No. 18-1124

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

Southern Environmental, Inc.,

Defendant Below, Petitioner,

v.

Tucker-Stephen G. Bell, Heather M. Bell, individually and as Guardians and Next Friends of Colton T. Bell and Tucker M. Bell, minor children; and Tucker-Stephen G. Bell and Randi Peters as Guardians and Next Friends of Chase G. Bell, a minor child,

Plaintiffs Below, Respondents,

Best Flow Line Equipment, L.P., Longview Power, LLLC, Casagrande S.P.A., and Nicholson Construction Company

Defendants Below, Respondents

From the Circuit Court of Monongalia County, West Virginia
Civil Action No. 17-C-193

RESPONDENT BEST FLOW LINE EQUIPMENT, L.P.'S SUMMARY RESPONSE BRIEF

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I. STATEMENT OF THE CASE

Respondent Best Flow incorporates herein by reference its Statement of the Case contained in Best Flow's Response Brief filed in Docket No. 18-1140, which was consolidated with this appeal by Order dated April 25, 2019. While Best Flow sets forth the facts and procedural history of this matter in detail as part of its contemporaneously filed Response Brief to Petitioner Nicholson Construction Company's ("Nicholson") Appeal Brief, Southern Environment Inc.'s ("SEI") brief, however, is filed with such factual errors and blatant omissions that Best Flow is compelled to set forth the most egregious errors to correct the factual record before this Court.

Defendant Longview Power ("Longview") entered into a contractual agreement with SEI to act as the general contractor and oversee various construction projects with respect to Longview's power plant located just outside of Morgantown, West Virginia. As part of its contractual agreement with Longview, SEI was required "[b]efore commencing Work,...[to] provide and shall require its subcontractors to provide . . . insurance in amounts not less than indicated" within the contract. (JA_1008 at ¶ 10B). This insurance coverage was to remain in "full force and effect" through the course of the performance of the contractual work and was required to include "*[w]orker's Compensation Insurance in* ***accordance with the statutory requirements of the location in which the Work [was] performed.***" (JA_1008) (Emphasis added). SEI fails to even advise the Court as part of its appeal that it, along with any subcontractor it chose to use, was required to cover every employee, including Plaintiff Tucker Bell ("Tucker Bell"), with West Virginia Workers' Compensation insurance. Any perceived right to claim that Pennsylvania Workers' Compensation laws are applicable or that it is entitled

to any immunity afforded by Pennsylvanian law is simply disingenuous and fails to address that SEI contractually agreed otherwise.

The same is true even considering that Tucker Bell was an employee of a subcontractor, Nicholson. Nicholson's Subcontract with SEI provides that Nicholson was required to provide full compliance with Longview's insurance requirements. (JA_1083–84, at Art. 6, 7.) Specifically, Nicholson agreed to the following term: "Prior to the start of [Nicholson's] Work, [Nicholson] shall procure and maintain in force for the duration of the work, Workers Compensation Insurance, Employers Liability Insurance, Comprehensive General Liability Insurance, Employers Liability Insurance, Comprehensive General Liability Insurance ***and all insurance required of Contractor under the contract Documents***." (JA_1083, at Art. 6) (Emphasis added). The Nicholson Subcontract identifies the "SEI Contract Documents" and the included exhibits as "applicable contract documents." (JA_1084, at Art. 9).

Further, SEI persists in propagating the myth that Tucker Bell affirmatively chose Pennsylvania's Workers' Compensation system as his exclusive remedy for the injury, and as such, it is entitled to immunity under Pennsylvania law. This supposed election, while incorrect, is wholly irrelevant to the claims asserted herein. Under West Virginia law, Tucker Bell is fully within his rights to collect Workers' Compensation benefits from Pennsylvania and pursue a deliberate intent claim against Nicholson, or other tort claim against SEI in West Virginia.[1] Much like Nicholson in its appeal, however, SEI's facts tell a misleading story with respect to this issue. Following Tucker Bell's injury, while he still remained in a coma, Nicholson, ignoring Tucker Bell's potential claim under West Virginia law, unilaterally chose to file a Workers'

[1] *See generally, Coburn v. C&K Indus. Servs.*, No. CIV. 5:07CV23, 2007 WL 2789468, at *1 (N.D.W. Va. Sept. 24, 2007); *See also, Russell v. Bush & Burchett*, 210 W. Va. 699, 559 S.E.2d 36 (2001)(finding that a Kentucky resident, who was injured while working on a Kentucky construction project, and had filed a Kentucky workers compensation claim, was entitled to bring a deliberate intent action against his employer in West Virginia).

