

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31860

JAMES W. ARNAZZI,
Plaintiff below, Appellant,

v.

QUAD/GRAPHICS, INC., and ROBERT KNIGHTEN,
Defendants below, Appellees,

The Honorable David H. Sanders
Circuit Court of Berkeley County
Civil Action No. 02-C-195

BRIEF OF THE APPELLEES

Counsel for Appellant

Harry P. Waddell, Esquire
W. Va. State Bar ID 3883
300 West Martin Street
Martinsburg, West Virginia 25401
(304) 263-4988

Counsel for Appellees

Ancil G. Ramey, Esquire
W. Va. State Bar ID 3013
Bryan R. Cokeley, Esquire
W. Va. State Bar ID 774
Scott E. Johnson, Esquire
W. Va. State Bar ID 6335
Steptoe & Johnson PLLC
P.O. Box 1588
Charleston, West Virginia 25326
(304) 353-8000

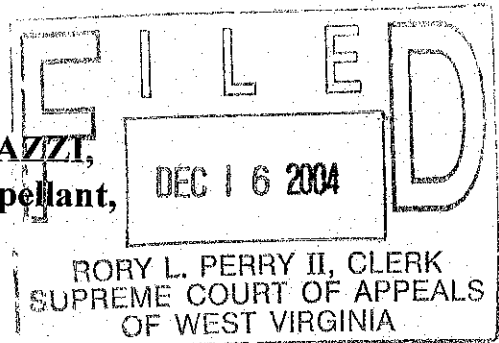


TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 2

III. STANDARD OF REVIEW 6

IV. ARGUMENT 8

 A. MR. ARNAZZI'S BRIEF IS INSUFFICIENT TO PRESERVE HIS
 ASSIGNMENTS OF ERROR 8

 1. OSHA REGULATION 1910.178(l) 8

 2. PROXIMATE CAUSATION 9

 3. FORESEEABILITY. 10

 B. ASSUMING THAT THIS COURT CHOOSES TO ADDRESS THE PERFUNCTORY
 ARGUMENTS IN MR. ARNAZZI'S BRIEF ON THE MERITS, IT SHOULD
 NONETHELESS ALSO AFFIRM THE ORDER GRANTING SUMMARY JUDGMENT
 TO QUAD/GRAPHICS 10

 1. THE OPERATIVE PORTION OF OSHA REGULATION 1910.178
 CONCERNING MR. ARNAZZI'S ACCIDENT IS NOT 1910.178(l), BUT
 1910.178(m)(4) 11

 2. MR. ARNAZZI RELIES ON LEGAL CONCLUSIONS IN ARGUING AGAINST
 SUMMARY JUDGMENT AND HAS FAILED TO SHOW ANY DISPUTED
 MATERIAL FACTS THAT WOULD ALLOW HIM TO SURVIVE SUMMARY
 JUDGMENT 14

 3. MR. ARNAZZI CANNOT CONTRADICT HIS OWN TESTIMONY IN AN
 EFFORT TO SHOW THAT HIS ACCIDENT WAS FORESEEABLE 20

V. CONCLUSION 21

TABLE OF AUTHORITIES

CASES

<i>Arbaugh v. Bd. of Educ.</i> , 214 W. Va. 677, 591 S.E.2d 235 (2003)	17
<i>Brady v. Deals on Wheels, Inc.</i> , 208 W. Va. 636, 542 S.E.2d 457 (2001)	14
<i>Cookman Realty Grp., Inc. v. Taylor</i> , 211 W. Va. 407, 566 S.E.2d 294 (2002)	13
<i>Crane Equip. & Rent. Co. v. Park Corp.</i> , 177 W. Va. 65, 350 S.E.2d 692 (1986)	15
<i>Deskins v. S.W. Jack Drilling Co.</i> , 215 W. Va. 525, 600 S.E.2d 237 (2004)	11
<i>Gentry v. Mangum</i> , 195 W. Va. 512, 466 S.E.2d 171 (1995)	13
<i>Harrison v. Town of Eleanor</i> , 191 W. Va. 611, 447 S.E.2d 546 (1994)	15
<i>Kiser v. Caudill</i> , 215 W. Va. 403, 599 S.E.2d 826 (2004)	21
<i>Kizer v. Harper</i> , 211 W. Va. 47, 561 S.E.2d 368 (2001)	19, 20
<i>McCoy v. Cohen</i> , 149 W. Va. 197, 140 S.E.2d 427 (1965)	20
<i>Mumaw v. U.S. Silica Co.</i> , 204 W. Va. 6, 511 S.E.2d 117 (1998)	11
<i>Myers v. Wood</i> , 154 W. Va. 431, 175 S.E.2d 637 (1970)	12
<i>Ohio Cellular v. Board of Pub. Works</i> , 198 W. Va. 416, 481 S.E.2d 722 (1996)	8

<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994)	6
<i>Payne v. Weston</i> , 195 W. Va. 502, 466 S.E.2d 161 (1995)	6
<i>Powderidge Unit Owners Ass'n v. Highland Prop., Ltd.</i> , 196 W. Va. 692, 474 S.E.2d 872 (1996)	6
<i>State ex rel. Abraham Linc. Corp. v. Bedell</i> , ___ W. Va. ___, 602 S.E.2d 542 (2004)	1
<i>State ex rel. Richey v. Hill</i> , ___ W. Va. ___, 603 S.E.2d 177 (2004)	9
<i>State ex rel. Smeltzer v. Sawyers</i> , 149 W. Va. 641, 142 S.E.2d 886 (1965)	15
<i>State v. Buck</i> , 170 W. Va. 428, 294 S.E.2d 281 (1982)	8
<i>State v. Ladd</i> , 210 W. Va. 413, 557 S.E.2d 820 (2001)	8,10
<i>State v. Lilly</i> , 194 W. Va. 595, 461 S.E.2d 101 (1995)	10
<i>State v. Phelps</i> , 197 W. Va. 713, 478 S.E.2d 563 (1996)	10
<i>Tolley v. ACF Indust., Inc.</i> , 212 W. Va. 548, 575 S.E.2d 158 (2002)	15
<i>Vance v. Virginia Pocahontas Coal Co.</i> , 74 W. Va. 728, 82 S.E. 1081 (1914)	15
<i>In re Vandelinde</i> , 179 W. Va. 183, 366 S.E.2d 631 (1988)	12
<i>Watson v. Inco Alloys Intern., Inc.</i> , 209 W. Va. 234, 545 S.E.2d 294 (2001)	6

