BEFORE THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

No. 35521

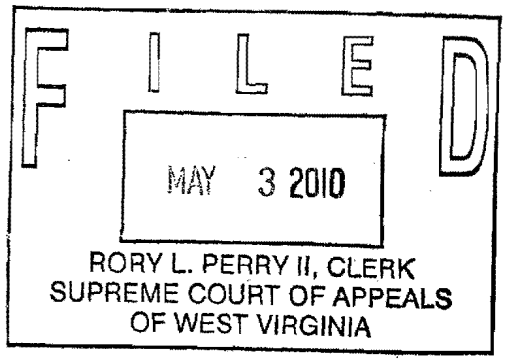
IRMA J. RIFFLE, Administratrix of the Estate of Edgar Riffle, Jr., deceased,

Appellant,

v.

C.J. HUGHES CONSTRUCTION COMPANY, INC., a West Virginia corporation; and CONTRACTORS RENTAL CORPORATION, a West Virginia corporation,

Appellee (Contractors Rental Corporation).



Appeal from the Circuit Court of Cabell County, West Virginia

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APPELLANT'S BRIEF

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APPELLANT'S BRIEF

I. Kind of Proceeding and Nature of Ruling Below

To the Honorable Justices of the

West Virginia Supreme Court:

On July 28, 2004, Edgar Riffle, Jr., a West Virginia resident employed by Appellee Contractors Rental Company (Appellee Contractors), a West Virginia company, was working on a project in Virginia removing old gas pipelines. Another West Virginia company, C. J. Hughes

Construction Company, Inc.[1] (Hughes), was involved in the same project replacing the gas pipelines. An employee from Hughes parked a flatbed trailer, used to haul the old pipes, under a live overhead voltage line. While Mr. Riffle was on this trailer, another Appellee Contractors employee operating a crane beside this flatbed trailer came into contact with the live overhead voltage lines, causing Mr. Riffle to be electrocuted. At the time of his death, Mr. Riffle, who was forty-seven years old, was survived by his wife, Irma J. Riffle, their daughter, Amanda, and their son, Seth.

Appellant Irma J. Riffle, as the Administratrix of the Estate of her husband, Edgar Riffle, Jr., filed a wrongful death claim on June 1, 2005, in the Circuit Court of Cabell County. On September 14, 2005, Appellee Contractors moved to dismiss this deliberate intent action under the doctrine of *lex loci delecti*, asserting that the substantive rights of Appellant are governed by Virginia law. Appellant responded, and Appellees' reply brief, filed August 28, 2006, does not make any reference to the *lex loci delecti* theory. Attached to Appellees' reply brief was an affidavit signed by Timothy B. Donahoe, Chief Financial Officer for Hughes, to which the lower court, Judge John L. Cummings, assigned substantial weight. A hearing was held only three days later on August 31, 2006. Subsequently, Judge Cummings sent a letter to the parties on October 4, 2006 advising of his intent to grant the motion on the ground that under the doctrine of *lex loci delecti*, Virginia's substantive law controls because the accident occurred in Virginia.

On November 14, 2006, Appellant filed a motion to reconsider the intention of Judge Cummings to dismiss Appellee Contractors. The motion requested a hearing. On November 22, 2006, over Appellant's objection, Judge Cummings signed Appellee Contractors' proposed order

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[1]The claim against Hughes is still pending in the Circuit Court of Cabell County. Therefore, Hughes is not a party to this appeal, but the interests of Hughes will be impacted by this Court's ruling.

granting the motion to dismiss with respect to Appellee Contractors prior to conducting a hearing on the motion to reconsider. A hearing on the motion to reconsider, however, was held on December 11, 2006. At that time, the trial court took the matter under advisement.

In any event, the order, prepared by Appellee Contractors and entered November 22, 2006, dismissed Appellee Contractors, but did not address the argument for dismissal made by Hughes.[2] Consequently, the November 22, 2006 order was interlocutory and did not resolve all pending claims. The order stated that Mr. Riffle and Appellee Contractors were West Virginia residents, but that Appellant's decedent only worked for Appellee Contractors in Virginia; the accident took place in Virginia; Appellee Contractors paid workers' compensation premiums arising from Mr. Riffle's employment to Virginia; and Appellant received workers' compensation benefits from Virginia. (11-22-06 Order ¶¶ 1-3, 5-6).

