NO. 18-1139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TUCKER-STEPHEN G. BELL, ET AL.,

Petitioner,

v.

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

NICHOLSON CONSTRUCTION COMPANY,

Respondent.

RESPONDENT'S BRIEF

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II. ASSIGNMENTS OF ERROR

Petitioner makes the following assignments of error, with which the Respondent disagrees:

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

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

To the contrary, the Circuit Court correctly ruled on these issues based upon applicable law. Moreover, additional basis exist for the dismissal of Petitioners' claims as set forth in the cross-assignments of error below.

III. SUMMARY OF THE ARGUMENT

The Petitioners' claims against the Respondent should have been dismissed, in their entirety, because any claim for deliberate intent under West Virginia Code §23-4-2(d)(2) was barred by the two-year statute of limitations, as well as the fact that the Petitioners pursued a claim for workers' compensation benefits under Pennsylvania law. Accordingly, the Pennsylvania workers' compensation system became the Petitioners' exclusive remedy for all claims against the Respondent employer. Consequently, the Circuit Court lacked subject matter jurisdiction to allow the Petitioners to proceed with claims against the Respondent as such claims are not recognized under Pennsylvania law.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is appropriate as the dispositive issues now before this Court have not been authoritatively decided and the decisional process would be significantly aided by permitting oral argument. Further, consolidated argument in this case and the matters of docket No. 18-1124 and No. 1140 would also benefit the decisional process of the Court.

V. ARGUMENT

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure allows a trial court to dismiss a pleading for failure to state a claim upon which relief can be granted in the appropriate case whereby the formal sufficiency of the complaint is tested and unfounded suits are weeded out. Collia v. McJunkin, 358 S.E.2d 242, 243-244 (W.Va. 1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 330, 98 L.ED.2d 357 (1987). While the allegations in the COMPLAINT must be taken as true, the FIRST AMENDED COMPLAINT on its face has time-barred causes of action which must be dismissed. The "singular purpose" of Rule 12(b)(6) is to determine whether the party asserting the claim is entitled to offer evidence to support it. Dimon v. Mansy, 479 S.E.2d 339, 347 at fn. 5 (W.Va. 1996). In this instance, the Petitioners' claims are time-barred by the statute of limitations.

A. THE CIRCUIT COURT CORRECTLY RULED THAT PETITIONERS' CLAIMS AGAINST RESPONDENT ARE BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS UNDER WEST VIRGINIA LAW

There can be no dispute that West Virginia deliberate intent claims are governed by a two-year statute of limitations. *See e.g.*, Tudor's Biscuit World of Am. V. Critchley, 729 S.E.2d 231, 242 (W.Va. 2012), *citing* W.VA. CODE § 55-2-12. This two-year statute begins to run from the date of the injury. *See e.g.*, State ex rel. Ashworth v. State Rd. Comm'n, 128 S.E.2d 471 (W.Va. 1962). "[S]tatutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception...defendants have a right to rely on the certainty the statute of limitations provides." Perdue v. Hess, 484 S.E.2d 182, 186 (W.Va. 1997), *quoting* Johnson v. Nedoff, 452 S.E.2d 63, 69 (W.Va. 1994) (internal quotations omitted). "The plaintiff or his attorney bears the responsibility to see that an action is properly and timely instituted." Syl. Pt. 4, Stevens v. Saunders, 220 S.E.2d 887 (W.Va. 1975).

The workplace injury upon which the Petitioners' claims are based occurred May 19, 2015, and the initial COMPLAINT filed May 4, 2017, limited the claims against this Respondent to

spoliation of evidence following the workplace injury, spousal and parental consortium. JA 38-39. The FIRST AMENDED COMPLAINT, filed August 17, 2017, asserted claims against this Respondent for deliberate intent under the West Virginia Workers' Compensation Act, and spousal and parental loss of consortium. JA 295-304. The Petitioner erroneously maintains that these new causes of action, governed by West Virginia Code §23-4-2(d)(2)(i) and (ii), relate back to the filing of the original Complaint though they are based upon an entirely different set of facts. Despite Petitioners' assertions to the contrary, the Circuit Court correctly ruled on this issue.