<i>Williams v. Precision Coil, Inc.</i> , 194 W. Va. 52, 459 S.E.2d 329	6, 7, 18
--	----------

STATUTES, RULES AND REGULATIONS

29 C.F.R. § 1910.178	<i>passim</i>
W. Va. Code § 23-4-2	1
W. Va. Code § 23-4-2(c)	1, 18
W. Va. Code § 23-4-2(d)	1, 2
W. Va. Rule of Civil Procedure 56	4, 14

FEDERAL CASES

<i>Angell v. Chesapeake and O. Ry. Co.</i> , 618 F.2d 260 (4 th Cir. 1980)	15
<i>Barrett v. Independent Order of Foresters</i> , 625 F.2d 73 (5 th Cir. 1980)	15
<i>Bellomy v. United States</i> , 888 F. Supp. 760 (S.D. W. Va. 1995)	15
<i>Black & Decker Corp. v. Commissioner of Internal Revenue</i> , 986 F.2d 60 (4 th Cir. 1993)	13
<i>Hicks v. Brysch</i> , 989 F. Supp. 797 (W.D. Tex. 1997)	14
<i>Metropolitan Detroit Area Hosp. Serv., Inc. v. United States</i> , 634 F.2d 330 (6 th Cir. 1980)	12
<i>Murray v. City of Sapulpa</i> , 45 F.3d 1417 (10 th Cir. 1995)	4
<i>OmniSource Corp. v. NCM Americas, Inc.</i> , 313 F. Supp.2d 880 (N.D. Ind. 2004)	21

<i>Prosser v. Ross</i> , 70 F.3d 1005 (8 th Cir. 1995)	21
<i>Skretvedt V. E.I. DuPont De Nemours</i> , 372 F.3d 193 (3d Cir. 2004)	9
<i>Toro v. Krouse, Kern & Co.</i> , 644 F. Supp. 986 (D. Ind. 1986)	4

OTHER JURISDICTIONS

<i>Florence v. Knight</i> , 217 Ga. App. 799, 459 S.E.2d 436 (1995)	18,19
<i>Reinhardt v. Great A&P Tea Co., Inc.</i> , 829 So.2d 600 (La. Ct. App. 2002)	17, 18
<i>Richard v. Swiber</i> , 760 So.2d 355 (La. Ct. App. 1999)	13
<i>Shabaaz v. Tecton Corp.</i> 116 Wash. App. 1002, 2003 WL 734527	19

MISCELLANEOUS

13B Mich. Juris. <i>Negligence</i> § 12 (2002)	20
13B Mich. Juris. <i>Negligence</i> § 23 (2002)	18
Franklin D. Cleckley, et al., <i>Litigation Handbook on West Virginia Rule of Civil Procedure</i> (2002)	14

I. INTRODUCTION

James Arnazzi, Plaintiff below, Appellant, appeals a September 23, 2003 final order of the Circuit Court of Berkeley County granting his employer, Quad/Graphics, Inc., and Robert Knighten (Mr. Arnazzi's immediate superior at Quad/Graphics), Defendants below, Appellees, summary judgment in this deliberate intent action brought under W. Va. Code § 23-4-2(c)(2)(ii).¹ The circuit court's fourteen-page order found that Mr. Arnazzi failed to demonstrate that his injury was proximately caused by Quad/Graphics. This was not a case where an employer's violation of a known safety standard proximately caused one of its employees to be subjected to death or serious injury as contemplated by the deliberate intent statute; rather, Mr. Arnazzi was involved in a simple workplace accident when his pant leg was caught on a piece of wood while his was operating a forklift. Mr. Arnazzi, following injuries to his ankle and knee, applied for and received workers' compensation benefits. As the circuit court was correct that Mr. Arnazzi failed to produce sufficient evidence to allow a jury to find proximate cause between any safety violation and his having his pant leg caught on a piece of wood while operating a forklift, this Court should affirm the order granting summary judgment in favor of Quad/Graphics. The deliberate intent statute was never intended to expose employer's to civil liability, over and above workers' compensation benefits, for simple workplace accidents.

¹The language comprising the deliberate intent cause of action was moved and recodified at West Virginia Code § 23-4-2(d)(2)(ii) in S.B. 2013, 2003 W. Va. Acts (2d Ex. Sess.) Ch. 27 (eff. July 1, 2003). See *State ex rel. Abraham Linc. Corp. v. Bedell*, ___ W. Va. ___, ___ n.1, 602 S.E.2d 542, 545 n.1 (2004) (per curiam) ("We note that W. Va. Code § 23-4-2 was amended in 2003, and the language upon which Mr. Edens premises his deliberate intent allegation is now found in W. Va. Code § 23-4-2(d)(2)(ii) (2003) (Spec. Supp.2003).").

II. STATEMENT OF FACTS²

In 2002, Mr. Arnazzi sued Quad/Graphics alleging it violated W. Va. Code § 23-4-2(d)(2) which eliminates an employer's immunity from common law actions if the employer or person against whom liability is asserted acted with "deliberate intent." Mr. Arnazzi invoked subsection (ii) which strips the employer's immunity if the plaintiff proves:

(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 the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition;

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of the employer, 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), inclusive, of this paragraph, the employer nevertheless thereafter exposed an employee to the specific unsafe working condition intentionally; and

(E) That the employee exposed suffered serious injury or death *as a direct and proximate result* of the specific unsafe working condition.