This order relied heavily on the affidavit submitted to the trial court only three days prior to the hearing, and before Appellant could be afforded an opportunity to conduct discovery into the allegations made therein. The trial court found this Court's decision in *McGilton v. U.S. Xpress Enterprises, Inc.*, 591 S.E. 2d 158 (W. Va. 2003)(*per curiam*) to be dispositive of the issue. Specifically, the trial court held Appellant could file a deliberate intent action under West Virginia law only if there was evidence that he had worked in West Virginia. (*Id.* ¶ 8). Since Appellant was never given an opportunity to conduct discovery on this issue, there is nothing in the record to refute the last second affidavit filed by Mr. Donahoe. Furthermore, the order makes no reference to the statutory language of the West Virginia Workers' Compensation Act or any other authority.

No ruling was made by then Judge Cummings as to Appellant's motion for reconsideration.

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[2] The Order did not dismiss Hughes from the case.

Subsequently, Judge Cummings' term ended and he was replaced by the current Judge F. Jane Hustead. Thereafter, Appellant's counsel submitted additional authority in support of the reconsideration motion on April 9, 2009. On August 17, 2009, Judge Hustead entered an order denying the motion for reconsideration and upholding the earlier order granting Appellee Contractors' motion to dismiss. Judge Hustead also provided in this order that there is no just reason for delay and she directed entry of judgment for Appellee Contactors, which language, under Rule 54(b) of the West Virginia Rules of Civil Procedure, permits Appellant to seek this interlocutory appeal. On September 9, 2009, Judge Hustead entered an order staying all proceedings in the claim still pending against Hughes because the Court's ruling in the present appeal will have a direct impact on the claim against Hughes.

II. Statement of the Facts

Decedent, Edgar Riffle, Jr., a West Virginia resident, was a union laborer hired by Appellee Contractors whose principal place of business is also in West Virginia. Complaint at ¶¶3, 5. At all times relevant to this case, he worked with two additional laborers and a crane operator loading old pipes onto a flatbed trailer for disposal at a Columbia Gas Transmission substation in Culpeper, Virginia. *Id.* at ¶5. Appellee Hughes also has its principal place of business in West Virginia, and had contracted with Columbia Gas to replace gas lines and to remove the old pipes. *Id.* at ¶¶2, 9. An employee of Hughes, Keith Hill, was the superintendent of this project, and he was to ensure that this work was performed safely. *Id.* at 6.

On July 27, 2004, employees of Hughes reportedly parked a flat bed trailer directly underneath a live overhead high voltage line in order to transport some of the above referenced pipes. *Id.* at ¶7. The following morning, the crane operator employed by Appellee Contractors knowingly

placed the crane dangerously close to the same live overhead voltage lines. *Id.* at ¶8. Throughout the placement of both the trailer and the crane, Keith Hill, the superintendent hired by Hughes to ensure that this work was performed safely was located at another job site in Richmond, Virginia. *Id.* at 9.

Around 10:00 a.m. on the morning of July 28, 2004, the crane operator was moving a pipe secured by a wire chain, onto the trailer. *Id.* at 10. At this time, an employee of Appellee Contractors was on the ground guiding the pipe onto the trailer. *Id.* This employee handed the chain to Mr. Riffle, who was standing on the trailer guiding the pipe in order to position it for transportation. *Id.* As Mr. Riffle guided the pipe, the crane operator caused the boom to come into contact with the primary conductor line. *Id.* At that time, 7200 volts of electricity knocked Mr. Riffle off of the trailer and threw him onto the ground causing him to strike his head. Mr. Riffle was able to remain responsive for several minutes, but despite being administered CPR, passed away. *Id.* at ¶11. His autopsy report listed the cause of death as electrocution. *Id.*

This case was brought pursuant to West Virginia's wrongful death statute, W. Va. Code § 55-7-5 and West Virginia's deliberate intent statute, W. Va. Code § 23-4-2.

III. Issues Presented

A.

Whether the trial court erred in granting Appellee's Motion to Dismiss in that Factual Issues were Resolved in Favor of Appellee, the Moving Party?

B.

Whether the trial court erred in Determining that the law of Virginia applies to Appellant's deliberate intent claim where Appellant's decedent was a West Virginia resident, and his Employer is a West Virginia Corporation?

IV. Standard of Review

In reviewing a circuit court's order granting a motion to dismiss, this Court will apply a *de novo* standard. Syllabus Point 1, *Lipscomb v. Tucky County Commission*, 475 S.E.2d 84 (W. Va. 1996). Generally, a motion to dismiss should only be granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Murphy v. Smallridge*, 468 S.E. 2d 167, 168 (W. Va. 1996). With this standard in mind, Appellant respectfully submits it is clear that the lower court erred in granting Appellee Contractor's motion to dismiss.