Rule 15 of the West Virginia Rules of Civil Procedure provides in relevant part as follows:

> (c) *Relation Back of Amendments.* An amendment of a pleading relates back to the date of the original pleading when:
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action; or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set for the or attempted to be set forth in the original pleading; or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing paragraph (2) is satisfied and, within the period provided by Rule 4(k) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action and the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identify of the property party, the action would have been brought against the party.

W.VA. R. CIV.P., 15(c) (2017).

The 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. Namely, even though the Petitioners were well aware of the subject workplace injury and were under no misapprehension regarding the identity of Plaintiff Tucker Bell's employer, the initial COMPLAINT against the Respondent asserted only claims for spoliation of evidence occurring *after* the subject workplace

accident. The subsequently asserted deliberate intent claims arose from an entirely different relationship, from an entirely different set of alleged wrongful acts, occurred at an entirely different place and time, and involved entirely different individuals. Consequently, and as recognized by the Circuit Court, the Petitioners' new claims against the Respondent could not "relate back" as new facts were alleged against the Respondent for the purpose of asserting the additional claims. *See e.g.*, Dzinglski v. Weirton Steel Corp., 445 S.E.2d 219 (W.Va. 1994) (it is determinative for purposes of the relation back analysis that new facts were alleged for the purpose of asserting additional claims).

The Supreme Court of Appeals of West Virginia has previously addressed the nature of spoliation claims in the context of whether they "relate back" to an original cause of action in the case of *State ex rel. Vedder v. Zakaib* and found that the spoliation claims arose "out of a different occurrence and transaction than those facts originally asserted," concluding that the subsequent spoliation claim was barred by the statute of limitations. 618 S.E.2d 537 (W.Va. 2005). This Court has similarly refused to apply the "relation back" doctrine in other matters where the newly asserted claim is separate and distinct from the matters original asserted. *See e.g.*, Kassab v. Ellis, No. 13-0263, 2013 WL 6152416, at *4 (W.Va. Nov. 22, 2013) (finding that relation back was not permitted when "[t]he alleged mold exposure claim and the alleged fraudulent concealment of it had nothing to do with inducing petitioners into entering the land contract."); Pickens v. Tribble, 783 S.E.2d 310, 316 fn. 9 (W.Va. 2016) (finding that claim for tortious interference with inheritance expectancy, conversion and fraud would not relate back to the original complaint, which "solely concerned real property").

The Petitioner maintains that because there were facts about the workplace accident asserted in its COMPLAINT against other defendants, that the Respondent should have been on notice that a deliberate intent cause of action would be asserted against it. This assertion ignores

the specialized nature of deliberate intent claims as set forth in West Virginia Code §23-4-2(d)(2) such that the inclusion of facts concerning the workplace accident and allegations of negligence against other defendants would have in no way placed the Respondent on notice that a deliberate intent claim against it would be forthcoming. On the contrary, the Petitioners' negligence claims against other defendants does not serve as a factual basis for a deliberate intent claim against this Respondent. In fact, a deliberate intent claim against an employer requires very artful and specialized pleading as evidenced by the inclusion of six (6) addition paragraphs of factual allegations, over and above the 15 new paragraphs which make up the deliberate intent causes of action against the Petitioner in the FIRST AMENDED COMPLAINT. It also demands the existence of facts over and above those required to maintain a common law negligence claim: the deliberate intent statue "represents the wholesale abandonment of the common law tort concept of a deliberate intention cause of action by an employee against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the workers compensation system." Michael v. Marion County Bd. of Educ., 482 S.E.2d 140, 145 (W.Va. 1996).

Generally, "'courts have denied leave to amend when the moving party knew about the facts on which the proposed amendment was based but omitted the necessary allegations in the original pleading.'" State ex rel. Vedder v. Zakaib, 618 S.E.2d 537, 542 (W.Va. 2005), *quoting* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1488 (2d ed 1990) (footnote omitted). Nevertheless, in this instance, the Petitioners were given the opportunity to amend the complaint and the Circuit Court dismissed the amended claims following a full opportunity by the Petitioners to plead the same.

