STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Toshanda Mahon, Ben Sawyers, Etta Bailey, Glenn Caudill, Gracie Ferrell, John Peck, Johnny Owens, Judy Stafford, Mack Mullins, Robert Preece, Victoria Runyon, Virginia Bailey, Virginia Justice and William Lambert,
Plaintiffs Below, Petitioners

FILED
May 25, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-1280 (Mingo County 06-C-380)

White Flame Energy, Inc.,
Defendant Below, Respondent

MEMORANDUM DECISION

The petitioners, by counsel Kevin W. Thompson and David R. Barney Jr., appeal the order of the circuit court of Mingo County entered May 4, 2011, denying their motion for new trial or in the alternative, additur. The respondent White Flame Energy, Inc. ("White Flame") has filed a response by its counsel, Jason S. Hammond, John P. Fuller and Suleiman Oko-ogua.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The petitioners filed suit against White Flame based upon alleged damages to their real property. The jury verdict resulted in no recovery to the petitioners due to the jury's finding that the petitioners' comparative negligence was fifty percent. The petitioners filed post-trial motions seeking a new trial or in the alternative, additur. The circuit court denied the post-trial motions.

"'[T]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. pt. 4, in part, *Sanders v. Georgia-Pacific Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976)." Syl.Pt. 2, *Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc.*, 223 W.Va. 209, 672 S.E.2d 345 (2008).

The Court has fully reviewed the issues raised by the petitioners. The Court concludes that the circuit court's decision to deny a new trial or in the alternative, additur, under the facts and

circumstances of this case was proper and, further, adopts and incorporates by reference the well-reasoned final order denying the petitioners' post-trial motions entered by the circuit court that is attached hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 25, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

11-1280

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IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

TOSHANDA MAHON, et al.,

Plaintiffs,

v.

Civil Action No.: 06-C-380
Chief Judge Michael Thornsbury

WHITE FLAME ENERGY, INC.,

Defendants.

FINAL ORDER DENYING PLAINTIFFS' POST TRIAL MOTIONS AND MOTION FOR STATUTORY ATTORNEYS' FEES

On March 9, 2009, this matter came before the Court pursuant to the parties Post-trial Motions. The parties appeared as follows, the Plaintiffs, through counsel, Kevin Thompson and David Barney, and the Defendant, White Flame, through counsel, Jason Hammond and John Fuller. The matter again came before the Court on April 4, 2011. The Court has considered the instant Post-Trial Motions and hereby **DENIES** the Post-Trial Motions and **DENIES** the Motion for Statutory Attorneys' Fees based upon the following Findings of Fact and Conclusions of Law, to-wit:

Findings of Fact

1. The delay in rendering decision on the Plaintiffs' Post-Trial Motions stems from representations made to the Court that the matter was settled and resolved. However, at the April 4, 2011, Hearing the Court was informed that the matters were still pending and, thus, the Court now enters the following Order.

2. On October 24, 2008, the Mingo County Petit Jury returned a verdict in this matter finding the Plaintiffs and the Defendants were each fifty percent (50%) responsible for the damages alleged in the Plaintiffs' Complaints.

3. The various Plaintiffs were consolidated into *Vicie Kolffe v. White Flame Energy, Inc.*, Mingo County Civil Action No. 06-C-382. In that Complaint the Plaintiffs asserted property damages as a result of the Defendant's blasting operations, nuisance, trespass, negligence/gross negligence, and violation of West Virginia Code § 22-3-1, *et seq.* See *Plaintiff's Complaint.*

4. The Plaintiffs' Pre-Trial Memorandum included the following proposed jury instructions, to-wit:

> i. The jury is instructed that general damages for nuisance. property damages and repair cannot exceed the fair market value of the subject property.
> ii. The Jury is instructed to accept the fact that property damage occurring within 7/10th of a mile from blasting activities is the cause of property damage found in the subject structures. The Defendants shall have the burden to (sic) proof to prove that the Defendant's blasting did not cause the damage. Plaintiffs' Pre-Trial Memorandum.

