STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

KATY ADDAIR, ADMINISTRATRIX, ET AL.,
Plaintiffs Below, Petitioners

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0397 (Wyoming County 04-C-252)

LITWAR PROCESSING COMPANY, LLC, ET AL.,
Defendants Below, Respondents

MEMORANDUM DECISION

The nine petitioners in this case (hereinafter collectively referred to as "plaintiff petitioners")[1] appeal an order of the Circuit Court of Wyoming County that granted summary judgment to multiple employers[2] who were defendants in the deliberate intent[3]

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[1]The plaintiffs before this Court on appeal are: Katy Addair (administratrix of the estate of Gary Addair), Larry Hatfield, Steven Hylton, Kenneth King, Terry Martin, Clarence McCoy, Mitchell McDerment, Roger Muncy, and William Weese.

[2]The following defendant employers were granted summary judgment: Virginia Crews Coal Company; Independence Coal Company, Inc.; Rawl Sales & Processing Co.; Buffalo Mining Company; Standard Laboratories, Inc.; Noone Associates, Inc.; Westmoreland Coal Company; Pittston Coal Management Company; Pittston Coal Sales Corporation; Marfork Coal Company, Inc.; Massey Energy Company; Massey Coal Services, Inc.; and Massey Coal Capital Corporation.

[3]Plaintiff petitioners brought their deliberate intent cause of action pursuant to W. Va. Code § 23-4-2(2)(ii) (2005) (Repl. Vol. 2010), which states as follows:

> (2) The immunity from suit provided under this section and under sections six and 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

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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, prior to the injury, had actual knowledge 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, as demonstrated by competent evidence of written standards or guidelines which reflect a consensus safety standard in the industry or business, 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 intentionally thereafter exposed an employee to the specific unsafe working condition; and

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actions[4] underlying this appeal. The circuit court granted summary judgment on the ground of collateral estoppel because each of the plaintiff petitioners had previously filed a related workers' compensation claim that had resulted in a final order finding that the claimant had not sustained a compensable injury. The circuit court concluded that, because of the existence of a final adjudication finding no compensable injury with respect to each of the plaintiff petitioners, they each were estopped from re-litigating the issue and were, therefore, unable to prove a mandatory element of their deliberate intent claims. Before this Court, the plaintiff petitioners assert various reasons why they believe the circuit court's application of collateral estoppel was erroneous. After a careful review of the parties' arguments, the record submitted, and the pertinent authorities, we determine that the order granting summary judgment to the various employers should be affirmed, but on grounds different than those relied upon by the circuit court. Furthermore, because our resolution of this case does not require us to address a new or significant issue of law, we find this matter to be proper for disposition in accordance with Rule 21 of the West Virginia Revised Rules of Appellate Procedure.

The plaintiff petitioners have worked for various amounts of time in or around coal float-sink operations[5] and were thereby exposed to perchloroethylene and other chemicals. They each filed a workers' compensation claim based upon their chemical exposure. Each of these workers' compensation claims ultimately resulted in a final order determining that the subject claimant had not suffered an injury related to his employment. Thereafter, the instant lawsuit was filed asserting deliberate intent causes of action against

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[3](...continued)

> (E) That the employee exposed suffered serious compensable injury or compensable death as defined in section one, article four, chapter twenty-three whether a claim for benefits under this chapter is filed or not as a direct and proximate result of the specific unsafe working condition.

[4]The plaintiff petitioners sought to certify this case as a class action, however, class certification was denied.

[5]According to the plaintiff petitioners, float-sink testing is a process used to determine the quality of coal. The testing requires that the coal be crushed to a certain grade, soaked in perchloroethylene, dried, and then analyzed.

a variety of employers[6] and claiming that the plaintiffs had suffered injury from exposure to hazardous chemicals.

Because each of the plaintiff petitioners herein previously had filed a workers' compensation claim based upon the same chemical exposure asserted in their deliberate intent actions, and because each claim ultimately was denied based upon the absence of proof establishing a work-related injury had resulted from chemical exposure, several of the defendant employers filed motions for summary judgment asserting that the deliberate intent actions were barred by collateral estoppel. Noting that the existence of a compensable injury is a mandatory element for a deliberate intent claim, the employers argued that the final orders, which concluded that no compensable injuries existed, operated to prohibit the relitigation of that issue in the subsequently asserted deliberate intent actions. The circuit court agreed and granted the summary judgment motions. This appeal followed.

