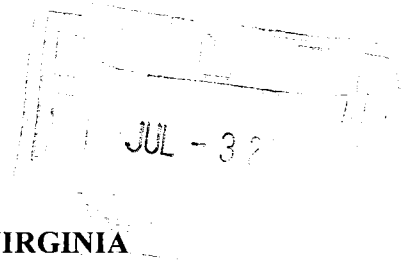
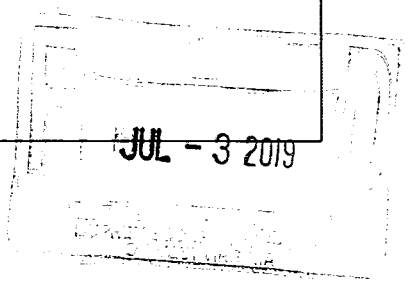


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 18-1139

TUCKER-STEPHEN G. BELL, ET AL., Plaintiff Below, Respondent **v.** **NICHOLSON CONSTRUCTION COMPANY** Defendant Below, Respondent	Appeal from Order of Circuit Court of Monongalia County, Civil Action **17-C-193**



PETITIONERS' REPLY BRIEF

Counsel for Petitioners: Tucker-Stephen G. Bell, et al.:

Carl A. Frankovitch, Esq. (WV Bar # 12150)
Counsel of Record
FRANKOVITCH, ANETAKIS, SIMON, DECAPIO & PEARL, LLP
337 Penco Road
Weirton, WV 26062
(304) 723-4400
cfrankovitch@faslaw.com

Matthew R. Zwick Esq. (WV Bar # 12160).
ZWICK LAW
171 Beaver Drive
P.O. Box 1127
DuBois, PA 15801
(814) 371-6400
mrz@zwick-law.com

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ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED IN CONCLUDING THAT PETITIONERS' CLAIMS AGAINST NICHOLSON FOR DELIBERATE INTENT ARE BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS.

A. Petitioners' claims against Nicholson for deliberate intent relate back pursuant to Rule 15(c)(2) because they arise out of the same occurrence set forth in the initial *Complaint*.

In its August 31, 2018 *Order Denying, In Part, and Granting, In Part, Nicholson Construction Company's Motion to Dismiss the Petitioners' First Amended Complaint*, the Circuit Court erred by failing to find that Petitioners' claims against Respondent, Nicholson Construction Company ("Nicholson"), for deliberate intent that were contained in the *First Amended Complaint* relate back to the date of the original *Complaint* pursuant to Rule 15(c)(2) of the West Virginia Rules of Civil Procedure since such claims undeniably "arose out of the conduct, transaction, or occurrence **set forth or attempted to be set forth in the original pleading.**" W.Va. R. Civ. P. 15(c)(2).

The Circuit Court's error is highlighted by Nicholson's conclusory argument that, "[t]he deliberate intent claim asserted by the Petitioners against the Respondent in the *First Amended Complaint* does not arise out of the same conduct, transaction, or occurrence **as the claims previously asserted against the Respondent by the Petitioners.**" (Nicholson Resp. Br. p. 3)(*emphasis added*). In order to justify the lower' court erroneous holding, Nicholson is forced to distort the plain language of Rule 15(c)(2) because Petitioner's deliberate intent claims undeniably arose out of an occurrence set forth in the initial *Complaint – i.e.*, the subject May 19, 2015 workplace incident. Respondent has not, and cannot, contest that fact. Rather, Nicholson attempts to misdirect this Court with inapposite caselaw in a futile attempt to create a nonexistent requirement for an amended pleading to relate back under Rule 15(c)(2).

As in the proceedings below, Nicholson directs this Court to the cases of *Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 281, 445 S.E.2d 219, 222 (1994) and *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 531, 618 S.E.2d 537, 540 (2005). As explained in Petitioners' principal *Brief*, these cases in no way support Nicholson's proposition that Petitioners' claims for deliberate intent arising out of an occurrence set forth in the original pleading, i.e. the May 19, 2015 workplace incidence, do not relate back pursuant to Rule 15(c)(2).

Nowhere in the *Dzinglski* decision does this Court even suggest that the inclusion of additional facts in an amended pleading precludes the relation back of new claims as Nicholson maintains. (Nicholson Resp. Br. p. 4). To the contrary, *Dzinglski* actually demonstrates that an amended complaint will relate back under Rule 15(c)(2) regardless of the presence of additional facts so long as the new claim arises out of out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint. 191 W. Va. at 281, 445 S.E.2d at 222.

