IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
November 19, 1999
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OF WEST VIRGINIA

September 1999 Term

RELEASED
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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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No. 25959

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SHERMAN JONES AND LORI JONES,
Plaintiffs Below, Appellants

v.

PATTERSON CONTRACTING, INC., A WEST VIRGINIA CORPORATION;
AND GRASAN EQUIPMENT COMPANY, AN OHIO CORPORATION,
Defendants Below

GRASAN EQUIPMENT COMPANY, INC., AN OHIO CORPORATION,
Defendant Below, Appellee

AND

_____

No. 25960

_____

SHERMAN JONES AND LORI JONES,
Plaintiffs Below, Appellants

v.

PATTERSON CONTRACTING, INC., A WEST VIRGINIA CORPORATION;
AND GRASAN EQUIPMENT COMPANY, AN OHIO CORPORATION,
Defendants Below

PATTERSON CONTRACTING, INC., A WEST VIRGINIA CORPORATION,
Defendant Below, Appellee

Appeal from the Circuit Court of Logan County
Honorable Rodger L. Perry, Judge
Civil Action No. 97-C-53P

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Submitted: September 22, 1999
Filed: November 19, 1999

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The Opinion of the Court was delivered Per Curiam.
JUDGE RISOVICH, sitting by temporary assignment.
JUSTICES DAVIS AND MAYNARD concur in part, dissent in part, and reserve the right to file separate Opinions.
JUSTICE SCOTT did not participate.

SYLLABUS BY THE COURT

1. "'When the plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right to recovery, the trial court should direct a verdict in favor of the defendant.' Syl. Pt. 3, Roberts ex rel. Roberts v. Gale, 149 W. Va. 166, 139 S.E.2d 272 (1964)." Syl. Pt. 1, Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996).

2. "The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to nonmovant party, will sustain the granting of directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." Syl. Pt. 3, Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996).

3. "Upon a motion for a directed verdict, all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed." Syl. Pt. 5, Wager v. Sine, 157 W. Va. 391, 201 S.E.2d 260 (1973).

4. "'"Upon a motion to direct a verdict for the defendant, every 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. Syllabus, Nichols v. Raleigh-Wyoming Coal Co., 112 W. Va. 85[, 163 S.E. 767 (1932)]."' Point 1, Syllabus,

Jenkins v. Chatterton, 143 W. Va. 250[, 100 S.E.2d 808](1957)." Syl. Pt. 1, Jividen v. Legg, 161 W. Va. 769, 245 S.E.2d 835 (1978).

5. "Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trail court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Syl. Pt. 5, Overton v. Fields, 145 W. Va. 797, 117 S.E.2d 598 (1960).

6. "In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify." Syl. Pt. 5, Gentry v. Mangum, 195 W. Va. 512, 466 S.E.2d 171 (1995).

7. "A plaintiff may establish 'deliberate intention' in a civil action against an employer for a work-related injury by offering evidence to prove the five specific requirements provided in W.Va.Code Sec. 23-4-2(c)(2)(ii) (1983)." Syl. Pt. 2, Mayles v. Shoney's, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990).

8. "The portion of the statute which authorizes "prompt judicial resolution" of "deliberate intention" actions against employers, specifically, W.Va.Code § 23-4-2(c)(2)(iii)(B) [1994], relates to plaintiffs' more specific substantive law burden under the five-element test of W.Va.Code § 23-4-2(c)(2)(ii)(A)-(E) [1994], but the preexisting

procedural law still applies for granting employers' motions for summary judgment, directed verdict and judgment notwithstanding the verdict." Syl. Pt. 3, Sias v. W-P Coal Co., 185 W. Va. 569, 408 S.E.2d 321 (1991).

Per Curiam:

This is an appeal by Sherman and Lori Jones (hereinafter "Appellants") from July 28, 1998, and August 27, 1998, orders of the Circuit Court of Logan County granting directed verdicts in favor of Patterson Contracting, Inc., and Grasan Equipment Company

(hereinafter "Appellees," "Patterson," or "Grasan").[1] The Appellants maintain that the lower court erred in granting the directed verdicts, that expert testimony was improperly excluded from consideration, and that the Appellants' evidence of deliberate intent was not properly evaluated. We conclude that the lower court erred in granting the directed verdict in favor of Grasan, but we affirm the directed verdict in favor of Patterson.

