

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0084

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

Petitioner,

v.

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

Respondent..

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Rudolph L. DiTrapano (WV Bar # 1024)
Sean P. McGinley (WV Bar # 5836)
**DI TRAPANO, BARRETT, DiPIERO,
MCGINLEY & SIMMONS, PLLC**
P.O. Box 1631
Charleston, West Virginia 25326-1631
(304) 342-0133

Counsel for Plaintiffs below

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Questions Presented	1
Statement of the Case	2
Summary of Argument	4
Statement Regarding Oral Argument and Decision	5
Argument	6
A Standard of Review	6
B The Petitioner’s Petition is Nothing More Than A Disguised Appeal Of a Non-Appealable Order, and Should Be Summarily Refused	6
C If The Kentucky Statute Applies, The Applicable Kentucky Statute of Limitations is Two Years, Not One Year	11
D Claims of “Deliberate Intent” Are Statutory Claims That Arise Under The West Virginia Code Workers’ Compensation Chapter	12
E All Claims For Compensation For Injuries Made Under The Kentucky Workers Compensation Chapter Are Subject to a Two Year Statute of Limitations	13
F Rules of Statutory Construction Mandate That The More Specific Statute or Limitations Applicable to Claims Under The Workers Compensation Chapter Should Apply Rather Than The More General Statute That Applies To Common Law Personal Injury Claims	15
G Rules of Statutory Construction Mandate That if There Are Two Possible Statutes of Limitation That May Apply, Courts Must Apply The Longer Statute of Limitations	16
H Conclusion	17

TABLE OF AUTHORITIES

Bell v. Vecellio & Grogan, Inc., 197 W.Va. 138, 475 S.E.2d 138 (1996) 12, 13

Cochran v. Appalachian Power Co., 162 W.Va. 86, 246 S.E.2d 624 (1978) 16

Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370 (1953) 8

Guido v. Guido, 202 W. Va. 198, 202, 503 S.E.2d 511, 515 (1998) 8

Hinkle v. Black, 164 W. Va. 112, 116, 262 S.E.2d 744, 747 (1979) 8

Horkulic v. Galloway, 665 S.E.2d 284, 292 (W. Va. 2008) 9

James M.B. v. Carolyn M., 193 W. Va. 289, 456 S.E.2d 16 (1995) 8

Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 602 (Ky.2006) 14

Matthys v. Donelson, 179 Iowa 1111, 160 N.W. 944 (1917) 16

Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 819 (Ky.1992) 16

Munday v. Mayfair Diagnostic Laboratory, 831 S.W.2d 912, 914 (Ky. 1992) 17

Province v. Province, 196 W. Va. 473, 478, 473 S.E.2d 894, 899 (1996) 8

River Riders, Inc. v. Steptoe, 672 S.E.2d 376, 383 (W. Va. 2008) 9

Southern Pacific Railway Co. v. Gonzalez, 48 Ariz. 260, 61 P.2d 377 (1936) 16

State ex rel. Arrow Concrete Co. v. Hill, 460 S.E.2d 54 (W. Va. 1995) 7, 9, 10

State ex rel. Bell Atlantic-West Virginia v. Ranson, 497 S.E.2d 755, 771 n.12 (1997) 11

State ex rel. Evans v. Robinson, 197 W. Va. 482, 475 S.E.2d 858 (1996) 9

State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996) 6

State ex rel. Gibson v. Hrko, 220 W. Va. 574, 648 S.E.2d 338 (2007) 8, 9, 11

State ex rel. United States Fid. & Guar. Co. v. Canady, 460 S.E.2d 677 (W. Va. 1995) 9