²The statements of fact in the following discussion are either undisputed as evidenced by the circuit court order or are taken in a light most favorable to Mr. Arnazzi.

(Emphasis supplied).

Mr. Arnazzi initially claimed two unsafe working conditions—the narrow alleyways in the building where he was working and the failure of Quad/Graphics to provide him formal forklift instruction. Sum. Jud. Ord. at 2. In his response to the Motion for Summary Judgment, Mr. Arnazzi conceded that he could not maintain a deliberate intent action as to narrow alleyways. *Id.* Consequently, Mr. Arnazzi asserted liability based upon Quad/Graphics' failure to formally train and certify him as a forklift operator. *Id.*

Mr. Arnazzi applied with Quad/Graphics seeking a job in the bindery or press departments on September 5, 2002. Sum. Jud. Ord. at 2. Mr. Arnazzi was unqualified for these positions, but he accepted Quad/Graphics offer of employment as a forklift operator. *Id.* at 3. On September 26, 2000, Mr. Arnazzi reported to work and received general workplace orientation and training and a review of procedures. *Id.* He also signed some documents and received information about his benefits. *Id.*

The next day, Mr. Arnazzi received orientation on the forklift from his supervisors, Bill Youngblood, Bob Maynard, and Robert Knighten. *Id.* Mr. Arnazzi was assigned a forklift and was instructed to operate it until he learned how to handle it. *Id.* Mr. Arnazzi also testified in his deposition that: (1) he drove the forklift for several hours, Arnazzi Depo. at 59; (2) he was shown how to refill the propane fuel tank on the forklift, *id.* at 65-66; (3) he was given a checklist in order to perform maintenance on the forklift to ensure it was not damaged, *id.* at 66; (4) he was told that pedestrians had the right of way and to blow the horn when approaching pedestrians, *id.* at 74; and (5) he was explicitly informed by his supervisor that there was to be

no horseplay "on or off the truck." *Id.* at 80. Mr. Arnazzi was shown how to move pallets with the forklift in order to place them on a "wrapper-strapper," a device that shrink wraps and labels pallets. Sum. Jud. Ord. at 3. Mr. Arnazzi is unsure if his supervisors observed this process. *Id.*

Mr. Arnazzi did not receive *formal* forklift certification training from Quad/Graphics, Sum Jud. Ord. at 5, apparently because Quad/Graphics at the time was holding forklift certification training once a quarter. Maynard Depo. at 15, 26 (Maynard was distribution department manager for Quad/Graphics, *id.* at 7.). Mr. Arnazzi, however, felt confident in his skills and raised no questions or concerns about his ability after the first day of operating the forklift. Sum. Jud. Ord. at 5; Arnazzi Depo. at 90. The court also found, based on Mr. Arnazzi's affidavit responding to the summary judgment motion, that in the three weeks between his hiring and accident he knocked over an average of two pallets a shift and that "[s]upervisors and management Quad/Graphics [sic] were aware of [his] difficulties operating the forklift." Sum. Jud. Ord. at 5, Mem. Opp. Sum. Jud. Ex.2 at 2.³

³Mysteriously, Mr. Arnazzi did not testify at his deposition to the information in the affidavit. The circuit court erred in considering the affidavit. R. Civ. P. 56(e) provides that "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial." (emphasis added). Mr. Arnazzi's affidavit is self-serving and conclusory since it never identifies who the "[s]upervisors and management" were that had an awareness of his difficulties. *See, e.g., Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) (plaintiffs' affidavits all alleging that "it was general knowledge of the administration that it was common practice of the members" held insufficient to avoid summary judgment since the affidavits were conclusory and self-serving); *Toro v. Krouse, Kern & Co.*, 644 F. Supp. 986, 990 (D. Ind. 1986) ("[T]he affidavits do not further elaborate on how the affiants became aware of the subjective knowledge of the defendants. Consequently, these statements resemble allegations more appropriate for pleadings than specific, nonconclusory facts in an affidavit offered in support of a party's position in a motion for summary judgment."), *specifically aff'd on this point*, 827 F.2d 155, 162 (7th Cir. 1987). Thus, Quad Graphics cross-assigns as error the circuit court's consideration of Mr. Arnazzi's affidavit.

On October 19, 2000, Mr. Arnazzi's supervisor, Mr. Knighten, directed Arnazzi to move pallets to a wrapper-strapper. Sum. Jud. Ord. at 5. To access the wrapper-strapper, Mr. Arnazzi had to drive in an alleyway between rows of stacked and loaded pallets, Sum. Jud. Ord. at 5, an area where other workers had been traveling that morning without incident. Knighten Depo. at 76. Mr. Arnazzi allegedly questioned Mr. Knighten as it looked to Arnazzi that the alley was narrow and did not appear safe. Sum. Jud. Ord. at 5. Mr. Knighten supposedly responded, "You'll be alright. Just go slow and you'll be fine." *Id.* Mr. Knighten departed. *Id.* Mr. Arnazzi moved the forklift through the alleyway, *id.*, with a "couple of inches on each side of the truck[.]" Arnazzi Depo. at 107-08, "fairly slow . . . not going at full speed[.]" *Id.* at 119; *see also id.* at 124.

