

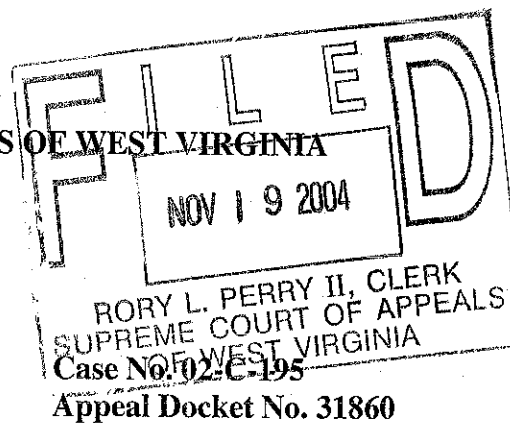
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES W. ARNAZZI,

Appellant,

QUAD/GRAPHICS, INC., and
ROBERT KNIGHTEN,

Appellees.



BRIEF FOR APPELLANT

Harry P. Waddell
300 West Martin Street
Martinsburg, WV 25401
(304) 263-4988
Bar No. 3883

Counsel for the Appellant

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THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This appeal arises from the grant of summary judgment dismissing Appellant's "deliberate intent" claim brought under W. Va. Code Section 23-4-2(c)(2)(ii). Appellant was operating a forklift in a confined space without proper safety training as required by federal law. As a result of his lack of training, Appellant was injured when his left foot was pinned between the forklift and a wall of stacked pallets. Appellees conceded that genuine issues of material existed with regard to four of the five elements necessary for a deliberate intent claim under W. Va. Code 23-4-2(c)(2)(ii) but contended that lack of training was not a proximate cause of the injury. The trial court granted summary judgment solely on the issue of proximate cause. It is from this ruling that the Appellant appeals.

ASSIGNMENTS OF ERROR

1. The Circuit Court of Berkeley County erred in ruling as a matter of law that Appellant's lack of training did not cause or contribute to his injury.
2. The Circuit Court of Berkeley County erred in ruling that 29 C.F.R. 1910.178(1) does not require safety training that could have prevented Appellant's injury

3. The Circuit Court of Berkeley County erred in ruling as a matter of law that Appellant's injury was "unforeseeable".

STATEMENT OF FACTS

Appellant applied for work in Appellee's bindery or press departments but failed to qualify due to color blindness. Appellant was then offered employment as a forklift operator. Appellant had no experience operating a forklift, no prior training in forklift operation and was not certified as a forklift operator. Despite his lack of training, experience or certification, Appellant was put to work operating a forklift on his first day of work. R. 244¹ By permitting the Appellant to operate a forklift without proper training, Appellees knowingly violated federal law [29 C.F.R. 1910.178(l)] requiring forklift operators to successfully complete formal classroom instruction, practical training, and a performance evaluation by an instructor before being allowed to operate a forklift. The OSHA regulation in question required specific training in: (1) operating instructions, warnings, and precautions for the types of truck the operator would be authorized to operate; (2) truck controls and instrumentation: where they are located, what they do, and how they work; (3) steering and maneuvering; (4) visibility (including restrictions due to loading); (5) operating limitations; (6) any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate. The regulation also required Appellees to provide specific training on the particular conditions encountered in the workplace including: (1) surface conditions where the vehicle will be operated; and (2) narrow aisles and other restricted

¹ This and all subsequent entries of this type are page cites to the record prepared for appeal.

places where the vehicle will be operated. R. 245-246. The OSHA mandated training included an obstacle course of pallets through which Appellant should have been required to maneuver a forklift to demonstrate his proficiency. R. 473. If Appellant had knocked any of the pallets over he would not have passed the course and would not have been certified until he had demonstrated his ability to successfully complete the obstacle course. Allowing Appellant to operate a forklift without this certification was admitted by Appellees to be a safety hazard. R. 714-715.

Appellant was permitted to work as a forklift operator from his first day of employment until he was injured three weeks later. Appellees' violation of the OSHA regulation was not isolated or fortuitous event. Appellees were aware at the time Appellant was hired that federal law required forklift operators to be properly trained and certified. R. 389, 393. Despite this awareness, Appellees did not begin training and certifying forklift operators in compliance with federal law until after Appellant's injury. R. 389, 393.

