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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0084

ON PETITION FOR WRIT OF PROHIBITION FROM AN ORDER OF THE CIRCUIT COURT OF LINCOLN COUNTY

STATE OF WEST VIRGINIA ex rel.
BJ SERVICES COMPANY, U.S.A.,

Petitioner, **Civil Action No. 02-C-64**

ONORABLE JAY M. HOKE
JDGE OF THE CIRCUIT COURT OF
INCOLN COUNTY, WEST VIRGINIA

VERIFIED PETITION FOR WRIT OF PROHIBITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

Pursuant to Article VIII, Section 3, of the West Virginia Constitution and Rule 16 of the West Virginia Revised Rules of Appellate Procedure, Petitioner, BJ Services Company U.S.A., respectfully requests this Honorable Court grant its Verified Petition for Writ of Prohibition and, in support thereof, states as follows:

I.

QUESTION PRESENTED

Pursuant to West Virginia Code § 55-2A-2 and *Hayes v. Roberts & Schaefer Co.,* 192 W. Va. 368, 452 S.E.2d 459 (1994), does the Kentucky one-year statute of limitations for personal injury claims – Kentucky Revised Statute § 413.140 – bar an employee's personal injury claim filed against his employer under West Virginia Code § 23-4-2 when the claim accrued in Kentucky but was filed in West Virginia?

II.

STATEMENT OF THE CASE

On June 12, 2000, Plaintiff, Glen Anderson, was allegedly injured while working at a gas well near Belcher, Kentucky while employed by Petitioner, BJ Services Company U.S.A., ("BJ Services"). On May 23, 2002, Mr. Anderson and his wife Brenda Anderson ("Plaintiffs") filed a Complaint in the Circuit Court of Lincoln County, West Virginia wherein Plaintiffs asserted a claim against BJ Services pursuant to West Virginia Code § 23-4-2. Plaintiffs also asserted negligence claims against Equitable Production Company ("Equitable") and Larry Ballard, Mr. Anderson's supervisor. Complaint, Counts I, II, A.R. 3-7.

On June 16, 2002, BJ Services, Equitable and Mr. Ballard ("Defendants") filed a Motion for Judgment on the Pleadings. *See* Defs.' Motion for Judgment on the Pleadings, A.R. 9-18. Defendants moved to dismiss Plaintiffs' claims because Kentucky's one-year statute of limitations for personal injury claims – Kentucky Revised Statute § 413.140 – barred Plaintiffs' claims. Pursuant to West Virginia Code § 55-2A-2 and the Court's decision in *Hayes v. Roberts & Schaefer Co.,* 192 W. Va. 368, 452 S.E.2d 459 (1994), Defendants asserted that Kentucky's one-year statute of limitations applies to Plaintiffs' personal injury claims against BJ Services because Plaintiffs' claims accrued in Kentucky. *See* Defs.' Motion for Judgment on the Pleadings at pp. 3-6, A.R. 13-16.

In *Hayes*, the Court applied West Virginia Code § 55-2A-2 and held:

> [w]hen a person files a personal injury claim in West Virginia more than one year after the injury occurred in Kentucky, Kentucky's one-year statute of limitations for personal injuries, rather than West Virginia's two-year statute of limitations for personal injuries, is applicable because the Kentucky period of limitations would bar the claim.

452 S.E.2d at 462. Defendants relied on this clear mandate and moved to dismiss Plaintiffs' claims. *See* Defs.' Motion for Judgment on the Pleadings at pp. 3-6, A.R. 13-16.

Plaintiffs filed a Response to Defendants' Motion on September 2, 2003 and opposed Defendants' Motion making the same argument rejected by the Court in *Hayes. See generally* Pls.' Resp. to Defs.' Mot. for Judgment on the Pleadings, A.R. 19-28. Plaintiffs argued that because Kentucky law does not provide for an equivalent statutory deliberate intent claim, Plaintiffs' deliberate intent claim was not a "foreign claim" as contemplated by West Virginia Code § 55-2A-1, *et. seq. See id*, pp. 3-5, A.R. 23-25. Instead, Plaintiffs argued their deliberate intent claim was a statutory claim arising under the West Virginia Workers' Compensation Act, and thus, West Virginia Code § 55-2A-2 did not operate to apply Kentucky's one-year statute of

limitations for personal injuries, Kentucky Revised Statute § 413.140. *Id.* Accordingly, Plaintiffs argued the Circuit Court was required to apply the two-year statute of limitations for a deliberate intent claim brought pursuant to West Virginia Code § 23-4-2. *Id.*

Defendants filed a Reply on September 10, 2003. Defendants asserted that West Virginia Code § 55-2A-2 applied because (1) a "claim," as defined by West Virginia Code § 55-2A-1, is "any right of action which may be asserted in a civil action or proceeding and includes, but is not limited to a right of action created by statute," and (2) Plaintiffs' claims accrued in Kentucky because that is where Mr. Anderson was allegedly injured. *See* Defs.' Reply to Pls.' Resp. to Defs.' Motion for Judgment on the Pleadings, pp. 3-4, A.R. 31-32. Thus, pursuant to West Virginia Code § 55-2A-2 and *Hayes*, Defendants asserted that when a claim accrues outside of West Virginia and the resulting lawsuit is filed in West Virginia, Section 55-2A-2 mandates application of the statute of limitations that would bar the claim. *Id.* Specifically, Defendants argued that Kentucky's one-year statute of limitations for personal injury claims, Kentucky Revised Statute § 413.140, applied and barred Plaintiffs' claims. *Id.*

A hearing was held on Defendants' Motion for Judgment on the Pleadings on October 14, 2003. However, the Court did not enter a ruling. On December 27, 2006, Plaintiffs filed a Motion for Entry of Scheduling Order Setting a Trial Date on December 27, 2006. *See* Motion for Entry of a Scheduling Order Setting a Trial Date, A.R. 35-36. In response, Defendants objected and again moved for the dismissal of Plaintiffs' claims. *See* Defs.' Resp. to Pls.' Motion for Entry of a Scheduling Order Setting a Trial Date, A.R. 37-40.