5. On November 5, 2008, the Plaintiffs filed the instant Post-Trial Motion asserting various grounds for the Court to grant a new trial in this matter and a further Motion requesting statutory attorneys' fees under the West Virginia Surface Coal Mining and Reclamation Act (SCMRA).

6. First, the Plaintiffs assert the Court erroneously allowed Juror No. 42 to remain on the jury panel after she indicated to the Court and counsel that her son-in-law was employed as a mechanic for the Defendant. Additionally, the Plaintiffs assert that Juror No. 42 had an indirect financial interest in the outcome of the trial and potential bias against the Plaintiffs. *Plaintiff's Motion*, unnumbered p. 1.

7. During the Jury Voir Dire the Court specifically questioned the Jury Panel regarding their knowledge and relationship to the various parties, counsel, and witnesses in this cause of

action. During the Voir Dire Juror No. 42 indicated she thought her son-in-law had previously been employed by the Defendant, that she did not believe he currently worked for the Defendant, and that his employment did not affect her ability to fairly judge the issues in this matter.

THE COURT: Do any of you work or any of you employed by White Flame Energy? The jurors have remained silent.
Have any of you or members of your family ever been employed by White Flame Energy? Come on up.
(Bench Conference)
THE COURT: This is Juror 42, Barbara Christian.
JUROR CHRISTIAN: I believe my son-in-law did, but he doesn't work there now. I think they changed it.
THE COURT: Does he work now for Alpha Resources?
JUROR CHRISTIAN: I don't know who he works for now. I don't even think about his work, to be honest.
THE COURT: If your son-in-law did work for White Flame Energy would that cause you to have any bias or prejudice for or against the plaintiffs or defendant?
JUROR CHRISTIAN: No.
THE COURT: Would you be able to listen to all the evidence and return a true, fair and impartial verdict in this case?
JUROR CHRISTIAN: Yes, sir.
THE COURT: And your son-in-law has never discussed these cases with you at any time. Is that correct?
JUROR CHRISTIAN: I don't know anything about it, no.
THE COURT: Any questions, gentlemen?
MR. THOMPSON: Did you say he works at Alpha?
JUROR CHRISTIAN: No. He used to. Let me think, it used to be White Flame, but I don't know nothing about it. I know I can be honest and fair.
MR. THOMPSON: Does he work at the same mine?
JUROR CHRISTIAN: Let me think. I should know this but I don't.
MR. THOMPSON: What does he do?
JUROR CHRISTIAN: He's a mechanic.
MR. THOMPSON: I don't have any more questions.
JUROR CHRISTIAN: I don't know anything about it. I never talk to him about work. All we talk about is kids.
MR. HAMMOND: Just a couple of questions; Do you know what area your son-in-law works?
JUROR CHRISTIAN: Do you know where the Hannah Lumber Company place is there? He goes back to somewhere on the mountain- I don't know which way, and that's where he goes to work.
MR. HAMMOND: And he's still employed there?

JUROR CHRISTIAN: Yes.
MR. HAMMOND: He's never been terminated?
JUROR CHRISTIAN: No.
MR. HAMMOND: No further questions.
THE COURT: Ms Christian, you make take a seat back in the jury box.
(Juror Christian complies.)
Motions?
MR. THOMPSON: I don't know, Your Honor. She seemed to indicate she didn't know much about his work but she knew where he worked, and this is the exact, same mine.
MR. HAMMOND: But she said she didn't know anything about this case, Your Honor, and she said she could be fair.
THE COURT: Yes, she did. She made no disclosure that would give rise to a challenge for cause. Step back. (Trial Transcript, Volume One, pp. 24:12 – 26:21).

8. Second, the Plaintiffs assert that subsequent to the jury charge conference Mr. Fuller, counsel for the Defendant, went with Mr. Barney, counsel for the Plaintiffs, and dictated a jury interrogatory regarding comparative fault. The verdict form was never seen by the Court and the Court never had the opportunity to review the verdict form in light of the jury charge. As a result, the Jury was improperly instructed regarding the applicability of the doctrines of comparative fault and mitigation, over Plaintiffs' counsels' objections. *Plaintiff's Motion*, unnumbered p. 2.