I. Facts

On May 15, 1995, Mr. Sherman Jones, employed by Appellee Patterson at Cora, West Virginia, was operating a rock crusher manufactured by Appellee Grasan. Mr. Jones was injured as he placed his head and upper body into a chute in the rock crusher in an attempt to manually dislodge dirt which had become clogged in the machine.[2] While cleaning the chute, dirt and rock dust from within the machine fell on Mr. Jones, trapping him in the chute. He has alleged that he sustained back, neck, and psychiatric injuries as a result of the accident.

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[1]The directed verdict in favor of Patterson was entered on July 28, 1998, and Appeal Number 25960 was granted by this Court on that issue. The directed verdict in favor of Grasan was entered on August 27, 1998, and Appeal Number 25960 was granted by this Court on that issue. The two appeals were thereafter consolidated.

[2]The rock crushing process originated at Patterson's Quarry where an end loader was used to load rock, dirt, and gravel into trucks. The trucks then transported the material to a stationary rock crusher operated by Mr. Jones. The material was dumped into a "shaker bin" which vibrated to move the material through an opening into the "jaws." As the material moved along a conveyor toward the jaws, smaller rocks and dirt were removed as they passed over a metal grate on top of a collecting chute. The rock chute occasionally became clogged, as in this instance.

The Appellants instituted a civil action in the Circuit Court of Logan County against Patterson based upon the deliberate intent statute, West Virginia Code § 23-4-2(c)(2)(ii)(A-E) (1994), and against Grasan on a products liability theory. Trial commenced on July 13, 1998, and continued through July 16, 1998. The lower court granted directed verdicts in favor of both defendants, entered by order dated July 28, 1998, for Patterson, and August 27, 1998, for Grasan. The Appellants thereafter appealed to this Court.

II. Review of a Lower Court's Entry of a Directed Verdict

Rule 50(a) of the West Virginia Rules of Civil Procedure authorizes a party to move for a directed verdict. A circuit court should direct a verdict in the defendant's favor if "'the plaintiff's evidence, considered in the light most favorable to him, fails to establish a prima facie right to recovery[.]' " Syl. Pt. 1, in part, Brannon v. Riffle, 197 W. Va. 97, 475 S.E.2d 97 (1996) (quoting Syl. Pt. 3, in part, Roberts ex rel. Roberts v. Gale, 149 W. Va. 166, 139 S.E.2d 272 (1964)). In syllabus point three of Brannon, this Court explained as follows:

> The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to nonmovant party, will sustain the granting of directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed.

In evaluating a request for a directed verdict, syllabus point five of Wager v. Sine, 157 W. Va. 391, 201 S.E.2d 260 (1973), instructs that "all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed." ""Upon a motion to direct a verdict for the defendant, every 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. Syllabus, Nichols v. Raleigh-Wyoming Coal Co., 112 W. Va. 85[, 163 S.E. 767 (1932)]." ' Point 1, Syllabus, Jenkins v. Chatterton, 143 W. Va. 250[, 100 S.E.2d 808](1957)." Syl. Pt. 1, Jividen v. Legg, 161 W. Va. 769, 245 S.E.2d 835 (1978).

III. Grasan Products Liability Claim

The Appellants maintained that Grasan, as manufacturer of the rock crusher, had failed to warn operators of the "dangers associated with the foreseeable use and misuse of its product." They further alleged that the machine was inherently dangerous in its failure to provide a safe and reliable means of cleaning the chute. The Appellants' primary evidence of defective design was introduced at trial through the expert testimony of Mr. Keith Colombo, a licensed professional engineer and a certified safety professional. His practical experience included systems safety analysis in major companies such as Boeing, Martin

Marietta, and United Technologies. Mr. Colombo is a member of the American Society of Safety Engineers, the American Society for Testing and Materials, the National Fire Protection Association, and the Systems Safety Society.

Prior to trial, Grasan had presented the lower court with a motion in limine requesting that the lower court prohibit the introduction of Mr. Colombo's testimony based upon his alleged lack of familiarity with the standards of the mining industry in particular. The lower court, however, permitted Mr. Colombo to testify at trial, explaining as follows: "I think this is a question of what weight to give to his testimony and the jury will give whatever weight is appropriate."