On January 17, 2007, Plaintiffs replied to Defendants' objections and reiterated the arguments previously made in response to Defendants' Motion for Judgment on the Pleadings. However, Plaintiffs also argued that if the Circuit Court must apply a Kentucky statute of

limitations, the applicable statute of limitations is Kentucky's two-year statute of limitations for workers' compensation claims, Kentucky Revised Statute § 342.185(1). *See* Pls.' Reply to Defs.' Resp. to Pls.' Motion for Entry of a Scheduling Order Setting a Trial Date, and Supplemental Argument in Opposition to Defs.' Motion for Judgment on the Pleadings at pp. 2-5, A.R. 42-45.

On November 12, 2008, the Circuit Court of Lincoln County denied Defendants' Motion.[1] The Circuit Court agreed that Plaintiffs' personal injury claims accrued on June 12, 2000 in Kentucky and that West Virginia Code § 55-2A-2 applied. *See* Procedural Order, Findings and Conclusions, ¶ 11 ["November 12, 2008 Order"], A.R. 66. However, the Circuit Court did not apply Kentucky's one-year statute of limitations and did not dismiss Plaintiffs' claims. *See generally* November 12, 2008 Order, Findings and Conclusions, A.R. 64-71. Rather, the Circuit Court ruled that Kentucky's two-year statute of limitations for filing a workers' compensation claim – Kentucky Revised Statute § 324.185(1) – applied to Plaintiffs' claims against BJ Services. *See* November 12, 2008 Order, Findings and Conclusions, ¶ 29, A.R. 70. The Circuit Court, relying in part on the Court's holding in *Bell v. Vecellio & Grogan, Inc.*, 475 S.E.2d 138, 475 S.E.2d 138 (1996), ruled that Plaintiffs' deliberate intent claim is, by nature, a statutory claim for a work related injury under the West Virginia Workers' Compensation Act. Thus, the "most logical and specific" statute of limitations applicable to Plaintiffs' claims against BJ Services was Kentucky Revised Statute § 324.185(1) – the two-year

[1] Because all parties presented matters outside of the pleadings, the Circuit Court treated Defendants' Motion for Judgment on the Pleadings as a Motion for Summary Judgment under Rule 56 of the West Virginia Rules of Civil Procedure. *See* November 12, 2008 Order, Brief Procedural History at p. 3, A.R. 59.

statute of limitations for filing a workers' compensation claim. *See* November 12, 2008 Order, Findings and Conclusions, ¶ 17, A.R. 67.[2]

Following the Circuit Court's Order denying Defendants' Motion, Defendants filed a Motion for Reconsideration and a Motion to Certify the Question of Law. *See* Defs.' Motion for Reconsideration, A.R. 72-76; *see also* Defs.' Motion to Certify Question of Law, A.R. 77-86. Defendants requested the Circuit Court reconsider its ruling because the Court's holding in *Hayes* – a case that presented facts and issues indistinguishable from the facts and issues in this case – mandated the application of Kentucky's one-year statute of limitations for personal injury claims and, in turn, the dismissal of Plaintiffs' claims – not the two year statute of limitations for workers' compensation claims. *See* Defs.' Motion for Reconsideration, A.R. 72-76.[3]

Further, Defendants requested the Court to reconsider because even under Kentucky law – Kentucky Revised Statute § 342.610(4) – an employee's direct personal injury claim against an employer is governed by Kentucky's one-year statute of limitations for personal injury claims – not the two-year statute of limitations for workers' compensation claims. *Id.* Thus, even under the Court Circuit's analysis, Kentucky's one-year statute of limitations was the only, and most "specific" statute of limitations to apply in this case.[4] Alternatively, Defendants requested the

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[2] The Court's November 12, 2008 Order did not address Equitable and Mr. Ballard's Motion, or the arguments therein. *See generally* November 12, 2008 Order, A.R. 57-71.

[3] Equitable and Mr. Ballard likewise moved for reconsideration and additionally argued that even under the Court's analysis, Plaintiffs' claims against Equitable and Mr. Ballard were time-barred. *See* Defs.' Motion for Reconsideration, A.R. 74-75.

