IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 18-1124

SOUTHERN ENVIRONMENTAL, INC., Defendant Below, Petitioner **v.** **TUCKER-STEPHEN G. BELL, AT AL.,** Plaintiffs Below, Respondents	Appeal from Order of Circuit Court of Monongalia County, Civil Action **17-C-193**

RESPONDENTS' BRIEF

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ASSIGNMENTS OF ERROR

Petitioner, Southern Environmental, Inc. ("SEI"), advances six (6) assignments of error in this appeal that seemingly overlap. Pursuant to Rule 10(d) of the Revised Rules of Appellate Procedure, the aforesaid assignments of error are not restated herein. Since SEI failed to structure its Argument under headings that correspond with its six (6) assignments of error in accordance with Rule 10(c)(7) of the Revised Rules of Appellate Procedure, Respondents' Argument section below specifically responds to each assignment of error as presented within SEI's Brief.

STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, this Statement of the Case is included to correct inaccuracies and omissions within Petitioner SEI's Brief. In addition to the following, Respondents incorporate herein by reference, their Statement of the Case contained in Petitioner's Brief filed in Docket No. 18-1139, which was consolidated with this appeal by Order dated April 25, 2019.

The first flagrant inaccuracy in SEI's Statement of the Case is that SEI misrepresents that Bell "elected" to file a workers' compensation claim under the Pennsylvania Workers' Compensation Act, 77 Pa. Stat. Ann. § 1, *et seq.*, rather than under the West Virginia Workers' Compensation Act, W.Va. Code § 23-1-1, *et seq.* In actuality, it was Respondent Tucker-Stephen G. Bell's employer and SEI's subcontractor, Nicholson Construction Company ("Nicholson"), that elected and filed Bell's work-related claim under the Pennsylvania Act with no input from the Respondent or anyone acting on his behalf. (A.R. 841-47).

As evidenced by the Affidavit of Heather Bell, within hours of the incident, while Bell remained unconscious and in critical condition, Nicholson unilaterally filed a workers' compensation claim under the Pennsylvania Act without the knowledge or consent of Bell and his

family. (*Id.*). Mrs. Bell provided sworn testimony that neither she nor any other member of the Bell family took any part in deciding whether Tucker Bell would receive West Virginia or Pennsylvania workers' compensation benefits. That decision was made solely by Nicholson. (*Id.*). Nicholson's conduct in filing the claim on Bell's behalf warranted Bell and his family assuming that the claim was being properly filed in Respondents' best interests. Instead, Nicholson unilaterally – of its own accord – elected to file Bell's claim under the workers' compensation scheme of the jurisdiction that provided greater protections to Nicholson and its indemnitee, SEI.

Moreover, Mrs. Bell provided evidence that a claim for benefits under the West Virginia Workers' Compensation Act, W.Va. Code § 23-1-1, *et seq.*, was actually commenced. (A.R. 847). Exhibit B to the Affidavit of Heather Bell is a copy of the Employee's and Physician's Report of Occupational Injury form (WC–1) that was executed by Heather Bell the day after the work-related incident, May 20, 2015, as well as by Dr. Roger Tillotson, MD on August 15, 2015. (*Id.*) The submission of the WC-1 form initiates the workers' compensation claim process in West Virginia. As evidenced by the stamp on the Report, it was timely received on August 19, 2015. (*Id.*) However, due to Nicholson's continued refusal to cooperate in discovery, Respondents have been unable to obtain necessary information relating to this claim for benefits under the West Virginia Workers' Compensation Act.

Another glaring omission from SEI's Statement of the Case is the fact that Tucker Bell was employed in West Virginia for a period exceeding thirty (30) days during the 365-day period preceding the subject accident. As such, Tucker was a "non-temporary" employee as defined under the West Virginia Workers' Compensation Act. (A.R. 279). This fact was admitted by Tucker's employer, Nicholson, in its *Answer to the First Amended Complaint.* (A.R. 872) ("Defendant Nicholson Construction Company admits that Plaintiff Tucker-Stephen G. Bell performed work

in West Virginia for Defendant Nicholson for a period exceeding thirty (30) calendar days within the 365-day period preceding May 19, 2015."). The fact that Bell was a "non-temporary" West Virginia employee is essential to the analysis below upon which the Circuit Court found that SEI was not entitled to statutory immunity under Pennsylvania's Worker's Compensation Act.

Procedural History

On September 21, 2017, SEI filed a motion to dismiss Respondents' claims of negligence and loss of spousal and parental consortium asserted against SEI in the *First Amended Complaint* pursuant to Rule 12(b)(1) and 12(b)(6) of the *West Virginia Rules of Civil Procedure*. (A.R. 606-617). SEI argued that Pennsylvania law applies to Respondents' claims against SEI, and that pursuant to Pennsylvania statutory employer immunity, SEI is immune from such claims. (A.R. 607-610). As a result, SEI maintained that the Circuit Court lacked subject matter jurisdiction over Respondents' claims against SEI and that such claims were not viable under Pennsylvania law. (*Id.*)

In their *Response in Opposition to SEI's Motion to Dismiss* filed on September 29, 2017, Respondents explained that West Virginia Code § 12-2-1c(c), upon which SEI based its position, is inapplicable to this case since Bell was not "temporarily" employed in West Virginia at the time of the subject incident. (A.R. 677 – 683). Respondents further retorted that the doctrine of comity does not justify an application of the antiquated Pennsylvania statutory employer immunity to SEI for the claims asserted against it in this action. (A.R. 683 – 88). Lastly, Respondents maintained that even if the court were to find that Pennsylvania statutory employer immunity applied, SEI failed to carry its burden at this early stage in the proceeding. (A.R. 688 – 90).