Appellant was seriously injured three weeks after he began operating a forklift. Prior to his injury, Appellant's lack of experience and training was evident. Several times during each of his shifts the Appellant would knock over pallets while operating his forklift. R. 275. Appellant's supervisors observed him operating his forklift in an unsafe manner. R. 720-722. Despite knowledge of Appellant's lack of safety training and unsafe practices, Appellees permitted him to continue operating a forklift until he was injured.

On the date of his injury, the Appellant's supervisor instructed him to maneuver a forklift down a narrow passageway between two rows of stacked, loaded pallets. Appellees routinely stacked pallets two high due to space constraints. R. 394. Each individual pallet was slightly less than four feet tall, making a row of stacked pallets almost eight feet tall. R. 394. The width of the passageway created between two rows of stacked pallets was normally fifty-two and one-quarter inches. The width of the forklift itself was forty-seven and one-half inches. This left mere inches on either side of the forklift as the Appellant maneuvered down the passageway between the rows of eight foot high stacked pallets. R. 398-399. In addition, between each layer of product on the pallets was cardboard sheeting extending beyond the pallets themselves. R. 309.

Appellant reported to his supervisor that he was concerned about his ability to safely operate the forklift in the confined space created by the stacked pallets. His supervisor ignored his safety concerns. R. 246-247. While proceeding down the passageway, Appellant's left foot became pinned between the forklift and a wall of pallets. He sustained a severe crush injury and multiple fractures of his left foot and internal derangement of his knee requiring surgery. R. 247.

Despite abundant evidence in the record to support a reasonable inference that his lack of training proximately caused or contributed to Appellant's injury, the trial court granted summary judgment to Appellees.

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

The appropriateness of the trial court's entry of summary judgment is subject to *de novo* review. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). The Court's traditional standard for granting summary judgment is stated in *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963): "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Summary judgment is only appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

A deliberate intention case does not change Appellees' burden with regard to establishing their right to summary judgment:

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.

Jones v. Patterson Contracting, Inc., 206 W. Va. 399, 407, 524 S.E.2d 915, 923 (1999), quoting syllabus point three of *Sias v. W-P Coal Co.*, 185 W. Va. 569, 408 S.E.2d 321 (1991)

Appellees concede that genuine issues of material fact exist with regard to four of the five elements of Appellant's deliberate intent claim. Appellant need not address those four elements in order to defeat summary judgment. It is not Appellant's burden to prove each element of his claim at the summary judgment stage, rather the Appellees must prove there are no issues of fact which would preclude summary judgment in their favor. *Dawson v. Allstate Insurance Co.*, 189 W.Va. 557, 565, 433 S.E.2d 268, 276 (1993).

ARGUMENT

I. The Circuit Court Committed Reversible Error in Granting Summary Judgment on the Element of Proximate Cause

A. Appellees Conceded that Material Issues of Fact Existed with Four of the Five Elements of Appellant's Deliberate Intent Claim

Appellees admitted that material issues of fact existed with regard to the following elements of Appellant's deliberate intent claim:

- a. Whether an unsafe working condition existed which presented a risk of serious injury due to the defendants' failure to train and certify the plaintiff;
- b. Whether the defendants' intentionally exposed the plaintiff to the unsafe condition; and,
- c. Whether the plaintiff suffered a serious injury.

R. 180.

Appellees further admitted that the unsafe condition in issue was in violation of a federal safety law:

“Quad/Graphics concedes that it did not fully comply with the provisions of 29 C.F.R. 1910.178(1), which required employers to ensure that operators of forklift trucks received training, consisting of formal instruction, practical training, and workplace evaluation, and are certified prior to formal assignment and operation of the forklift truck in the workplace”

R. 183.

In short, Appellees admitted that material issues of fact existed with regard to every element of Appellant’s deliberate intent claim except the element of proximate cause.

B. The Safety Training Required by Law Was Specifically Designed to Prevent Forklift Injuries

The circuit court’s conclusion that 29 C.F.R. 1910.178(1) did not require training that could have prevented Appellant’s injury is erroneous. The OSHA regulation mandates specific training in operating forklifts in “narrow aisles and other restricted places where the vehicle will be operated”. The regulation requires not only class room instruction, but practical live demonstrations of safe forklift operation and requires that the operator demonstrate his ability to safely operate the forklift. The operator must successfully complete the training to be certified. The operator must receive refresher training if he is observed operating the forklift in an unsafe manner. 29 C.F.R. 1910.178(1). This legally mandated training is specifically designed to prevent the type forklift injury that occurred in this case.