[4] In reply to Plaintiff's Response and during oral argument on March 6, 2013, Defendants further argued that pursuant to the West Virginia Workers' Compensation Act, the statute of limitations for filing a workers' compensation claim is six months. *See* Defs.' Reply to Pls.' Resp. to Defs' Mot. to Reconsider, A.R. 97 -100; *see also* Mar. 6, 2013 Hearing Trans., p. 6-9, A.R. 106-109; W. Va. Code § 23-4-15 (West. 2014) And, the statute of limitations for filing a personal injury claim under West Virginia Code 23-4-2 is two years – the general statute of limitations for personal injuries set forth in West Virginia Code § 55-2-12(b). This, Defendants contended, supported their position that the only, and most specific, statute of limitation applicable to Plaintiffs' claims is Kentucky Revised Code § 413.140 – the one year statute of limitations applicable to personal injuries. *See generally id.*

Circuit Court to certify the question of law presented herein to the Court. *See generally* Defs.' Motion to Certify Question of Law, A.R. 81.

Plaintiffs responded and requested that the Circuit Court uphold its prior ruling. Specifically, Plaintiffs argued that under *Bell* a "deliberate intent" claim is a "direct statutory cause of action expressed within the workers' compensation system" and a "wholesale abandonment" of the common law tort concept of a deliberate intent cause of action by an employee against an employer. *See* Pls.' Resp. to Defs.' Motion to Certify Question of Law and to Reconsider, p. 5, A.R. 91. Plaintiffs further argued that a "deliberate intent" claim is, by statute, a claim for a work related injury. Thus, according to Plaintiffs, it is Kentucky's two-year statute of limitations for administrative workers' compensation claims, Kentucky Revised Statute § 342.185(1), and not Kentucky's one-year statute of limitations for personal injuries, Kentucky Revised Statute § 413.140, which is applicable to the claims asserted against BJ Services in this case. *See id.* at p. 6, A.R. 92.

The Circuit Court entertained oral argument on Defendants' Motion to Reconsider and Motion to Certify Question of Law on March 6, 2013. At the hearing, the Circuit Court denied Defendants' Motion to Reconsider and Motion to Certify Question of Law and ruled that there had been no material change in the factual or legal posture of this case sufficient to warrant reconsideration of its November 12, 2008 Order or certification to the Court. *See* Mar. 6. Hearing Trans., p. 17, A.R. 117. Unfortunately, the Circuit Court has not, to date, issued a written order of its findings.[5]

The Circuit Court's application of Kentucky's two-year statute of limitations for workers' compensation claims, and not Kentucky's one-year statute of limitations for personal injury

[5] Pursuant to Rule 16(e)(1) of the West Virginia Rules of Appellate Procedure a copy of the transcript from the March 6, 2013 hearing has been included in the Appendix Record. *See* W. Va. R. App. Pr. 16(e)(1)(2014).

claims as mandated by *Hayes*, is clear error as a matter of law. Thus, BJ Services files this extraordinary Writ of Prohibition seeking the Court to provide immediate relief from the Circuit Court's Order denying Defendants' Motions, the Circuit Court's failure to follow the Court's precedent in *Hayes* and the Circuit Court's failure to apply the correct statute of limitations.

BJ Services respectfully requests the Court to provide it relief insofar as the Circuit Court erroneously applied the wrong statute of limitations. As a result, BJ Services must proceed to trial in a case clearly barred by the statute of limitations. Trial is set to begin on November 12, 2013.

III.

SUMMARY OF ARGUMENT

Kentucky's one-year statute of limitations for personal injury claims applies to Plaintiffs' claims. Thus, Plaintiffs' claims are barred by the statute of limitations and should be dismissed.

It is undisputed that Plaintiffs' claims accrued in Kentucky. Thus, pursuant to West Virginia Code § 55-2A-2, the period of limitations applicable to this claim shall be either that prescribed by the law of the place where the claim accrued or by the law of West Virginia, whichever bars the claims.

The statute of limitations for personal injury claims in Kentucky is one year. *See* Ky. Rev. Stat. § 413.140 (West 2014). The statute of limitations for personal injury claims in West Virginia is two years. W. Va. Code § 55-2-12(b) (West 2014). Because Plaintiffs' claims accrued in Kentucky and Kentucky's one-year statute of limitations bars the Plaintiffs' claim, the Court must apply Kentucky's one-year statute of limitations, and in turn, dismiss Plaintiffs' claims. *Hayes v. Roberts & Schaefer Co.,* 192 W. Va. 368, 452 S.E.2d 459 (1994).

Despite the Court's ruling in *Hayes*, the Circuit Court did not apply Kentucky's one-year statute of limitations. The Circuit Court's ruling is clearly erroneous. Instead, the Circuit Court applied Kentucky's two-year statute of limitations for workers' compensation claims. The Circuit Court's ruling was clear error and inconsistent with the Court's decision in *Hayes*, inconsistent with the law of Kentucky and inconsistent with West Virginia law.

First, *Hayes* mandates that the Kentucky one-year statute of limitations applies to Plaintiffs' claims in this case. Second, even under the Court's analysis (a statutory construction approach), Kentucky's one-year statute of limitations for personal injury claims should apply because personal injury claims filed by an employee against an employer in Kentucky are subject to the one-year statute of limitations. Finally, the statute of limitations applicable to claims brought in West Virginia under West Virginia Code § 23-4-2 is the two-year statute of limitations for personal injury claims, not the six month statute of limitations for filing workers' compensation claims. The Circuit Court's ruling in this matter directly conflicts with *Hayes* and creates a wholly inconsistent application of the law on statute of limitations in Kentucky and West Virginia.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure is necessary. Although the law is clear and the facts and legal arguments are adequately presented in the record below, oral argument pursuant to Rule 19 is necessary to address the Circuit Court's ruling and its finding that Kentucky's two-year statute of limitations for workers' compensation claims applies to Plaintiffs' claims. Finally, this case involves a narrow issue of law and BJ Services believes a memorandum decision is appropriate.

