

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 35521

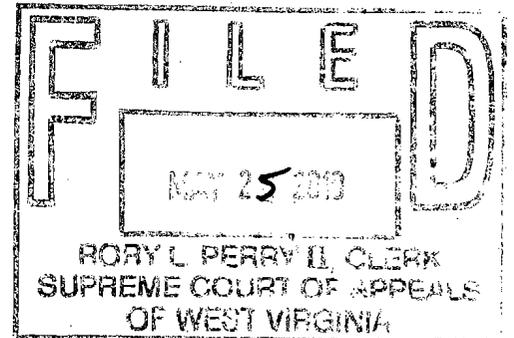
IRMA J. RIFFLE, Administratrix of the Estate of
Edgar J. Riffle, Jr., deceased,

Appellant,

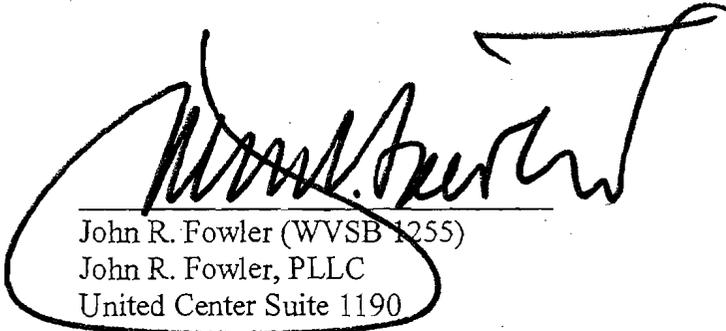
v.

C.J. Hughes Construction Company, Inc.,
a West Virginia corporation; and Contractors
Rental Corporation, a West Virginia corporation,

Appellees.



APPELLEES' BRIEF



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Estate of Robinson ex rel. Robinson v. Randolph County Com'n, 209 W.Va. 505, 549 S.E.2d 699 (2001).

Russell v. Burchett, Inc., 210 W. Va. 699 (2001).

Bell v. Vecellio & Grogan, Inc., 197 W. Va. 138 (1996).

Coburn v. C&K Industrial Services, No. 5:07CV23, 2007 WL 2789468 (Sept. 24, 2007).

West Virginia Code § 23-2-1a.

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APPELLEES' BRIEF

NOW COMES the Appellee, Contractors Rental Corporation, by counsel, John R. Fowler, Anna B. Williams and Andrea M. King, John R. Fowler, PLLC and for Appellate Brief states:

STATEMENT OF FACTS

Appellant's decedent was a union laborer, based out of Portsmouth, Ohio, hired by Contractors Rental, with two other laborers and a crane operator, to load old pipes onto a flatbed trailer for disposal at a Columbia Gas Transmission substation in Culpepper, Virginia. All individuals at the Virginia worksite at the time of Edgar Riffle's accident, including Edgar Riffle, were employees of Contractors Rental, Inc. Moreover, at no time did Appellant's decedent ever work for either Appellee in the State of West Virginia. As a result of Edgar Riffle's employment with Contractors Rental, Appellant filed for and received workers' compensation benefits under the Virginia Workers' Compensation plan, which was funded by her decedent's employer. Other than the residency of the parties, there is nothing to tie the employment relationship or this

incident to the State of West Virginia. Despite this, Appellant has chosen to file her action in the Circuit Court of Cabell County, West Virginia alleging that both Appellees are liable under the West Virginia Deliberate Intent Statute.

Judge Cummings addressed all the issues set forth by Appellant and granted Contractors Rental's Motion to Dismiss. Thereafter, Appellant filed a Motion to Reconsider. Approximately 10 days after the filing the Motion to Reconsider, Judge Cummings entered the Order granting the Motion to Dismiss, thus, de facto overruling the Motion to Reconsider.

Judge Cummings properly applied the standard given in *McGilton v. U. S. Xpress Enterprises, Inc.*, 214 W.Va. 600, 591 S.E.2d 158 (2003) and the Circuit Court's ruling should be affirmed.

DISCUSSION

A. Even if all of the alleged "facts" submitted by the Appellant in her Appellate Brief to this Court are true, the Circuit Court of Cabell County still correctly found in favor of the Appellant.