9. Prior to the completion of this trial the Court instructed counsel for Plaintiffs' and the Defendant to meet and confer to write the Jury Verdict Forms for this trial. These forms were not completed by counsel prior to the close of evidence. In fact, the Court and the Jury had to wait for approximately two (2) hours while the parties met and conferred regarding the Verdict Forms. After the Verdict Forms were completed counsel presented them to the Court, the Court reviewed the same, the Court inquired whether either party had any objections to the form of the Verdict Forms at that time, counsel for Defendant indicated there was a problem regarding one of the interrogatories potentially allowing

for a double recovery of the same damages, and the Court instructed Plaintiffs' counsel to make the necessary corrections prior to the end of Closing Arguments. Again, counsel did not comply with the Court's request and the Verdict Forms were once again delayed at the end of closing arguments as Plaintiffs' counsel still needed to make further changes to the Verdict Forms prior to the same being given to the Jury. The parties agreed on the changes and the agreed upon Verdict Forms were given to the Jury during its deliberations without objection.

10. The Verdict Forms presented to the Jury included the following Interrogatories:

1. Do you find by a preponderance of the evidence that White Flame Energy, Inc.'s blasting constituted a trespass impacting the [Plaintiff's] property?
2. Do you find by a preponderance of the evidence that [Plaintiff] suffered damages from a trespass impacting [Plaintiff's] property by White Flame Energy, Inc.'s blasting?
3. What is the fair market value of [Plaintiff's] property?
4. Do you find by a preponderance of the evidence that White Flame Energy, Inc.'s blasting constituted a nuisance impacting [Plaintiff's] property?
5. Do you find by a preponderance of the evidence that [Plaintiff] suffered damages from a nuisance impacting [Plaintiff's] property from White Flame Energy, Inc.'s blasting?
6. What amount of annoyance, discomfort, inconvenience & loss of use of property has [Plaintiff] suffered due to a trespass &/or nuisance, if any, created by White Flame Energy, Inc.?
7. What percentage of the amount, if any, on Question No. 6 is attributable to dust?
8. Do you find by a preponderance of the evidence that [Plaintiff's] property suffered damages from the blasting activities of White Flame Energy, Inc.?
9. Do you find by a preponderance of the evidence that [Plaintiff's] property suffered damage after [date], from the blasting activities of White Flame Energy, Inc.?
10. Do you find by a preponderance of the evidence that [Plaintiff] was negligent in the maintenance of her property?
11. What is the amount of damage to [Plaintiff's] property after [date]?

11. The Plaintiffs also filed a separate Motion requesting statutory attorneys' fees incurred during the litigation. Plaintiffs' counsel assert that the billable rates for each of the attorneys in this action are as follows:

Kevin Thompson and Van Bunch $250.00,

David Barney $200.00

Paralegal $30.00

Dr. Kiger $22,547.00

Ron McVey $7,653.60

IVIZE of Charleston, LLC $876.86

Thompson West $244.04

12. These fees and expenses totaling $510,257.13, include attorneys' fees and expert witness fees incurred during the litigation of this action. As part of these attorneys' fees requests the Plaintiffs included travel time for Kevin Thompson to travel to and from New Orleans, Louisiana; however, Plaintiff's counsel maintained a local office and employees various office staff full-time in their Williamson, West Virginia office. Costs associated with advancements made by Bonnett Fairbourn, Friedman & Balint, PC's and for Van Bunch's participation in this litigation totaling $94,651.67.

Conclusions of Law

1. West Virginia Rules of Civil Procedure Rule 59(a) provides that:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

2. "[A] new trial should not be granted 'unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." *State ex rel. Meadows v. Stephens*, 207 W.Va. 341, 345, 532 S.E.2d 59, 63 (2000)(quoting *W.R. Grace & Co. v. West Virginia*, 515 U.S. 1160 (1995)).

SEATING OF JUROR NO. 42

3. First, the Plaintiffs object that the Court erred in allowing Juror No. 42 to remain on the jury panel after she indicated that her son-in-law worked for the Defendants and asserted that she had an indirect financial interest in the outcome of the trial.

4. West Virginia Code § 56-6-12 provides that:

> Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case, unless it be otherwise specially provided by law, the plaintiff and defendant may each challenge four jurors peremptorily.