V. Argument

A.

The trial court erred in granting Appellee's Motion to Dismiss in that Factual Issues were Resolved in Favor of Appellee, the Moving Party

As previously noted, Appellee Contractors originally sought dismissal based on the doctrine of *lex loci delicti*. Only after receiving Appellant's responsive brief containing numerous citations to West Virginia law unequivocally stating that *lex loci delicti* did not apply to a deliberate intent cause of action did Appellee change its legal arguments to argue that the relationship of the states to the incident in question was the controlling inquiry. In support of this new argument, they attached an affidavit containing multiple factual statements only three days prior to the hearing on the motion to dismiss. Prior to the Judge issuing his order in this matter, Appellant was not furnished with an opportunity to conduct discovery into the statements made in the affidavit. Compounding the prejudice suffered by Appellant by this unjust procedural and substantive presentation of shifting arguments and facts, the Judge heavily relied on the statements contained in the affidavit in granting Appellee's motion to dismiss.

Specifically, the lower court noted in its Order that Appellant's decedent "only worked for this Defendant in the Commonwealth of Virginia." Order at ¶3. Such a fact was never stated in Appellant's Complaint. It was never even part of the record until three days prior to the hearing on the motion to dismiss by way of an affidavit. The lower court's Order further opines that "[i]t is undisputed that Plaintiff's decedent never worked for the Defendant in the State of West Virginia." *Id.* at ¶8. Contrary to this finding by the lower court, Appellant steadfastly disputes that Appellant's decedent never worked for Appellee in the State of West Virginia. Indeed, discovery conducted after this order was entered reveals that Appellant's decedent was in fact compensated for his mileage to travel from West Virginia to Virginia to work at the subject job site. Donahue Depo. at pp. 10-11. Further, the lower court's order states that "Edgar Riffle was hired for the Virginia job out of a Portsmouth, Ohio Union Hall." Order at ¶4. Appellant has not had an opportunity to discover all the facts leading up to decedent's being hired. For example, Appellant is not aware of whether decedent was hired "on the spot" in Ohio, whether he was telephoned at his resident in West Virginia to let him know that he was hired, or how he came to be notified of the job site in Virginia.

Further, this is simply a thinly veiled self-serving comment contained in the affidavit. As phrased, it implies that Appellant's decedent was only hired to work on a Virginia job. Contrary to this misleading phraseology, it is Appellant's assertion that decedent was not hired to work exclusively on one project in Virginia; rather, the tenure and location of his future employment likely would have been in West Virginia. Based upon the lower court's reliance on these disputed facts, and resolution of them in favor of Appellee, it ruled "there is simply nothing about the facts and circumstances of this case relating to West Virginia." *Id.* at ¶8. There can be no serious debate that the lower court relied on the information contained in the affidavit in granting Appellee's motion

to dismiss. Reliance by the lower court on these self-serving statements contained in the affidavit are grossly unfair to Appellant.

It is well settled that only matters considered in the pleadings can be considered on a motion to dismiss under Rule 12(b) of the West Virginia Rules of Civil Procedure. If matters outside the pleadings are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56. Syllabus Point 1, *Dunn v. Consolidation Coal Co.*, 379 S.E. 2d 485 (W. Va. 1989)(quoting, Syllabus Point 4, *United States Fidelity & Guaranty Co. v. Eades*, 144 S.E. 2d 703 (W. Va. 1965). Here, reliance on the facts contained in the affidavit at a motion to dismiss was improper and erroneous. Appellant requests that this Court reverse the lower court's ruling on this basis alone.

B.

The trial court erred in determining that the law of Virginia applies to Appellant's deliberate intent claim where Appellant's decedent was a West Virginia resident, and his employer is a West Virginia Corporation

Because of the fluctuating nature of Appellee's arguments in seeking their motion to dismiss, as well as the lack of legal analysis in the lower Court's Order granting the motion to dismiss, it is unclear on which theory Appellee was entitled to be dismissed. This question has never been decided by this Court. Namely, is a West Virginia resident, employed by a West Virginia Corporation, entitled to bring suit under West Virginia's deliberate intent statute where the worker was temporarily working out of state. The only legal analysis in the lower court's Order, in its entirety, is as follows:

> "Under *McGilton v. U.S. Xpress Enterprises, Inc.*, 214 W. Va. 600 (2003), for a worker who is injured in a foreign state to be eligible for the benefits of the West Virginia Workers' Compensation Act,

> including the right to sue his employer under the deliberate intent statute, the worker must have worked regularly in West Virginia prior to his injury, and the injury must have occurred while he was temporarily working in the foreign state."

