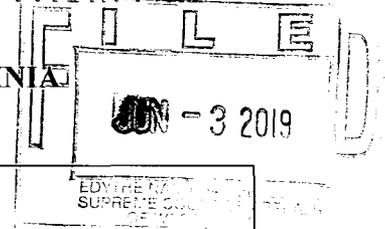


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 18-1140



NICHOLSON CONSTRUCTION COMPANY,
Defendant Below, Petitioner

v.

BEST FLOW LINE EQUIPMENT, L.P.,
Defendant Below, Respondent

Appeal from Order of Circuit Court of
Monongalia County, Civil Action 17-C-193

SUMMARY RESPONSE OF TUCKER-STEPHEN G. BELL, ET AL.

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STATEMENT OF JOINDER

The plaintiffs below, Tucker-Stephen G. Bell and his wife and children (the “Bells”), affirmatively join the *Respondents’ Brief* filed by Best Flow Line Equipment, L.P. (“Best Flow”) in response to the *Brief* of Petitioner, Nicholson Construction Company (“Nicholson”) in the instant appeal of the Circuit Court’s denial of Nicholson’s *Motion to Dismiss* Best Flow’s cross-claims against Nicholson. Certain assignments of error and arguments contained within Nicholson’s *Brief* correlate to arguments made by Nicholson in moving to dismiss plaintiffs’ claims asserted against it that were rejected by the Circuit Court below. The Bells file this *Summary Response* pursuant to Rule 10€ of the West Virginia Revised Rules of Appellate Procedure in order to rebut misstatements of fact and misapplication of law advanced by Nicholson which could otherwise impact the Bells’ ability to pursue their claims against Nicholson.

To the extent that Nicholson asserts cross-assignments of error in its *Respondents’ Brief* to be filed in the Bells’ appeal of the lower court’s August 31, 2018 *Order Denying, In Part, and Granting, In Part, Nicholson’s Motion to Dismiss*, docketed at No. 18-1139, the Bells will more fully respond and refute such assignments of error in their *Reply Brief*. In addition to the following, Respondents incorporate herein by reference, their arguments contained in *Petitioners’ Brief* filed in Docket No. 18-1139 and in *Respondents’ Brief* filed in Docket No. 18-1124, which were consolidated with this appeal by Order dated April 25, 2019.

ARGUMENT

A. The Circuit Court correctly found that Tucker Bell and his family were entitled to all of the rights and benefits provided under the West Virginia Workers Act, including the right to bring deliberate intent claims against Nicholson, and that the Circuit Court has jurisdiction over all claims and cross-claims asserted against Nicholson.

In the Circuit Court's *Order Denying, In Part, and Granting, In Part, Nicholson's Motion to Dismiss* dated August 31, 2018, the Court found that Bell was required to be covered under the West Virginia Workers' Compensation Act, W.Va. Code § 23-1-1, *et seq.*, and that Bell was entitled to all of the benefits of the Act, including the right to bring a deliberate intent action against his employer, Nicholson. (A.R. 853). In its *Brief*, Nicholson argues that, "regardless of whether Bell could have availed himself to the benefits of the West Virginia Workers' Compensation Act, the fact is that he did not," and since the statute of limitations to file a claim for West Virginia workers compensation benefits has run, the Bells' exclusive remedy is to receive Pennsylvania benefits. (*Petitioner Nicholson's Brief* at p. 3-4). Nicholson's entire argument is premised on a deceptive distortion of the facts and a gross misapplication of West Virginia law.