Mr. Colombo testified that he was familiar with chutes, conveyors, and material handling. Having viewed numerous photographs and videotapes of the rock crusher, Mr. Colombo opined that there was no safe method by which operators could clean the rock crusher chute. Relying upon standard promulgated by the American National Standard Institute (ANSI) to assist him in identifying hazards in the work place, Mr. Colombo determined that either of two potential design alterations could have prevented access to the chute door: (1) an interlock device to prevent opening the door, or (2) a permanent metal grate to prevent a person from accessing the chute door opening. Mr. Colombo also emphasized that the written materials supplied by Grasan regarding the maintenance and operation of the rock crusher did not instruct the user on the appropriate method of cleaning

the chute.

On the morning following Mr. Colombo's presentation of testimony to the jury, Grasan moved to strike Mr. Colombo's testimony in its entirety. The lower court granted Grasan's motion to strike and asked the jury to disregard Mr. Colombo's testimony. The lower court explained that it had done a "disservice" by allowing Mr. Colombo to testify and reasoned as follows:

> There are mining engineers in profusion and you end up with somebody who is an astronautical (sic) engineer from Florida . . . . [H]e seemed to have a real hard time coping with the stuff and his obvious unfamiliarity with the industry, with the standards of the industry, with anything having to do with the mining industry was just pretty obvious. . . . There are various engineers who deal with very narrow areas and do not have expertise in other areas and I don't accept the proposition that it is quite that flexible.

The Appellants maintain that Mr. Colombo's lack of experience within the particular field of mining or the realm of rock crushing equipment does not render his testimony as to general safety precautions inadmissible. They contend that any credibility issues are more properly resolved by permitting the jury to have the benefit of all information, establishing an issue of credibility, the weight of the evidence, rather than admissibility.

Grasan asserts that the lower court properly exercised its discretion in striking the testimony of Mr. Colombo based upon his deficiencies in training, education, and experience in the mining industry. Grasan emphasizes that Mr. Colombo had not seen the actual machine in question until the morning of the trial, had not operated a rock crusher, had no knowledge of MSHA (Mine Safety and Health Administration) regulations, and had no knowledge of the mining industry in general.

In the determination of the admissibility of expert testimony, we must be guided by the principles of Rule 702 of the West Virginia Rules of Evidence, explaining as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

In syllabus point five of Gentry v. Mangum, 195 W. Va. 512, 525, 466 S.E.2d 171, 184 (1995). this Court explained:

> In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

In syllabus point five of Overton v. Fields, 145 W. Va. 797, 117 S.E.2d 598 (1960), we

explained: "Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused."

"What must be remembered, however, is that there is no 'best expert' rule. Because of the 'liberal thrust' of the rules pertaining to experts, circuit courts should err on the side of admissibility." Gentry, 195 W. Va. at 525, 466 S.E.2d at 184, citing II Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers §7-2(A) at 24. In Gentry,[3] we acknowledged that "we have clearly stated that a broad range of knowledge, skills, and training qualify an expert as such, and rejected any notion of imposing overly rigorous requirements of expertise." 195 W. Va. at 525, 466 S.E.2d at 184. In Cargill v. Balloon Works, Inc., 185 W. Va. 142, 405 S.E.2d 642 (1991), we explained as follows:

> West Virginia Rule of Evidence 702 enunciates the standard by which the qualification of an individual as an expert witness will be determined. It cannot encompass every nuance of a specific factual matter or a particular individual sought to be qualified. It simply requires that the witness must, through knowledge, skill, experience, training, or education, possess scientific, technical, or other specialized knowledge which will assist the trier of fact to understand the evidence or to determine a fact in issue. It cannot be interpreted to require ... that the experience, education, or training of the individual be in complete congruence with the nature of the issue sought to be proven.

[3]Gentry dealt specifically with expert testimony in the realm of "scientific" evidence derived from the scientific method. Syl. Pt. 6, Gentry, 195 W. Va. at 521, 466 S.E.2d at 180.

Id. at 146-47, 405 S.E.2d at 646-47.

