

APPEAL NO. 33907

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANTIONETTE FALLS,

Appellant,

v.

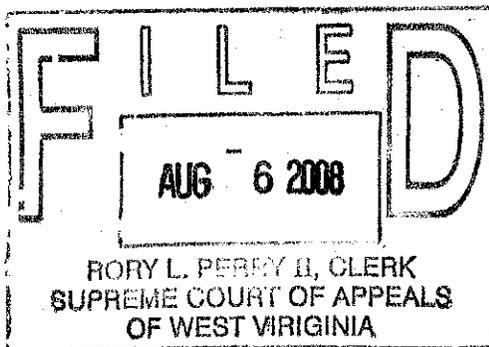
APPEAL NO. 33907

UNION DRILLING, INC., a Delaware corporation,
KEVIN WRIGHT, DONALD ROACH, LINDA HALL,
and W. VA. INSURANCE COMPANY,

Appellees.

FROM THE:
CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA,
CIVIL ACTION NO. 06-C-613

APPELLEES DONALD ROACH'S APPEAL BRIEF



APPELLEE DONALD ROACH,

By Counsel:

Charles R. Bailey, Esq. (WV Bar No. 0202)
Ryan J. Flanigan, Esq. (WV Bar No. 9059)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
Telephone: (304) 345-4222

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS 4

III. PROCEDURAL HISTORY 5

IV. THE STANDARD FOR A MOTION TO DISMISS 8

V. ARGUMENT 9

A. The Circuit Court correctly granted Donald Roach’s Motion to Dismiss pursuant to Rules 12(b)(6) of the West Virginia Rules of Civil Procedure because the Appellant’s Complaint alleged that Daniel Falls injuries were do to work-related negligence, which clearly placed him within the scope of his employment, entitling the Donald Roach immunity from suit under the West Virginia Workers’ Compensation Act.9

B. The Appellant’s assertions in her Appeal Brief that the Circuit Court’s June 21, 2007, Order was in error because the Appellees’ actions fall into the “going to or coming from work”exception to the immunity provided under the West Virginia Workers’ Compensation Act is irrelevant.16

C. The Appellant’s assertions in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order by not considering that an employer may be liable for injuries caused by an over-fatigued employee if the employer could have reasonably foreseen that the employee would pose a risk of harm to others under Robertson v. LeMaster is irrelevant; the Circuit Court did not need to make such consideration because the Appellees were immune from liability under the Workers’ Compensation Act and the Robertson reasoning does not apply.18

D. The Appellant’s assertions in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order in its application of the *Respondent superior* doctrine in a tort context with the requirement that Workers’ Compensation immunity is only triggered if the injuries “result from” and occur “in the course of” the injured person’s employment, is irrelevant; the Circuit Court did not need to make such consideration because the Appellees were immune from liability under the Workers’ Compensation Act.20

E. The Appellant’s assertions in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order by misinterpreting and somehow expanding this Court’s decisions in Bias v. Eastern Associated Coal Corp., and State ex rel Darling v. McGraw, is completely unfounded.21

F. The Appellant’s assertions in her Appeal Brief that the Circuit Court’s June 21, 2007, Order creates an unnecessary constitutional confrontation between the Appellant’s right to a certain remedy and jury trial and the immunity of the Workers’ Compensation immunity is unfounded because the Appellant has a remedy by due course of law through the Workers’ Compensation Act.23

G. The Appellant’s assertions in her Appeal Brief that the Circuit Court’s June 21, 2007, Order violates the public policy of the State of West Virginia is unfounded because the Appellant’s Complaint could not support a cause of action against Donald Roach, as he was entitled to immunity from suit under the West Virginia Workers’ Compensation Act.24

VI. CONCLUSION25

TABLE OF AUTHORITIES

STATE CASES

<u>Bias v. Eastern Associated Coal Corp.</u> , 220 W. Va. 190, 640 S.E.2d 540 (2006)	10, 21, 23, 24
<u>Collia v. McJunkin</u> , 178 W.Va. 158, 358 S.E.2d 242 (1987)	8, 9, 12
<u>Courtless v. Jolliffe</u> , 203 W. Va. 258, 507 S.E.2d 136 (1998)	15
<u>Cox v. United States Coal & Coke Co.</u> , 80 W. Va. 295, 92 S.E. 559 (1917)	19
<u>Dimon v. Mansey</u> , 177 W.Va. 50, 52, 479 S.E.2d 339 (1996)	8
<u>Fass v. Nowsco Well Services, Ltd.</u> , 177 W. Va. 50, 350 S.E.2d 562, 564 (1986)	9
<u>Gallapoo v. WalMart Stores</u> , 197 W. Va. 172, 475 S.E.2d 172 (1996)	8, 9, 12
<u>Harrison v. Davis</u> , 197 W.Va. 651, 478 S.E.2d 104 (1996)	8
<u>Holbrook v. Holbrook</u> , 196 W. Va. 720, 474 S.E.2d 900 (1996)	18
<u>Javins v. Workers' Compensation Commission</u> , 173 W. Va. 747, 320 S.E.2d 119 (1984)	24
<u>John W. Lodge Distrib. Co. v. Texaco, Inc.</u> , 161 W. Va. 603, 245 S.E.2d 157 (1978)	8
<u>Mandolitis v. Elkins Industries, Inc.</u> , 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)	8, 9, 12
<u>Proudfoot v. Proudfoot</u> , 214 W. Va. 841, 591 S.E.2d 767 (2003)	17
<u>Robertson v. LeMaster</u> , 171 W. Va. 607, 301 S.E.2d 563 (1983)	18, 19
<u>Standley v. Johnson</u> , 276 So.2d 77 (1973)	15, 16
<u>State ex rel Darling v. McGraw</u> , 194 W. Va. 770, 461 S.E.2d 516 (1995)	21, 22, 23, 24
<u>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</u> , 194 W.Va. 770, 461 S.E.2d 516 (1995)	8

STATE RULES

Rule 12(b)(6) of the <u>West Virginia Rules of Civil Procedure</u>	5, 6, 7, 8, 9, 12, 16, 17, 18, 21
--	-----------------------------------

STATE STATUTES

West Virginia Code Section 23-4-2 2

West Virginia Code Section 23-2-6 5, 7, 10, 11, 22

West Virginia Code Section 23-2-6A 6, 10

West Virginia Code Section 23-4-2(d) 7, 11, 22

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANTIONETTE FALLS,

Appellant,

v.