Contrary to the misquoted dicta cited as being determinative in the lower court's Order, the law in West Virginia provides:

> Whether a deliberate intention cause of action under W. Va. Code §23-4-2(c) may be brought against an employer because of an injury that occurred in a *situs* other than West Virginia is not determined by the doctrine of *lex loci delicti*, but under the principles of comity.

Syllabus Point 1, *Russell v. Bush & Burchett, Inc.*, 559 S.E. 2d 36 (W. Va. 2001).

> Comity is a court-created doctrine through which the forum court may give the laws or similar rights accorded by another state effect in the litigation in the forum state. Comity is a flexible doctrine and rests on several principles. One is legal harmony and uniformity among the co-equal states. A second, grounded on essential fairness, is that the rights and expectations of a party who has relied on foreign law should be honored by the forum state. Finally, and perhaps most important, the forum court must ask itself whether these rights are compatible with its own laws and public policy.

Id. at Syllabus Point 2 (quoting, Syllabus Point 1, *Pasquale v. Ohio Power Co.*, 418 S.E. 2d 738 (W. Va. 1992).

Perhaps because this was not the original argument raised by Appellee, the lower court never addressed these factors in its Order. An examination into this test shows initially that the first factor, promoting legal harmony and uniformity among the co-equal states would not be applicable to this matter. There is no question that the West Virginia legislature has specifically provided for a deliberate intent cause of action, whereas Virginia law does not recognize such a right.

Application of the second principle, that the rights and expectations of a party who has relied on foreign law should be honored by the forum state, is uncertain at this juncture as there has been

no discovery conducted in relation to this principle. It is uncertain the extent, if any, to which any of the parties relied on Virginia or West Virginia law.

Finally, and perhaps most important, this Court, in keeping with the mandate of *Russell* and *Pasquale*, should ask whether application of Virginia law is compatible with West Virginia's laws and public policy. As noted above, West Virginia specifically allows an employee to recover from an employer for a deliberate intent cause of action, whereas Virginia does not. Application of Virginia law to this matter would be completely contrary and incompatible with West Virginia's own laws and public policy. The principles of comity will not be impacted by application of West Virginia law to this matter. Appellant's decedent was a West Virginia resident, and both Appellee Contractors and Hughes are West Virginia corporations.[3] Thus, the only parties impacted have no ties to Virginia besides an incidental temporary work site in Virginia.

Rather than conduct such an analysis into the principles of comity, the lower court instead seemed to focus on the relation of decedent's work to West Virginia. Essentially, the lower court applied the "most significant relationship" test found in the Second Restatement of Conflicts.[4] In this questionable "most significant relationship" test seemingly relied on by the lower court, it finds, prior to any discovery being had, that "[o]ther than the residency of the parties, there is simply nothing about the facts and circumstances of this case relating to West Virginia." Order at ¶8. The only basis for the lower court's statement in that regard is a disputed affidavit submitted three days

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[3] According to Tim Donahoe, Appellee Contractors did approximately 15 to 20 percent of its work in West Virginia. Donahoe Depo. at 25-26.

[4] Utilization of the Second Restatement "most significant relationship" test is generally disfavored as it leads to inconsistent results. *Oakes v. Oxygen Therapy Svcs.*, 363 S.E. 2d 130 (W. Va. 1987)(citing *Paul v. National Life*, 352 S.E. 2d 550 (W. Va. 1986)).

prior to the hearing. The lower court, based on simply that affidavit, resolved all factual disputes in favor of Appellee. Moreover, the lower court omits a discussion of several factors which weigh heavily in favor of the application of West Virginia law.

First and foremost, not only was decedent a resident of West Virginia, but Appellant is also a resident of West Virginia. Additionally, both Appellee Contractors and Hughes are West Virginia corporations with their principle places of business in West Virginia. Accordingly, disposition of this matter will only affect West Virginia residents and corporations. At this early stage, Appellant has not had an adequate opportunity to discover whether any work or other activities incident to Appellant's decedent's employment was performed in West Virginia.