As an initial matter, none of the alleged "facts" which the Appellant claims were resolved in favor of the Contractors Rental were properly before the Circuit Court in the underlying matter. *Guthrie v. Northwestern Mutual Life Ins. Co.*, 158 W.Va. 1, 208 S.E.2d 60 (1974) ("Summary judgment cannot be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for summary judgment for such judgment."). Therefore, those arguments should be disregarded as they were not properly before the lower Court and are therefore, not properly before this Court. They have not been presented in any type of affidavit or other proper document because they are complete speculation and attempts at distorting the actual facts. However, even if the

Court found that the Appellant's factual allegations were true, it still would not entitle the Appellant to bring a deliberate intent case in West Virginia.

In order to twist the true nature of this case, the Appellant attempts to raise alleged "factual issues" about the fatal aspect of the Appellant's case, i.e., that the decedent never worked for Contractors Rental for one single day in West Virginia. The Appellant believes these "facts" were erroneously resolved in favor of the Appellee and would entitle her to continue her action. However, even if the Circuit Court did consider these facts, the Circuit Court still properly dismissed this action against Contractors Rental.

Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading 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 R.C.P. if there is no genuine issue as to any material fact in connection therewith...." Syllabus Point 4, *United States Fidelity & Guaranty Co. v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965).

Estate of Robinson ex rel. Robinson v. Randolph County Com'n, 209 W.Va. 505, 549 S.E.2d 699 (2001). In *Robinson*, the West Virginia Supreme Court of Appeals found that the Motion to Dismiss was converted to a motion for summary judgment and the final order was appealable but erroneous because it did not make any factual findings. *Id.* at 511. It only made legal conclusions. *Id.*

In the instant matter, the Cabell County Circuit Court made findings of fact that clearly disposed of the Appellant's case.

The Circuit Court of Cabell County properly found:

1. Plaintiff's decedent, Edgar Riffle, was a resident of the state of West Virginia.

2. Plaintiff's decedent was working for Contractors Rental Corporation, a West Virginia corporate entity, at the time of his death. Plaintiff never worked for C.J. Hughes Construction Company, Inc.

3. Plaintiff's decedent never worked for Contractors Rental in the State of West Virginia. Rather, he only worked for this Defendant in the Commonwealth of Virginia.

4. Edgar Riffle was hired for the Virginia job out of Portsmouth, Ohio Union Hall.

5. Edgar Riffle passed away in a workplace incident in Culpepper Virginia.

6. Contractors Rental Corporation paid Workers' Compensation premiums arising from Mr. Riffle's employment to the Commonwealth of Virginia.

7. Plaintiff received Workers' Compensation benefits from the Commonwealth of Virginia.

See Order Dismissing Contractors Rental Corporation.

Despite these clear findings of fact, none of which are disputed by the Appellant, the Appellant would still have this Court overturn the sound reasoning of the Cabell County Circuit Court. Other than to raise irrelevant and tenuous arguments that the decedent may be deemed to work in West Virginia, the Appellant cannot dispute any of the dispositive facts found by the Cabell County Circuit Court.

First, the Appellant contends that her decedent was paid for his mileage from West Virginia to Virginia. The Appellant submits this as evidence that the decedent "worked" in West Virginia. Such a contention is absurd. If the decedent happened to travel through Pennsylvania on his way to work in New Jersey, and be reimbursed for his mileage through Pennsylvania, would that mean that he was employed in Pennsylvania? If the decedent took an airplane from West Virginia to California to work, which was paid for by his employer, does that mean that the decedent is employed in every state

over which he flies? These theories are completely without merit or logic. Unquestionably, someone who travels through West Virginia on his way to a job, even if West Virginia is his starting point, that does not mean that he was employed in West Virginia. Further, as testified by Mr. Donahue, the paid mileage component of pay was something exclusive to one union group and was not something exclusively given to West Virginia citizens who worked outside of the State of West Virginia. Rather, it was part of a collective bargaining agreement given to each member of the union regardless of the citizenship of the member or where the individual was traveling to work.

Equally without merit is the Appellant's contention that the decedent was possibly contacted for the Virginia job while he was physically located in West Virginia position is equally without merit. Imagine the chaos if every employee who was contacted by an employer for a job in another state was deemed to be "employed" in West Virginia and therefore entitled to bring a deliberate intent action in this State. The mere happenstance of where someone is physically located while receiving an employment inquiry has no bearing on the issues in this matter.

Further, the Appellant argued that the decedent may have worked for West Virginia in the future. This is pure speculation and the law does not permit speculation on the issue at hand. The Appellant could have just as easily worked in Maryland, Pennsylvania, or Florida, in the future but that does not entitle him take advantage of workers' compensation statutes in those states. In fact, as stated by Tim Donahoe, it is much more likely that the decedent would have never worked for his employer in West Virginia as 80 to 85% of the work performed by his employer occurred in states other than West Virginia.

