No. 18-1124

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SOUTHERN ENVIRONMENTAL, INC.,

Petitioner,

v.

No. 18-1124
(CIRCUIT COURT OF MONONGALIA COUNTY CIVIL ACTION NO. 17-C-193)

TUCKER-STEPHEN G. BELL, et al.,

Respondents.

BRIEF OF RESPONDENT, LONGVIEW POWER, LLC

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STATEMENT OF THE CASE

Respondent Longview Power, LLC (hereinafter "Longview") offers the following statement of the case as necessary to correct inaccuracies and/or omissions provided by Petitioner Southern Environmental, Inc. ("SEI"). *See* W. Va. R. App. Proc. 10(d).

A. Factual Background

This lawsuit arises out of a workplace accident that occurred at the Longview Power Plant located in Maidsville, Monongalia County, West Virginia on May 19, 2015. (*Appellate Record* 133–36, at ¶¶ 2-23.) SEI was the general contractor retained by Longview to complete a Fabric Filter Expansion project at the Monongalia County site. (hereinafter "Longview Power Project"). (*A.R.* 136, at ¶ 17). It is undisputed that the contractual relationship between SEI and Longview is fully set forth within the February 3, 2015, SEI Conforming Proposal P14-180 – for the Fabric Filter Expansion project (hereinafter "SEI Contract") (*A.R.* 1008–79.) To assist in completing its contractual obligations with Longview, SEI contracted with Nicholson Construction Company ("Nicholson") on or about April 24, 2015, making Nicholson its subcontractor to perform necessary portions of the work on the Longview Power project. (*A.R.* 1081–1102.) (hereinafter "Nicholson Subcontract").

At the time of the subject accident, its has been plead that Plaintiff Tucker-Stephen G. Bell ("Tucker Bell") was employed and working in the course of his employment for Nicholson. (*A.R.* 136, at ¶ 19.) It is further undisputed that Plaintiff had been performing work within the scope of his employment for Nicholson in the State of West Virginia for a period exceeding thirty (30) calendar days. (*A.R.* 136, at ¶¶ 20–22.) The Plaintiffs allege that Tucker Bell was operating a drill rig as part of the expansion of the Longview Power baghouse on May 19, 2015, when during the

drilling process a water swivel became unthreaded and/or detached from the pipe nipple, striking Tucker Bell in the back of the head. (*A.R.* 136–37, at ¶¶ 23-26.)

As part of its agreement with Longview, the SEI Contract included an insurance and indemnity provision in which SEI "shall, to the maximum extent allowed by applicable law, indemnify, defend and hold harmless [Longview] from and against all loss, liability, damage, cost and expense . . . resulting from or arising out of or in connection with the Work (including negligence or concurrent negligence) or [SEI's] negligent acts or omissions occurring at the jobsite during the performance of the work . . .." (*A.R.* 1008, at ¶ 10A.) Furthermore, the SEI Contract required that: "Before commencing Work, [SEI] shall provide and shall require its subcontractors to provide . . . insurance in amounts not less than indicated" within the contract. (Id. at ¶ 10B.) Said 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." (*A.R.* 1008.) (emphasis added).

The Nicholson Subcontract between SEI and Nicholson provides that Nicholson was required to provide similar terms of indemnification as well as full compliance with Longview's insurance requirements. (*A.R.* 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." (*A.R.* 1083, at Art. 6.) The Nicholson Subcontract identifies the "SEI

Contract Documents" and the included exhibits as "applicable contract documents." (*A.R.* 1084, at Art. 9.)

Following the accident, Nicholson assumed control over the water swivel, hose, and other component parts of the drill rig that were involved in the accident. (*A.R.* 156–7, at ¶¶ 129–133.) Nicholson removed these components from Monongalia County, West Virginia, where the accident occurred, to preserve such parts as evidence in anticipation of litigation arising from the accident. (Id.) Thereafter, Nicholson misplaced the swivel, hose and other component parts of the drill rig that were involved in the accident. (Id.)

Prior to filing suit, Plaintiff Tucker Bell was enrolled workers' compensation benefits pursuant to the Pennsylvania Workers Compensation Act. (*A.R.* 841.) Contrary to SEI's factual contentions, discovery in this matter has established that Tucker Bell's employer, Nicholson, unilaterally enrolled the Plaintiff in the workers' compensation system while Tucker Bell was still hospitalized following the subject accident. (*A.R.* 841–43.)

