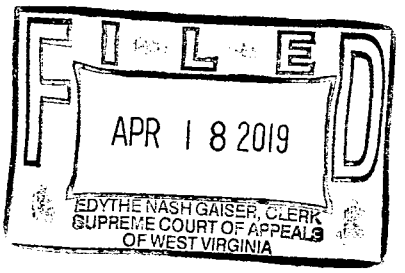
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 18-1139

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' BRIEF

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STATEMENT OF THE CASE

The instant lawsuit arises out of a May 19, 2015 workplace incident that occurred at the Longview Power Plant located in Monongalia County, West Virginia. (A.R. 278-79). At all relevant times, Petitioner, Tucker-Stephen G. Bell ("Bell"), was an employee of Respondent, Nicholson Construction Company ("Nicholson" or "Respondent") and was employed to work in West Virginia on a non-temporary basis. (A.R. 277).

Nicholson is a Pennsylvania corporation that maintains its principal place of business in Alleghany County, Pennsylvania. (A.R. 279). Nicholson was a subcontractor retained by Southern Environmental, Inc. ("SEI") to design and install foundation pilings for the Fabric Filter Building at the Longview Power Plant. (A.R. 279).

At the time of the incident, Bell working in the course of his employment for Nicholson at the West Virginia facility. (A.R. 279-80). While Bell was operating a drill rig manufactured by Casagrande SpA ("Casagrande"), a 3" water swivel unthreaded and/or detached from the drill rig causing the hose and swivel to whip in the air and strike the back of Bell's head with great force fracturing his skull and knocking him off the drill rig platform. (A.R. 280). The water swivel was designed, manufactured, marketed, labeled, packaged and sold by Best Flow Line Equipment, Inc. ("Best Flow"). (*Id.*)

Within hours of the incident, while Bell remained unconscious and in critical condition, Nicholson unilaterally made the decision to file a workers' compensation claim under the Pennsylvania Workers' Compensation Act, 77 Pa. Stat. Ann. § 1, *et seq.*, without the knowledge or consent of Petitioners. (A.R. 841-47).[1]

Following the incident, Nicholson assumed control over the swivel, hose and other component parts of the drill rig that were involved in the incident in order to preserve such parts as evidence in anticipation of litigation. (A.R. 299-302). Sometime thereafter, Nicholson, without any right or privilege, negligently and/or intentionally discarded the aforesaid evidence. (*Id.*)

On May 4, 2017, Petitioners filed their Complaint against Best Flow, Longview Power, SEI, Casagrande[2], **and Nicholson** in the Circuit Court of Monongalia County seeking an award of all damages that they may be entitled for the injuries and damages that they suffered as a result of the subject workplace incident and resultant injuries sustained by Bell. (A.R. 17-43). In the Complaint, Petitioners asserted claims against Nicholson for negligent and intentional spoliation of evidence due to Nicholson's destruction of the evidence of the subject workplace incident. (A.R. 36-39). Petitioners also asserted claims against Nicholson for loss of spousal and parental consortium arising out of the subject workplace incident that resulted in devastating injuries to Bell, which deprived Bell's wife, Heather M. Bell, of his love, affection, companionship, and society, and which deprived Bell's children, Colton T. Bell, Tucker M. Bell, and Chase G. Bell, of their father's love, care, guidance, and companionship. (A.R. 39-41).

On June 30, 2017, Nicholson filed a motion to dismiss Petitioners' claims of intentional and negligent spoliation of evidence and loss of spousal and parental consortium asserted against

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[1] Nicholson did not disclose that it also maintained workers' compensation coverage under the West Virginia Workers' Compensation Act, W.Va. Code § 23-1-1, until the hearing held on October 10, 2017. (A.R. 782).

[2] Petitioners' initially named Casagrande SpA's subsidiary, Casagrande USA, Inc., as a defendant, but identified the correct entity in its *Amended Complaint* which was found to have related back pursuant to Rule 15(c)(3) (A.R. 11).

Nicholson pursuant to Rule 12(b)(1) and 12(b)(6) of the *West Virginia Rules of Civil Procedure*. (A.R. 94-108). Nicholson argued that the Circuit Court lacks subject matter jurisdiction over Petitioners' claims against Nicholson, or in the alternative, such claims are not viable under Pennsylvania law. (*Id.*)

On July 31, 2017, Petitioners filed their *Motion for Leave to File an Amended Complaint* which sought, *inter alia,* to assert causes of action against Nicholson for deliberate intent pursuant to West Virginia Code Sections 23-4-2(d)(2)(i)–(ii). (A.R. 128-72). The Circuit Court granted Petitioners' request for leave to amend and on August 17, 2017, Petitioners filed their *First Amended Complaint* in this matter through which Petitioners asserted additional causes of action against Nicholson for deliberate intent. (A.R. 273-308).

Nicholson then again filed a *Motion to Dismiss the First Amended Complaint* in which Nicholson renewed its arguments regarding the original claims, and further maintained that the Circuit Court lacked subject matter jurisdiction over the deliberate intent claims and that such claims also were barred by the pertinent two-year statute of limitations, W.Va. Code § 55-2-12. (A.R. 533-62). On October 10, 2017, the Court heard oral arguments on Nicholson's *Motion to Dismiss the First Amended Complaint* along with other pending motions. (A.R. 759-213).

