id. at 667 fn. 2, 759 fn. 2. The significant difference is that the term "subjective realization" in the 1994 version of the statute has been changed to "actual knowledge" in the 2005 version of the statute. Id. at 676 fn. 4, 768 fn. 4 (Benjamin, J. dissenting). Nevertheless, nothing in the Court's majority decision in Ryan suggests that the Court intended to limit the application of its ruling to the 1994 version of the statute. In fact, the West Virginia Supreme Court has subsequently held that "subjective realization" and "actual knowledge" have the same meaning. Ramey v. Contractor Enterprises, Inc., 225 W.Va. 424, 429 fn. 13, 693 S.E.2d 789, 794 fn. 13 (2010); *see also* Ryan, 219 W.Va. at 675 fn. 3, 767 fn. 3 (Benjamin, J. dissenting).

welder, he was not qualified to build structures like the one at issue here. (A.R. 138, 159, 160-161, 177.) Nor did the mine at Frontier have anyone present who was experienced in surface construction. (A.R. 118.) Bluestone, however, did.

Importantly, 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. (A.R. 38, 40.) Nevertheless, 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. (A.R. 112.)

Mr. Lester admitted that had someone trained in surface construction been on site, they might have recognized the hazards associated with the construction of the canopy walls. (A.R. 108-109.) In addition, Mr. Lester, Mr. Cline, and Mr. Compton all testified that if Mr. Graham or Mr. O'Neal had been present, their instructions would have been followed. (A.R. 112-113, 144-145, 166-167.)

Mr. Lester did have actual knowledge, however, that if a wall was to fall over on an employee during construction, the employee would suffer serious injury. (A.R. 108.)

Accordingly, Mr. Keneda's expert James Jenkins testified that Frontier and Bluestone did not have a qualified construction supervisor present at the work site as required under W.Va.C.S.R. §36-23-7; who would have been capable of performing the mandatory hazard inspection under W.Va.C.S.R. §36-23-9.1; or who would have been able to provide hazard training as required by W.Va.C.S.R. §36-23-9.4. (A.R. 251-254, 259, 260-262.) In fact, no inspection was conducted whatsoever. (A.R. 137, 139-141, 254.)

In other words, none of the three corporate defendants had anyone present during the dangerous construction of this canopy with sufficient knowledge, training, or experience to be

able to perform a reasonable evaluation of or remediation of the hazards associated with the construction. Therefore, the Respondents are estopped from denying the existence of actual knowledge of the unsafe working conditions. Syl.Pt. 6, Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756 (2006).

In addition, both Mr. Keneda and Mr. Jude testified that they told their supervisors that they were not welders. (A.R. 197-198, 332, 361-362.) Furthermore, neither Mr. Keneda nor Mr. Jude received training in welding or canopy construction. (A.R. 173, 194, 204-205.) Even Mr. Lester admitted that if someone didn't know how to weld, you wouldn't want them doing it. (A.R. 95.) Accordingly, Mr. Keneda's expert James Jenkins testified that the lack of training, which is intended to help the employee identify hazards, was an unsafe working condition. (A.R. 263-264, 320-321.)

Finally, Mr. Keneda introduced evidence that two employees actually told management about the dangers associated with the construction of the canopy walls.

Billy Trent, another Frontier / Bluestone employee, who worked the day before Mr. Keneda was injured, specifically warned foreman Bruno Cline (as well as another foreman Nick Browning) at the end of his shift that the weather was expected to be bad on Sunday with high winds, and that if the canopy walls were not properly braced, they were likely to be blown over, fall on a worker, and cause injury or death. (A.R. 372-373, 378-379, 381.)

In addition, prior to the wall falling over, Mr. Keneda himself expressed concern to his supervisors that the braces did not look sufficient to hold the wall up. (A.R. 333-334.) Mr. Keneda's expert James Jenkins also testified that the wall was not properly constructed and was unsafe, and that requiring employees to work under the wall was unsafe. He also testified that the employers had actual knowledge of those unsafe working conditions. (A.R. 255, 256, 258,

263-270, 272.) Accordingly, Mr. Keneda did prove that the Respondents had actual knowledge of unsafe working condition as required by W.Va.Code §23-4-2(d)(2)(ii)(B).