B. Procedural Background

Plaintiffs filed their Complaint in this matter on May 4, 2017. (*A.R.* 17–43.) In their Complaint, Plaintiffs assert claims for personal injury and products liability arising from the workplace accident wherein Tucker Bell was injured. (Id.) The Court held a hearing on August 7, 2017, wherein Plaintiffs were granted leave to file their Amended Complaint, and a briefing schedule was set by the Court. (*A.R.* 309–11.) An Order laying out the briefing schedule was entered by the Court on August 30, 2017. (Id.) Plaintiff's filed their First Amended Complaint on August 15, 2017. (*See A.R.* 4; 132–63.) On September 5, 2017, Longview filed its Answer and Affirmative Defense to Plaintiff's First Amended Complaint and Cross-Claims against Co-Defendants. (*A.R.* 313–474.)

Within its own responsive pleadings, Longview filed cross-claims against SEI for implied indemnity, contribution, and contractual indemnity. (*A.R.* 357–61.) Longview also filed cross-claims against Nicholson for implied indemnity, contribution, and spoliation. (*A.R.* 357–62.) Subsequently, Longview asserted an additional cross-claim against Defendant Nicholson for contractual indemnity, which included documentary support demonstrating the contractual terms agreed upon by SEI and Nicholson. (*A.R.* 932–1107.)

Defendant SEI filed its Motion to Dismiss Plaintiffs' Amended Complaint on September 19, 2017. (*A.R.* 604–617.) On September 21, 2017, SEI filed its Motion to Dismiss Amended Cross-claims of Defendants, Longview Power, LLC and Best Flow Line Equipment, L.P. (*A.R.* 618–20.) No Orders have been issued which address the full extent of the cross-claims raised by Longview; however, the disposition of the motions to dismiss filed by Nicholson and SEI will potentially impact Longview's right to indemnification and contribution.

SUMMARY OF ARGUMENT

Longview's interest in the outcome of the multiple appeals currently before this Honorable Court center on the potential dismissal of—and/or additional adverse effects that the outcome of these appeals may have on—its duly raised cross-claims in the matter below. To the extent necessary, Longview submits this Response Brief in an effort to protect those interests and so as to not waive any opportunity to respond. It remains Longview's position, however, that the Circuit Court has not issued any substantive ruling that directly addresses its interests and cross-claims for which Longview is an appropriately named respondent by the various petitioners in this matter.

To that end, Longview submits that Petitioner SEI's "Appeal from an Order from the Circuit Court of Monongalia County, West Virginia" (hereinafter "SEI's Appeal 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. (*A.R.* 604–617.) 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 Petitioner SEI remains a named defendant subject to the cross-claims raised by Longview against SEI for contribution and indemnity.

STATEMENT OF ORAL ARGUMENT AND DECISION

The facts of this case were well-presented in the proceeding below, as reflected in the Joint Appendix and as further discussed herein. Because the law and the facts are clear, the decisional process would not be significantly aided by oral argument, and the same is therefore unnecessary in this case pursuant to West Virginia Rule of Appellate Procedure 18(a).

ARGUMENT

SEI brings several assignments of error centered on the Circuit Court's denial of its Motion to Dismiss that seemingly overlap several correlated legal issues. To the extent it is not otherwise clear in the arguments below, Longview disputes each of the six (6) enumerated assignments of error put forth by SEI within SEI's Appeal Brief.

SEI asserts that the Circuit Court erred in its denial of SEI's Motion to Dismiss on several grounds; however, all errors claimed by SEI focus in some degree upon SEI's argument that 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 Longview's cross-claims against SEI, SEI's appeal also indirectly seeks for this Court to reverse the decision of the Circuit Court in a manner that would adversely affect Longview.

To the degree applicable and to the extent that it is necessary to do so, Longview submits this Response Brief in response to SEI's Appeal Brief as accepted by this Court under Docket No. 18-1124. In addition, Longview incorporates its arguments and its positions put forth herein in response to the consolidated appeals of Plaintiff Tucker Bell (Docket No. 18-1139) and Nicholson Construction Company (Docket No. 18-1140). Longview has been named as a respondent to only the appeal brought before this Court by SEI (Docket No. 18-1124); however, Longview's interest in the consolidated appeals is universal, and similar arguments would be made in each proceeding.

