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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**IN THE WEST VIRGINIA
SUPREME COURT OF APPEALS**

REGGIE LEE PHILYAW,

Appellant

**On Appeal from the
Circuit Court of Raleigh County
Civil Action No. 04-C-238B**

DOCKET NO. 32754

v.

**EASTERN ASSOCIATED COAL CORP.,
a West Virginia Corporation**

Appellee

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES

Auber v. Jellen
196 W. Va. 168, 173 (1996) 8

Courtney v. Courtney
186 W.Va. 597, 600-01, 413 S.E. 2d 418, 421-422 (1991) (Courtney I) 10

Courtney v. Courtney
190 W.Va. 126, 437 S.E.2d 436 (1993) (Courtney II) 10

DeRocchis v. Matlack, Inc.
194 W. Va. 417, 460 S.E.2d 663, n.4, 460 S.E.2d 663, 669 n.4 (1995)8

Graham v. Beverage, P.C.
211 W. Va. 466 (2002) 8

Handley v. Town of Shinnston
169 W. Va. 617, 289 S.E.2d 201 (1982) 7, 8

Kanawha Valley Power Co. v. Justice
181 W.Va. 509, 513, 383 S.E.2d 313, 317 (1998) 10

West Va. Human Rights Comm'n v. United Transp. Union
167 W. Va. 282, 280 S.E. 2d 653 (1981) 8

CODES

W. Va. Code § 5-11-2 8

OTHER

54 C.J.S. Limitations of Actions § 169 (1948) 7

Restatement (Second) of Torts §46 cmt j 10

Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. 8

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I
Law Practice is Not a Game of "Mother May I?"

Judge Burnside listened to a lengthy oral argument in which deposition evidence, documentary evidence, and stipulations were discussed. At no time was there ever any question concerning the existence or authenticity of this evidence. And, it is clear from Judge Burnside's order itself that he accepted evidence presented by the Plaintiff in the form of summaries of deposition testimony, quotes from depositions in the summary judgment briefs, and stipulations in oral argument because it was that evidence on which he relied to make his ruling. Thus, Judge Burnside's own order shows that he understood exactly what the Plaintiff planned to prove and would be able to prove, at least in the sense of making a prima facie case..

Notwithstanding Defendant's cavil about whether someone at Eastern directly ordered Mr. Philyaw to violate the law, the judge found as a matter of fact that the actions of the Defendant were tantamount to giving that order. Thus, Judge Burnside wrote:

The Court will accept for argument's sake, that the Plaintiff believed that the communication constituted an instruction to break the law. The weakness in Plaintiff's position, in the context of a claim for the intentional infliction of emotional distress, is that Plaintiff points to no overt conduct of the Defendant. Plaintiff relies entirely on his subjective interpretation of Defendant's communication. That subjective interpretation finds some support in Plaintiff's experience with the federal grand jury prior to 1993, but it remains subjective.

In essence, the judge accepted that: (1) Mr. Philyaw was a target of a federal grand jury investigation between 1990 and 1993 arising out of his employment with Eastern and

related to his manipulation of mine safety data; (2) Beginning in 1998, Eastern told Mr. Philyaw that if the mine "went out of compliance" he would be fired; and, (3) there was no lawful way for the mine to remain in compliance that was in any way under Mr. Philyaw's control.

In this last regard, the Court said:

...If Plaintiff truly believed that his employer's standard constituted a command to break the law, he was faced with an admittedly difficult choice. The solution available to Plaintiff was not an easy one...

...The fact that an employee finds himself faced with a set of instructions that he interprets to require that a law be broken might support another cause of action, but it does not satisfy the Travis standard that the Defendant's conduct be "atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency."...

Upon these considerations, it is the Court's opinion that while an employer's admonition to an employee to meet the employer's standard of performance or be fired might be unreasonable, unkind or unfair, no reasonable person would find that it exceeds the bounds of decency or offends community notions of acceptable conduct.

Memorandum Opinion, p. 6.