5. "Jurors who on *voir dire* of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse." Syllabus Point 3, *State v. Pratt*, 161 W.Va. 530, 244 S.E.2d 227 (1978).

6. "When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those

circumstances and to resolve any doubts in favor of excusing the juror." Syllabus Point 3, *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002).

7. "If a prospective juror makes an inconclusive or vague statement during *voir dire* reflecting or indicating the possibility of a disqualifying bias or prejudice, further probing into the facts and background related to such bias or prejudice is required." Syllabus Point 4, *Id.*

8. "Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." Syllabus Point 5, *Id.*

9. Juror No. 42 was questioned by the Court during a bench conference regarding her son-in-law's employment with the Defendant at which time she indicated she did not know anything about the trial, did not know whether he was still employed at the mine, and she never discussed work with her son-in-law. At the conclusion of the bench conference, where counsel for both the Plaintiffs' and Defendant questioned Juror No. 42, the Court asked the parties if there were any motions and ruled that Juror No. 42 had not revealed anything rising to a challenge for cause. There was never an affirmative request to challenge for cause and even if Plaintiffs' counsels' response of "I don't know" is considered as a challenge for cause a challenge was not warranted.

> Motions?
> MR. THOMPSON: I don't know, Your Honor. She seemed to indicate she didn't know much about his work but she knew where he worked, and this is the exact, same mine.
> MR. HAMMOND: But she said she didn't know anything about this case, Your Honor, and she said she could be fair.
> THE COURT: Yes, she did. She made no disclosure that would give rise to a challenge for cause. Step back.

10. The Court **FINDS** that Juror No. 42 was questioned extensively regarding her knowledge of her son-in-law's employment and its effect on her ability to fairly judge the issues in this cause of action.

11. The Court **FINDS** that there is great latitude given in determining whether to dismiss a juror for cause.

12. The Court **FINDS** that Juror No. 42 did not indicate any bias or prejudice in either party's favor during the bench conference, nor did she indicate any knowledge of the cause of action.

13. The Court **FINDS** there was no error in allowing Juror No. 42 to remain as a potential juror in this cause of action.

14. Additionally, despite having the opportunity to do so, the Plaintiff's did not use one of their juror challenges to strike Juror No. 42 from the panel.

15. Therefore, the Plaintiffs' Motion regarding Juror No. 42 is **DENIED**.

COMPARATIVE NEGLIGENCE INSTRUCTION

16. In *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 341-2, 256 S.E.2d 879, 885 (1979), the West Virginia Supreme Court of Appeals in discussing, contributory and comparative negligence noted:

> We do not accept the major premise of pure comparative negligence that a party should recover his damages regardless of his fault, so long as his fault is not 100 percent. Without embarking on an extended philosophical discussion of the nature and purpose of our legal system, we do state that in the field of tort law we are not willing to abandon the concept that where a party substantially contributes to his own damages, he should be permitted to recover for any part of them. We do recognize that the present rule that prohibits recovery to the plaintiff if he is at fault in the slightest degree is manifestly unfair, and in effect rewards the substantially negligent defendant by permitting him to escape any responsibility for his negligence.

> Our present judicial rule of contributory negligence is therefore modified to provide that a party is not barred from recovering in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident."

17. "[U]nder *Bradley*, it is not initially necessary for the jury to make a comparison of each individual defendant's negligence. The first determination is whether the plaintiff's percentage of contributory negligence bars recovery. On this issue, the jury is instructed to determine if the defendants are liable to the plaintiff. Then the percentage, or degree, of the plaintiff's contributory negligence is compared to that of all of the other parties involved in the accident." *King v. Kayak Mfg. Co.*, 182 W.Va. 276, 279, 387 S.E.2d 511, 514 (1989).

18. In *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W.Va. 79, 87, 297 S.E.2d 854, 862 (1982), the Supreme Court of Appeals further held that "comparative negligence is available as an affirmative defense in a cause of action founded on strict liability so long as the complained of conduct is not a failure to discover a defect or to guard against it."