On August 31, 2018, the Circuit Court entered an *Order Denying, In Part, and Granting, In Part, Nicholson Construction Company's Motion to Dismiss the Petitioners' First Amended Complaint.* (A.R. 848-56). The Circuit Court denied Nicholson's *Motion to Dismiss* as to Petitioners' spoliation claims finding that questions of fact remained. (A.R. 855). The Circuit Court granted Nicholson's *Motion to Dismiss* as to Petitioners' claims for deliberate intent finding that such claims were viable under West Virginia law, but were barred by the two-year statute of limitations. (A.R. 853-54). The Circuit Court also granted Nicholson's *Motion to Dismiss* as to

Petitioners' claims for loss of consortium finding that such claims cannot be maintained independent of a claim for personal injury. (A.R. 856).

On September 10, 2017, Petitioners filed a *Motion to Amend Order Pursuant to Rule 59(e) or in the Alterative, For Entry of Final Judgment Pursuant to Rule 54(b)* in which Petitioners argued that the Circuit Court's August 31, 2018 Order granting Nicholson's motion to dismiss Petitioners' deliberate intent claims based upon the statute of limitations should be amended to remedy the clear error of law and to prevent obvious injustice. (A.R. 857-66). On November 29, 2018, the Circuit Court entered an Order denying Petitioners' request to amend the August 31, 2018 Order, but granted Petitioners' requested alternative relief of determining that said Order was final and appealable pursuant to Rule 54(b) of the *West Virginia Rules of Civil Procedure*. (A.R. 1138-41). The Order included an express determination that there is no just reason to delay the certification of the Court's August 31, 2018 Order as final and appealable. (A.R. 1139).

It is from the Circuit Court's August 31, 2018 Order granting Nicholson's motion to dismiss Petitioners' claims for deliberate intent and loss of consortium that Petitioners now appeal.

SUMMARY OF THE ARGUMENT

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 in concluding that Petitioners' claims for deliberate intent were barred by the two-year statute of limitations.

The subject workplace incident that resulted in Bell' injuries occurred on May 19, 2015. Petitioners timely filed their *Complaint* on May 4, 2017. Petitioners' *Complaint* set forth the May 19, 2015 workplace incident in great detail and included causes of action against Nicholson for negligent and intentional spoliation of evidence and for loss of spousal and parental consortium

arising out of the workplace incident, which was specifically set forth and described in the *Complaint*.

On August 9, 2017, Petitioners were granted leave to amend their *Complaint* to assert additional causes of action against Nicholson for claims for deliberate intent under West Virginia's Workers Compensation Act, W.Va. Code § 23–4–2(d)(2)(i)–(ii). (A.R. 273-74). Petitioners filed their *First Amended Complaint* on August 17, 2017. (A.R. 275-308). While the *First Amended Complaint* was filed more than two years after the subject incident, Petitioners' *First Amended Complaint*, and all causes of action contained therein, relate back to the filing of Petitioners' initial *Complaint* pursuant to Rule 15(c)(2) of the *West Virginia Rules of Civil Procedure*, because the additional claims "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...." W.Va. Rule Civ. P. 15(c)(2).

In holding that Petitioners' *First Amended Complaint* did not relate back to the date of Petitioners' filing of the original *Complaint*, the Circuit Court erred by failing to appropriately interpret and apply rule 15(c)(2) to the *First Amended Complaint*. Remarkably, the Court failed to even consider whether Petitioners' claims for deliberate intent arose out of the conduct, transaction, or occurrence that was extensively set forth in Petitioners' original *Complaint*, *i.e.*, the May 19, 2015 workplace accident, as is required by Rule 15(c)(2). (A.R. 848-56).

Instead, the Circuit Court erroneously held that Petitioners' *First Amended Complaint* did not relate back because the additional claims did not arise out of the same conduct, transaction or occurrence that underlie Petitioners' claims against Nicholson for spoliation of evidence and loss of consortium. (A.R. 854). In so holding, the Circuit Court erroneously reasoned that six factual allegations added to the *First Amended Complaint*, which were ancillary to Petitioners' claims and did not set forth a different transaction or occurrence than that which was set forth in the original

Complaint prevented the operation of Rule 15(c)(2) from averting the harsh and unjust consequence of the statute of limitations in this case. (*Id.*) Apparently, the Circuit Court also reasoned, incorrectly, that Petitioners' claims against Nicholson did not arise out of the subject May 19, 2015 workplace incident that resulted in Bell's injuries. (*Id.*)

The Circuit Court's Order dismissing Petitioners' claims for deliberate intent and loss of consortium against Nicholson should be reversed because the Circuit Court erred, as a matter of law, in concluding that the *First Amended Complaint* did not relate back to the date of the filing of Petitioners' original *Complaint* pursuant to Rule 15(c)(2). Petitioners' claims against Nicholson for deliberate intent undeniably arose out of the conduct, transaction and occurrence set forth in detail in Petitioners' original *Complaint* and, therefore, the *First Amended Complaint* relates back to the date of filing of the original *Complaint*. W.Va. R. Civ. P. 15(c)(2). The Circuit Court's order runs entirely contrary to the *West Virginia Rules of Civil Procedure*, which exist to facilitate the adjudication of cases on their merits, and results in an injustice to Bell and his family, who have already suffered beyond comprehension as a result of this horrific workplace incident.