APPEAL NO. 33907

UNION DRILLING, INC., a Delaware corporation,
KEVIN WRIGHT, DONALD ROACH, LINDA HALL,
and W. VA. INSURANCE COMPANY,

Appellees.

FROM THE:
CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA,
CIVIL ACTION NO. 06-C-613

APPELLEES DONALD ROACH'S APPEAL BRIEF

I. INTRODUCTION

The Appellant filed a common law negligence claim against the Appellees which the Circuit Court of Harrison County dismissed by its Order of June 21, 2007, (the subject of this appeal) because the Appellees were immune from liability under the West Virginia Workers' Compensation Act.¹ *Record* (hereinafter "R") 1-8. Prior to filing the Complaint, the Appellant settled with Linda Hall's insurance company for policy limits and agreed to release the Appellees Linda Hall and

¹Donald Roach filed a Motion to Dismiss on April 17, 2007, thereafter, Union Drilling, Inc., and Kevin Wright filed a Motion to Dismiss. *R* 15-20; *R* 43-52. Both Motion's argued that the Appellees were immune from liability under the West Virginia Workers' Compensation Act.

Donald Roach from all liability with the condition that the Appellant be permitted to sue Linda Hall and Donald Roach in name only. Linda Hall was Donald Roach's girlfriend and the owner of the automobile Donald Roach drove on the night of the accident.

After the Circuit Court's June 21, 2007, Order the Appellant requested leave from the Circuit Court to file an Amended Complaint asserting a "deliberate intent" claim pursuant to West Virginia Code Section 23-4-2, against the Appellees, which the Circuit Court granted. R 146-152. The Appellant's "deliberate intent" claim is still pending in the Circuit Court of Harrison County and has been stayed at the request of the Appellant pending this Court's decision. Clearly, the Appellant has a remedy in law, but nevertheless, the Appellant has proceeded with this appeal, apparently intending to assert a common law negligence claim and a "deliberate intent" claim against the Appellees despite the contradiction.

The Appellant appealed the Circuit Court's June 21, 2007, Order because the Circuit Court found that Daniel Falls was within the scope of his employment when he sustained injuries contributing to his death, thus, the immunity afforded under the Workers' Compensation Act applied. R79-80 & 81-85. The Appellant argues that Daniel Falls was not within the scope of his employment, an argument in which **we agree**; however, the Appellant's Complaint plead that Daniel Falls was within his scope of employment.

The Appellant's common law negligence Complaint stated that "the injuries suffered by Daniel Falls were caused by the *work-related negligence* of Union Drilling, Inc., and its employees, Kevin Wright and Donald Roach." R 1-8 (*emphases added*). Clearly, asserting that Daniel Falls was within the scope of his employment. The Appellant further stated that the actions and omissions of Donald Roach were within the scope of his employment and/or agency relationship, or his conduct

within the doctrine of *respondeat superior* with Union Drilling, Inc., being the principal and Donald Roach an agent of Union Drilling, Inc., at the time of the accident. *R 1-8*.

Based on the Appellant's Complaint, Donald Roach was acting within his scope of employment and as an agent of Union Drilling, Inc., at the time of the accident; thus, he was immune from liability for his negligent conduct under the West Virginia Workers' Compensation Act. These clear and logical findings, based on the Appellant's Complaint, are exactly what the Circuit Court of Harrison County found in its June 21, 2007, Order.

The Appellant would like to formulate the issue in this appeal as whether or not Donald Roach, Kevin Wright, and Union Drilling, Inc., can claim the blanket immunity of the West Virginia Workers' Compensation Act with regard to the wrongful death of a completely disconnected third party (Daniel Falls), allegedly stretching the Act's immunity to cover injuries to non-employees; however, this is not the issue on appeal.

The issue on appeal is whether the Circuit Court of Harrison County erred in its June 21, 2007, Order, granting Appellees' Motion to Dismiss, concluding that the Appellees, Union Drilling, Inc., Kevin Wright and Donald Roach were entitled to immunity for all claims brought by the Appellant pursuant to the Workers' Compensation Act because, as plead in the Appellant's Complaint, Daniel Falls' death occurred within the scope of his employment.

The Appellant's Appeal Brief alleges, for the first time, that the Daniel Falls was killed after leaving Union Drilling's work premises after his work shift had ended and, therefore, that his death did not (result from) and occur (in the course of) his employment. *See Appellant's Appeal Brief, pg. 7*. Accordingly, the Appellant alleges in her Appeal Brief that the Circuit Court erred in granting Donald Roach's Motion to Dismiss, because the decedent Daniel Falls and Donald Roach's actions

fall into the “going to or coming from work” exception to the immunity provided under the Workers’ Compensation Act; thus, immunity does not apply to Donald Roach and the Appellant has a common law negligence cause of action against Donald Roach. *Id.* The Appellant’s Complaint, however, alleged no such allegations and none were presented to the Circuit Court before it made its ruling on the Donald Roach’ Motion to Dismiss, until the Appellant’s Appeal Brief.

