No. 35139 - *Clarence T. Coleman Estate by Co-Administrators, Clarence Coleman and Helen M. Adkins, Appellants v. R.M. Logging, Inc., a West Virginia Corporation, Clonch Industries Inc., a West Virginia Corporation, and John Robinson, individually, Appellees.*

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Benjamin, Justice, dissenting:

The majority's judicial expansion of this statutory cause of action marks a troubling departure both from our prior deliberate intent jurisprudence and from the necessary deference we are constitutionally obligated to give to the Legislature for statutorily-created causes of actions. Heretofore, we have endeavored to accord legal effect to the plain meaning and clear intent of West Virginia's deliberate intent statute. By doing so, the Court ensured that the elements necessary to establish and maintain such an action resulted from legislative policy-making, not judicial policy-making. In failing to give legal effect to the express language of the deliberate intent statute, the majority now trespasses into the prerogative of the Legislature. By ignoring certain statutory language and by overwriting other statutory language, the majority has now expanded through the common-law a narrowly crafted legislative cause of action. I therefore dissent.

The plain language of W. Va. Code §23-4-2(d)(1)(2003)[1] provides, in pertinent

[1] W. Va. Code §23-4-2 was amended effective July 1, 2005. As this action was filed on June 17, 2005, the changes are not applicable to this action.

part, that:

> "[i]n enacting the immunity provisions of this chapter, the Legislature intended to create a legislative standard for loss of that immunity of ***more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct***; and that it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter."

W. Va. Code §23-4-2(d)(1)(2003) (Emphasis added). In order to survive summary judgment, plaintiffs are *required* to demonstrate that a material question exists as to whether *each* of the following elements may be 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 or 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 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), inclusive, of this paragraph, the employer nevertheless thereafter exposed an employee to the specific unsafe working condition intentionally; and
>
> (E) That the employee exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.

W. Va. Code §23-4-2(d)(2)(ii)(2003).[2] *See Marcus v. Holley*, 217 W. Va. 508, 520, 618 S.E.2d 517, 529 (2005)(*citing Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 9, 511 S.E.2d 117, 120 (1998).

Rule 56 of the West Virginia Rules of Civil Procedure provides that when "there is no genuine issue as to any material fact" a party is entitled to summary judgment if the applicable substantive law so provides. Syl. Pt. 2, *Painter v. Peavy*,192 W. Va. 189, 451 S.E.2d 755 (1994). Although the facts and inferences must be viewed in a light most favorable to the non-moving party, that party must produce "concrete" evidence which would allow a reasonable finder of fact to return a verdict in its favor. *Id*. at 193, 759. Where, as here, there has been an opportunity for adequate discovery, our consideration should properly move from the speculative realm of possibility to the actual realm of plausibility when

[2] The 2005 amendments to this statute changed the language in subsection (B) from "employer had a subjective realization and an appreciation" to "employer, prior to the injury, had *actual knowledge* of the existence of the specific unsafe working condition." (Emphasis added).

considering the non-moving party's case.

While I believe it to generally be preferable that a case be decided on its merits,[3] procedural mechanisms like summary judgment can and should be efficient and effective tools in resolving cases where there is no real dispute as to the facts or the law. In *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), this Court held:

> Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this state. It is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if in essence there is no real dispute as to the salient facts or if only a question of law is involved." *Oakes v. Monongahela Power Co.*, 158 W. Va. 18, 22, 207 S.E.2d 191, 194 (1974). Indeed, it is one of the few safeguards in existence that prevents frivolous lawsuits that have survived a motion to dismiss from being tried. Its principal purpose is to isolate and dispose of meritless litigation. *West Virginia Pride Inc. v. Wood County*, 811 F.Supp. 1142 (S.D.W.Va. 1993). To the extent that our prior cases implicitly have communicated a message that Rule 56 is not to be used, that message is hereby modified. When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion. *Hanks v. Beckley Newspapers Corp.*, 153 W. Va. 834, 172 S.E.2d 816 (1970).

[3] *See Masinter v. WEB-CO Co.*, 164 W. Va. 241, 243, 262 S.E.2d 433, 436 (1980); *Lengyel v. Lint*, 167 W. Va. 262, 281, 280 S.E.2d 66, 71 (1981).

Id. at 192 n. 5, 758 n. 5.

Here, we are asked to consider a cause of action of Legislative creation. The Legislature chose to specifically limit this cause of action by explicitly directing trial courts to scrutinize deliberate intent claims and to grant summary judgment when a plaintiff fails to put forth sufficient evidence as to *each* of the applicable five factors (as set forth above). West Virginia Code §23-4-2(d)(2)(iii)(B), expressly provides, in pertinent part:

> Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of ***intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter***, the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E), inclusive, paragraph (ii) of this subdivision do not exist, . . .

