

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

FAYETTE COUNTY
CIRCUIT CLERK
2009 MAY 26 AM 11:50
DANIEL E. WRIGH

CLARENCE T. COLEMAN ESTATE by
Co-Administrators, CLARENCE
COLEMAN and HELEN M. ADKINS,

v.

CIVIL ACTION NO.: 05-182(B)
Judge Paul M. Blake, Jr.

R.M. LOGGING, INC., a West Virginia
Corporation, and JOHN ROBINSON,
individually,

Defendants.

ORDER
GRANTING R. M. LOGGING INC.'S
MOTION FOR SUMMARY JUDGMENT

On January 20, 2009, came the plaintiffs, by counsel Travis E. Ellison of *John R. Mitchell, L.C.* and Joshua I. Barrett of *DiTrapano, Barrett & DiPiero, LLC*, and came the defendant, by counsel Mary H. Sanders of *Huddleston Bolen LLP*, for a hearing on the R. M. Logging, Inc.'s *Motion for Summary Judgment*, as well as other pending motions.¹

The Court has reviewed the record, including the relevant evidence and briefs, has heard and considered the parties' arguments, and has reviewed the relevant legal authority. For good and sufficient reasons appearing to the Court, the Court GRANTS defendant R.M. Logging, Inc.'s *Motion for Summary Judgment* based upon the following findings of fact and conclusions of law:

¹ During the hearing, the Court issued rulings regarding all other pending motions, as set forth in a separate *Order*. In said *Order*, the Court granted defendant John Robinson's *Motion for Summary Judgment* and dismissed him as a defendant in this action.

FINDINGS OF FACT

1. The defendant R.M. Logging employed Clarence "Amos" Coleman, (hereinafter referred to as the decedent or Mr. Coleman).
2. Mr. Coleman had at least one year of experience as a timbercutter before being hired by R.M. Logging, Inc.
3. John Robinson, a certified logger employed by R.M. Logging, Inc., oversaw the daily activities of R.M. Logging, Inc. and was the immediate supervisor of the decedent.
4. Mr. Robinson received significant training to become a certified logger. Mr. Robinson personally trained R. M. Logging, Inc. timber cutters. To ensure that each new employee was properly trained and was knowledgeable in all areas for which Mr. Robinson received training as a certified logger, Mr. Robinson cut beside each new employee for two weeks following their employment.
5. Kelcey Nichols and Gary Moore, R. M. Logging, Inc. employees and coworkers of the decedent, testified that they received training from their employer regarding proper timbering methods.
6. On December 2, 2003, Mr. Coleman was working on a timbering site cutting trees. A tree Mr. Coleman cut became lodged in a limb, causing the tree to become suspended above. Mr. Coleman walked underneath the suspended tree. The supporting limb snapped and the tree fell approximately twenty or twenty-five feet, striking Mr. Coleman on the left temple and occipital are of his head, fatally wounding him.
7. Kelcey Nichols, the sole eyewitness to the fatal accident, after offering testimony regarding the details of how the accident occurred, stated that:

It's just an accident that happened. And mainly the reason that it did happen was neglect on [Mr. Coleman's] part from not walking around the butt. That's it. That's open and shut. That's what happened. Nobody at fault. That's it.

(Nichols Deposition, p. 27.)

8. Regarding why he did not stop Mr. Coleman from walking under the suspended or "hung" or "snagged" tree, Mr. Nichols testified as follows:

Q. Did you have any conversations with him during this time? Were you able to talk to him, yell out to him?

A. No. The saw was running. When he went to go back through and under it I didn't have time to say anything to him. It just happened too quick to say anything.

Q. After he cut the first tree, the one that see-sawed up, did you attempt to speak to him or yell out to him, call to him after that?

A. He just moved over to another tree and went to sawing on it. He couldn't of heard me if I did yell at him.

Q. But you didn't yell at him; is that right?

A. No. He was far enough away from it that there wasn't no danger. He went and topped them. Then when he went to go through and under that one, instead of walking around it, it fell.

(Nichols Deposition, p. 29.)

9. Following the accident, OSHA issued R.M. Logging, Inc. a number of citations, including a citation for employee training that did not consist of the recognition of safety and health hazards.²
10. The plaintiffs assert that Mr. Coleman was not properly supervised and was not properly trained to recognize the risk of walking under a snagged tree suspended in the air.