II. STATEMENT OF FACTS

The Appellant, by counsel, filed a Complaint in the Circuit Court of Harrison County, West Virginia, on December 16, 2006. *R 1-8.* The Appellant states in her Complaint that the deceased, Daniel Falls, was an employee of Union Drilling, Inc., and on February 4, 2005, was involved in an automobile accident resulting in his death. *R 1-8.* The deceased was a guest passenger of Donald Roach, who was driving the automobile involved in the accident and who fell asleep while driving, after working a 31-hour work shift along with the deceased. *R 1-8.* The automobile accident occurred on U. S. Route 250, a public highway, several miles from the job site. *See Appellant’s Appeal Brief, pg. 4.*

The Appellant alleged in her Complaint that the Appellees created an unsafe workplace and work environment, and allowed to exist unreasonable risk of harm to their employees and public, by routinely requiring Union Drilling, Inc.’s, employees, which the deceased and Donald Roach were, to regularly and consistently work excessive hours without adequate rest or sleep. *R 1-8.* The Appellant stated in her Complaint that, by acquiescing, encouraging, authorizing, and otherwise condoning the driving by Donald Roach, the Appellees joined and conspired to violate the common law, were grossly negligent, and violated the laws of the State of West Virginia; and it was foreseeable that such conduct would place others in jeopardy. *R 1-8.* The Appellant also stated in

her Complaint that without such conduct Donald Roach would not have had the means to end the life of Daniel Falls or the financial incentive to engage in such conduct and drive on the public highways. *R 1-8.*

The Appellant also stated in her Complaint that Donald Roach was the supervisor of the deceased, Daniel Falls, and was responsible for directing the activities of Daniel Falls, which included the number of hours and work performed by these employees. *R 1-8.* The Appellant further stated in her Complaint that the actions and omissions of Donald Roach were within the scope of his employment and/or agency relationship, or his conduct within the doctrine of *respondeat superior* with Union Drilling, Inc., being the principal and Donald Roach an agent of Union Drilling, Inc., at the time of the accident. *R 1-8.*

III. PROCEDURAL HISTORY

Donald Roach, by counsel, filed a Motion to Dismiss, arguing that the Appellant's Complaint must be dismissed, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, because Donald Roach, as stated in the Appellant's Complaint, was acting within the scope of his employment and as an agent of Union Drilling, Inc., at the time of the accident, and is immune from liability for his conduct under the West Virginia Workers' Compensation Act. *R 15-20.*

Donald Roach argued in his Motion to Dismiss that, pursuant to West Virginia Code Section 23-2-6, Union Drilling, Inc., cannot be liable for violation of common law negligence, no matter how gross or aggravated, conduct which was not specifically intended or willful, wanton, or reckless misconduct, which results in an employee's death, as alleged in the Appellant's Complaint. *R 15-20.* Donald Roach argued that such immunity applies to Union Drilling, Inc.'s employees, pursuant to

West Virginia Code Section 23-2-6A, which Donald Roach was at the time of the events alleged in Appellant's Complaint. *R 15-20*. Thus, Donald Roach is immune from liability.

Donald Roach argued that the Workers' Compensation immunity from suit can only be lost if the employee or person against whom liability is asserted acted with "deliberate intent;" however, the Appellant, in her Complaint, did not plead a "deliberate intent" cause of action to pierce the immunity provided to Donald Roach under the Workers' Compensation Act. *Id.*

Donald Roach argued in his Motion to Dismiss that the Appellant acknowledged in her Complaint that Donald Roach "was the supervisor of the deceased Daniel Falls and was responsible for directing the activities of Daniel Falls . . . which included the number of hours and work performed by these employees." *R 15-20; R 1-8*. The Appellant further states that the actions and omissions of Donald Roach were within the scope of his employment and/or agency relationship, or his conduct within the doctrine of *respondeat superior* with Union Drilling, Inc., being the principal, and Donald Roach an agent of Union Drilling, Inc., at the time of the accident. *R 15-20; R 1-8*.

Accordingly, Donald Roach was acting within the scope of his employment and as an agent of Union Drilling, Inc., at the time of the accident; thus, he is immune from liability for this negligent conduct under the West Virginia Workers' Compensation Act. *R 15-20*. Donald Roach further argued that since no cause of action exists against him, the Appellant's Complaint must be dismissed as to Donald Roach, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. *R 15-20*.

Accordingly, the Circuit Court, construing the Appellant's Complaint most favorable to the Appellant and assuming all allegations as true, granted Donald Roach's Motion to Dismiss. The

Circuit Court stated in its June 21, 2007, Order that Donald Roach, at all times relevant to this proceeding, was an employee of Union Drilling, Inc. *R 79-80 & R 81-85*. The Circuit Court found that, in her Complaint, the Appellant alleges the injuries suffered by Daniel Falls were caused by the work-related negligence of Donald Roach. *R 79-80 & R 81-85*. The Circuit Court found that, as alleged in Appellant's Complaint, the work-related negligence of Donald Roach, was the direct and proximate cause of Daniel Falls' fatal injuries. *R 79-80 & R 81-85*. The Circuit Court found that Appellant did not allege that Donald Roach violated West Virginia's "deliberate intent" statute, West Virginia Code Section 23-4-2(d). *R 79-80 & R 81-85*. The Circuit Court correctly found that, pursuant to West Virginia Code Section 23-2-6, Donald Roach was entitled to sweeping immunity from common law tort claims from negligently inflicted injuries because he was a Union Drilling, Inc. employee. *R 79-80 & R 81-85*.

The Circuit Court concluded that, because Donald Roach was entitled to immunity for all claims brought in the above-styled matter, the Appellant, individually and as administrator of the Estate of Daniel Falls, had failed to state a cause of action upon which relief could be granted. *R 79-80 & R 81-85*. Accordingly, the Circuit Court, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, found that Donald Roach must be dismissed from this civil action as a matter of law. *R 79-80 & R 81-85*.

The Appellant filed a Motion for Reconsideration arguing that the Circuit Court's June 21, 2007, Order was in error, *alleging for the first time* that the incident leading to the decedent's death did not occur "within the work zone" or "did not occur as a result of decedent's employment"; thus, the Workers' Compensation Act immunity did not apply. *R 86-89*. Additionally, the Appellant filed an Amended Complaint, asserting a "deliberate intent" claim against the Appellees. *R 90-95*.