State ex rel. W. Va. Fire & Casualty Co. v. Karl, 487 S.E.2d 336 (W. Va. 1997) 9

<i>State ex rel. W. Va. Nat'l Auto Ins. Co. v. Bedell</i> , 223 W. Va. 222, 672 S.E.2d 362 (2008)	8
<i>Troxell v. Trammell</i> , Ky., 730 S.W.2d 525 (1987)	16
<i>UMWA by Trumka v. Kingdon</i> , 174 W.Va. 330, 325 S.E.2d 120 (1984)	16
<i>Woodall v. Laurita</i> , 156 W. Va. 707, 195 S.E.2d 717 (1973)	9
<i>Ky. Rev. St. Ann.</i> § 342.185(1)	14
<i>Ky. Rev. Stat. Ann.</i> § 413.140	11
<i>W. Va. Code</i> § 23-4-2(c)(2)(I)-(ii) (1991)	13
<i>W. Va. Code</i> § 53-1-1	8, 9
<i>W. Va. Code</i> § 55-2A-2	12
<i>W. Va. Code</i> § 58-5-1	7
<i>W. Va. R. Civ. P.</i> 12(b)(6)	8, 11
<i>Am. Jur.2d Limitation</i> § 92	17

QUESTION PRESENTED

1. Where Petitioner has an adequate means, such as direct appeal, to obtain the desired relief, is it nevertheless entitled to a Writ of Prohibition?
2. Where Petitioner will not be damaged or prejudiced in a way that is not correctable on appeal, is it nevertheless entitled to a Writ of prohibition?
3. Where the lower court's order is not clearly erroneous, is Petitioner entitled to a Writ of prohibition?
4. Where the lower court's order is not an oft repeated error and does not persistently disregard procedural or substantive law, is Petitioner entitled to a Writ of Prohibition?
5. In a deliberate intent cause of action occurring in Kentucky, if the lower court applies the law of the foreign jurisdiction under *W.Va. Code* § 55-2A-2, should the Court apply the more specific statute of limitations for work related injuries (two years) found in *Ky. Rev. Stat.* § 342.185(1), and not apply the general statute of limitations for personal injuries found in *Ky. Rev. Stat.* § 413.140?

STATEMENT OF THE CASE

Plaintiff Glen H. Anderson, a resident of West Virginia, was employed as a nitrogen equipment operator by Defendant BJ Services Company, U.S.A., a Delaware corporation authorized and licensed to do business in West Virginia. A.R. 3-5. On or about June 12, 2000, Plaintiff was assigned by his employer to do work in Belcher, Kentucky, on a gas well owned by Eastern States Oil & Gas Inc., the predecessor corporation to defendant Equitable Production Company, a Pennsylvania corporation authorized and licensed to do business in West Virginia. Defendant Larry Ballard, a resident of West Virginia, was the agent, servant, and employee of BJ Services, and was the supervisor directly supervising Plaintiff at the time of his injuries. *Id.*

While at the job site, Plaintiff was severely injured when a service line not properly secured by Defendants shifted suddenly, causing Plaintiff to be violently knocked down by the pressure and to be struck repeatedly by the flailing service line. *Id.* As a result of the serious trauma he sustained, trauma that included having rocks, dirt, and debris lodged deeply in his lower extremities and arms, Plaintiff was hospitalized and underwent extensive surgery, and was been rendered permanently disabled. *Id.* Plaintiff and his wife Brenda Anderson (together “Plaintiffs”) filed their Complaint with this Court on or about May 23, 2002. Plaintiffs’ claims include a deliberate-intention cause of action under the West Virginia Workers’ Compensation Act, negligence, and loss of consortium. *Id.*

On November 12, 2008, the lower court properly entered an Order denying Defendants’ Motion for Judgment on the Pleadings, and determined that Kentucky’s two-year statute of limitations for the filing of workers’ compensation claims applied to the underlying Plaintiff’s deliberate intent claims against Petitioner BJ Services Company, U.S.A. (“BJ Services). A.R. 57

- 71. It was not until over one year after the Court denied the Motion for Judgment on the Pleadings that Petitioner and co-defendants bothered to file on December 1, 2009 a Motion for Reconsideration. A.R. 72 - 76. Petitioner never set the Motion to Reconsider for hearing until 2013, A.R. 101 -119, after the Court had issued a Scheduling Order with a trial date of November, 2013 (that trial date had to be continued after Petitioner was unable to produce defendant Larry Ballard for deposition after months of attempts). Curiously, the Petitioner waited another full year after the lower court orally denied its Motion to Reconsider to file this Writ. While not in the record, the Court should be aware that the lower court informed the parties at a January 30, 2014 telephonic status conference that the lower court was prepared that day to enter a written order denying the Motion to Reconsider, but would refrain from doing so in light of the Petitioner's filing of the instant Writ the previous day.