Compensation claim for him in Pennsylvania. (JA_841-843) and (JA_44-843). Certainly, SEI cannot rely upon the fact that Nicholson chose the situs for the original Workers' Compensation claim filing as rational to protect it from tort liability in this State.

II. SUMMARY OF ARGUMENT

Best Flow submits that Petitioner SEI's "Appeal from an Order from the Circuit Court of Monongalia County, West Virginia" ("SEI's Appeal Brief" or "Brief") should be denied because the Circuit Court did not err when it denied SEI's Motion to Dismiss, which moved for the dismissal of Tucker Bell's tort claims against SEI. (JA_604–617).[2] SEI's Appeal Brief is based largely on its contention that the exclusive remedy in this matter is that as prescribed by the Pennsylvania Workers' Compensation Act. This argument fails as a matter of law, and this matter should be remanded to the lower court for further proceedings wherein SEI remains a named defendant subject to the Crossclaims raised by Best Flow, and the other Defendants below.

III. STATEMENT REGARDING ORAL ARGUMENT

Best Flow does not believe that oral argument is necessary in this case. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. *See* W. Va. Revised R. App. P. 18(a). Best Flow further submits that this case would be appropriate for affirmance by memorandum decision. *See* W. Va. Revised R. App. P. 21(a), (c).

[2] As noted below, SEI filed multiple Motions to Dismiss including a Motion to Dismiss Best Flow's Crossclaims for contribution and implied indemnity. The Circuit Court's Order that is appealed from does not indicate from which Motion to Dismiss the Court issued its ruling. While the factual allegations and legal conclusions drawn by the Court are not particularly helpful in determining which Motion the Court was addressing it can be inferred that the Court was likely addressing SEI's Motion to Dismiss the Plaintiffs' Amended Complaint.

IV. ARGUMENT

SEI notes several assignments of error centered on the Circuit Court's denial of its Motion to Dismiss that overlap several correlated legal issues. To the extent it is not otherwise clear in the arguments below, Best Flow disputes each of the six (6) enumerated assignments of error put forth by SEI within its Appeal Brief. SEI asserts that the Circuit Court erred in its denial of SEI's Motion to Dismiss on several grounds; however, each assignment of error centers on SEI's argument that the Pennsylvania Worker' Compensation Act provides the exclusive remedy upon which Tucker Bell could bring his claim against SEI. Due to the derivative nature of some of Best Flow's Crossclaims in contribution and indemnification as to SEI, SEI's appeal also indirectly requests this Court reverse the decision of the Circuit Court in a manner that would adversely affect Best Flow.

As such, pursuant to Rule 5(c) of the W. Va. R. App. P., Best Flow acknowledges that it is a party to all of the currently docketed appeals. For judicial efficiency, Best Flow submits only this Summary Response Brief in direct response to the appeal brought by SEI as Best Flow has already set forth its position regarding the applicability of Pennsylvania's Workers' Compensation scheme and the alleged immunity under it as part of its detailed response to Nicholson Construction Company's appeal. The arguments raised by Best Flow in its Response Brief to Nicholson Construction Company's Appeal Brief are incorporated herein to the extent they are equally applicable to the issues raised by SEI, and Best Flow incorporates its arguments and its positions put forth herein in response to the consolidated appeals of Tucker Bell (Docket No. 18-1139) and Nicholson (Docket No. 18-1140). [3] Best Flow further requests that it be

[3] As West Virginia law does not extend the Workers' Compensation immunity and deliberate intent exception to a general contractor, Best Flow's claims against SEI are contribution and implied indemnity as those are generally understood between joint tortfeasors.

permitted to join the arguments put forth by Tucker Bell and Respondent Longview to the extent that their positions are aligned with the arguments put forth by Best Flow herein.