The Circuit Court denied the Appellant's Motion for Reconsideration; however, the Circuit Court did grant the Appellant's motion to amend her Complaint, allowing the Appellant to assert a "deliberate intent" cause of action against the Appellees, which is still pending. *R 191-192; R 131-132; R 133-135; R 146-152.*

IV. THE STANDARD FOR REVIEW

The issue before the Court is whether the Circuit Court of Harrison County erred in granting Donald Roach's Motion to Dismiss, which dismissed the Appellant's Complaint, which alleged workplace negligence, pursuant to the immunity afforded to him, as an employee of Union Drilling, Inc., pursuant to the West Virginia Workers' Compensation Act.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." *Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). A motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. See *Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 303 (1987); *Mandolitis v. Elkins Industries, Inc.*, 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)(superseded in part by statute see *Gallapoo v. WalMart Stores*, 197 W. Va. 172, 475 S.E.2d 172 (1996)). A motion to dismiss enables a court to weed out unfounded suits. *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996). The primary purpose of a motion to dismiss is to seek a determination of whether the Appellant is entitled to offer evidence in support of the claims made in the complaint. *Dimon v. Mansey*, 177 W.Va. 50, 52, 479 S.E.2d 339 (1996). For purposes of the motion to dismiss, the complaint is construed in the light most favorable to Appellant, and its allegations are to be taken as true. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 245 S.E.2d 157 (1978).

Although a motion to dismiss for failure to state a claim is viewed with disfavor, if a Appellant's Complaint states no cause of action upon which relief might be granted, then the Appellees' Motion to Dismiss should be granted. See Fass v. Nowasco Well Services, Ltd., 177 W. Va. 50, 350 S.E.2d 562, 564 (1986).

V. DISCUSSION OF LAW

- A. **The Circuit Court correctly granted Donald Roach's Motion to Dismiss pursuant to Rules 12(b)(6) of the West Virginia Rules of Civil Procedure because the Appellant's Complaint alleged that Daniel Falls injuries were do to work-related negligence, which clearly placed him within the scope of his employment, entitling the Donald Roach immunity from suit under the West Virginia Workers' Compensation Act.**

A motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. See Collia v. McJunkin, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 303 (1987); Mandolitis v. Elkins Industries, Inc., 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)(superseded in part by statute see Gallapoo v. WalMart Stores, 197 W. Va. 172, 475 S.E.2d 172 (1996). The Appellant's Complaint stated that "the injuries suffered by Daniel Falls were *caused by the work-related negligence* of Union Drilling, Inc., and its employees, Kevin Wright and Donald Roach." R 1-8 (*emphasis added*). Thus, based on the Appellant's Complaint, Daniel Falls was within his scope of employment and an agent of Union Drilling, Inc., at the time of the accident because his injuries were work-related.

The Appellant further states that the actions and omissions of Donald Roach were within the scope of his employment and/or agency relationship, or his conduct within the doctrine of *respondeat superior* with Union Drilling, Inc., being the principal and Donald Roach an agent of Union Drilling, Inc., at the time of the accident. R 1-8. Thus, based on the Appellant's Complaint, Donald Roach

was acting within his scope of employment and as an agent of Union Drilling, Inc., at the time of the accident.

Pursuant to West Virginia Code Section 23-2-6, Donald Roach, cannot be liable for the violation of common law negligence. Donald Roach was acting within his scope of employment and as an agent of Union Drilling, Inc., at the time of the accident; thus, he is immune from liability for his negligent conduct under the West Virginia Workers' Compensation Statute.

Pursuant to West Virginia Code Section 23-2-6,:

[a]ny 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(2007) **emphasis added**. Furthermore, such immunity applies to the employer's employees pursuant to West Virginia Code Section 23-2-6A, which states:

[t]he 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.

W. VA. CODE § 23-2-6A(2007) **emphasis added**.

The West Virginia Supreme Court in Bias v. Eastern Associated Coal Corp., 220 W. Va. 190, 640 S.E.2d 540, 547 (2006), stated that there are only three exceptions, where immunity provided under the Workers' Compensation Act will not apply to an employer. The Court stated that:

[a]n 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 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 West Virginia Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system.

Bias, 640 S.E.2d at 547.

The Appellant did not assert in her Complaint that Union Drilling, Inc., the employer of Donald Roach, defaulted in the payment of Workers' Compensation premiums. Neither did the Appellant rely on a statute expressly permitting a tort claim against the Appellees in her Complaint. Moreover, the Appellant did not allege the elements of a "deliberate intent" claim in her Complaint. Therefore, the Appellant had no basis to assert that Union Drilling, Inc., and subsequently Donald Roach, lost their immunity under the Workers' Compensation Act.

The Circuit Court stated in its June 21, 2007, Order that, according to the allegations asserted in the Appellant's Complaint, Donald Roach, at all times relevant to this proceeding, was an employee of Union Drilling, Inc. *R 79 & R 81-85*. The Circuit Court found that, in her Complaint, the Appellant alleges the injuries suffered by Daniel Falls were caused by the *work-related negligence* of Union Drilling, Inc., and its employees, Kevin Wright and Donald Roach. *Id.* (*emphasis added*). The Circuit Court found that, as alleged in Appellant's Complaint, the work-related negligence of Union Drilling, Inc., and its employees, Kevin Wright and Donald Roach, was the direct and proximate cause of Daniel Falls' fatal injuries. *Id.* The Circuit Court found that the Appellant did not allege that any of the Appellees violated West Virginia's "deliberate intent" statute, West Virginia Code § 23-4-2(d). *Id.*² The Circuit Court found that, pursuant to West Virginia Code Section 23-2-6, Union Drilling, Inc. and its employees, Kevin Wright and Donald

²After the Court's June 21, 2007, Order, dismissing the Appellant's negligence common law claim, the Appellant's filed an Amended Complaint alleging the Appellees violated the West Virginia "deliberate intent" statute. *R 146-152*.

