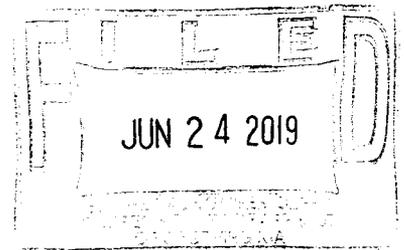


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NO. 18-1140



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NICHOLSON CONSTRUCTION COMPANY,

Petitioner,

v.

BEST FLOW LINE EQUIPMENT, L.P.,

Respondent.

**(ON APPEAL FROM THE
CIRCUIT COURT OF MONONGALIA
COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 17-C-193)**

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

In the interest of brevity and judicial efficiency, Petitioner incorporates by reference as if fully restated verbatim herein, the law and arguments set forth in its Petition for Appeal previously filed in this matter wherein it has already addressed the various assertions raised by the Respondents in their Response Briefs.

By way of brief summary, Petition reiterates that regardless of whether Mr. Bell could have legally availed himself of the benefits and privileges of the West Virginia Workers' Compensation Act, the fact is that he did not; his claim for benefits was and continues to be singularly paid through the Pennsylvania Workers Compensation Act. As such, the trial court should have applied Pennsylvania law and the principles of comity to this action and thereafter found that no cause of action existed because Petitioner Nicholson Construction is immune from all common law claims arising from the subject work-place accident by virtue of the Pennsylvania Workers' Compensation Act, which is the exclusive remedy available against this Pennsylvania employer, including those cross-claims brought by the Respondent. *See* 77 Pa. Stat. Ann. § 481.

Additionally, the application of West Virginia Code § 55-7-13c, which provides that co-defendants in a civil action are to be held severally, and not jointly, liable for any damages awarded, should have resulted in the dismissal of the Respondent's cross-claims for common law contribution and implied indemnification as such claims are made redundant and unnecessary under the several liability statute. Thus, the trial court should not have applied former West Virginia common law in this case so as to permit the Respondent's claims of deliberate intent, contribution and implied indemnity to survive against the Petitioner.

Finally, the trial court erred in failing to apply Pennsylvania law to the spoliation claims against the Petitioner as the facts underlying the spoliation claims against this Petitioner arose in

the Commonwealth of Pennsylvania, between residents of Pennsylvania, and from allegedly injurious conduct occurring in Pennsylvania, and therefore are insufficient to confer jurisdiction in West Virginia over the subject matter of said claims.

ARGUMENT

A. THE CIRCUIT COURT LACKED SUBJECT-MATTER JURISDICTION OVER THE CLAIMS AGAINST THE PETITIONER AND ERRED IN FAILING TO APPLY PENNSYLVANIA LAW BECAUSE PLAINTIFFS HAVE ELECTED THEIR REMEDY AND SHOULD BE BOUND BY SAID ELECTION

Despite the factual assertions that Plaintiff Tucker Bell was entitled or otherwise permitted to bring a claim under the West Virginia Workers' Compensation Act, he did not do so within the time required. *See e.g.*, W.VA. CODE 23-4-15 (An occupational injury claimant as six (6) months to file a proper application for benefits with the insurer. Failure to do so will bar the claimant from claiming workers' compensation.) Regardless of his initial application for Pennsylvania workers' compensation benefits, should he have desired to avail himself of the benefits of West Virginia workers' compensation benefits, he could have done so.¹ Plaintiffs likewise missed the two-year statute of limitations for bringing a deliberate intention claim against this Petitioner under West Virginia Code §23-4-2.

This Petitioner adopts and incorporates by reference the arguments set forth in the brief of Southern Environmental, Inc., Appeal From An Order From The Circuit Court of Monongalia County, West Virginia in the matter of Southern Environmental, Inc. v. Tucker-Stephen G. Bell,

¹ The Petitioner, having been disparaged at length and assigned various nefarious motives for assisting its employee Plaintiff with a Pennsylvania workers' compensation claim, notes for the records that the maximum allowable weekly temporary total disability indemnity payments are higher in Pennsylvania than in West Virginia. *See e.g.*, [https://www.dli.pa.gov/Businesses/Compensation/WC/claims/Pages/Statewide-Average-Weekly-Wage-\(SAWW\).aspx](https://www.dli.pa.gov/Businesses/Compensation/WC/claims/Pages/Statewide-Average-Weekly-Wage-(SAWW).aspx) and <https://www.wvinsurance.gov/Workers-Compensation>.

et al., Appeal No. 18-1124, as well as its prior arguments and assignments of error set forth in the Brief of Petitioner in the appeal herein, No. 18-1140.