In an effort to avoid the Respondent's evidence, the Petitioners cite Sedgmer v. McElroy Coal Co., 220 W.Va. 66, 640 S.E.2d 129 (2006), for the proposition that actual knowledge can be disproven by the fact that a supervisor exposed himself or a loved one to the same working conditions which lead to the employee's injury. While it may prove the supervisor's lack of knowledge, it can also prove the supervisor's willfulness. However, this argument ignores two key issues. First, under the applicable standard of review as set forth above, the defendants' evidence is not relevant to this Court's decision. The entire focus is placed on the evidence offered by Mr. Keneda, the inferences which may be drawn from that evidence which favor Mr. Keneda, and whether that presented a *prima facie* case. Second, under the facts of this case where the allegations are that the employer failed to utilize competent personnel to perform a reasonable evaluation of the hazards associated with the tasks being undertaken and that neither the employees nor their supervisors were properly trained to perform the tasks being undertaken, it is not surprising that a supervisor would expose himself or a loved one to an unsafe working condition. This Court has previously demonstrated that it will not adopt a rule which allows an employer to disclaim actual knowledge of an unsafe working condition as a result of its deliberate ignorance. *See generally* Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756 (2006); Coleman Estate v. R.M. Logging, Inc., 226 W.Va. 199, 700 S.E.2d 168 (2010).

(1) Mr. Keneda's Proof of the Violation of an Applicable Safety Statute, Rule, Regulation, or Standard

Mr. Keneda also offered sufficient evidence to prove that the employers' unsafe acts were in violation of applicable safety statutes, rules, regulations, generally accepted standards, and in

fact, their own MSHA approved Comprehensive Mine Safety Plan and other knowledge of the applicable safety rules.

Superintendent Randall Lester admitted that Frontier and Bluestone had the responsibility for making sure that the mines were operated pursuant to the applicable safety rules and regulations (A.R. 8-9.) Foreman Bruno Cline was also aware of the state and federal safety rules. (A.R. 130.) Those rules included training by a qualified supervisor in how to do the job and how to ascertain hazards of the job. (A.R. 59-60.)

Accordingly, the mine had a Comprehensive Mine Safety Program, which identified Bluestone Safety Director Pat Graham as the contact person, and required a minimum of eight hours of task training by a qualified employee for each assigned task. (A.R. 10-21, 120-124.) According to the Mine Safety Program, the safety of the employees is the first consideration and compliance with all safety practices is essential. (A.R. 18.) Furthermore, the Mine Safety Program required management to ensure that all employees were working safely, but required management to work safely themselves. (A.R. 21.)

In discussing the Comprehensive Mine Safety Program, Mr. Lester testified that the objective of these safety rules and regulations is the “recognition and avoidance of mining hazards.” (A.R. 0012.) Mr. Lester admitted that the objective was to “instruct health and safety aspects of the task assigned.” (A.R. 0012.) Their own safety rules required that the training be conducted by an experienced operator or supervisor experienced in the safe operating procedures of performing the task. (A.R. 0013.) And, contrary to Petitioners’ claim, Mr. Lester admitted that every employee on surface operations had to be task trained by a certified person who is “qualified in the particular task that’s going to be performing.” (A.R. 0015-0016.)

Importantly, the Comprehensive Safety Program rules for Frontier identify Patrick Graham as the contact person. (A.R. 0017.) Mr. Graham is the Safety Director at Bluestone. (A.R. 0015.) Also importantly, the three safety instructors listed never visited or appeared at the subject mine. (A.R. 0017.) The actual practices at Frontier flies in the face of Bluestone's statement that "safety of our employees is our first consideration." "Complete cooperation with the mine safety program is essential for a safe operation." (A.R. 0018.)

Incredibly, Defendants claim that there were no applicable safety rules which applied to what Mr. Keneda was ordered to do. Mr. Keneda was an underground roof bolter with no experience welding or building canopies, yet because Bluestone was in a hurry and wanted to save money he was required to weld a 3000 lb., 25' X 5' steel wall without any training when the rules required first that he have eight hours of training, pre-shift meeting. (A.R. 0018-0019.) Mr. Lester admitted that these rules were agreed to by Defendants with MSHA and required that all the training be qualified. (A.R. 0014-0019.) These rules are the same as the state and federal safety rules. (A.R. 0019.) In addition, this situation created an imminent danger for all persons working under this wall. This danger was reported by Mr. Trent and Mr. Keneda. Once this was reported, the work had to be done under the direct supervision of a qualified supervisor which could only be the engineer or safety director. (A.R. 20.)