V.

ARGUMENT

Plaintiffs assert a claim under West Virginia Code § 23-4-2 against BJ Services and negligence claims against Equitable and Larry Ballard. Plaintiffs' claims accrued in Kentucky. Therefore, pursuant to West Virginia Code § 55-2A-2 and the holding of the Court in *Hayes v. Roberts & Schaefer Co.,* 192 W. Va. 368, 452 S.E.2d 459 (1994), Kentucky's one-year statute of limitations for personal injury claims bars Plaintiffs' claims. The Circuit Court's decision to not apply Kentucky's one-year statute of limitations, and instead apply Kentucky's two-year statute of limitations for the filing of workers' compensation claims, is clear error.

A. STANDARD OF REVIEW

"The Writ of Prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1 (West. 2014); *see also State ex. rel. Charleston Mail Ass'n v. Ranson,* Syl. Pt. 1, 200 W. Va. 5, 488 S.E.2d 5 (1997)("[T]his Court will use prohibition...to correct...substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently from any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.").

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft

> repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need to be satisfied, **it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight**.

State ex rel. TD Ameritrade, Inc. v. Kaufman, Syl. Pt. 1, 225 W. Va. 250, 692 S.E.2d 293 (2010)(emphasis added).

The Circuit Court committed a clear error of law by refusing to apply Kentucky Revised Statute § 413.140 to Plaintiffs' claims. Defendants in the underlying action filed a Motion for Reconsideration and a Motion to Certify the Question of Law. However, the Circuit Court denied both motions. Therefore, the filing of this extraordinary writ is now BJ Service's only available remedy to address the erroneous holdings of the Circuit Court and to determine the statute of limitations applicable to Plaintiffs' claims herein.

B. LAW AND ANALYSIS

KENTUCKY'S ONE-YEAR STATUTE OF LIMITATIONS – KENTUCKY REVISED STATUTE § 413.140 – BARS PLAINTIFFS' CLAIMS

Plaintiffs' claims relate to alleged personal injuries suffered by Glen Anderson while employed by BJ Services at a gas well in Belcher, Kentucky. Because Mr. Anderson was an employee of BJ Services, Plaintiffs filed a claim against BJ Services pursuant to West Virginia Code § 23-4-2. Plaintiffs also filed negligence claims against Equitable – the owner of the well – and Larry Ballard – Mr. Anderson's supervisor. Since it is undisputed Plaintiffs' claims accrued in Kentucky and that West Virginia Code § 55-2A-2 applies to Plaintiffs' claims (*See* November 12, 2008 Order, Findings and Conclusion, ¶¶ 11, 13, A.R. 66), the only issue is what statute of

limitation applies to Plaintiffs' claims. BJ Services maintains that Kentucky's one-year statute of limitations for personal injury claims applies.

When a claim is filed in West Virginia but accrues in another state, West Virginia Code § 55-2A-2 requires the court to apply the shorter period of limitations. Pursuant to West Virginia Code § 55-2A-2, "[t]he period of limitation applicable to a claim accruing outside of this State shall be either that prescribed by the law of the place where the claim accrued or by the law of this State, *whichever bars the claim*." W. Va. Code § 55-2A-2 (West 2013)(emphasis added); *see also McKinney v. Fairchild Int. 'l*, 199 W. Va. 718, 487 S.E.2d 913 (1997)("W. Va. Code 55-2A-2 [1959] borrows the shorter period of limitation for a claim accruing outside of this State...."); *accord Hayes*, 192 W. Va. 368, 452 S.E.2d 459 (1994)("The spirit of W. Va. Code [1959] clearly favors the extinguishment of the claim."). A "claim" as defined under West Virginia Code § 55-2A-2 is "any right of action which may be asserted in a civil action or proceeding and includes, *but is not limited to, a right of action created by statute*." *See* Procedural Order, Findings and Conclusions, ¶ 8, A.R. 66 (emphasis added); *see also* W. Va. Code § 55-2A-1 (West 2014).

The Circuit Court correctly ruled that Plaintiffs' claims against BJ Services accrued on June 12, 2000, in Belcher, Kentucky. Moreover, the Circuit Court recognized:

> That under *W. Va. Code* § 55-2A-2, when a person files a personal injury claim in West Virginia more than one year after the injury occurred in Kentucky, Kentucky's one-year statute of limitations for personal injuries, rather than West Virginia's two-year statute of limitations for personal injuries, is applicable because the Kentucky period of limitations would bar the claim. *Hayes v. Roberts and Schaefer Co.*, 452 S.E.2d 459 (W. Va. 1994).

See November 12, 2008 Order, Findings and Conclusion, ¶¶ 11, 13, A.R. 66. Nevertheless, although the Circuit Court applied West Virginia Code § 55-2A-2, the Circuit Court committed clear error when it did not apply the correct Kentucky statute of limitations to Plaintiffs' claims.

Instead of applying Kentucky's one-year statute of limitations for personal injuries (as mandated by *Hayes*), the Circuit Court applied Kentucky's two-year statute of limitations for the filing of administrative workers' compensation claims. *See* November 12, 2008 Order, Findings and Conclusions ¶ 28, A.R. 69.

