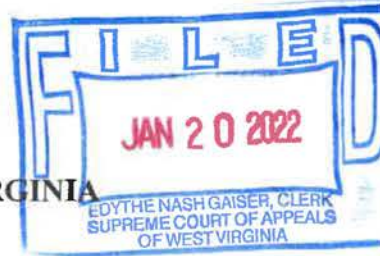


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 21-0841

**PRECISION PIPELINE, JASON STROMBERG,
and VANESSA STROMBERG**

Petitioners,

v.
MARK WEESE,

Respondent.

FILE COPY

PETITIONERS' BRIEF

Counsel for Petitioners Precision Pipeline, Jason Stromberg and Vanessa Stromberg

Cy A. Hill, Jr., Esq.
W. Va. State Bar # 8816
chill@c-wlaw.com
Allison M. Subacz, Esq.
W. Va. State Bar # 11378
asubacz@c-law.com
CIPRIANI & WERNER, P.C.
500 Lee Street E., Suite 900
Charleston, WV 25301
Phone: 304 341-0500
Fax: 304-341-0507

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ASSIGNMENT OF ERROR

1. The Circuit Court of Marshall County erred in denying Defendants'/Petitioners' worker's compensation immunity under West Virginia Code Section 23-2-6 in a case where Plaintiff sustained an injury in the course and scope of his employment.

STATEMENT OF THE CASE

On February 25, 2021, Mark Weese instituted a civil action by filing a Complaint in the Circuit Court of Marshall County, West Virginia designated Civil Action No. 21-C-9. (Appx. 000033-000041). On May 25, 2021, the Petitioners filed a Motion to Dismiss asserting that they are entitled to workers compensation immunity because Respondent was employed by Precision Pipeline and received an on-the-job-injury. (Appx. 000021-000023).

For the purposes of this appeal, the facts in the Complaint are not disputed. On April 12, 2019, Mark Weese was working in Marshall County, West Virginia at a Precision Pipeline, LLC pipeline construction projection. *See* Compl. at ¶ 7. (Appx. 000034). Respondent alleges that he sustained injuries to his left leg while moving a fuel hose while working in the course and scope of his employment. (*Id.*) Assistance was called and the onsite Emergency Medical Technician Vanessa Stromberg arrived at the site. (*Id.*) Respondent alleges that Mrs. Stromberg did not provide any actual medical assistance or intervention on site. (*Id.*). He also alleges that Mrs. Stromberg is not a licensed Emergency Medical Technician. (*Id.*). Respondent alleges that no ambulance or outside medical assistance was called for and he was loaded into a pickup truck for transportation to seek medical treatment. (*Id.*).

Respondent alleges that West Virginia law required Petitioners to transport Respondent to the nearest medical facility. (Appx. 000035). However, Respondent alleges that he was not transported to the nearest medical facility; rather, he was taken to the Precision Pipeline

Yard/Office in McMechen, West Virginia. (*Id.*). Respondent was then loaded into another pickup truck and taken to MedExpress. (*Id.*). Respondent alleges that Precision Pipeline employees received monetary bonuses based in part on workplace safety and limiting reportable workplace injuries. (*Id.*). Because he was not taken to the hospital, Respondent alleges that the Petitioners conspired to provide the bare minimum emergency response to Mr. Weese to ensure that the bonuses were not affected. (*Id.*).

Since his injury occurred in the workplace, Respondent received workers compensation benefits and worked with a Workers Compensation Case Manager. (*Id.*). Respondent alleges that he broke his ankle and tore his Achilles tendon. (Appx. 000036). Respondent has asserted the torts of negligent hiring, retention, and supervision, vicarious liability, and negligence against Precision Pipeline and the tort of negligence against fellow Precision Pipeline employees, Jason Stromberg and Vanessa Stromberg. (*Id.*).

On May 25, 2021, Petitioners Precision Pipeline. LLC, Jason Stromberg, and Vanessa Stromberg filed their Motion to Dismiss and Memorandum of Law in Support for Their Motion to Dismiss. (Appx. 000021-000041) arguing that they are entitled to workers compensation immunity as Respondent's injuries occurred during the course and scope of his employment and he received workers' compensation benefits.

On September 17, 2021, Judge Hummel entered an Order Denying the Petitioners Motion to Dismiss. The Court determined that the parties should be given further opportunity for discovery to develop the facts as well as exactly what causes of actions are being asserted. (Appx. 000001-000004). Therefore, Petitioners filed the instant appeal of the Circuit Court's Order.