A. Standard of Review

Initially, it should be noted that the Order from which SEI appeals from to this Court does not identify which of the several Motions to Dismiss filed by SEI is applicable. The Circuit Court's Order simply notes the denial of **a** Motion to Dismiss without further clarification. (JA_915-920). Moreover, the minimal factual findings and legal conclusions made by the Court do not allow any party to ascertain which Motion the Court was addressing. *Id.* at 916-18. Rather, the basic facts and conclusions are equally applicable across all the motions. SEI for its part, rather than seeking clarification from the Court below, chooses instead to simply treat the denial of a single motion as a denial of each of its motions leaving it to this Court to determine what the Circuit Court intended and the rationale behind its rulings.

The Circuit Court's lack of clarity and SEI's refusal to seek additional information from the Circuit Court is compounded by the fact that traditionally the denial of a motion to dismiss is an interlocutory order and not immediately appealable. Syl. pt. 2, *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 460 S.E.2d 54 (1995). Although the Circuit Court certified its decision as final and appealable pursuant to West Virginia Rule of Civil Procedure 54(b), such inclusion does not automatically grant this Court jurisdiction to hear an appeal. *See generally, Erie Ins. Co. v. Dolly*, 240 W. Va. 345, 354, 811 S.E.2d 875, 884 (2018) (Holding that this Court lacked jurisdiction to resolve an appeal of an order denying a motion to dismiss since it did not possess the requisite degree of finality regardless of a Rule 54(b) certification.). *See also*, Syl. Pt. 2, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995) ("Parties to a lawsuit cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking.").

Moreover, as recognized by this Court, "[a] circuit court speaks through its written orders, which, as a rule, must contain the requisite findings of fact and conclusions of law to permit meaningful appellate review." *Certegy Check Servs. v. Fuller*, No. 17-0972, 2019 W. Va. LEXIS 213, *10 (May 17, 2019) (internal citations omitted) (analyzing a Circuit Court's Order denying a Motion to Compel Arbitration). Thus, this Court has held "a circuit court's order dismissing a case must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed." *Id.* (internal citations omitted). "Without factual or legal findings, this Court is greatly at sea without a chart or compass in making a determination as to whether the circuit court's decision was right or wrong." *Id.*

Therefore, the Circuit Court "must apply the law to the facts to reach conclusions of law that explain the court's decision. It is not enough to provide an accurate summary of the law. The court must identify the particular doctrines of the law that guide its thinking; then it must connect these doctrines to the particular facts that warrant its decision." *Id.* In the case at bar, the Circuit Court failed to provide adequate findings of fact or conclusions of law within its Order from which SEI brings this appeal. In fact, most if not all of the assignments of error raised by SEI are not addressed by the Circuit Court's Order leaving the parties to infer what the Court's rationale was in reaching its conclusions. While the ultimate conclusion reached by the Court is correct in that SEI's Motion to Dismiss fails even the most basic test, the Order appealed from provides little guidance to this Court. Traditionally, this Court has declined to "guess at a circuit court's reasoning or even its decision[]" as such this matter is not ripe for review and must be remanded for the circuit court to make these findings of fact and legal conclusions. *Id.* at *13. (JA_909-914, 1132-1136).

If the Court believes that it is proper to proceed, the standard of review for the denial of a motion to dismiss is *de novo*. *See Evans v. Bayles,* 237 W.Va. 269, 272, 787 S.E.2d 540, 543 (2016) ("[w]hen an appeal from an order denying a motion to dismiss is properly before this Court, our review is de novo.").

B. The Circuit Court has Subject Matter Jurisdiction over All Claims and Crossclaims against SEI because they arise under West Virginia Law in Response to a West Virginia Accident, and Seek West Virginia Remedies.

SEI presents several assignments of error in response to the Circuit Court's denial of its Motion to Dismiss all based on the erroneous assertion that Pennsylvania's Worker's Compensation Act is the exclusive remedy available to Tucker Bell in this matter. SEI further asserts that the Circuit Court erred when failing to recognize and enforce Pennsylvania law, which SEI argues would provide it with statutory immunity. SEI's position ultimately fails as a matter of law, however, as there are sufficient facts to establish subject matter jurisdiction over SEI, and Pennsylvania's Workers' Compensation scheme is not the exclusive remedy available to Tucker Bell.