In Kentucky, the statute of limitations for personal injury claims is one year. *See* Ky. Rev. Stat. § 413.140; *see also Michals v. Baxter Healthcare Corp.*, 289 F.3d 402, 406 (6th Cir. 2002)("Under Kentucky law, a personal injury action must be commenced within one year after the case of action accrued."); *accord Combs v. Albert Kahn Associates, Inc.*, 183 S.E.2d 190 (Ky. 2006); *Stivers v. Ellington,* 140 S.W.3d 599 (Ky. App. 2004). The one-year statute of limitations applies to all cases filed in Kentucky involving claims for personal injury – including claims filed by an employee against an employer for work-related personal injuries. *See generally id.* Kentucky's one-year statute of limitations also applies to personal injury claims (including claims asserted against an employer) accruing in Kentucky but filed in West Virginia, *See generally*, *Hayes*, 192 W. Va. 368, 452 S.E.2d 459.

The Circuit Court's failure to apply Kentucky Revised Statute § 413.140 as mandated by West Virginia Code § 55-2A-2 and *Hayes* constitutes clear error for two reasons: (1) the decision runs contrary to the clear and binding precedent set forth in *Hayes*; and (2) the failure to apply Kentucky Revised Statute § 413.140 violates rules of statutory construction requiring application of the most specific statute to Plaintiffs' claims against BJ Services.

1. **The Circuit Court's failure to apply Kentucky's one year statute of limitations for personal injuries constitutes clear error.**

In *Hayes*, the Court held that Kentucky's one-year statute of limitations for personal injury claims – Kentucky Revised Code § 413.140 – applies when a West Virginia resident asserts claims in West Virginia against his employer for claims that accrued in Kentucky. 192 W.

Va. at 370, 452 S.E.2d at 461. However, the Circuit Court did not apply Kentucky's one-year statute of limitations in this case – a case, just like *Hayes*, in which a West Virginia resident asserts claims that accrued in Kentucky against his employer.

In *Hayes*, the plaintiff, a West Virginia resident, "was injured when he fell from a roof at a coal preparation plant while working on a construction job in Pike County, Kentucky." *Id.* at 369, 460. The plaintiff filed suit against Roberts & Schaefer Company, the general contractor for the construction of the preparation plant, and his employer, J & K Erection Company, alleging that each had failed to provide him a reasonably safe place to work. *Id.* The defendants asserted, among other issues, that the plaintiff's claims were barred by the statute of limitations. Upon motion, Judge Jay M. Hoke, sitting in the Circuit Court of Boone County, West Virginia, certified the following question to the Court:[6]

> **1.** Whether in this Court, in which jurisdiction and venue have been found to be proper, a personal injury claim of a West Virginia resident plaintiff...[who] is injured in Kentucky, is...barred by the operation of Kentucky's one year statute of limitations when the action is brought in this West Virginia Court within West Virginia's two year statute of limitations?

Id. at 370, 461.

In *Hayes*, Defendant, Roberts & Schaefer Company, asserted that the plaintiff's claim accrued in Kentucky and thus West Virginia Code § 55-2A-2 applied. *Id.* In response, the plaintiff asserted that West Virginia Code § 55-2A-2 did not apply because under Kentucky law the plaintiff did not have a claim for an unsafe work place, and thus, the Kentucky statute of limitations could not be applied to a claim that did not exist in Kentucky. *Id.*

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[6] Judge Hoke also certified a second question to the Court: "Whether the West Virginia Court will allow the claim of a West Virginia resident plaintiff against defendant [Roberts & Schaefer Co.] who conducts business activity in West Virginia, for failure to provide a safe place to work, when Kentucky does not recognize such a claim?" *Hayes*, 192 W. Va. at 370, 452 S.E.2d at 461. However, having determined that West Virginia Code § 55-2A-2 required application of the Kentucky one-year statute of limitation applicable to personal injuries, the Court stated that the second certified question was rendered moot. *Id.* at 372, 463.

First, the Court held West Virginia Code § 55-2A-2 applied to the plaintiff's claims because the claims accrued in Kentucky and were, by nature, claims for personal injury. *Id.* Next, the Court applied Kentucky law and held that Kentucky's one-year statute of limitations for personal injury claims – Kentucky Revised Statute § 413.140 – was the applicable Kentucky statute of limitations. *Id.* at 371, 462. Finding that Kentucky's one-year statute of limitations for personal injuries was shorter than West Virginia's two-year statute of limitations applicable to personal injuries, the Court held, without qualification, that West Virginia Code § 55-2A-2 required the application of Kentucky's one-year statute of limitations. *Id.* Specifically, the Court found:

> In summary, we hold that *W. Va. Code § 55-2A-2* [1959] provides that the period of limitation applicable to a claim accruing outside of West Virginia shall be either that prescribed by the law of the place where the claim accrued or by the law of West Virginia, whichever bars the claim. Therefore, under *W. Va. Code § 55-2A-2*, when a person files a personal injury claim in West Virginia more than one year after the injury occurred in Kentucky, Kentucky's one-year statute of limitations for personal injuries, rather than West Virginia's two-year statute of limitations for personal injuries, is applicable because the Kentucky period of limitations would bar the claim.

