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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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

PRECISION PIPELINE, JASON STROMBERG, and VANESSA STROMGBERG,

Petitioners,

v.

MARK WEESE,

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Respondent.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

On the 12th day of April 2019, Respondent Mark Weese was working in Marshall County, West Virginia at a Precision Pipeline LLC pipeline construction project engaged in the construction of the Rover Pipeline. (R.A. 002 at ¶ 7). While in the course and scope of his employment, Respondent severely injured his left leg while dragging a fuel hose. (R.A. 002 at ¶ 8). Witnessing his injury, an unidentified laborer and bulldozer operator on site called for assistance. (R.A. 002 at ¶ 10). Site Emergency Medical Technician, Vanessa Stromberg arrived at the site of Respondent's injury. (*Id.*). Ms. Stromberg provided no actual medical assistance of intervention on site. (R.A. 002 at ¶ 11). Ms. Stromberg is not a licensed Emergency Medical Technician. (R.A. 002 at ¶ 12). No ambulance or outside medical assistance was called for Respondent and instead, he was loaded into a pickup truck for transportation to a medical facility. (R.A. 002 at ¶ 14). He was not transported directly to the hospital, instead he was taken to the precision pipeline yard, transferred to another pickup truck and driven to MedExpress instead of the nearest hospital as dictated by the site safety plan. (R.A. 003 at ¶ 15-18).

II. SUMMARY OF ARGUMENT

The Petitioners' lone assignment of error is that the Circuit Court of Marshall County erred in denying Petitioners' worker's compensation immunity under West Virginia Code § 23-2-6 in a case where Respondent suffered an injury in the course and scope of his employment. The Petitioners' assignment of error has no merit.

The Petitioners' repeatedly claim workers compensation immunity. The Respondent has not disputed or argued that his injury occurred at work in the course and scope of his employment. But that workplace injury is not why he sued. He sued because the negligence of the employer

after the injury occurred caused additional damages to Mr. Weese over and above his workplace injury. That negligence is not covered by workers compensation.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case should be granted oral argument pursuant to W.Va. R.A.P., Rule 18(a). Oral argument is necessary as the facts and legal arguments could be more adequately presented at oral argument and the decisional process would be significantly aided by oral argument.

IV. ARGUMENT

Prior to Petitioners filing this Appeal, Petitioner's filed a Writ of Prohibition to be directed against the trial judge in this matter. On January 13, 2022, the Supreme Court of Appeals denied the Writ. Respondent's Response to the Writ contained many arguments that apply in the instant appeal. As such, some of these arguments may be repetitive.

A. THE COURT SHOULD DENY PETITIONERS' APPEAL AS ORDERS DENYING MOTIONS TO DISMISS ARE INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE

West Virginia Code § 58-5-1 establishes the standard for filing an appeal:

> "Any party to a civil action may appeal to the Supreme Court of Appeals from a **final judgment** of any circuit court or from an order of any circuit court constituting a **final judgment** as to one or more but fewer than all claims or parties upon an **express determination by the circuit court that there is no just reason for delay** and upon an express direction for the entry of judgment as to such claims or parties". Emphasis added.

The order that Petitioner seeks to have reviewed by the West Virginia Supreme Court of Appeals is not a final order. Therefore, it is not appealable to this Court. For an Order to be appealable, it must be final. (A statutory right to appeal arises in a civil case following the entry of a final judgment, decree or order.) *Durm v. Heck's*, 184 W.Va. 562, 564, 401 S.E.2d 908, 910 (1991) citing W.Va. Code § 58-5-1(a) (1996). (Appeals only may be taken from final decisions of

a circuit court. 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 execution of what has been determined.) *Sipp v. Yeager*, 194 W.Va. 66, 67, 459 S.E.2d 343, 344 (1995).

A Circuit Court's Order denying a motion to dismiss for failure to state a claim are interlocutory and not immediately appealable. See *Syl. Pt. 2, State ex rel. Arrow Concrete Co. v. Hill,* 194 W.Va. S.E.2d 54 (1995). ("Ordinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to subdivision (b)(6) of this rule is interlocutory and is, therefore, not immediately appealable.") *Hutchinson v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996). ("Ordinarily, the supreme court of appeals will not entertain nor discuss a denial of a motion for failure to state a claim under subdivision (b)(6) because such an order is interlocutory in nature.") Nevertheless, it is possible, as is evidenced by the case sub judice, for a party, whose Rule 12(b)(6) motion was denied by the circuit court, to ultimately raise this issue on appeal, not as an interlocutory order but as part of the final judgment underlying his/her appeal. Thus, "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." *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998) citing Syl. pt. 4 *Ewing v. Bd. of Educ.*, 202 W. Va. 228, 503 S.E.2d 541 (1998). Further, it must always be remembered "the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted." *Mandolidis v. Elkins Indus.*, 161 W. Va. 695, 697, 246 S.E.2d 907, 909 (1978).