Subject matter jurisdiction requires a showing that:

> (1) the court has the general power to grant the type of relief demanded under any circumstances; (2) the pleadings demonstrate that a set of facts may exist which could arguably invoke the court's jurisdiction; and (3) the allegation both with regard to the facts and applicable law are of sufficient substance to require the court to make, in an adversary proceeding, a reasoned determination of its own jurisdiction.

Saverse v. Allstate Ins. Co., 223 W.Va. 119, 131, 672 S.E.2d 255, 267 (2008).

Throughout its Brief, SEI focuses on the fact that Tucker Bell was a Pennsylvania resident while he was working for Nicholson (a Pennsylvania company) in West Virginia. SEI also repeatedly highlights the fact that Tucker Bell received Pennsylvania Workers'

Compensation benefits as a result of the accident.[4] SEI, however, conveniently ignores several key facts in bringing these arguments before the Court. Specifically, Plaintiffs, and by incorporation Best Flow, have alleged the following facts concerning Tucker Bell's employment, which the Court must assume as true for purposes of this appeal:

> Defendant Nicholson was a subcontractor hired by Defendant SEI to design and install the foundation pilings for the Fabric Filter Building at Longview Power Plant.
>
> Plaintiff Tucker-Stephen G. Bell was an employee of Defendant Nicholson performing work in West Virginia on a non-temporary basis.
>
> In the preceding 365 day period, Plaintiff Tucker-Stephen G. Bell had performed work within the scope of his employment for Defendant Nicholson in the State of West Virginia for a period exceeding thirty (30) calendar days.
>
> Defendant Nicholson believed or reasonably should have believed that Plaintiff Tucker-Stephen G. Bell would be employed by Nicholson in the State of West Virginia for a period exceeding thirty (30) calendar days in a 365 day period.
>
> Plaintiff Tucker-Stephen G. Bell was required to be covered by West Virginia workers' compensation coverage under applicable West Virginia law, and is entitled to all benefits and privileges under the West Virginia Workers' Compensation Act.

(JA_278-80, 511-521).

Thus, when all applicable pled facts are examined, Tucker Bell has set forth a claim that alleges that he, a non-temporary employee, was injured in West Virginia while employed by an employer required to provide West Virginia Workers' Compensation coverage. Therefore, the Circuit Court's finding of subject matter jurisdiction must be upheld.

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[4] As noted above, Tucker Bell's receipt of these benefits was not by his election alone and is not dispositive of his ability to seek redress under West Virginai law.

i. The Court has Subject Matter Jurisdiction because Tucker Bell was a Non-Temporary Employee Pursuant to the West Virginia Workers' Compensation Act.

The accident at issue that resulted in the injuries to Tucker Bell occurred in West Virginia where Tucker Bell was working on a non-temporary basis and thus, he was covered under the West Virginia Workers' Compensation Act. (JA_136, at ¶¶ 19-22).

Since the inception of the West Virginia Workers' Compensation Act, whether an employee was "temporary" or "nontemporary" has been an important consideration that has been afforded more weight than is customary in West Virginia's sister states. *Fausnet v. State Workers' Comp. Com'r, Workers Comp. Appeal Bd.*, 174 W.Va. 489, 493, 327 S.E.2d 470, 473 (1985). Under West Virginia law, the Workers' Compensation scheme of another state is the exclusive remedy against the employer only where a nonresident employee is ***temporarily employed*** in West Virginia. *See*, Syl. Pt. 3, *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (W.Va. 1992) (Emphasis added).[5] Once an employee, however, is no longer considered temporary under West Virginia's statutory scheme they are entitled to all benefits of West Virginia's Workers' Compensation system including the ability to bring a deliberate intent claim, if appropriate. *See Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 144, 475 S.E. 2d 138, 144 (1996).

Promulgated in 2008, W.Va. Code R. § 85-8-1, *et. seq., inter alia*, expands the employees entitled to coverage under the West Virginia Act to include nonresident employees working in West Virginia on a non-temporary basis. Specifically, W. Va. Code R. 85-8-7.2 provides, in relevant part:

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[5] ("W.Va. Code § 23-2-1(c) (1975), makes the compensation law of another state the exclusive remedy against the employer for a nonresident employee who is ***temporarily employed in this state***, if such employee is injured in this state and is covered by his or her employer's workers' compensation in the other state"); *see also* Syl. Pt. 2, *Gallapoo v. Wal-Mart Stores*, 197 W.Va. 172, 475 S.E.2d 172 (1996) (Emphasis added).