On October 10, 2017, the lower court heard oral arguments on SEI's *Motion to Dismiss the First Amended Complaint* along with other pending motions. (A.R. 759 - 816). Importantly,

Nicholson admitted during the hearing that Nicholson did, in fact, maintain West Virginia workers' compensation coverage for Bell during his employment in West Virginia. (A.R. 782).

Following the hearing, Respondents supplemented their responses to the *Motions to Dismiss* of Nicholson and SEI with the aforementioned Affidavit of Heather Bell to refute the misrepresentations of Nicholson and SEI that Bell himself chose Pennsylvania Workers' Compensation benefits as his exclusive remedy for his injuries. (A.R. 833 – 47).

On August 21, 2018, the Court entered an *Order Granting, In Part, and Denying In Part, Nicholson's Motion to Dismiss*, which found that Bell was required to be covered under the West Virginia Workers' Compensation Act and that Bell was entitled to all of the benefits of the Act, including the right to bring a deliberate intent action against his employer, Nicholson. (A.R. 853).[1] In response, on October 18, 2018, SEI filed a *Supplemental Brief in Support of its Motion to Dismiss* arguing its new theory of "election of remedies" and *res judicata* to support its request for the application of Pennsylvania statutory employer immunity. (A.R. 902 – 08).

The Circuit Court was unpersuaded by SEI's arguments, and on November 1, 2018, entered an *Order Denying Defendant Southern Environmental, Inc.'s Motion to Dismiss.* (A.R. 915 - 20). In denying SEI's *Motion to Dismiss*, the Circuit Court found that West Virginia law applied to this case and rejected SEI's theory that the Pennsylvania's workers' compensation statute is the exclusive remedy by which Bell can recover against SEI for his injuries. (*Id.*)

On November 19, 2018, SEI filed a *Motion for Entry of Final Judgment Pursuant to Rule 54(b).* (A.R. 1121-1125). On November 29, 2018, the Circuit Court entered an Order granting SEI's *Motion* and determined that the Order denying SEI's *Motion to Dismiss* was final and

[1] The lower court erroneously found that Respondents' deliberate intent claims against Nicholson were barred by the two-year statute of limitations which is the subject of the Bells' appeal filed in Docket No. 18-1139 that is consolidated herewith.

appealable pursuant to Rule 54(b) of the *Rules of Civil Procedure* because the issues decided were sufficiently related to the issues addressed in the Circuit Court's *Order* regarding Nicholson's *Motion to Dismiss*, which was likewise certified as final and appealable. (A.R. 1138-41).

SEI has appealed the November 1, 2018 Order denying SEI's *Motion to Dismiss* arguing that, even though Bell was required to be, and was, in fact, covered by the West Virginia Workers' Compensation Act, and even though Respondents brought their common law tort claims against SEI under West Virginia law in a West Virginia Court, Bell supposedly "elected" to claim benefits under the Pennsylvania Workers' Compensation Act, and consequently, SEI argues it should be entitled to statutory employer immunity under Pennsylvania law.

SUMMARY OF THE ARGUMENT

In its November 1, 2018 *Order Denying Defendant Southern Environmental, Inc.'s Motion to Dismiss*, the Circuit Court correctly found that Bell was required to be covered by West Virginia workers' compensation coverage and that Pennsylvania's statutory employer immunity provision was inapplicable to SEI in this case. As such, the lower court found that Respondents' claims against SEI are viable and that the court has subject matter jurisdiction over the claims.

As an initial matter, this Court lacks jurisdiction to even hear SEI's appeal since the Order denying SEI's *Motion to Dismiss*, lacks the requisite degree of finality. Although the Circuit Court's Order was certified as final and appealable under Rule 54(b) of the *Rules of Civil Procedure,* such certification does not confer jurisdiction upon this Court if the order does not actually resolve the litigation as to a claim or party.

However, to the extent the Court finds jurisdiction to entertain SEI's appeal, the Court should affirm the decision of the lower court to dismiss SEI's *Motion to Dismiss.* In this appeal, SEI argues that it is immune from Respondents' West Virginia tort claims of negligence and loss

of consortium pursuant to a Pennsylvania statute that, in certain instances, may afford a non-employer, general contractor the same immunity that the employer-subcontractor would receive under the Pennsylvania Workers' Compensation Act. SEI maintains that it is afforded this Pennsylvania statutory employer immunity in this case since Bell "elected" to obtain benefits under the Pennsylvania Workers' Compensation Act, rather than under the West Virginia Workers' Compensation Act. SEI's theory is based upon an inapplicable provision in the West Virginia Act that provides a foreign jurisdiction's workers' compensation scheme is the exclusive remedy when a nonresident employee is injured in West Virginia *while "temporarily employed"* in West Virginia and covered under the foreign jurisdiction's workers' compensation scheme.

SEI's theory fails at every level. First and foremost, neither Bell nor any member of his family chose or elected to file a claim for benefits under the Pennsylvania Workers' Compensation Act. That decision was made solely by Bell's employer, Nicholson, in order to afford Nicholson and its indemnitee, SEI, the greatest possible protection, and to thwart Bell's tort claims. Further, Bell's wife, Heather, timely executed and submitted the Employee's and Physician's Report of Occupational Injury form to initiate the workers' compensation claim process in West Virginia. Records pertaining to this claim have not yet been produced in this case. Since SEI's position hinges on Respondents' "election" of Pennsylvania law over West Virginia law, its argument immediately fails.

Next, since Bell was admittedly working in West Virginia for a period in excess of thirty (30) days prior to the subject workplace incident, he was a statutorily defined, "non-temporary" employee and not "temporarily" employed in West Virginia. West Virginia's exclusive remedy statute requires the nonresident employee to be temporarily employed in West Virginia in order for the foreign jurisdiction to be the injured employee's exclusive remedy. Mr. Bell was admittedly

not "temporarily" employed within the meaning of the Act, and the exclusive remedy provision is totally inapplicable.