In *Dzinglski*, the plaintiff initially filed a six (6) paragraph complaint with a single cause of action of wrongful termination.[1] In that case, the plaintiff alleged only that: 1) he began employment with Weirton Steel Corporation in May 1959 as a laborer; 2) he became a general foreman in November 1978; 3) he continued as a general foreman with Weirton Steel until October 1984; 4) in October 1984 he received notification that his employment was terminated; 5) that such termination "was wrongful and was without adequate reason"; and 6) as a result of his termination, he suffered damages in the form of lost benefits, wages and other injuries.

Two years after the commencement of the suit and after the statute of limitations on all claims stemming from his termination had run, the plaintiff was permitted to amend his complaint

[1] Complaint, *Dzinglski v. Weirton Steel Corporation*, Civil Action No. 85-C-488W (Hancock Co. Cir. Ct.)(filed Oct. 21, 1985).

to assert seven (7) new causes of action described in twenty-nine (29) paragraphs.[2] Over four years later at the pre-trial conference, the plaintiff again moved for leave to amend his complaint to assert a claim for the tort of outrage regarding the manner in which he was terminated. 191 W. Va. at 287-88, 445 S.E.2d at 228-29. The *Dzinglski* Court found that the tort of outrage claim, which requires specific conduct that is "atrocious and utterly intolerable in a civilized community," related back to the time of the filing of the original six (6) paragraph complaint, which simply alleged his termination "was wrongful and was without adequate reason," **because the tort of outrage claim arose from the same occurrence and conduct alleged in the original complaint**. *Id.* Therefore, *Dzinglski* actually supports the application of Rule 15(c)(2) even when additional facts are necessary to support a new cause of action.

The present case is more analogous to that of *Tucker v. Momentive Performance Materials USA Inc.*, No. 2:13-CV-04480, 2013 WL 6073463, at *2 (SDWV, Nov. 18, 2013). In that case, the plaintiff brought various common law tort claims against his prior employer and ninety-nine other "John Doe" defendants related to his exposure to toxic chemicals during his employment. *Tucker*, 2013 WL 6073463, at *1. The employer moved to dismiss the claims against it alleging that it was immune under West Virginia's Workers' Compensation Act. *Id.* The plaintiff moved for leave to amend the complaint to explicitly set forth the elements of a deliberate intent cause of action. *Id.* The employer did not contest the adequacy of the amended complaint; instead, it argued that the court should deny leave to amend since the statute of limitations on the deliberate intent claim had run and, according to the employer, did not relate back to the date the original complaint

[2] Amended Complaint, *Dzinglski v. Weirton Steel Corporation*, Civil Action No. 85-C-488W (Hancock Co. Cir. Ct.)(filed Sept. 16, 1987).

was filed. *Id.* In finding that the deliberate intent claims would relate back under Rule 15(c)(2), the Court soundly reasoned,

> The amended complaint, like the original, arises out of Mr. Tucker's exposure to hazardous chemicals at Momentive's worksite between the years of 1977 and 2011. The additional factual allegations contained in the amended complaint are obviously designed to track the West Virginia statute setting forth the elements of a deliberate intent cause of action. They do not, as Momentive claims, invoke reference to any conduct, transaction, or occurrence **other than that already set forth by the original complaint**. Particularly given the liberal amendment standard established by Federal Rule of Civil Procedure 15, any variances between the factual allegations in these pleadings do not suffice to prevent relation back.

Id. at *2 (emphasis added). Accordingly, the "artful and specialized" allegations of a deliberate intent claim can be added in the amended complaint, so long as they arise out of particular conduct or a certain occurrence or transaction set forth in the original complaint.

As in *Tucker,* Petitioners' *First Amended Complaint* arises out of the same workplace incident already set forth in the original *Complaint.* (A.R. 279-280). Petitioners' additional factual allegations track the elements of a deliberate intent cause of action and do not invoke reference to any conduct, transaction, or occurrence other than the May 19, 2015 workplace incident. (A.R. 295-299). Accordingly, the inclusion of additional facts in the *First Amended Complaint* does not preclude relation back in this instance. *Tucker*, at *2.

Nicholson's reliance of this Court's holding in *Zakaib* is also unfounded. *Zakaib* involved the appeal of a denial of leave to amend a complaint rather than the dismissal of claim supposedly barred by the statute of limitations. 217 W. Va. at 529, 618 S.E.2d at 538. This distinction is notable since the lower court has discretion to grant leave to amend while relation back is automatic once the requirements of Rule 15(c)(2) are satisfied. *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 130 S. Ct. 2485, 2488, 177 L. Ed. 2d 48 (2010)("[Rule 15(c)] mandates relation back once its requirements are satisfied; it does not leave that decision to the district court's equitable discretion.").