Mr. Arnazzi's left foot was inside the forklift's cab before the accident. Sum. Jud. Ord. at 6. Arnazzi Depo. at 123 ("My foot would be on the inside of the truck."); *id.* ("Q. Okay. So you're certain as you sit here today that your left foot and left leg were inside the cab part of the forklift? A. Yes.").⁴ Mr. Arnazzi claims that a layer sheet or a piece of wood from a pallet grabbed his pant leg and pulled his left leg off the truck causing injuries to his left ankle and right knee for which he was awarded a 6% permanent partial disability workers' compensation award totaling, as of September 23, 2003, \$40,560.99 in payments and benefits. *Id.* Mr. Arnazzi returned to work at Quad/Graphics on January 22, 2001, but later voluntarily resigned on July 2, 2001. *Id.* In addition to his workers' compensation benefits, Mr. Arnazzi sued

⁴Mr. Arnazzi also testified at his deposition that he never operated his forklift with his feet outside of the running lines of the truck. Arnazzi Depo. at 83.

Quad/Graphics under the deliberate intent statute, contending that the failure to immediately provide forklift certification training upon commencement of his employment caused his pant leg to become caught on a piece of wood. Respectfully, the circuit court properly used common sense and entered summary judgment for Quad/Graphics on this claim.

III. STANDARD OF REVIEW

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Thus, “[i]n considering the propriety of summary judgment in this case, [this Court] appl[ies] the same standard that is applied at the circuit court level[.]” *Watson v. Inco Alloys Intern., Inc.*, 209 W. Va. 234, 238, 545 S.E.2d 294, 298 (2001). Summary judgment “is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 459 S.E.2d 329, 335 (1995). “Summary judgment is not a remedy to be exercised at the circuit court’s option; it must be granted when there is no genuine disputed issue of a material fact.” *Powderidge Unit Owners Ass’n v. Highland Prop., Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996); *Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165 (1995).

Summary judgment is 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, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Williams, 194 W. Va. at 59, 459 S.E.2d at 336 (citation omitted). “[W]hile the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some ‘concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor’ or other ‘‘significant probative evidence tending to support the complaint.’’’ *Id.* at 59-60, 459 S.E.2d at 336-37.

To be specific, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere “scintilla of evidence” and must produce evidence sufficient for a reasonable jury to find in a nonmoving party’s favor. The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a “trialworthy” issue. A “trialworthy” issue requires not only a “genuine” issue but also an issue that involves a “material” fact.

Id. at 60, 459 S.E.2d at 337 (footnote omitted). “[U]nsupported speculation is not sufficient to defeat a summary judgment motion,” *id.* at 61, 459 S.E.2d at 338 (citation omitted), nor is evidence that is “‘merely colorable . . . or is not significantly probative[.]’” *Id.*, 459 S.E.2d at 338 (citation omitted). Similarly, while the party opposing summary judgment “‘is entitled to the most favorable inferences that may reasonably be drawn from the forecast evidence[.]’” a party cannot “‘create a genuine issue of material fact through mere speculation or the building of one inference upon another[.]’” *Id.* at 61 n.14, 459 S.E.2d at 338 n.14 (citations omitted). “Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.” *Id.*, 459 S.E.2d at 338 n.14.

IV. ARGUMENT

Mr. Arnazzi asserts the circuit court erred in granting summary judgment based on Mr. Arnazzi's inability to present a *prima facie* case of proximate causation. This Court should affirm the circuit court either because Mr. Arnazzi's brief is insufficient to perfect his claims or because the circuit court's order was palpably correct.

A. Mr. Arnazzi's Brief is Insufficient to Preserve His Assignments of Error. Mr. Arnazzi's Brief raises three issues that require resolution by this Court: (1) whether OSHA Regulation § 1910.178(l) was specifically designed to prevent forklift injuries; (2) whether the issue of proximate cause should have been submitted to a jury; and (3) whether the circuit court erred in finding that the accident was unforeseeable. This Court has said "many times that '[a] skeletal argument, really nothing more than an assertion, does not preserve a claim Judges are not like pigs, hunting for truffles buried in briefs.'" *State v. Ladd*, 210 W. Va. 413, 424 n.1, 557 S.E.2d 820, 831 n.1 (2001) (citations omitted). Mr. Arnazzi's Brief is insufficient to preserve the errors it alleges.

1. *OSHA Regulation 1910.178(l)*. Mr. Arnazzi cites to several portions of OSHA Regulation 1910.178(l), Appellant's Br. at 7, and makes the *ipse dixit* assertion that "[t]his legally mandated training is specifically designed to prevent the type forklift [sic] injury that occurred in this case." *Id.* He does not explain how the cited portions of the regulation actually lead to the conclusion he asserts. This Court has noted its "established rule, [to] limit [its] consideration . . . to those arguments fully developed and argued . . ." *State v. Buck*, 170 W. Va. 428, 431 n.2, 294 S.E.2d 281, 284 n.2 (1982). *See also Ohio Cellular v. Board of Pub.*

Works, 198 W. Va. 416, 424 n.11, 481 S.E.2d 722, 210 n.11 (1996) (“However, because this issue was inadequately briefed . . . we do not address it on appeal.”). The requirement of a fully developed argument is even more imperative when, as here, a detailed regulatory scheme is implicated. *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 202 n.12 (3d Cir. 2004) (citation omitted) (“[W]here important and complex issues of law are presented, a . . . detailed exposition of argument [in a party’s appellate brief] is required to preserve an issue.”). *Cf. State ex rel. Richey v. Hill*, ___ W. Va. ___, ___ n.9, 603 S.E.2d 177, 183 n.9 (2004) (citations omitted) (“It is not sufficient that appellant raise only a general constitutional doctrine in support of his request for relief. It is incumbent upon appellant to cite specific legal authority and to provide legal arguments based upon that authority. This is especially important where, as here, the relevant area of law is new or not well defined.”). Mr. Arnazzi’s injuries were caused when he caught his pant leg on a piece of wood while operating a forklift. It was a simple workplace accident. Mr. Arnazzi had no expert in forklift safety who identified any causal relationship between the forklift regulations upon which he relies and the conditions which resulted in the accident. Indeed, Mr. Arnazzi identifies no such causal relationship. Rather, Mr. Arnazzi simplistically argues that because he did not have forklift certification training and was injured in a forklift accident, Quad/Graphics should be liable. Under this Court’s prior cases, Mr. Arnazzi’s superficial treatment of his argument is inadequate.