First, neither Bell nor any of his family members chose to file a claim for workers' compensation benefits under the Pennsylvania's Workers' Compensation Act, 77 Pa. Stat. Ann. § 1, *et seq.* (A.R. 841-47). That decision was made solely by Bell's employer, Nicholson, in order to afford Nicholson the greatest possible protection, and to thwart Bell's tort claims. *Id.* Further, completely contrary to Nicholson's assertion that no evidence was produced to show a claim was filed under the West Virginia Workers' Compensation scheme, (*Petitioner Nicholson's Brief* at p. 6), the Affidavit of Heather Bell included as "Exhibit B" a completed and executed "Employee's and Physician's Report of Occupational Injury" form (WC-1), which initiates the workers' compensation claim process in West Virginia, that was timely received on August 19, 2015. (A.R. 847). The only reason the Bells do not have more information on this claim for West Virginia

workers' compensation benefits is because Nicholson has objected and refused to produce relevant and discoverable information relating to the claim.

Next, Nicholson asserts that since Bell allegedly did not file a claim for benefits under the West Virginia Workers' Compensation Act, he cannot assert a claim under the deliberate intent exception under the Act. Nicholson's assertion is in complete contradiction to the express language of the controlling "deliberate intent" statute:

If injury or death result to any employee from the deliberate intention of his or her employer to produce the injury or death, the employee, the widow, widower, child or dependent of the employee has the privilege to take under this chapter and has a cause of action against the employer, as if this chapter had not been enacted, for any excess of damages over the amount received or receivable in a claim for benefits under this chapter, **whether filed or not.**

W. Va. Code Ann. § 23-4-2(c) (2005)¹ (emphasis added).

Even assuming, *arguendo*, that Bell did not file a claim for benefits under the West Virginia Act and that filing a claim for benefits is a requisite to assert deliberate intent claims (which is not the case as explained herein), Nicholson should be estopped from asserting immunity under Pennsylvania law since any failure of Bell to timely file a claim for West Virginia benefits was the result of Nicholson and its acts and omissions in handling the workers' compensation claim on his behalf. *See Baker v. Ctr. Foundry Mach. Co.*, No. 17-0749, 2018 WL 2261275, at *5 (W. Va. May 17, 2018) (Explaining that the rule followed in the overwhelming majority of jurisdictions is that an employer cannot invoke the time bar to defeat compensation when the application for workers' compensation benefits is untimely filed due to the employer's fault); *See also France v. Workmen's Comp. Appeal Bd.*, 117 W. Va. 612, 186 S.E. 601, 602 (1936).

¹ The amendments to this section enacted during the 2015 session of the Legislature only apply injuries occurring on or after July 1, 2015; Bell's injuries occurred on May 19, 2015.

Nicholson also fails to acknowledge that Nicholson did, in fact, maintain West Virginia workers' compensation coverage for Bell during his employment in West Virginia. (A.R. 782).

This fact is of the utmost importance since under West Virginia law:

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 Act, including the right to file a direct deliberate intention cause of action.

Bell v. Vecellio & Grogan, Inc., 197 W. Va. 138, 144 (1996); *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 704, 559 S.E.2d 36, 41 (2001). Thus, Bell's right to file a deliberate intention cause of action turns on whether he was covered by the West Virginia Workers' Compensation Act. Since Nicholson admits that Bell was covered by West Virginia Workers' Compensation Act, he is entitled to maintain deliberate intent claims against Nicholson. (A.R. 782).

Nicholson's total reliance upon *Easterling v. Am. Optical Corp.*, 207 W. Va. 123, 125, 529 S.E.2d 588, 590 (2000) for its proposition that the Circuit Court lacks jurisdiction over Bells' deliberate intent claims and that Pennsylvania law applies is entirely misplaced. The holding in *Easterling* cited by Nicholson is actually quoted exactly from and based upon Syllabus Point 3 of *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 173, 475 S.E.2d 172, 173 (1996), and that *Gallapoo* holding was based entirely on West Virginia Code § 23-2-1(c)(c).