Contrary to Nicholson's account, the *Zakaib* Court found the lower court's denial of leave to amend to be appropriate due to the plaintiff's lack of diligence in seeking leave to amend and expressly declined to decide whether the spoliation claim sought to be added to the complaint would relate back to the original complaint under Rule 15(c)(2). 217 W. Va. at 534, 618 S.E.2d at 543. In its *Brief*, Nicholson actually cites to this Court's synopsis of the lower's court's decision rather than to the holding of the case. (Nicholson Resp. Br. at p. 4). Regardless, the lower court's holding in *Zakaib* is completely in line with the plain language of Rule 15(c)(2) and Petitioners' position on this issue.

In *Zakaib*, the claim sought to be added to the amended complaint was for spoliation of evidence while the allegations in the initial complaint involved claims of negligence and products liability against a manufacturer and claims of bad faith and unfair claim settlement practices against an insurer. Since the spoliation claim did not arise out of any conduct, transaction or occurrence set forth in the initial complaint, it followed that the spoliation claim did not relate back pursuant to Rule 15(c)(2). However, in the instant case, the May 19, 2015 workplace incident, from which Petitioners' deliberate intent claims arose, *and* Nicholson's conduct in destroying crucial evidence were both set forth in the original Complaint. Therefore, because Petitioners' deliberate intent claims undeniably arose out of the May 19, 2015 workplace incident as set forth in the original *Complaint*, such claims relate back under Rule 15(c)(2).

Nicholson's reliance on *Kassab v. Ellis*, No. 13-0263, 2013 WL 6152416, at *4 (W. Va. Nov. 22, 2013) (memorandum opinion) and *Pickens v. Tribble*, 236 W. Va. 670, 783 S.E.2d 310, 312 (2016) is likewise misplaced. In *Kassab,* a plaintiff who was purchasing a home on land contract brought an action against the seller to block his eviction and to compel the seller to complete the sale of the property. 2013 WL 6152416, at *1. Nine months after the commencement

of the action, the plaintiff sought leave to amend his complaint to assert a claim for personal injury arising from exposure to mold in the home. *Id.* at *2-3. This Court found that the lower court did not abuse its discretion in denying the plaintiff leave to amend since the amendment would have been prejudicial to the defendant due to the plaintiff's lack of diligence in seeking to amend. *Id.* at *3. The court did note, however, that the personal injury claim would not relate back to the filing of the original complaint since the original allegations pertained only to the improper conduct of inducing the plaintiff to enter into the contract. *Id.* at * 4.[3] Thus, *Kassab* does not provide any support to Nicholson's argument that a claim that arises out of an occurrence set forth in the original pleading will not relate back under Rule 15(c)(2).

Similarly, in *Pickens,* this Court commented in dicta that claims contained in an amended complaint regarding breach of a fiduciary duty and conversion of personal property would not relate back to the filing of the original complaint which dealt solely with real property claims. *Pickens*, 236 W. Va. at 676, 783 S.E.2d at 316, fn. 9. Yet, the Court found that the additional claims were not barred by the statute of limitations since the issue turned on questions of fact and the defendant failed to raise such questions to the jury. *Id.*

Not one of the cases cited by Nicholson supports its restrictive interpretation of Rule 15(c)(2). To the contrary, each case is completely in accord with finding that Petitioners' deliberate intent claims relate back to the date of the filing of the original *Complaint*. There is no dispute that the subject May 19, 2015 workplace incident is set forth in the initial *Compliant* and that Petitioners' deliberate intent claims arise from that incident. Accordingly, the *First Amended Complaint* relates back to the date of the filing of the initial *Complaint*.

[3] Notably, relation back was not at issue in *Kassab* since the statute of limitations on the personal injury claim had not yet run and the plaintiff was still able to bring a separate action to pursue that claim. 2013 WL 6152416, at *3-4.

B. Nicholson will not be prejudiced by allowance of relation back since Nicholson received adequate notice of the deliberate intent claims and has an adequate opportunity to prepare a defense.

The purpose of the statute of limitations is to prevent a defendant from being prejudiced in its defense of a claim by not having the ability to investigate the circumstances upon which his liability is based while the facts are accessible. *Donley v. Bracken*, 192 W. Va. 383, 387, 452 S.E.2d 699, 703 (1994). Since West Virginia also has a public policy of having cases decided on their merits despite a technicality, mistake or oversight in the pleading, Rule 15(c) creates an exception to the harsh effects of the statute of limitations when (1) injustice to the adverse party will not result from allowance of relation back, and (2) the adverse party has received adequate notice of the claim against him and has an adequate opportunity to prepare a defense to it. *Roberts v. Wagner Chevrolet-Olds, Inc.*, 163 W. Va. 559, 559, 258 S.E.2d 901, 901 (1979). The rationale behind the requirement that the newly added claim arise out of the same conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading is that, once a defendant is placed on notice of litigation involving particular conduct or a given occurrence or transaction, he will not be prejudiced, as a matter of law, by a new claim arising out of the same conduct, transaction or occurrence. W.Va. R. Civ. P. 15(c)(2); *Tucker,* 2013 WL 6073463, at *2.