Furthermore, Respondents' claims against SEI sound in tort under West Virginia common law, and they are entitled to redress against SEI, a third-party, non-employer, for their injuries in West Virginia. The remedy sought from SEI in this action is consistent with the Pennsylvania worker's compensation benefits Respondents have received. In fact, both the Pennsylvania and West Virginia Workers' Compensation Act expressly authorize such dual remedies. Thus, the doctrines of election of remedies and *res judicata* are inapplicable and have no bearing on the Respondents' ability to pursue their claims against SEI.

The sole issue here is whether West Virginia will disregard its long-standing conflicts of law doctrine – *lex loci delicti* – and apply comity to allow an antiquated Pennsylvania law wholly incompatible with the expectations of the parties, including SEI, and the law and public policy of West Virginia to provide SEI immunity in this case. West Virginia should apply its own law to protect those employed in this State and promote safe working environments in West Virginia, rather than provide a windfall of immunity to SEI, a non-employer located in Florida.

Lastly, even if this Court were inclined to allow Pennsylvania's statutory employer immunity to be applied in this case, SEI failed to satisfy its burden to prove that it is entitled to such immunity under the facts alleged in the *First Amended Complaint.* As such, the Circuit Court's Order denying SEI's *Motion to Dismiss* should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents submit that oral argument will significantly aid the decisional process on the issues presented in this appeal and the appeals consolidated herewith. This matter is appropriate for oral argument pursuant to Rule 20 of the Rules of Appellate Procedure, in that this matter involves issues of first impression that are of fundamental public importance. This matter also is appropriate for oral argument under Rule 19 since the issue on appeal involves a narrow issue of law.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED SEI'S MOTION TO DISMISS BECAUSE SEI IS NOT ENTITLED TO PENNSYLVANIA'S STATUTORY EMPLOYER IMMUNITY.

Standard of Review

SEI appeals the Circuit Court's November 1, 2018 *Order Denying Defendant Southern Environmental, Inc.'s Motion to Dismiss.* To the extent this Court finds it has jurisdiction to hear this appeal, this Court's review of the Circuit Court's order denying SEI's motion to dismiss is *de novo. Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998) ("[W]hen a pary, 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.*").

In undertaking its *de novo* review, this Court applies the same standards for evaluating a motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6) that should be applied by the circuit court. *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 702, 696 S.E.2d 1, 4 (2010). Motions to dismiss are to be viewed with disfavor and rarely granted—particularly in actions to recover for personal injuries. *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 538, 236 S.E.2d 207, 212 (1977). To this end, the court must liberally construe the complaint in the light most favorable to

the plaintiff, and the allegations are to be taken as true. *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978)).

A complaint must not be dismissed pursuant to Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 237 W. Va. 77, 81, 785 S.E.2d 627, 631 (2016). The plaintiff is merely obliged to provide information sufficient to outline the elements of his claim or to permit the court to draw inferences that these elements exist. *John W. Lodge Distributing Co.*, 161 W. Va. at 605-06, 245 S.E.2d at 158-59.

In order for a motion to dismiss to be successful under Rule 12(b)(1), the defendant must prove that there is no plausible way that the plaintiff can establish a viable claim over which the court may have subject matter jurisdiction. *Commonwealth, Pennsylvania Fish & Boat Comm'n v. Consol Energy, Inc.*, 233 W. Va. 409, 413, 758 S.E.2d 762, 766 (2014). The requirement of subject matter jurisdiction is met initially if: (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 allegations both with regard to the facts and the 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).

A. <u>This Court lacks jurisdiction to hear SEI's appeal since the *Order Denying SEI's Motion to Dismiss* lacks the requisite degree of finality.</u>

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 Rule 54(b) of the *Rules of Civil Procedure*, whether the language from Rule 54(b) is included in the order does

not necessarily confer jurisdiction upon this Court. *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.)

In order for this Court to have jurisdiction to entertain the appeal under West Virginia Code § 58–5–1, the order certified under Rule 54(b) must "completely dispose of at least one substantive claim." *Id.* (*quoting Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 550, 584 S.E.2d 176, 184 (2003)). "A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." *Id.* at Syl. Pt. 6. Therefore, the key in determining whether this Court has jurisdiction is not whether language from Rule 54(b) is included in the Order, but "whether the order approximates a final order in its nature and effect." *Id.* (*quoting* Syl. Pt. 1, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995)).

No substantive claims were resolved in the court's order denying SEI's *Motion to Dismiss* and the litigation between the parties continues on Respondents' tort claims against SEI. The lower court's certification of the order pursuant to Rule 54(b) does not confer jurisdiction upon this Court. *Id.* Consequently, this Court lacks the requisite jurisdiction to even consider SEI's appeal.

Additionally, SEI's theory of relief depends upon facts; facts that are not only not contained in the *First Amended Complaint*, but on facts that have been disproven by sworn, uncontroverted testimony of the parties. Therefore, to the extent that this Court does not find that Respondent's claims against SEI are viable as a matter of law at this juncture, the denial of SEI's *Motion to Dismiss* should be affirmed. *Id.*, 240 W. Va. at 355, 811 S.E.2d at 885. SEI could then file a motion for summary judgment with the circuit court after further discovery on these issues. *Id.*

B. Respondents did not elect Pennsylvania workers' compensation benefits as their exclusive remedy.

SEI contends that since Bell allegedly "elected" to receive benefits under the Pennsylvania Workers' Compensation Act, Bell "elected" that such benefits would be his exclusive remedy, and as a result, he should be precluded from asserting claims against SEI under West Virginia tort law under the doctrine of *res judicata*. SEI's theory of immunity fails because it depends upon a factual assertion that has been proven to be inaccurate – that Bell made the decision to elect benefits under the Pennsylvania Act rather than under the West Virginia Act. To the contrary, acting completely on its own, Nicholson made the decision on which jurisdiction Bell's workers' compensation benefits would be filed in within hours after the incident while Bell was unconscious and in extreme critical condition. (A.R. 841-47). There was absolutely no informed decision by Bell or his family to choose Pennsylvania workers' compensation benefits as the exclusive remedy they could recover from Nicholson and his non-employer, SEI. *Id.* The fact that Nicholson made this election, and not Bell or his family, is undisputed and unchallenged by any party in this action. Despite its knowledge of this undisputed fact, SEI bases its entire appeal on the disproven assertion that Bell elected the Pennsylvania Workers' Compensation Act and related benefits as his exclusive remedy. For this reason alone, SEI's entire argument fails.