Pursuant to Rule 5(c) of the W. Va. R. App. Proc., Longview acknowledges that it is a party to all of the currently docketed appeals. For judicial efficiency, Longview submits this Response Brief in direct response to the appeal brought by SEI and asks that its arguments be considered and incorporated into the docketed appeals of Nicholson and Tucker Bell, as well. Longview further asks that it be permitted to join the arguments put forth by Tucker Bell and Respondent Best Flow Equipment, L.P., in all of the docketed appeals, to the extent that their positions are aligned with the interests and arguments put forth by Longview.

A. Legal Standard

The Court has held that "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 1, *Evans v. United Bank, Inc.*, 235 W. Va. 619, 775 S.E.2d 500 (2015) (quoting Syl. Pt. 1, *Longwell v. Bd. of Educ. of the Cnty. of Marshall*, 213 W. Va. 486, 583 S.E.2d 109 (2003)). In the more infrequent scenario, wherein the denial of a party's motion to dismiss is reviewed, the Court has similarly reasoned that "when a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed de novo." *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998).

B. THE CIRCUIT COURT DID NOT ERR BY DENYING SEI'S MOTION TO DISMISS WHEN IT FOUND THAT IT MAINTAINED SUBJECT MATTER JURISDICTION OVER THIS MATTER; NOR DID IT ERR WHEN IT FAILED TO HOLD THAT PENNSYLVANIA'S WORKERS' COMPENSATION SCHEME WAS THE EXCLUSIVE REMEDY IN THIS MATTER.

SEI presents several assignments of error in response to the Circuit Court's denial of SEI's Motion to Dismiss. Ultimately, the Circuit Court determined that SEI's arguments—namely that Pennsylvania's Worker's Compensation Act was the exclusive remedy available to Tucker Bell in this matter—was insufficient to survive a motion to dismiss. 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. In essence, these assignments of error encompass SEI's prevailing assertion that the Circuit Court erred in finding that it did have subject matter jurisdiction in this matter. SEI's position ultimately fails as a matter of law because 1) Sufficient facts have been plead to establish subject matter jurisdiction, and 2) Pennsylvania's workers' compensation scheme is not the exclusive remedy available to Tucker Bell.

1. The Circuit Court did not err by failing to find that it lacked subject matter jurisdiction in this matter because sufficient facts have been plead that establish the Circuit Court's jurisdiction.

Based upon all the alleged facts in this matter to date, the Circuit Court correctly denied SEI's assertion that it lacked subject matter jurisdiction in this matter. 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).

In support of its general positions, SEI highlights only a portion the undisputed facts in this matter related to the classification of the employee, Tucker Bell. Notably, 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 had been receiving Pennsylvania Workers' Compensation benefits as a result of the accident. Longview will note, however, that SEI's repeated contention that Tucker Bell "elected" to receive Pennsylvania benefits is a factual issue very much in dispute.[1] More importantly, however, even these limited facts relied upon by SEI fail to address the full extent of the claims made against SEI by the Plaintiff as well as by co-Defendants like Longview.

For example, SEI fails to adequately acknowledge that the Amended Complaint, as plead, asserts that Tucker Bell was a non-temporary employee in West Virginia. (*A.R.* 136, at ¶¶ 20–21.) The Amended Complaint and Longview's related cross-claims, including documentary support for both, also outlines the expectations and legal relationship between some of the various parties. This includes the fact that SEI was contracted by Longview to complete the Longview Power Project (*A.R.* 971–1079); in turn, SEI contracted with Nicholson to install the foundation pilings as part of its own contract (*A.R.* 1082–1107); and Tucker Bell was employed by Nicholson for more than thirty (30) days in West Virginia. (*A.R.* 136, at ¶¶ 20–21.)

Perhaps most importantly SEI and Nicholson were required to obtain West Virginia Workers' Compensation coverage for their employees while working on the subject project in West Virginia pursuant to contractual agreements of both SEI and Nicholson. (*A.R.* 1083, 1101).

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[1] Within the Sworn Affidavit of Heather M. Bell (*A.R.* 841–43), Tucker Bell's spouse details how her husband's workers' compensation claim was initiated by his employer Nicholson, while Tucker Bell was still unconscious and in medical treatment. Specifically, Mrs. Bell provides that: "Neither my Husband nor I, nor my Husband's family, took any part in deciding or electing whether my Husband would receive West Virginia or Pennsylvania workers' compensation benefits." (Id. at ¶ 15.)