Noticeably absent from Nicholson's entire brief is any citation to West Virginia Code Section 23-2-1c(c), upon which Nicholson's arguments below depended. Section 23-2-1c(c) provides that a foreign State's laws shall be the exclusive remedy of a non-West Virginia employee who is injured in West Virginia while "temporarily" employed in West Virginia provided the injured employee is covered by workers' compensation in the foreign state. W.Va. Code § 23-2-1c(c); *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 302, 418 S.E.2d 738, 748 (1992). "Temporarily" as the term is used in Section 23-2-1c(c) "means for a period not exceeding thirty

(30) calendar days within any three hundred and sixty-five (365) day period.” W. Va. Code R. §85-8-3.17. Therefore, § 23-2-1c(c) is completely inapplicable where a nonresident is injured while employed in West Virginia for more than thirty (30) calendar days in a 365-day period.

In its *Answer to the First Amended Complaint*, Nicholson stated “Defendant Nicholson Construction Company admits that Plaintiff Tucker-Stephen G. Bell performed work in West Virginia for Defendant Nicholson for a period exceeding thirty (30) calendar days within the 365-day period preceding May 19, 2015.” (A.R. 872). **Based upon Nicholson’s own admission, Bell was not temporarily employed in West Virginia and § 23-2-1c(c) does not apply to this case. Consequently, the holdings in *Gallapoo* and *Easterling*, which were based upon the application of § 23-2-1c(c), are likewise inapplicable.**

Even if the Court were inclined to read *Easterling* as Nicholson suggests, Section 85-3-3.17 of the West Virginia Code of State Rules was enacted after the *Easterling* decision, thereby reducing the Court’s holding in *Easterling* to the original intent of W.Va. Code § 23-2-1(c)(c), which was to only limit the remedies afforded under West Virginia law to non-resident employees who are injured while *temporarily* employed in West Virginia. By specifically limiting the exclusive remedy provision of Section 23-2-1c(c) to only situations where the nonresident employee was injured while *temporarily* employed in West Virginia the legislature dictated a clear policy that West Virginia law apply to those employees who work in West Virginia in excess of the 30-day threshold and are injured in this State despite their non-resident status.

Moreover, West Virginia Code of State Rules § 85-8-7.2 titled “Extraterritorial employees working in West Virginia on a non-temporary basis,” which was likewise enacted after the *Easterling* decision, directs in relevant part:

Extraterritorial employees who perform work in the State of West Virginia on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any

three hundred and sixty-five (365) day period) and are not otherwise exempt from West Virginia's workers' compensation laws must be covered with West Virginia workers' compensation coverage unless they enter into an agreement with their employer described under subsection 7.4. of this section....

“Extraterritorial employee” is defined as “an employee who is not a resident of the State of West Virginia *and who is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than the State of West Virginia.*” W. Va. Code R. 85-8-3.7 (emphasis added). Hence, not only does § 85-8-7.2 mandate that any non-resident who is employed in West Virginia on a non-temporary basis be covered with West Virginia workers' compensation coverage regardless of whether such employee is covered and collected benefits under a foreign workers' compensation scheme, *it requires that such non-resident be being subject to another State's workers' compensation laws* by virtue of the definition of “extraterritorial employee.” W. Va. Code R. 85-8-3.7. Nicholson's argument that receiving workers' compensation benefits of a State other than West Virginia mandates application of the foreign State's laws contradicts the most basic reading of the Act. While a plain reading of the law may be too “academic” for Nicholson, this Court should apply the clear laws of West Virginia – the State with the dominate interest in protecting workers within its borders – and affirm the decision of the lower court to deny Nicholson's *Motion to Dismiss* the cross-claims of Best Flow, and reject any cross-assignments of error that may be asserted by Nicholson in this regard.

Additionally, for all of the reasons set forth within the Bells' *Petitioners' Brief* filed in Docket No. 18-1124, the claims against Nicholson for deliberate intent contained in the *First Amended Complaint* relate back to the filing of the original *Complaint* under Rule 15(c)(2) of the *West Virginia Rules of Civil Procedure*, because the deliberate intent claims against Nicholson arose out of the exact conduct, transaction or occurrence set forth in the original *Complaint*. Nicholson suffered absolutely no prejudice as a result of amended pleading and this Court should

overturn the Circuit Court's decision finding that such claims are barred by the statute of limitations so that the claims can be heard on their merits.