B. THE CIRCUIT COURT ERRED IN FAILING TO DISMISS THE RESPONDENT'S CROSS CLAIMS AGAINST THE PETITIONER IN ACCORDANCE WITH WEST VIRGINIA CODE §55-7-13c

Best Flow argues that West Virginia Code §55-7-13c, does not apply to the underlying suit because it is a substantive statute that diminishes substantive rights or augments substantive liability and therefore should not be applied retroactively. This argument fails as no substantive right is being affected by West Virginia Code §55-7-13c.

“Substantive rights, which are not necessarily synonymous with vested rights, are included within that part of the law dealing with creation of duties, right, and obligations, as opposed to procedural or remedial law, which prescribes methods of obtaining redress or enforcement of rights.” Mildred L.M. v. John O.F., 452 S.E.2d 436, fn 10 (W.Va. 1994). Joint liability simply allowed the collection of Plaintiff’s damages from one tortfeasor versus another. It did not permit claims by a Plaintiff that are now somehow nonexistent under the new statute. Furthermore, the statute streamlines a process which was otherwise brought about through the filing of multiple cross-claims and/or third-party claims by a defendant. The subject statute is procedural or remedial in nature. Moreover, the plain language of the statute clearly indicates the legislature’s intent that the statute apply “[i]n any action for damages[.]” W.VA. CODE §55-7-13c(a).

Statutes which do not create new rights or take away vested ones are deemed to be remedial and are not within the strict application of the rule of presumption against retroactivity. *See e.g.*, Joy v. Chessie Emp. Fed. Credit Union, 411 S.E.2d 261 (W.Va. 1991).

Black’s Law Dictionary, 5th Ed., at page 1281, succinctly defines “substantive law” as “(t)hat part of law which creates, defines, and regulates rights, as opposed to ‘adjective or remedial law’, which prescribes methods of enforcing the rights or obtaining redress for their invasion. That which creates duties, rights and

obligations, while 'procedural or remedial law' prescribes methods of enforcement of rights or obtaining redress.

Shanholtz v. Monongalia Power Co., 270 S.E.2d 178, 183 (W.Va. 1980). West Virginia Code §55-7-13c, does not take away the Plaintiff's right to sue the Petitioner herein for damages. Rather, it codifies, streamlines and makes legally unnecessary any claim for contribution by Best Flow against this Petitioner.

Common law claims of contribution and indemnity both arise from equitable principles and are designed to remedy those scenarios wherein one party has been held liable, either partially (contribution) or wholly (indemnity), for the fault of another. Sydenstricker v. Unipunch Prod., Inc., 288 S.E.2d 511, 516 (W. Va. 1982). "[T]he right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation." Id. at 516.

Effective May 25, 2015, the West Virginia Legislature enacted West Virginia Code § 55-7-13c, which in essence codifies the common law, statutorily securing the common law right of a party not to pay more than his or her *pro tanto* share of a judgment. Even assuming for the sake of argument that the statute at issue is substantive and not procedural or remedial, a statute that incorporates common law that had existed before the statute may be applied retroactively. *See e.g., Myers v. Morgantown Health Care Corp.*, 434 S.E.2d 7, 9 (W.Va. 1993).

In the present case, the Circuit Court has already determined that the Plaintiffs do not have a deliberate intent cause of action against Nicholson. For Best Flow to suggest that the application to this lawsuit of the several liability statute is inappropriate simply because it was effective five (5) days after the Plaintiff's work-place injury, but nearly two years before Plaintiffs' Complaint was filed is nonsensical.

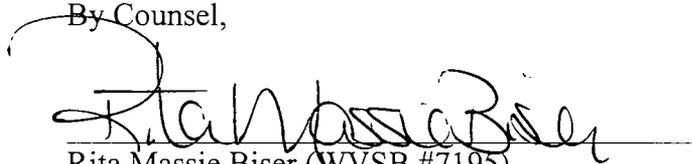
CONCLUSION

WHEREFORE, based upon the foregoing arguments and for the reasons set forth above, the Petitioner Nicholson Construction Company respectfully requests that this Court reverse the AMENDED ORDER DENYING DEFENDANT NICHOLSON CONSTRUCTION COMPANY'S MOTION TO DISMISS CROSS-CLAIMS OF BEST FLOW LINE EQUIPMENT, L.P., of the Circuit Court of Monongalia County and enter an Order dismissing the cross-claims of the Respondent Best Flow against this Petitioner Nicholson Construction Company.

Respectfully submitted,

**NICHOLSON CONSTRUCTION COMPANY
PETITIONER**

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