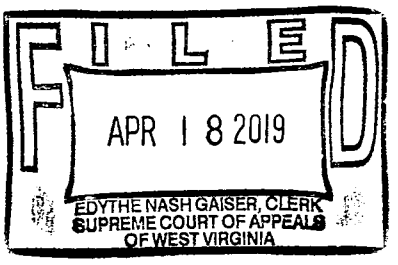
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



SOUTHERN ENVIRONMENTAL, INC.,

Petitioner

Appeal No.: 18-1124

v.

TUCKER-STEPHEN G. BELL et. al.,

Respondents.

APPEAL FROM AN ORDER FROM
THE CIRCUIT COURT OF MONONGALIA COUNTY,
WEST VIRGINIA

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PETITION FOR APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I.

ASSIGNMENTS OF ERROR

1) The Circuit Court erred when failing to hold that Pennsylvania's workers' compensation scheme was the exclusive remedy in this case.

2) The Circuit Court erred when failing to recognize and enforce the statutory employer immunity provided to SEI under the Pennsylvania Workers' Compensation Act.

3) The Circuit Court erred when failing to recognize it lacked subject matter jurisdiction in this case.

4) The Circuit Court erred when it found that a plaintiff may seek and obtain benefits pursuant to Pennsylvania's Workers' Compensation Act but then file suit in West Virginia to obtain additional benefits that would otherwise be denied in Pennsylvania.

5) The Circuit Court erred when it failed to apply Pennsylvania law to this case.

6) The Circuit Court erred when it failed to apply the doctrine of election of remedies.

II.

STATEMENT OF THE CASE

A. Introduction to the Issue

The Plaintiff, Tucker Bell, suffered a workplace injury. Bell is a Pennsylvania resident working for a Pennsylvania employer, but was performing work in West Virginia at the time of the accident. Bell proceeded to file a workers' compensation claim pursuant to the laws of the Commonwealth of Pennsylvania. Under that statutory scheme, there is no claim against the employer for deliberate intent or similar theory. The employer is completely immune from suit. Further, under the Pennsylvania system, the general contractor, in this case SEI, is also immune from liability.

However, after electing to receive benefits under the Pennsylvania workers' compensation scheme, Bell filed suit in West Virginia, seeking to hold his employer liable for deliberate intent under the West Virginia Workers' Compensation Act and filing a negligence claim against the general contractor, SEI.

B. Detailed Factual History

Plaintiff Tucker Bell is a Pennsylvania resident who was employed by a Pennsylvania company, Nicholson Construction Company, to work on a construction site at the Longview Power Plant in Monongalia County, West Virginia. On May 19, 2015, Plaintiff Tucker Bell, in the course and scope of his employment for Nicholson Construction operated a drill rig manufactured by Casagrande USA, Inc., Casagrande Sp.A., and/or International Drilling Equipment, Inc. (cumulatively referred to as "Casagrande"), to drill the foundation pilings. *App. 13, First Am. Compl. at ¶¶ 25, 30.* The Casagrande rig employed a 3" water swivel ("Swivel") manufactured by Defendant Best Flow Line Equipment, L.P. ("Best Flow"). *App. 13., First Am. Compl. at ¶ 29.* While the Plaintiff Tucker Bell was operating the drill rig, Plaintiffs allege that the Swivel unthreaded and detached from the rig, allowing the hose and Swivel to whip in the air and strike the back of Plaintiffs' head causing injury. *App. 13., First Am. Compl. at ¶ 26.*

SEI was the general contractor retained by Longview Power. *App. 13., First Am. Compl. at ¶ 17.* SEI retained Nicholson Construction Company as SEI's subcontractor to perform a portion of SEI's work on the Longview Power project. *App. 13., First Am. Compl. at ¶ 18.* Plaintiff was injured as an employee of Nicholson while he was performing that portion of SEI's work. *App. 2., Complaint, ¶¶19-26.* Plaintiff has been receiving Pennsylvania workers' compensation benefits from Nicholson for these injuries.