SEI's position is premised on the belief that Bell failed to file a claim for benefits under the West Virginia Act, but that is likewise untrue. Respondents have produced evidence that a claim for West Virginia benefits was timely filed. (A.R. 847). At this juncture, the status and outcome of Bell's West Virginia workers' compensation claim is unclear; however, Respondents have and will continue to seek such information from the only party that appears to have the answer – *i.e.*, Nicholson. To the extent that the status of this claim for West Virginia workers' compensation benefits would be influential to this Court's decision, the Circuit Court's denial of

SEI's *Motion to Dismiss* should be affirmed so that the discovery may proceed on Respondents' claims and the facts surrounding this matter may be fully developed.

Notwithstanding the undisputed facts, whether Bell knowingly and consciously "elected" to file a claim for benefits under Pennsylvania Workers' Compensation Act and whether a claim was filed and pursued under the West Virginia Act is ultimately unnecessary for this Court to affirm the decision of the lower court to deny SEI's *Motion to Dismiss*. By receiving Pennsylvania workers' compensation benefits, Respondents did not abrogate their right to bring common law tort claims in West Virginia against a third-party, non-employer that is liable for their injuries that occurred in West Virginia. Applying West Virginia's conflicts of law analysis, SEI is not entitled to statutory employer immunity under Pennsylvania law for Respondents' claims. As such, this Court should affirm the decision of the lower court to deny SEI's *Motion to Dismiss*.

C. Pennsylvania workers' compensation scheme is not the exclusive remedy in this case.

Even assuming, *arguendo*, that Bell made an informed decision to choose workers' compensation benefits under the Pennsylvania Workers' Compensation Act, that would not result in SEI being afforded statutory employer immunity under the Pennsylvania Workers' Compensation Act. SEI excludes from its analysis an admitted and undisputed fact – Bell was employed in West Virginia on a non-temporary basis, *i.e.* he worked in West Virginia in excess of thirty (30) days in the 365-day period preceding the incident. (A.R. 872). SEI acknowledges that Bell was required to be covered with West Virginia workers' compensation coverage, but SEI ignores the more important consequence of Bell's non-temporary employment status in West Virginia.

SEI contends that under West Virginia law, the Pennsylvania Workers' Compensation scheme is the exclusive remedy under which Respondents may recover since Bell, who is a non-West Virginia resident, collected benefits under Pennsylvania's Act. In support of this contention

SEI relies upon West Virginia Code § 23-2-1c(c), which provides as follows:

> 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.

(Emphasis added).

SEI's reliance on Section 23-2-1c(c) is misguided because the facts of this case do not warrant the application of the exclusive remedy statute. The plain language of §23-2-1c(c), states that a foreign state's laws shall be the exclusive remedy against an employer *only* for an employee who is: (1) a nonresident; (2) **temporarily employed in West Virginia**; (3) injured in this state; *and* (4) and is covered by his employer's workers' compensation in the foreign state. *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 302, 418 S.E.2d 738, 748 (1992). For Section 23-2-1c(c) to be applicable, all four of the statutory elements 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). Therefore, §23-2-1c(c) is inapplicable unless the nonresident is "temporarily" employed in West Virginia when the injury occurs.

Section 85–8–3.17 of the West Virginia Code of State Rules provides:

> "Temporary" or "**Temporarily**," as the term is used in W. Va. Code §§ 23-2-1(b)(3); 23-2-1a(a)(1) and **23-2-1c(c)**, and in this rule, **means for a period not exceeding thirty (30) calendar days within any three hundred and sixty-five (365) day period**.

W. Va. Code R. §85-8-3.17 (2008) (emphasis added).

Similarly, §85–8–7.2, of the West Virginia Code of State Rules directs:

> **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 West Virginia's workers' compensation laws **must be covered with West Virginia workers' compensation coverage** unless they enter into an agreement with their employer described under subsection 7.4 of this section. An employer of extraterritorial employees has a duty to immediately advise its West Virginia private carrier when it reasonably believes it will be employing extraterritorial employees in the State of West Virginia on a non-temporary basis, so that the premium can be adjusted accordingly.

W. Va. Code R. 85–8–7.2 (2008) (Emphasis added).

Section 23-2-1c(c) is completely inapplicable where a nonresident is employed in West Virginia or is reasonably anticipated to work in West Virginia for more than thirty (30) calendar days in a 365-day period. As previously stated, Bell inarguably and very clearly worked in West Virginia for more than thirty (30) calendar days in the 365-day period preceding his catastrophic injury. (A.R. 872). Consequently, §23-2-1c(c) has no application to this case. The Circuit Court correctly found that the benefits provided under Pennsylvania Workers' Compensation Act were not Respondents' exclusive remedy.

Within its Brief, SEI completely disregards the requirement that the injury must occur while being *temporarily* employed in West Virginia, and misleadingly maintains that §23-2-1c(c) applies in this case to mandate that Pennsylvania workers' compensation benefits be Respondents' exclusive remedy. In an attempt to further this misapplication of law, SEI also cites to, but neglects to discuss, several cases applying §23-2-1c(c); specifically, *Pasquale v. Ohio Power Company*, 187 W. Va. 292 (1992), *Mize v. Commonwealth Mining, LLC*, 2017 WL 1348516 (W.Va. Apr. 7, 2017)(unpublished opinion), *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172, (1996), *Easterling v. American Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000).