It readily is apparent that Petitioner's Writ of Prohibition was filed untimely. There is no good reason the Writ was not filed for more than *five years* after the lower court's Order denying the motion for judgment on the pleadings, and even then almost a year after the lower court denied Petitioner's Motion to Reconsider (a Motion itself that was noticed for hearing *four years after* the Motion at issue was denied. Clearly, the Writ serves no purpose other than to add to the lengthy delay in bringing these proceedings to a conclusion.

SUMMARY OF ARGUMENT

Petitioner fails to meet its burden of showing entitlement to extraordinary relief - the Writ is nothing more than an interlocutory appeal disguised as a Writ of Prohibition, and Petitioner makes no effort whatsoever to satisfy its burden of showing that it has “no other adequate means, such as direct appeal, to obtain the desired relief” or that it “will be damaged or prejudiced in a way that is not correctable on appeal,” because neither of those burdens can be met. As for its argument on the merits, arguments that can be raised adequately on appeal, if necessary, the Petitioner’s legal arguments attempt to squeeze the square peg of West Virginia’s specific *statutory* deliberate intent claim into the round hole of Kentucky’s general statute of limitations for *common law* personal injury claims. Rules of statutory construction in both West Virginia and Kentucky mandate that the more specific two year statute of limitations applicable to occupational injuries under Kentucky law should apply to the Plaintiffs claim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Writ should be refused summarily by general order without oral argument. If oral argument is deemed necessary, Rule 19 argument is sufficient, but this case would not then be appropriate for a memorandum decision.

ARGUMENT

A STANDARD OF REVIEW

As this Court has explained repeatedly, a Writ of Prohibition requires starting with an analysis of five factors:

“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 not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.”

Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996). Curiously, Petitioner ignores all but factor number 3, and even there, Petitioner fails to prove any “clear error” by the lower court.

B THE PETITIONER'S PETITION IS NOTHING MORE THAN A DISGUISED APPEAL OF A NON-APPEALABLE ORDER, AND SHOULD BE SUMMARILY REFUSED

Factor number one from *Berger, supra*, requires an examination of “whether [Petitioner] has no other adequate means, such as direct appeal, to obtain the desired relief.” A direct appeal not only is an adequate means for the desired relief, it is the only appropriate means. The Writ of Prohibition is untimely and has no function other than to delay a case that has been delayed far too long. After lengthy delays occasioned by a number of changes of counsel, this case finally

was scheduled to go to trial last November, but was continued after Petitioner's co-defendant and former employee Larry Ballard refused to make himself available for discovery deposition. Plaintiffs thereafter noticed a status conference for the purpose of re-scheduling the trial, and Petitioner waited until the day before the status conference to serve the instant Writ (over five years after the Court issued the ruling it purports to challenge herein). Now, more than five years after its motion to dismiss was denied, and after failing to produce co-defendant Ballard for a discovery deposition, Petitioner seeks solace in this Court's extraordinary writ procedure, desperately searching for way to avoid the fact deposition of Mr. Ballard by attempting to appeal the denial its motion to dismiss through a writ of prohibition.

It is beyond cavil that the denial of a Rule 12 motion is interlocutory and not immediately appealable. *Syl. Pt.2, State ex rel. Arrow Concrete Co. v. Hill*, 194 W.Va. 239, 460 S.E.2d 54 (1995). The law is quite clear. "Under W. Va. Code, 58-5-1, appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." *Syl. pt. 3, James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995). "The required finality is a statutory mandate, not a rule of discretion." *Province v. Province*, 196 W. Va. 473, 478, 473 S.E.2d 894, 899 (1996). In other words, the Supreme Court of Appeals generally lacks discretion to permit an appeal of an interlocutory order that does not terminate a claim or the litigation between parties.