Given the above, pursuant to West Virginia Rules of Civil Procedure 12(b)(1) and 12(b)(6), Southern Environmental, Inc., ("SEI") moved the Circuit Court to dismiss the Plaintiffs' claims against it as contained in the First Amended Complaint. Pursuant to

controlling Pennsylvania law, SEI is the statutory employer of Plaintiff Tucker-Stephen G. Bell, (hereafter "Plaintiff") and thus entitled to full immunity from tort liability for the claims asserted by the Plaintiffs, which deprives the Circuit Court of subject matter jurisdiction and also results in the Plaintiffs' Complaint failing to state a claim upon which relief can be granted against SEI. SEI also set forth the election of remedies doctrine and resulting application of *res judicata* given that Plaintiff opted for benefits under the Pennsylvania Workers' Compensation Statute. The Circuit Court denied SEI's Motion, but recognizing the legal import of the issues, allowed for the matter to be appealed immediately.

III.

SUMMARY OF THE ARGUMENT

Tucker Bell had two options in submitting a claim for this workplace accident. He could file a workers' compensation claim with Pennsylvania or he could file a claim with West Virginia. Both states' codes declare their workers' compensation system to be the exclusive remedy. However, despite the exclusivity language, Tucker Bell is pursuing claims with both. He filed for workers' compensation benefits in Pennsylvania. Then he filed deliberate intent and negligence claims in West Virginia against his statutory employers in violation of Pennsylvania law. Tucker Bell cannot pick and choose which portions of the statutes he wishes to apply by hopping back and forth across state lines. He made his choice with Pennsylvania and accordingly, should not be permitted to proceed in West Virginia.

IV.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner requests Oral Argument in accord with Rule 20.

V.

ARGUMENT

A. Standard of Review

When considering a Motion to Dismiss, the Court is to construe the Amended Complaint in the light most favorable to the Plaintiff and to consider all allegations contained therein as true. However, "this liberal standard does not relieve a plaintiff. . . of the obligation of presenting a valid claim, that is a claim upon which relief can be granted." *Wilhelm v. W. Va. Lottery,* 198 W. Va. 92, 96-97, 479 S.E.2d 602, 606-607 (1996). Additionally, a Rule 12(b)(6) Motion to Dismiss "enables a circuit court to weed out unfounded suits." *State ex rel. McGraw v. Scott Runyan Pontiac Buick, Inc.,* 194 W. Va. 770, 776, 461 S.Ed.2d 516, 522 (1995); *accord Harrison v. Davis,* 197 W. Va. 651, 657-58 n. 17, 478 S.E.2d 104, 110-11 n. 17 (1996). While a Plaintiff is minimally required to make a "short and plain" statement of the claim, a Plaintiff may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint." *Franklin D. Cleckley et al.*, Litigation Handbook on West Virginia Rules of Civil Procedure 199 (4th ed. 2012). Although the Plaintiff enjoys the benefits of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted. See *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59, 65 (1984).

Since the issues presented in this appeal are pure questions of law, this Court's review of the Circuit Court's decision is *de novo*. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." *Syl. pt. 1*, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). *Syl. pt. 1*, Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W.Va. 573, 466 S.E.2d 424 (1995) ("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review.").

B. Exclusivity of Remedies

On August 31, 2018, the Circuit Court issued an Order dismissing the deliberate intent claim filed by Plaintiffs against Defendant Nicholson Construction Company. The Court dismissed the claim finding that it was not filed within the applicable statute of limitations. However, the Court also made a finding that Plaintiff Tucker-Stephen Bell was required to be covered by West Virginia's Workers' Compensation Act. *App. 33.*

In reaching its decision that Plaintiff was covered by West Virginia's Workers' Compensation Statute, the Circuit Court reviewed WV CSR 85-8-7 and its application to extra-territorial employees who work within the State of West Virginia for a period exceeding 30 days during a 365 day period. Finding that Plaintiff worked in excess of 30 days in West Virginia, this Court reasoned that Plaintiff should be covered by West Virginia's Workers' Compensation Statute.

