

No. 33907

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston**

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**ANTIONETTE FALLS,**

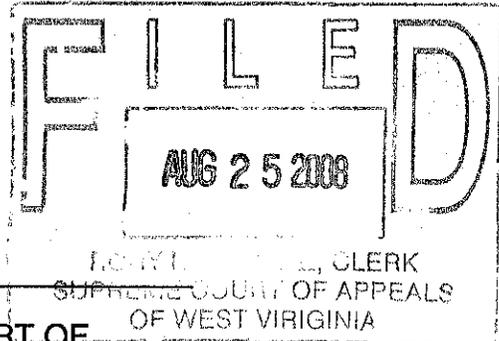
Appellant and Plaintiff below,

v.

// No. 33907

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

Appellees and Defendants below.



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

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**APPELLANT'S REPLY TO RESPONSES OF UNION DRILLING, INC.,  
KEVIN WRIGHT AND DONALD ROACH**

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**I. REPLY TO APPELLEE DONALD ROACH**

Appellee, Donald Roach's response Brief (hereinafter, "Roach"), is nonsensical, as it does not address any of the points of law raised in the Appellant's Brief, but rather, entirely disregards Appellant's (hereinafter, "Appellant" or Plaintiff) legal arguments by merely repeating that Roach was entitled to immunity under the Workers' Compensation statute. Such a response provides no help to this Court in deciding the legal issues presented in this appeal, and consequently, Roach's submission to this Court should be accorded no consideration. Also, Roach has misconstrued the factual record, to the extent that the same was able to be developed in the Trial Court before the Rule

12(b)(6) dismissal was granted. Those factual inaccuracies in Roach's response are as follows:

1) Roach's assertion that the Plaintiff alleged in her Complaint that Daniel Falls' injuries "were caused by the work-related negligence of Union Drilling and its employees, Kevin Wright and Donald Roach" is inaccurate (Roach Brief pg. 2); that phrase does not appear in either the Complaint or Amended Complaint filed in this case; those were the words of the Trial Court in granting the Rule 12(b)(6) Motion to Dismiss, [R. 81-85]; however, that is the essence of the legal error before the Court in this Appeal; Roach also asserts at pg. 3 and 4 of his Brief that Plaintiff did not allege a common law negligence claim against Defendant Donald Roach; however, this is also inaccurate; Plaintiff's Complaint in Paragraphs 14, 17 and 18 stated that (¶14) "...Defendant Roach fell asleep while driving his vehicle from Union's work site, resulting in a single vehicle automobile crash. As a direct and proximate result of the misconduct of Defendants, Daniel Falls was fatally injured in said automobile crash." (¶17) "The actions of Defendants and other supervisors, agents, servants or employees, were negligent, willful, wanton and reckless, grossly unreasonable...." (emphasis added) (¶18) "The willful, wanton and reckless conduct of Defendant Union and its supervisors, including Defendants Roach and Wright are of such a nature to entitle the Plaintiff to punitive damages to punish the Defendants and deter future misconduct."

Plaintiff's Complaint asserted claims for negligence, and for reckless and willful misconduct against Defendant Roach and the other Defendants which included Defendant Roach's common law negligence violation of falling asleep while driving a vehicle on a public highway, causing a single vehicle crash, which resulted in Daniel Falls' death. Thus, the statements by Appellee Roach in his Brief are inaccurate.

2) Roach also states at pg. 5 of his Brief that Plaintiff made allegations that Donald Roach was acting within "the scope of his employment and/or agency