Importantly, this Court has long recognized that comity does not require the application of the substantive law of a foreign state when that law contravenes West Virginia's public policy. *See*, *Mills v. Quality Supplier Trucking, Inc.*, 510 S.E. 2d 280 (W. Va. 1998)(refused to apply a foreign state's automobile guest passenger statute); *Lee v. Comer*, 224 S.E. 2d 721 (W. Va. 1976)(abrogated the doctrine of parental immunity); *Adkins v. St. Francis Hospital*, 143 S.E. 2d 154 (W. Va. 1965)(abolished charitable immunity for hospitals); *Bradley v. Appalachian Power Co.*, 256 S.E. 2d 879 (W. Va. 1979)(adopted the doctrine of comparative negligence in preference to the harsh rule of contributory negligence); *Coffindaffer v. Coffindaffer*, 244 S.E. 2d 338 (W. Va. 1978)(abolished the doctrine of interspousal immunity); *Dallas v. Whitney*, 188 S.E. 766 (W. Va. 1936). Accordingly, under the principles of comity and West Virginia public policy, West Virginia law should apply.

Besides the *situs* of this incident, the only thing tying these parties to Virginia as opposed to West Virginia is receipt of Workers' Compensation benefits from Virginia. However, this fact alone

should not be determinative in a comity analysis. *Russell v. Bush & Burchett, Inc.*, 559 S.E. 2d 36, n. 6 (W. Va. 2001). Subsequent to Judge Cummings's Order, the District Court for the Northern District of West Virginia handed down its opinion in *Coburn v. C&K Indus. Services*, 2007 WL 2789468 (N.D. W. Va. 2007). *Coburn* points out that the plain language of the Worker's Compensation Act, W. Va. Code § 23-2-1c(d), contemplates that employees could be covered under the Act, though they received worker's compensation benefits from another state. Quoting W. Va. Code §23-2-1c(d), that Court noted:

> If any employee or his or her dependents are awarded workers' compensation benefits or recover damages from the employer under the laws of another state for an injury received in the course of and resulting from the employment, the amount awarded or recovered, whether paid or to be paid in future installments, shall be credited against the amount of any benefits payable under this chapter for the same injury.

From here, that Court concluded that the statute "provides for instances where an employee receives benefits both under an out-of-state workers' compensation plan and under the West Virginia Workers' Compensation Act." *Coburn v. C & K Industrial Services*, 2007 WL 2789468, *6 (N.D.W. Va. 2007). Thus, compensation payments received by decedent's estate from the Commonwealth of Virginia should not be determinative of which states' law to apply.

Rather than conduct a comity inquiry, the lower Court's Order relies exclusively on *McGilton v. U.S. XPress Enterprises, Inc.*, 591 S.E.2d 158 (2003). However, this reliance is misplaced as this Court in that case was confronted with the question of "whether the West Virginia Workers' Compensation Act applies to the appellant, Brian Chad McGilton, <u>who was employed as a truck driver by a foreign corporation</u> and who was injured in the State of Texas." 591 S.E.2d at 160 (emphasis added). The importance of *McGilton* was that it differentiated between the analysis

as to when the defendant is a foreign resident and the analysis as to when the defendant is a West Virginia resident. The analysis in the discussion section in *McGilton* first conducts an evaluation of the five factors from another foreign defendant case, *Van Camp v. Olen Burrage Trucking, Inc.*, 401 S.E.2d 913 (W. Va. 1991), which must be considered "where the worker is injured in West Virginia and the employer is a foreign corporation or business . . . ." In *McGilton*, the defendant was a foreign resident, and thus the offhand statement in the *per curiam* opinion of *McGilton* relied upon by Judge Cummings in his order was unmistakably *dicta*. More importantly, the proper inquiry, is that of comity, not the five factor test in *McGilton*.

VI. Conclusion

For all the foregoing reasons, Appellant respectfully asks the Court to grant **APPELLANT'S BRIEF**, to schedule this appeal on the argument docket, to reverse the orders of Judge Cummings and Judge Hustead granting Appellee's Motion to Dismiss and Denying Appellant's Motion for Reconsideration, and to remand this case to the trial court for jury consideration.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Heather M. Langeland, do hereby certify that on the 30th day of April, 2010, a copy of the foregoing **APPELLANT'S BRIEF** was served on counsel of record through the United States Postal Service, to the following:

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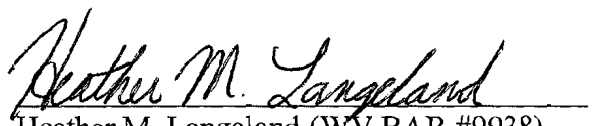

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