The problem with the Circuit Court's rationale and resulting decision is that it did not take into account the application of Pennsylvania law. Nor did it consider the preclusive effects of the Plaintiff's decision to seek and accept benefits under the

Pennsylvania workers' compensation scheme. Once those factors are considered, as shown below, there is no "requirement" that Plaintiff be covered by West Virginia's workers' compensation statute. Instead, Plaintiff is eligible for coverage under both Pennsylvania and West Virginia.

Like West Virginia, Pennsylvania has taken legislative action to address the issue of employees working out of state and their eligibility to receive benefits through its workers' compensation fund. Employees injured in the course and scope of employment can still obtain benefits through the Pennsylvania Workers' Compensation Fund even if the injury was sustained in another state so long as the employee can show at the time of injury that:

> 1) the employee's employment was principally located in Pennsylvania, or
>
> 2) the employee was working under a contract of hire made in Pennsylvania in employment not principally localized in any state, or
>
> 3) the employee was working under a contract of hire made in Pennsylvania in employment principally localized in another state whose workmen's compensation law is not applicable to his employer, or
>
> 4) the employee was working under a contract of hire made in Pennsylvania for employment outside the US and Canada.

77 P.S. § 411.2(a). Pennsylvania's statute defines "principally localized" to mean (i) the place of business where the employee regularly works, or (ii) having worked at or from such place of business, the employee's duties have required him to go outside of the State not over one year, or (iii) if clauses 1 and 2 foregoing are not applicable, he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state. *77 P.S. § 411.2(d)(4).* Based upon the information currently available,

it appears Plaintiff met the requirements of clauses 1 and 2 as it is undisputed that the Plaintiff filed a workers' compensation claim with Pennsylvania and not West Virginia.

Given the above, it appears that Plaintiff was eligible for workers' compensation benefits from both Pennsylvania and West Virginia. The ability to be eligible in two states derives primarily from the arbitrary time limits set by each state's legislature. In West Virginia, anyone working 30 or more days within a 365 day period is required to be covered by West Virginia Workers' Compensation. *WV CSR 85-8-7.* Pennsylvania provides coverage to employees so long as they do not work out of state for more than 1 year. *77 P.S. § 411.2(d)(4).* Here, Plaintiff worked in West Virginia for 30 days but was outside the State of Pennsylvania for less than one year.

Plaintiff had his choice therefore as to which workers' compensation system he wanted this claim to be covered. He chose Pennsylvania. That state's law is now the exclusive remedy through which he can recover. "Where an employee's injury is compensable under the Act, the compensation provided by the statute is the employee's exclusive remedy against his or her employer." *77 P.S. § 481(a); cf W.Va. Code 23-2-6.* "Under W.Va. Code 23-2-1c(c) (1993), the workers' compensation scheme of another state is the exclusive remedy against the employer for a non-resident employee who is temporarily employed in this State, if such employee is injured in the State and is covered by the workers' compensation act of the other state. *Syl. pt. 3,* Pasquale v. Ohio Power Company, 187 W. Va. 292, 418 S.E.2d 738 (1992), Mize v. Commonwealth Mining, LLC, No. 16-0413, 2017 WL 1348516 (W. Va. April 7, 2017). Therefore, a non-resident employee's rights against his employer would be exclusively under the laws of the foreign state, and no remedy would be available against the employer in West Virginia

under our deliberate intent statutes, W.Va. Code 23-4-2(c) (1994)." *Syl. pt. 2*, Gallapoo v. Wal-Mart, 197 W. Va. 172, 475 S.Ed.2d 172 (1996); *see also Syl. pt. 3*, Easterling v. Am. Optical Corp., 207 W.Va. 123, 529 S.E.2d 588 (2000). Accordingly, at this point the issue becomes one governed by the election of remedies doctrine and *res judicata*.