Moreover, the Court's interpretation of Rule 15(c)(2) is contrary to the plain and unambiguous language of the Rule, and effectively amends the Rule by imposing additional requirements in order for the Rule to be effectuated. The lower court's judicial activism in writing nonexistent constraints into the Rules of this Court should be stymied. Even if this Court were inclined to adopt the lower court's construction of Rule 15(c)(2) that is antithetical to merit-based decisions, such modification of the plain language of the Rule cannot be applied retroactively to Petitioners' claims in this case.

Since Petitioners' claims against Nicholson for deliberate intent are not barred by the two-year statute of limitations, Petitioners pleaded valid personal injuries claims against Nicholson. As

a result, Petitioners can maintain the derivative claims of loss of spousal and parental consortium against Nicholson as well. Therefore, the Circuit Court erred in granting Nicholson's motion to dismiss as to Petitioners' loss of consortium claims due to the lack of an actionable, underlying personal injury claim. Accordingly, the Circuit Court's Order granting Nicholson's Motion to Dismiss as to the deliberate intent and loss of consortium claims against Nicholson should be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The issues presented in the instant appeal involve interpretive issues relating to the *West Virginia Rules of Civil Procedure* and substantial questions regarding retroactive application of Court amended Rules of Civil Procedure when such application will produce substantial inequitable results. Additionally, there are two other appeals of separate orders from the Circuit Court in this case that will present intertwined issues of law that are anticipated to be address in this appeal. Due to the fundamental importance of the matters presented in this appeal and the complexity of the issues that will be raised in the associated appeals and the responses thereto, Petitioners submit that oral argument will significantly aid the decisional process of all such issues.

This matter is appropriate for oral argument pursuant to Rule 20 of the Rules of Appellate Procedure, in that it involves issues of first impression that are of fundamental public importance. This matter also is appropriate for oral argument under Rule 19 since the issue on appeal involves a narrow issue of law.

ARGUMENT

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

Standard of Review

This appeal stems from the Circuit Court's order dismissing certain claims against Respondent that were contained in Petitioners' *First Amended Complaint*. The issues presented herein require this Court to not only examine the propriety of a decision to dismiss claims under the forgiving standard of Rule 12(b)(6), but to also analyze the lower court's interpretation of Rule 15(c) of the *West Virginia Rules of Civil Procedure*. The standard of review in both instances is *de novo*. *Vanderpool v. Hunt*, 241 W. Va. 254, 823 S.E.2d 526, 530–31 (2019); *Muto ex rel. Muto v. Scott*, 224 W. Va. 350, 354, 686 S.E.2d 1, 5 (2008).

It is well-settled that this Court "exercise[s] plenary review over a circuit court's decision to grant either a motion to dismiss or a summary judgment." *Conrad v. ARA Szabo*, 198 W.Va. 362, 369, 480 S.E.2d 801, 808 (1996); Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac–Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995)("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*").

Additionally, the interpretation and application of the *West Virginia Rules of Civil Procedure* presents a question of law subject to a *de novo* review. *J.A. St. & Assocs., Inc. v. Thundering Herd Dev., LLC*, 228 W. Va. 695, 701–02, 724 S.E.2d 299, 305–06 (2011)(*quoting* Syl. pt. 4, *Keesecker v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997)); *Muto ex rel. Muto*, 224 W. Va. at 354, 686 S.E.2d at 5. With respect to the term *de novo*, this Court has observed that it "means '[a]new; afresh; a second time," and therefore, this Court should "give a new, complete and unqualified review to the parties' arguments and the record before the circuit court." *Vanderpool*,

241 W. Va. at 823 S.E.2d at 530 (*quoting Gastar Exploration Inc. v. Rine*, 239 W.Va. 792, 798, 806 S.E.2d 448, 454 (2017)).

In undertaking its *de novo* review, this Court applies the same standard for evaluating a motion to dismiss pursuant to Rule 12(b)(6) that should be applied by the circuit court. *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 702, 696 S.E.2d 1, 4 (2010). "A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice." *Cantley v. Lincoln Cty. Comm'n*, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007)(*citing* W.Va. R. Civ. P. 8(f)). "The trial court's consideration begins, therefore, with the proposition that '[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true.'" *Id.* (*quoting John W. Lodge Distributing Co., Inc. v. Texaco, Inc.,* 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978)). To prevail on a Rule 12(b)(6) motion, the pleader is merely obliged to provide information sufficient to outline the elements of his claim or to permit the court to draw inferences that these elements exist. *John W. Lodge Distrib. Co.*, 161 W. Va. at 605-06, 245 S.E.2d at 158-59.

This Court has long embraced a policy of adjudicating actions based on their merits, as opposed to on procedural sleight of hand. *Id.* Thus, Rule 12(b)(6) motions are to be viewed with disfavor and rarely granted—particularly in actions to recover for personal injuries. *Id.*; *see also Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 538, 236 S.E.2d 207, 212 (1977). To this end, a "plaintiff's burden in resisting a motion to dismiss is a relatively light one." *Id.*

Indeed, the threshold that a plaintiff must meet to overcome a Rule 12(b)(6) motion is a low one, and "*few complaints fail to meet it.*" *Id.* (emphasis added). This Court has consistently held that in appraising the sufficiency of a complaint per a Rule 12(b)(6) motion, the court must refrain from dismissing the complaint unless it appears beyond doubt that the plaintiff can prove

no set of facts in support of his claim that would entitle him to relief. Syl. Pt. 2, *J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 237 W. Va. 77, 785 S.E.2d 627, 628 (2016). In other words, it is improper for the trial court to dismiss a complaint "merely because it doubts that the plaintiff will prevail in the action[.]" *Holbrook v. Holbrook*, 196 W. Va. 720, 725, 474 S.E.2d 900, 905 (1996)(*quoting John W. Lodge Distrib. Co.*, 161 W. Va. at 605-06, 25 S.E.2d at 159).