This Court has held, "we are adamantly opposed to being in the interlocutory appeals business." *Hinkle v. Black*, 164 W. Va. 112, 116, 262 S.E.2d 744, 747 (1979). "This Court has neither the authority nor the desire to invade the province of a trial court to prohibit the further

prosecution of a proceeding pending therein, where the lower court has jurisdiction, and has not exceeded its legitimate powers; to do so would constitute the usurpation and abuse of power that is forbidden to trial courts by Code. 53-1-1.” *Crawford v. Taylor*, 138 W. Va. 207, 214, 75 S.E.2d 370, 373-74 (1953). “To be appealable, therefore, an order either must be a final order or an interlocutory order approximating a final order in its nature and effect.” *Guido v. Guido*, 202 W. Va. 198, 202, 503 S.E.2d 511, 515 (1998).

“[A]s an extraordinary remedy invoking the original jurisdiction of this Court, a petition for a writ of prohibition may not be used as a substitute for an appeal. *Syl.* pt. 1, *State ex rel. Gibson v. Hrko*, 220 W. Va. 574, 648 S.E.2d 338 (2007); *syl.* pt. 3, *Hoover, supra*; *syl.* pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). As early as 1873, this Court stated that ‘a mere error in the proceeding may be ground of appeal or review, but not of prohibition.’ *Syl.* pt. 3, in part, *Buskirk v. Judge of Circuit Court*, 7 W. Va. 91 (1873).” *State ex rel. W. Va. Nat’l Auto Ins. Co. v. Bedell*, 223 W. Va. 222, 226-227, 672 S.E.2d 362-63 (2008).

Consistently, this Court has explained that the use of the extraordinary writ of prohibition is reserved only for those cases where the trial court engages in an abuse of powers “so flagrant and violative of the petitioner’s rights” as to make an appeal wholly inadequate:

“we have explained, ‘traditionally, the writ of prohibition speaks purely to jurisdictional matters. It was not designed to correct errors which are correctable upon appeal.’ *Williams*, 164 W. Va. at 635, 264 S.E.2d at 854 (citations omitted). . . . ‘and **only** if the appellate court determines that the abuse of powers is **so flagrant and violative of petitioner’s rights as to make a remedy by appeal inadequate**, will a writ of prohibition issue.’ *Syl.* pt. 2, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973).’ *Syl.* pt. 1, *Williams, supra*.”

State ex rel. Evans v. Robinson, 197 W. Va. 482, 489, 475 S.E.2d 858, 865 (1996)(emphasis

added).

The Circuit Court's 2008 denial of Petitioner's Motion to Dismiss in the case at bar was a pedestrian judicial act. To imply that the circuit court's order was some kind of "flagrant" violation of Petitioner's rights, or that an appeal somehow would be wholly inadequate, is preposterous. Factor number 2 from *Berger, supra*, "whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal," is, perhaps understandably, ignored by Petitioner. This is because, like every other litigant, Petitioner will have an opportunity to move for summary judgment at the appropriate time, after discovery is concluded, and may appeal if, after a trial, it receives an unfavorable result. There is no prejudice or damage that can not be corrected on appeal. To the contrary, if the Court were to grant Petitioner's Petition, and issues a rule to show cause, it would be tantamount to an invitation to every defendant whose motion to dismiss is denied to file a writ of prohibition in this Court as a substitute for an interlocutory appeal.

It is transparently clear that, in an effort to obtain this Court's review of a nonappealable order, Petitioner has disguised its appeal as a Petition for Writ of Prohibition. There is no basis for issuance of a writ in this case, and the Court should refuse the Petition. Under the statute, a "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.

This Court has cautioned that "prohibition against judges is a drastic and extraordinary remedy," and as such, "is reserved for really extraordinary causes." *River Riders, Inc. v. Steptoe*, 672 S.E.2d 376, 383 (W. Va. 2008) (quoting *State ex rel. United States Fid. & Guar. Co. v.*

Canady, 460 S.E.2d 677, 682 (W. Va. 1995)). Accordingly, the Court “has been restrictive in the use of prohibition as a remedy.” *Horkulic v. Galloway*, 665 S.E.2d 284, 292 (W. Va. 2008) (quoting *State ex rel. W. Va. Fire & Casualty Co. v. Karl*, 487 S.E.2d 336, 341 (W. Va. 1997).)