Finally, the Appellant's plea that she did not have the chance to conduct discovery is another attempt at distorting the facts and the history of this case. The Appellant complains about an affidavit that was submitted by the Appellee to the Circuit Court three days before a November 22, 2006 hearing. Appellant's Brief at 3. The Appellant then states that she submitted "additional authority" to the Court on April 9, 2009 in an attempt to get the Court to reconsider its position. This would have given the Appellant two years, four months, and eighteen days to submit her own affidavit disputing the affidavit upon which the Court largely based its ruling. However, the Appellant failed to do that because she cannot dispute the incontrovertible facts supporting the summary judgment motion against her.

As this Court can clearly see, even assuming all of the things the Appellant raised are true, even though they should not be considered because they were not raised below, nothing can change the fact that the decedent never worked for the Appellee in the State of West Virginia. Nothing. The only place the decedent ever worked for the Appellees was in Virginia and this is indisputable despite the Appellant's attempts at the manipulation of irrelevant facts.

B. Appellant is not entitled to sue under the West Virginia Deliberate Intent Statute.

The Circuit Court of Cabell County correctly found that the Appellant was not entitled to sue his employer pursuant to West Virginia's deliberate intent statute. There is no case law that stands for the proposition that a West Virginia resident is automatically granted the right to sue for deliberate intent solely on the basis of residency. As aptly noted by Judge Cummings at the oral argument of the prior motion, substantive due process would be violated if West Virginia Common Law set forth different tests and

standards based solely on the citizenship of the parties. Quite simply, despite Appellant's exhaustive pleas to the contrary, there is no fundamental right under the West Virginia Constitution for West Virginia residents to sue their employer for additional Workers' Compensation benefits regardless of the citizenship of their employer. In order to rely on this extraordinary statutorily created remedy, the employer-employee relationship must fit the confines of the statute, not just the citizenship of the parties to the relationship.

West Virginia case law is clear that a person can only avail themselves to the deliberate intent statute when they are an "employee" of the employer under the principles set forth in the Workers' Compensation statute. Should the Appellant meet this burden, then an analysis is done under the principles of comity as to whether West Virginia or another state's Workers' Compensation statute applies. *Russell v. Burchett, Inc.*, 210 W. Va. 699 (2001); *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138 (1996). There is simply no bright line rule as to when a person injured in another state can file suit under the deliberate intent statute. Rather, the cases all focus on the nature of the employee's employment within and outside of the state. *See McGilton v. U. S. Xpress Enterprises, Inc.*, 214 W.Va. 600, 591 S.E.2d 158 (2003). There is nothing in *McGilton* or any other case decided by the Supreme Court of Appeals noting that the standard to be used is different depending on the residency of the employee or employer. Rather, regardless of citizenship, as an initial hurdle, the employee must have worked regularly for the employer at some prior point in the State of West Virginia. *Id.* Some future speculative employment, a mileage check, or a telephone call to West Virginia does not qualify.

West Virginia Code § 23-2-1a defines individuals who are “employees” covered by the West Virginia Workers' Compensation Act as

(a) . . . all persons in the service of employers [as defined by the Act] and employed by them for the purpose of carrying on the industry, business, service or work in which they are engaged, including, but not limited to:

(1) Persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state.

In this matter, it is undisputed that Edgar Riffle never worked for either Appellee in the State of West Virginia. The simple fact of the matter is that not one single second of Edgar Riffle’s employment ever occurred within the State of West Virginia. Rather, Mr. Riffle was employed out of a Portsmouth, Ohio Union Hall to solely work for Contractors Rental in the Commonwealth of Virginia. Other than the residency of the parties, there is simply nothing to tie Edgar Riffle’s work to the State of West Virginia. The facts of this case are much closer to *McGilton*, where this Court held a West Virginia resident was not entitled to sue under the Deliberate Intent statute, than they are to *Bell* or *Russell*.

In *McGilton*, this Court held that an interstate truck driver who resided in West Virginia was not entitled to maintain a cause of action under the deliberate intent statute when Mr. McGilton’s employment was not primarily based in the State of West Virginia. *Id.* It made no difference that Mr. McGilton parked his truck in West Virginia and had occasional deliveries within the State. It further made no difference that Mr. McGilton was a resident of the State of West Virginia and that his employer maintained facilities in West Virginia.