In this appeal, the Court is asked to review an order granting summary judgment. Accordingly, our review is *de novo*. *See* Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."). Furthermore, in conducting our *de novo* review, we apply the same summary judgment standard that is applied in the circuit court. *See* Syl. pt. 2, *id.* ("A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." (quotations and citations omitted)). Finally, we note that

> [s]ummary judgment is appropriate where the record taken as a whole 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.

Syl. pt. 4, *Painter, id.*

One of the appellate response briefs filed in this matter pointed out that the trial court had imposed a sanction upon the plaintiff petitioners that precluded them from

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[6]The employers against whom workers' compensation claims were filed are not necessarily the same as the employers named as defendants in the instant action, but we find this difference to be of no moment to our resolution of the legal issues before us.

presenting any expert witness in connection with the cases underlying this appeal.[7] The circuit court's order stated:

> As a sanction for the failure to make the November 1, 2009[,] expert witness disclosures, it is ORDERED that *Plaintiffs shall not be entitled to offer against any party at trial any expert witnesses in an individual case on the merits*. This sanction includes exclusion of expert witnesses in the claims asserted against the employer defendants pursuant to W. Va. Code § 23-4-2 . . . .

(Emphasis added).

In light of this ruling by the circuit court, we need not address the issues raised by the plaintiff petitioners regarding the propriety of the circuit court's application of collateral estoppel.[8] Instead, we have a much more compelling reason to affirm the circuit court's award of summary judgment to the defendants.[9] *See Gentry v. Mangum*, 195 W. Va. 512, 519, 466 S.E.2d 171, 178 (1995) ("In *Williams v. Precision Coil, Inc.*, [194 W. Va. 52, 459 S.E.2d 329 (1995)], we acknowledged that a grant of summary judgment may be sustained on any basis supported by the record. Thus, it is permissible for us to affirm the granting of summary judgment on bases different or grounds other than those relied upon by the circuit court." (footnote omitted)).

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[7]In fact, the trial court imposed multiple sanctions related to the plaintiffs' repeated failure to abide by deadlines established in the circuit court's initial scheduling order and two subsequently issued amended scheduling orders. The circuit court found that the plaintiffs' repeated failure to comply with the court's scheduling orders was done knowingly and willfully, and demonstrated an egregious pattern of misconduct. As a result, in addition to the sanction described in the body of this decision, the circuit court also prohibited the plaintiffs from: (1) offering against any party at trial any undisclosed fact witnesses that should have been disclosed on August 1, 2009; and (2) offering any fact or expert witnesses against any party at the class certification hearing or at a trial on the merits if a class is certified.

[8]We wish to make clear that we simply need not address the collateral estoppel issue to resolve the instant appeal. We save that issue for another day.

[9]We also point out that, although the plaintiff petitioners filed a brief in reply to the defendant respondents appellate briefs, the plaintiff petitioners did not refute the exclusion of expert witnesses imposed by the circuit court as a sanction for their failure to meet expert witness disclosure deadlines established by that court.

The above-quoted sanction is significant due to the fact that one of the mandatory elements of a deliberate intent action requires plaintiff petitioners to establish that they "*suffered serious compensable injury or compensable death . . . as a direct and proximate result of the specific unsafe working condition*." W. Va. Code § 23-4-2(2)(ii)(E) (2005) (Repl. Vol. 2010). Thus, to prevail in the instant cause of action, the plaintiff petitioners must establish that they suffered "serious compensable injury or compensable death" and that such "serious compensable injury or compensable death" was "a direct and proximate result" of chemical exposure to which they were subjected in the course of their employment. In this regard, the plaintiff petitioners have alleged that they sustained occupational diseases:[10] a variety of complex health consequences resulting from their

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[10]"Occupational disease" is defined in W. Va. Code § 23-4-1(f) (2008) (2010) as follows:

> For the purposes of this chapter, occupational disease means a disease incurred in the course of and resulting from employment. No ordinary disease of life to which the general public is exposed outside of the employment is compensable except when it follows as an incident of occupational disease as defined in this chapter. Except in the case of occupational pneumoconiosis, a disease shall be considered to have been incurred in the course of or to have resulted from the employment only if it is apparent to the rational mind, upon consideration of all the circumstances: (1) That there is a direct causal connection between the conditions under which work is performed and the occupational disease; (2) that it can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; (3) that it can be fairly traced to the employment as the proximate cause; (4) that it does not come from a hazard to which workmen would have been equally exposed outside of the employment; (5) that it is incidental to the character of the business and not independent of the relation of employer and employee; and (6) that it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction: Provided, That compensation shall not be payable for an occupational disease or death resulting from the disease unless the employee has been