A. PETITIONERS' CLAIMS AGAINST NICHOLSON FOR DELIBERATE INTENT ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

West Virginia's civil justice system is founded upon principles of accountability and the fair administration of justice. To this end, West Virginia has embedded in its Constitution the fundamental right of access to courts to seek remedies for injuries "by due course of law" (W. Va. Const. Art. III, § 17) and has adopted Rules of Civil Procedure that seek "to secure the just, speedy, and inexpensive determination of every action." W. Va. R. Civ. P. 1. In this regard, "if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962).[3] "[A] case is resolved 'on the merits' when it is resolved accurately, on the basis of the law and the facts, without letting procedural technicalities or traps derail the decision." Jay Tidmarsh, *Resolving Cases on the Merits*, 87 Denv. U. L. Rev. 407 (2009-2010).

The fundamental right to have cases resolved on the merits is admittedly not unfettered and may be subjected to reasonable limitations in order to promote social and economic policy. *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 606, 425 S.E.2d 551, 561 (1992). In furtherance of the

[3] *See also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1029 (3d ed. 2004)(discussing Rule 1 as an example of the drafters' intent that disputes be resolved on their merits).

policy of protecting parties from being prejudiced by stale claims, statutes of limitation are imposed to require that claims be instituted within a reasonable period of time. *Morgan v. Grace Hosp., Inc.*, 149 W. Va. 783, 797, 144 S.E.2d 156, 164 (1965); *Worley v. Beckley Mech., Inc.*, 220 W. Va. 633, 641, 648 S.E.2d 620, 628 (2007).

The confliction between the competing policies of supporting the extinguishment of untimely claims and of encouraging the resolution of all claims on their merits is exacerbated by the unfortunate fact that attorneys are not infallible. Notwithstanding their specialized education, practitioners inevitably make mistakes, this fact being most clearly manifest in pleadings and filings. Rule 15 of the *West Virginia Rules of Civil Procedure* represents the codification of the foregoing judicial policy and serves as a safeguard against the unjust result of a meritorious litigant being deprived of his day in court due to his counsel's misstep. *See Brooks v. Isinghood*, 213 W. Va. 675, 684, 584 S.E.2d 531, 540 (2003).

Thus, Rule 15(c) functions as an exception to West Virginia's general statute of limitations. *Id.*, 213 W. Va. at 684, 584 S.E.2d at 540. The rule provides, in relevant part, that "[a]n amendment of a pleading relates back to the date of the original pleading when...the claim or defense asserted in the amended pleading *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) (emphasis added).

Rule 15(c)(2) allows for relation back of claims to avoid the harsh injustice that results when a statute of limitation bars an injured plaintiff from seeking redress for his injuries due to a technicality, mistake or oversight. As the Supreme Court of the United States stated,

> It is too late in the day and entirely contrary to the spirit of the ... Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. "The ... Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Patton v. Miller, 420 S.C. 471, 492–93, 804 S.E.2d 252, 263 (2017), reh'g denied (Sept. 27, 2017) (*quoting Foman v. Davis*, 371 U.S. 178, 181, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962) (*quoting Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80, 86 (1957))); 3 Cyclopedia of Federal Procedure § 8.2 (3d ed., rev. 2017) ("The spirit of the Rules is to settle controversies upon their merits rather than to dismiss actions on technical grounds, to permit amendments liberally, and to avoid, if possible, depriving a litigant of a chance to bring a case to trial").

In the present case, Petitioners' 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) because the deliberate intent claims against Nicholson arose out of the same conduct. transaction or occurrence set forth in the original *Complaint*. Accordingly, the Circuit Court erred in finding that such claims were barred by the applicable statute of limitations.

1. **Petitioners' Claims Against Nicholson for Deliberate Intent Relate Back to the Time of the Filing of the Original Complaint Pursuant to Rule 15(c)(2) Because Such Claims Arise Out of the Same Conduct, Transaction and Occurrence Set Forth in the *Original Pleading*.**

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 in concluding that Petitioners' claims for deliberate intent were barred by the two-year statute of limitations. The Circuit Court erroneously found that Petitioners' claims against Nicholson for deliberate intent were barred by the statute of limitations because those claims did not relate back pursuant to Rule 15(c) of the *West Virginia Rules of Civil Procedure*. In so finding, the lower court reasoned that Petitioners' deliberate intent claims did not arise out of the same conduct, transaction, or occurrence out of which Petitioners' claims for loss of consortium arose. In so holding, the Court disregarded the clear and unambiguous language of Rule 15(c)(2) and

applied an erroneous interpretation of the Rule that runs contrary to the express objective of having claim heard on their merits.

Rule 15(c) provides:

> "An amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading 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) (*emphasis added*).

In interpreting the meaning of any Rule of Civil Procedure, the Court should first determine whether the language of the Rule is clear and unambiguous; where it is, the Rule should not be construed but applied according to its plain terms. Syl. Pt. 3, *State v. Mason*, 157 W. Va. 923, 923, 205 S.E.2d 819, 820 (1974); *Bragg v. Robertson*, 54 F. Supp. 2d 653, 660 (S.D.W. Va. 1999)(*citing Marex Titanic, Inc. v. The Wrecked & Abandoned Vessel,* 2 F.3d 544, 546 (4th Cir.1993)). As the late Supreme Court Justice Antonin Scalia instructed, "The text is the law, and it is the text that must be observed." Antonin Scalia, *A Matter of Interpretation*, 22 (Amy Gutmann ed., 1997).