Mr. Lester further admitted that an on-shift inspection of the property was required. (A.R. 88-89.) Mr. Cline also testified that although he knew he had to do an on-shift inspection, his only inspection on the day of Mr. Keneda's incident was to tell the crew what they were going to be doing that day. (A.R. 137, 139-141.)

Randall Lester also testified that in constructing a steel structure, there was a safety rule that the structure must be kept stable at all times for safety purposes. (A.R. 60, 111.) In order to

achieve that goal, the wall's braces had to hold, had to be properly welded to the wall, and had to be placed in such a manner that they would stop the wall from tilting. (A.R. 104.)

(a) Respondents' Violation of W.Va.C.S.R. §36-23-7

Title 36, Series 23 of the West Virginia Code of State Rules sets forth the requirements for "Surface Construction Operations Within the Coal Mining Industry."² Pursuant to W.Va.C.S.R. §36-23-7, an "employer shall designate at least one (1) certified construction supervisor for each surface construction project at each specific mine where the employer employs ten (10) or more employees or at least one (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) employees."

Bluestone / Frontier employed approximately twenty employees at the mine. (A.R. 135.) Accordingly, the employers were required to have a certified construction supervisor on hand. However, neither Mr. Lester, Mr. Cline nor Mr. Compton was certified in surface construction. (A.R. 22, 130, 170-161.) Nor did the mine have anyone else on hand who was certified in surface construction. (A.R. 118.) Finally, Bluestone failed to send qualified personnel to the mine who could oversee this construction project. (A.R. 112.)

² Respondents note that 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 coal mine[.]" The Respondents then suggest, without authority, that a "facility" is a large construction project such as a preparation plant, a load-out, or a tippie, and that a canopy does not constitute a "facility." The state rules contained in the West Virginia Office of Miner's Health Safety & Training "Mining Laws, Rules and Regulations Manual" do not define "facility." However, they do use the term facility in a variety of different contexts including: W.Va.C.S.R. §22A-1-14 (which requires every coal mine to "furnish the director or his or her authorized representative proper facilities for entering such mine and making examination or obtaining information."); W.Va.C.S.R. §22A-2-3(b)(facilities related to ventilation fans); and W.Va.C.S.R. §22A-2-42(communcations facilities). More importantly, W.Va.C.S.R. §22A-1-14 would seem to very clearly include a canopy in the definition of a facility and "facilities" are not limited to large structures. (A.R. 309-311, 315-316.)

Furthermore, if the Petitioners are correct and these construction regulations do not apply, then there would be no applicable safety regulations protecting coal miners while performing construction work on the surface. (A.R. 315.)

Mr. Keneda's expert James Jenkins testified that the Respondents' failure to have a qualified construction supervisor on site during the canopy construction was a violation of W.Va.C.S.R. §36-23-7. (A.R. 251-252.)

(b) Respondents' Violation of W.Va.C.S.R. §36-23-9.1 and 30 C.F.R. §77.1713(a)

One of the duties of a construction supervisor under W.Va.C.S.R. §36-23-7 is to "examine within the first four (4) hours of a working shift, the working places of a construction project for unsafe working conditions, and make sure appropriate action is taken to either correct, or prevent exposure of employees to, unsafe conditions." W.Va.C.S.R. §36-23-9.1. Obviously, only a competent construction supervisor will be able to recognize the hazards associated with a construction project.

Similarly, 30 C.F.R. §77.1713(a), requires a certified person to perform an inspection "[a]t least once during each working shift, or more often if necessary for safety" of each surface working area.

It is absolutely undisputed that not only was there no certified construction supervisor at the mine to perform a W.Va.C.S.R. §36-23-9.1 inspection, foreman Bruno Cline testified that he did not do a surface inspection at all that day. (A.R. 137, 139-141.)