Faced with similar circumstances of a defendant masking what is essentially an appeal of the denial of a motion to dismiss for failure to state a claim, this Court has refused to grant a writ of prohibition. In *State ex rel. Arrow Concrete Co. v. Hill*, 460 S.E.2d 54 (W. Va. 1995), defendants sought a writ of prohibition when their motion to dismiss had been denied, ostensibly seeking the Supreme Court’s resolution of discovery issues. This Court refused the bait, observing that, “[i]ndirectly, the defendants are asking this Court to address the trial court’s denial of their motion to dismiss for failure to state a claim.” 460 S.E.2d at 60. The Court continued:

“Although for obvious reasons the defendants resist categorizing this prohibition as an appeal of the denial of a motion to dismiss a claim for failure to state a cause of action, essentially that is what this proceeding involves. Accordingly, we hold that ordinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to *West Virginia Rules of Civil Procedure* 12(b)(6) is interlocutory and is, therefore, not immediately appealable. Thus, the defendants may not indirectly raise this issue by seeking a writ of prohibition in order to preclude the trial judge from compelling discovery.

Id. (see also *State ex rel. Bell Atlantic-West Virginia v. Ranson*, 497 S.E.2d 755, 771 n.12 (W. Va. 1997) (relying on *Arrow Concrete* to deny writ of prohibition to prohibit enforcement of circuit court’s order denying motion to dismiss under W. Va. R. Civ. P. 12(b)(6)). Like the defendants in *Arrow Concrete* and *Ranson*, Petitioner is attempting to invoke the writ mechanism to obtain this Court’s review of a non-appealable order. Accordingly, plaintiffs respectfully requests that this Court refuse to review Petitioner’s arguments, and permit this case to finally

proceed to trial before the circuit court.

As for factors 3, 4 and 5 articulated by *Berger, supra*, Plaintiffs claims are “deliberate intent” claims. Pursuant to West Virginia law, those claims are *statutory* claims (not common law claims) that fall within the Chapter of the West Virginia Code addressing Workers’ Compensation. As expressed in more detail below, the fact that the deliberate intent claim is part of the West Virginia Workers’ Compensation chapter is another factor supporting the lower Court’s denial of Petitioner’s Motion for Judgment on the Pleadings, because in Kentucky, all statutory claims under that state’s Workers Compensation chapter are subject to a two year statute of limitations, not a one year statute.

C IF THE KENTUCKY STATUTE APPLIES, THE APPLICABLE KENTUCKY STATUTE OF LIMITATIONS IS TWO YEARS, NOT ONE YEAR

In Petitioner’s Motion for Judgment on the Pleadings below, it and its co-defendants made the argument that because the plaintiff was injured in Kentucky, the Kentucky general statute of limitations for “personal injury” claims, a one year statute (Ky. Rev. Stat. Ann. § 413.140), should apply to bar plaintiffs’ claims. The Petitioner’s argument that the Kentucky statute of limitations applies was (and still is) based on a West Virginia statute, *W. Va. Code* § 55-2A-2, that applies the statute of limitations of a foreign jurisdiction if the claim “accrued” in the foreign jurisdiction, and the limitation period in the foreign jurisdiction is shorter than the limitation period in West Virginia and would bar the claim. The Petitioner’s err, however, by asserting the relevant Kentucky statute is a one year limitation period, as they ignore the two year statute of limitations that should apply to any claim made pursuant to the workers’ compensation statute (such as a “deliberate intent” claim).

D CLAIMS OF “DELIBERATE INTENT” ARE STATUTORY CLAIMS THAT ARISE UNDER THE WEST VIRGINIA CODE WORKERS’ COMPENSATION CHAPTER

In the case at bar, Plaintiffs filed a “deliberate intent” claim. Petitioner argues that, for a West Virginia “deliberate intent” claim, the Kentucky “personal injury” statute of limitations, of one year, should apply, because it would bar Plaintiffs’ claims. However, a West Virginia deliberate intent claim is not a common law personal injury claim. Rather, the important distinction ignored by Petitioner is that a “deliberate intent” claim is a *statutory* claim, one that falls under the West Virginia workers’ compensation statute:

“Because the deliberate intention statute is part of the West Virginia workers’ compensation scheme, the appellant is entitled to all benefits under the West Virginia Workers’ Compensation Act[.]”

Bell v. Vecellio & Grogan, Inc., 197 W.Va. 138, 145, 475 S.E.2d 138, 145 (W.Va. 1996)
(emphasis added).