To the extent that there is any question as to the dictate of the Rule, the Rule must be construed "to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties." *Muto ex rel. Muto*, 224 W. Va. at 355, 686 S.E.2d at 6. This is especially true with Rule 15 which should be liberally construed to promote the ends of justice. Syl. Pt. 6, *Murredu v. Murredu*, 160 W.Va. 610, 236 S.E.2d 452 (1977); *Peneschi v. Nat'l Steel Corp.*, 170 W. Va. 511, 523, 295 S.E.2d 1, 13 (1982); *Ash v. Ravens Metal Prod., Inc.*, 190 W. Va. 90, 95, 437 S.E.2d 254, 259 (1993); *Brooks*, 213 W. Va. at 684, 584 S.E.2d at 540. "The purpose of this policy statement is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments." *Brooks*, 213 W. Va. At 684, 584 S.E.2d at 540 (citing Franklin D. Cleckley, *et al., Litigation*

Handbook on West Virginia Rules of Civil Procedure § 15(a) at 334 [Juris Publishing, 2002]. Therefore, any doubt as to whether an amended pleading relates back under Rule 15(c)(2) must be resolved in favor of the application of the Rule so that the claim may be heard on its merits.

The clear and unambiguous language of Rule 15(c)(2) only requires that the conduct, transaction or occurrence which gives rise to the claims contained in the amended pleading be set forth or attempted to be set forth in the **original pleading**. Nowhere in the Rule is it expressed or even implied that the newly added claim must arise from the conduct, transaction, or occurrence set forth in a particular section of the original pleading directed at a specific defendant.

Thus, the relevant inquiry under Rule 15(c)(2) is whether the claims asserted in the amended pleading arose out of **the same conduct, transaction, or occurrence set forth in the original pleading**. Rule 15(c)(2) does not require that the claims against one defendant, which were contained in an original complaint, and the claims that are set forth in and added to an amended complaint against that same defendant share the same conduct, transaction or occurrence. Rather, by Rule's plain language, **the additional claims set forth in an amended complaint must only arise out of the same conduct, transaction or occurrence set forth in the original complaint**. As such, the Circuit Court erred in construing Rule 15(c)(2), rather than simply applying its plain meaning. This error was made more egregious by the lower court construing the Rule against allowing the claim to be heard on its merits.

Applying the plain meaning of Rule 15(c)(2) in the present case, Petitioner's claims for deliberate intent asserted against Nicholson in Petitioners' *First Amended Complaint* must only arise out of conduct, a transaction or an occurrence that Petitioners set forth within their original *Complaint* (*i.e.*, the May 19, 2015 workplace incident). Petitioners' deliberate intent claims are not required to share only common conduct, transaction or occurrences with the conduct, transaction

or occurrence that underlie Petitioners' spoliation and loss of consortium claims against Nicholson; rather the claims for deliberate intent set forth in an amended complaint must only arise out of the same conduct, transaction or occurrence set forth in the original *Complaint*.

There can be no doubt that Petitioners' claims for deliberate intent contained in the *First Amended Complaint* arise out of the same conduct, transaction or occurrence set forth in the original *Complaint*. This fact is not even disputed by Nicholson. The May 19, 2015 workplace incident that gives rise to all of Petitioners' claims was set forth in great detail in Petitioners' original *Complaint*. (A.R. 17-43). Petitioners' deliberate intent claims arise out of this same occurrence and the facts that provide the basis for the deliberate intent claims are identical within both the original *Complaint* and the *Amended Complaint*. (A.R. 295-99). In fact, Best Flow asserted cross-claims against Nicholson for deliberate intent based entirely on the facts alleged in Petitioners' original *Complaint*. (A.R. 76-77).

The six additional paragraphs included within Petitioners' *Amended Complaint* that were referenced in the Circuit Court's Order certainly did not set forth a different occurrence than that which was set forth in the original *Complaint*. (A.R. 277; 79). In particular, Paragraphs 7 and 9 of the *Amended Complaint* pertained to two additional defendants – Casagrande S.p.A. and International Drilling Equipment, Inc. (*Id.*) Paragraphs 19 through 22 of the *Amended Complaint* provided a further background of Bell's work history with Nicholson. These factual allegations are ancillary to the allegations that set forth the actual occurrence that give rise to all of Petitioners' causes of action against all defendants, and specifically Petitioners' deliberate intent claims against Nicholson – *i.e.*, the May 19, 2015 workplace incident. (*Id.*) Importantly, had these six additional factual allegations not been included in the *Amended Complaint*, Petitioners would still have set forth valid claims for deliberate intent against Nicholson. Accordingly, the Court's decision that

Petitioners' *Amended Complaint* did not relate back under Rule 15(c) is a clear error of law that should be reversed.