The West Virginia Supreme Court of Appeals stated,

The plain thrust of the authorities is that for a worker who is injured in a foreign state to be eligible for the benefits of the West Virginia Workers' Compensation Act, *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.*

Id. at 603 (emphasis added). Further, the West Virginia Supreme Court of Appeals stated,

Although the appellants argued that he parked his truck in West Virginia between runs and that he might have occasionally made deliveries inside the state, the evidence shows that the overwhelming bulk of his activity occurred outside the state, and, in this Court's opinion, *it cannot be said that he was regularly employed within the state prior to his injury, within the meaning of West Virginia law, or that his employment out of state was "temporary," so as to entitle him to the benefits of West Virginia's Workers' Compensation Act.*

Id. at 603-604 (emphasis added). The Appellant attempts to gloss over this clear standard by calling it "dicta," but it is clear what factors this Court was considering when making its decision. After expressing the rule that a worker must have worked regularly in the state of West Virginia prior to his injury and the injury must have occurred while he was temporarily working in a foreign state, the West Virginia Supreme Court of Appeals found that Mr. McGilton was not regularly employed within the state prior to his injury nor was out of state employment temporary. *Id.* at 603-604. The West Virginia Supreme Court of Appeals therefore ruled that Mr. McGilton was not entitled to bring a deliberate intent cause of action in West Virginia.

Similarly to *McGilton, supra*, Mr. Riffle's employment was not based in the State of West Virginia, nor did he ever work for Contractors Rental in West Virginia at any time. Therefore, it is clear that he was not regularly employed within West Virginia prior to his incident. Further, he was hired to work in Virginia and only worked in that

Commonwealth. Quite simply, every single task that Mr. Riffle was asked to do on behalf of Contractor's Rental occurred within the borders of Virginia. A ruling by this Court that corporate citizenship and not the nature of the employer-employee relationship subjects a defendant to the deliberate intent statute would be contrary to the law and the spirit of the deliberate intent statute.

Moreover, the payment of Workers' Compensation premiums arising from Mr. Riffle's employment was paid to the Commonwealth of Virginia. Appellant would have this Court determine that Mr. Riffle was a West Virginia employee based solely on citizenship and the very slim prospect that Mr. Riffle might have worked in the State of West Virginia at some future point, that he received a mileage check for traveling to Virginia, and that he may have been contacted for his employment within the state of West Virginia. However, it is much more likely that he would never work in the State of West Virginia for Contractor's Rental. In any event, such a speculative event would not even be admissible in a Court and certainly should not be used to determine the substantive rights of the parties.

Bell, supra, and *Russell, supra* are not analogous to the instant case. In *Bell*, the Court determined that the Appellant was entitled to bring suit under the deliberate intent statute because the Appellant's primary employment was in the State of West Virginia even though he was injured while working temporarily out of the State. In this case, Edgar Riffle was never hired to work in West Virginia. In *Russell*, the Court held that because Appellant was working under a contract from the State of West Virginia, his employer was bound by the State's Workers' Compensation laws. No such factor exists

here as Edgar Riffle was working for a private employer whose contract for work was with another private employer.

Further, *Coburn v. C&K Industrial Services*, 2007 WL 2789468 (2007) adds nothing to the discussion. First and foremost, *Coburn* is an unpublished opinion from a foreign jurisdiction. Secondly, the Northern District of West Virginia in *Coburn* applied *McGilton* to reach its decision. Thirdly, *Coburn* is factually distinct from this matter. In *Coburn*, the plaintiff had worked for the employer within the State of West Virginia and was, in fact, suing for injuries that occurred while working in the State of West Virginia. As such, under *McGilton*, comity made C&K Industrial Services subject to the West Virginia Workers' Compensation Act and made the West Virginia Workers' Compensation Act the applicable law.

In this matter, it is undisputed that Appellant *never worked a single second in the State of West Virginia for this Appellee*, his family accepted Workers Compensation benefits from the Commonwealth of Virginia and all factors set forth in *McGilton* weigh heavily toward Virginia law applying (emphasis ours).