relationship" triggering vicarious liability; this is accurate as Plaintiff made such allegations in Paragraph 11 of the Complaint but this is not the same as alleging that Donald Roach was "acting in the course of and as a result of" Donald Roach's employment with Union Drilling; allegations in a complaint that one is acting within the scope of his employment for tort law purposes is not the same as an admission that Donald Roach was "on the job" and that the death of Daniel Falls was therefore "in the course of and as a result of" Daniel Fall's employment with Defendant Union Drilling; this Court and other courts have recognized the distinction between tort law and Workers' Compensation statutes providing coverage for on the job injuries. Courtless v. Joliffe, 507 S.E.2d 136 (W.Va. 1998); Brown v. City of Wheeling, 569 S.E.2d 197 (W.Va. 2002); Ex parte Shelby County Health Care Auth., 850 So.2d 332 (Ala. 2002); see also, Depew v. Crocodile Enterprises, Inc., 63 Cal. App. 4<sup>th</sup> 480, 485-492, 73 Cal. Rptr. 2d 673, 676-679 (Calif. 1998) ["Of course, we cannot overlook the fact that the 'special risk' exception to the going and coming rule is a creation of the workers' compensation system. As far as we can tell, it has not been applied outside that context, i.e., to third party claims against an employer based on *respondeat superior*."]

Plaintiff alleged in her Complaint claims for both direct negligence against Defendant Roach and Defendants Union Drilling and Wright, and a claim of vicarious liability predicated upon Defendant Roach acting within the scope of his employment as a tort law theory; of course, none of these alternative theories of recovery were permitted to be "fleshed out" by way of full discovery as the case was dismissed as a matter of law which Plaintiff claims in this appeal was error.

3) Throughout Appellee Roach's Brief, he asserts that Plaintiff's Complaint failed to allege that Donald Roach was going home from work at the time of the crash that killed Daniel Falls which thus fails to bring Donald Roach within the "going and coming rule" and excluding his conduct from the reach of Workers' Compensation immunity, even though Donald Roach's status is irrelevant; the Record below is clear that

the crash killing Daniel Falls occurred on a public highway while Donald Roach was driving his automobile home from work. [See Plaintiff's Response to Defendants Union Drilling's et al's Motion to Dismiss - Exh. 1 W.Va. Uniform Traffic Crash Report, R. 1-8 ¶14 and R. 61-78]. The Traffic Crash Report clearly stated that the crash occurred on U.S. Rt. 250 near Cameron, West Virginia and that this location was not on the job site of Union Drilling is undisputed; further, Roach fails to acknowledge that the duty to raise immunity as an affirmative defense is the obligation of the party asserting such defense, which in this instance would be Defendant Roach; if such affirmative defense [see WVRCP 8(c)], is asserted and is a factual matter subject to dispute, it cannot be determined on a 12(b)(6) motion as a matter of law; Plaintiff's Complaint clearly alleges that Donald Roach was not on the job at Union Drilling's work site at the time of the crash, and therefore, this must be accepted as true for purposes of a Rule 12(b)(6) motion and Roach's argument to the contrary in his Brief is inappropriate; thus, this Court should not consider the misstatements of Roach in his Brief at pg. 7 where he asserts that Plaintiff alleged for the first time in Plaintiff's Motion for Reconsideration that the Decedent's death did not occur within the work zone as such assertion is incorrect and moreover it is not the burden of Plaintiff to allege in the first instance; however there would be nothing procedurally incorrect with raising it in a timely filed reconsideration motion.

In summary, the response of Donald Roach fails to present any legal arguments using the facts in the Record before this Court worthy of consideration by this Court, and consequently, Appellee Donald Roach's Response should be rejected as any basis to support the Trial Court's ruling below.

## II. REPLY TO APPELLEES UNION DRILLING, INC. AND KEVIN WRIGHT

Appellees Union Drilling and Kevin Wright (hereinafter, "Union"), have asserted as fact in their Brief, various statements which are incorrect or not found in the undeveloped Record in this case. For instance, Union asserts on pg. 5 of their Brief that they provided a "per diem" to each of their employees "intended to be used by employees such as Roach and Falls for lodging near the drilling site." This alleged fact is not in the Record before this Court<sup>1</sup> nor is there any evidence whatsoever as to the intended use of such per diem. Union asserts that Mr. Roach did not use his per diem money to secure lodging (Union Brief pg. 5); however, there is no evidence whatsoever as to Mr. Roach's use of per diem money nor was this issue raised before the Trial Court, and more importantly, the Trial Court did not rely upon it as ground for granting the 12(b)(6) dismissal motion.