Id. at 371, 462.

Hayes mandates that Kentucky's one-year statute of limitations for personal injuries applies in this case. The similarity (if not identicalness) – both factually and legally – between *Hayes* and this case mandates the same result. Like *Hayes,* Plaintiffs' claims accrued in Kentucky. Like *Hayes*, Plaintiffs filed their claims in West Virginia. Like *Hayes*, Plaintiffs' claims are, by nature, claims for personal injury. Finally, like *Hayes*, Plaintiffs filed claims against an employer and a premises owner. However, unlike *Hayes*, the Circuit Court did not

apply the statute of limitations mandated by the Court in *Hayes*. As a result, the Circuit Court committed clear error.

Again, it is undisputed that Plaintiffs' claims accrued in Kentucky and that West Virginia Code § 55-2A-2 applies. Also, there is no dispute that West Virginia's statute of limitations for personal injury claims is two years and that Kentucky's statute of limitations for personal injury claims is one year. Finally, there should be no dispute that Plaintiffs' claims are, by nature, claims for personal injury. *See, e.g., Delp v. Itmann Coal Company,* 176 W. Va. 252, 255, 342 S.E.2d 219, 222 (W. Va. 1986)("West Virginia Code § 23-4-2 preserves a common law right of action against an employer for personal injuries in the work place when the employee's injury results from the deliberate intention of the employer to produce it."); *Bell,* 197 W. Va. at 138, 475 S.E.2d at 138 (characterizing the plaintiff's claim as a "deliberate intention personal injury claim."); *accord Sias v. W-P Coal Co.,* 185 W. Va. 569, 408 S.E.2d 321 (1991); *Mayles v. Shoney's, Inc.,* 185 W. Va. 88, 405 S.E.2d 15 (1990).

Hayes is clear: Kentucky's one-year statute of limitations for personal injury claims applies to personal injury claims accruing in Kentucky but filed in West Virginia – irrespective of the legal basis by which a plaintiff asserts such claims pursuant to West Virginia Code § 55-2A-2. In this case, Kentucky's one-year statute of limitations for personal injury claims applies to Plaintiffs' claims and operates to bar Plaintiffs' personal injury claims. The Circuit Court's holding is wholly inconsistent with *Hayes*. The Circuit Court's failure to apply Kentucky's one-year statute of limitations constitutes clear error and a remarkable departure from the Court's holding in *Hayes*.

2. The Circuit Court's Application of Kentucky's Two-Year Statute of Limitations for Workers' Compensation Claims was Clear Error.

The Circuit Court did not follow the *Hayes* decision. Rather, the Circuit Court utilized a statutory construction analysis and held that the rules of statutory construction in both Kentucky and West Virginia require that courts "apply the more specific statute to a claim rather than the more general." *See* November 12, 2008 Order, Findings and Conclusions, ¶ 26, A.R. 69. Under this analysis, the Circuit Court ruled that Kentucky's two-year statute of limitations for workers' compensation claims applied to Plaintiffs' claims against BJ Services.

First, the Circuit Court found that Plaintiffs' claim was a "statutory claim for a work related injury" under the West Virginia Workers' Compensation Act. *See* November 12, 2008 Order, Findings and Conclusions, ¶ 21, A.R. 68. Because the claim was find under West Virginia Code § 23-4-2, the Circuit Court then ruled that Kentucky's statute of limitations for workers' compensation claims was the most "logical and specific statute of limitation." *See* November 12, 2008 Order, Findings and Conclusions, ¶ 28, A.R. 69-70. In Kentucky, the statute of limitations for filing a workers' compensation claim is two years. Thus, the Circuit Court ruled Plaintiffs' claims were not time barred. However, even under the statutory construction analysis, the Circuit Court applied the wrong statute of limitations.

a. *The Circuit Court's reliance on Bell v. Vecellio & Grogan, Inc. 475 S.E.2d 138 (W. Va. 1996) is misplaced.*

The Circuit Court relied on the Court's decision in *Bell v. Vecellio & Grogan, Inc.*, 475 S.E.2d 138 (W. Va. 1996) in applying Kentucky's two-year statute of limitations for workers' compensation claims. *See* November 12, 2008 Order, Findings and Conclusions, ¶¶ 28-29, A.R. 69-70. However, the Circuit Court's reliance on *Bell* is misplaced and, the application of Kentucky's two-year statute of limitations for workers' compensation claims was in clear error.

Relying on *Bell*, the Circuit Court ruled Plaintiffs' deliberate intent claim is a "statutory claim for a work related injury" under the West Virginia Workers' Compensation Act. *See* November 12, 2008 Order, Findings and Conclusions, ¶ 28, A.R. 69-70 According to the Circuit Court, because a claim under West Virginia Code § 23-4-2 "is part of the West Virginia Workers' Compensation scheme," Kentucky's statute of limitations for the filing of workers' compensation claims should apply. *See* November 12, 2008 Order, Findings and Conclusions, ¶¶ 29, A.R. 70.

The Court in *Bell* did not address the issue of statute of limitations. Instead, the Court only answered one question – whether a West Virginia resident covered under the West Virginia Workers Compensation Act could assert a claim under West Virginia Code § 23-4-2 for an injury that occurred, and accrued, in another state. *See generally Bell,* 197 W. Va. 138, 475 S.E.2d 138. In *Bell,* the Court was presented this question:

> We are now requested as a matter of first impression to decide whether the "deliberate intention" cause of action expressed within W. Va. Code § 23-4-2(c)(1991) is part of the West Virginia workers' compensation statutory scheme, or whether it is a common law cause of action independent from the workers' compensation laws of this state.