Consequently, the issue on this appeal is whether the Circuit Court was correct in holding that requiring an employee to break the law as a condition precedent to continued employment does not constitute the intentional infliction of emotional distress. Obviously, under the facts as recited in the Court's own order, it is a jury question whether the circumstances Mr. Philyaw described constituted a command to break the law, but resolving conflicting testimony on that issue is not appropriate for summary judgment,

and, indeed, the Court did not base his decision on any conclusion that Eastern did not require Mr. Philyaw to violate the law..

Defendant's argument is similar to the argument that because a robber wore a mask and the bank clerk could not identify him, he could not be prosecuted for the robbery notwithstanding that he was caught outside the bank with the loot in his pocket and the mask in his hand! Thus, the fact that Eastern is clever and/or deceitful does not exonerate it from liability for intentionally inflicting severe emotional distress if the jury finds that its elliptical commands amounted to a direction to violate the federal mining laws and by so doing subject oneself to a federal felony prosecution.

The Court's own order clearly shows that: (1) the Court understood the facts that were in contention; (2) the Court had no problems with counsel's stipulations during argument; and (3) the Court decided that even if the defendant had ordered Mr. Philyaw to violate the law, that action did not rise to the Travis standard and constitute the intentional infliction of emotional distress. Therefore, the issue of whether ordering a supervisor to violate the federal mining law or get fired is the intentional infliction of emotional distress is clearly presented before this Honorable Court and nothing could be added to the record that would improve the Court's ability to decide whether Judge Burnside were correct.

II

Eastern's Conduct Was So Extreme As to Exceed the Bounds of Decency

Judge Burnside accepted that Mr. Philyaw might convince a jury that Eastern had required him to violate the law. Yet Judge Burnside said in his order that requiring an employee to violate the Mine Health and Safety Standards was not conduct that exceeded the bounds of decency. Clearly there was no problem of inadequate proof of damages: The record does contain as an appendix to Mr. Philyaw's brief in opposition to the motion for summary judgment a copy of Dr. Faheem's report that shows a complete mental breakdown: There was no challenge to the assertion that Mr. Philyaw had been given a total disability rating for psychiatric reasons by the Social Security Administration.

Therefore, the question for this court has nothing to do with whether severe psychological injury occurred, or with whether the proof of such severe injury would be adequate before the jury. The sole question is: Assuming severe psychiatric injury proximately caused by Eastern's requirement that Mr. Philyaw violate the law, was Eastern's conduct so extreme as to exceed the bounds of decency? Given that the conduct was illegal, and given that the injury was severe, the answer must be "yes," and that is the only issue on this appeal.

III

The Statute of Limitations is not an Issue on Appeal

Defendant raised the issue of the statute of limitations in the Circuit Court and argued the matter in its brief for summary judgment. The court did not dismiss the case on

statute of limitations grounds, nor did the court say that the statute of limitations issue need not be decided because he was dismissing the case on other grounds. Accordingly, the Court implicitly rejected the statute of limitations argument, and for good reason.

This tort was a continuing course of conduct that culminated in Mr. Philyaw having a complete mental breakdown, leaving Eastern's employ on disability (discontinued after two years) and receiving a total disability award from the Social Security Administration. "[W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from the date of the last injury, or when the tortious overt acts cease." 54 C.J.S. Limitations of Actions § 169 (1948).

The facts show that every day Mr. Philyaw faced the prospect of needing to falsify mine safety data: although he did not actually do this each and every day, the outrageous conduct was that he was routinely required to falsify mine safety data and could be required to do it on any given day. This situation, then, comes within the holding of Handley v. Shinnston, 169 W. Va. 617 (1982) (a per curiam opinion)¹, reaffirmed by a

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In Shinnston, the town had installed a water transmission line through the homeowners' property. It began to leak 1972, and despite notifications to the town by the homeowners, the line continued to leak, causing a crack to appear in the surface of the homeowners' lawn in 1976. After the line was removed 1978, a crater developed in the yard and the foundation of the homeowners' house shifted. The homeowners' brought an action seeking compensation for the damages to their property in 1979. This Honorable Court reversed the dismissal of the action by the trial court, holding that the tortious act in question continued until the line was removed in 1978. When a tort involved a continuous or repeated injury, the statute of limitations ran from the last date of the injury.

signed opinion by Justice Albright in Graham v. Beverage, P.C., 211 W. Va. 466 (2002)

where the Court said:

We recognize that Town of Shinnston was a per curium opinion which may raise doubt in some minds as to the validity in this jurisdiction of the continuing tort exception to the statute of limitations. To dispel any such doubts, we hereby hold that where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease.