Union's statement that Appellant first pursued a negligent driving claim, and recovered from Roach's insurer, is nowhere to be found in this Record and is inaccurate. Plaintiff's civil action included both Donald Roach and Linda Hall as Defendants so Union's assertion in this regard is incorrect.<sup>2</sup> Plaintiff's Complaint alleged independent causes of action against Defendant Roach for his negligent and reckless driving, as well as, an independent and separate cause of action against Defendants Union Drilling and Kevin Wright for, *inter alia*, adopting policies designed to knowingly require personnel to work

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<sup>1</sup> Although Union did not designate as part of the Appellate Record, their discovery responses to Plaintiff's requests, in a discovery response filed by Union it did claim that there was a per diem paid and reference was made to certain pay stubs as evidence. However, Union did not answer these discovery requests in complete fashion and there was a Motion to Compel pending before the Trial Court seeking the details of this and other discoverable information at the time the Trial Court dismissed the action pursuant to Rule 12(b)(6).

<sup>2</sup> The Plaintiff did receive some of the insurance covering the automobile Defendant Roach was driving, although this is nowhere in the Record before this Court nor did the Trial Court rely upon it in granting the dismissal; Plaintiff retained the right to join Donald Roach and Linda Hall as Defendants to seek whatever additional insurance and other relief from them available as long as their personal assets were not invaded.

excessive hours to the point of exhaustion without taking adequate precautions to prevent injury to others caused by exhausted drivers traveling on the public highways. The determination that a legal duty exists to prevent such conduct has already been decided by this Court and is settled precedent. Robertson, infra. Such conduct is no different than requiring a driver to become intoxicated or otherwise impaired and then allowing him to set out on the public highways in an automobile. Plaintiff also alleged a cause of action based upon *respondeat superior* due to the conduct of Defendants Roach and Wright, both of whom were supervisors for Union Drilling. Thus, Union's characterization in its Statement of Facts that Plaintiff only asserted claims against Union relating to a work injury are mischaracterizations, but this Court can review the Complaint [R. 1-8], as well as, Plaintiff's Motion to Reconsider and Plaintiff's reply on its own merits. [R. 86-9 & 112-21]

Union argues, that it is entitled to immunity pursuant to W.Va. Code §23-2-6 [2003] while conveniently disregarding the plethora of case law decided by this Court determining when a worker is within the framework of the Act and immunity applies. Union makes no effort to distinguish the facts of this case with the settled law regarding when immunity applies to a given set of facts. Immunity is triggered only after it is proven that the injury is work related pursuant to the statute as interpreted by the case law, and not merely because one is injured by his employer at his place of employment. Cox v. United States Coal & Coke Co., 92 S.E. 559 (W.Va. 1917); In this case Daniel Falls was killed while "off the job" while going home from work. Therefore worker's compensation does not apply. This is known as the "going and coming rule" which has been established in a multitude of cases starting in 1914 with DeConstantin v. Public Service Comm'n, 83 S.E. 88 (W.Va. 1914), which precedent continues to be valid at the present time. The Appellees have made no cogent argument why this precedent should not be followed in this case. Appellant will not repeat the discussion of those many cases following the "going and coming rule" as they are amply set forth in Appellant's initial Brief at pgs. 11 -

13. Although Union "parades the horribles" arguing that a reversal of the Trial Court's ruling will open "Pandora's Box", such is nothing more than rhetoric and hyperbole. To the contrary, should this Court sustain the Trial Court's ruling, then it is likely that the Workers' Compensation coffers will be depleted by numerous claims made by workers going to or coming home from work as long as they can allege any connection to a prior work related activity even though such worker may not be acting for the benefit of his or her employer at the time of the crash. Most assuredly Pandora's Box would be figuratively opened by disturbing the almost 100 year precedents of DeConstantin and Cox, supra, in affirming the Trial Court's dismissal as Union seeks in this Appeal.