W. Va. Code §23-4-2(d)(2)(iii)(B)(2003) (Emphasis added).

At issue in this appeal is Appellant's evidence relating to the second element of "subjective realization" found in subsection (B) of the statute. This Court has previously held that the subjective realization requirement "is not satisfied merely by evidence that the employer ***reasonably should have known*** of the specific unsafe working condition and of the strong possibility of serious injury or death presented by that condition. Instead, it must

be shown that the employer ***actually possessed such knowledge***." Syl. Pt. 3, in part, *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991)(emphasis added); *accord Blake v. John Skidmore Truck Stop, Inc.*, 201 W. Va. 126, 493 S.E.2d 887 (1997); *Tolley v. ACF Industries, Inc.*, 212 W. Va. 548, 575 S.E.2d 158 (2002); *Deskins v. S.W. Jack Drilling Co.*, 215 W. Va. 525, 600 S.E.2d 237 (2004)(*per curiam*). "This is a high threshold that cannot be successfully met by speculation or conjecture." *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 12, 511 S.E.2d 117, 123 (1998). This requirement is most often satisfied by evidence of prior complaints, prior injuries on the same equipment, or prior, unabated citations by federal or state agencies. Singular accidents have been held insufficient to prove subjective realization. *Sedgmer v. McElroy Coal Co.*, 220 W. Va. 66, 640 S.E.2d 129 (2006).

The majority reasons that the Appellee and the circuit court misapprehend the unsafe working condition in this case, and that in order to overcome summary judgment, the Plaintiffs herein were required to establish the existence of a material question of fact with regard to whether R.M. Logging had a subjective realization of the fact that Mr. Coleman was not properly trained and, knowing his lack of training, whether R.M. Logging intentionally sent him out to cut trees. Accordingly, the majority finds that the hung tree and Mr. Coleman's decision to walk under said tree are simply manifestations of the allegedly inadequate training received by Mr. Coleman, and that Plaintiffs are not required to show a subjective realization of those manifestations on the part of R.M. Logging. In a brief

footnote, the majority then explains that to the extent that R.M. Logging interprets certain deposition excerpts of Mr. Dougovito's testimony as wavering on the issue of whether Mr. Coleman was adequately trained, this is a point they must argue to the finder of fact. Likewise, the majority finds that R.M. Logging's argument that Mr. Dougovito's opinion is flawed because of his reliance solely on the incident that resulted in Mr. Coleman's death is one to be made to the fact finder. The majority explains that both of these arguments address the weight that a trier of fact should give to Mr. Dougovito's opinions. It then concludes that the evidence in this case, albeit circumstantial, was controverted. *See Sias v. W-P Coal Co.*, 185 W. Va. 569, 408 S.E.2d 321, 327 (1991)("Subjective realization, like any state of mind, must be shown usually by circumstantial evidence, from which, ordinarily, conflicting inferences reasonably can be drawn.")

However, it is readily apparent that, in this case, Appellants' evidence of subjective realization of a lack of proper training and supervision is unquestionably lacking. It is evident from Mr. Dougovito's deposition that he had not ascertained any facts, other than the occurrence of the accident itself, on which to base an opinion that Mr. Coleman had been inadequately trained or supervised. Mr. Dougovito testified:

> Q. If you take Mr. Robinson's testimony and Mr. Moore's testimony about the training, and even Kelcey Nichols testified about training, then - I know you're critical of the lack of documentation, but if you just take their testimony that there was

training and the amount of training that they testified to, would that be adequate training?

A. No.

Q. Why not?

A. You need supervision. Adequate training - it's clear, very clear, by looking at two out of three trees hung up right after lunch that the training wasn't adequate on cutting, felling trees properly. And then working in and around a hung tree, which should have been part of that training, didn't take hold. So there was a lack of supervision to reinforce that training. So that didn't occur.

Q. So you're just looking at the result and saying that as a result of what happened that one day, then what follows in your mind is lack of training, lack of supervision, on down the road?

A. Well, not lack of training. I have to take them at their word that they did, in fact, train him, that they did, in fact, train him as they said they did, although, of course, by law, it's not documented.

Mr. Dougovito admitted that he does not know the extent of the on-the-job training provided to Mr. Coleman by R.M. Logging:

Q. You don't have any information to know exactly what training Mr. Coleman received, other than what was testified to in the deposition of Nichols and Robinson and, I think his name was, Moore?

A. Moore. No, I didn't – No, there was no other indication in the information, other than looking at what transpired, cutting three trees after lunch and hanging two, that whatever training that he had was inadequate.

No evidence was presented that either Mr. Robinson or R.M. Logging was aware of prior incidents in which Mr. Coleman had walked under a hung tree or that he had ever hung a tree. There was likewise no evidence, other than the accident itself, presented by the Plaintiffs proving that Mr. Coleman had not received adequate training to recognize the hazards of the job. In fact, the testimony of Mr. Robinson reveals that before hiring Mr. Coleman, Mr. Robinson spoke with Mr. Coleman's previous boss at Nicholas Logging, where Mr. Coleman had been cutting timber. Mr. Robinson believed that Mr. Coleman had worked as a cutter for over a year before coming to R.M. Logging. Mr. Robinson was also responsible for training R.M. Logging employees, including an initial two week on-the-job training session for each new employee. In his deposition, Mr. Robinson identified the various areas in which each new cutter was trained during the first two weeks of employment, including chain saw safety, hinging, escapeways, and hung timber. This training comports with the requirements of 29 C.F.R. 1910.266(i)(3)(iii), regarding hazard recognition.