These are important considerations that significantly alter much of the argument relied upon by SEI.

As an initial point of contention, the facts plead and discovered to date demonstrate that Tucker Bell may have qualified for the protections afforded under West Virginia's workers' compensation scheme. Based on these limited facts alone, the requisite elements for finding subject matter jurisdiction are met in this case.

In addition, Longview has established a basis upon which SEI might owe a duty of either contribution or indemnification. Indemnity and contribution claims between defendants are derivative in nature – meaning that such claims derive from a plaintiff's claims against the defendants. "Our right of contribution before judgment is derivative [.]" Syl. Pt. 4, in part, *Bd. of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E. 2d 796 (1990). While not immediately pertinent to the issues on appeal, the allegations in the Amended Complaint, when combined with the allegations in the amended cross-claim, state a valid claim for contribution and indemnification under West Virginia law.[2]

When all applicable facts are examined, the Circuit Court's finding of subject matter jurisdiction must be upheld. The Plaintiff Tucker Bell has set forth a claim that alleges that a non-temporary employee was injured in West Virginia while employed by an employer required to provide West Virginia Workers' Compensation coverage. To permit Defendants SEI and Nicholson to effectively forum shop on their own to seek out shelter and statutory immunity would be an irreversible injustice in this matter.

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[2] In addition, Longview continues to maintain additional cross-claims that involve its contractual indemnification agreement with Defendants SEI and Nicholson.

2. **The Court has subject matter jurisdiction of this matter 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 Mr. Bell was working on a non-temporary basis and thus was covered under the West Virginia Workers' Compensation act. (*See A.R.* 136, at ¶¶ 19-22.) West Virginia Code §23-2-1c(c), states that:

> If the employee is a resident of a state other than this state and is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than this state, the employee and his or her dependents are not entitled to the benefits payable under this chapter on account of injury, disease or death in the course of and as a result of employment temporarily within this state, and the rights of the employee and his or her dependents under the laws of the other state shall be the exclusive remedy against the employer on account of any injury, disease or death.

W.Va. Code §23-2-1c(c).

As evidenced by the plain language of the W.Va. Code §23-2-1c(c), the foreign state's law shall be the exclusive remedy against an employer only if the employee is (1) a nonresident employee; (2) temporarily employed in West Virginia; (3) is injured in West Virginia; and (4) covered by his employer's workers' compensation in the foreign state. *See Pasquale v. Ohio Power Company*, 187 W.Va. 292, 301-302, 418 S.E. 2d 738, 747-48 (1992) (emphasis added). The Legislature's use of the word "and", between the elements, made the only possible interpretation of the statute be such that each and every element must be present. *See Emmel v. State Comp. Dir.*, 150 W.Va. 277, 281, 145 S.E.2d 29, 32 (1965) (holding that where statutory language is conjunctive, every statutory element must be met).

Accordingly, in order for W.Va. Code §23-2-1c(c) to be applicable, the employment at issue must be "temporary," as required by element number two. The term "temporary" is a legal term of art, which is defined by the West Virginia Code of State Rules within the context of W.Va.

Code §23-2-1c(c). *See* W.Va. Code R. §§ 85-8-3.17 and 85-8-7.2. W. Va. Code R. 85-8-7.2 provides, in pertinent part:

> 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 [].

(emphasis added).

SEI now argues that the "temporary" definition is an arbitrary time limit set by our legislature, but appears to admit that Tucker Bell was in fact a non-temporary employee. Because W.Va. Code §23-2-1c(c) is inapplicable where the employee does not meet the definition of "temporary," and West Virginia courts are not required to defer to the workers' compensation laws of a foreign state where a person is not a "temporary" employee of the state, § 23-2-1c(c) is not controlling for Tucker Bell. It is well-reasoned that this analysis would necessitate that the Circuit Court conclude that the exclusive remedy provisions found within the § 23-2-1c(c) are not applicable, as well.

As a non-temporary employee under West Virginia law, Tucker Bell would be entitled to all of the benefits and privileges under West Virginia's Workers' Compensation Act. In support of this contention, this Court has held that:

> All employees covered by the West Virginia Workers' Compensation Act... 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 v. Vecellio & Grogan, Inc., 197 W.Va. 138, 144, 75 S.E.2d 138, 144 (1996).