Roach, were entitled to sweeping immunity from common law tort claims from negligently inflicted injuries brought by Union Drilling, Inc. employees. *Id.*

The Circuit Court concluded that, because Donald Roach was entitled to immunity for all claims brought in the above-styled matter, the Appellant, individually and as administrator of the Estate of Daniel Falls, had failed to state a cause of action upon which relief could be granted. *Id.* Accordingly, the Circuit Court, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, found that Donald Roach must be dismissed from this civil action as a matter of law. *Id.*

As previously stated, a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. See Collia v. McJunkin, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S. Ct. 303 (1987); Mandolitis v. Elkins Industries, Inc., 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)(superseded in part by statute see Gallapoo v. WalMart Stores, 197 W. Va. 172, 475 S.E.2d 172 (1996)). The Appellant's Complaint clearly stated that the injuries the decedent sustained were *work-related* and the proximate cause of his death, and that Donald Roach was acting within his scope of employment and as an agent of Union Drilling, Inc., at the time of the accident; thus, the Court did not commit error when it granted Donald Roach's Motion to Dismiss because, as an employee of Union Drilling, Inc., Donald Roach enjoyed the immunity under the West Virginia Workers' Compensation Act.

The Appellant argues throughout her brief that Daniel Falls was a completely disconnected third party and had no connection to the Appellees. The Appellant's brief argues that "Daniel Falls' death clearly did not occur 'in the course of' his employment nor was it the result of his employment as he was an innocent passenger in a vehicle on a public highway." See *Appellant's Appeal Brief*,

pg. 14. The Appellant, however, knowingly disregards one thing, Daniel Falls was not a completely disconnected third party, Daniel Falls was an employee of Union Drilling. The *Appellant's Complaint admits* that Daniel Falls sustained injuries which were do to *work-related negligence*. Clearly, any injuries which are characterized as work-related must be sustained while in the scope of employment. Even if this clear assertion by the Appellant in her Complaint is somehow misinterpreted or disregarded, Daniel Falls' injures still occurred within the scope of his employment with Union Drilling because Donald Roach was within the scope of his employment as a Union Drilling employee.

The Appellant asserts in her Complaint that Donald Roach was acting within the scope of his employment when he was traveling home with the Appellant on that fatal night. The Appellant clearly has to establish that Donald Roach was acting within the scope of his employment with Union Drilling, Inc., so the Appellant can sustain a cause of action under the theory of *respondent superior* against Union Drilling. However, the Appellant's argument fails to follow its logical conclusion. If Donald Roach was acting within the scope of his employment while traveling home with Daniel Falls, then Daniel Falls had to be acting within the scope of his employment as an employee of Union Drilling, Inc., because he was acting in the same capacity as Donald Roach, he was traveling home. Donald Roach's conduct cannot be classified as one thing, and the same conduct by Daniel Falls be classified as something else. One type of conduct cannot be classified two different ways depending on which way will allow the Appellant to sustain a cause of action against Union Drilling, Inc., under the theory of *respondent superior*. Both Donald Roach and Daniel Falls were traveling together with one objective, to return home after a long day of work. Thus, if Donald Roach's conduct was within the scope of his employment with Union Drilling, so

too was Daniel Falls' conduct.

If this Court was to remand this case, as requested by the Appellant, to determine if Donald Roach and Daniel Falls were within the scope of their employment, not convinced by the Appellant's clear assertion in her Complaint, there would only be two possible findings. The first, Donald Roach and Daniel Falls were within the scope of their employment, the Workers' Compensation Act would apply and Donald Roach would be immune from liability. The second, Donald Roach and Daniel Falls were not within the scope of their employment, the Workers' Compensation Act would not apply and the Appellant would lose its cause of action under *respondent superior* against Union Drilling but maintain its cause of action against Donald Roach. The Appellant, however, has already released Donald Roach from any liability, settling with Donald Roach and Linda Hall before the Complaint was filed. Therefore, the Appellant would have no cause of action.

A third scenario, the scenario that the Appellant is arguing for, that Donald Roach was within the scope of his employment and Daniel Falls was not within the scope of his employment is not a possible finding. See *Appellant's Appeal Brief*, pg. 10-17. As previously addressed, Donald Roach's conduct cannot be classified as one thing and the same conduct by Daniel Falls be classified as something else because Donald Roach and Daniel Falls were both traveling together with one objective, to return home after a long day of work. One type of conduct cannot be classified two different ways depending on which way will allow the Appellant to sustain a cause of action against Union Drilling, Inc., under the theory of *respondent superior*. Even if the Court applied the test under the "coming and going" exception, as the Appellant argues the Circuit Court should have done, to determine if Donald Roach could have been within the scope of his employment as the driver and Daniel Falls was not within the scope of his employment as the passenger, the result

would be the same.³

This Court discussed the “going and coming” exception in the case of Courtless v. Jolliffe 203 W.Va. 258, 507 S.E.2d 136, 264 (1998), referencing the Florida case of Standley v. Johnson. In Standley, an employee had traveled to a drugstore to purchase medicine for his wife on his way to work. *Id.* After getting the medicine, he went to a gas station and purchased a gallon of gas for use in the lawn mower at his work. *Id.* Johnson then dropped the medicine off at his home and proceeded to work, stopping at another service station to purchase gas for his truck. *Id.* As Johnson pulled out of this second service station, he turned into the oncoming traffic, striking Standley's car. *Id.* Part of Johnson's work at a local nursery was keeping the lawn mower filled with gas and his truck was used in his work for hauling dirt and fertilizer. *Id.*

The plaintiff argued that the lower court erred in “determining as a matter of law that no material issue of fact exists as to whether employee Johnson was within the scope of his employment at the time the accident occurred, thereby rendering employer vicariously liable for Johnson's negligence.” *Id.*

The Standley court reasoned that it is the well recognized rule that an employee driving to or from work is not within the scope of employment so as to impose liability on the employer. *Id.* However, in this case, Johnson was doing more than merely driving to work, he was instructed to keep the lawn mower filled with gas and was in fact transporting gas to the nursery as part of his job and for the benefit of his employer. *Id.*

³The “going and coming” exception has been applied in the workers compensations context; however, the Court has never held that it is equally applicable to the tort context. Courtless v. Jolliffe 203 W.Va. 258, 507 S.E.2d 136 (1998)

Thus, the court in Standley determined that the test to determine if an employee was within the “coming and going” exception was based on two criteria, the employees intent and conduct. The court looked at Johnson’s intent in getting the gasoline, which was to cut the lawn of his employer, one of his job duties. The court looked at his conduct, the actual physical act of transporting the gasoline to his employer for his employers benefit.