²OSHA issued a eleven of citations to R.M. Logging, Inc. after the accident, the majority of which are not at all relevant to the circumstances of the accident. The Court determined that only two citations would be admissible if the matter went to trial. These citations state that: (1) employee training did not consist of the recognition of safety and health hazards associated with the employee's specific work tasks, in violation of 29 CFR 1910.266(i)(3)(iii), and (2) failure to remove dangerous lodged or snagged trees before work was commenced in an area, in violation of 29 CFR 1910.266(h)(1)(vi).

11. In support of their assertion 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, the plaintiffs rely upon the fact that Mr. Coleman continued to work in and around snagged trees rather than having the trees removed before continuing work, that the accident occurred, that R.M. Logging, Inc. received certain OSHA citations following the accident, and upon Mr. Dougovito's³ report and deposition testimony.
12. Plaintiffs assert that the OSHA citations issued after the accident and Mr. Dougovito's opinions and testimony constitute sufficient evidence to satisfy the subjective realization requirement, in that the same confirm that training and supervision are needed to recognize and avoid hazardous situations such as hung trees.
13. The plaintiffs further assert that there is a conflict in evidence regarding the extent of Mr. Coleman's training and that a jury could find that the decedent was not trained to recognize hazards, and that his coworker Mr. Nichols was not properly trained to recognize and respond to the situation.
14. The Court finds the plaintiffs' case relies exclusively on evidence of the accident itself, as no other evidence exists showing that Mr. Coleman or other employees snagged trees and walked under them prior to the accident. The evidence is that on the day of the accident, Mr. Coleman, contrary to the training he received as outlined in the deposition testimony of his coworkers, hung trees and then proceeded to work underneath them. The OSHA

³Mr. Dougovito is the Plaintiff's safety expert. Mr. Dougovito based his opinions upon his review of R.M. Logging, Inc.'s OSHA citations/findings issued following the accident, photographs taken of the job site, and certain deposition testimony concerning the accident.

citations were issued after the accident, and the citations relevant to this action stemmed from the accident. The only basis for plaintiff's expert to opine that Mr. Coleman was not properly trained was the accident itself.

15. The Court finds that the plaintiffs failed to produce evidence that R. M. Logging, Inc., through its supervisor, John Robinson, or any other agent, was aware that Mr. Coleman cut a tree which was caught by another tree and suspended in the air or that Mr. Coleman would walk under the suspended tree, exposing himself to a dangerous condition.
16. The Court finds the record devoid of evidence that R.M. Logging, Inc. knew Mr. Coleman was not properly trained or that could support an inference that R. M. Logging failed to provide training. However, the record does contain evidence of just the opposite, specifically, that Mr. Robinson, a certified logger employed by R.M. Logging, worked alongside Mr. Coleman for two weeks when Mr. Coleman was hired in order to ensure that Mr. Coleman understood how to properly do the job. Further, the Court notes that specialized training is not required for a person of ordinary intelligence to recognize the hazard of walking under a tree suspended in the air by a limb of another tree.
17. The Court finds that the unsafe working condition which led to the accident was created by Mr. Coleman's act of negligently walking underneath a suspended tree. It is uncontroverted that R.M. Logging was unaware of the suspended tree and did not direct or encourage Mr. Coleman to walk beneath it.

CONCLUSIONS OF LAW

1. Rule 56(c) of the West Virginia Rules of Civil Procedure provides that: “. . .[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *West Virginia Rules of Civil Procedure, Rule 56(c)*.
2. “The essence of the inquiry the court must make is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Williams v. Precision Coil, Inc., 194 W.Va. 52, 61, 459 S.E.2d 329, 338 (1995). A party opposing summary judgment must satisfy the burden of proof by offering more than a mere ‘scintilla of evidence.’” The party opposing summary judgment must produce evidence sufficient for a reasonable jury to find in the nonmoving party’s favor. Merrill v. West Virginia Dept. of Health and Human Resources, 219 W.Va. 151, 160, 632 S.E.2d 307, 316 (2006), *per curiam*, citing Painter v. Peavy, 192 W.Va. 189, 192-93, 451 S.E.2d 755, 758-59 (1994). “A jury will not be permitted to base its findings of fact upon conjecture and speculation.” Crane v. Equipment Rental Co., Inc. v. Park, 177 W.Va. 65, 350 S.E.2d 692 (1986).
3. Workers’ compensation is the exclusive remedy of an employee injured while acting within the course and scope of his employment. The purpose of the Workers’ Compensation Act is to protect and compensate employees injured by negligence at the

workplace, as well as to protect immunized employers from litigation outside of the Workers' Compensation system, except as expressly provided by statute. *See W.Va. Code §23-4-2(c)(1)(2003)*.