> Extraterritorial employees who perform work in the State of West Virginia on a ***non-temporary basis*** (i.e., ***for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period***) and are not otherwise exempt from the West Virginia's workers' compensation laws ***must be covered with West Virginia workers' compensation coverage*** [].[6]

(Emphasis added).

W. Va. Code R. 85-8-7.2 clarifies that nonresident employees working in West Virginia on a non-temporary basis (a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period), as Plaintiffs have alleged Tucker Bell to be, must be covered with West Virginia Workers' Compensation coverage, and, as such, are "subject to every provision of the workers' compensation chapter" and are "entitled to all benefits and privileges under the Act, including the right to file a direct deliberate intention cause of action[.]" *Bell*, at 197 W.Va. 138, 144 (1996). (JA_19-22).

As noted above, for purposes of a Motion to Dismiss, Plaintiffs' allegations in their Complaint and Amended Complaint demonstrate conclusively that Tucker Bell was not temporarily employed in the State of West Virginia. (JA_18-22, 276-280, 776-79). Moreover, Tucker Bell's employer, Nicholson, acquiesces that Tucker Bell was a non-temporary employee defined under the West Virginia Workers' Compensation Act, admitting the same within its Answer to the Plaintiffs' First Amended Complaint. (JA_872).

Thus, in denying SEI's Motion to Dismiss, the Circuit Court did not err by failing to follow Pennsylvania law, nor did it err when it declined to enforce the statutory immunity provided to SEI under the foreign law. By considering the status of the non-temporary employee and recognizing that "[a]ll employees covered by the West Virginia Workers' Compensation Act

[6] By making it mandatory for any non-resident who is employed in West Virginia on a non-temporary basis to be covered with West Virginia Workers' Compensation coverage, West Virginia clearly intended to extend the benefits afforded by the West Virginia Workers' Compensation Act to such extraterritorial, non-temporary employees. W. Va. Code R. 85-8-7.2. (JA_836-837)

. . . are entitled to all benefits and privileges under the Act . . . ," the Circuit Court properly applied the eligibility requirements of the Act, and it properly evaluated the applicable laws in effect. *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 144 75 S.E.2d 138, 144 (1996). Accordingly, the Circuit Court's Order should be affirmed.

ii. The Circuit Court Did Not Err by Not Applying the Doctrine of Comity.[7]

SEI further asks this Court to find that, as a non-resident, no remedy would be available against Tucker Bell's employer in West Virginia under this State's deliberate intent statutes.[8] In support of this position, SEI cites to decisions such as, *Gallapoo v. Walmart*, 197 W. Va. 172, 475 S.Ed.2d 172 (1996) and *Easterling v. Am. Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000). Holdings such as *Gallapoo* and *Easterling*, however, involved circumstances significantly different from that of the parties herein. For example, *Gallapoo* makes determinations of the West Virginia Workers' Compensation Act's applicability to temporary employees, and not employees similarly situated to Tucker Bell. SEI argues that the Circuit Court's failure to apply the holdings in these dissimilar matters was in error, and it argues that the Circuit Court effectively failed to apply the doctrine of election of remedies in so doing.

In *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 418 S.E.2d 738 (1992), however, this Court reasoned that:

> Comity is a court-created doctrine through which the forum court may give the laws or similar rights accorded by another state effect in the litigation in the forum state. Comity is a flexible doctrine and rests on several principles. One is legal harmony and uniformity among the co-equal states. A second, grounded on essential fairness, is that the rights and expectations of a party who

[7] SEI refers to the concept of comity as "Election of Remedies" in its Appeal Brief, however, the arguments put forth by SEI are those in comity and should be analyzed under the same.

[8] It is interesting that SEI would bring up the issue of deliberate intent as the claims asserted against SEI by the very nature of West Virginia do not involve the application of the deliberate intent statute. Only Defendant Nicholson is subject to the provision of that act. SEI is subject to simple tort claims by Plaintiffs and to contribution and deliberate intent claims by its co-defendants as West Virginia does not recognize a general contractor's right to be protected from suit under the exclusive remedy provisions of the Workers' Compensation Act.