If this Court was to apply this same criteria to the facts in this case, both Donald Roach and Daniel Falls’ intent and conduct are the same. Donald Roach and Daniel Falls were both traveling home after work to go to bed after working a thirty-one hour work shift. Likewise, Donald Roach and Daniel Falls’ intent was the same, the purpose in their trip was to return home to go to bed. Even if it is concluded that Donald Roach’s conduct in driving the automobile was somehow for the benefit of Union Drilling, Inc., the second part of the test cannot be satisfied, because Donald Roach and Daniel Falls’ intent was to drive. Clearly, Donald Roach and Daniel Falls’ conduct was one in the same and cannot be classified in two different ways.

B. The Appellant’s assertion in her Appeal Brief that the Circuit Court’s June 21, 2007, Order was in error because Donald Roach and Daniel Falls’ actions fall into the “going to or coming from work”exception to the immunity provided under the West Virginia Workers’ Compensation Act is irrelevant.

The Circuit Court’s June 21, 2007, Order granting Donald Roach’ Motion to Dismiss was based solely on the allegations alleged in the Appellant ’s Complaint, as required under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The Appellant ’s Complaint asserted no allegations that Donald Roach and Daniel Falls’ actions fall into the “going to or coming from work” exception to the immunity provided under the West Virginia Workers’ Compensation Act until such allegations were raised in the Appellant’s Appeal Brief. Nowhere in the Appellant’s Complaint were there any

allegations made that Donald Roach and Daniel Falls' actions somehow could have or did fall into the "going to or coming from work" exception to the immunity provided under the Workers' Compensation Act. *R 1-8*. This Court held in Proudfoot v. Proudfoot, 214 W. Va. 841, 591 S.E.2d 767, 771 (2003), that it will not consider matters not first presented to the trial court, stating that "[w]e have held, that "[o]ur law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal."

As addressed above, the Circuit Court reviewed the sufficiency of the Appellant's Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and found that based on the Appellant's own allegations asserted in her Complaint the Appellant's Complaint clearly stated that the injuries the decedent sustained were work-related and the proximate cause of his death, and that Donald Roach and Daniel Falls were acting within his scope of employment and as an agent of Union Drilling, Inc., at the time of the accident; thus, the Court did not commit error when it granted Donald Roach's Motion to Dismiss because Donald Roach enjoyed the immunity under the West Virginia Workers' Compensation Act.

The Appellant's allegations contained in her Appeal Brief for the first time, asserts that Daniel Falls was killed after leaving Union Drilling, Inc.'s work premises after his work shift had ended and, therefore, that his death did not (result from) and occur (in the course of) his employment, is irrelevant because no such allegations were presented to the Circuit Court in the Appellant's Complaint or before it made its ruling on Donald Roach's Motion to Dismiss. When considering a motion claiming that the Appellant has failed to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a circuit court appraises the sufficiency of the a complaint by inquiring whether "it appears beyond a doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief.” *Syllabus Point 2, Holbrook v. Holbrook*, 196 W. Va. 720, 474 S.E.2d 900 (1996). The Appellant’s Complaint made no assertions that Daniel Falls was killed after leaving Union Drilling, Inc.’s work premises after his work shift had ended and that his death did not (result from) and occur (in the course of) his employment; therefore, the Appellant could obviously not prove any facts to support such a claim.

- C. The Appellant’s assertions in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order by not considering that an employer may be liable for injuries caused by an over-fatigued employee if the employer could have reasonably foreseen that the employee would pose a risk of harm to others under *Robertson v. LeMaster* is irrelevant; the Circuit Court did not need to make such consideration because the Appellees were immune from liability under the Workers’ Compensation Act and the *Robertson* reasoning does not apply.**

The Appellant argues in her Appeal Brief that Circuit Court erred in its June 21, 2007, Order because it failed to consider that an employer may be liable for injuries caused by an over-fatigued employee if the employer could have reasonably foreseen that the employee would pose a risk of harm to others. *See Appellant’s Appeal Brief, pg 17*. In support of such an argument, the Appellant makes reference to the Court’s decision in *Robertson v. LeMaster* 171 W. Va. 607, 301 S.E.2d 563 (1983), where the court reasoned that an employer may be *liable to others for injuries sustained* in an automobile accident caused by an employee who fell asleep while traveling home from work after his shift where the employer had required him to work for twenty-seven straight hours.

The Circuit Court, however, did not need to make such a legal analysis before making its June 21, 2007, Order because Donald Roach, Union Drilling, Inc., and Kevin Wright were immune from liability under the Workers’ Compensation Act. As addressed above, the Circuit Court reviewed the sufficiency of the Appellant’s Complaint pursuant to Rule 12(b)(6) of the West Virginia

Rules of Civil Procedure and found that, based on the Appellant's own allegations asserted in her Complaint, that Complaint was not sufficient. The Circuit Court concluded that, because Donald Roach, Union Drilling, Inc., and Kevin Wright were entitled to immunity for all claims brought in the above-styled matter, the Appellant, individually and as administrator of the Estate of Daniel Falls, had failed to state a cause of action upon which relief could be granted. The Circuit Court did not need to determine whether or not in this case the employer, Union Drilling, Inc., could be liable for an over-fatigued employee's actions. The Appellant's argument is simply an attempt to cloud the issues before this Court, in an attempt to prevent the Court from seeing that there is no basis for this appeal.