Moreover, the Petitioners neglected to plead any extenuating circumstance for failing to assert a deliberate intent cause of action, and the facts necessary to establish a *prima facie* showing

of such, in their COMPLAINT. The Petitioners certainly knew of the facts purportedly giving rise to the deliberate intent causes of action against the Respondent (i.e. the identity of the employer, the nature of the incident and the nature of the injury) when the original COMPLAINT was filed. "Mere ignorance of the existence of a cause of action . . . does not prevent the running of the statute of limitations[.]" McCoy v. Miller, 578 S.E.2d 355, 360 (W.Va. 2003), *quoting* Gaither v. City Hosp., Inc., 487 S.E.2d 901 (W.Va, 1997) (*quoting* syl. Pt. 3, in part, Cart v. Marcum, 423 S.E.2d 644, 645 (W.Va. 1992).

In the present case, the Circuit Court properly concluded that the Petitioners' cause of action for deliberate intent arose out of a different set of facts than the spoliation claim asserted against the Respondent in the Complaint, as well as being distinct from the facts set forth in support of the negligence claims against the other defendants, and thus did not "relate back" for purposes of Rule 15 and preservation of the statute of limitations.

In an effort to obfuscate their failure in this regard, the Petitioners attempt to argue that the Respondent will not be prejudiced in maintaining a defense on the merits should the deliberate intent cause of action be allowed to move forward. However, the Petitioners fail to properly apply Rule 15(c)(3) of the West Virginia Rules of Civil Procedure. As an initial matter, Petitioners have failed to satisfy the requirements of paragraph 2 of Rule 15(c) which requires a showing that the claim asserted in the amended pleading arose out of the of the facts asserted in the original Complaint. Nevertheless, the allegation that the Respondent will not be prejudiced in presenting a defense of the merits as to the deliberate intent actions again ignores the very peculiar nature of such a cause of action (differing greatly both from a negligence claim and from a spoliation claim), as well as the fact that the Respondent is immune from such suits under the Pennsylvania workers compensation system from which the Petitioners sought and received benefits. Accordingly, because Pennsylvania provided the workers' compensation in this matter and is the exclusive

remedy against this employer Respondent, the Respondent had no reason to believe that but-for some mistake on the part of the Petitioners that it would have been sued in the original COMPLAINT under a theory of West Virginia deliberate intent. 77 P.S. § 481(a); syl. Pt. 3, Pasquale v. Ohio Power Company, 418 S.E.2d 738 (W.Va. 1992); Mize v. Commonwealth Mining, LLC, 2017 WL 1348516 (W.Va. April 7, 2017). To suggest otherwise ignores the positions and expectations of the parties as set forth in the record.

Additionally, the Petitioners' argument that the Circuit Court did not have sufficient law or authority to support its denial of the "relation back" doctrine is not well taken. The Circuit Court's refusal to apply the "relation back" doctrine so as to permit the Petitioners to assert, after the expiration of the statute, new facts and a new cause of action against the Respondent is wholly consistent with existing legal precedent as set forth above.

B. THE CIRCUIT COURT CORRECTLY RULED THAT PETITIONERS CANNOT MAINTAIN CLAIMS FOR SPOUSAL AND PARENTAL LOSS OF CONSORITUUM AGAINST THE PETITIONER

The Petitioners' claims for spousal and parental loss of consortium cannot survive, independently, in the absence of a personal injury claim or in this particular instance a West Virginia deliberate intent claim against the Respondent.

It is well established under both West Virginia and Pennsylvania law that claims for loss of consortium are derivative of the underlying personal injury claim. *See, e.g.,* Bada v. Comcast Corporation, 2015 Phila. Ct. Com. Pl. LEXIS 198 (2015), *citing* Barchfeld v. Nunley by Nunley, 577 A.2d 910, 912 (Pa. Super. Ct. 1990) ("[A]n action for loss of consortium is derivative of the injured spouse's claim."); State ex rel. Small v. Clawges, 745 S.E.2d 192, 201 (W. Va. 2013) *holding modified on other grounds by* Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., No. 16-0401, 2017 WL 2537018 (W. Va. June 8, 2017) (holding that a claim for loss of consortium must be tried together with the underlying personal injury claim).

