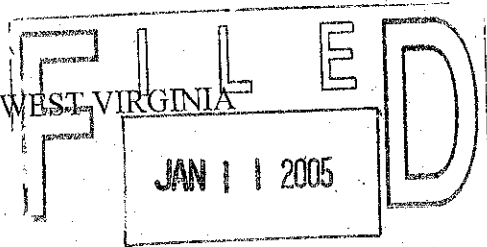


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



JAMES W. ARNAZZI,

Appellant,

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
Case No. 02-01951 VIRGINIA
Appeal Docket No. 31860

QUAD/GRAPHICS, INC., and
ROBERT KNIGHTEN,

Appellees.

REPLY BRIEF OF THE APPELLANT

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

Counsel for the Appellant

ARGUMENT

Quad/Graphics concedes that genuine issues of material exist with regard to four of the five elements necessary for a deliberate intent claim but contends that Appellant's lack of training was not a proximate cause of his injury. Appellant submits that proximate cause is a jury question to be determined based upon the totality of the evidence to be developed during the trial of this civil action.

Appellant Arnazzi had no experience operating a forklift, no prior training in forklift operation and no certification as a forklift operator. Despite Arnazzi's complete lack of training, experience or certification, he was permitted to operate a forklift on his first day of work. R. 244¹ Quad/Graphics knowingly violated the federal law requiring its 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 also required Quad/Graphics to provide Arnazzi specific training with regard to operating in narrow aisles and other restricted places. R. 245-246. The mandated training also included the successful completion an obstacle course to demonstrate his proficiency. R. 473. Quad/Graphics admitted that permitting Arnazzi to operate a forklift without this training created a safety hazard. R. 714-715.

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

Arnazzi was injured after only three weeks on the job. During this time, his supervisors observed him operating the forklift unsafely with his limbs extended outside the confines of the forklift. R. 720-722. On the date of his injury, his left foot became pinned between the forklift and a wall of pallets causing a severe crush injury to his foot and internal derangement of his knee requiring surgery. R. 247.

The issue of whether Quad/Graphics' admitted violation of the law proximately caused or contributed to Arnazzi's injury is analogous to the proximate cause issue presented in the case of *Anderson v. Moulder*, 183 W. Va. 77; 394 S.E.2d 61 (1990) in which the defendant sold beer to a minor, who later died in an automobile accident. This Court determined that the unlawful sale of beer could be considered the proximate cause of the deceased minor's death, but there were insufficient facts on the record to enable the Court to resolve the issue as a matter of law. This Court stated:

The question of proximate cause is ordinarily a factual one. As we stated in Syllabus Point 6 of *McAllister v. Weirton Hosp. Co.*, W. Va. , 312 S.E.2d 738 (1983):

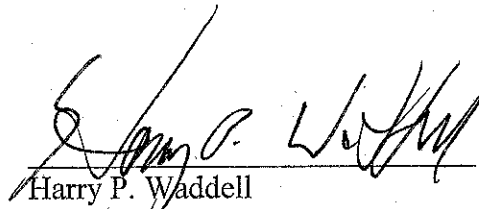
'Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.' [citations omitted]

While a statutory violation gives rise to a prima facie case of negligence, "the determination as to whether there was in fact a violation and whether the violation

was the proximate cause of the injury is within the province of the jury.' [citations omitted]

Anderson v. Moulder, 183 W. Va. at 90; 394 S.E.2d at 74.

In the present case, the evidence if it were presented at trial would certainly justify the jury's conclusion that Appellant's left leg became trapped between the forklift and the pallets because he was operating the forklift with this leg extended beyond the confines of the forklift. This is certainly the most probable mechanism of the injury in question. Appellant also had been observed operating the forklift in this unsafe manner on a number of occasions prior to his injury. If this unsafe act is determined to be the mechanism of injury, the jury would also be entitled to conclude that Quad/Graphics failure to provide adequate training to the Appellant in the safe operation of the forklift was a proximate cause or contributing factor to the injury.



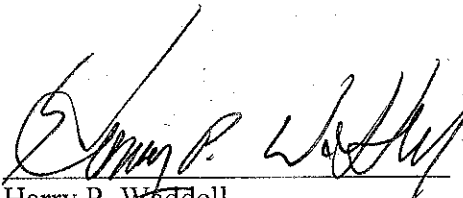
Harry P. Waddell
300 West Martin Street
Martinsburg, WV 25401
(304) 263-4988
WV Bar No. 3883

Counsel for Appellant

CERTIFICATE OF SERVICE

I, Harry P. Waddell, hereby certify that I have caused to be served a true copy of the foregoing *Reply Brief of the Appellant* upon the following counsel of record, by first class mail this 10th day of January, 2005:

Ancil G. Ramey, Esquire
Steptoe & PLLC
P.O. Box 1588
Charleston, WV 25302-2348.



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