The Circuit Court's erroneous interpretation of Rule 15(c)(2) apparently stems from Nicholson's misrepresentation of West Virginia caselaw inapplicable to the present issue. In its *Motion to Dismiss* and in its *Response to Petitioner's Motion to Amend the Order pursuant to Rule 59(e)*, Nicholson deceptively submitted that West Virginia precedent specifically addressed this narrow question of law and imposed this additional requirement of Rule 15(c)(2) that is contrary to the Rule's plain language. (A.R. 554-55; 893-94). (citing syl. pt. 7, *Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 281, 445 S.E.2d 219, 222 (1994)). In support of its misstatement of law, Nicholson selectively quoted only part of syllabus point 7 of *Dzinglski*. (A.R. 893). The Syllabus Point in its entirely states:

> Pursuant to Rule 15, *W.Va.R.C.P.*, amendments relate back when the cause of action sought to be added grows out of the specified conduct of the defendant that gave rise to the original cause of action. If, however, the supplemental pleading creates an entirely new cause of action ***based on facts different from those in the original complaint***, the amended pleading will not relate back for statute of limitations purposes.

Dzinglski, at syl. pt. 7 (emphasis added).

Read in its entirety, it is clear that this Court in *Dzinglski* simply iterated the concept plainly set forth in Rule 15(c)(2) that a new cause of action will relate back if it arises out of conduct set forth in the original complaint. *Dzinglski* **does not hold** that, in cases against multiple defendants – similar to the instant matter – new claims will only relate back if they arise out of the same conduct that gave rise to the original causes of action against the same defendant. *Id.*

In *Dzinglski*, the plaintiff brought an action against a **single defendant** – Weirton Steel Corp. – arising out of circumstances surrounding its investigation into alleged improprieties on the part of the plaintiff during his employment and his discharge from Weirton Steel. *Id.* 191 W. Va.

at 281, 445 S.E.2d at 222. Two weeks before trial and *six and one-half* years after the action was begun, the plaintiff amended his complaint to assert a cause of action for the tort of outrage. *Id.* The Supreme Court rejected Weirton Steel's contention that the claim for the tort of outrage was barred by the statute of limitations because it arose out of the same conduct set forth in the original complaint. *Id.,* 191 W. Va. at 287, 445 S.E.2d at 228.

As in *Dzinglski,* Petitioners' deliberate claims against Nicholson arose out of the same conduct set forth in the initial *Complaint*. However, what distinguishes this case from the limited holding in *Dzinglski* is that there are multiple defendants in this case and a series of occurrences set forth in the initial *Complaint*. The fact that Plaintiffs' deliberate intent claims arise out of one occurrence set forth in the *Complaint* and their spoliation claims arise out of an ensuing occurrence does not render Rule 15(c)(2) inapplicable. All that Rule 15(c)(2) requires is that the deliberate intent claims arise of an occurrence set forth in the initial pleading so that Nicholson is on notice of litigation arising from those facts. W. Va. R. Civ. P. 15(c)(2). Nicholson was on notice that any claims against it arising out of the facts relating to that occurrence could be brought against it and it would not be afforded the protection of the statute of limitations for those claims. The Circuit Court erroneously relied upon Nicholson's misrepresentation of the holding in *Dzinglski,* to improperly enact a non-existent requirement of Rule 15(c)(2).

Nicholson also completely misdirected the Court in its application of the holding in *State ex rel. Vedder v. Zakaib*, 217 W. Va. 528, 531, 618 S.E.2d 537, 540 (2005) to facts of the present case. In *Zakaib*, the plaintiff was involved in a motor vehicle accident and brought an action against the manufacturer of the vehicle for negligence and products liability and against her insurer, Nationwide, for bad faith and unfair claim settlement practices for Nationwide's handling of her uninsured motorist claim. *Id.* Over a year after the commencement of the action, the plaintiff

sought to amend her complaint to assert a cause of action for spoliation of evidence against Nationwide who had sold the vehicle to a salvage yard. *Id.* The Court found that the plaintiff's claim for spoliation of evidence did not relate back pursuant to Rule 15(c)(2) because she made no mention or reference whatsoever to the facts giving rise to the claim of spoliation of evidence in her original complaint. *Id.*, 217 W.Va. at 533, 618 S.E.2d at 542.

Zakaib is actually in accord with Petitioners' position and the function Rule 15(c)(2). Only the facts of the motor vehicle accident were set forth in the plaintiff's complaint, so the spoliation claim, which arose out of Nationwide's conduct of selling the subject vehicle and not out of the accident, would not relate back. However, unlike in *Zakaib*, Petitioners' initial *Complaint* set forth all of the facts of both the workplace incident and Nicholson's conduct in destroying the subject drill rigs parts. Since Petitioners' deliberate intent claims arise out of the workplace incident as set forth in the initial *Complaint*, the amendment relates back pursuant to Rule 15(c)(2).

The lower Court's interpretation of Rule 15(c)(2), based upon Nicholson's misapplication of caselaw, is contrary to the clear language of the Rule and the intent of the Rules to have cases heard on their merits rather than dismissed due to procedural technicalities. Accordingly, the Court erred by adopting Nicholson's misrepresentation of West Virginia law to hold that the *First Amended Complaint* did not relate back, and the Court's holding should be reversed.

2. Petitioners' Deliberate Intent Claims Against Nicholson Relate Back Pursuant to Rule 15(c)(2) Even Under the Circuit Court's Restrictive Interpretation of the Rule.

The Circuit Court's erroneously interpreted Rule 15(c)(2) to conclude that the claims added in the amending pleading must arise out of the same conduct, transaction or occurrence from which the original claims against the same defendant arose. This additional requirement is not found anywhere in the clear and unambiguous mandate of Rule 15(c), or any precedent of this Court. It

is a wholly original requirement that was arbitrarily imposed by the Circuit Court.