SEI's inattention to these cases is telling since much of its argument presented below analyzed the applicability of these holdings to the facts of this case. SEI's abandonment of its prior arguments is apparently the result of the Circuit Court's recognition that *Easterling*, *Pasquale*, and *Gallapoo* turned on the application of the exclusive remedy provision of §23-2-1c(c), which is

inapplicable in this case because of West Virginia's subsequent codification defining "temporarily," and Nicholson's admission that Bell worked in West Virginia prior to the accident in excess of the 30-day threshold, i.e., Bell is a non-temporary employee under West Virginia law. With this being said, although SEI seemingly abandons its arguments under the aforesaid cases, Respondents further address and distinguish these cases in their response to arguments that have been advanced, and will likely again be advanced by Nicholson in the instant consolidated appeals.

Bewilderingly, SEI asserts that §23-2-1c(c) and *Easterling*, *Pasquale*, and *Gallapoo* provide that Pennsylvania Workers' Compensation scheme is Respondents' exclusive remedy, while at the same time acknowledging that "Plaintiff was eligible for workers' compensation benefits from both Pennsylvania and West Virginia." These inconsistent positions highlight the flawed and misguided reasoning of SEI's appeal. If Plaintiff was entitled to benefits under the West Virginia Act, then §23-2-1c(c) cannot possibly apply. Since the exclusive remedy provision of §23-2-1c(c) is admittedly inapplicable to this case, the Pennsylvania's workers' compensation scheme is not Respondents' exclusive remedy.

D. Respondents are entitled to pursue their tort claims against SEI under West Virginia common law regardless of whether Respondents have received benefits under the Pennsylvania Workers' Compensation Act.

Respondents' are entitled to pursue their common law tort claims against SEI under West Virginia law. Respondents' claims for negligence and loss of consortium against SEI are founded in West Virginia common law and not derived from the West Virginia workers' compensation statute. SEI was not Bell's employer, but rather a third-party general contractor. *See Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 139, 475 S.E.2d 138, 139 (1996).

Under West Virginia law, a general contractor may be held liable to an employee of its subcontractor injured on its worksite if the general contractor breaches its duty. *Pasquale v. Ohio*

Power Co., 187 W. Va. 292, 305, 418 S.E.2d 738, 751 (1992). A general contractor has the duty to exercise ordinary care for the safety of an employee of its independent contractor, and to furnish such employee a reasonably safe place in which to work. *Hall v. Nello Teer Co.*, 157 W. Va. 582, 587, 203 S.E.2d 145, 149 (1974); *Sanders v. Georgia-Pac. Corp.*, 159 W. Va. 621, 629, 225 S.E.2d 218, 223 (1976); *McLean v. Fed. St. Const. Co.*, 77 F.3d 469 (4th Cir. 1996). "The employer of an independent contractor will also be liable to such contractor's employee if he retains some control or supervision over the work which negligently injures the employee." *Pasquale*, 187 W. Va. at 305, 418 S.E.2d at 751. This includes "the right to inspect, to stop the work, to make suggestions or recommendations as to the details of the work, or to prescribe alterations or deviations in the work." Syl. Pt. 4, *Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 524 S.E.2d 688 (1999).

Respondents allege in detail that SEI breached duties owed to Respondents under West Virginia law. The sufficiency of the allegations has never even been challenged by SEI. Rather, SEI challenges the viability of Respondents' claims and the jurisdiction of the Circuit Court under the doctrine of election of remedies. "The election of remedies doctrine is applicable only when there are two or more **inconsistent** remedies available to a litigant at the time of election, and such litigant has knowledge of facts giving rise to a duty to elect." Syl. Pt. 2, *Harrison v. Miller*, 124 W. Va. 550, 21 S.E.2d 674, 674 (1942)(emphasis added).[2]

As an initial matter, it is immediately apparent from the undisputed facts surrounding Nicholson's unilateral decision to file a claim under the Pennsylvania Act, that Respondents had no knowledge of the facts giving rise to any purported duty to elect and did not elect the Pennsylvania Workers' Compensation scheme as their remedy. That decision was made solely by Nicholson. The doctrine of election of remedies is inapposite in this case for that reason alone.

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[2] In an attempt to conceal the inapplicability of the doctrine, SEI wrongly asserts that *Harris v. Miller* holds that election of remedies applies when there are two "possible" remedies rather the two "inconsistent" remedies.

Moreover, the doctrine of election of remedies is inapplicable in this case because Respondents are not seeking to recover two inconsistent remedies. *Id.*; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 94 S. Ct. 1011, 1020, 39 L. Ed. 2d 147 (1974) (Doctrine of election of remedies only applies to "situations where an individual pursues remedies that are legally or factually inconsistent.") "Under the rule requiring an election of remedies, a party is not estopped to maintain a second suit unless the aim, scope, and remedy sought is substantially the same in each suit." Syl. Pt. 1, *Cameron v. Cameron*, 111 W. Va. 375, 162 S.E. 173, 173 (1931); *Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.*, 594 F.3d 285, 293 (4th Cir. 2010) ("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.")

The remedy that Respondents' pursue from SEI under West Virginia tort law is in no way inconsistent with the Pennsylvania workers' compensation benefits received by Respondents. Both the West Virginia and Pennsylvania Workers' Compensation Acts expressly provide that an employee that is injured, in whole or in part, by the act or omission of a third party, is entitled to receive workers' compensation benefits from his employer *and* is entitled to bring an action against that third party, provided that, in the event of recovery against the third-party, the employer has the right of subrogation. W. Va. Code Ann. § 23-2A-1; 77 Pa. Stat. Ann. § 671.