2. *Proximate Causation.* Mr. Arnazzi’s Brief asserts that “[i]t 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.” Appellant’s Br. at 8. This

statement is then supported by reference to a prolix string cite of opinions. *Id.* The Brief then makes the bald statement that “[i]n 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.”

Id. This cursory treatment is insufficient to perfect this argument. “[I]t is . . . well settled . . . that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.” *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) (citation omitted).

3. *Foreseeability.* Finally, Mr. Arnazzi argues the circuit court erred in finding his accident was unforeseeable. His Brief, however, does not cite either to the record or any pertinent authority. The absence of these two fundamental aspects of any brief is fatal to this Court’s review. *See, e.g., State v. Ladd*, 210 W. Va. 413, 424 n.1, 557 S.E.2d 820, 831 n.1 (2001) (“The defendant’s mere assertion, without supporting case law, is inadequate to preserve the assignment of error.”); *State v. Phelps*, 197 W. Va. 713, 724, 478 S.E.2d 563, 574 (1996) (per curiam) (“The State contends the defendant’s failure to cite to the record and to cite pertinent authority in support of this assignment of error renders appellate review of this particular assignment of error waived. The State is correct that this matter is not set out sufficient to satisfy our standards on appellate review.”).

B. Assuming that this Court Chooses to Address the Perfunctory Arguments in Mr. Arnazzi’s Brief on the Merits, It Should Nonetheless also Affirm the Order Granting Summary Judgment to Quad/Graphics.

If this Court does address Mr. Arnazzi's arguments, it should affirm the circuit court on the merits. This Court has always required "the plaintiff to establish *each* of the statute's five factors." *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 9, 511 S.E.2d 117, 120 (1998) (per curiam). "Thus, in order to withstand a motion for summary judgment, a plaintiff must make a prima facie showing of dispute on each of the five factors." *Id.*, 511 S.E.2d at 120. "Therefore, at the summary judgment stage, if a defendant should establish that no material issue of fact is in dispute on any one of the five factors, and such a finding is in favor of the defendant, summary judgment must be granted to the defendant." *Id.* at 11, 511 S.E.2d at 121 (footnote omitted). *Accord Deskins v. S.W. Jack Drilling Co.*, 215 W. Va. 525, ___, 600 S.E.2d 237, 240 (2004) (per curiam). Mr. Arnazzi has failed to make prima facie showing of "direct and proximate result." Thus, Quad/Graphics was entitled to summary judgment.

1. *The operative portion of OSHA Regulation 1910.178 concerning Mr. Arnazzi's accident is not 1910.178(l), but 1910.178(m)(4).* Mr. Arnazzi claims that OSHA Regulation 1910.178(l) requiring formal training of forklift operators "is specifically designed to prevent the type [sic] forklift injury that occurred in this case." Appellant's Br. at 7. A review of Mr. Arnazzi's own testimony and a reading of all of OSHA Regulation 1910.178 belies Mr. Arnazzi's argument.

Mr. Arnazzi contends that the full training mandated by OSHA Regulation 1910.178(l) was "specifically designed to prevent the type [sic] forklift injury that occurred in this case." Appellant's Br. at 7. Mr. Arnazzi's myopic focus on subsection (l) has led him to overlook the

actual portion of OSHA Regulation 1910.178 that directly addresses the steps required to avoid the type of injury suffered in this case.

OSHA Regulation 1910.178(m) is entitled "Truck Operations" and specifically provides, "[t]he employer shall prohibit arms or legs from being placed between the uprights of the mast or outside the running lines of the truck." OSHA Regulation 1910.178(m)(4) imposes the specific obligation to protect workers from having arms or feet injured as a result of being outside of the protection of the cabin of the forklift. Because the pertinent portion of the regulation relating to Mr. Arnazzi's accident was OSHA Regulation 1910.178(m)(4), the circuit court was correct in concluding that portion relied upon by Arnazzi OSHA Regulation 1910.178(l) would not have provided "any specific type of training or education that would have provided [Mr. Arnazzi] with knowledge enabling him to recognize the alleged dangerous condition and avoid his workplace injury[.]" Sum. Jud. Ord. at 11

It is an elementary rule of statutory construction both in West Virginia and the federal system that a specific provision addressing an issue controls over a more general section. *See, e.g., In re Vandelinde*, 179 W. Va. 183, 186, 366 S.E.2d 631, 634 (1988) ("Traditional rules of statutory construction require, as we explained in Syllabus Point 2 of *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970), that: 'A specific section of a statute controls over a general section of the statute.'"); *Metropolitan Detroit Area Hosp. Serv., Inc. v. United States*, 634 F.2d 330, 334 (6th Cir. 1980) ("It is an elementary rule of statutory construction that

a specific provision controls when the same subject matter is addressed by a more general provision.”).⁵

In this case, Mr. Arnazzi testified that he was certain that when he was operating his forklift his left foot and leg were inside the cab. Arnazzi Depo. at 123. Indeed, Mr. Arnazzi testified that he never operated his forklift with his feet outside of the running lines, *id.* at 83, because it was “[k]ind of an innate safety common sense” to keep arms and feet inside the forklift. *Id.* at 80-81. Mr. Arnazzi’s own testimony establishes that at the time of his accident his conduct was consistent with both common sense and OSHA Regulation 1910.178(m)(4). Mr. Arnazzi himself proves his conduct before the accident complied with the specific safety provision of 1910.198(m)(4). Thus, he cannot show proximate causation and Quad/Graphics is entitled to summary judgment. *See Richard v. Swiber*, 760 So.2d 355, 361 (La. Ct. App. 1999) (summary judgment granted because no cause-in-fact shown—even if funeral home failed to instruct plaintiff on how to drive in funeral procession, plaintiff’s driving was consistent with what instruction would have required).⁶

⁵Likewise, both West Virginia and the federal system apply the canons of statutory construction to administrative rules and regulations. *See, e.g., Black & Decker Corp. v. Commissioner of Internal Revenue*, 986 F.2d 60, 65 (4th Cir.1993) (“Regulations, like statutes, are interpreted according to the canons of construction.”); *Cookman Realty Grp., Inc. v. Taylor*, 211 W. Va. 407, 412, 566 S.E.2d 294, 299 (2002) (citations omitted) (“A cardinal rule of textual interpretation requires, of course, that statutes and administrative rules “be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof.””).