> has relied on foreign law should be honored by the forum state. Finally, and perhaps most important, the forum court must ask itself whether these rights are compatible with its own laws and public policy.

Id. at Syl. Pt. 1; *accord* Syl. Pt. 2, *Russell v. Bush & Burchett*, 210 W. Va. 699, 559 S.E.2d 36 (2001).

In *Russell*, the plaintiff, a Kentucky resident, working for a Kentucky company, on a project that spanned West Virginia and Kentucky, was injured in Kentucky while working on the Kentucky portion of the project. *Russell v. Bush & Burchett*, 210 W. Va. 699, 559 S.E.2d 36, 38-40 (2001). Importantly, the plaintiff in *Russell* affirmatively sought and was granted Kentucky Workers' Compensation payments without seeking those same payments from West Virginia's compensation system. *Id.* at *41 n.6. Following the incident, the plaintiff and his wife filed a lawsuit in the Circuit Court of Kanawha County alleging deliberate intention against his employer and negligence against the West Virginia Department of Highways ("DOH"); the Circuit Court dismissed both claims, dismissing the deliberate intent claim against the employer based on the choice-of-law doctrine *lex loci delicti*, the law of the *situs* of the injury, after the employer contended that Kentucky law was controlling. *Id.* at *38-40.

This Court, however, vacated the dismissals and remanded, stating that the doctrine of comity, and not *lex loci delicti*, controlled when the *situs* of the accident was other than West Virginia. *Id.* at *40. In its application of the doctrine, this Court noted the importance of the contractual relationship between the employer and the DOH wherein the employer contractually agreed that all of its employees on the project "would be covered by the West Virginia Workers' Compensation Fund and Act." *Id.* at *40-41. This Court then stated:

> This requirement by the DOH strongly evidences an affirmative public policy of this State, clearly communicated to [the employer], that all persons working on the Tug Fork bridge project

> would have all of the benefits of West Virginia workers' compensation law, including its 'deliberate intent' provisions.

Id.

Therefore, this Court held that based on this foregoing contractual requirement that the employer was "unquestionably aware of and contractually agreed to comply with []" the public policy "that a full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia state-funded construction project." *Id.* This Court noted no countervailing factors that would "weigh heavily against applying West Virginia law in this circumstance." *Id.* at *41.

Here, a similar analysis under the doctrine of comity must be made. This analysis must begin with the expectations of the parties as to which laws would apply to non-temporary workers such as Tucker Bell. As part of its contract with Longview, the SEI Contract required that both SEI and its chosen subcontractors obtain insurance of the type and amounts set forth in the contract. (JA_1008, at ¶ 10B). The required insurance coverage was to remain in "full force and effect" through the course of the performance of the contractual work. *Id.* Importantly, the terms also required that SEI provide: "Worker's Compensation Insurance in accordance with the statutory requirements of the location in which the Work [was] performed." *Id.* (Emphasis added).

Further, the Nicholson Subcontract between SEI and Nicholson provides that Nicholson was required to provide indemnification to Longview, and Nicholson was required to be in full compliance with Longview's insurance requirements. (JA_ 1083–84, at Art. 6, 7). Specifically, Nicholson agreed to the following term requiring it: "procure and maintain in force for the duration of the work, Workers Compensation Insurance, [...] and all insurance required of Contractor under the Contract Documents." (JA_1083, at Art. 6). The Nicholson Subcontract

identifies the "SEI Contract Documents" and the included exhibits as "applicable contract documents." (JA_1084).

It is uncontested that the situs for the work on the subject project was West Virginia, and that the terms of the SEI Contract are clear on their face – Longview required that SEI obtain Workers' Compensation insurance in accordance with the statutory provisions of the West Virginia Workers' Compensation Act. In a comity analysis, this Court must consider the expectations and rights bargained for within the SEI Contract. Here, as Nicholson had a contractual obligation to obtain and provide West Virginia compensation coverage for Tucker Bell, it was on notice that West Virginia law would be applicable, and, pursuant to *Russell*, comity commands the application of West Virginia Workers' Compensation law to this case.[9]