211 W.Va. at 477.²

And, in discussing the hallmarks of a continuing tort, this Court has also said:

"The Court conceives a continuing cause of action as being a situation where events, which for all practical purposes are identical, occur repeatedly, at short intervals, in a consistent, connected, rhythmic manner." DeRocchis v. Matlack, Inc., 194 W. Va. 417, 460 S.E.2d 663, n.4, 460 S.E.2d 663, 669 n.4 (1995), discussing Handley v. Town of Shinnston, 169 W. Va. 617, 289 S.E.2d 201 (1982).

Auber v. Jellen, 196 W. Va. 168, 173 (1996). Certainly that is the circumstance with Mr.

2

See, also, West Va. Human Rights Comm'n v. United Transp. Union, 167 W. Va. 282, 280 S.E. 2d 653 (1981) In that case, the consolidated complaints of union members were heard by the Human Rights Commission, which held that the members were denied promotions on basis of their race in violation of their rights under W. Va. Code § 5-11-2. Although the seniority system was neutral on its face, it was not applied equally to blacks and whites. On appeal of the trial court's reversal, the court held that the commission's findings were supported by substantial evidence and adopted them. In reaching the conclusion that the facially neutral seniority system was discriminatorily applied, the court recognized the policies underlying federal claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq. The court held that the members' claims were not time-barred because the union's violations were continuous. Although the court was satisfied that the union no longer used the discriminatory system, the violations were continuous because the members had never been compensated for their inferior positions that resulted from the prior discrimination. Although the employer had already settled, the union was also responsible for collective bargaining agreements that perpetuated past discriminati

Philyaw: He has alleged and supported with evidence in his deposition that the need to violate mine safety regulations was present every day he was on the job from roughly 1998 until he left work as a result of a mental breakdown. Thus, the rule governing "continuing torts" applies to him.

Furthermore, the Circuit Court had no trouble with these allegations and the notion that up to the time Mr. Philyaw left Eastern's employment he "believed" that we would be required to break the law. In this regard to Circuit Court said:

Plaintiff claims that in the period following 1998, he was required by Defendant to manipulate the dust sampling environment so that the dust sample would be cleaner than the routine working environment. Plaintiff concedes that he was never specifically instructed to engage in this manipulation, but he asserts that such instruction was implied in Defendant's communication to him that he would be fired if he allowed the mine to go out of compliance. Plaintiff testified in his deposition that he thought this communication constituted an instruction to manipulate the testing environment to make sure that the test samples were clean. *Plaintiff's responsive brief*, p. 9.

Plaintiff claims that in the period following 1998, he was required by Defendant to manipulate the dust sampling environment so that the dust samples would be cleaner than the routine working environment.

Memorandum Opinion, p. 2.

Therefore, the Court accepted for the purposes of the motion for summary judgment that Mr. Philyaw was under constant threat of being required to manipulate the dust samples and thus under constant threat of facing a federal prosecution, as he had in the early 1990's when he was the target of a federal grand jury investigation.

VI
The Relevant Standards

There is no better outline of the relevant standards for an intentional infliction of emotional distress claim than Footnote 24 to Defendant's brief. Therefore, let us use the Defendant's own analysis to examine this case. The Defendant's footnote says: "This Court has noted, "The law intervenes only where the distress is so severe that no reasonable [person] could be expected to endure it." Kanawha Valley Power Co. v. Justice, 181 W.Va. 509, 513, 383 S.E.2d 313, 317 (1998) (quoting Restatement (Second) of Torts §46 cmt j) (alteration in Kanawha Valley Power Company); *id.* (liability may be imposed for outrageous conduct only where the distress that results is more than the 'transient' and 'trivial' distress that necessarily accompanies life among other people").