The common law doctrine of election of remedies applies where two possible remedies are available for the same legal injury. Harrison v. Miller, 124 W.Va. 550, 21 S.E.2d 674, 678 (1942). The basic purpose of the doctrine is to prevent a plaintiff from obtaining a windfall recovery, either by recovering two forms of relief that are premised on legal or factual theories that contradict one another or by recovering overlapping remedies for the same legal injury. Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr., 594 F.3d 285, 293 (4th Cir.2010); *see* Dionne v. Mayor and City Council of Baltimore, 40 F.3d 677, 681 (4th Cir.1994); *see also* 25 Am.Jur.2d Election of Remedies § 3.

"When an identical set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both." Save Charleston Foundation v. Murray, 333 S.E.2d 60, 64 (S.C.Ct.App.1985). Election of remedies "involves the choice between two or more different and coexisting modes of procedures or forms of relief afforded by law for the same injury ... [it is] the act of choosing between the different remedies allowed by law on the same set of facts." Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374, 379 (S.C.Ct.App.1986) (*quoting* Boardman v. Lovett Enterprises, Inc., 283 S.C. 425, 428, 323 S.E.2d 784, 785 (S.C.App.1984), *rev'd on other grounds*, 287 S.C. 303, 338 S.E.2d 323 (S.C.1985).

Once a Plaintiff has elected his remedy, the doctrine of *res judicata* takes effect. "'[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' " Hubbard v. State Farm Indem. Co., 213 W.Va. 542, 552 n. 21, 584 S.E.2d 176, 186 n. 21 (2003) (*quoting* New Hampshire v. Maine, 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968, 977 (2001)). *See also Syl. pt. 2,* Dillon v. Board of Educ. of Mingo County, 171 W.Va. 631, 301 S.E.2d 588 (1983) ("Parties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts.") WV DOH v. Robertson, 217 W.Va. 497, 504, 618 S.E.2d 506, 513 (2005).

Here, Plaintiff filed his workers' compensation claim pursuant to Pennsylvania law to enjoy the benefits provided to him under Pennsylvania law. Now, as a means to obtain benefits specifically prohibited by Pennsylvania law, Plaintiff seeks to make a claim against Defendant Southern Environmental. The Plaintiff had the choice of two different remedies – Pennsylvania workers' compensation or West Virginia workers' compensation. As stated above, now that the choice has been made, Pennsylvania's workers' compensation statute is the exclusive remedy by which Plaintiff can recover for his workplace injuries. Since Pennsylvania law controls, Defendant SEI is the statutory employer and is immune from liability. Accordingly, this Court should reverse the decision of the Circuit Court and dismiss Defendant Southern Environmental from this action.

C. Pennsylvania Law Applies and it Bestows Immunity to SEI

Given that Pennsylvania law applies it is necessary to examine whether or not it permits Plaintiff to maintain a cause of action against SEI. Upon close examination, it is clear that no cause of action is permitted because immunity has been conferred upon SEI.

The principal of immunity for general contractors has been roundly recognized by authoritative treatises in the field, which instruct that "the statutory-employer provisions confer immunity from suit upon the statutory employer by placing the statutory-employer in the same position as the contractual or common-law employer of the injured worker for tort-liability purposes; the statutory-employer is entitled to the same immunity from suit that would be enjoyed by the contractual or common-law employer." *39 Standard Pennsylvania Practice 2d § 167:368.* The preeminent authoritative commentator in the field of workers' compensation law[1] teaches that "if a damage suit is brought in the forum state by the employee against the employer. . . the forum state will enforce the bar created by the exclusive-remedy statute of a state that is liable for workers' compensation[.]" *Arthur Larson & Lex K. Larson, Vol. 9,* Larson's Workers' Compensation Law § 88.11 (1999).

The pertinent Pennsylvania statutory sections from which the statutory-employer immunity is derived are as follows:

Section 302(a) of the Act provides as follows:

> § 461. Coverage of employees of subcontractor; subcontractor defined; exception.