Accordingly, the remedies sought by Respondents from SEI are not inconsistent, but rather are authorized by both States' workers' compensation schemes. *Id.* Further, a recovery against SEI would not result in a windfall to Respondents, since Bell's employer would be entitled to statutory subrogation for benefits paid as of the date of the recovery. Since Respondents' claims against SEI

will not result in any overlapping remedies with their collection of workers' compensation benefits, the doctrine of election of remedies simply has no application in this case.

The issue then is not one of election of remedies, but whether SEI is a non-employer, third-party against which Respondents may bring an action under the applicable law. Herein lies the conflict between West Virginia law, which allows an injured employee to bring claims against a non-employer general contractor – and Pennsylvania law, which provides immunity in certain circumstances to a general contractor based upon its subcontractor having workers' compensation coverage. As discussed below, under West Virginia's conflicts of law doctrine, Respondents are entitled to maintain their common law tort claims against SEI and Pennsylvania's statutory employer immunity does not apply.

E. West Virginia's conflicts of law doctrine dictates that West Virginia law applies to Respondents' tort claims against SEI and that SEI is not entitled to statutory employer immunity under Pennsylvania law.

West Virginia consistently applies the doctrine of *lex loci delicti* – "that is, the substantive rights between the parties are determined by the law of the place of injury." *State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 330, 332, 565 S.E.2d 793, 795 (2002). Under this conflicts of law doctrine, West Virginia requires the application of the law of the place of the wrong. *Bell*, 197 W. Va. at 139, 475 S.E.2d at 139. In this case, the alleged negligence of SEI that proximately caused the workplace incident and resulting injuries to Respondents, occurred in West Virginia. As such, West Virginia law applies to determine whether Respondents sufficiently pleaded claims against SEI. Since West Virginia does not provide immunity to non-employer third-party general contractors, such as SEI in this case, Respondents are entitled to pursue their claims against SEI.

Despite West Virginia's longstanding and well-established conflicts of law doctrine *lex loci delicti*, the doctrine of comity also has been examined in the context of the choice of law

analysis regarding the application of immunity provided under another jurisdiction's workers' compensation scheme. *See Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 700, 559 S.E.2d 36, 37 (2001); *Pasquale*, 187 W. Va. at 295, 418 S.E.2d at 741. Even though SEI has abandoned its comity argument in its appeal, the examination of the doctrine demonstrates that the application of comity is unwarranted in this case and that Respondents can maintain their claims against SEI.

Comity is a doctrine created by the courts wherein a forum court may give the laws or rights accorded by another state effect in litigation in the forum state. Syl. Pt. 2, *Russell*, 210 W. Va. at 701, 559 S.E.2d at 38 (citing Syl. Pt. 1, *Pasquale,* 187 W.Va. at 295, 418 S.E.2d at 741). The extension of comity turns on three principles: (1) legal harmony and uniformity among the co-equal states should be promoted; (2) the rights and expectations of a party, who has relied on foreign laws, should be honored; and (3) the forum court must determine whether the foregoing rights are compatible with the laws and public policy of its jurisdiction. *Id.* However, the most heavily weighted of these three principles is the latter. *Id.* "[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." *Paul v. National Life,* 177 W.Va. 427, 433, 352 S.E.2d 550, 556 (1986) (Noting the "strong public policy of this State that persons injured by the negligence of another should be able to recover in tort.").

While legal harmony and uniformity is a consideration in the comity analysis, the Full Faith and Credit Clause of the United States Constitution does not require this Court to apply Pennsylvania's statutory employer immunity to Respondent's West Virginia claims. *Pasquale*, 187 W. Va. at 300, 418 S.E.2d at 746 (*citing Carroll v. Lanza,* 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955)). In *Carroll,* an employee of a subcontractor was injured while working in Arkansas and brought suit against the general contractor in Arkansas. The injured employee had

also collected benefits under Missouri's workers' compensation scheme since that was the home state of his employer. The court in *Carroll* recognized that the Missouri's workers' compensation statute provided general contractors immunity from suit provided its subcontractor had workers' compensation coverage. However, under Arkansas law where the suit was filed, the employer was entitled to immunity, but not the general contractor. The Supreme Court of the United States found:

> Missouri can make her Compensation Act exclusive, if she chooses, and enforce it as she pleases within her borders. Once that policy is extended into other States, different considerations come into play. Arkansas can adopt Missouri's policy if she likes. Or, as the *Pacific Employers Insurance Co.* [*v. Industrial Accident Commission of California,* 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940 (1939)] case teaches, she may supplement it or displace it with another, insofar as remedies for acts occurring within her boundaries are concerned. ***Were it otherwise, the State where the injury occurred would be powerless to provide any remedies or safeguards to nonresident employees working within its borders. We do not think the Full Faith and Credit Clause demands that subserviency from the State of the injury.***

Pasquale. at 300, 418 S.E.2d at 746 (*citing Carroll*, at 75) (emphasis added).

The facts of the case *sub judice*, are virtually identical to those presented in *Carroll.* Bell is a non-West Virginia resident who was employed by a non-West Virginia subcontractor—Nicholson. Bell was injured while working in West Virginia and brought suit against the general contractor, SEI, in West Virginia. Bell has collected workers' compensation benefits under the Pennsylvania workers' compensation scheme that, in certain circumstances, provides a general contractor immunity from suit by the employee of its subcontractor. Under West Virginia law, immunity is provided for the employer (subject to exceptions), but not for third-party general contractors. As in *Carroll*, comity does not apply in this instance to subvert West Virginia's laws to the antiquated workers' compensation laws of Pennsylvania.

With regard to the second principle of comity, SEI not only expected West Virginia law to apply over Pennsylvania law, it was contractually obligated to provide, and to require its subcontractors to provide, West Virginia workers' compensation coverage. (A.R. 403, 717, 1008,

1083 and 1101). SEI cannot genuinely maintain that, in light of such contractual obligations, it expected Pennsylvania law to control. *See Russell*, 210 W. Va. at 703–04, 559 S.E.2d at 40–41.