C. Proximate Cause is Almost Invariably a Jury Question to be Determined Based Upon the Totality of the Evidence

It is well established that except in very limited circumstances, the issue of proximate cause is a jury question to be decided based upon the totality of the evidence. See, e.g., *Matheny v. Fairmont Gen. Hosp.*, 212 W. Va. 740; 575 S.E.2d 350 (2002); *Kizer v. Harper*, 211 W. Va. 47; 561 S.E.2d 368 (2001) (a jury question was presented as to whether the statutory violation was the proximate cause of the plaintiff's injuries); *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477; 509 S.E.2d 1 (1998) (district court ruled that jury question existed over proximate cause of loss); *Wehner v. Weinstein*, 191 W. Va. 149; 444 S.E.2d 27 (1994); *Weese v. Muir*, 188 W. Va. 542; 425 S.E.2d 218 (1992) (proximate cause was a jury question); *Yost v. Fuscaldo*, 185 W. Va. 493; 408 S.E.2d 72 (1991); *Grillis v. Monongahela Power Co.*, 176 W. Va. 662; 346 S.E.2d 812 (1986) (issues of negligence and proximate cause are jury questions); *Burdette v. Maust Coal & Coke Corp.*, 159 W. Va. 335; 222 S.E.2d 293 (1976); *Butler V. Smith's Transfer Corp.*, 147 W. Va. 402; 128 S.E.2d 32 (1962) (evidence was sufficient to submit to the jury the questions as to whether or not the defendant was guilty of negligence and, if so, whether such negligence was the proximate cause of the damages); *Johnson v. Monongahela Power Co.*, 146 W. Va. 900; 123 S.E.2d 81 (1961) (question of proximate cause would be a jury question); *Frye V. McCrory Stores Corp.*, 144 W. Va. 123; 107 S.E.2d 378 (1959); *Darling v. Baltimore & O. R.R.*, 136 W. Va. 303; 69 S.E.2d 139 (1951) (Whether violation was in this case the proximate cause of decedent's death is a jury question); *Shrimplin V. Simmons Auto Co.*, 122 W. Va. 248; 9 S.E.2d 49 (1940) (negligence, which was the proximate cause of the plaintiff's injuries, was, we think, a

jury question); *White v. Ohio V. E. Ry.*, 98 W. Va. 378; 127 S.E. 65 (1925) (The general rule as to what is the proximate cause of an injury is ordinarily a jury question); *Crockett v. Black Wolf Coal & Coke Co.*, 75 W. Va. 325; 83 S.E. 987 (1914) (proximate cause is question for the jury).

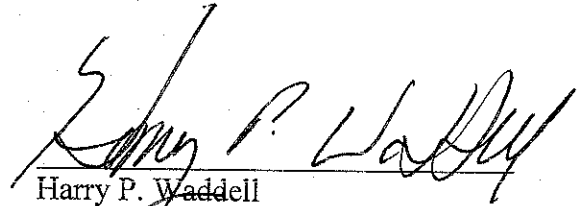
In the present case, the circuit court invaded the jury's role as fact finder. The jury should have been permitted to determine by a preponderance of all the evidence whether Appellant's lack of training proximately caused or contributed to the injury.

II. The Circuit Court Erred in Finding Appellant's Injury was Unforeseeable

Appellant had no prior experience or training in operating a forklift. The Appellees were aware of his lack of experience and training when he was hired. The Appellees were aware of their legal obligation to provide training prior to allowing the Appellant to operate a forklift. The Appellees failed to provide training in deliberate violation of federal law. Appellees observed the Appellant operating a forklift in an unsafe manner, but continued to allow him to operate the forklift without training. On the date of his injury, the Appellant openly expressed his concern that he could not safely operate the forklift in the very confined and narrow space as he was instructed. His safety concerns were ignored and he was injured while trying to comply. Under these facts, the circuit court's conclusion that the forklift injury was "unforeseeable" is not supported by the weight of the evidence.

CONCLUSION

Based upon the points and authorities recited above, Appellant respectfully requests that the Order granting summary judgment be overturned, and that this civil action be remanded to the Circuit Court of Berkeley County for a full jury trial based upon the merits.



Harry P. Waddell
300 West Martin Street
Martinsburg, WV 25401
(304) 263-4988
WV Bar No. 3883

Counsel for Appellant