⁶To the extent that the circuit court’s order did not rely on subsection m, “it is permissible for [this Court] to affirm the granting of summary judgment on bases different or grounds other than those relied upon by the circuit court.” *Gentry v. Mangum* 195 W. Va. 512, 519, 466 S.E.2d 171, 178- 179 (1995) (footnote omitted).

2. Mr. Arnazzi relies on legal conclusions in arguing against summary judgment and has failed to show any disputed material facts that would allow him to survive summary judgment. A motion for summary judgment tests whether there exist any genuine issues of material fact. Consequently, "[t]he party opposing a motion supported by evidence cannot discharge his burden by alleging mere legal conclusions; instead, he must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Hicks v. Brysch*, 989 F. Supp. 797, 807 (W.D. Tex. 1997) (footnote omitted). Here, Mr. Arnazzi cites with an incantory repetitiveness a plethora of cases observing that the issue of proximate cause is generally a jury question. Appellant's Br. at 8-9. However, this "argument" is really a legal conclusion, *i.e.*, that proximate cause is usually a jury question. Citing to an illusory truism does not satisfy Mr. Arnazzi's burden as:

The mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination does not automatically immunize the case from summary judgment. The plaintiff must still discharge his/her burden under Rule 56, by demonstrating that a legitimate jury question, *i.e.*, a genuine issue of material fact, is present.

Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rule of Civil Procedure* 924 n.106 (2002). See also *Brady v. Deals on Wheels, Inc.*, 208 W. Va. 636, 642-44, 542 S.E.2d 457, 463-65 (2001) (per curiam) (grant of summary judgment affirmed because plaintiff failed to make out a prima facie showing of proximate cause).

Mr. Arnazzi cannot survive summary judgment by asserting the truism that in general proximate cause is a jury issue; rather, he must show why *in this case* proximate cause is a jury question. In the absence of such a showing, Quad/Graphics is entitled to summary judgment.

See, e.g., *Tolley v. ACF Indust., Inc.*, 212 W. Va. 548, 558-59, 575 S.E.2d 158, 168-69 (2002) (per curiam) (summary judgment in deliberate intent case affirmed because plaintiff failed to show proximate cause).⁷ Indeed, not only has Mr. Arnazzi's failure to provide a factual argument relating to causation, under the facts in this case he cannot do so.

Under West Virginia law, "[t]he proximate cause of an injury has two dimensions: first, the injury resulting from the negligence must have been reasonably foreseeable to a prudent person; and second, the act or omission must have caused the injury." *Bellomy v. United States*, 888 F. Supp. 760, 766 (S.D. W. Va.1995). Proximate cause cannot rest upon speculation, conjecture, surmise, or mere possibility. *Tolley*, 212 W. Va. at 558, 575 S.E.2d at 168; *Crane Equip. & Rent. Co. v. Park Corp.*, 177 W. Va. 65, 69, 350 S.E.2d 692, 696 (1986) (per curiam); *State ex rel. Smeltzer v. Sawyers*, 149 W. Va. 641, 644-45, 142 S.E.2d 886, 889 (1965); Syl. pt. 2, *Vance v. Virginia Pocahontas Coal Co.*, 74 W. Va. 728, 82 S.E. 1081 (1914) Yet, Mr. Arnazzi's case rests precisely upon speculation, conjecture, surmise, and mere possibility.

Mr. Arnazzi's entire theory of the case is predicated upon Quad/Graphics failure to fully follow OSHA Regulation 1910.178(l). However, when questioned as to how Regulation 1910.178(l) training would have prevented his accident, he was only able to say,

⁷Mr. Arnazzi claims that "the circuit court invaded the jury's role as fact finder." Appellant's Br. at 9. However, when there are no disputed issues of material fact in a case, the jury has no role. See Syl. pt. 4, in part, *Harrison v. Town of Eleanor*, 191 W. Va. 611, 447 S.E.2d 546 (1994) ("Determinations involving questions of law are within the sole province of the court, while determinations of fact are within the province of the jury."); *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980) ("Summary judgment is authorized where there are no issues of material fact in dispute. In such circumstances the jury, as trier of fact, has no role . . ."). "Accordingly, since the facts surrounding this issue were not in dispute, the application of the Act was a matter of law to be decided by the [circuit] court." *Angell v. Chesapeake and O. Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980) (footnote omitted).

Okay. I believe if I would have had training, some safety training in driving a fork truck, that I would not have drove this alley way. I knew it was unsafe the day I did it. I think if I would have had the training I would have said, "no, its an unsafe condition."

Arnazzi Depo. at 242. Likewise, he testified, "I think if I had had a safety class I would have had more knowledge about driving the truck and possibly would have said, 'no, I'm not going to drive down through there.'" *Id.* "I believe I would have possibly recognized unsafe conditions and knowing that I could say no to it." *Id.* at 243. *See also id.* at 250:

I believe had I had some safety training and knew more about the fork truck I probably would not have driven down the aisle, I would have recognized and maybe known what my rights were about safety, but I didn't have the class so I just did what I was told.