Here, the Petitioner filed a motion to dismiss under W.Va. Rules of Civil Procedure Rule 12(b)(6).The circuit court denied that motion. That decision is not a final judgment, but an interlocutory one. After discovery, the Petitioner can file a motion for summary judgment on any

and all issues developed during discovery[1]. There is no reason to make an exception here when none applies.

B. THE CIRCUIT COURT OF MARSHALL COUNTY DID NOT ERR BY DENYING THE PETITIONERS' WORKERS COMPENSATION IMMUNITY IN THIS MATTER

At the outset, it is important to note that because this action is at the Motion to Dismiss stage, "[c]omplaints are to be read liberally[.]" To that end, "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true." *State ex rel. Raven Crest Contracting. LLC v. Thompson,* 240 W.Va. 8, 12 (2017). The Respondent acknowledges that his injury occurred in the course and scope of his employment. (R.A. 002 at ¶ 8). Respondent's complaint intentionally omitted any reference to *Bias v. Eastern Associated Coal Corp.,* 220 W.Va. 190, 640 S.E.2d 540 (2006) as Respondent is not attempting to defeat workers compensation immunity as provided by W.Va. Code § 23-2-6. Respondent's claims are simple, Precision Pipeline hired, retained, and supervised emergency medical personnel that were not qualified to provide emergency medical care - this is negligence of a kind not contemplated by W.Va. Code § 23-2-6 and § 23-2-6A, and the Petitioners failed to properly care for the Respondent *after* his workplace injury.

All employer conduct cannot be explained away or dispensed with under the guise of workers compensation immunity. Consider *Mandolidis v. Elkins Industries, Inc.,* 161 W.Va. 695, 246 S.E.2d 907 (1978) where the Supreme Court of Appeals of West Virginia held that an employer loses immunity from common law actions where such employer's conduct constitutes an intentional tort or willful, wanton, and reckless misconduct. *Mandolidis* still provided protection

[1] The Circuit Court specifically stated this in its Order denying the Motion to Dismiss when it stated "it is the Court's position that the parties should be given further opportunity for discovery to develop the facts as well as exactly what causes of action are being asserted herein. When discovery has produced such facts, Defendant may reach the same issues by way of a Motion for Summary Judgment." (P.A. 004 at ¶ 2).

for employers except this protection diminished when one could prove reckless misconduct by establishing a "test" as to reckless misconduct:

> Although liability is not simply a function of the degree of the risk created by the conduct without regard to the social utility of such conduct, the degree of the risk of physical harm necessary for a finding of reckless misconduct is greater than that which is necessary to make the conduct negligent. Liability will require "a strong probability that harm may result." *Id.*

Petitioners were aware of a "strong probability that harm may result," when they retained, hired, and supervised an Emergency Medical Technician who was unqualified for that position. Petitioners were aware of a "strong probability that harm may result," when they ignored previously established safety plans and took it upon themselves to take the Respondent, not to the nearest hospital, but to the Precision Pipeline "yard" where they transferred him to a second pickup truck to be taken to MedExpress. (R.A. 003 at ¶ 15-18). Mr. Weese should have immediately been transported to a hospital, an ambulance should have been called, or aid should have been provided by a qualified emergency medical technician employed by the Petitioner. This is the negligence the Respondent seeks redress for in Circuit Court, not the injury itself. The injury itself is covered by workers compensation.

It is well-known that *Mandolidis* has been superseded by statute.[2] But the statute that superseded *Mandolidis* can still guide the Court. The immunity from suit provided under this section and under sections six and six-a, article two of this chapter may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:

> (A) It is proved that the employer or person against whom liability is asserted acted with a consciously, subjectively, and deliberately formed intention to produce the specific

[2] The Respondent here asks the Court to be mindful the claims asserted are not for the injury sustained during work, but for the conduct of the employer that that did not cause the injury, but aggravated his injury and made his suffering, aggravation, and healing much worse.

result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of: (i) Conduct which produces a result that was not specifically intended; (ii) conduct which constitutes negligence, no matter how gross or aggravated; or (iii) willful, wanton or reckless misconduct; or

(B) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(i) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(ii) That the employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by the specific unsafe working condition.

W. Va. Code § 23-4-2.

Here, to the extent that if this Court finds Respondent's claims fall under the immunity provided by the Workers' Compensation statute, the Petitioners should lose that immunity because not providing an emergency medical technician on a drilling well-pad created a specific unsafe working condition. Further, the employer knew this unsafe working condition existed. The employer knew its employee, Vanessa Stromberg, who was designated as an Emergency Medical Technician, was not a licensed medical technician. Further, the employer knew that not providing immediate medical care to an injured worker would create the probability of serious injury or death. The immunity is lost, at least at the motion to dismiss stage, until the facts are developed in discovery that may support the employer's position that it is immune. This Appeal should be denied.

Instead of being transported to the nearest hospital where the Respondent could have received a full examination, he was taken to MedExpress. (R.A. 003 at ¶ 21-22). The Respondent, working with a workers compensation case manager was not seen in a hospital for approximately 3-4 weeks

after his injury. (R.A. 003 at ¶ 24). Once Respondent was seen at an appropriate medical care facility, licensed medical care professionals determined he had suffered a broken ankle. (R.A. 004 at ¶ 25). An MRI was also performed on the Respondent. That standard diagnostic test indicated Respondent tore his Achilles tendon in the workplace incident as well. (R.A. 004 at ¶ 26).