19. In this case, the Plaintiffs presented evidence during the course of the trial regarding their knowledge of damages to their property, which they assert was caused by the Defendant's blasting operations. Thus, the Plaintiffs assert that the Defendant is subject to strict liability for these damages; however, inexplicably, the Plaintiffs did not plead strict liability in their Complaints, nor did the Plaintiffs present a strict liability instruction to the Court. Additionally, the Plaintiffs failed to object to the absence of a strict liability instruction in the jury charge prior to the charge being read to the jury at trial.

20. The Court **FINDS** that *Star Furniture's* holding regarding the application of comparative negligence in a case where the Plaintiff is not alleging damages resulting from their failure to discover a defect or to guard against it. In fact, the Plaintiff's evidence at trial showed their knowledge of the various damages to their respective properties. their knowledge of these damages during the course of blasting operations by the Defendants, and the absence of the damages prior to the blasting operations.

21. The Court **FINDS** that the instruction regarding comparative negligence is appropriate in this matter according to the principles set forth in *Star Furniture*.

22. The Plaintiffs also assert that the Court erred in failing to instruct the jury regarding the effect of a finding of fifty percent (50%) negligence by the Plaintiffs and their potential recovery of damages. Once again the Court notes that the proposed jury instructions included within the Plaintiffs' Pre-Trial Memorandum did not include a proposed instruction regarding comparative negligence. Nor did the Plaintiff's object during the Jury Charge Conference to the absence of this instruction or to the Court's intention to instruct the jury on comparative negligence in this matter.

23. The Plaintiffs cite to *Adkins v. Whitten* 171 W.Va. 106, 297 S.E.2d 881 (1982), in support of their assertion that even if a comparative negligence instruction was proper in this case the Court erred by not instructing the jury that finding that the Plaintiffs were fifty percent (50%) negligent would result in zero recovery. Again, this argument is advanced in spite of the Plaintiff's failure to request the instruction.

24. In *Adkins* the defendant filed a motion for appeal urging the Supreme Court of Appeals to adopt a rule that would preclude informing the jury as to the effect of its finding of some percentage of contributory negligence against the plaintiff. The court held that "a trial

court has a duty to instruct the jury as to the effect of the doctrine of comparative negligence when requested." *Id.*

25. The Court **FINDS** that the Plaintiffs did not present the Court with a request to give an instruction regarding a finding of fifty percent (50%) negligence by the Plaintiffs and the effect on their ultimate recovery of damages.

26. West Virginia Rules of Civil Procedure Rule 51 provides that:

> Either before or at the close of the evidence, any party may file written requests that the court instruct the jury on the law as set forth in the requests, and the court shall inform counsel of its proposed action upon the requests before it instructs the jury. The court shall instruct the jury before the arguments to the jury are begun, and the instructions given by the court, whether in the form of a connected charge or otherwise, shall be in writing and shall not comment upon the evidence; except that supplemental written instructions may be given later, after opportunity to object thereto has been afforded to the parties. The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room. No party may assign as error the giving or the refusal to give and instruction unless the party objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which the party objects and the grounds of the party's objection; but the court or any appellate court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not is has been made the subject of objection. Opportunity shall be given to make objection to the giving or refusal to give and instruction out of the hearing of the jury.

27. In *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 838-39, 131 S.E.2d 736, 744 (1963), the West Virginia Supreme Court of Appeals noted that objections to jury instructions filed seven days after the verdict of the jury were untimely and would not be considered by the court.

28. The issues presented by the Plaintiffs in this case are distinguishable from *Adkins* regarding the instruction on awarding fifty percent (50%) damages, because such an instruction was not requested by the Plaintiffs or the Defendant in this cause of action.

29. In fact, the Plaintiffs offered no instructions regarding the negligence standard for the Court's consideration and did not object to the general negligence standard contained within the Court's Jury Instructions prior to the same being read to the Jury in this cause of action.

30. The Court gave counsel for both parties the opportunity to review the jury charge. See *Trial Transcript*, Volume 9 at page. 155. At which time, Mr. Thompson, counsel for the Plaintiffs, noted that he had the opportunity to review the jury charge. *Id.* at 155. After some minor deviation and discussions regarding the jury charge, which were resolved, Mr. Thompson noted that the Plaintiffs had no further objections. *Id.* at 155-162. The Court then specifically asked "[a]ny other proposed instructions?" *Id.* at 162. Mr. Thompson then stated that he had no additional proposed instructions. *Id.* at 162. Additionally, after Mr. Barney prepared the verdict form, the Plaintiffs did not have any objections to the Verdict Form. *Id.* at 162, 227.

31. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

32. "An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public

reputation of the judicial proceedings." Syllabus Point 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

33. The Court **FINDS** that the failure to instruct the jury on the effect of assigning fifty percent (50%) damages on the Plaintiffs did not result in plain error which would result in the award of a new trial in this cause of action.

34. The Court **FINDS** that pursuant to Rule 51 of the Rules for Civil Procedure the Plaintiffs' counsel had a duty to propose instructions to the Court, to object to the failure of the Court to instruct or object to the giving of a specific instruction. Here, the Plaintiffs did not present the Court with proposed instructions regarding this issue nor did they object at the Jury Charge Conference.

35. It is the duty of the parties to present the Court with any proposed Jury Instructions for consideration by the Court prior to the Jury Charge being read to the Jury at trial.

ATTORNEYS' FEES

36. "As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syllabus Point 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986).

37. West Virginia Code § 22-3-25(f) provides that "[a]ny person or property who is injured through the violation by any operator of any rule, order or permit issued pursuant to this article may bring an action for damages, including reasonable attorney and expert witness fees, in any court of competent jurisdiction."

38. "Under W.Va.Code, 22A-3-25(f) [1985], the trial court should award attorneys' fees if the plaintiff is the 'prevailing' party at trial. For a plaintiff to have 'prevailed' at trial, he need not show success on every claim brought, but he must demonstrate that the litigation

effected the material alteration of the legal relationship of the parties in a manner which the legislature sought to promote in the fee statute." Syllabus, *Schartiger v. Land Use Corp.*, 187 W.Va. 612, 420 S.E.2d 883 (1991).

39. The *Schartiger* decision further delineated that:

> In applying this standard, trial courts should consider good faith efforts by either party to settle the case without unnecessary litigation. Our Legislature encourages the bringing of certain types of suits by enacting fee-shifting statutes, but a party who receives less from the jury than he was offered by his opponent has not *necessarily* 'materially altered' their relationship. A party who needlessly pursues litigation after he has been offered a settlement that exceeds what the jury finally awards by an amount sufficient to have compensated the plaintiff for all his attorneys' fees and expenses *at the time the offer was made* is not entitled to any attorney's fees that accrued after the offer was made." *Id.*, 420 S.E.2d at 887.

40. "[T]he amount of the award is limited to what the court determines is reasonably incurred." *Martinka Coal Co. v. West Virginia Div. of Environmental Protection*, 214 W.Va. 467, 471, 590 S.E.2d 660, 664 (2003).

41. The Supreme Court of Appeals in *Martinka* further noted that:

> The fee-shifting rules adopted by the legislature in the statute under consideration and enforced by this court are meant to cover two extreme cases as well as all of the cases in between. If a tort-feasor approaches his victim immediately after a tort and makes a reasonable offer that includes reasonable attorneys' fees up to the time of the offer, only to be rebuffed by a greedy victim's lawyer, and the jury awards less than the tort-feasor originally offered for damages alone, then it would be an abuse of discretion for the trial court to award attorneys' fees to the plaintiff.
>
> On the other hand, if the tort-feasor chases down the plaintiff on the courthouse steps minutes before trial only to make an offer that might minimally cover the plaintiff's damages, but that would not cover plaintiff's attroneys' fees expended to that point, and the jury awards damages roughly equivalent to the tortfeasor's offer, then it would be an abuse of discretion for the trial court *not* to award attorneys' fees to the plaintiff.

42. The Plaintiffs assert their attorneys are entitled to the statutory fees under W.Va. Code § 22-3-25(f) because the Plaintiffs substantially prevailed on the issues of liability presented to the Jury and the Jury awarded monetary damages to each individual plaintiff.