Because the personal injury claim asserted against the Respondent is not viable, both by reason of the application of Pennsylvania law and by reason of the running of the statute of limitations under West Virginia law,[1] the Petitioners may not maintain any derivative claims for loss of consortium against the Respondent. *See* Pierce v. Montgomery County Opportunity Bd., 884 F.Supp. 965, 979 (E.D.Pa. 1995) (where claims are pre-empted by the Pennsylvania Workers' Compensation Act, so too are derivative claims for loss of consortium).

VI. CROSS-ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRED IN FAILING TO DISMISS THE PETITIONERS' CLAIMS AGAINST THE RESPONDENT UNDER THE EXCLUSIVITY PROVISIONS OF PENNSYLVANIA WORKERS' COMPENSATION LAW

There is no dispute in this action that Petitioner Tucker Bell was the employee of the Respondent at the time of his injury. There is likewise no dispute that the Petitioners filed a claim for benefits under the Pennsylvania workers' compensation scheme arising from Tucker Bell's workplace injury. Regardless of the employee's potential eligibility to file his claim under the West Virginia workers compensation system, he was eligible for Pennsylvania benefits and actually filed his claim under the Pennsylvania workers compensation system. Furthermore, while the Petitioner alleges that he did not make the election to file under the Pennsylvania workers' compensation system, he enjoyed (and continues to enjoy) the benefits of the Pennsylvania workers compensation for years before filing his amended claim against the Respondent for deliberate intent under West Virginia law.

Pennsylvania law provides that "[w]here an employee's injury is compensable under the Act, the compensation provided by the statute is the employee's exclusive remedy against his or her employer." 77 P.S. § 481(a); *accord*, Markle v. Workmen's Comp. Appeal Bd. (Caterpillar

[1] Any such personal injury claim would be barred by the Pennsylvania Workers' Compensation immunity. *See* 77 P.S. § 481(a) (2017).

Tractor Co.), 661 A.2d 1355, 1357 (Pa. 1995); Nagle v. TrueBlue, Inc., 148 A.3d 946 (Pa. Commw. 2016). "The employer's shield from tort liability on work-related injuries under [Section 481] is virtually impenetrable no matter how willful or wanton the employer's conduct." Uon v. Tanabe Intern. Co., Ltd, 2010 WL 4861436 (E.D. Pa. 2010).

West Virginia law acknowledges that

> [u]nder W.Va. Code §23-2-1c(c) (1993), the workers' compensation scheme of another state is the exclusive remedy against the employer for a non-resident employee who is temporarily employed in this State, if such employee is injured in the State and is covered by the workers' compensation act of the other state.

Syl. pt. 3, Pasquale v. Ohio Power Company, 418 W.Va. 738 (W.Va. 1992); *accord*, Mize v. Commonwealth Mining, LLC, 2017 WL 1348516 (W.Va. April 7, 2017). There is a "dominant interest . . . in the state that is the residence of the parties rather than in the state that is the location of the negligent conduct and the injury" which requires the forum state to enforce the bar created by the exclusivity provisions of the foreign state. Easterling v. American Optical Corporation, 529 S.E.2d 588, 598 (W.Va. 2000).

The Petitioner has attempted to distinguish the foregoing West Virginia case holdings with purported factual issues regarding the number of days Tucker Bell worked in West Virginia prior to his injury. However, as Petitioner Southern Environmental, Inc., so astutely points out in its APPEAL FROM AN ORDER FROM THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA, Appeal No. 18-1124, the Petitioners' eligibility for West Virginia Workers' Compensation is no longer the issue, the issue is now one of election of remedies. The Petitioners filed a workers' compensation claim pursuant to Pennsylvania law and enjoyed the increased benefits provided to them thereunder. Consequently, the Circuit Court should have applied Pennsylvania law, recognized the very broad immunity provided to employers for claims of employees arising from workplace injuries, and dismissed the Petitioners' claims against the Respondent accordingly.