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exposure to chemicals in the course of their employment.[11] These are not simple ailments that have resulted from common causes familiar to the average layperson. Instead, these are complex illnesses that allegedly have arisen from exposure to chemicals of which the average person has no knowledge or experience. Under these circumstances, we find expert testimony to be necessary to establish the existence of an occupational disease. *Cf* Syl. pt. 15, in part, *Strahin v. Cleavenger*, 216 W. Va. 175, 603 S.E.2d 197 (2004) ("'[W]here the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.' Syl. Pt. 11, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974)."); Syl. pt. 1, *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991) ("'It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.' Syl. Pt. 2, *Roberts v. Gale*, 149 W. Va. 166, 139 S.E.2d 272 (1964).");

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[10](...continued)

> exposed to the hazards of the disease in the State of West Virginia over a continuous period that is determined to be sufficient, by rule of the board of managers, for the disease to have occurred in the course of and resulting from the employee's employment. . . .

[11]According to the plaintiff petitioners' amended complaint, some of them are symptomatic and some are asymptomatic. The plaintiff petitioners alleged in their complaint that those who are symptomatic suffer from "peripheral nervous system damage, central nervous system damage, respiratory system problems, liver problems, kidney problems, and skin anomalies." Medical monitoring also was sought based upon the symptomatic plaintiffs' "fear that their health problems will worsen and that they may develop additional health problems that they currently do not suffer from, such as cancer, blood disorders and reproductive problems." With regard to the asymptomatic plaintiff petitioners, the complaint alleged that they

> fear that they will develop serious health problems that they currently do not suffer from due to their exposure to the hazardous chemicals used in their float sink coal lab work environments, including, but not limited to the following: peripheral nervous system damage, central nervous system damage, respiratory system problems, liver problems, kidney problems, and skin problems, cancer, blood disorders and reproductive problems.

Syl. pt. 5, in part, *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982) ("[E]xpert medical testimony would ordinarily be required to establish certain matters including: (1) the risks involved concerning a particular method of treatment, (2) alternative methods of treatment, (3) the risks relating to such alternative methods of treatment and (4) the results likely to occur if the patient remains untreated.").

Indeed, counsel for the plaintiff petitioners seems also to have acknowledged the need for expert testimony. When criticizing the handling of the appeal of one of the plaintiff petitioner's cases to the Workers' Compensation Office of Judges, counsel stated in footnote 2 of "Plaintiffs' Memorandum of Law in Opposition to the Pending Motions for Summary Judgment Founded on the Doctrine of Collateral Estoppel," that

> [t]he Calwell Practice's reliance on the Kostenko paper for demonstrating the causal link between exposure and illness was curious. Dr. Kostenko is a doctor of Osteopathic Medicine with no noted specialized training in epidemiology or toxicology. While the observations that Dr. Kostenko made connecting injuries that float sink lab employees [sustained] to PCE [(perchloroethylene)] exposure is sound, and epidemiologically correct, *he appears to lack the training or expertise to demonstrate the causal link in a manner that a Court would find admissible from an "expert."*

(Emphasis added).

Based upon the foregoing discussion, we find that, under the particular facts of the cases underlying this appeal, expert testimony is necessary to establish that the plaintiff petitioners have "suffered serious compensable injury or compensable death . . . as a direct and proximate result of the specific unsafe working condition." W. Va. Code § 23-4-2(2)(ii)(E). Because the plaintiff petitioners have been prohibited from presenting such evidence by virtue of sanctions imposed on them by the circuit court, they are unable, as a matter of law, to meet their burden of proof as to this element of their claim. This inability to make a sufficient showing on an essential element of their case, for which they bear the burden of proof, renders summary judgment proper. Accordingly, the July 27, 2010, order of the Circuit Court of Wyoming County granting summary judgment to various defendant employers and dismissing the deliberate intent claims of the plaintiff petitioners is affirmed.

Affirmed.

ISSUED: February 9, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh
Judge John A. Hutchison, sitting by temporary assignment

DISQUALIFIED:

Justice Brent D. Benjamin