SUMMARY OF ARGUMENT

In the action below, the Circuit Court was tasked with determining whether the Petitioners were entitled to workers compensation immunity under West Virginia Code § 23-2-6. The Respondent wishes to sidestep workers compensation immunity and pursue negligence claims against his employer and co-workers as the result of an injury indisputably received in the course and scope of his employment and covered by worker's compensation. No matter how the Respondent wishes to cleverly disguise his case, the Petitioners are entitled to workers compensation immunity under W.Va. Code § 23-2-6 unless the Respondent can prove a deliberate intent case, which was not plead here. The Respondent has not plead any other viable exception to workers compensation immunity. It is clear that the Petitioners are entitled to workers compensation immunity under W.Va. Code § 23-2-6. Therefore, this Court should reverse the Circuit Court's judgment.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioners state that oral argument is necessary pursuant to the criteria in Rule 18(a). Further, the Petitioners contend that his case is appropriate for Rule 19 argument because it concerns a narrow issue of law. Finally, the Petitioners state that this case is appropriate for a memorandum decision.

ARGUMENT

A. Standard of Review

As a general proposition, the Supreme Court reviews a circuit court's rulings on a motion to dismiss under a *de novo* standard. Syl. pt. 4, in part, Ewing v. Bd. of Educ. of Cty. of Summers, 202 W. Va. 228, 503 S.E.2d 541 (1998). Furthermore, "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff [], and its allegations are to be

taken as true.” West Virginia Board of Education v. Marple, 236 W. Va. 654, 660, 783 S.E.2d 75, 81 (2015) (quotations and citation omitted). “[D]ismissal for failure to state a claim is only proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint.” Id. (citation omitted). However, a plaintiff’s complaint must, “at a minimum[,] ... set forth sufficient information to outline the elements of his [or her] claim,” and, “in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff.” Id. (quotations and citations omitted).

B. The Circuit Court of Marshall County erred by denying the Petitioners/Defendants workers compensation immunity in a case involving on-the-job injuries.

The Petitioners are entitled to workers compensation immunity pursuant to W.Va. Code § 23-2-6 as the Respondent was indisputably injured in the course and scope of his employment and has received worker’s compensation benefits for his injuries. When an employer pays Workers’ Compensation premiums and complies with all other requirements of the Workers’ Compensation Act, the employer is entitled to immunity for any injury to an employee, however occurring, and shall not be liable to respond in damages at common law or by statute. W.Va. Code § 23–2–6.

This Code provision provides, in relevant part:

Any employer subject to this chapter who subscribes and pays into the workers’ compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after so subscribing or electing, and during any period in which the employer is not in default in the payment of the premiums or direct payments and has complied fully with all other provisions of this chapter.

W.Va. Code § 23–2–6 (emphasis added).

As fellow employees, Jason and Vanessa Stromberg, are also entitled to worker’s compensation immunity by virtue of W.Va. Code § 23–2–6a. This provision states, “The

immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.”

In Syl. Pt. 2 of Bias v. Eastern Associated Coal Corp., 220 W.Va. 190, 640 S.E.2d 540 (2006) the Court held that an employer who is otherwise entitled to the immunity provided by W. Va. Code § 23-2-6 (1991) may lose that immunity in only one of three ways: (1) by defaulting in payments required by the Workers' Compensation Act or otherwise failing to be in compliance with the Act; (2) by acting with "deliberate intention" to cause an employee's injury as set forth in W.Va. Code § 23-4-2(d); or (3) in such other circumstances where the Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system, i.e. employment discrimination claims under the Human Rights Act. *See e.g. Messer v. Huntington Anesthesia Group, Inc.*, 218 W. Va. 4, 620 S.E.2d 144 (2005).

The Legislature intended for W.Va. Code § 23-2-6 to provide qualifying employers sweeping immunity from common-law tort liability for negligently inflicted injuries. Bias, 220 W. Va. At 194; Gaus v. Consol. Inc., 294 F.Supp.2d 815 (2002) (“Under West Virginia law, right of injured employee to workmen's compensation has been substituted in lieu of her cause of action against negligent employer, and remedy of workers' compensation is exclusive remedy, except where employer acted with deliberate intention”).