Astonishingly, as late as October 15, 2002, Mr. Arnazzi was unable to identify a single aspect of a training program that would have avoided his accident, *id.* at 242, 243, 244, nor was he even able to explain what he thought might be included in a training program that might have helped him. *Id.* at 248-49. As the circuit court recognized, "[i]n his deposition, the Plaintiff admitted that it is only through speculation that he can assume that he would have received training that would have prompted him not to proceed down the alleyway." Sum. Jud. Ord. at 11. Never did Mr. Arnazzi point to any regulation dealing with 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," as required by statute, that proximately resulted in his injury. All the training in the world cannot prevent a something from inadvertently catching

a forklift operator's pant leg while operating in close quarters which themselves present no known safety hazard.

This Court has clearly stated that a statutory violation is evidence of negligence *only* when "such violation is the proximate cause of injury. *See, e.g., Powell v. Mitchell*, 120 W. Va. 9, 196 S.E. 153 (1938); *Porterfield v. Sudduth*, 117 W. Va. 231, 185 S.E. 209 (1936).'
Yourtee v. Hubbard, 196 W. Va. 683, 687, 474 S.E.2d 613, 617 (1996) (footnote omitted). *See also* Syl. Pt. 1, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990) ('Violation of a statute is prima facie evidence of negligence. In order to be actionable, such violation must be the proximate cause of the plaintiff's injury.')." *Arbaugh v. Bd. of Educ.*, 214 W. Va. 677, 681, 591 S.E.2d 235, 239 (2003). In this case, Mr. Arnazzi simply failed to establish any causal connection between the alleged regulatory violation and the accident.

The Louisiana Court of Appeals affirmed the granting of summary judgment in a case with issues similar to the case *sub judice*. In *Reinhardt v. Great A&P Tea Co., Inc.*, 829 So.2d 600 (La. Ct. App. 2002), a plaintiff at a supermarket was injured when another customer riding in a motorized shopping cart struck her. *Id.* at 602. The plaintiff testified at her deposition that the other customer told her at the scene that the other customer's sleeve caught in the cart's controls causing it to go forward. *Id.* Affirming the summary judgment, the court of appeals held:

Here, plaintiff urges first that the conduct which renders defendant liable is its failure to instruct the elderly woman in the proper operation of the cart. However, even assuming that the grocery store should have given such instruction, its failure to do so is not causally related to the accident. Plaintiff's only factual explanation for the incident is not that the woman did not know

how to operate the cart safely, but rather that her sleeve inadvertently activated the controls.

Id. at 602. Like the plaintiff in *Reinhardt*, Mr. Arnazzi's only factual explanation for the accident is that his foot was inadvertently pulled out of the cab. Even if Mr. Arnazzi is correct that his foot was pulled from the forklift, he has failed to demonstrate a causal relationship between his lack of training and the accident beyond sheer speculation, conjecture, or surmise. The mere occurrence of an accident is insufficient to show liability. *Cf.* 13B Mich. Juris. *Negligence* § 23 at 389 (2002) ("Negligence cannot be presumed from the mere happening of an accident.") As the circuit court succinctly found, Mr. Arnazzi can only speculate that training would have prevented his accident, but "such a leap of faith, standing alone, is insufficient and proves fatal to the Plaintiff's prima facie case of deliberate intent under W. Va. Code § 23-4-2(c)(2)(ii)." Sum. Jud. Ord. at 11.⁸

The mere existence of a safety standard violation is plainly insufficient where there is no evidence that such violation is causally-related to an accident. In *Florence v. Knight*, 217 Ga.

⁸Indeed, it is difficult to fathom what additional training would have avoided the accident when Mr. Arnazzi himself cannot state with any certainty *how* his foot was pulled from the forklift. In his deposition, Mr. Arnazzi initially said that a piece of cardboard (a layer sheet) snagged his pant leg and pulled his leg outside of the forklift. Arnazzi Depo. at 124. However, Mr. Arnazzi then testified that "I don't know what grabbed my leg, I don't know if the layer sheet grabbed my leg or a piece of wood from the pallet grabbed my leg or what pulled my foot off. I was not looking at my foot at the time of the accident." *Id.* at 124-25. He further testified, "I believe that when I went through it somehow caught my pants leg and pulled my leg off the truck. I don't know what pulled my leg off the truck." *Id.* at 126. At best, Mr. Arnazzi was able to speculate that "I didn't see what actually—it could have been a slither of wood sticking off one of the pallets. There was something sticking out." *Id.* at 127. Mr. Arnazzi's own deposition testimony shows that even he cannot state with any sort of definitiveness as to what actually caused the accident. In opposing summary judgment, "[i]nferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors." *Williams*, 194 W. Va. at 61 n.14, 459 S.E.2d at 338 n.14.

App. 799, 459 S.E.2d 436 (1995), homeowners' sued a builder claiming that building code violations were the proximate cause of their injuries. The court rejected this argument, stating that:

Negligence per se is not liability per se. *See generally Biggs v. Long*, 212 Ga. App. 195, 199, n. 4, 441 S.E.2d 677 (1994). "Negligence, it should be remembered, is in itself [only] one of the essential elements prerequisite to a cause of action in a given case." *Platt v. Southern Photo Material Co.*, 4 Ga. App. 159, 163, 60 S.E. 1068 (1908). "Even if plaintiff[s] could show that the [lack of a walkway and accessible lighting in the attic] was negligence per se as a violation of the building code, [they] would nevertheless be precluded from recovering because of the equal knowledge rule." *Sullivan v. Quisc, Inc.*, *supra* at 116, 427 S.E.2d 86. Here the absence of the element of proximate cause, regardless of any building code infractions, is fatal to the Florences' claims.

Id. at 800, 459 S.E.2d at 438.