43. On the other hand, the Defendant asserts that the Plaintiffs' Complaints did not include any attempts to have the Defendants comply with SCMRA or any requests for equitable or injunctive relief. During the trial the Plaintiffs failed to demonstrate any violations of SCMRA that would entitle them to an award of attorneys' fess and expert witness fees. The Jury did not award the Plaintiffs any damages based on their fugitive dust claims at trial, and the Plaintiffs' expert, Dr. Kiger, did not indicate that the Defendant's blasting plan violated the SCMRA.

44. The Court **FINDS** that West Virginia Code § 22-3-25(f) requires that the plaintiffs prevail at trial in order to recover attorneys' fees. See Syllabus, *Shartiger*, 187 W.Va. 612.

45. The dispositive factor, even without consideration of the settlement offer and determination of whether the parties attempted to settle the case, is that the Plaintiffs did not prevail in the underlying claim. The Court would be hard-pressed to consider a Plaintiff in a tort action for monetary damages a prevailing party when they do not recovery any monetary award. Here, the jury found that the Plaintiffs were fifty percent at fault; thus, under West Virginia's Comparative Negligence structure, the Plaintiffs will not recover. Under the standards, discussed above it can hardly be found that the outcome of this case materially altered the legal relationship of the parties in the manner sought by the applicable statute or that the Plaintiffs were the prevailing party at trial.

46. The Court **FINDS** that the Plaintiffs in the current action did not substantially prevail at the trial level. The Plaintiffs received, in essence, a zero damages verdict from the jury.

47. Thus, the Court **FINDS** that the Plaintiffs' Motion For Statutory Attorneys' Fees should be **DENIED**.

48. The Court will further address whether the litigation effected the material alteration of the legal relationship of the parties in a manner which the legislature sough to promote in the fee statute. The Court **FINDS** that it did not.

49. The Defendant asserts that the parties engaged in settlement negotiations prior to the trial in this matter. On February 16, 2006, the Plaintiffs sent a demand letter to the Defendant requesting one million four hundred thousand dollars ($1,400,000) to settle this matter. Negotiations between the parties later broke down after the Defendant offered two hundred eighty thousand dollars ($280,000.00) and the Plaintiffs decreased their demand to nine hundred thousand dollars ($900,000.00) in December 2006. At that time, the Plaintiffs' counsel had expended approximately one hundred sixty-four (164) hours on this action, at two hundred fifty dollars ($250.00) per hour for the work completed. *Defendant's Response to Plaintiff's Motion for Attorneys' Fees*, p. 3. Resulting in attorneys' fees in the amount of forty thousand nine hundred thirty dollars ($40,930.00); however, the Plaintiffs were seeking three hundred sixty thousand dollars ($360.000.00) in attorneys' fees at that time based upon the forty percent (40%) contingency fee agreement with the Plaintiffs. *Id.* At this time the Plaintiffs had only expended twenty thousand dollars ($20,000.00) in litigation expenses and expert witness fees. *Id.*

50. On September 8, 2008, the Plaintiffs made a "renewed" global settlement demand in the amount of one million three hundred and seventy-nine dollars ($1,379,000) to resolve the

Plaintiffs' claims. At that time, the Defendant offered to settle the matter for one hundred twenty thousand dollars ($120,000.00), which the Plaintiffs' refused and counter-offered for one million one hundred and seventy-one dollars ($1,171,000). *Id.*, p. 4.

51. The Court **FINDS** that the Defendant made a reasonable offer to settle these matters in 2006, which the Plaintiffs' did not accept. The Defendant's offer was a greater amount than the damages the jury found the Plaintiffs had suffered. However, the Plaintiffs ultimately recovery nothing, due to the jury's finding that they were equally at fault. Furthermore, at the time the effort to settle was made, the expenses of the Plaintiffs, and although not relevant to the Court's inquiry, the Defendant, were relatively minimal, especially considering the end result. As noted above, Plaintiffs' counsel sought to be compensated, pursuant to the negotiations, at their contingency rate rather than an hourly rate, which resulted in a difference of fees in the amount of three hundred nineteen thousand and seventy dollars ($319,070).