The sole exception to the immunity provision in the Workers' Compensation statutes is discussed in West Virginia Code § 23–4–2 (2015), where the intent of the Legislature regarding employer liability is set forth as follows:

(d)(1) It is declared that enactment of this chapter and the establishment of the workers' compensation system in this chapter was and is intended to remove from the common law tort system *all disputes* between or among employers and employees regarding the compensation to be received for injury or death to an

employee except as expressly provided in this chapter and to establish a system which compensates even though the injury or death of an employee may be caused by his or her own fault or *the fault of a co-employee*; that the immunity established in sections six and six-a, article two of this chapter is an essential aspect of this workers' compensation system; that the intent of the Legislature in providing immunity from common lawsuit was and is to protect those immunized from litigation outside the workers' compensation system. . . .

(emphasis added).

This Court stated in State ex rel. City of Martinsburg v. Sanders, that “[t]he immunity from liability afforded all employers . . . participating in the Workers' Compensation system through West Virginia Code § 23–2–6 protects employers against awards of . . . damages based on common law tort theories.” 219 W.Va. 228, 234, 632 S.E.2d 914, 920 (2006). Further, this Court clarified O’Dell v. Town of Gauley Bridge, that workers compensation immunity applies “for all damages arising from a tortious injury” and “not merely for those compensated by workers compensation.” 188 W.Va. 596, 610, 425 S.E.2d 551, 565 (1992)

In the case at hand, the Circuit Court’s Order denying the Motion to Dismiss does not analyze or explain how Respondent can maintain negligence causes of action against his employer stemming from injuries indisputably sustained in the course and scope of his employment. However, the purpose of the workers compensation immunity is to prevent common law causes of action, such as a negligent hiring and supervision claim, against a person’s employer or co-workers. Respondent claims that his co-worker Petitioners’ actions caused or exacerbated his ultimate injury. The parties do not need to conduct discovery to confirm that Respondent’s injury occurred in the course and scope of his employment and that he received workers compensation benefits for those injuries. It is also undisputed that Respondent and Petitioners, Jason Stromberg and Vanessa Stromberg, were all employees of Precision Pipeline and acting within the course and scope of their employment at the time of Respondent’s injuries and events that allegedly followed.

As the Respondent's injuries were received in the course and scope of his employment and Respondent failed to plead any viable exception to workers' compensation immunity, the Circuit Court of Marshall County erred in denying the Petitioners' workers compensation immunity under W.Va. Code § 23-2-6 and well-established West Virginia case law on this point

CONCLUSION

For the foregoing reasons, the Circuit Court erred in denying the Petitioners' Motion to Dismiss. As evidenced above, the Petitioners are entitled to workers compensation immunity from Respondent's Complaint pursuant to W.Va. Code § 23-2-6. Accordingly, this Court should reverse the decision of the Circuit Court and grant the Petitioners Precision Pipeline, Jason Stromberg, and Vanessa Stromberg's Motion to Dismiss.

Respectfully submitted,

**PETITIONERS PRECISION PIPELINE, JASON
STROMBERG and VANESSA STROMBERG
By Counsel**



Cy A. Hill, Jr. (WV State Bar: 8816)
Allison M. Subacz (WV State Bar: 11378)
Cipriani & Werner, P.C.
Laidley Tower
500 Lee Street E., Suite 900
Charleston, WV 25301
(304) 341-0500
(304) 341-0507 (fax)
chill@c-wlaw.com
asubacz@c-wlaw.com

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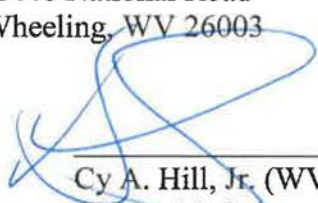
MARK WEESE,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2022, true and accurate copies of the foregoing Petitioners' Brief was served via electronic mail and United States Mail in a postage-paid envelope addressed to the following:

Teresa C. Toriseva, Esq.
Joshua D. Miller, Esq.
Michael A. Kuhn, Esq.
TORISEVA LAW
1446 National Road
Wheeling, WV 26003



Cy A. Hill, Jr. (WV State Bar: 8816)
Allison M. Subacz (WV State Bar: 11378)
Cipriani & Werner, P.C.
Laidley Tower
500 Lee Street East Suite 900
Charleston, WV 25301
(304) 341-0500
(304) 341-0507 (fax)