Furthermore, the reasoning in Robertson does not apply to this case. The word "others" as used by the Court in Robertson clearly does not mean "other" employees who received work-related injuries. In such a case, the employee receives pecuniary protection through the Workers Compensation Act and at the same time, the employer, is provide relief to the employer from liability. Cox v. United States Coal & Coke Co., 80 W. Va. 295, 92 S.E. 559, 561 (1917). The "others" as referenced in Robertson is a third party, completely disconnected from the employer, like Robertson, a third party who just happened to be driving on the same road as LeMaster when LeMaster fell asleep at the wheel and collided with Robertson.⁴ Accordingly, Daniel Falls does not fit into the definition of "others" in Robertson, because as clearly asserted in the Appellant's Complaint, he was an employee of Union Drilling, who sustained work-related injuries within the

⁴ In Robertson v. LeMaster, 171 W. Va. 607, 301 S.E.2d 563 (1983), LeMaster was driving home, by himself, after working a twenty-seven hour work shift. LeMaster's fell asleep while in the process of passing Robertson, who was in another automobile traveling in the same direction of LeMaster. Robertson was not a co-worker of LeMaster and had no connection to LeMaster's employer.

scope employment, as a result of traveling home with Donald Roach.

The Appellant makes an outlandish statement that “[u]nder the Trial Court’s ruling in this case, even if Donald Roach had been under the influence of drugs or alcohol, or driving one hundred miles an hour, there would be no cause of action against him since he was an employee of Union Drilling and the co-employee of Daniel Falls.” *See Appellant’s Appeal Brief, pg. 18.* This is simply not true. The Court’s June 21, 2007, Order only holds that there is no cause of action by the Appellant with regard to the wrongful death of Daniel Falls because he was within the scope of his employment when he received his work-related injuries. As stated above, Daniel Falls does not fit the definition of “others” the Court addressed in Robertson.

The Circuit Court’s June 21, 2007, says nothing as to whether a disconnected third-party like Robertson can hold an employer liable for injuries sustained in an automobile accident caused by an employee who fell asleep while traveling home after work. The Circuit Court was not confronted with such a legal scenario and its June 21, 2007, Order does not address such a legal scenario.

D. The Appellant’s assertions in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order in its application of the *respondent superior* doctrine in a tort context with the requirement that Workers’ Compensation immunity is only triggered if the injuries “result from” and occur “in the course of” the injured person’s employment, is irrelevant; the Circuit Court did not need to make such consideration because the Appellees were immune from liability under the Workers’ Compensation Act.

The Appellant argues in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order because it did not take into consideration that the negligent conduct of Union Drilling, Inc., was separate and apart from Donald Roach’s alleged negligent conduct; thus, the doctrine of *respondent superior* may or may not apply. *See Appellant’s Appeal Brief, pg. 22.* Once again, however, the Circuit Court did not need to make such a legal analysis before making its June 21,

2007, Order because the Appellees were immune from liability under the Workers' Compensation Act.

As previously stated, the Circuit Court reviewed the sufficiency of the Appellant's Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and found that, based on the Appellant's own allegations asserted in her Complaint, that Complaint was not sufficient. The Circuit Court did not need to go any further in its analysis nor did it need to allow the Appellant an opportunity through discovery to attempt to prove such an allegation. The Circuit Court concluded, based on the face of the Appellant's Complaint, that, because Union Drilling, Inc., Kevin Wright, and Donald Roach are entitled to immunity for all claims brought in the above-styled matter, the Appellant, individually and as administrator of the Estate of Daniel Falls, had failed to state a cause of action upon which relief could be granted.

The Appellant's argument is simply an attempt to have this Court reverse the Circuit Court's June 21, 2007, Order so she can continue with her insufficient claims against the Appellees and conduct a fishing expedition; however, no such expedition is needed because the Circuit Court committed no error in finding that the Appellant's Complaint failed to state a viable cause of action, as it was required to do pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

E. The Appellant's assertions in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order by misinterpreting and somehow expanding this Court's decisions in Bias v. Eastern Associated Coal Corp., and State ex rel Darling v. McGraw, is completely unfounded.

The Appellant argues in her Appeal Brief that the Circuit Court erred in its June 21, 2007, Order by misinterpreting and somehow expanding this Court's decisions in Bias v. Eastern Associated Coal Corp., and State ex rel Darling v. McGraw,. *See Appellant's Appeal Brief, pg. 19.*

The Appellant states that the question presented in this case is whether the Workers' Compensation Act immunity immunizes employers and its employees from common-law liability for injuries that did not result from or occur within the course of employment. *See Appellant's Appeal Brief, pg. 19.* Once again, the Appellant is attempting to argue, for the first time, that the Daniel Falls' actions fall into the "going to or coming from work" exception to the immunity provided under the West Virginia Workers' Compensation Act. The Appellant's argument, however, is completely unfounded.

The Court's June 21, 2007, Order found as a finding of fact, based on allegations in the Appellant's Complaint, "the injuries suffered by Daniel Falls were caused by the work-related negligence of Union Drilling, Inc., and its employees, Kevin Wright and Donald Roach" citing the Appellant's Complaint, ¶¶ 9, 11, 12, 13, 14, and 17. *R 81-85.* Work-related negligence actions clearly fall into the actions to which employers and their employees are immune under the Workers' Compensation Act.

The Circuit Court's June 21, 2007, Order does not misinterpret or somehow expand this Court's decision in Bias v. Eastern Associated Coal Corp., 220 W. Va. 190, 640 S.E.2d 540, 547 (2006) and State ex rel Darling v. McGraw, 194 W. Va. 770, 461 S.E.2d 516 (1995). This Court, in Bias v. Eastern Associated Coal Corp., stated that there are only three exceptions, where immunity provided under the Workers' Compensation Act will not apply to an employer. The Court stated that:

[a]n 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 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 West Virginia Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system.

Bias, 640 S.E.2d at 547. The Circuit Court simply applied the Workers' Compensation immunity to this case because the Appellant made no assertions that such immunity was not applicable according to the three exceptions in Bias v. Eastern Associated Coal Corp and State ex rel Darling v. McGraw.

F. The Appellant's assertions in her Appeal Brief that the Circuit Court's June 21, 2007, Order creates an unnecessary constitutional confrontation between the Appellant's right to a certain remedy and jury trial and the immunity of the Workers' Compensation immunity is unfounded because the Appellant has a remedy by due course of law through the Workers' Compensation Act.