However, even applying the Circuit Court's flawed interpretation of Rule 15(c)(2) to the *First Amended Complaint,* Petitioners' claims against Nicholson for deliberate intent would still relate back by the operation of the more restrictive Rule. The Court stated that it was "not persuaded" that Petitioners' claims for loss of spousal and parental consortium arose out of the same conduct, transaction and occurrence that Petitioners' claims for deliberate intent arose. (A.R. 854). Yet the obstinate Circuit Court failed to even attempt to explain, in any way, its unfounded and incompatible holding, nor could it.

The Circuit Court held that claims for loss of consortium are derivative of an underlying personal injury claim. (A.R. 856). It is undeniable that Petitioners asserted claims against Nicholson for loss of spousal and parental consortium in the original *Complaint* and Petitioners sought damages resulting from such loss of consortium from Nicholson. (A.R. 39-41). In those Counts of the *Complaint* against Nicholson for loss of consortium, Petitioners incorporated all preceding allegations of the Complaint, including the allegations pertaining to the workplace incident which gave rise to all of Petitioners' claims. (*Id.*)

Nicholson also recognized that these claims for loss of consortium were directed at it and immediately moved to dismiss them. (A.R. 106). Nicholson again moved to the dismiss the unaltered loss of consortium claims contained in the *Amended Complaint.* (A.R. 540-41). Therefore, Nicholson knew that Petitioners sought recovery for their loss of consortium resulting from the injuries that Bell suffered during the subject May 19, 2015 workplace incident. The May 19, 2015 workplace incident was the only occurrence alleged in the original *Complaint* in which Bell suffered personal injuries. This occurrence gave rise to both the claims for loss of consortium and the claims for deliberate intent. Therefore, Petitioners' claims for deliberate intent relate back

even under the Court's restrictive interpretation of Rule 15(c)(2). Accordingly, the Circuit Court's Order granting Nicholson's *Motion to Dismiss* should be reversed.

3. Nicholson Will Suffer No Prejudice If Petitioners' Claims Relate Back Pursuant to Rule 15(c)(2).

Relation back is automatic once the Rule 15(c) requirements are satisfied; the court has no discretion regarding whether Rule(c) applies. *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."). In determining whether an amended pleading relates back under Rule 15(c), the court may not consider factors such the reason for the absence of the claims from the initial pleading; the delay in seeking to amend; or even resulting prejudice to the defendant. Those are all factors that may be considered in determining whether to grant a plaintiff leave to amend in the first instance, but once leave to amend is granted, the court is divested of all discretion with regard to relation back. *Krupski*, 130 S. Ct. at 2488.

Nevertheless, given the importance of the consideration of prejudice to the non-moving party in court's decision of whether to grant leave to amend in the first instance, it is worth noting that, in this case, Nicholson will suffer absolutely no prejudice if Petitioners' claims for deliberate intent related back and are decided on their merits. Nicholson has never even alleged, and the Circuit Court did not find, that any injustice will result from application of Rule 15(c)(2) to these claims. Indeed, no such injustice is remotely foreseeable.

As set forth above, the sole requirement for a claim asserted in the amended pleading to relate back to the date of the original pleading pursuant to Rule 15(c)(2) is that the claim "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). If the claim satisfies this single requirement, then the defendant is on notice of all claims that could be asserted against it which arose out of the occurrence set forth in the initial pleading. *Patton v. Miller*, 804 S.E.2d at 262–63. Thus, there can be no prejudice to the defendant and the claim relates back. *Id.* In the present case, Nicholson obviously knew that deliberate intent claims arising out of the occurrence set forth in the initial *Complaint* could have been asserted against it, because Nicholson actually took steps to prevent Petitioners from asserting those claims, specifically by filing a workers' compensation claim on behalf of Bell in Pennsylvania, without his knowledge or consent, and by discarding essential evidence in this case. (A.R. 841-47; 299-302).

The prejudice contemplated in the rule governing a motion to amend a pleading is not that the non-moving party is forced to defend the merits of a valid claim; rather, such prejudice must involve some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits, which disadvantage the party would not have faced if the amended claim had been included in the original pleading or a timely motion to amend. It is entirely contrary to the spirit of the rules of civil procedure for decisions on the merits to be avoided on the basis of mere pleading technicalities. *Patton v. Miller*, 804 S.E.2d at 262–63. It is true that Nicholson must now defend claims it thought were barred, due to a combination of the manner of pleading and the passage of time. This, however, is not prejudice in the sense that would bar a legitimate claim against which Nicholson fully could have expected to defend. *Plum v. Mitter*, 157 W. Va. 773, 777, 204 S.E.2d 8, 10 (1974).

No such prejudice can possibly be found to exist in this case. Nicholson has been a party to this action since its commencement. Nicholson also has been actively participating in the defense of the personal injury claims arising out of the workplace incident, not just the spoliation

of evidence, since Nicholson has a duty to indemnify SEI and Longview Power. Moreover, Best Flow asserted a deliberate intent cause of action against Nicholson in its responsive pleading to the original *Complaint*. Nicholson has more than adequate time to prepare a defense to these claims, since, at the time of the filing of the *Amended Complaint*, discovery had just begun and the case was in its infancy. Additionally, due to the overwhelming amount of dilatory tactics, gamesmanship, and procedural posturing in this case since its inception, and the fact that Nicholson is refusing to participate in meaningful discovery due to Circuit Court's dismissal of the deliberate intent claims, much of the necessary discovery is still to be had.