4. Immunity is an essential aspect of the Workers' Compensation system. *See W.Va. Code §23-4-2(c)(1)(2003)*. Before immunized employers can lose immunity, their alleged actions must fall under the provisions of West Virginia Code §23-4-2(c)(2)(i) or (ii).⁴ Such civil actions are referred to as "deliberate intention" or "deliberate intent" actions.
5. "... [T]he 'deliberate intention' exception to the Workers' Compensation system is meant to deter the malicious employer, not to punish the stupid one." *Deskins v. S.W. Jack Drilling Co.*, 215 W.Va. 525, 531 (2004).
6. The plaintiffs herein allege that the defendant's alleged actions fall under the exception stated in W. Va. Code §23-4-2(c)(2)(ii)(2003).
7. W.Va. Code §23-4-2(c)(2)(ii)(2003) provides 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 of 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*

⁴ In the version of this statute applicable in this case, §23-4-2(c)(2) contains the applicable exceptions to immunity.

or standard was specially applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring a safe workplace, 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.”

W.Va. Code §23-4-2(C)(2)(ii)(2003), (emphasis added.)

8. Plaintiffs have the burden of proving the elements of W.Va. Code §24-4-2(c)(2)(ii). A deliberate intention action plaintiffs' burden is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge. See Marcus v. Holley, 618 S.E.2d 517, 529 (2005).
9. For a deliberate intention case falling under §23-4-2(c)(2)(ii)(2003) to survive a summary judgment motion, the Court must determine that sufficient evidence exists that would allow the jury to find that each of requirements of section (ii) exist. See *W.Va. Code* §23-4-2(c)(iii)(2003).
10. The Court notes that in “deliberate intent” cases where the West Virginia Supreme Court of Appeals has found that a matter should be submitted to a jury, the employer was aware of the unsafe condition and, in spite of such knowledge, allowed the employee to engage in the known dangerous activity. Such circumstances are not present in this case.
11. The Court finds that the present case presents a scenario more similar to that presented in Deskins v. S.W. Jack Drilling Co., 215 W.Va. 525, 600 S.E.2d 237 (2004). In Deskins, the Court found that the “specific unsafe working condition” at issue did not exist until

the employee failed to comply with safety procedures/precautions, and that the employer had no knowledge that the employee would fail to comply. Deskings at p. 531. The Court concluded that the “. . . circuit court properly found that the evidence was simply inadequate to create an issue of fact regarding the [employer 's] subjective realization of the specific unsafe working condition.” Id. In Deskings, the Court also noted that: “Obviously, an unsafe condition that develops or first springs into existence close in time to the accident presents less of an opportunity for the employer to realize and appreciate its risk.” Id.

12. The Court **CONCLUDES** that no genuine issues of material fact exist and that the plaintiffs herein failed to present evidence sufficient to survive the defendant’s motion for summary judgment.
13. The plaintiffs assert that the decedent was not trained and supervised as required by law, and that there existed a pattern of disregard of safety at the job site, and that this is sufficient evidence of a specific unsafe working condition presenting a high risk of serious injury or death as required by W. Va. Code § 23-4-2(c)(2)(ii)(A). The plaintiffs assert that these specific unsafe working conditions resulted in OSHA citations, thereby satisfying W. Va. Code § 23-4-2(c)(2)(ii)(C).
14. With regard to elements (B) and (D), the Plaintiffs, (citing Syllabus Point 5, *Ryan v. Clonch Industries, Inc.*, 219 W. Va. 664, 639 S.E. 2d 756 (2006) and *Nutter v. Owens Illinois, Inc.* 209 W.Va. 608, 550 S.E.2d 398 (2001)), assert that whether or not an employer has a subjective realization, (B), or intentionally exposed the employee to the

unsafe working condition, (D), both require an interpretation of the employer's state of mind, and must ordinarily be shown by circumstantial evidence, from which conflicting inferences may often reasonably be drawn.