In *Russell,* this Court, applying principles of comity, held that West Virginia law should apply to claims asserted against a Kentucky corporation, by a Kentucky resident who was injured in Kentucky and who collected Kentucky workers' compensation benefits. *Id.* This Court reasoned that because the Kentucky defendant contractually promised that its workers would be provided West Virginia workers' compensation coverage the parties had an expectation that West Virginia law would apply to any personal injury claims. *Id.* [3] Importantly, this Court held that the fact that a Kentucky workers' compensation claim was submitted was not dispositive in a comity analysis. *Id.* at fn. 6. Identically to the defendant in *Russell,* SEI contractually promised that its workers and its subcontractors' employees would be covered by the West Virginia Workers' Compensation Act. (A.R. 403, 717, 1008, 1083 and 1101). Accordingly, under principles of comity, West Virginia law, and not Pennsylvania law, should apply to Respondents' claims against SEI.

Additionally, Pennsylvania has even a lesser connection to Respondents' claims than Kentucky had to the claims asserted by the plaintiff in *Russell.* SEI is a Delaware corporation principally located in Florida. (A.R. 276). SEI did not employ Bell in Pennsylvania, rather its subcontractor employed Bell on a non-temporary basis in West Virginia, where the workplace incident occurred. (A.R. 278 – 80). SEI could have no expectation that Pennsylvania law would apply in this case and has taken no action in reliance upon such an unwarranted expectation. Thus,

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[3] The *Russell* Court also explained that West Virginia has a strong "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." Syl. Pt. 3, *Russell*, 210 W. Va. 699, 559 S.E.2d 36. Respondents posit that this public policy of protecting West Virginia workers is equally applicable regardless of whether the project is State funded. Nonetheless, online reports evidence that Longview Power received $20 million in tax-exempt bonds from the West Virginia Economic Development Authority, further supporting the application of West Virginia law to Respondents' claims. *See* https://www.wvgazettemail.com/news/state-helps-power-generators-pay-for-equipment/article_4e1e3767-9b8e-5440-913d-ee6138beb731.html

the second principal of comity regarding reliance upon the expectation of the parties strongly weighs against West Virginia applying Pennsylvania law to provide SEI immunity in this case.

The most compelling argument against applying Pennsylvania law is the fact that the Pennsylvania's statutory employer immunity is fundamentally *incompatible* with West Virginia law, and undercuts West Virginia public policy. Most notably, West Virginia has declined to adopt a similar statutory-employer immunity in its Workers' Compensation scheme and has a declared public policy that persons injured in West Virginia should be able to recover in tort. W. Va. Code § 23-1-1, *et seq*; *Paul*, at 433, 352 S.E.2d at 556. Statutory-employer immunity often frustrates the very purpose of workers' compensation legislation (*i.e.* extending benefits to workers) by functioning as a shield behind which negligent general contractors seek to hide. *Stipanovich v. Westinghouse Electric Corp.*, 210 Pa.Super. 98, 106, 231 A.2d 894, 896 (1967).

Even in Pennsylvania, where statutory-employer immunity is codified in its workers' compensation scheme, it is widely abhorred as a counterproductive, vestigial doctrine. *Patton v. Worthington Associates, Inc.*, 625 Pa. 1, 13–14, 89 A.3d 643, 650–51 (2014)(Baer, J., concurring). In *Patton*, Justice Baer urged the General Assembly to eliminate the doctrine since "the mandatory nature of workers' compensation has rendered the statutory employer doctrine obsolete." *Id.* He advocated his position as follows:

> I respectfully urge our colleagues in the General Assembly to eliminate the doctrine, so that it no longer serves as blanket immunity for general contractors, thwarting a victim's right to recover from a tortfeasor, and an innocent subcontractor-employer's right to recoup workers' compensation payments through subrogation; while adversely impacting worker safety by eliminating the traditional consequences (money damages) when a general contractor's negligence harms a subcontractor's employee.

Id.; *see also Peck v. Delaware County Board of Prison Inspectors*, 572 Pa. 249, 261 (2002) (Nigro, J., concurring) (arguing that in providing for statutory employer immunity, the General Assembly has "altered the fundamental compromise underlying the workers' compensation system").

Therefore, it would be irrational for this Court to apply Pennsylvania immunity that is so unpalatable and archaic that even sitting Justices on the Pennsylvania Supreme Court are vociferously lobbying for its abrogation.

Statutory employer immunity is "irrational relic of a bygone era" when it was discretionary for an employer to provide its employees with workers' compensation coverage. *Patton*, at 15–16. Once employers were required to provide workers' compensation coverage, the *quid pro quo* for providing general contractors immunity was lost. *Id*; *Fonner v. Shandon, Inc.*, 555 Pa. 370, 381, 724 A.2d 903, 908 (1999)("The Legislature never intended that the amendments would allow a general contractor to escape civil liability if it did not pay for the injured employee's workers' compensation insurance.")

West Virginia workers' compensation scheme is also "a tit-for-tat, *quid pro quo* system: the employee gives up a common law cause of action only when it is replaced with a statutory workers' compensation remedy. If there is no *quid pro quo* within the workers' compensation system to counter a worker's loss of the right to sue, then states allow the worker to proceed with a common law tort action." *Bias v. E. Associated Coal Corp.*, 220 W. Va. 190, 201, 640 S.E.2d 540, 551 (2006). Since West Virginia workers' compensation coverage is mandatory when an employee works in West Virginia on a non-temporary basis, there is no justification for abrogating the injured employee's right to bring a third-party common law tort action. SEI did not pay for Bell's workers' compensation insurance but seeks immunity for its negligent conduct for nothing more than the happenstance of being a general contractor. *See Patton*, at 16. Rejecting Pennsylvania's statutory employer immunity "would help to ensure safety in the workplace, and hopefully lead to the prevention of tragic accidents due to someone's carelessness (as seen in the instant case), by incentivizing general contractors to adopt more rigorous safety regimes. *Id.* at 17.