Nothing in the Legislative enactment of W.Va. Code §23-2-6 [2003], nor in the case law establishing the "going and coming rule", leads any reasonable person to conclude that our Legislature intended to immunize employers from common law claims for accidents occurring off the job and not on work time, and not in furtherance of the employer's business. General liability insurance fills the gap for these per chance occurrences not Worker's Compensation coverage. The reason Union is so quick to argue that Worker's Compensation applies to Daniel Falls' death is because Union is well aware that Mr. Falls was a young man, unmarried and without a family or other dependants, thus severely limiting Workers' Compensation benefits to medical expenses, of which there were none, and funeral expenses. Zelenka v. City of Weirton, 539 S.E.2d 750 (W.Va. 2000). It is very unlikely that Union Drilling would be arguing that Daniel Falls was entitled to Workers' Compensation benefits if he had left a 26 year old wife and four young children at the time of his death. Suffice it to say that the nightmarish scenarios predicted by Union to occur in the future (Pandora's Box), if this Court reverses the Trial Court's dismissal order, are wholly unfounded, but are much more plausible should Workers' Compensation benefits be extended to workers traveling to work or going home from work while off the job. This is why the DeConstantin line of cases have repeatedly

been upheld by this Court for almost 100 years.

Union also notes that Daniel Falls was its employee at the time of his death, however, Daniel Falls' status as an employee of Union is irrelevant. Cox, supra; It makes no difference whether Daniel Falls was Union's employee, or a co-employee friend given a ride by Defendant Roach, or a totally unknown victim, because Plaintiff's Complaint clearly alleged that both Mr. Roach and Daniel Falls were "off the job" at the time of the automobile crash. Robertson v. LeMaster, 301 S.E.2d 563 (W.Va. 1983); However only Daniel Falls status at the time of the injury is important for application of the Act's immunity provision. In the Cox case an employee of the Coal Company, while off the job, went to the Company premises to discuss why he had on a previous day missed work. While at his employer's premises, Mr. Cox was injured by fellow employee who negligently tossed a heavy item that hit Cox in the head injuring him. The Coal Company had moved to dismiss [demurrer at that time] the common law action based upon worker's compensation immunity. The trial court denied the motion and after a verdict for plaintiff Cox, the Coal Company appealed. This Court affirmed the trial court because Cox was not "on the job" at the time of his injury, even though he was injured by a fellow servant on his employer's premises, just as Daniel Falls was not "on the job". This Court rejected the employer's claim of immunity, observing:

[A] very important purpose the legislature had in view in passing the act was to relieve the employer from personal liability to the injured employee in those cases wherein he would have been liable at the common law on the ground of negligence in the performance of his duty to his servant. It is clear plaintiff was not injured in the course of his employment, and, therefore, he has no right to demand compensation out of the workmen's compensation fund. But it was surely not the purpose of the legislature to relieve an employer from liability for a negligent act causing injury to one of his

employees who happens not at that particular moment to be engaged in performing labor for him.

Id. at 561 (emphasis added). This Court then held the Coal Company was not entitled to immunity from a common-law suit, and affirmed the plaintiff's personal injury award. Id. at 561-62. accord, Griffith v. Raven Red Ash Coal Co., 20 S.E.2d 530 (Va. 1942); Donnelly v. Minneapolis Mfg. Co., 201 N.W 305 (Minn. 1924); see also, Rawson v. Jones-Winifrede Coal Co., 130 S.E. 492 (W.Va.1925) [holding employee must be injured "in the course of, and as a result of, his employment" for immunity to apply].

Additionally there is no evidence in the Record demonstrating that Union was a subscriber in good standing with the Worker's Compensation Fund of West Virginia. Although Plaintiff has no evidence that Union, was or was not in good standing, such failure in the Record highlights the prematurity of the Trial Court's ruling. If Union desired to raise the issue of immunity pursuant to Workers' Compensation law by asserting the elements necessary to sustain such a plea, then such is an affirmative defense which Union must prove, and if factually disputed, cannot be determined pursuant to Rule 12(b)(6).