Accordingly, Mr. Keneda's expert James Jenkins testified that the employers violated the rules requiring inspections of surface working areas. (A.R. 253-254.)

(c) Respondents' Violation of W.Va.C.S.R. §36-23-9.4, 30 C.F.R §48.27(c), and the Comprehensive Mine Safety Program

A further duty of a construction supervisor under W.Va.C.S.R. §36-23-7 is to "make sure that new employees are warned about hazards inherent to the type of work they will perform, and instructed in safety procedures." W.Va.C.S.R. §36-23-9.4

In addition, under 30 C.F.R. §48.27(c), “Miners assigned a new task” (other than blasting or operating mobile equipment, drilling machines, haulage and conveyer systems, ground control machines, or AMS) “shall be instructed in the safety and health aspects and safe work procedures of the task.”³ Furthermore, “All training and supervised practice and operation required by this section shall be given by a qualified trainer, or a supervisor experienced in the assigned tasks, or other person experienced in the assigned tasks.” 30 C.F.R. §48.27(d).

Finally, as noted earlier, the mine’s own MSHA approved Comprehensive Mine Safety Program requires that employees assigned to a new job, including surface jobs, to be given a minimum of eight hours by an experienced supervisor. (A.R. 13-19.)

Mr. Keneda was neither a welder nor experienced in construction, nevertheless, he was assigned those tasks on February 10, 2008 without receiving the required hazard training. (A.R. 332, 173.) Accordingly, Mr. Keneda’s expert James Jenkins testified that the Respondents violated W.Va.C.S.R. §36-23-9.4, 30 C.F.R §48.27(c), and the Comprehensive Mine Safety Program. (A.R. 256-257, 263-264, 270-271, 290, 317-322.)

³ 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.” As an initial matter, all underground mines have canopies. (A.R. 322.) However, Respondents cite Bridger Coal Co. v. MSHA, 23 FMSHRC 887, 2001 WL 1003323 (2001) in support of their contention that Mr. Keneda was not performing a “task” at the time of his injury and therefore hazard training was not required because canopy building was not a regular part of Mr. Keneda’s job. Bridger is factually distinguishable in that simply pushing a button while under the direction of two tasked trained operators, id. at 887-888, as was at issue in that case, is considerably less involved than constructing a steel canopy. But more importantly, Bridger Coal is very poorly reasoned. By defining “task” in terms of whether the specific employee performs that task on a regular basis, as opposed to defining “task” in terms of whether the task is performed by anyone on a regular basis, the Federal Mine Safety Health and Review Commission has undermined the very purpose of task training. An employee is most at risk when they are assigned a new task in which they lack experience and when they have not been properly trained to perform and recognize the associated hazards. Under the Bridger Coal analysis, an employer could assign any employee to do any task without providing any safety training, as long as the employer only asks the employee to do that task occasionally. This position conflicts entirely with the very purpose of the Federal Mine Health & Safety Act, 30 U.S.C. §801.

(d) Respondents' Violation of W.Va.C.S.R. §22A-1-15, 30 C.F.R. §77.1713(b), and the Comprehensive Mine Safety Program

Pursuant to W.Va.C.S.R. §22A-1-15, if an imminent danger exists, all employees must be withdrawn from the affected area until the danger no longer exists. Similarly, 30 C.F.R. §77.1713(b) requires that if any hazardous condition creates an imminent danger for employees, the employer shall withdraw all employees from the area until the problem is abated.

Finally, the mine's MSHA approved Comprehensive Mine Safety Program requires the foreman to take steps to abate any imminent danger to the employees. Mr. Keneda's expert James Jenkins testified that as a result of the lack of qualified supervision and the improper manner of construction of the canopy wall, the Petitioners placed Mr. Keneda in a position of imminent danger prior to his injury. (A.R. 254-256, 263-270.) Accordingly, Mr. Keneda did prove that the unsafe working conditions created by the Petitioners violated numerous written state and federal safety rules and regulations, as well as the mine's own MSHA approved Comprehensive Mine Safety Program, as required by W.Va.Code §23-4-2(d)(2)(ii)(C). Furthermore, contrary to the Petitioners' argument, Mr. Keneda did prove "actual knowledge" and violation of applicable state or federal rules or regulations as required by W.Va.Code §23-4-2(d)(2)(ii), thereby establishing a *prima facie* right of recovery under the deliberate intent statute.