Appellant in this matter is attempting to pick and choose dicta from a variety of cases under a variety of circumstances to contort the facts of this case into an untenable position. Appellee does not deny that it is subject to West Virginia Workers Compensation Act in some circumstances as its residency requires that it hire some employees to perform work in the State of West Virginia. Edgar Riffle was not one of those employees. Moreover, Appellee does not deny that had Edgar Riffle worked for Appellee in the State of West Virginia, the analysis would be different as well. However,

he did not. Everything about the nature of the employment relationship occurred within the Commonwealth of Virginia and Virginia law therefore applies.

Appellant's "public policy" arguments are equally without merit. The West Virginia Supreme Court of Appeals in *McGilton* did not find that it was against public policy to decline to allow Mr. McGilton to bring a deliberate intent case in West Virginia. It is not the public policy of West Virginia to allow every single West Virginia resident, no matter where they are employed or where they are injured, to bring a deliberate intent cause of action in West Virginia against their employers. Mr. Riffle was protected under Virginia's workers' compensation laws, and the fact that the Appellant would like to pursue this matter outside of Virginia's workers' compensation laws, does not mean that it is against West Virginia's public policy.

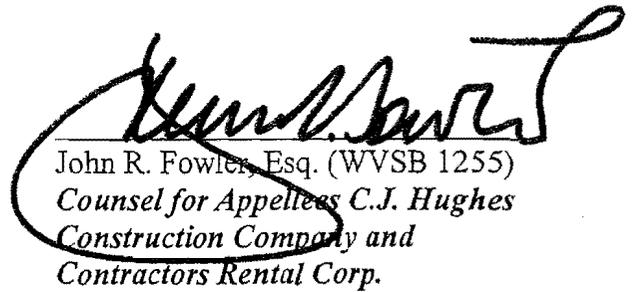
In conclusion, Edgar Riffle's family is not entitled to avail themselves to the West Virginia Deliberate Intent Statute as Edgar Riffle was hired out of a Portsmouth, Ohio Union Hall to perform work in the Commonwealth of Virginia. He was not employed by Contractor's Rental to do any work in the State of West Virginia and has never done any work for the company within this State. All Workers' Compensation premiums were paid to the Commonwealth of Virginia and Appellant elected to accept Workers' Compensation benefits from the Commonwealth of Virginia. Given that the plain thrust of the authorities is that for a worker who is injured in a foreign state to be eligible for the benefits of the West Virginia Workers' Compensation Act, the worker must have worked regularly for the employer in West Virginia prior to his injury, and the injury must have occurred while he was temporarily working in the foreign state, Appellant is not entitled to avail herself to the West Virginia Deliberate Intent Statute.

CONCLUSION

The Appellant is attempting to create issues where none exist. She is attempting to ignore the clear law of *McGilton* in which this Court stated that in order to be entitled to bring a deliberate intent case in West Virginia, “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.” *McGilton*, 214 W.Va. at 603 (emphasis added). No amount of hair splitting will change the fact that the decedent never worked a single second for the Appellee in West Virginia prior to his injury or that he was not “temporarily” employed in Virginia. The Appellant would have this Court articulate a bright line rule that if a West Virginia resident is employed by a West Virginia company, then that employee is always automatically entitled to file a deliberate intent case in West Virginia even if that employee never works a single day in West Virginia and receives workers’ compensation benefits from another state. This position has never been articulated by the legislature or this Honorable Court and is not supported by the case law or the statute.

The Cabell County Circuit Court correctly found, on more than one occasion and by two different Circuit Judges, that the Appellant was barred from maintaining a deliberate intent cause of action against the Appellee. The Appellant received Virginia Workers’ Compensation, but also wants to avail herself to West Virginia’s Workers’ Compensation scheme. Deliberate intent is a statutory scheme that clearly does not apply to the decedent. The decedent never spent one single day working in the State of West Virginia for the Appellee. The West Virginia Supreme Court of Appeals has already given the standard to apply when making these kinds of decisions and the Cabell County

Circuit Court of Appeals applied it properly. Therefore, the rulings of the Cabell County Circuit Court should be affirmed.



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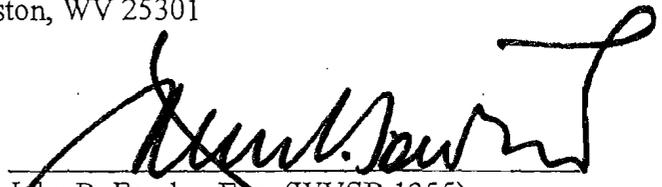
Appellees.

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that the foregoing "Appellees' Brief" has been served upon counsel of record on this day by depositing a true copy in the United States Mail, postage prepaid and addressed as follows:

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