Union's assertion that Appellant has already recovered compensation, and therefore making irrelevant Appellant's legal argument relating to the Certain Remedy clause of the West Virginia Constitution, is wrong. The Certain Remedy clause is invoked because Daniel Falls would not be entitled to Workers' Compensation benefits under the "going and coming rule" as he was off the job and not acting in furtherance of his employer's business, yet, the Appellees nevertheless want this Court to uphold the Trial Court's application of immunity under the Act. It is irrelevant that the Appellant received pre-suit some of the insurance proceeds from the automobile liability carrier of Defendant Roach, just as it would be irrelevant if the Appellant received life insurance proceeds, or

other benefits. The important consideration is whether an adequate remedy can be pursued from the particular Defendant who is asserting immunity under the Workers' Compensation scheme, in this case, Union Drilling and Wright. The receipt of liability proceeds was not before the Trial Court, nor contained anywhere in this Record, nor did Union raise such issue below, and the Trial Court did not rely on such receipt of liability insurance proceeds for any part of its ruling. Thus this Court should not consider it on Appeal in the first instance unless it is plain error which it clearly is not. Keesee v. General Refuse Service, Inc., 604 S.E.2d 449 (W.Va. 2004)

The Trial Court's ruling shielding Donald Roach from all common law liability, included prohibiting the Appellant from seeking any recovery from his liability insurance carrier and also precluding Plaintiff from seeking any further recovery should any additional liability insurance coverage be discovered, is error. [R. 81-85] In Paragraph 7 of the Trial Court's dismissal order, the Trial Court made no distinction regarding dismissal of the different causes of action asserted in the Complaint including dismissing the common law cause of action against Donald Roach for his negligence by falling asleep and crashing his vehicle. Under the Trial Court's ruling if Plaintiff had not made a partial pre-suit settlement such settlement would never occur as the common law negligence claim asserted against Donald Roach was dismissed presumably because Donald Roach and the Decedent worked for the same employer, even though there was no evidence in the Record that Daniel Falls was "on the job" at the time of the crash. Cox, supra.

If Union Drilling is permitted to shield itself from common law liability based on Workers' Compensation immunity and likewise be shielded from paying a Workers' Compensation claim because Daniel Falls was not on the job at the time of his death, then the Certain Remedy clause of our Constitution is invoked and would prohibit such application of the law. Bias v. Eastern Associated Coal Corp., 640 S.E.2d 540 (W.Va. 2006); State ex rel Darling v. McGraw, 647 S.E.2d 758 (W.Va. 2007). Although Union

makes light of Appellant's argument relating to this issue, it is a serious argument and one which this Court would have to resolve should it find that immunity shields employers from common law claims such as those asserted in this case while not permitting employees to recover Workers' Compensation benefits for the same conduct. This dilemma is avoided by reversing the Trial Court and remanding this case for full factual development regarding Plaintiff's common law claims against Union, Kevin Wright and Donald Roach.

Union Drilling argues that W.Va. Code §23-2-6 [2003] grants immunity to Union for the death of Daniel Falls because Daniel Falls was killed from a work related injury. Union then argues that the "going and coming rule" long established in this State to identify the "zone of employment" is irrelevant because Daniel Falls was killed from a work related injury. This argument is circuitous. What Union fails to acknowledge is that it was the duty of the Trial Court to first determine whether Daniel Falls' death was a result of a work related injury as defined by the case law, which required the Trial Court to analyze whether Daniel Falls, as a passenger in a private vehicle on a public highway, after work had ceased and while neither he nor the driver were "on the job", and neither furthering their employer's business at the time of the crash, were within the "zone of employment." Cox, supra. Because these factual matters were never developed, and because Plaintiff's allegations in her Complaint must be taken as true for purposes of a 12(b)(6) motion, there could be no finding that either Donald Roach or Daniel Falls were within the "zone of employment" at the time of the crash as they were driving on a public highway going home after work. Appellant made this clear to the Trial Court in her Motion to Reconsider the Court's Dismissal Order. [R. 112-121] Appellant directed the Trial Court's attention to its obligation to accept,