Additionally, the sole eyewitness to the fatal accident, Kelcey Nichols, testified regarding the details of the accident and 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.

When asked why he did not stop Mr. Coleman from walking under the suspended 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.

This Court has previously found this precise type of evidence to be insufficient to survive summary judgment. In *Deskins , supra*, this Court found that the "specific unsafe working condition" at issue did not exist until the employee failed to comply with safety procedures and precautions, and that the employer had no knowledge that the employee would fail to comply. 215 W.Va. at 531, 600 S.E.2d at 243. In affirming the circuit court's

grant of summary judgment to the defendant employer, this Court stated that:

> In the case at bar, the appellant has not presented any evidence to show that the appellees possessed actual knowledge that their employees were improperly supervised and that there was a high degree of risk and a strong probability of serious injury. To be specific, the appellant has produced no evidence of prior injuries, employee complaints, or citations from any regulatory or governmental agency arising from the use of a dozer to set up the pipe rack or pipe tub or the lack of supervision during that operation. The appellant simply has not offered any evidence remotely suggesting that the appellees knew that their supervision of the appellant or any of their employees was inadequate. At best, the appellant might be able to prove ordinary negligence on the part of the appellees.

Id. Based upon this, we 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*. We 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*.

Likewise, in *Blevins v. Beckley Magnetite, Inc.*, 185 W. Va. 633, 408 S.E.2d 385 (1991), this Court upheld a circuit court's grant of judgment notwithstanding the verdict to an employer finding that an unsafe working condition existed only because of the employee's failure to comply with safety procedures and thus, subjective realization had not been proven. Therein, an employee had been severely injured while cleaning up an ore spillage around a self-cleaning conveyor tail pulley when his coveralls got caught on the

conveyor belt and pulled him into the machine. While the employee claimed that the employer told him not to shut off the conveyor belt when performing the task, no other witness testimony corroborated that he had received such instruction. The evidence showed that the employees who worked at the plant during the relevant time-frame were advised to shut off the power to the conveyor and that no prior injuries had occurred. *Id*.

Much like the cases cited above, the Plaintiffs herein rely exclusively on evidence of the accident itself to prove that Mr. Coleman lacked the requisite training and supervision. The evidence reveals that on the day of the accident, Mr. Coleman, contrary to the training he received as outlined in the deposition testimony of his co-workers, hung trees and then proceeded to work underneath them. The Appellants failed to produce evidence that R.M. Logging, Inc., through its supervisor, John Robinson, or any other agent, had a subjective realization that Mr. Coleman lacked the proper training and nevertheless intentionally sent him out to cut trees.

Utilizing the occurrence of an accident itself as circumstantial evidence should be, and until now, always has been, legally insufficient to demonstrate subjective realization. While this Court has previously held that circumstantial evidence may be used to prove the subjective realization requirement, there must be more circumstantial evidence than just the accident's occurrence for a jury to consider. *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. Veccilio & Grogan, Inc.*, 191 W. Va. 577, 447 S.E.2d 269 (1994); *Sias v. W-P Coal Co.*, 185 W. Va. 59, 408 S.E.2d 321 (1991). "[A] non-moving party cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). "The evidence illustrating the factual controversy cannot be conjectural or problematic." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329,337 (*quoting Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d. 202, 217 (1986), quoting First National Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569, 593 (1968). *See also Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (holding that unsupported speculation is insufficient to defeat summary judgment).

". . . [T]he 'deliberate intent' exception to the Workers' Compensation system is meant to deter the malicious employer, not to punish the stupid one." *Deskins*, 215 W. Va. at 531, 600 S.E.2d at 243. However, permitting after-the-fact circumstantial evidence of this nature to create a question of material fact regarding the element of subjective realization effectively transforms the limited statutory deliberate intent cause of action into a wide-open action of common law dimension. As unfortunate as this accident was, the record shows it to have simply been that: an accident. This is precisely the type of negligence action

intended to be covered by the Workers' Compensation system because, at the very most, the evidence presented shows only that R.M. Logging "should have known" that Mr. Coleman might walk under the tree. Being insufficient to survive summary judgment according to West Virginia law, summary judgment was properly granted in this case by the circuit court.

Mindful of the legislative intent of W. Va. Code §23-4-2, I fear that the majority's decision will now cause trial judges to become reluctant to grant summary judgment in deliberate intent cases even though it is appropriate and the statute specifically compels it, thus prolonging unnecessary litigation and forcing West Virginia employers to settle cases that lack merit simply to avoid costly litigation. "It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled or rewritten." *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 299 n. 10, 624 S.E.2d 729, 736 n. 10 (2005). Because I believe the majority's holding is directly contrary to the legislative intent of the narrow deliberate intent exception to statutory workers' compensation immunity and to this Court's prior jurisprudence on this issue, I respectfully dissent.