52. In *Schartiger* the Supreme Court of Appeals noted that if the tort-feasor approaches the victim immediately after the tort and makes a reasonable offer that includes reasonable attorneys' fees up to the time of the offer, only to be rebuffed by a greedy victim or victim's attorney, and the jury awards less than the tort-feasor originally offered for damages alone, then it would be an abuse of discretion for the trial court to award attorneys' fees to the plaintiffs. *Supra.*

53. Here the Defendant offered the Plaintiffs two hundred eighty thousand ($280,000.00) to settle this case in 2006 after the Plaintiffs had incurred forty thousand nine hundred thirty dollars ($40,930.00) in attorneys' fees and twenty thousand ($20,000.00) in expert witness fees at that time. The settlement offer minus the attorney fees incurred to that

date and expert witness fees and expenses would have resulted in a net recovery of two hundred nineteen thousand and seventy dollars ($219,070.00) for the Plaintiffs in this matter. Additionally, even applying the forty percent (40%) contingency fee agreement to this original settlement offer the potential attorneys' fees and expert witness fees and expenses would have resulted in a recovery of one hundred sixty eight thousand dollars ($168,000.00) for the Plaintiffs and attorneys' fees in the amount of one hundred twelve thousand dollars ($112,000.00). However, the Plaintiffs' choose to refuse the settlement offer and proceed to trial in this matter.

54. After another year's worth of discovery the Plaintiffs' made another global settlement offer of one million three hundred seventy-nine thousand dollars ($1,379,000) with the Defendant counter-offering for one hundred twenty thousand dollars ($120,000.00), presumably based upon the information gathered through ongoing discovery at that time.

55. In this case, despite having reasonable offers of settlement, Plaintiffs' counsel took an unreasonable stand and took their chances at trial. At trial, the Plaintiffs did not prevail and will not receive any damages. Thus, the Plaintiffs have not sustained their burden of "demonstrat[ing] that the litigation effected the material alteration of the legal relationship of the parties in a manner which the legislature sought to promote in the fee statute." Syllabus, *Schartiger*, 187 W.Va 612.

56. Accordingly, Plaintiffs' counsel is not entitled to an award of attorneys' fees.

57. The Court **FINDS** that the Plaintiffs did not prevail at trial and the litigation did not effect the material alteration of the legal relationship of the parties.

58. Therefore, the Court **DENIES** the Plaintiffs' request for statutory attorneys' fees.

PLAINTIFFS' ADDITUR REQUEST

59. Additionally, the Plaintiffs' assert that the Jury Verdict in this matter was improper and the Court should adjust the Jury Verdict through additur.

60. "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syllabus Point 3, Walker v. Monongahela Power Company, 147 W.Va. 825, 131 S.E.2d 736 (1963).

61. "An award of additur is appropriate under West Virginia law only where the facts of the case demonstrate that the jury has made an error in its award of damages and the failure to correct the amount awarded would result in a reduction of the jury's intended award." Bressler v. Mull's Grocery Mart, 194 W.Va. 618, 621, 461 S.E.2d 124, 127 (1995).

62. The Plaintiffs request the Court to grant an additur in this matter and adjust their recovery from that found by the Petit Jury in this case.

63. The Court **FINDS** that the Verdict of the Jury was proper in this instance and the application of additur in this cause of action is not proper.

64. The Court **FINDS** that Plaintiffs have presented no evidence showing that the jury has made an error in its award of damages and the failure to correct the amount would result in a reduction of the jury's intended award.

65. The Court **DENIES** Plaintiffs' request for the application of additur in this matter.

66. Therefore, based upon the foregoing Findings of Fact and Conclusions of Law the Court hereby **DENIES** Plaintiffs' Motion for Post-Trial Motions **DENIES** the Plaintiffs' Motion for Statutory Attorneys' Fees.

Judgment

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law the Court does hereby **DENY** Plaintiffs' Post-Trial Motions **DENIES** Plaintiffs' Motion for Statutory Attorney Fees.

This being a **FINAL ORDER** which any party may appeal the Clerk is **ORDERED** to strike this matter from the active docket of the Court.

The Clerk is **DIRECTED** to send attested copies of this Order to all parties of record.

ENTERED this the 4th day of May 2011.

The Honorable Michael Thornsbury
Chief Judge, 30th Judicial Circuit

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