Essentially, Mr. Arnazzi argues that Quad/Graphics' failure to provide forklift certification training was alone sufficient to present genuine issues of material fact on causation. But this very Court, in an opinion cited by other courts,⁹ has held that the absence of a license or certificate is insufficient, standing alone, to defeat summary judgment. Specifically, this Court held that hiring a person to do work who was not licensed to do such work was not sufficient to establish negligent hiring as a matter of law. *Kizer v. Harper*, 211 W. Va. 47, 561 S.E.2d 368 (2001).

In *Kizer*, a cable company employee filed a claim for injuries sustained in a fall from a utility pole while stringing cable. 211 W. Va. at 50, 561 S.E.2d at 371. The plaintiff alleged

⁹See, e.g., *Shabazz v. Techton Corp.*, 116 Wash. App. 1002, 2003 WL 734527 at *3.

that the homeowner's son was negligent in hiring an unlicensed electrician who failed to hook up a circuit breaker to neutral wire. *Kizer*, 211 W. Va. at 51 n.6, 561 S.E.2d at 372 n.6. To support his claim, the plaintiff cited to a state statute requiring a license to perform electrical work. *Kizer*, 211 W. Va. at 52, 561 S.E.2d at 373. This court observed that the statutory violation was not enough to prove negligent hiring by the defendant as a matter of law because the plaintiff still had to show that the statutory violation proximately caused his injuries. *Kizer*, 211 W. Va. at 52, 561 S.E.2d at 373. Those are precisely the circumstances of this case and the circuit court was plainly warranted in awarding summary judgment.

3. *Mr. Arnazzi cannot contradict his own testimony in an effort to show that his accident was foreseeable.* "One requisite of proximate cause is an act or an omission which a person of ordinary prudence could reasonably foresee might naturally or probably produce an injury" *McCoy v. Cohen*, 149 W. Va. 197, 214, 140 S.E.2d 427, 437-438 (1965). A defendant

is not responsible for a consequence which is only possible, according to occasional experience, but only for a consequence which is probable according to ordinary and usual experience. The natural and probable consequences are those which human foresight can foresee, because they happen so frequently that they may be expected to happen again. The possible consequences are those which happen so infrequently, that they are not expected to happen again.

13B Mich. Juris. *Negligence* § 12 at 387 (2002) (footnote omitted). Mr. Arnazzi contends that "Appellees observed [him] operating a forklift in an unsafe manner, but continued to allow him to operate the forklift without training." Appellant's Br. at 9. Apparently, Mr. Arnazzi rests this assertion upon the testimony of Robert Maynard, *id.* at 3 (citing R. at 720-22), who testified

to Mr. Arnazzi's habit of driving his forklift "with his left foot tipped outside of the confines of the forklift." Maynard Depo. at 37. Mr. Arnazzi himself, though, contradicted this testimony by testifying he never operated his forklift with his feet outside of the running lines, and that no supervisor, including Mr. Maynard, "ever called [him] on this[.]" Arnazzi Depo. at 83. For the same reason a plaintiff cannot avoid summary judgment by submitting their own affidavit contradicting their deposition testimony, *Kiser v. Caudill*, 215 W. Va. 403, 409, 599 S.E.2d 826, 832 (2004), a plaintiff cannot avoid summary judgment "by proffering testimony from another person that contradicts the plaintiff's own testimony." *Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995). *See also OmniSource Corp. v. NCM Americas, Inc.*, 313 F. Supp.2d 880, 890 n.13 (N.D. Ind. 2004) ("NCM's attempt to create a genuine issue by contradicting its own witnesses, and even its previous briefs, is unavailing.").¹⁰

V. CONCLUSION

The deliberate intent statute was never intended to expose employers to civil liability in addition to workers' compensation liability for simple workplace accidents. While operating a forklift in close quarters which violated no known safety standard, Mr. Arnazzi apparently caught his pant leg on a piece of wood. Although Mr. Arnazzi invokes a federal regulation related to operator training, he did nothing to establish any nexus between the absence of full forklift certification training and this accident. Rather, when asked, Mr. Arnazzi gave only evasive, speculative, conjectural, and outright dismissive answers when asked how such

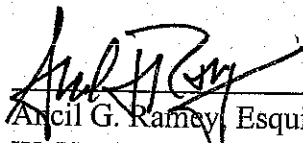
¹⁰Reliance on federal precedent here is especially appropriate for this Court is *Kiser* observed that "[t]raditionally, this Court has utilized decisions of federal courts when interpreting and applying our Rules of Civil Procedure." 215 W. Va. at 410, 599 S.E.2d at 833.

training would have avoided the accident. Finally, in an effort to demonstrate foreseeability, Mr. Arnazzi is relegated to relying on testimony from an employee of Quad/Graphics directly contradicting Mr. Arnzaai's own deposition testimony. Mr. Arnazzi has failed to meet his burden in this case and this Court should affirm the circuit court.

QUAD/GRAPHICS, INC. and
ROBERT KNIGHTEN

By Counsel

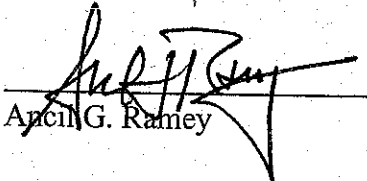
STEPTOE & JOHNSON, PLLC
Of Counsel


Ancil G. Ramay, Esquire
W. Va. State Bar ID No. 3013
Bryan R. Cokeley, Esquire
W. Va. State Bar ID No. 774
Scott E. Johnson, Esquire
West Virginia State Bar ID No. 6335
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, do hereby certify that on the 15th day of December, 2004, I served the foregoing "BRIEF OF THE APPELLEES" upon the following counsel of record by depositing true copies thereof in the United States mail, postage prepaid, addressed as follows:

Harry P. Waddell, Esquire
300 West Martin Street
Martinsburg, West Virginia 25406


Ancil G. Ramey