II. SEI FAILED TO CARRY ITS BURDEN OF PROOF UNDER RULE 12(b)(6) AND THE PENNSYLVANIA WORKERS' COMPENSATION ACT.

Even if this Court were inclined to bestow Pennsylvania statutory employer immunity upon SEI, the Court should nevertheless affirm the decision of the lower court because SEI failed to carry its burden of demonstrating how the factual allegations within the *First Amended Complaint* color it as a "statutory employer." In its Brief, SEI conducts a lengthy and extraneous discussion of the current status of the Pennsylvania Act's statutory employer immunity provisions but neglects to articulate how this authority is effectuated by the facts of this case.

The burden of demonstrating the application of Pennsylvania statutory employer immunity is on the litigant who is asserting it. *See Stipanovich*, 210 Pa. Super at 106. Moreover, "[V]ery great care...must be exercised before allowing an employer to avoid his liability at common law by asserting that he is a statutory employer." *Peck*, 572 Pa. at 255. The Pennsylvania workers' compensation laws were designed to extend benefits to workers; they were not designed to function as a shield behind which negligent employers – or general contractors thereof – may hide. *Id.* Hence, courts should find statutory employer status *only when the facts clearly warrant it. Id.*

The statutory employer immunity under § 302(a) of the Pennsylvania Workers' Compensation Act, 77 P.S. § 461, extends only to scenarios where a contractor subcontracts work specifically "within the scope of the work delineated in [the statute's] specialized definition of 'contractor.'" *Six L's Packing Co.,* 615 Pa. 615, 629, 44 A.3d 1148, 1157 (2012). To confer statutory-employer status on a contractor, the contracted work must either (1) consist of removal, excavation or drilling of soil, rock or minerals or the cutting or removal of timber, or (2) the work must be "of a kind which is a regular or recurrent part of the business, occupation, profession or trade" of the contractor. *Id.* at 629-30.

To interpret § 302(a) as broadly conferring statutory employer status on any contractor who subcontracts in any capacity would impermissibly swallow the carefully tailored language of the statute, which describes in detail the two species of subcontract that impart statutory employer status. Hence, such an interpretation must be rejected because courts' principal duty in construing a statute is to give effect to each and every provision contained therein. *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 115–16, 219 S.E.2d 361, 365–66 (1975).

In an attempt to characterize itself as the statutory employer of Bell, SEI makes conclusory statements that the work being done by Bell when he was injured was the removal, excavation, or drilling of soil, rock, or minerals which was of a kind which is a regular or recurrent part of the business, occupation, profession or trade of SEI. However, while such specific facts are requisite for the application of § 302, such facts are not found in the *First Amended Complaint.*

This Court should refuse to rely upon SEI's conjecture as to the nature of Bell's work and SEI's purported business practices and conclude that the work being performed by Bell does not fall within the ambit of § 302(a). To the extent this Court even reaches this analysis, it should recognize that Respondents could prove facts in support of their claims that would entitle them to relief against SEI and affirm the lower court's denial of SEI's *Motion to Dismiss.*

To the extent that consideration of facts outside of the *First Amended Complaint* is warranted in this analysis, this Court should affirm the denial of SEI's *Motion to Dismiss* and allow Respondents to properly discover facts relating to SEI's representation of the extrinsic facts proffered by SEI, and respond to the same at the summary judgment stage. *Riffle v. C.J. Hughes Const. Co.*, 226 W. Va. 581, 588, 703 S.E.2d 552, 559 (2010) (Considering matters outside of the pleadings in connection with a motion to dismiss without providing litigants with notice and an opportunity to respond constitutes reversible error.)

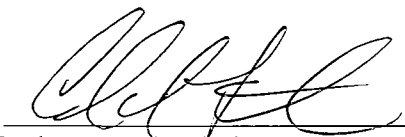
SEI failed to carry its burden of proof to demonstrate statutory employer status. Even assuming, *arguendo*, that this Court should decide that Pennsylvania's antiquated statutory-employer doctrine applies to this case, SEI has pointed to nothing compelling or decisive in the *First Amended Complaint* that suggests that SEI is aptly categorized as a statutory employer under §302(a). Further, even if SEI *could* support its conclusory assertions through a lopsided reading of the facts contained in the *First Amended Complaint*, under the 12(b)(6) standard of review, the Court must construe the facts in a light most favorable to Respondents with a strong preference for allowing this case to be heard on merits. As the Respondents have properly set forth facts sufficient to sustain claims against SEI, the denial of SEI's *Motion to Dismiss* should be affirmed.

III. SINCE SEI IS NOT IMMUNE FROM RESPONDENTS' CLAIMS, THE COURT HAS SUBJECT MATTER JURISDICTION OVER THE CLAIMS.

The Circuit Court correctly found that it has subject matter jurisdiction over Respondents' claims against SEI. SEI's theory for dismissal of Respondents' claims depends entirely upon this Court's application of Pennsylvania's statutory-employer immunity doctrine. As explained above, West Virginia law controls and SEI is not entitled to immunity under Pennsylvania law. Accordingly, the Circuit Court has subject matter jurisdiction over Respondents' claims, and Respondents' claims for the devastating injuries they suffered should be permitted to proceed.

CONCLUSION

For the reasons set forth herein and in other Briefs of Tucker-Stephen G. Bell, et. al. filed in these consolidated appeals, this Court should affirm the Order of the Circuit Court denying SEI's *Motion to Dismiss* Respondents' claims asserted against SEI in the *First Amended Complaint.*

Signed: 

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