[How does forcing someone to do acts that will subject him to a federal felony indictment measure up??? Is total permanent psychiatric disability more than transient and trivial??? See also, Courtney v. Courtney, 186 W.Va. 597, 600-01, 413 S.E. 2d 418, 421-422 (1991) (Courtney I) (reversing dismissal of outrage claim because of extreme nature of conduct; noting that "conduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent does not constitute outrageous conduct"), rev'd on other grounds, Courtney v. Courtney, 190 W.Va. 126, 437 S.E.2d 436 (1993) (Courtney II)." **Does threatening to destroy a man's life by firing him if he doesn't commit federal felonies amount merely to "annoying," "uncivil," "mean-spirited," or "negligent" conduct????**

Obviously, by the very authorities cited by the Defendant in Footnote 24, Mr. Philyaw makes out his case.

V

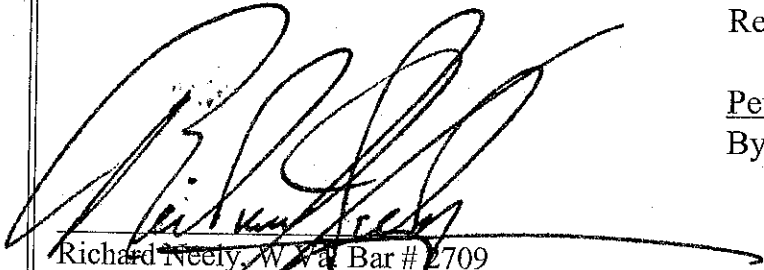
Mr. Philyaw Emphatically Alleges that Eastern Ordered Him to Break the Law

The Defendant keeps repeating that Mr. Philyaw did not allege that Eastern ordered him to break the law. This is entirely untrue: The fact that Eastern couched its demands and instructions to break the law in such a way as to obfuscate the “smoking gun” does not make Eastern’s commands a figment of Mr. Philyaw’s imagination. If in Vietnam a five man long range patrol group heard the officer tell a sergeant to “march the prisoners to the rear and be back in ten minutes,” that command was clearly an order to shoot the prisoners! In the middle of the jungle there was no “rear” to which to march, and so it was in Mr. Philyaw’s case: With Eastern’s unwillingness to spend money on safer configurations of the mine, Mr. Philyaw’s orders either to bring the mine into compliance or be fired were clearly commands to break the law. Indeed, the command was as explicit and unequivocal as the command to march the prisoners to the rear.

VI

Conclusion and Prayer

Wherefore, Petitioner prays that this Honorable Court reverse the judgment of the Circuit Court of Raleigh County and remand this case for trial on the merits, and grant such other and further relief as justice and the nature of the cause may require.



Respectfully submitted,

Petitioner,
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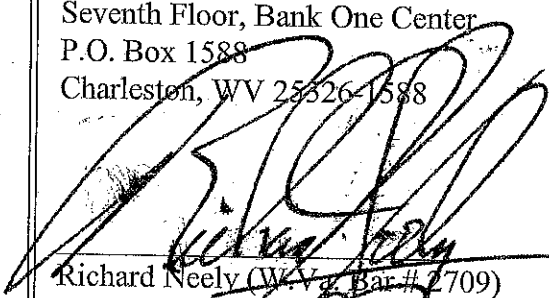
EASTERN ASSOCIATED COAL CORP.,
a West Virginia Corporation

Respondent

CERTIFICATE OF SERVICE

I, RICHARD NEELY, counsel for Appellant, hereby certify that I served the foregoing **Reply Brief of Appellant** by mailing two copies of the same United States First Class Mail, postage prepaid on the 30th day of August, 2005 to all counsel of record at the following addresses:

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