B. Principals of comity support the Circuit Court's application of West Virginia to the claims in this case.

As set forth within Best Flow's *Brief*, an analysis under the doctrine of comity weighs irrefutably on behalf of the Bells' ability to bring and maintain his deliberate intention actions against Nicholson under West Virginia law. Nicholson's comity analysis is that West Virginia should not strip an out-of-state employer of its absolute immunity provided by the employer's home state when its employee is injured in West Virginia. Nicholson's argument is flawed for a myriad of reasons.

First, Nicholson gives no weight to the fact that West Virginia has a strong public policy that persons injured in West Virginia by the negligence of another should be able to recover under West Virginia law. *See Paul v. National Life*, 177 W.Va. 427, 433, 352 S.E.2d 550, 556 (1986). Moreover, the limitation of the exclusive remedy provision of the West Virginia Act to those "temporarily" employed in West Virginia, and the requirement that "non-temporary" employees be covered by the West Virginia Workers Act, demonstrate the State's clear intent to protect employees working in West Virginia for a significant amount of time, *i.e.* more than thirty (30) days, and to provide redress for such employees when injured under the West Virginia Workers' Compensation scheme. W. Va. Code R. §§ 85-3-3.17; 85-8-7.2. Accepting Nicholson's position that Pennsylvania law applies in this instance, would render West Virginia powerless to provide any remedies or safeguards to nonresident employees working within its borders. *Pasquale.*, 187 W.Va. at 300, 418 S.E.2d at 746 (*citing Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804 (1955)).

Additionally, Nicholson has a legal and contractual obligation to provide Bell coverage under the West Virginia Workers' Compensation Act. W. Va. Code R. 85-8-7.2; A.R. 403, 717,

1008, 1083 and 1101. Nicholson cannot genuinely maintain that, in light of such legal and contractual obligations, it expected Pennsylvania's Workers' Compensation Act to control over claims brought against it. *See Russell*, 210 W. Va. at 703–04, 559 S.E.2d at 40–41.

In *Russell*, this Court, applying principles of comity, held that a Kentucky employer was not entitled to Kentucky's absolute immunity for a claim brought by a Kentucky resident who was injured in Kentucky *and who collected Kentucky workers' compensation benefits*. *Id.* Rather, this Court held that the employee could bring a deliberate intent cause of action under West Virginia's Workers' Compensation Act because the Kentucky employer was contractually obligated to provide its workers with West Virginia workers' compensation coverage. Therefore, this Court reasoned that the parties had an expectation that West Virginia law would apply to any claims resulting from injuries arising from the work being performed pursuant to that contract. *Id.* **Importantly, this Court held that the fact that a Kentucky workers' compensation claim was submitted was not dispositive on whether Kentucky law would apply.** *Id.* at fn. 6. Nicholson not only had a contractual obligation to provide West Virginia workers' compensation coverage to its employees, but also a legal mandate. W. Va. Code R. 85-8-7.2. Accordingly, the principles of comity, do not support this State applying Pennsylvania's absolute immunity to an out-of-state employer whose employee was injured while working in West Virginia work in West Virginia on a non-temporary basis.

C. West Virginia law applies to all claims of spoliation asserted against.

In the proceedings below, Nicholson moved to dismiss the Bells' claims, and Best Flow's cross-claims, for negligent and intentional spoliation of evidence arising out of Nicholson's destruction of the critical evidence of the drill rig component parts that were involved in the subject workplace accident. (A.R. 559 - 60). Nicholson based its motions on its belief that Pennsylvania

law applies to the spoliation claims since Nicholson supposedly destroyed the evidence in Pennsylvania. *Id.* Hence, Nicholson maintains that the Bells' and Best Flow's injuries resulting from its destruction of evidence occurred in Pennsylvania and under the doctrine of *lex loci delicti*, Pennsylvania law applies. *Id.*

The Circuit Court did not reach a decision on this matter, and instead found that there were questions of fact remaining as to where Nicholson actually destroyed the evidence. (A.R. 855; 914). Since the lower court did decide which State's laws regarding spoliation should apply, this Court does even have jurisdiction to entertain an argument on a claim that was not disposed of by the lower court. *Erie Ins. Co. v. Dolly*, 240 W. Va. 345, 354, 811 S.E.2d 875, 884 (2018).