15. Citing *Costilow v. Elkay Mining Co.*, 200 W.Va. 131, 134, 466 S.E.2d 406, 409 (1997), *Mayles v. Shoney's Inc.*, 185 W.Va. 88, 405 S.E.2d 15 (1990), *Cecil v. D & M, Inc.* 205 W.Va. 162, 170, 517 S.E.2d 27, 35 (1999), the plaintiffs argue that the subjective realization requirement may be satisfied by showing that managers/supervisors were aware of an unsafe practice yet failed to take remedial action, and that an employer's common practice may amount to intentional exposure. The Court concludes that these cases are significantly distinguishable from than the present case. In the present case, there is no evidence that R.M. Logging, Inc.'s managers/supervisors were aware of an unsafe practice and failed to take remedial action, or that walking underneath trees suspended in the air was a common practice.
16. Citing *Sias v. W-P Coal Co.* 185 W.Va 569, 575, 408 S.E.2d 321, 327 (1991)⁵, the plaintiffs argue that they have produced sufficient evidence of element (B), either directly or circumstantially, by Mr. Dougovito's report and/or testimony and the OSHA citations issued after the accident, and that evidence of subjective intent also supports intentional exposure as required by (D).

⁵ *Sias v. W-P Coal Co.* noted: "(t)he fact finder ... reasonably may infer the intentional exposure if the employer acted with the required specific knowledge ("subjective realization" and appreciation of a specific unsafe working condition violative of a specific safety standard) and intentionally exposed the employee to the specific unsafe working condition. *Handley v. Union Carbide Corp.*, 620 F. Supp. 428, 439 (S.D. W.Va. 1985), (*Haden, C.J.*) *fd.*, 804 F.2d 265 (4th Cir. 1986) (Sprouse, J., writing for three-judge panel)." *Sias.*

17. Plaintiffs also argue that the fact that the defendant did not intentionally force Mr. Coleman to walk underneath the tree does not mean the defendant lacked the requisite subjective intent.
18. Plaintiffs assert that a jury could find, based on the plaintiffs' evidence, that the defendant was aware of and yet intentionally ignored safety precautions and procedures required to avoid serious injury or death, and in doing so intentionally exposed the decedent to a specific unsafe working condition, in violation of federal OSHA regulations and well accepted safety standards, and that the Mr. Coleman was killed as a proximate result of the specific unsafe working condition, thereby satisfying all the elements of Code § 23-4-2(c)(2)(ii)(A) through (E).
19. The Court notes that a the relevant OSHA citations issued after the accident were classified as "serious." Unlike a "willful" violation, a "serious" violation issued for failure to train and supervise may be issued when it cannot be determined that the employer had actual knowledge of the unsafe condition. See 29 U.S.C. § 666 (k) (2009); *Id.* at (a).
20. The Court **CONCLUDES** that the OSHA citation at issue is not evidence of subjective realization. While it is a citation related to training, it is not evidence of a subjective realization on the part of the employer that Mr. Coleman was not trained regarding work around suspended trees and walking under trees suspended in the air. Such a citation alone is not sufficient evidence of subjective realization on the part of the employer of the existence of a working condition that carries a high risk or injury or death.

21. The Court **CONCLUDES** the occurrence of the accident itself as circumstantial evidence is insufficient to demonstrate subjective realization. While it is true that circumstantial evidence may be used to prove the subjective realization requirement, there must be circumstantial evidence for a jury to consider beyond just the fact of the accident. For a court to find sufficient evidence of subjective realization, the employee/plaintiff must submit evidence beyond just the fact of the accident.⁶ The facts of the present case are more closely parallel to the facts of cases where there were no prior injuries or notice provided to the employer of the unsafe working conditions or where the worker himself created the condition.⁷
22. The Court **CONCLUDES** that in this case, the employee Mr. Coleman created a specific unsafe working condition by not following proper safety procedures, therefore, a deliberate intention action cannot be maintained against the employer R. M. Logging, Inc. See Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 639, 408 S.E. 2d 385, 391 (1991); Mumaw v. U.S. Silica Co., 204 W. Va. 6, 12, 511 S.E.2d 117, 123 (1998);
23. The Court **CONCLUDES** that the record does not contain any evidence that R.M. Logging, Inc. was aware of the suspended tree, knew that Mr. Coleman would choose to continue to work around and under hung trees, or allowed or encouraged Mr. Coleman to