B. THE CIRCUIT COURT ERRED IN FAILING TO APPLY PENNSYLVANIA LAW AND FINDING IT HAD NO SUBJECT MATTER JURISDICTION OVER THE PETITIONERS' SPOLIATION CLAIMS AGAINST THE RESPONDENT

As an initial matter, the Circuit Court should have dismissed the Petitioners' claims against the Respondent pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure for lack of subject matter jurisdiction. The Supreme Court of Appeals of West Virginia has held:

> [w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.

Syl. pt. 5, State ex rel. Dale v. Stucky, 752 S.E.2d 330 (W. Va. 2013); syl. pt. 1, Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc., 211 S.E.2d 705 (W. Va. 1975); syl. pt. 1, Hanson v. Bd. of Educ. of the Cnty. of Mineral, 479 S.E.2d 305 (W. Va. 1996). The issue of whether the Circuit Court had jurisdiction to hear the controversy between the Petitioners and the Respondent was of primary significance.

The spoliation claims asserted against the Respondent arose wholly in the Commonwealth of Pennsylvania, between residents of Pennsylvania, and from allegedly injurious conduct occurring at the Respondent's principal place of business in Pennsylvania. J.A. 18, 36-38. As such, a sufficient nexus to the State of West Virginia did not exist upon which to confer jurisdiction over the subject matter of the Petitioners' claims for spoliation against the Respondent. *See* Savarese v. Allstate Ins. Co., 672 S.E.2d 255, 265 (W. Va. 2008) (affirming the lower court's dismissal, holding that "a nonresident plaintiff must establish that all or a substantial part of the acts giving rise to his or her claims occurred in West Virginia" in order to establish that the claim is properly brought within this state). *See also* Mize v. Commonwealth Mining, LLC, No. 16-0413, 2017 WL 1348516, *at* *4 (W. Va. Apr. 7, 2017) (holding that the West Virginia courts lacked subject matter jurisdiction over the claims of an out-of-state employee against an out-of-state employer who was injured on a worksite located in West Virginia); Easterling v. Am. Optical

Corp., 529 S.E.2d 588, 598 (W. Va. 2000) (holding that a West Virginia court may only exercise subject matter jurisdiction over actions brought by an out-of-state employee against an out-of-state employer if the injury arose within the state). The Petitioners' claims for spoliation against the Respondent arose in Pennsylvania and should have been subject to Pennsylvania law.

Pursuant to the doctrine of *lex loci delicti*, the Circuit Court was required to apply the law of the place of the claimed injury to test the substantive viability of the Petitioners' spoliation claims. McKinney v. Fairchild Int'l, Inc., 487 S.E.2d 913, 922 (W. Va. 1997). In this case, the injury related to the spoliation claims – not to the claimed personal injury forming the basis of the remaining causes of action – arose in Pennsylvania, not West Virginia. Thus, the Circuit Court should have applied Pennsylvania law to test the viability of the Petitioners' spoliation claims against the Respondent in this matter. However, the Commonwealth of Pennsylvania does not recognize such claims under the facts and circumstances of this case.

The Supreme Court of Pennsylvania has expressly held that a party may not maintain a claim for negligent spoliation of evidence against a third party, and a claim of intentional spoliation against a third party has never been recognized by the Pennsylvania courts. Pyeritz v. Pennsylvania, 32 A.3d 687, 692 (Pa. 2011); Elias v. Lancaster Gen. Hosp., 710 A.2d 65, 68 (Pa. Super. Ct. 1998). Thus, any claims for spoliation as asserted by the Petitioners against the Respondent in this matter should have been dismissed for failure to state a claim upon which relief can be granted.

Moreover, even if Pennsylvania did recognize such a spoliation claim against the Respondent, the Respondent is immune from common lawsuits by its employees by virtue of the Pennsylvania Workers' Compensation Act. Specifically, in Section 303(a) of the Act, the Pennsylvania General Assembly declared:

> The liability of an employer under this [A]ct shall be exclusive and in place of any and all other liability to such employees, [] legal representative[s, or] . . . next of

> kin ... entitled to damages in any action at law or otherwise on account of any injury or death as defined in [S]ection 301(c)(1) and (2) [of the Act, 77 P.S. § 411(1), (2).]