Nicholson does not even attempt to maintain that an injustice would result by allowance of relation back or that it was not given adequate notice or an opportunity to defend the deliberate intent claims, as such a contention would be entirely disingenuous. Nicholson was absolutely on notice of the fact that litigation had commenced regarding the subject May 19, 2015 workplace incident. The subject workplace incident was detailed throughout the original *Complaint*, which included claims against Nicholson arising from that workplace incident.

Nicholson also had the opportunity to, and did in fact, conduct an extensive investigation of the incident. Prior to the commencement of the action, Nicholson assumed control over crucial evidence of the incident and retained legal counsel in anticipation of litigation. (A.R. 299-302). Furthermore, Nicholson has been a party to this action since its commencement and has been and continues to defend not only claims for spoliation of evidence but also claims and cross-claims arising from the May 19, 2015 workplace incident. (A.R. 17, 867, 1202). Therefore, Nicholson has received ample notice of the litigation arising out of the workplace incident and has an adequate opportunity to defend the deliberate intent claims asserted against it.

Nicholson has not maintained that any injustice or prejudice would result to it if Petitioners' claims for deliberate intent relate back pursuant to Rule 15(c)(2). An injustice or prejudice in the context of amended pleadings may exist when the defendant would be placed in a disadvantage in defending the merits of the claim, which it would not otherwise have been faced if the new claim had been included in the original pleading. *Plum v. Mitter*, 157 W. Va. 773, 777, 204 S.E.2d 8, 10 (1974). Nicholson has not alleged any such injustice or prejudice, nor could it.

Rather, Nicholson bewilderingly contends that Petitioners have not satisfied the requirement of Rule 15(c)**(3)** because Nicholson had no reason to believe that but-for some mistake on the part of Petitioners, it would have been sued in the original *Complaint* under a deliberate intent theory. (Nicholson Resp. Br. at 6-7). This argument is baffling since Rule 15(c)(3), which governs relation back when an amendment changes the party against whom an existing claim is asserted, is totally irrelevant to this analysis. Relation back of the *First Amended Complaint* in this instance is governed solely by Rule 15(c)(2) and Petitioners are not required to establish the requirements of Rule 15(c)(3) concerning a mistake in identity of a party. To the extent Nicholson is maintaining that Petitioners were required to establish each of the three numbered provisions of

Rule 15(c) as it appears, Nicholson is totally off base since those three provisions outline alternative scenarios for relation back depending on the nature of the amendment.

Nicholson next tries to misdirect this Court to conduct another analysis that is irrelevant for the purposes of relation back under Rule 15(c)(2) by arguing that Petitioners have not advanced any extenuating circumstances for failing to initially assert the deliberate intent cause of action. (Nicholson Resp. Br. at 5-6). However, the reason for the omission of the new claim is immaterial in the relation back analysis since relation back is automatic once the Rule 15(c) requirements are satisfied. *Krupski*, 560 U.S. 538, 130 S. Ct. 2485, 2488, 177 L. Ed. 2d 48. While the lower court may consider whether a party is dilatory is seeking leave to amend, once leave is granted, the court divulges all discretion in regard to relation back. *Id.* at 2488. In the proceedings below, the Circuit Court granted Petitioners' leave to amend their *Complaint* and Petitioners filed their *First Amended Complaint* on August 17, 2017. (A.R. 273-308).

Nevertheless, it is evident that Petitioners were not dilatory in seeking leave to amend since they moved for leave to amend three (3) months of the filing of the initial *Complaint*, prior to substantial discovery being conducted, and prior to all of the defendants filing a responsive pleading to the original *Complaint*. (A.R. 1). Petitioners obviously did not act in bad faith as they immediately sought to correct the omission of the deliberate intent claims. As such, the Circuit Court found that good cause existed to grant Petitioners leave to amend their *Complaint*. (A.R. 273).

Since Nicholson was well aware that litigation was being commenced regarding the workplace incident, it had adequate opportunity to prepare a defense to the claims and it will suffer no injustice if relation back is allowed, the Circuit Court's dismissal of Petitioners' deliberate intent claims against Nicholson must be reversed.

C. Even applying the Circuit Court's restrictive interpretation of Rule 15(c)(2) to the *First Amended Complaint,* Petitioners' claims against Nicholson for deliberate intent would still relate back since Petitioners' claims for loss of consortium also arose out of the May 19, 2015 workplace incident.