[1] Larson is cited by the West Virginia Supreme Court of Appeals in multiple published decisions. *See e.g.* Bowens v. Allied Warehousing Services, Inc., 229 W. Va. 523, 535, 729 S.E.2d 845, 857 (2012); Bias v. Associated Coal Corp., 220 W. Va. 190, 198 & 202, 640 S.E.2d 540, 549 and 552 (2006) (Albright, J., con. And dis.; Starcher, J., dis.); State ex rel. Beirne v. Smith, 214 W. Va. 771, 780, 591 S.E.2d 329, 338 (2003) (Marynard, J., con.).

A contractor who subcontracts all or any part of a contract and his insurer shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured its payment as provided for in this act. Any contractor or his insurer who shall become liable hereunder for such compensation may recover the amount thereof paid and any necessary expenses form the subcontractor primarily liable therefor.

For purposes of this subsection, a person who contracts with another (1) to have work performed consisting of (i) **the removal, excavation or drilling of soil, rock** or minerals or (ii) the cutting or removal of timber from lands, or (2) **to have work performed of a kind which is a regular or recurrent part of the business, occupation, profession or trade of such person** shall be deemed a contractor, and such other person a subcontractor. This subsection shall not apply, however, to an owner or lessee of land principally used for agriculture who is not a covered employer under this act who contracts for the removal of timber form such land.

77 P.S. § 461 (emphasis added).

Section 302(b) of the Act provides as follows:

§ 462. Coverage of laborer or assistant hired by employee or contractor; contractor defined.

Any employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of such employer's regular business entrusted to that employee or contractor, shall be liable for the payment of compensation to such laborer or assistant unless such hiring employee or contractor, if primarily liable for the payment of such compensation, has secured the payment thereof as provided for in this act. Any employer of his insurer who shall become liable hereunder for such compensation may recover the amount thereof paid and any necessary expenses from another person if the latter is primarily liable therefore.

77 P.S. § 462.

Section 203 of the Act sets forth the rights enjoyed by a statutory employer as follows:

§ 52. Employers' liability to employee of employee or contractor permitted to enter upon premises.

> An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as his own employee.

77 P.S. § 52.

In Doman v. Atlas America, Inc., 2016 PA. Supr. 233, 150 A.3d 103 (2016), the Pennsylvania Superior Court affirmed summary judgment in favor of the defendant who asserted the statutory employer defense. In Doman, Atlas entered into an oil and gas lease with Springer Drilling and Producing on property in Greene County, Pennsylvania. Atlas subcontracted the drilling to Yost. Plaintiff's decedent, Doman, was an employee of Yost, when he was killed by working on the drilling rig platform. Yost paid workers' compensation benefits to Doman's minor child under the Pennsylvania workers' compensation system. The Estate of Doman filed suit against Atlas in Pennsylvania for wrongful death.

The Doman Court discussed section 302(a), section 302(b), and section 203 of the Act, as set forth above. Pursuant to those statutory section, the Doman Court found that a "contractor may be deemed a statutory employer if the requirements of either Section 202(a) or Section 302(b) have been satisfied. *See* Emery v. Leavesly McCollum, 725 A.2d 807, 813 (Pa. Super. 1999); *see also* Gann v. Workmen's Comp. Appeal Bd., 792 A.2d 701, 704 (Pa. Cmwlth. 2002) (stating that "Sections 302(a) and 302(b) of the Act [ ] confer 'statutory employer' status on certain entities for workers' compensation purposes"). Doman, 150 A.3d at 106. These code sections work together as follows: "The language of Section 203, which places the statutory employer in the same position as the direct employer, coupled with Section 303's mandate that 'the liability of an

employer under this act shall be exclusive and in place of any and all other liability to such employee's' provides immunity from tort liability for statutory employers." *Id.* at 107. Nevertheless, the court recognized that "case law reveals a 'degree of ambiguity" in the statutory employer language and case law. *Id.*

For example, "Section 302(a) does not require the primary contractor to occupy all controlling work sites in order to be deemed the statutory employer of the subcontractor's employee. *See 77 P.S. 461.*" *Id.* "The Supreme Court declined to limit *Delich's* holding. . .and reiterated that 'section 302(a), by its terms, is not limited to injuries occurring on premises occupied or controlled by the putative statutory employer.' Six L's Packing, 44 A.3d at 1157." *Id.* at 108.

