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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.

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PETITIONERS' REPLY BRIEF

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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

Petitioners incorporates their Statement of Case and Summary of Argument as if more fully set forth in herein. Petitioners would note that Respondent substantially agree with the issues and there is no dispute as to the facts of this case.

ARGUMENT

A. Petitioners' Appeal is Proper under the Collateral Order Doctrine

Respondent argues that the Court should deny this Appeal as it is not the final order. He argues that W.Va. Code § 58-5-1 requires an Order must be final in order for it to be appealable. However, Respondent has already made this exact argument in its Motion to Dismiss filed on November 1, 2021. This motion was fully briefed by the parties. This Court entered an Order Denying the Motion to Dismiss on January 18, 2022. As such, Respondent's argument that this appeal should be dismissed as moot.

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

Respondent argues that the workplace injury is not why he sued, but rather because the negligence of his employer after the injury occurred, which allegedly caused additional damages. However, Respondent's argument is ineffectual as workers compensation benefits frequently can and do cover subsequent aggravation to original injuries.

In determining whether subsequent aggravation is subject to workers compensation benefits, this Court has held that “[i]f a worker's compensation claimant shows that he received an initial injury which arose out of and in the course of his employment, then every normal consequence that flows from the injury likewise arises out of the employment.” Wilson v. Workers' Comp. Com'r, 174 W. Va. 611, 612, 328 S.E.2d 485, 486 (1984).

It is logical that normal consequences that flow from the initial injury would include treatment for said injury, whether it be treatment by a co-worker or by a medical professional. Furthermore, receipt of workers compensation benefits would not typically start until a few weeks following the initial injury and treatment of said injury. In fact, Respondent admits in his response brief that, three to four weeks following the injury while working with a workers compensation case manager, he received additional treatment for his ankle. *See Response Brief*, at pp. 6-7. Furthermore, there is no way to separate Respondent's initial injury from the alleged additional injuries claimed to have been caused by Petitioners.

Because there is no dispute that Respondent received workers compensation benefits from the time period immediately following the injury forward, 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. There is no applicable exception to the workers compensation immunity.

Furthermore, in his Response, Respondent attempts to further circumvent workers compensation immunity by arguing that if Petitioners' claim of Negligent Hiring, Retention, and Supervision, is barred by worker's compensation immunity then “corporations and employers could hire anyone for any position and be protected from liability when negligently hired employee causes injury to the public would have no recourse if injured by that employee.” *See Response*

Brief at p. 12. However, Plaintiff's argument is entirely inaccurate and ignores entire bodies of law regarding workers compensation, deliberate intent, and negligent hiring, retention and supervision. He is grasping at straws in an attempt to overcome workers compensation immunity.

Respondent does not cite to a single case to support his argument that his negligent supervision and training claims fall outside of workers compensation immunity. Further, Petitioners are not aware of any case law that stands for proposition that an injured employee who has received workers compensation benefits can maintain suit for negligent retention, supervision, and training. The reason no such reported cases exist is that it is well-known that employers are immune from negligence suits. If a person is injured while working in the course and scope of his employment by another employee, then that person can receive workers compensation benefits, and under the proper circumstances, could file a deliberate intent claim. If a person is not working within the course and scope of his employment and is injured by an employee, then that person is able to maintain a lawsuit for negligent retention, supervision, and training as workers compensation benefits are likely not available in that scenario.

Respondent further argues that his negligence claim survives because "the Defendants acted contrary to this safety plan for fear it would affect safety bonuses." *See* Response at pp. 8-9. He then argues that, "Plaintiff can show that Defendants acted contrary to his interests and personal safety and therefore *contributed to* the severity of his injuries and subsequent suffering." *Id.* (emphasis added).

Regardless of Respondent's allegations regarding this alleged safety bonus issue, it is clear that Plaintiff was injured in the course and scope of his employment. He alleges that the individually named Defendants' actions contributed to his injuries while also acting within the course and scope of their employment. However, the Defendants' alleged motives do not remove

workers compensation immunity from negligence claims. West Virginia law is clear that workers compensation immunity may only be lost under three circumstances:

(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.

Bias v. Eastern Associated Coal Corp., 220 W.Va. 190, 640 S.E.2d 540 (2006)

Petitioners are not aware of any case law or statutes that removes workers compensation immunity from lawsuits alleging negligent hiring, supervision, and training. Indeed, as discussed above, Respondent was unable to cite to any such cases in his response.

The Legislature intended for W.Va. Code § 23-2-6 to provide 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 West Virginia Supreme Court clearly held the breadth of the immunity provided under the statute includes any injury or death of an employee "however occurring" while at work. Bias, 220 W.Va. at 194, 544.

Respondent attempts to mix various elements of deliberate intent law and his negligence claims in order to avoid workers compensation immunity. *Response Brief*, at pp. 4- 7. However, in his Complaint, he fails to plead any viable exception to worker's compensation immunity under Bias, Petitioners are entitled to immunity from Respondent's Complaint pursuant to W.Va. Code § 23-2-6. To the extent, the Plaintiff has only pled negligence claim against the Defendants, they are entitled to worker's compensation immunity. Similarly, because Defendants are entitled

worker's compensation immunity from the negligence claims, Plaintiff's claim for punitive damages fails as a matter of law.

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
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2022, true and accurate copies of the foregoing "Petitioners' Reply Brief" were served via United States Mail in a postage-paid envelope addressed to the following:

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