In *Bell*, the plaintiff employee was determined to not be an employee subject to the statutorily provided remedies expressed within W. Va. Code § 23-2-1a. *Id.* The *Bell* Court, in part

relying on its holdings in *Pasquale v. Ohio Power Co.*, reasoned that, because the plaintiff was a non-resident, temporary employee covered by the workers' compensation act of another state, he met the statutory exclusion language found within 23-2-1c(c). *Id.* at 175 (emphasis added). Because the plaintiff therein was deemed ineligible for West Virginia benefits, the foreign state's compensation scheme was his exclusive remedy. *Id.*

Here, Tucker Bell was injured during his non-temporary employment in West Virginia as defined within W.Va. Code R. §§ 85-8-3.17 and 85-8-7.2. Therefore, Tucker Bell would meet the statutory definition of an eligible employee under § 23-2-1(a), and he would not be in the same position as the plaintiff employee in *Bell*.

SEI seemingly agrees that Tucker Bell is qualified to receive the benefits conferred under West Virginia's Workers' Compensation Act, but attempts rely on the "exclusivity" provisions of Pennsylvania's compensation scheme by shifting its argument to focus on elections of remedies. This issue is discussed more thoroughly below; however, as an immediate response, SEI's arguments fails to acknowledge that West Virginia's Worker's Compensation Act has a mechanism in place to address the "windfall" or "overlapping remedies" that the election of remedies doctrine aims to protect against. (*See* SEI Appeal Brief, at p.9.)

West Virginia Code § 23-2-1c(d) provides that:

> (d) If any employee or his or her dependents are awarded workers' compensation benefits or recover damages from the employer under the laws of another state for an injury received in the course of and resulting from the employment, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited against the amount of any benefits payable under this chapter for the same injury.

The cited provision specifically provides for instances wherein an employee receives benefits from both an out-of-state workers' compensation scheme as well as under the one afforded

under West Virginia statute. If taken as true, SEI's position that Pennsylvania law must apply to the issue at hand is in direct conflict to § 23-2-1c(d), and would render that portion of our statute meaningless.

The issue at hand is not whether or not Tucker Bell is seeking a double recovery of Workers' compensation benefits. The issue is more accurately framed as a situation wherein an employer seeks immunity and shelter from claims offered by the West Virginia Workers' Compensation Act despite the fact that the employee would qualify for benefits under either scheme. Notably, the employer's affirmative act of enrolling the employee in the benefits in the first place must be considered. (*See A.R.* 841–43.)

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 . . . 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). It is not immediately clear whether or not facts could be uncovered that would alter the Court's analysis, but at this early juncture, sufficient information exists to show that Tucker Bell and the Defendants SEI and Nicholson could be subject to the West Virginia Workers' Compensation Act. As such, the Circuit Court's Order should be affirmed.

C. THE CIRCUIT COURT DID NOT ERR BY FAILING TO APPLY THE DOCTRINE OF ELECTION OF REMEDIES.

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. In

support of this position, SEI cites to matters such as *Gallapoo v. Walmart*, 197 W. Va. 172, 475 S.Ed.2d 172 (1996). It bears repeating that holdings such as *Gallapoo* involved a determination of the West Virginia Workers' Compensation Act applicability to temporary employees, and not employees similarly situated to Tucker Bell. Similarly, this Court's holdings in matters such as *Easterling v. Am. Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000), also involve circumstances significantly different from that of the parties herein.

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 doing so. The issue, however, as more accurately described by the Court in *Gallapoo*, should be analyzed under the principle of comity.

In *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 418 S.E.2d 738 (1992), 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 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). ("[C]omity does not require the application of the substantive law of a foreign state when that law contravenes the public policy of this State."). 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).

This Court has recognized a distinction between the general meaning of "comity" and the meaning used in *Pasquale*:

> Courts sometimes use the term "comity" as a shorthand term to explain why a forum court is deferring to the law or rulings of another jurisdiction. However, "comity" is used in Syllabus Point 1 of *Pasquale* in its meaning as a choice-of-laws analytic approach that may lead to either applying or declining to apply the law of another jurisdiction.

Russell, 559 S.E.2d at 40. n.4.