The Appellant argues in her Appeal Brief that the Circuit Court's June 21, 2007, Order violates her right to seek redress for a recognized common law action, all of which is granted by the Certain Remedy Clause as contained in Article III, Section 17 of the West Virginia Constitution. *See Appellant's Appeal Brief, pg. 25*. This argument, however, is unfounded because the Appellant has a remedy by due course of law through the Workers' Compensation Act.

"At the heart of the workers' compensation schema is a recognition that, in exchange for extending statutorily designed benefits for workplace injures, an employer gains a guarantee that this statutory system of recovery is the exclusive means for compensating his/her employees, barring any statutory exception. Bias v. Eastern Associated Coal Corp., 220 W. Va. 190, 640 S.E.2d 540, 548 (2006). Thus, a quid pro quo is created. In Javins v. Workers' Compensation Commission, 173 W. Va. 747, 758, 320 S.E.2d 119, 131 (1984), "[t]he quid pro quo for the employees is the guarantee that they will be afforded due process and proper restitution for injuries they receive in their line of work." Accordingly, the employee, the Appellant, as a representative of the employee's estate in this

case, is guaranteed a remedy by due course of law. Thus, the Certain Remedy Clause contained in Article III, Section 17 of the West Virginia Constitution is not violated.

Moreover, in this case, the Circuit Court allowed the Appellant to file an Amended Complaint, which is still pending in the Circuit Court of Harrison County, West Virginia, which alleges a “deliberate intent” cause of action against the Appellees. Thus, the Appellant clearly has a remedy by due course of law.

Furthermore, the Appellant also argues that the Court showed concern in the Bias and Darling cases of the potential implication of the certain Remedy Clause when an employee is denied workers compensation benefits and also denied the right to see redress by a common law claim. *See Appellant's Appeal Brief, pg. 20.* However, the issue in this appeal is the Appellant's right to bring an action under a common law negligence. The Appellant's workers' compensation benefits claim or potential benefits claim is not an issue in this appeal. Whether or not the Appellant has been denied a claim under the Workers' Compensation Act is completely irrelevant to these proceedings and any such denial by the Workers' Compensation Commission should be appealed in its own vehicle in order to allow this Court to address such any such issues.

G. The Appellant's assertions in her Appeal Brief that the Circuit Court's June 21, 2007, Order violates the public policy of the State of West Virginia is unfounded because the Appellant's Complaint could not support a cause of action against Donald Roach, as he was entitled to immunity from suit under the West Virginia Workers' Compensation Act.

The Appellant argues in her Appeal Brief that the Circuit Court's June 21, 2007, Order violates the public policy of the State of West Virginia by extending immunity from common-law liability for injuries which do not “result from” and occur “in the course of” employment, which shields wrongful conduct of the Appellees. *See Appellant's Appeal Brief, pg. 28.* Once again, the

Appellant is attempting to argue, for the first time, that the Appellees' actions fall into the "going to or coming from work" exception to the immunity provided under the West Virginia Workers' Compensation Act. The Appellant's argument, however, is completely misplaced.

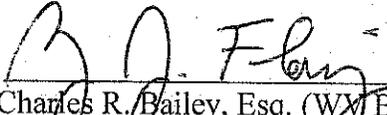
The Circuit Court's June 21, 2007, Order does not misinterpret or somehow expand immunity from common-law liability for injuries which do not "result from" and occur "in the course of" employment. The Court's June 21, 2007, Order found, as a finding of fact, based on allegations in the Appellant's Complaint, "the injuries suffered by Daniel Falls were caused by the work-related negligence of Union Drilling, Inc., and its employees Kevin Wright and Donald Roach" citing the Appellant's Complaint, ¶¶ 9, 11, 12, 13, 14, and 17. *R 81-85*. Work-related negligence actions clearly fall into the actions to which employers and their employees are immune under the Workers' Compensation Act.

VI. CONCLUSION

It is respectfully requested that this Court **AFFIRM** the Circuit Court of Harrison County's June 21, 2007, Order, as the Circuit Court's ruling was correct based on the Appellant's Complaint that Donald Roach was entitled to immunity from suit under the West Virginia Workers' Compensation Act.

APPELLEE DONALD ROACH,

By Counsel:



Charles R. Bailey, Esq. (WV Bar No. 0202)

Ryan J. Flanigan, Esq. (WV Bar No. 9059)

BAILEY & WYANT, P.L.L.C.

500 Virginia Street, Suite 600

Post Office Box 3710

Charleston, West Virginia 25337-3710

(304) 345-4222

Counsel for Appellee Donald Roach

APPEAL NO. 33907

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANTIONETTE FALLS,

Appellant,

v.

APPEAL NO. 33907

UNION DRILLING, INC., a Delaware corporation,
KEVIN WRIGHT, DONALD ROACH, LINDA HALL,
and W. VA. INSURANCE COMPANY,

Appellees.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing "APPELLEES DONALD ROACH'S APPEAL BRIEF" has been served upon the following counsel of record by this day mailing true copies thereof:

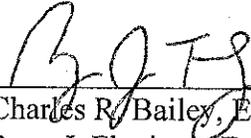
David J. Romano, Esq.
ROMANO LAW OFFICE
363 Washington Avenue
Clarksburg, WV 26301
Counsel for Plaintiff

Jeffrey Zurbuch, Esq.
Busch, Zurbuch & Thompson
P.O. Box 1819
Elkins, WV 26241
Counsel for Linda Hall

Stuart A. McMillan, Esq.
Bowles Rice McDavid Graff & Love, L.L.P.
600 Quarrier Street
Charleston, WV 25301
Counsel for Union Drilling, Inc.

David A. Sims, Esq.
P.O. Box 2659
Elkins, WV 26241
Counsel for W. Va. Insurance Company

Dated this 6th day of August, 2008.


Charles R. Bailey, Esq. (WV Bar No. 0202)
Ryan J. Flanigan, Esq. (WV Bar No. 9059)
BAILEY & WYANT, P.L.L.C.
500 Virginia Street, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222
Counsel for Appellee Donald Roach