"as true that the Decedent's injury (death) occurred 'off the job' outside the zone of his employment and not on his employer's premises; the adoption of such factual assertion clearly removes this case from the limited holding

in Bias (Bias v. Easter Assoc. Coal Corp., citation omitted) and squarely puts it within the framework of Brown v. City of Wheeling (citation omitted)...." *Id.*

The Appellant also directed the Trial Court to Emmel v. State Comp. Director, 145 S.E.2d 29 (W.Va. 1965) holding that "it must be shown that the injury complained of occurred not only in the course of employment but also as a result of such employment." Thus, the Trial Court was acutely aware that when ruling on the pleadings as a matter of law pursuant to Rule 12(b)(6) that all allegations must be taken as true, as well as any reasonable inferences which would support the Plaintiff's theories of recovery asserted in the Complaint. This the Trial Court did not do and Union cannot blindly assert, with any credibility, that immunity applies to the allegations set forth in Plaintiff's Complaint without directing this Court to uncontested facts, and legal analysis, establishing the same. In fact, the contrary is evident as it was pleaded that Daniel Falls was not within the "zone of employment" or furthering his employer's interest at the time of his death and his status as an employee of Union Drilling was really irrelevant. Robertson and Cox, supra. Likewise, even should it be found that Defendant Roach was somehow furthering his employer's business, which he was not, this would not allow immunity to be imputed to Daniel Falls unless Daniel Falls likewise is found to have been furthering his employer's interest, and thus, within the "zone of employment" at the time of his death. In any event, such could not be determined by way of a 12(b)(6) motion. Gray v. Mena, 625 S.E.2d 326,333 (W.Va. 2005). Thus, the Trial Court should be reversed.<sup>3</sup>

Finally, Union Drilling argues that the Appellant is attempting to subvert the Workers' Compensation administrative system by going directly to Circuit Court without

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<sup>3</sup> None of the Appellees argued before the Trial Court any factual bases to substantiate that either Donald Roach or Daniel Falls were within the "zone of employment" as required by the case law. By holding as it did, the Trial Court ignored the long line of cases starting with DeConstantin and also ignored the holdings in Cox and Courtless.

filing a Workers' Compensation claim for a determination of whether benefits would be granted under these circumstances. First, this argument was never presented to the Trial Court below, and therefore, it should not be considered by this Court on appeal. Keesee, supra. However, it is a specious argument because there is no requirement of exhaustion of administrative remedies as that would require filing a Workers' Compensation claim every time an employer decides to plead the affirmative defense of immunity no matter how clear the facts demonstrating that Workers' Compensation does not apply. Such would be a fruitless act. The Act itself does not require that an administrative claim be made before asserting a statutory deliberate intent cause of action, W.Va. Code § 23-4-2(d)(2)(ii)(E) [2005], so it is dubious at best for Union to assert, without legal authority, that such must be done prior to filing a common law action based on facts which would not give rise to coverage. Of course, Union Drilling was permitted to file a Workers' Compensation claim with regard to Daniel Falls' death if it truly believed it was a covered event. W.Va. Code §23-4-1(b). Moreover, the Trial Court is more than able to make a determination in the tort litigation, after the facts have been developed, whether the employee was within the "zone of employment" or as Larsen states, injured on the employer's premises while on the job which has become known as the "premises rule", thus invoking worker's compensation. 1 Larsen's, The Law of Workmens' Compensation, §15.12(a) (1985). Such is no different than any other affirmative defense. This is why the solid precedent in this State relating to the "going and coming rule" as initiated in Deconstantin was important for the Trial Court to follow before dismissing Plaintiff's Complaint. If Daniel Falls was not injured, "in the course of and resulting from his employment" with Union Drilling, then the immunity provisions of the Workers' Compensation Act do not apply to his death. The Trial Court should have applied the precedent in this State relating to when an employee is within the "zone of employment", or to state it another way, was "on the job." The cases identified in Footnote 41 of Union Drilling's Brief identifying some court's which have held

that under certain circumstances employees were considered within the zone of employment after leaving work and crashing their vehicles due to work fatigue, are irrelevant for several reasons.