Nevertheless, Nicholson renews its argument that the place of injury resulting from Nicholson's destruction of evidence relating to a West Virginia accident at issue in this West Virginia lawsuit is Pennsylvania. Contrary to Nicholson's assertion, the place of the injuries is West Virginia since they consist chiefly of the impairment of the parties' ability to prosecute and defend claims asserted in West Virginia, due to the loss of the crucial evidence at issue.

West Virginia undeniability recognizes claims for both negligent and intentional spoliation of evidence. *See Hannah v. Heeter*, 213 W. Va. 704, 712, 584 S.E.2d 560, 568 (2003); *Williams v. Werner Enterprises, Inc.*, 235 W. Va. 32, 38, 770 S.E.2d 532, 538 (2015). Nicholson does not challenge the sufficiency of any of the spoliation claims under controlling West Virginia law, but rather argues that Pennsylvania law concerning spoliation should apply.

West Virginia law applies to the subject spoliation claims because the injuries suffered by the Bells and Best Flow as a result of Nicholson's destruction of crucial evidence occurred in West Virginia where this lawsuit is pending. The *First Amended Complaint* sets forth a litany of present and future damages, stemming from Nicholson's negligent and intentional spoliation of evidence,

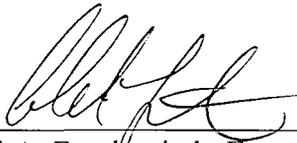
which relate to the impact the absence of such material evidence will have in this West Virginia litigation. (A.R. 299 – 302; 304. West Virginia’s spoliation law governs this case because Nicholson impinged upon the Bells’ prosecution of a West Virginia product liability injury suit and Best Flow’s defense of that suit. *Williams*, 235 W. Va. at 42, 770 S.E.2d at 542.

Beyond this, Nicholson’s duty to preserve the evidence arose in West Virginia. Nicholson cannot be allowed to extinguish its duty merely by smuggling the evidence into Pennsylvania in order to dispose of it in a jurisdiction with laws more favorable to a litigant’s misdeeds. Consider the absurd result, and ensuing pandemonium, if the Court were to adopt Nicholson’s position and apply Pennsylvania law (which Nicholson maintains does not recognize claims for spoliation of evidence): Pennsylvania could become a universal dumping ground for potential defendants’ damaging evidence. Any party who could potentially be subject to liability for an accident and who is in possession of damaging evidence, could simply abscond with the evidence to Pennsylvania and dispose of it without any risk of liability. Such a result would do violence to the policy concerns that gave rise to the recognition of the tort of spoliation, which exists to shield local courts and litigants from the disruptive effects of the destruction of necessary evidence. *Id.*

Even assuming, *arguendo*, that Pennsylvania law applies, the Bells and Best Flow have still alleged viable claims for spoliation of evidence against Nicholson. Although Pennsylvania law has not imposed a duty upon a third-party to preserve evidence, when Nicholson voluntarily assumed the duty to preserve the evidence it was required to carry out that duty reasonably. Nicholson breached its duty when it destroyed the evidence. Therefore, to the extent Pennsylvania law applies to the spoliation claims, Nicholson is still not entitled to the dismissal of the claims.

CONCLUSION

For the reasons set forth herein and in other Briefs of Tucker-Stephen G. Bell, *et. al.* filed in these consolidated appeals, this Court should affirm the Order of the Circuit Court denying Nicholson's *Motion to Dismiss* the cross-claims asserted by Best Flow against Nicholson.

Signed: 

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