CROSS ASSIGNMENT OF ERROR

(1) THE CIRCUIT COURT ERRED IN FAILING TO FIND THAT PETITIONERS' INSTRUCTION NO. 16 WAS REVERSIBLE ERROR OR FAILING TO ADDRESS IT AS A GROUND.

Petitioners offered an intervening cause instruction which the trial court gave over Respondent's objection.⁴ Petitioners have consistently claimed that a great wind knocked the steel wall over and therefore it fell, not because it was improperly braced but because of the unexpected wind. "Despite the bracing, a huge and unexpected gust of wind blew one side of the canopy wall over onto Mr. Jude and Mr. Keneda." (A.R. 145-146, 171, 185 & 226; Petitioner's Brief at p. 3.).

Actually, the wind was not so huge, etc., but there was a wind. Respondent offered evidence of the wind reports for that date which demonstrated that the wind was not that abnormal and/or unexpected. Regardless, however, the "Instruction No. 16, Intervening Cause" was error because there was no evidence of any act or occurrence which fits the definition of intervening cause.

Petitioners offered and the trial court gave, over Respondent's objection, Petitioners' Instruction No. 16, which instructed the jury as follows:

To satisfy the fifth element, Plaintiff must prove that Mr. Keneda's injury was the direct and proximate result of the specific unsafe working condition.

Proximate cause is defined by the law as an act which, in the natural and continuous sequence of events, unbroken by any intervening cause, produces the injury, and without which the injury would not have occurred. The proximate cause of an injury is the last act contributing thereto, without which the injury would not have resulted.

⁴ Defendant's Instruction No. 16 was as follows: "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 the Defendants' control, you may find that this element has not been proven and you must find for the Defendants."

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 the Defendants' control, you may find that this element has not been proven and you must find for the Defendants.

There is a clear distinction between the proximate cause of an injury and the condition or occasion of the injury. The proximate cause is the superior or controlling agency, as distinguished from those causes which are merely incidental, or subsidiary to such controlling or principal cause. **A condition or occasion is harmless except in connection with the real proximate cause.**

(Emphases added.)

Respondent contends that there was no evidence introduced which satisfied the elements of an intervening cause instruction. The West Virginia Supreme Court, in Sydenstricker v. Mohan, 217 W.Va. 552, 559, 618 S.E.2d 561, 568 (2005), discussed when the defense of intervening cause can be established:

Insofar as intervening cause is a recognized defense in this State, the defense can be established only through the introduction of evidence by a defendant that shows the negligence of another party or a nonparty. See *Schreiber v. National Smelting Co.*, 157 Ohio St. 1, 104 N.E.2d 4, 8 (1952) (“The defendant is ... permitted to establish, if he can, an efficient independent cause. That cause could be the negligence of a third person not a party to the action.”).

(Emphasis added).

The only evidence offered by Petitioners as to what might constitute an intervening cause was that there was a strong wind which blew hard enough to cause the steel wall to fall onto Respondent. Petitioners argued to the jury that the wind was the cause. This “wind” would not qualify as an “intervening” cause under any circumstance since it was not caused by a third party or a nonparty. Further, Petitioners did not offer an instruction as to an “act of God,” which is the only arguable category that the wind could fall into. An act of God defense should only be allowed under the following circumstances:

No liability attaches to anyone for damages sustained by reason of the acts of God and the forces of nature, but **a party whose wrongful acts co-operate with, augment or accelerate those forces to the injury of another is liable in damages therefore...[t]hat which reasonable human foresight, pains and care should have prevented cannot be called an act of God.**

13B M.J. Negligence § 21 (emphasis added). *See also*, Riddle v. Baltimore & O.R. Co., 137 W.Va. 733, 73 S.E.2d 793 (1952). *See also* Adkins v. City of Hinton, 149 W.Va. 613, 142 S.E.2d 889 (1965), in which the Court, citing to numerous previous holdings, including those in Riddle, further held that, “For an act of God to constitute a valid defense and exonerate one from a claim for damages, **it must have been the sole cause, and not just a contributing cause of the injuries or damages sustained.**” (Emphasis added.)