An additional component of this inquiry is that where issues of credibility are present, the proper focus may be the weight of the evidence, rather than its admissibility. In Gentry, this Court explained the method of dealing with credibility concerns within admissible testimony:

> We are not at all persuaded by the circuit court's concern that the witness was unfamiliar with the specifics of West Virginia law and how that law may relate to the facts of this case. The failure of an expert to be able to explain all aspects of a case or a controlling principle in a satisfactory manner is relevant only to the witness's credibility. "Should ... [a] witness later fail to adequately [explain], define, or describe the relevant standard of care, opposing counsel is free to explore that weakness in the testimony." Friendship Heights Assoc. v. Vlastimil Koubek, 785 F.2d 1154, 1163 (4th Cir.1986); see also, Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 22, 422 S.E.2d 494, 499 (1992) (suggests that "[t]he fact that a proffered expert may be unfamiliar with pertinent statutory definitions or standards is not grounds for disqualification ...[; s]uch lack of familiarity" affects credibility, not qualification to testify).

195 W. Va. at 528, 466 S.E.2d at 187, n.23. The consistency of this approach with principles enunciated by the United States Supreme Court was recognized in Gentry, as follows: "'Conventional devices,' like vigorous cross-examination, careful instructions on the burden of proof, and rebuttal evidence, may be more appropriate instead of the 'wholesale exclusion' of expert testimony under Rule 702." 195 W. Va. at 526, 466 S.E.2d at 185, quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, ___, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469, 484.

While the determination of whether a witness is qualified to state an opinion typically rests with the circuit court, an abuse of discretion warrants reversal.[4] In note six of Gentry, we discussed the abuse of discretion standard:

> We review these rulings only for an abuse of discretion. Only rarely and in extraordinary circumstances will we, from the vista of a cold appellate record, reverse a circuit court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect. Our review, however, must have some purpose and that is why we review under the abuse of discretion standard. In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.

195 W. Va. at 520, 466 S.E.2d at 179.

In the case sub judice, Mr. Colombo exhibited extensive knowledge of safety mechanisms and safety issues in general; his lack of distinctive knowledge of the workings of the mining industry should not render his testimony inadmissible. Prohibiting the testimony based upon lack of familiarity with the mining industry as a whole illustrates misapprehension of the fundamental questions raised by the Appellants. This was not predominantly or exclusively a "mining" issue; rather, it was a safety issue to be addressed

[4]We stated in Gentry that "where the granting of summary judgment is dependent on the exclusion of expert testimony, as it is sub judice, our review must be more stringent." 195 W. Va. at 519, 466 S.E.2d at 178.

more appropriately and exhaustively by a "safety" expert such as Mr. Colombo. The jury was asked to resolve the narrow questions of the operation of the chute and the proper methods of cleaning. A safety engineer possessing familiarity with chutes, conveyors, and material handling would appear amply qualified to address that issue and would potentially be more knowledgeable on the precise issues than an expert with more general knowledge of the mining industry. Concerns regarding the parameters of Mr. Colombo's expertise could have been addressed through cross-examination, as issues of credibility rather than admissibility.

We conclude that the lower court abused its discretion in striking the testimony of Mr. Colombo. In our de novo review of the lower court's ultimate decision on the directed verdict issue, we reverse the decision of the lower court.[5]

IV. Patterson Deliberate Intent Claim

The Appellants premised their civil action against Patterson upon the deliberate intent statue, West Virginia Code § 23-4-2(c)(2)(ii)(A-E). The pertinent

[5]Although "most rulings of a trial court regarding the admission of evidence are reviewed under an abuse of discretion standard, ... an appellate court reviews de novo the legal analysis underlying a trial court's decision." State v. Guthrie, 194 W. Va. 657, 680, 461 S.E.2d 163, 186 (1996). As expressed above, the standard of review for the directed verdict determination is also de novo.

portions of West Virginia Code § 23-4-2(c)(2) provide as follows:

> (2) The immunity from suit provided under this section and under section six-a, article two of this chapter, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if. . .
>
> (ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:
>
> (A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;
>
> (B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;
>
> (C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
>
> (D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and
>
> (E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

The Appellants claimed that Patterson failed to properly train Mr. Jones regarding safe chute cleaning methods, alleging that Patterson knew its employees inserted

their bodies into the chute to clean the materials lodged inside the chute.[6] Thus, the Appellants argued that they proved all five statutory requirements for recovery under the deliberate intent statute.