Nicholson argues that, in order for a newly added claim to relate back under Rule 15(c)(2), such claim must arise out of the same conduct, transaction, or occurrence as a claim previously asserted against that same defendant in the original complaint. (Nicholson Resp. Brief. p. 3). Yet, even accepting Nicholson's restrictive interpretation of the Rule, Nicholson fails to even attempt to explain why Petitioners' deliberate claims do not relate back in this instance since they arise out of the same occurrence as Petitioners' claims against Nicholson for loss of consortium.

Nicholson acknowledges that Petitioners' initial *Complaint* contained claims against Nicholson for spousal and parental loss of consortium. (Nicholson Resp. Brief p. 3). The loss of consortium claims undeniably arose out of the May 19, 2015 workplace incident – the same incident from which the deliberate intent claims arose. Nicholson does not dispute this fact. Nicholson simply ignores Petitioners' claims for loss of consortium and instead harps on the fact that Nicholson's spoliation of evidence occurred after the subject workplace incident. (Nicholson Resp. Br. p. 3-4). However, in conducting the analysis proposed by Nicholson, this Court cannot ignore the fact that Petitioners asserted claims against Nicholson in the original *Complaint* that arose out of the May 19, 2015 workplace incident *and* Nicholson's subsequent destruction of evidence. Therefore, even applying the more restrictive interpretation of Rule 15(c)(2) advanced by Nicholson and applied by the Circuit Court, Petitioners' claims for deliberate intent still relate back to the date of the filing of the original *Complaint.* Accordingly, the Circuit Court's Order granting Nicholson's *Motion to Dismiss* as to the deliberate intent claims against Nicholson should be reversed.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT PETITIONERS CANNOT MAINTAIN CLAIMS FOR LOSS OF SPOUSAL AND PARENTAL CONSORTIUM AGAINST NICHOLSON.

The Circuit Court erred in dismissing Petitioners' claims for loss of spousal and parental consortium against Nicholson because Petitioners' have cognizable personal injury claims against Nicholson. Petitioners' claims against Nicholson for deliberate intent are not barred by two-year statute of limitations because they relate back to the date of the filing of the original *Complaint* under Rule 15(c)(2). Nicholson is also not entitled to immunity under Pennsylvania's Workers' Compensation Act since Bell, as a non-temporary West Virginia employee covered by West Virginia Workers' Compensation coverage, is entitled to bring a West Virginia's deliberate intent claim against his employer. *Bell v. Vecellio & Grogan, Inc.*, 197 W. Va. 138, 475 S.E.2d 138 (1996); *Russell v. Bush & Burchett, Inc.*, 210 W. Va. 699, 704, 559 S.E.2d 36, 41 (2001). Therefore, this Court should reverse the Circuit Court's Order dismissing Petitioner's claims for loss of consortium, as well Petitioners' claims for deliberate intent, against Nicholson.

CROSS-ASSIGNMENTS OF ERROR

In response to Nicholson's cross-assignments of error, and in addition to the following, Petitioners incorporate herein the law and arguments presented in their *Respondents' Brief* filed in Appeal No. 18-1124 and their *Summary Response* filed in Appeal No. 18-1140.

I. THE CIRCUIT COURT CORRECTLY FOUND THAT PETITIONERS' CLAIMS AGAINST NICHOLSON FOR DELIBERATE INTENT ARE VIABLE UNDER WEST VIRGINIA LAW.

In the Circuit Court's August 31, 2018 *Order Denying, In Part, and Granting, In Part, Nicholson's Motion to Dismiss*, the Court correctly 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). However, Nicholson has asserted a cross-assignment of error in this appeal arguing that the Circuit Court erred in failing to yield West Virginia law to Pennsylvania's absolute immunity. (Nicholson Resp. Br. at p. 8).

Under West Virginia law, "**[a]ll 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,* 197 W.Va. at 144, 475 S.E.2d at 144; *Russell.,* 210 W. Va. at 704, 559 S.E.2d at 41. Thus, Bell's right to file a deliberate intent cause of action turns on whether he was covered by the West Virginia Workers' Compensation Act; not whether Bell was covered by or received benefits under the Pennsylvania Workers' Compensation Act. *Id.* Since Nicholson maintained West Virginia workers' compensation coverage for Bell during his employment in West Virginia, Bell is entitled to maintain deliberate intent claims against Nicholson. *Id.*; A.R. 782.