Notably, comity also "does not require the application of the substantive law of a foreign state when that law contravenes the public policy of [West Virginia]. *Russell, supra citing Paul v. Nat'l Life*, 177 W. Va. 427, 352 S.E.2d 550 (1986) (*citing Dallas v. Whitney*, 118 W.Va. 106, 188 S.E. 766 (1936). More succinctly, "[t]he doctrine of comity, which is merely courtesy between sovereignties, does not require a nation or state to be unjust in order that it may be generous." *Campen Bros. v. Stewart*, 106 W. Va. 247, 145 S.E. 381, 382 (1928). Thus, if the Court believes that it needs to continue with this comity analysis it must consider that, without a doubt, Pennsylvania's nearly absolute employer immunity, which prohibits tort recovery regardless of the intentional wrongdoing of an employer, and that has "never acknowledged or recognized [an intentional tort] exception to the exclusivity provisions" of its Act, is

[9] Moreover, if this Court was willing, as it was in *Russell, supra*, to extend the deliberate intent exception to a Kentucky resident, who was injured in the Commonwealth of Kentucky, while working on a Kentucky project, and who affirmatively filed for and received Kentucky Workers' Compensation benefits, certainly this same ability would extend to a non-temporary employee working in West Virginia, who was injured in West Virginia, and covered under the West Virginia Workers' Compensation scheme .

incompatible and irreconcilable with West Virginia's deliberate intention exception.[10] *Uon v. Tanabe Intern. Co., Ltd.*, 2010 U.S. Dist. LEXIS 128889*, *9 (E.D. Pa. 2010) ("[t]he employer's shield from tort liability on work-related injuries under the [Pennsylvania Workers' Compensation Act] is virtually impenetrable no matter how willful or wanton the employer's conduct[]").[11]

SEI is essentially requesting that this Court allow it to do the very thing that it argues Tucker Bell should be prevented from achieving – forum shop. Not only is its request refuted by our statutes and precedent, it also raises significant questions of fairness and public policy. Therefore, Longview must be entitled to the protections it required in its contractual agreement with SEI, and Tucker Bell must be afforded the protections given to similarly situated non-resident, non-temporary employees. As such, the Order of the Circuit Court should be affirmed.

V. CONCLUSION

Respondent Best Flow Line Equipment Company, L.P., requests that the Circuit Court of Monongalia County's rulings, as they pertain to the denial of Petitioner Southern Environmental Inc.'s Motion to Dismiss be affirmed in full.

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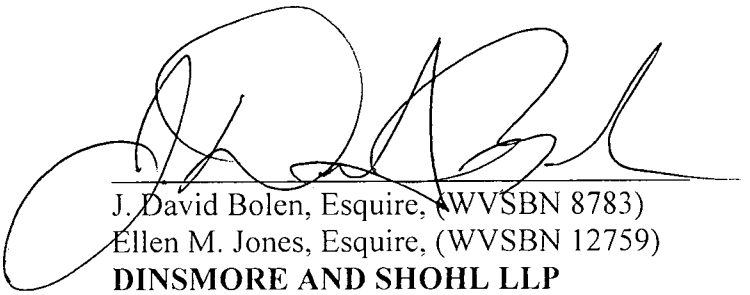
[10] *Barber v. Pittsburgh Corning Corp.*, 521 Pa. 29, 555 A.2d 766 (1989) (addressing the Pennsylvania Occupational Disease Act, but analogized to the WCA because of the close statutory language); *see Dean v. Handy & Harman*, 961 F. Supp. 798, 802 (M.D. Pa. 1997); *Alston v. St. Paul Insurance Cos.*, 612 A.2d 421, 426 (Pa. 1992)

[11] *Poyer v. Newman & Co., Inc.*, 514 Pa. 32, 35-36, 522 A.2d 548 (1987); *Kostryckyj v. Pentron Lab. Techs, LLC*, 52 A.3d 333, 337–40 (Pa. Super. Ct. 2012); *Kohler v. McCrory Stores*, 532 Pa. 130, 136, 615 A.2d 27, 30 (1992) (work related injury claims are only allowed if there has been a "fraudulent misrepresentation which leads to an aggravation of an employee's pre-existing condition" or if the employee's injuries were caused by a co-worker for reasons of personal animus."); compare with W.Va. Code § 23-4-2.



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