The Doman Court noted the prior case of McDonald v. Levinson Steel Company, 302 Pa. 287, 153 A. 424 (1930), and the somewhat confusing case law since McDonald discussing both section 302(a) and section 302(b). The Doman Court concluded that "we do not believe that direct comparisons between McDonald and Sections 302(a) serve a useful purpose. Rather, Section 302(a) is best interpreted. . .according to its own terms.'" *Id.* at 109, *quoting* Six L's Packing, 44 A.3d at 1159, n. 12.[2] In holding that the general contractor was entitled to the statutory employer immunity, the Doman Court concluded that:

> [h]ere, based upon the plain language of the statute, we conclude that the trial court correctly applied to section 302(a) to determine that Atlas is Doman's statutory employer. . . Atlas, as the primary contractor that subcontracted the drilling process at the Springer Well, is Doman's statutory employer as a matter of law. [citation omitted]. Consequently,

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[2] Although the McDonald decision has been the subject of much discussion in the case law, a recitation of which would not be helpful here, the most recent decision by the Pennsylvania Supreme Court to cite McDonald concisely explains how McDonald supports SEI's position here. *See* Patton v. Worthington Associates, Inc., 625 Pa. 1, 4-5, 89 A.3d 643, 645 (2014), discussed *infra.*

> Atlas is entitled to tort immunity, pursuant to section 203, regardless of the fact that Yost already had paid Doman's workers' compensation benefits.

Id. at 109.

The United States Court of Appeals for the Third Circuit agrees with this approach. In a case involving a trucking accident, the Third Circuit found that the general contractor who retained a subcontractor which employed the injured plaintiff was entitled to immunity as a statutory employer. "Here, QC qualifies as a statutory employer. Transporting bulk liquids was a regular and recurrent part of QC's business as a bulk tank truck network operator, and QC 'contractual[ly] delegated[d]. . aspects of its transportation business to TTL. Six L's Packing, 44 A.3d at 1158. Accordingly, QC as the contractor, was a statutory employer pursuant to section 302(a) who assumes secondary liability to pay workers' compensation benefits to employees of its subcontractor, TTL, should TTL default on its obligation. . . As Garlick's statutory employer, QC is immune from suit." Garlick v. Trans Tech Logistics, Inc., 636 F. App'x 108, 112 (3d Cir. 2015) (applying Pennsylvania law).

Likewise, the Pennsylvania Supreme Court reversed the trial court's and intermediate appellate court's denial of the general contractor's assertion that it was a statutory employer, in a negligence action brought by the subcontractor's employee, and reversed a jury award of $1.5 million for the injured Plaintiff in Patton v. Worthington Associates, Inc., 625 Pa. 1, 89 A.3d 643 (2014). In Patton, the Levittown Church, in Pennsylvania, hired Worthington Associates, Inc., as a general contractor to construct an addition to the church. Worthington hired Patton Construction, a Pennsylvania corporation, as a carpenter subcontractor, with the owner-operator being the sole shareholder and sole employee. Mr. Patton fell and injured his back on the work site.

Patton then sued Worthington for failure to provide a safe work place. The Pennsylvania Supreme Court applied Section 302(b) to provide statutory employer immunity to Worthington. Pursuant to Section 302(b), "general contractors have been denominated 'statutory employers' relative to workers' compensation liability[.]" *Id.* 625 Pa. at 4, 89 A.3d at 645. "Concomitant with the treatment of traditional employers, statutory employers under Section 302(b) enjoy a measure of immunity from liability in tort pertaining to work-related injuries. . .even where the statutory employer has not been required to make any actual benefit payments. [citation omitted]" *Id.*, 625 Pa. at 5, 89 A.3d at 645.