In support of its application of Pennsylvania immunity, Nicholson relies upon West Virginia Code § 23-2-1c(c). (Nicholson Resp. Br. at p. 9). 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 the instant case, Bell was, in fact, employed in West Virginia for more than thirty (30) calendar days within the year prior to the subject workplace incident. (A.R. 872). Nicholson attempts to discount the inapplicability of § 23-2-1c(c) by disingenuously maintaining that Bell's non-temporary employment status are "purported factual issues." (Nicholson Resp. Br. at p. 9). However, the fact that Bell is not a "temporary" employee in the context of § 23-2-1c(c) is not an unsupported allegation contained in the *First Amended Complaint*, but rather an admitted, uncontested fact. (A.R. 872). 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). Therefore, 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.

Nicholson's reliance upon *Easterling v. Am. Optical Corp.*, 207 W. Va. 123, 125, 529 S.E.2d 588, 590 (2000) is equally misplaced. *Easterling* was based on the application of § 23-2-1(c)(c), which does not apply in this case since Bell was not temporarily employed in West Virginia at the time of the workplace incident. *Id.* Further, 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. In such instance, the interest of the state of residence gives way to the more dominant interest of West Virginia in providing its remedies and safeguards to non-temporary employees working within its borders. Consequently, West Virginia will not enforce a bar created by the exclusive-remedy statute of the state of

residence, but will rather afford such non-temporary employee all of the benefits and privileges of West Virginia law, including the right to file a direct deliberate intention cause of action. *Bell*, 197 W. Va. 138, 144.

The issue of whether an exclusive-remedy statute of the state that is liable for workers' compensation will bar a deliberate intent claim under West Virginia Workers' Compensation Act was addressed in *Russell v. Bush & Burchett, Inc.* In *Russell,* this Court held that a Kentucky resident who was injured in Kentucky ***and who collected Kentucky workers' compensation benefits*** was entitled to bring a deliberate intent claim against his Kentucky employer, because the employer was contractually obligated to provide the employee with West Virginia Workers' compensation coverage. 210 W. Va. 699, 704, 559 S.E.2d 36, 41. Therefore, contrary to Nicholson's assertion, collecting workers' compensation benefits from another state is not dispositive on the issue of whether a West Virginia deliberate intent claim can be maintained. *Id.*, at fn. 6. Rather, the decisive factor is whether the employee is covered or required to be covered by the West Virginia Workers' Compensation Act because all employees so covered "are entitled to all benefits and privileges under the 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)." *Id.,* 210 W. Va. at 704, 559 S.E.2d at 41(quoting *Bell,* 197 W.Va. at 144, 475 S.E.2d at 144).

The United States District Court for the Northern District of West Virginia has also rejected the idea that a West Virginia deliberate intent claim is precluded if the injured employee receives workers' compensation benefits of a state other than West Virginia. *Coburn v. C&K Indus. Servs.*, No. CIV. A. 5:07CV23, 2007 WL 2789468, at *1 (N.D.W. Va. Sept. 24, 2007). In *Coburn,* the plaintiff brought a deliberate intent claim against his out-of-state employer resulting from his injuries sustained in West Virginia. *Id.* The plaintiff received and accepted benefits under the

Pennsylvania Workers' Compensation Act, and not under the West Virginia Act. *Id.*

The fact that the plaintiff received Pennsylvania workers' compensation benefits was not determinative of whether Pennsylvania's exclusive-remedy statute barred the plaintiff's West Virginia deliberate intent claim against his employer. *Id.* at *3-5. Instead, the Court found that the deliberate intent claim was viable provided the plaintiff was eligible for coverage under the West Virginia Workers' Compensation Act or if the employer was subject to the Act. *Id.* The District Court determined that questions of fact remained regarding those issues and permitted the plaintiff's deliberate intent claim to proceed. *Id.* at *6. In the present case, no such analysis is needed since Bell was in fact covered by West Virginia Workers' Compensation coverage.

The court in *Coburn* further reasoned that finding that an injured employee is precluded from maintaining a West Virginia deliberate intent claim due to the employee's receipt of another state's workers' compensation benefits would conflict with other provisions of the West Virginia Workers' Compensation Act that allow for employees to concurrently recover under the West Virginia Act and the workers' compensation laws of another state. *Id.* at *6 (citing W.Va. Code § 23-2-1(c)(d)). Accordingly, the fact that Bell has received Pennsylvania workers' compensation benefits is of no consequence to his ability to assert a deliberate intent claim against Nicholson.

Nicholson's "election of remedies" argument is also misguided. "The election of remedies doctrine is applicable only when there are two or more inconsistent remedies available to a litigant at the time of election, and such litigant has knowledge of facts giving rise to a duty to elect." Syl. Pt. 2, *Harrison v. Miller*, 124 W. Va. 550, 21 S.E.2d 674, 674 (1942)(emphasis added).