In other words, “[f]or an act of God to constitute a valid defense and exonerate one from a claim for damages, **it must have been the sole cause**, and not just a contributing cause of the injuries or damages sustained.” Syllabus Point 3, *Adkins v. City of Hinton*, *supra*.

In re Flood Litig., 216 W. Va. 534, 548-49, 607 S.E.2d 863, 877-78 (2004) (emphasis added).

“A trial court’s instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled [sic] by the law.” Syl. Pt. 4, *in part*, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). *Accord* State v. Bradshaw, 193 W.Va. 519, 543, 457 S.E.2d 456, 480 (1995); Kessel v. Leavitt, 204 W.Va. 95, 511 S.E.2d 720, 769 (1998). Similarly stated, “[i]t is reversible error to give an instruction which tends to mislead and confuse the jury.”

Syl. Pt. 5, Sydenstricker v. Vannoy, 151 W.Va. 177, 150 S.E.2d 905 (1966). *Accord* Syl. Pt. 19, Rodgers v. Rodgers, 184 W.Va. 82, 399 S.E.2d 664 (1990).⁵

In this case, the jury was left with its own interpretation of what an intervening cause might be, which would include the wind. If the jury found the wind was **equally at fault** for the wall falling, then Respondent could not recover. Instructing the jury as to the intervening cause defense without evidence to support the giving of same and without qualifying its application to the case at bar would be confusing to the jury and was an inaccurate statement of the law. Further, the instruction was an improper statement of the law as to events caused by nature, such as wind, since the act of God defense requires that the jury also be instructed that the natural cause must be the sole cause of the injury, not merely contributory.

In this case, the jury specifically found that the Petitioners' acts were not the proximate cause of the Respondent's injury. Therefore, proximate cause was covered by the subject Instruction No. 16 on intervening cause.

(A) Statement of the Case

The facts of the case are adequately described in the "Statement of The Case" in the "Respondent's Brief." The issues addressed Respondent's Cross Assignments of Error are relatively narrow.

The Petitioners argued that the wind caused the wall to fall, that a great wind blew it over. (Petitioner's Brief at p. 3; A.R. 145-146, 171, 185 & 226.) This factual statement was challenged by Respondent's witnesses as to whether it was unexpected or whether it was so huge. Regardless, however, it was argued. The trial court gave Petitioners' Instruction No. 16,

⁵ It should additionally be noted that "[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 1, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996). *Accord* Syl. Pt. 2, Foster v. Sakhaj, 210 W.Va. 716, 559 S.E.2d 53 (2001); Syl. Pt. 2, Keesee v. General Refuse Service, Inc., 216 W.Va. 199, 604 S.E.2d 449 (2004).

Intervening Cause, without any supporting evidence. The only thing or event which was identified by any evidence which could have contributed to the wall falling was the "wind." Respondent objected to the giving of the instruction because it did not fit the definition of an intervening cause.

CONCLUSION

Respondent prays that this Court will deny the Petitioners the relief they request in their appeal and rule that the trial court's rulings with respect to the motion for new trial are not error; and to rule that Respondent's cross assignment of error be granted concerning the giving of Petitioners' Instruction No. 16, that the matter be remanded for further proceedings should the Court find the same proper, and for costs and disbursement of the appeal and for such other further relief as the Court deems just and proper.

TIMOTHY KENEDA

By Counsel



Marvin W. Masters
West Virginia State Bar No. 2359
Christopher L. Brinkley
West Virginia State Bar No. 9331
The Masters Law Firm lc
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
Counsel for Respondent/Plaintiff Below
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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.

(Civil Action No. 08-C-256)
Honorable Warren McGraw

TIMOTHY KENEDA,

Respondent/Plaintiff Below.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Respondent/Plaintiff Below, do hereby certify that a true and exact copy of the foregoing "Respondent's Brief and Respondent's Cross Assignment of Error" was served upon:

Jeffrey M. Wakefield
William J. Hanna
Nathaniel K. Tawney
Keith R. Hoover
Flaherty Sensabaugh Bonasso, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338-3843
Counsel for Petitioners/Defendants Below

in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 15th day of March, 2013.


Marvin W. Masters
West Virginia State Bar No. 2359