First, none of the cases are binding precedent in this State and this Court's prior rulings regarding the "going and coming rule" do not appear to encompass such factual situations as being in furtherance of the employer's interest, without a "special errand" occurring, and many other courts have criticized such holdings for analyzing only the causal connection prong but not the second required prong of being on the job. Ex parte Shelby County Health Care Auth., *supra*. Second, the cases are rather dated, but more importantly, there are numerous other States that have interpreted the "going and coming rule" similar to West Virginia to preclude such coverage regardless of the circumstances and tangential relationship to employment. Most probably in order not to extend worker's compensation coverage into an area where liability under the Act would be uncertain, and very costly to employers. Ex parte Shelby County Health Care Auth., *supra*. [criticizing Van Devander v. Heller Elec. Co., 405 F.2d 1108 (D.C. Cir 1968); Scott v. Foodarama Supermarkets, 942 Ap.2d 107 (NJ Super. App. 2008); Case of Haslam's, 883 N.E.2d 949 (Mass. 2008); Plodzien v. Township of Edison Police Dept., 549 Ap.2d 59 (NJ Super. App. 1988); Clark v. Daniel Morine Const. Co., 559 P.2d 293 (Idaho 1977); Pappas v. Supports Services, Inc., 243 N.W.2d 10 (Mich. App. 1976); see also, Simerlink v. Young, 178 N.E.2d 168 (Ohio. 1961). Lastly, it makes no difference that Union argues that Donald Roach was within the "zone of employment" or on a "special errand" furthering Union's business, as the allegations of Plaintiff's Complaint are clear that he was not, and even more clear that Daniel Falls likewise was not "on the job" and did not cause his own death as he was a mere passenger. It would have made no difference that Daniel Falls was employed by Union Drilling, or was merely an innocent bystander unless he was "on the job" at the time of his death. Cox, *supra*. Union's reliance on this argument is

misplaced even though the argument was not presented to the Trial Court in the first instance as required by appellate procedure.

### III. CONCLUSION

The relief requested by Appellant in this Appeal is very simple. The Trial Court should be reversed and its Order dismissing the Plaintiff's Complaint pursuant to Rule 12(b)(6) should be vacated and this case remanded for a full development of the facts, and a trial on the merits regarding Plaintiff's common law claims against all of the Defendants. The Trial Court was premature and precipitous in granting a dismissal of Plaintiff's Complaint in this case without development of the factual record necessary for an informed decision. Daniel Falls, as a passenger in a private vehicle, traveling on a public highway, while off the job, could not be precluded by the Workers' Compensation immunity provisions from pursuing common law claims, just as the family injured by the fatigued employee in Robertson could not be so precluded from making common law claims. This is a tort case and it will be a jury determination as to whether it was foreseeable that Union Drilling's policies and procedures, and other conduct, proximately caused or contributed to Donald Roach's driving in an impaired condition on the public highways of this State which ultimately resulted in the death of Daniel Falls.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

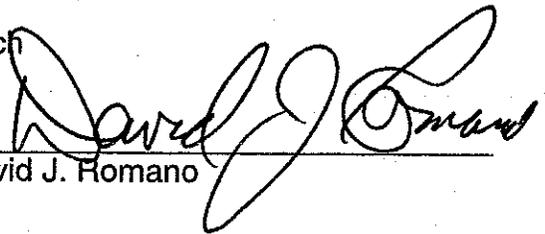
I, David J. Romano, do hereby certify that on the 25th day of August, 2008, I served the foregoing "**APPELLANT'S REPLY TO RESPONSES OF UNION DRILLING, INC., KEVIN WRIGHT AND DONALD ROACH**" upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in envelopes addressed to them at their office addresses:

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