Id. at 139. The Court then answered that question in the affirmative finding that "a West Virginia resident, employed by a West Virginia employer, with the origin of that employment relationship being in West Virginia" is entitled to the benefits of the West Virginia Workers' Compensation Act, including the right to file and maintain a deliberate intent cause of action under West Virginia Code § 23-4-2. *Id.* at 145.

Again, BJ Services does not dispute that Plaintiffs have a right to bring a deliberate intent claim against it, nor does BJ Services dispute that Plaintiffs' cause of action is a cause of action brought under West Virginia Code § 23-4-2(d)(2)(ii). Indeed, the *Bell* decision is wholly

irrelevant to the only salient issue in this case. The ***only*** issue in this case is what statute of limitations applies to Plaintiffs' claims. *Bell* neither answers nor provides any relevant or constructive guidance to answer that question. In fact, *Bell* clearly stands for the proposition that a West Virginia resident, injured in another state, while employed by a West Virginia employer with the origins of the employment in West Virginia, is entitled to all benefits and privileges of the West Virginia Workers' Compensation system, including filing a deliberate intent claim. However, *Bell* does not hold or support the Circuit Court's finding that the Kentucky statute of limitations for workers' compensation claims should apply to Plaintiffs' claims.

In this case, the Circuit Court ruled that because a deliberate intent claim under West Virginia Code § 23-4-2 is part of the West Virginia Workers' Compensation System, the statute of limitations for workers' compensation claims in Kentucky was the most logical and specific statute to apply. However, the Circuit Court's analysis ignores the specific statute of limitations that applies to personal injury claims filed by an employee against an employer in both Kentucky and West Virginia. The Circuit Court's reliance on *Bell* in applying Kentucky's statute of limitations for the filing of a workers' compensation claim to Plaintiffs' claim against BJ Services is not only wholly inconsistent with *Hayes*, but also wholly inconsistent with the law in West Virginia and Kentucky on statute of limitations.

b. *Personal injury claims against employers in both Kentucky and West Virginia are governed by the general statute of limitations for personal injury claims.*

In Kentucky, an employee may elect to file a personal injury claim directly against his employer in lieu of filing a workers' compensation claim. *See* Ky. Rev. Stat. § 342.610(4)(West 2013). The statute reads:

> If injury or death results to an employee through the deliberate intention of his or her employer to produce such injury or death, the employee or the employee's dependents may take under

> [Chapter 342], or in lieu thereof, have a cause of action at law against the employer as if this chapter had not been passed, for such damage so sustained by the employee...as is recoverable at law.

Ky. Rev. Stat. § 342.610(4). In essence, "an injured employee...must elect his remedies; if he chooses to sue under [Kentucky Revised Statute § 342.610(4)], he waives any recovery under the workers' compensation laws and if he chooses to make a claim under the workers' compensation laws, he waives his cause of action at common law." *Blanton v. Cooper Industries, Inc.* 99 F. Supp.2d 797, 803-04 (E.D. Ky. 2000); *see also* Ky. Rev. Stat. § 342.610(4); *see also Zurich American Ins. Co. v. Brierly,* 936 S.E.2d 561 (Ky. 1996) ("[Section 342.610(4)] gives the injured employee...an election as to the form in which to proceed. It does not afford an opportunity to proceed with both forms and elect the judgment or award that is most beneficial. As a consequence...the plaintiff in a civil action is forever excluded from any remedy under Chapter 342 of the Workers' Compensation Act.").

Additionally, if a plaintiff elects to file a direct civil action for a work-related injury against his employer in Kentucky, the one-year statute of limitations for personal injury claims applies (Kentucky Revised Statute § 413.140(1)) – not the two-year statute of limitations for filing a workers' compensation claim (Kentucky Revised Statute § 342.185(1)). *See Blankenship v. Majestic Collieries Co.,* 399 S.W.2d 699 (Ky. 1966)("The limitations prescribed by KRS § 342.185...apply only to proceedings before the board. KRS § 413.140(1) applies to actions for personal injury.").

In West Virginia, a plaintiff has two years to file a "deliberate intent" claim under West Virginia Code § 23-4-2. *See* W. Va. Code § 55-2-12(b) ("Every personal action for which no limitation is otherwise prescribed shall be brought...within two years after the right to bring the same shall have accrued if it be for damages for personal injuries...."); *see also Hamilton v.*

Pilgrim's Pride Cop., 314 F. Supp. 2d 630, 635 (N.D. W. Va. 2004)("the two year statute of limitations set forth in W. Va. § 55-2-12(b) is the statute of limitations applicable to a deliberate intent action brought under the Workers' Compensation Act."); *accord Beckner v. Bayer Cropscience, LP*, 2001 WL 805788 (S.D. W. Va. 2011). However, the statute of limitations for workers' compensation claims in West Virginia – West Virginia Code § 23-4-15(1) (West 2014) – is six months and only applies to claims made under the West Virginia Workers' Compensation Act. *See* W. Va. Code § 23-4-15(1)(West 2014) ("Unless filed within the six month period, the right to compensation under [the West Virginia Workers' Compensation Act] is forever barred[.]")