The *Bell* court explained in the *Syllabus* that a “deliberate intent” claim is a “direct statutory cause of action” that is “expressed within the workers’ compensation system[.]”:

“W. Va. Code § 23-4-2(c) (1991) represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the workers’ compensation system.”

Syl. Pt. 2, Bell v. Vecellio & Grogan, Inc., 197 W.Va. 138, 475 S.E.2d 138 (1996). The *Bell* court explained also that the “deliberate intent” claim had “blended” into the West Virginia workers’ compensation system:

“W. Va. Code § 23-4-2(c)(2)(I)-(ii) (1991) has blended within the West Virginia workers’ compensation scheme, the directive that all employees covered by the West Virginia Workers’ Compensation Act are subject to

every provision of the workers' compensation chapter and are entitled to all benefits and privileges under the Workers' Compensation Act, including the right to file a direct deliberate intention cause of action against an employer pursuant to W. Va.Code 23-4-2(c)(2)(I)-(ii) (1991).”

Syl. Pt. 3, Bell v. Vecellio & Grogan, Inc., 197 W.Va. 138, 475 S.E.2d 138 (1996).

It is beyond cavil that a deliberate intent claim is a *statutory* claim under the West Virginia Code workers compensation chapter for compensation for an injury. As shown below, *all claims for compensation for an injury made under the Kentucky workers compensation chapter are subject to a two year statute of limitations*. Thus, if a Kentucky statute of limitations applies, it is a two year statute, not the one year statute as argued by defendants.¹

E ALL CLAIMS FOR COMPENSATION FOR INJURIES MADE UNDER THE KENTUCKY WORKERS COMPENSATION CHAPTER ARE SUBJECT TO A TWO YEAR STATUTE OF LIMITATIONS

The parties are in agreement that Kentucky law does not provide for a “deliberate intent” cause of action. But Kentucky law does have a **specific** statute of limitation for claims for “occupational injuries” under their workers’ compensation chapter (a two year statute), and a more **general** statute for common law personal injury claims (one year). The “deliberate intent”

¹ Petitioner relies heavily on the 1994 opinion of this Court in *Hayes v. Roberts & Schaefer Co.*, 192 W. Va. 368, 452 S.E.2d 459 (1994), where it was held that, by operation of West Virginia’s borrowing statute in *W.Va. Code* § 55-2A-2, the lawsuit of a West Virginia worker who was injured in Kentucky was barred by Kentucky’s statute of limitations on personal injuries. Petitioner’s argument continues to overlook the fact that the reasoning of the lower court herein was not argued or addressed in *Hayes*. Moreover, the *Hayes* did not have the benefit of the reasoning in the later cases declaring that, unlike the law in Kentucky, the cause of action for deliberate intention falls under the West Virginia Workers’ Compensation Act, rather than the common law. *Bell v. Vecellio & Grogan, Inc., supra*. In *Bell* this Court concluded that, because the right to file a deliberate-intention cause of action is a workers’ compensation benefit under *W. Va. Code* § 23-2-1a and not a common-law cause of action, traditional conflicts-of-law principles were inapplicable, and the analysis of whether plaintiff’s cause of action was recognized in Maryland was irrelevant. *Bell*, 197 W. Va. at 139-40, 475 S.E.2d at 139-40.

claim falls within the West Virginia Code workers' compensation chapter. *Bell, supra*. A deliberate intent claim is, by statute, a claim for an "occupational injury." Contrary to the arguments in Petitioner's Writ, in Kentucky, claims for "occupational injuries" are governed by the **two year** limitation period found in KRS § 342.185(1):

"The statute of limitations **for occupational injuries** is found in KRS 342.185(1)[.]"

Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 602 (Ky.2006) (emphasis added).

That statute, KRS § 342.185(1), states that claims related to occupational injuries may be filed within **two years** of the accident:

"no proceeding **under this chapter** for compensation for an injury or death shall be maintained unless a . . . claim for compensation with respect to the injury shall have been made with the office **within two (2) years after the date of the accident**, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself for compensation."