⁶ See Nutter v. Owens Illinois, Inc., 209 W.Va. 608, 550 S.E. 2d 398 (2001); Mayles v. Shoney's Inc., 185 W.Va. 88, 405 S.E.2d 15 (1990); Amazzi v. Quad/Graphics, Inc., 218 W.Va. 36, 621 S.E.2d 705 (2005); Bell v. Vecclio & Grogan, Inc., 191 W.Va. 577, 447 S.E. 2d 269(1994); Ryan v. Clonch Industries, Inc., 219 W.Va. 664, 639 S.E.2d 756 (2006); Sias v. W-P Coal Co., 185 W.Va. 59, 408 S.E.2d 321 (1991)

⁷ See Blevins v. Beckley Magnetite, Inc., 185 W.Va. 633, 408 S.E.2d 385 (1991), Mumaw v. U.S. Silica Co., 204 W.Va. 211, 517 S.E.2d 117(1998); McGee v. U.S. Silica Co., 205 W.Va. 211, 517 S.E. 2d 308 (1999); Deskins v. S.W. Jack Drilling Co., 215 W.Va. 525, 600 S.E. 2d 237 (2004); Tolley v. ACF Industries, Inc., 212 W.Va. 548, 575 S.E.2d 158 (2002)

engage in his dangerous and unsafe actions. The Court **CONCLUDES** that the plaintiffs failed to produce evidence sufficient to demonstrate that R.M. Logging, Inc. was aware of the specific unsafe condition.

24. The Court **CONCLUDES** that the plaintiffs failed to produce evidence of the “subjective realization” required by W.Va. Code §23-4-2(d)(2)(ii)(B)(2003) sufficient to survive the defendant’s motion for summary judgment.
25. The Court **CONCLUDES** that the record in this case is completely devoid of evidence of the existence of the requirements of §23-4-2(c)(ii)(B) or (D), at the least. As stated above, there is no evidence that R.M. Logging, Inc. had the subjective realization that Mr. Coleman would choose, contrary to his training, to walk under trees suspended in the air, (the specific condition that led to the decedent’s death), (§23-4-2(c)(ii)(B)), or that R.M. Logging, Inc., or its agent, forced, directed, or encouraged the decedent to walk under suspended trees, (§23-4-2(c)(ii)(D)). The Court **CONCLUDES** that the evidence in the record is directly contrary to these two conditions. For example, (1) the decedent worked for two weeks with a certified logger, (2) the decedent was properly trained, and (3) the decedent was not directed to do as he did – but for the decedent’s own negligence, the accident would not have occurred.
26. For the above stated reasons, the Court **CONCLUDES** that the plaintiffs have not produced sufficient evidence upon which a reasonable jury could find that the defendant violation the provisions of W.Va. Code 24-4-2.

27. Based on the above findings and conclusions, the Court is of the opinion that the present case does not fall into the category of a deliberate intention action and is exactly the type of tragic case intended to be covered by the Workers' Compensation System. For these reasons, summary judgment should be granted.

WHEREFORE, the Court does hereby **GRANT** R. M. Logging, Inc.'s *Motion for Summary Judgment* and hereby **ORDERS** that plaintiffs' claims against R.M. Logging, Inc. be **DISMISSED** and stricken from the docket of the court. Plaintiffs' objections and exceptions to these rulings are noted and preserved.

The Clerk is directed to provide a certified copy of this *Order* to all counsel of record.

The Clerk is further directed to remove this case from the Court's active docket.

Entered this 10th day of February, 2009.

PAUL M. BLAKE, JR.
JUDGE

Judge Paul M. Blake, Jr.

A TRUE COPY of an order entered
February 11, 2009
Teste: Daniel E. Wright
Circuit Clerk Fayette County, WV