Thus, in Kentucky, the one-year statute of limitations for personal injuries applies to work place injury claims filed by employees against employers. The two-year statute of limitations for workers compensation claims in Kentucky applies to workers compensation claims. In West Virginia, the two-year statute of limitations for personal injuries applies to claims filed under West Virginia Code § 23-4-2. And, the six month statute of limitations applies to workers compensation claims filed in West Virginia. Both Kentucky and West Virginia apply a specific statute of limitations for workers' compensation claims – a statute that applies only to workers' compensation claims. And, both states apply a general statute of limitations to claims for personal injuries brought against an employer.

Clearly, had Plaintiffs filed this case in Kentucky against BJ Services, Kentucky's one-year statute of limitations would have applied, not the two-year statute of limitations for the filing of a workers' compensation claim. West Virginia's six-month statute of limitations for the filing of workers' compensation claims does not apply to Plaintiffs' claims. Indeed, even under the Circuit Court's analysis the only and most specific Kentucky statute of limitations applicable

to Plaintiffs' claim is Kentucky Revised Statute § 413.140 – Kentucky's one-year statute of limitations for personal injury claims. The Circuit Court's application of the Kentucky two-year statute of limitations applicable to workers' compensation claims is clear error and the statutory construction is wholly inconsistent with Kentucky and West Virginia law.

VI.

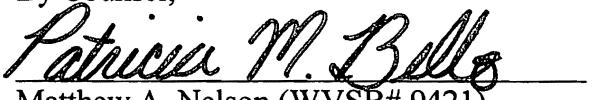
CONCLUSION

Pursuant to West Virginia Code § 55-2A-2 and the Court's decision in *Hayes v. Roberts & Schaefer Co.,* 192 W. Va. 368, 452 S.E.2d 459 (1994), Kentucky's one-year statute of limitations for personal injuries, Kentucky Revised Statute § 413.140, applies to Plaintiffs' claims against BJ Services. This writ is both necessary and proper because the Circuit Court clearly committed error when it applied Kentucky's two-year statute of limitations for administrative work related injury claims brought under the Kentucky workers' compensation system, Kentucky Revised Statute § 342.185(1). Accordingly, for all of the reasons set forth herein, BJ Services respectfully requests this Honorable Court to issue a writ of prohibition ordering the Circuit Court to vacate its March 6, 2013 oral ruling and its November 12, 2008 Order; ordering application of Kentucky Revised Statute § 413.140 to Plaintiffs' claims against BJ Services; and granting such other and further relief as the Court deems proper.

Respectfully submitted,

BJ SERVICES COMPANY, U.S.A.

By Counsel,



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VERIFICATION

STATE OF West Virginia,

COUNT OF Kanawha, To-Wit:

In accordance with the requirements of West Virginia Code § 53-1-3, the undersigned, Patricia M. Bello, appeared before me personally and, being by me first duly sworn, upon her oath deposes and says that she has reviewed the foregoing Verified Petition for Writ of Prohibition and knows the contents thereof, and that the facts set forth therein are true and accurate to the best of his knowledge and belief.

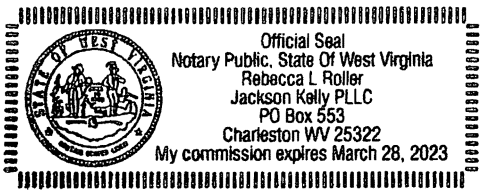
Patricia M. Bello

PATRICIA M. BELLO (WVSB #11500)

Subscribed and sworn before me this 29th day of January, 2014.

Rebecca L Roller

Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. _____

ON PETITION FOR WRIT OF PROHIBITION FROM AN ORDER OF THE CIRCUIT COURT OF LINCOLN COUNTY

STATE OF WEST VIRGINIA ex rel.
BJ SERVICES COMPANY, U.S.A.,

Petitioner, **Civil Action No. 02-C-64**

v.

HONORABLE JAY M. HOKE
JUDGE OF THE CIRCUIT COURT OF
LINCOLN COUNTY, WEST VIRGINIA

CERTIFICATE OF SERVICE

I, Patricia M. Bello, do hereby certify that service of the **VERIFIED PETITION FOR WRIT OF PROHIBITION** and a copy of the **APPENDIX** was made upon counsel of record by mailing true copies thereof by United States mail, postage prepaid, on this 29th day of January, 2014, and addressed to:

Sean P. McGinley, Esquire
Elizabeth G. Kavitz, Esquire
DiTrapano, Barrett & DiPiero, PLLC
604 Virginia Street, East
Charleston, West Virginia 25301
Counsel for Plaintiffs

I further certify that I have mailed true and correct copy of same to the Honorable Jay M. Hoke by U.S. mail, addressed as follows:

Honorable Jay M. Hoke
Lincoln County Courthouse
P.O. Box 605
8000 Court Avenue
Hamlin, WV 25523

I further certify that I have mailed true and correct copies of same to the Charlie Brumfield, Lincoln County Circuit Clerk, for civil action number 02-C-64 by U.S. mail, addressed as follows:

Charlie Brumfield, Lincoln County Circuit Clerk
P.O. Box 338
8000 Court Avenue
Hamlin, WV 25523

Patricia M. Bello

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