As an initial matter, it was Nicholson that elected to file a claim on behalf of Bell under the Pennsylvania Workers' Compensation Act rather than under the West Virginia Act. (A.R. 841-47). Petitioners had no knowledge of the facts giving rise to any purported duty to elect and did

not elect the Pennsylvania Workers' Compensation scheme as their exclusive remedy. *Id.* That decision was made solely by Nicholson, which Nicholson does not contest. The doctrine of election of remedies is inapposite in this case for that reason alone. *Harrison*, at syl. pt. 2.

Moreover, the doctrine of election of remedies is inapplicable in this case because Petitioners' are not seeking to recover two legally or factually inconsistent remedies. *Harrison*, at Syl. Pt. 2; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 94 S. Ct. 1011, 1020, 39 L. Ed. 2d 147 (1974); Syl. Pt. 1, *Cameron v. Cameron*, 111 W. Va. 375, 162 S.E. 173, 173 (1931); *Homeland Training Ctr., LLC v. Summit Point Auto. Research Ctr.*, 594 F.3d 285, 293 (4th Cir. 2010) ("The basic purpose of the doctrine is to prevent a plaintiff from obtaining a windfall recovery, either by recovering two forms of relief that are premised on legal or factual theories that contradict one another or by recovering overlapping remedies for the same legal injury.")

In West Virginia, an injured employee is entitled to receive workers' compensation benefits *and* to pursue a civil action for excess damages caused by the "deliberate intention" of the employer. West Virginia Code § 23-4-2(c) (2005) provides as follows:

> 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.

Accordingly, Petitioners are not seeking legally or factually inconsistent remedies. Instead, they are seeking a remedy expressly authorized by statute even though Bell has received workers' compensation benefits. Moreover, since a deliberate intent claim can seek only damages in excess of the amount of workers' compensation benefits received, Petitioners would not receive a windfall if they are successful in their deliberate intent claims.

While workers' compensation benefits may have been Petitioners' exclusive legal remedy if Bell was injured in Pennsylvania or while temporarily employed in West Virginia, Bell was injured in West Virginia, while employed on a non-temporary basis, and while covered under West Virginia Workers' Compensation coverage. As such, Bell is "entitled to all of the and privileges under the Act, including the right to file a direct deliberate intention cause of action against Nicholson." *Russell,* 210 W. Va. at 704, 559 S.E.2d at 41; *Bell, Inc.,* 197 W.Va. at 144, 475 S.E.2d at 144.

II. PETITIONERS' SPOLIATION CLAIMS AGAINST NICHOLSON ARE GOVERNED BY WEST VIRGINIA LAW AND THE CIRCUIT COURT HAS JURISDICTION OVER SUCH CLAIMS.

Nicholson erroneously contends that the lower court lacks subject matter jurisdiction over Petitioners' claims for intentional and negligent spoliation of evidence arising from Nicholson's destruction of the drill rig component parts that were involved in the subject workplace accident. (Nicholson Resp. Br. at p. 10-11). Nicholson also argues that such claims should be governed by Pennsylvania law and that Pennsylvania does not recognize intentional or negligence spoliation of evidence. *Id.* at. 11-12.

West Virginia has subject matter jurisdiction over Petitioners' spoliation claims because a substantial part of the acts giving rise to the claims occurred in West Virginia and because Petitioners' injuries occurred in West Virginia. The subject drill rig parts became evidence in West Virginia where the workplace incident occurred. Thereafter, Nicholson assumed control over such evidence and took possession of it in West Virginia. (A.R. 299-302). According to Nicholson, it then took the evidence out of West Virginia, brought it back into West Virginia at some point to

be inspected by OSHA, and eventually destroyed the evidence in Pennsylvania.[4] At a minimum, Nicholson's duty to reasonably preserve the evidence arose in West Virginia when it assumed control over the evidence in anticipation of litigation. (A.R. 559). Most importantly, Petitioners' injuries occurred in West Virginia since their injuries consist of the impairment of the Petitioners' ability to prosecute the claims in this West Virginia action due to the loss of the crucial evidence at issue. Therefore, West Virginia clearly has a sufficient nexus to the spoliation claims to confer jurisdiction over such claims.