The Patton Court further held that its decision was established by "this court's longstanding jurisprudence maintaining that conventional subcontract scenarios serve as paradigm instances in which the statutory-employment concept applies. [citation omitted]" *Id.* A "century ago, this court established that, per the terms of section 302(b), a conventional relationship between a general contractor maintaining control of a job site and a subcontractor implicates the statutory employer concept relative to employees of the subcontractor working there." *Id.*, 625 Pa. at 9, 89 A.3d at 648. "Here, as a matter of law, Patton Construction, Inc., was a subcontractor and not an 'independent contractor' relevant to section 203 and 302(b) of the act[.]" *Id.*, 625 Pa. at 11, 89 A.3d at 649. Consequently, as a matter of law, Patton Construction was entitled to immunity as the statutory employer of the Plaintiff.

If applied to the facts of the case as pled by the Plaintiff, Tucker Bell, the Pennsylvania statutes and case law discussed above show that SEI Was the statutory employer of the Plaintiff because the Plaintiff was engaged in work for his employer,

Nicholson, who was a retained subcontractor performing a portion of the scope of work for SEI on the construction project site owned by Longview Power. The work being done was the removal, excavation or drilling of soil, rock or minerals, and was of a kind which is a regular or recurrent part of the business, occupation, profession or trade of SEI. In support, Plaintiff concedes in his Amended Complaint that at the time of this accident he was operating a drill rig to drill foundation pilings at the power plant. *App. 13, Amd. Compl. ¶¶ 17-18.* Further, the type of work being performed by Plaintiff is a regular, recurrent aspect in jobs performed by SEI.

The above determination is one that can be made by a matter of law, as shown in the cases discussed above. The Doman Court affirmed summary judgment in favor of the defendant on this issue and the Patton Court reversed the lower court for failing to do so. Therefore, SEI respectfully requests that this Honorable Court reverse the decision of the Circuit Court and dismiss SEI from this action.

C. Given The Immunity Conferred Upon SEI By Pennsylvania Law, There Is No Subject Matter Jurisdiction

Because Pennsylvania law provides immunity to SEI, the Circuit Court lacks subject matter jurisdiction to hear Plaintiff's claims against it.

> The general rule pertaining to the issue raised here is that 'if a damage suit is brought in the forum state by the employee against the employer. . . the forum state will enforce the bar created by the exclusive-remedy statute of a state that is liable for workers' compensation[.]' Arthur Larson & Lex K. Larson, Vol. 9, *Larson's Workers' Compensation Law* § 88.11 (1999). . . . The rationale for applying substantive workers' compensation law of the foreign state is 'that the dominant interest is in the state that is the residence of the parties rather than in the state that is the location of the negligent [or intentional] conduct and the injury.' [citation omitted]

Easterling, 529 S.E.2d at 598.

West Virginia also recognizes that a defense of immunity from suit arising out of the workers' compensation statutes involves subject matter jurisdiction. Easterling v. American Optical Corp., 207 W.Va. 123, 529 S.E.2d 588, 597-599 (2000). In Easterling, the Court held that subject matter jurisdiction did not exist where an Ohio resident brought a West Virginia deliberate intent claim against his Ohio employer for an injury occurring in West Virginia. The Court reasoned that because Ohio law applied, the Plaintiff could not turn to West Virginia law, namely the deliberate intent theory created under the West Virginia Workers' Compensation Act, and assert a claim under it. Here, Plaintiff has brought a West Virginia common law negligence claim against SEI. *App. 13, Amended Complaint, Count IX.* Because Pennsylvania law applies, the Plaintiff cannot turn to the West Virginia common law to assert a claim because doing so is prohibited by Pennsylvania's workers' compensation statute.

VI.

CONCLUSION

While he may have been eligible for benefits under both Pennsylvania and West Virginia's workers' compensation laws, once choosing to go forward under Pennsylvania, Plaintiff cannot proceed with any claims based upon West Virginia law. Because Pennsylvania provides immunity to SEI, Plaintiff cannot maintain the prohibited claim by filing it in West Virginia. Accordingly, this Court should overrule the Circuit Court and dismiss SEI from this action.

MINTZER, SAROWITZ, ZERIS, LEDVA & MEYERS, LLP

BY: _____

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