In *Russell*, an employee brought claims of deliberate intent against his Kentucky-based employer pursuant to the West Virginia Workers' Compensation Act as well as negligence claims against the West Virginia Division of Highways. *Id.* at 40. Mr. Russell was injured during the construction of the Tug Fork Bridge project, which connected Williamson, West Virginia to South Williamson, Kentucky. *Id.* at 39. Specifically, Mr. Russel was injured on the Kentucky side of the project. *Id.* at 39.

Based in part on the choice-of-law principle, the trial court dismissed the deliberate intent claim against Mr. Russell's employer, as well as the negligence action made against the DOH. *Id.* at 39-40. On appeal, however, the trial court's dismissals of both parties were vacated. *Id.* at 40.

Specifically in relation to Mr. Russell's deliberate intent claim against his employer, this Court reasoned that:

> there is a public policy that the 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. [The employer] was unquestionably aware of and contractually agreed to comply with this policy. No countervailing factors weigh heavily against applying West Virginia law in this circumstance. Accordingly, the pertinent factors in a comity analysis weigh conclusively on behalf of the Russells being authorized to bring a deliberate intention action against [The employer] under West Virginia law.

Id. at 41. Of significant note, this Court further highlighted that:

> the DOH required in its bidding process—and [the employer] contractually promised to the DOH in that process—that all Tug Fork bridge project workers would be covered by the West Virginia Workers' Compensation Fund and Act. 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 intention" provisions. "[A]ll employees covered by the West Virginia Workers' Compensation Act ... 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 against an employer pursuant to W.Va.Code, 23–4–2(c)(2)(I)–(ii)." *Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 144, 475 S.E.2d 138, 144 (1996).

Id. at 40–41.

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 were to obtain insurance of the type and amounts put forth within the contract. (A.R. 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).

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. (*A.R.* 1083–84, at Art. 6. 7.). Specifically,

Nicholson agreed to the following term requiring that he: "procure and maintain in force for the duration of the work, Workers Compensation Insurance, ... and all insurance required of Contractor under the Contract Documents." (*A.R.* 1083, at Art. 6.) The Nicholson Subcontract identifies the "SEI Contract Documents" and the included exhibits as "applicable contract documents." (*A.R.* 1084, at Art.)

It is uncontested that the situs for the work on the subject project was West Virginia. It also cannot be contested 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 West Virginia Workers' Compensation Act. In a comity analysis, this Court must consider the expectations and rights bargained for within the SEI Contract.

By SEI's own admissions through its arguments presented on appeal, Pennsylvania's workers' compensation scheme does not provide the same statutory requirements as put forth by our West Virginia legislature. These discrepancies demonstrate that the two jurisdictions' laws are not in "harmony." *See* Syl. Pt. 1, *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 418 S.E.2d 738 (1992). In addition, when the focus shifts to that of an issue of fairness and whether the rights afforded by the foreign jurisdiction, in this case Pennsylvania, are compatible with those in West Virginia and its own public policy, the answer is again, the two are not harmonious.

Similar to the circumstances presented in *Russell*, the terms of the SEI contract strongly evidences the same public policy as demonstrated by the DOH's terms in its contract in the illustrated case. Likewise, Longview clearly communicated its desired policies to SEI, which is by all accounts a sophisticated party. These same intentions were communicated with the employer, Nicholson, through its terms within its own subcontract with SEI. Longview expected and required that all persons working on the project "would have all of the benefits of West

Virginia workers' compensation law, including its 'deliberate intention' provisions." *Russell*, 559 S.E.2d at 41.

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. Longview should be entitled to the protections it required in its contractual agreement with SEI, and Tucker Bell should be afforded the protections given to similarly situated non-temporary employees. As such, the Order of the Circuit Court should be affirmed.

CONCLUSION

Based upon the pleadings in this matter and the allegations of the Plaintiff, sufficient facts have been put forth to establish that the Circuit Court of Monongalia County can—and should—maintain jurisdiction of this matter. The standards and legal precedent applicable to temporary employees of West Virginia should not be extended to apply to non-temporary workers such as Tucker Bell.

Finally, an employer should not be permitted to disregard the intentions of a contractual agreement in order to take shelter under a more favorable jurisdiction. Reversing the Circuit Court's "Order Denying Defendant Southern Environmental, Inc.'s Motion to Dismiss" on any of the grounds asserted within SEI's assignments of error would effectively allow the Petitioner to accomplish this wrong.

For the foregoing reasons, this Honorable Court should affirm the decision below.

Respectfully submitted,

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