77 P.S. § 481(a). In interpreting this provision, the Pennsylvania Supreme Court has held that the Act "can best be understood as a replacement of common law tort actions between employees and employers as a means for obtaining compensation for injuries." Markle v. Workmen's Comp. Appeal Bd. (Caterpillar Tractor Co.), 661 A.2d 1355, 1357 (Pa. 1995) (emphasis added); Nagle v. TrueBlue, Inc., 148 A.3d 946 (Pa. Commw. 2016). The purpose of said exclusivity provision is:

> "to restrict the remedy available to an employee against the employer to compensation, and to close to the employee, and to third parties, any recourse against the employer in tort for negligence." Tsarnas v. Jones & Laughlin Steel Corp[.], ... 412 A.2d 1094, 1097, 488 Pa. 513 (1980).

LeFlar v. Gulf Creek Indus. Park No. 2, 515 A.2d 875, 879 (Pa. 1986).

The courts of Pennsylvania have held that this immunity is nearly absolute. Poyser v. Newman & Co., Inc., 522 A.2d 548 (Pa. 1987); Uon v. Tanabe Intern. Co., Ltd., 2010 WL 4861436 (E.D. Pa. 2010); Dean v. Handy & Harmon, 961 F. Supp. 2d 798 (M.D. Pa. 1997). Thus, an employee may not bring a common law cause of action against his Pennsylvania employer for injuries arising from the employment relationship. "The employer's shield from tort liability on work-related injuries under [Section 481] is virtually impenetrable no matter how willful or wanton the employer's conduct." Uon, *supra*, at 3.

The Circuit Court erred by failing to apply Pennsylvania law and dismiss the Petitioners' spoliation claims against the Respondent.[2]

[2] It is worth noting that even under West Virginia law, the Petitioners' claims for spoliation fail. "West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action." Syl pt. 2, Hannah v. Heeter, 584 S.E.2d 560 (W.Va. 2003).

VII. CONCLUSION

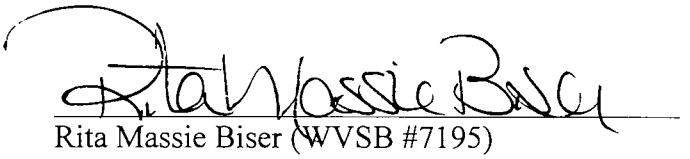
The Circuit Court of Monongalia County correctly applied Rule 15(c) of the West Virginia Rules of Civil Procedure in refusing to find that the Petitioners' new allegations and new cause of action against the Respondent, as set for the in the FIRST AMENDED COMPLAINT, related back to the original filing of the COMPLAINT. As such, the Circuit Court properly dismissed the Petitioners' deliberate intent cause of action against the Respondent under West Virginia law as time barred by the applicable statute of limitations. Additionally, as the Petitioners' claims for loss of spousal and parental consortium are derivative claims, the Circuit Court correctly dismissed such claims when the Petitioners' West Virginia deliberate intent claim against the Respondent was dismissed.

However, there existed additional grounds and basis for the Circuit Court to dismiss the Petitioners' claims, in their entirety, against the Respondent and upon which the Circuit Court should have relied. The Circuit Court erred by failing to apply Pennsylvania law and dismissing all of the Petitioners' claims against the Respondent as mandated by the exclusivity provisions of the Pennsylvania workers' compensation system. Petitioner Tucker Bell was an employee of the Respondent who was injured during the scope and course of his employment. While the Petitioners maintain that no election of Pennsylvania workers' compensation was made, the Petitioners have been enjoying the uninterrupted benefits provided by the Pennsylvania workers' compensation system for over four (4) years now. Consequently, the Petitioners should not be permitted to summarily move between Pennsylvania and West Virginia law so as to create additional forms of recovery related to a single workplace injury.

Respectfully submitted,

NICHOLSON CONSTRUCTION COMPANY,
Respondent

By Counsel,



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