(emphasis added). Ky. Rev. St. Ann. § 342.185(1). Even Petitioner admits in its Writ that, "[t]he two year statute of limitations for workers compensation claims in Kentucky applies to workers compensation claims." Writ at 20. As noted above, the instant deliberate intent claim falls within the workers compensation statute, and is thus a statutory workers compensation claim.

Because the plaintiffs' deliberate intent claim is a statutory claim for an "occupational injury" within the workers' compensation chapter, the most logical and applicable statute of limitations to apply from Kentucky would be the statute applicable to occupational injuries, claims that are made pursuant to the workers' compensation chapter, and not the more general

statute for common law personal injury claims.² Moreover, as shown below, rules of statutory construction in both Kentucky and West Virginia (rules completely ignored by Petitioner) strongly support applying the two year statute of limitations even if Kentucky law applies.

F RULES OF STATUTORY CONSTRUCTION MANDATE THAT THE MORE SPECIFIC STATUTE OR LIMITATIONS APPLICABLE TO CLAIMS UNDER THE WORKERS COMPENSATION CHAPTER SHOULD APPLY RATHER THAN THE MORE GENERAL STATUTE THAT APPLIES TO COMMON LAW PERSONAL INJURY CLAIMS

Petitioner ignores the fact that Kentucky's clear two year statute of limitations specifically applies under its workers' compensation chapter, and instead encourages the Court to look to Kentucky's more general "personal injury" statute of limitations of one year. Rules of construction mandate, however, that courts apply the more specific statute, rather than the more general. ("The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled.") Syllabus point 1, *UMWA by Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984).³ In this case, the more specific statute, the one that applies to "occupational injuries", is the two year statute of limitations for claims under the Kentucky workers' compensation chapter.

² In what can be characterized only as sophistry, Petitioner argues that the *general* personal injury statute of limitations is actually more "specific" than the two year Kentucky workers compensation statute of limitations for occupational injuries. This transposing of words is absurd - it is beyond cavil that a deliberate intent claim is an occupational injury, which is a more specific classification of injury than the general personal injuries - the two year statute is thus the more specific statute.

³ The rule in Kentucky is no different. ("The applicable rule of statutory construction where there is both a specific statute and a general statute seemingly applicable to the same subject is that the specific statute controls." *Meyers v. Chapman Printing Co., Inc.*, 840 S.W.2d 814, 819 (Ky.1992)).

G RULES OF STATUTORY CONSTRUCTION MANDATE THAT IF THERE ARE TWO POSSIBLE STATUTES OF LIMITATION THAT MAY APPLY, COURTS MUST APPLY THE LONGER STATUTE OF LIMITATIONS

Such a construction applying the two year workers' compensation chapter statute also is on all fours with the rule that courts facing two different statute of limitations *must* apply the *longer* statute "so as to avoid the bar of the statute of limitations whenever the action would be barred in one form but not in the other":

"courts frequently adopt the approach that the action should ordinarily be construed so as to avoid the bar of the statute of limitations whenever the action would be barred in one form but not in the other. *See, e. g., Southern Pacific Railway Co. v. Gonzalez*, 48 Ariz. 260, 61 P.2d 377 (1936); *McClure v. Johnson, supra*; *Matthys v. Donelson*, 179 Iowa 1111, 160 N.W. 944 (1917)."

Cochran v. Appalachian Power Co., 162 W.Va. 86, 93, 246 S.E.2d 624, 628 (1978).

The rule in Kentucky is the same as in West Virginia:

"as statutes of limitations are in derogation of presumptively valid claims, when doubt exists as to which statute should prevail, the longer period should be applied. *Troxell v. Trammell*, Ky., 730 S.W.2d 525 (1987)."

Munday v. Mayfair Diagnostic Laboratory, 831 S.W.2d 912, 914 (Ky. 1992). This rule favoring the *longer* statute of limitations is a "hornbook rule" of statutory construction:

"if there is a substantial question or reasonable dispute as to which of two or more statutes of limitation within the jurisdiction should be applied, the doubt should be resolved in favor of the application of the statute containing the longest limitation period."

Am.Jur.2d *Limitation* § 92.