Respondent has been unable to return to work and will never work again. As a direct result of the negligence of Precision Pipeline in seeking acute medical care for Respondent, his ability to walk has been affected. (R.A. 004 at ¶ 27). Further because of the lack of competent immediate medical care, his leg, foot, and ankle are permanently damaged in such a way that he is prone to further leg injury. (*Id.*). For example, the same leg has broken again simply when walking down a flight of stairs. (*Id.*). Had the Respondent been provided competent and timely medical care, his injuries would have been properly diagnosed and treated. (R.A. 004 at ¶ 29). Respondent brings his negligence claims against the Petitioners not for the workplace injury but for the negligence after the injury when his employer and their employees failed to render or obtain proper medical care.

The Respondent further makes a claim for punitive damages as the actions and inactions of the Petitioners were malicious, oppressive, wanton, willful and reckless with indifference to civil obligations owed the Respondent. These claims are not subject to the workers compensation immunity asserted by the Petitioners.

The Respondent and all others working on the Rover Pipeline in Marshall County with and for the Petitioners believed that if injured they would receive proper care. They were told that Respondent Vanessa Stromberg was an Emergency Medical Technician. (R.A. 002 at ¶ 10-12). Vanessa Stromberg was not an Emergency Medical Technician, yet she was negligently hired and retained as such. Precision Pipeline hired Vanessa Stromberg as a Site Emergency Medical

Technician. (*Id*). Upon information and belief, Vanessa Stromberg is not a licensed Emergency Medical Technician. (*Id.*). Respondent believes Jason Stromberg secured Vanessa Stromberg's position as an EMT because she is his wife. (R.A. 005 at ¶ 37). Respondent can satisfy all elements of his claim that the Petitioners negligently hired, retained, and supervised Vanessa Stromberg.

Petitioner Precision Pipeline possessed a duty to use reasonable care in the selection and retention of its respective employees. (R.A. 005 at ¶ 34). Petitioner, Precision Pipeline Inc. knew or should have known that a failure to carefully select (through hiring), retain, and supervise employees hired as emergency medical technicians would increase the risk of harm to all workers at Precision Pipeline Inc. jobsites. (R.A. 005 at ¶ 35).

The Petitioners' argue that 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). If, as Petitioners argue, Respondent's claim of Negligent Hiring, Retention, and Supervision is barred by workers 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.

The full extent of the Petitioners' culpability will be demonstrated through the discovery process. Respondent's verified Complaint advances the theory that the substandard and negligent care he received the day of his injury was related to the Petitioners' desire to maintain safety bonuses and incentives. Instead of working to ensure that Respondent received adequate and appropriate medical care, the Petitioners acted only to protect their safety bonuses. (R.A. 007 at ¶ 51). West Virginia Code § 21-3-1 requires: "Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged....and shall adopt and use methods and

processes reasonably adequate to render employment and the place of employment safe and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employee." The Petitioners had a safety plan in place. This plan required injured workers to be taken to the nearest hospital. In the instant case, the Respondent was driven PAST the nearest hospital only to be transferred to another pickup truck and taken to MedExpress. (R.A. 003 at ¶ 22). The Petitioners owed the Respondent a duty of care to ensure that his workplace injuries were treated quickly and competently. The Petitioner breached this duty by playing fast and loose with Respondent's medical care.

Further, workers on the pipeline were told there was a safety plan in place that would get them to the nearest hospital. (R.A. 0053 at ¶ 15-17). However, when the Respondent was injured, the Defendant acted contrary to this safety plan for fear it would affect safety bonuses. Through discovery, 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.

It is well-held "[f]or purposes of the motion to dismiss, the complaint is construed *in the light most favorable to the Respondent,* and its allegations are to be taken as true." *Raven Crest Contracting* at 8. It is also well-held that 12(b)(6) Motions to Dismiss are generally looked upon with disfavor. *Mandolidis,* 246 S.E.2d at 907. For this reason alone, the Petitioners' Motion to Dismiss should have been denied at the Circuit Court level and therefore, this Appeal must also be denied.

V. CONCLUSION

The Petitioners' Appeal is premature as they seek to overturn an interlocutory Order and not a final Order. The Respondent has not sought to overcome workers compensation immunity despite the assertions of the Petitioners. The actions and inactions which are the subject of the Respondent's Complaint occurred separate and apart from his workplace injury. Respondent brought his claims pursuant to actions and inactions of the Petitioners BEFORE and AFTER his injury. The Petitioners cannot hide behind claims of workers compensation immunity. Respondent's complaint has plead facts sufficient to survive Petitioners' Motion to Dismiss and this appeal. Petitioners' Appeal must be denied.

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CERTIFICATE OF SERVICE

I, do hereby certify that on the 7th day of March, 2022, I served the foregoing Respondents Brief upon the Petitioners' at the following address:

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