Since Nicholson will suffer no prejudice if Petitioners' claims for deliberate intent against Nicholson relate back to the filing of Petitioners' original *Complaint*, the lower court's decision to disregard the plain language of Rule 15(c)(2) and West Virginia' policy to have cases heard on the merits is even more perplexing. In order to promote the ends of justice in this instance, the Circuit Court's dismissal of Petitioners' claims against Nicholson must be reversed.

4. Rule 15(c)(2) as Amended By the Circuit Court Cannot Be Applied Retroactively to Petitioners' *First Amended Complaint.*

Assuming *arguendo*, that this Court is inclined to adopt the Circuit Court's restrictive interpretation of Rule 15(c)(2) and is similarly not persuaded that Petitioner's claims for loss of consortium, spoliation of evidence and deliberate intent arise out of the same workplace incident in which Bell was injured, such restriction on the application of Rule 15(c)(2) cannot be applied retroactively to Petitioners' *First Amended Complaint.*

Rule 15(c)(2) is unambiguously clear in its mandate – "An amendment of a pleading relates back to the date of the original pleading when ... the claim or defense asserted in the amended pleading arose *out of the conduct, transaction, or occurrence set forth or attempted to be set forth*

in the original pleading." The Circuit Court's erroneous interpretation of the Rule is effectively an amendment to the Rule that would be unjust to apply to the instant case.

As this Court has recognized, "[i]f a rule would, if applied in a pending case, attach a new legal consequence to a completed event, then it should not be applied in that case." *Smith v. W. Virginia Div. of Rehab. Servs. & Div. of Pers.*, 208 W. Va. 284, 287, 540 S.E.2d 152, 155 (2000)(*citing Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996)); *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 156, 690 S.E.2d 322, 350 (2009); *Silva v. Witschen*, 19 F.3d 725, 728 (1st Cir. 1994).

In *Caperton,* this Court established three factors that should be considered in determining whether a new principal of law established in a civil case should be applied retroactively: (i) whether the new principle of law was an issue of first impression whose resolution was clearly foreshadowed; (ii) whether or not the purpose and effect of the new rule will be enhanced or retarded by applying the rule retroactively; (iii) whether full retroactivity of the new rule would produce substantial inequitable results. *Caperton*, 225 W. Va. at 158, 690 S.E.2d at 352. Applying this retroactive analysis to the new rule set forth by the Circuit Court, it is clear that such rule cannot be applied retroactively in this case.

First, the Circuit Court's interpretation is unquestionably a new principle of law that was not foreshadowed by any precedent of this Court. As set forth above, the language Rule 15(c)(2) is clear and unambiguous, and there was no doubt as to when the automatic exception to the statute of limitations would take effect under its plain terms. Second, it is hard to even imagine the purpose of the Circuit Court's interpretation of the Rule as it runs contrary to the express purpose of the Rule, which is to secure an adjudication on the merits of claims.

Lastly, but most importantly, applying the Circuit Court's new construction of Rule 15(c)(2) would produce substantial inequitable results in the present matter. If Petitioners' claims for deliberate intent do not relate back under Rule 15(c)(2), Petitioners are barred from pursuing their deliberate intent claims against Nicholson, and Petitioners may very well be left without redress for their substantial injuries and damages apparently resulting from: (1) Nicholson subjecting Bell to the known risks of operating the subject drill rig using nonconforming component parts; (2) Nicholson causing Bell to work in the absence of adequate safety equipment, precautions, training, and safeguards; and (3) Nicholson permitting Bell to work in conditions that violate applicable state, federal and industry standards. Such a result undercuts the entire purpose of the *West Virginia Rules of Civil Procedure*, which exist to facilitate the adjudication of cases on their merits rather than to dismiss actions on technical grounds. *Muto ex rel. Muto*, 224 W. Va. at 355, 686 S.E.2d at 6; *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80, 86 (1957)); 3 Cyclopedia of Federal Procedure § 8.2 (3d ed., rev. 2017). Accordingly, even if this Court desired to adopt the Circuit Court's interpretation of Rule 15(c)(2), such restrictive Rule cannot be applied to the instant case.

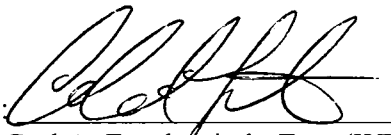
II. THE CIRCUIT COURT ERRED IN CONCLUDING THAT PETITIONERS CANNOT MAINTAIN CLAIMS FOR LOSS OF SPOUSAL AND PARENTAL CONSORTIUM AGAINST NICHOLSON.

The Circuit Court held that that a claim for loss of consortium cannot be maintained independent of a cognizable personal injury claim. The Circuit Court found that, since Petitioners' claims against Nicholson for deliberate intent were barred by the statute of limitations, Petitioners could not maintain any derivative claims against Nicholson for loss of consortium.

The Supreme Court should reverse Court's dismissal of Petitioners' claims against Nicholson for loss of spousal and parental consortium, because the Circuit Court erred, as a matter of law, in finding that Petitioners did not set forth cognizable claims for personal injury against Nicholson. The *First Amended Complaint* sets forth claims for deliberate intent under West Virginia's Workers Compensation Act, which (for the reasons set forth herein) the Circuit Court should have found relate back to the date of the filing of the original *Complaint* pursuant to Rule 15(c)(2) of the *West Virginia Rules of Civil Procedure*. Accordingly, 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.

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: 

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