In this case Petitioner argues the general one year statute of limitations applicable to *common law* personal injury claims should apply under Kentucky law. As shown above, plaintiffs have a *statutory* claim for an "occupational injury" under the West Virginia workers

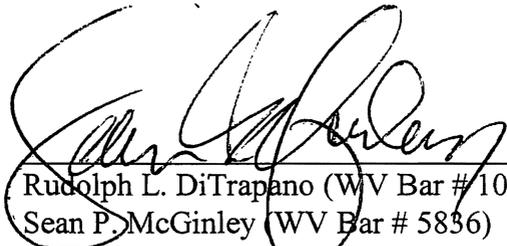
compensation chapter, not a *common law* personal injury claim. Thus, whether it be under Kentucky law or West Virginia law, if it is possible that either of two statutes of limitation may apply, the proper rules of construction mandate courts *must* apply the *longer* statute of limitations. In the case at bar, that means the court had to, and properly did apply a two year statute of limitations. Applying the two year statute, plaintiffs claims are not time barred, and Petitioner's Writ must be denied.

H CONCLUSION

Petitioner fails to show entitlement to any extraordinary relief. There is nothing extraordinary here beyond Petitioner's attempt to substitute the Writ process for an improper interlocutory appeal. Petitioner has attempted to stall this case for years by arguing and rearguing that plaintiffs' *statutory* deliberate intent claim, a claim that is within the workers compensation chapter of the West Virginia Code, should be shoe-horned into a general, one-year, *common law* "personal injury" statute of limitations time period in Kentucky. This argument is unsupportable because Kentucky's statute of limitations for "occupational injuries" under its workers compensation chapter is two years. Thus, Petitioner's Writ raises nothing but a non-issue. Even if it is "colorable" for Petitioner to argue that Plaintiffs claim could fall within the general one year limitation period, the more specific statute applicable to "occupational injuries" in the Kentucky workers' compensation chapter (because it clearly applies to plaintiffs' claims also and is a longer limitation period), is given priority under the applicable rules of statutory construction. Clearly, even if there was some question in this regard, the law of both West Virginia and Kentucky mandate that when there are two possible statutes of limitations that may apply, a court always should apply the **longer** statute. In this case, the longer statute is the **two**

year statute governing claims for “occupational injuries” within the Kentucky workers compensation chapter.

**GLEN H. ANDERSON and
BRENDA ANDERSON,
By Counsel**

A handwritten signature in black ink, appearing to read "Sean P. McGinley", is written over a horizontal line. The signature is cursive and somewhat stylized.

Rudolph L. DiTrapano (WV Bar # 1024)

Sean P. McGinley (WV Bar # 5836)

**DI TRAPANO, BARRETT, DiPIERO,
MCGINLEY & SIMMONS, PLLC**

P.O. Box 1631

Charleston, West Virginia 25326-1631

(304) 342-0133

Counsel for Plaintiffs

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0084

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

Petitioner,

v.

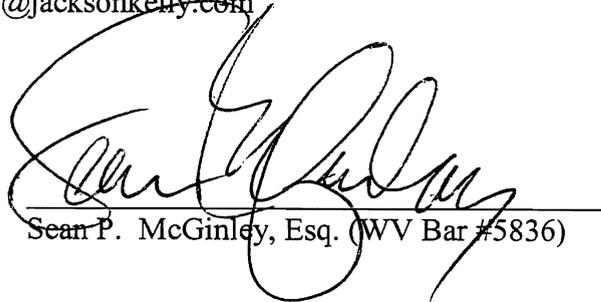
HON. JAY M. HOKE, JUDGE OF THE
CIRCUIT COURT OF LINCOLN COUNTY,
WEST VIRGINIA,

Respondent..

CERTIFICATE OF SERVICE

I, Sean P. McGinley, counsel for Plaintiffs below, do hereby certify that a true and correct copy of the foregoing **RESPONSE TO WRIT OF PROHIBITION** was served upon counsel of record by U. S. Mail by placing a true and correct copy thereof in a properly stamped and addressed envelope on the 20th day of February, 2014, addressed as follows:

Matthew A. Nelson, Esq.
Patricia M. Bello, Esq.
JACKSON KELLY, PLLC
Post Office Box 553
Charleston, WV 25322
pmbello@jacksonkelly.com



Sean P. McGinley, Esq. (WV Bar #5836)