Patterson contended that it had instructed its employees to stand above the chute while cleaning it and had no knowledge of the methods being utilized by Mr. Jones. Patterson had sent Mr. Jones to a training course offered by the West Virginia Office of Safety, Health & Training providing safety training for operators of machinery with chutes. This training course specified that placing one's body in the chute was dangerous and could result in serious injury.[7]

The lower court found no evidence to support (1) a specific unsafe working condition;[8] (2) a subjective realization by Patterson of a specific unsafe working condition;

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[6]The Appellants attempted to establish subjective realization by introducing the testimony of Virgil Cook a co-worker of Mr. Jones. Mr. Cook had apparently placed his own body in the chute when the machine was not running, had told Patterson about this episode, and had been reprimanded. There was no evidence, however, that Patterson had any realization that Mr. Jones was cleaning the chute by placing his body inside the chute.

[7]The training course included a video designed to teach safe methods of working around chutes. The video specified that dirt hangups in a chute may leave hollow spaces in the middle and "at any moment material can break free and anyone caught inside" could sustain injury. The video further instructed that the proper method of cleaning was from the top down and further instructed workers to refrain from inserting any part of the body in the chute.

[8]The lower court found: "The only evidence of an unsafe condition was the act committed by Sherman Jones when he put his body in a position which he knew was dangerous and which violated his training." The accident was investigated by the West Virginia Office of Mine Health,

or (3) an intentional exposure of Mr. Jones to an unsafe condition. As we stated in syllabus point two of Mayles v. Shoney's, Inc., 185 W. Va. 88, 405 S.E.2d 15 (1990): "A plaintiff may establish 'deliberate intention' in a civil action against an employer for a work-related injury by offering evidence to prove the five specific requirements provided in W.Va.Code Sec. 23-4-2(c)(2)(ii) (1983)." Accord, Syl. Pt. 4, Blake v. John Skidmore Truck Stop, Inc., 201 W. Va. 126, 493 S.E.2d 887 (1997). West Virginia Code § 23-4-2(c)(2)(iii)(B) provides the following guidance to courts reviewing allegations of deliberate intent: A court shall dismiss an action when, "after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court shall determine that there is not sufficient evidence to find each and every one of the facts required to be proven" in the deliberate intent statute.

In Sias v. W-P Coal Co., 185 W. Va. 569, 408 S.E.2d 321 (1991), this Court held that "such motions are to be granted when, pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, one or more of the five elements of W.Va.Code § 23-4-2(c)(2)(ii)(A)-(E) [1994] do not exist (motion for summary judgment) or when, after considering all of the evidence and every reasonable inference in the light most favorable to the plaintiff, there is insufficient evidence to find each and every one of the aforestated five elements (motion for a directed verdict)." 185 W. Va. at 576, 408 S.E.2d at 328.

Safety, and Training. The investigator did not find a violation for failure to train and in fact cited Mr. Jones for his lack of care.

Syllabus point three of Sias explained:

> The portion of the statute which authorizes "prompt judicial resolution" of "deliberate intention" actions against employers, specifically, W.Va.Code § 23-4-2(c)(2)(iii)(B) [1994], relates to plaintiffs' more specific substantive law burden under the five-element test of W.Va.Code § 23-4-2(c)(2)(ii)(A)-(E) [1994], but the preexisting procedural law still applies for granting employers' motions for summary judgment, directed verdict and judgment notwithstanding the verdict.

The lower court examined that evidence presented by the Appellants regarding the specific unsafe working condition, Patterson's subjective realization thereof, and the allegation of intentional exposure of Mr. Jones to an unsafe condition. Indulging in every favorable consideration toward the Appellants, the lower court concluded that the directed verdict should be granted in favor of Patterson. In our de novo review of the directed verdict question, we have reviewed the testimony presented on the deliberate intent issue, and we agree with the lower court's conclusions. We therefore affirm in that respect.

V. Conclusion

Based upon the foregoing, we find that the lower court abused its discretion in granting the directed verdict in favor of Grasan and remand for further proceedings on the Appellants' Grasan claim. We affirm the directed verdict in favor of Patterson.

Affirmed in Part, Reversed in Part, and Remanded.