Similarly, Petitioners' spoliation claims are governed by West Virginia law because Petitioners' injuries occurred in West Virginia. West Virginia follows the conflicts of law doctrine of *lex loci delicti*, which means "the substantive rights of the parties are determined by the law of the place of the injury." *Paul v. National Life*, 352 S.E.2d 550, 554 (W.Va. 1986); *McKinney v. Fairchild Intern.*, 199 W.Va. 718 (W.Va. 1997). Further, West Virginia law recognizes that "where a cause that is put in motion in one jurisdiction results in injury in another, *it is the law of the latter jurisdiction that controls the substantive rights of the parties*." *Dallas v. Whitney*, 118 W. Va. 106, 188 S.E. 766 (1936) (emphasis added). All of Petitioners' injuries stemming from Nicholson's spoliation of evidence relate to the impact the absence of such 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 Petitioners' prosecution of a West Virginia product liability injury suit, which resulted in injuries to Petitioners in West Virginia. *Williams v. Werner Enterprises, Inc.*, 235 W. Va. 32, 42, 770 S.E.2d 532, 542 (2015). The fact that Nicholson destroyed the evidence in Pennsylvania does not mean that Pennsylvania is the place of Petitioners' injuries resulting from such destruction of evidence since the resulting injury to Petitioners resulted

[4] The Circuit Court determined questions of fact existed as to where Nicholson actually destroyed the evidence and denied Nicholson's *Motion to Dismiss* on that basis. (A.R. 855).

in West Virginia. *Dallas*, 118 W. Va. , 188 S.E. 766. If it were not for this West Virginia lawsuit, Petitioners would have suffered no injury resulting from Nicholson's destruction of the subject drill rig parts.

Nicholson argues that having the choice of law be of the state where the action is filed, allows the plaintiff to forum shop and choose a statue with the most favorable laws in which to bring the action. However, a plaintiff's choice of forum is limited by jurisdictional restrictions and West Virginia was the sole jurisdiction where this action could be brought against all of the named defendants. Under Nicholson's theory, a defendant seeking to destroy evidence can forum shop without any such jurisdictional restrictions by removing evidence from the state of the accident and destroying the evidence in a state that has the most favorable spoliation laws to a defendant, as Nicholson did in this case. Since West Virginia recognizes causes of action for spoliation of evidence, and Pennsylvania arguably has not, Nicholson should not be rewarded by its removal of the subject evidence from West Virginia and its destruction of the evidence allegedly in Pennsylvania, by the application of Pennsylvania law to preclude Petitioners' spoliation claims.

Even assuming, *arguendo*, that Pennsylvania law applies, the Petitioners 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.

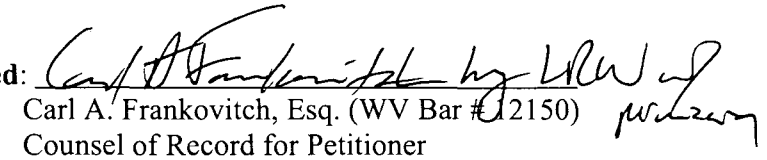
Lastly, Nicholson is not immune under either the West Virginia or Pennsylvania Workers Compensation Acts for Petitioners' claims for spoliation of evidence. Both the States' Acts require the injury suffered by an employee to arise in the course of employment in order for the workers

compensation immunity to be granted to the employer. 77 Pa. Stat. Ann. § 411; 481(a); *Canot v. City of Easton*, 37 A.3d 53, 60 (Pa. Commw. Ct. 2012); W. Va. Code § 23-2-6; *Sedgmer v. McElroy Coal Co.*, 220 W. Va. 66, 69, 640 S.E.2d 129, 132 (2006). Additionally, the injury suffered by the employee must be within the scope of the Workers' Compensation Act. *Urban v. Dollar Bank*, 1999 PA Super 33, ¶ 7, 725 A.2d 815, 818 (1999). To be within the scope of the Act, the injury must be a physical or emotional impairment to one's person, which often requires medical treatment, for which the Act was intended to compensate the employee. *Id.* at ¶ 13.

Petitioners' spoliation claims seek compensation not for the bodily injury Bell sustained in the workplace incident but, rather, for their diminution of a probable expectancy of recovery in this lawsuit. *See Shaw v. Cambridge Integrated Servs. Grp., Inc.*, 888 So. 2d 58, 63 (Fla. Dist. Ct. App. 2004); *Schusse v. Pace Suburban Bus Division,* 334 Ill.App.3d 960, 268 Ill.Dec. 645, 779 N.E.2d 259 (2002). The harm suffered by Petitioners as a result of Nicholson's spoliation is not recoverable under the Workers' Compensation Act. Nicholson's spoliation of evidence did not generate medical bills, require Bell to take time off of work, or seek work-related medical treatment. Thus, Petitioners' injuries resulting from Nicholson's spoliation of evidence are not injuries arising out of and in the course of employment which would entitle Nicholson to immunity under the either West Virginia or Pennsylvania workers' compensation laws.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's August 31, 2018 Order in so far as it granted Nicholson's *Motion to Dismiss* Petitioners' claims against Nicholson for deliberate intent and loss of consortium.

Signed: 

Carl A. Frankovitch, Esq. (WV Bar #12150)
Counsel of Record for Petitioner