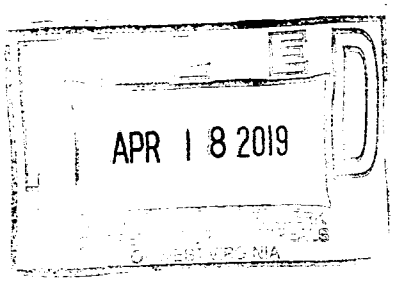

NO. 18-1140

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NICHOLSON CONSTRUCTION COMPANY,

Petitioner,

v.

BEST FLOW LINE EQUIPMENT, L.P.,

Respondent.

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

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

This appeal involves the failure of the trial court to dismiss the cross-claims of the Respondent manufacturer, Best Flow Line Equipment, L.P. ("Best Flow") against the Petitioner employer, Nicholson Construction Company ("Nicholson Construction"). In the underlying action from which the cross-claim arise, Pennsylvania resident Tucker-Stephen G. Bell ("Mr. Bell") was working as an employee of the Petitioner Nicholson Construction when he was injured on May 19, 2015, in Maidsville, West Virginia, when a component part (manufactured by Best Flow) of the drill he was operating detached from the machine and struck him in the back of the head. JA 21. The Petitioner Nicholson Construction is a Pennsylvania corporation. JA 277. Mr. Bell, also a Pennsylvania resident, received workers' compensation benefits as a result of the subject injury through the workers compensation system in the Commonwealth of Pennsylvania.

Mr. Bell and his family initially brought the underlying suit in the Circuit Court of Monongalia County, West Virginia, asserting, generally, claims for personal injury and products liability against the premises owner and manufacturers of the involved products. JA 17-43. The initial COMPLAINT filed May 4, 2017, limited the claims against the Petitioner Nicholson Construction to spoliation. JA 38-39. The FIRST AMENDED COMPLAINT, filed August 17, 2017, asserted claims against this Petitioner (Nicholson) for deliberate intent under the West Virginia Workers' Compensation Act, and spousal and parental loss of consortium. JA 295-304.

Respondent Best Flow was the manufacturer of a component part of the subject equipment, specifically the swivel at issue, which came loose causing Mr. Bell to be struck in the head. JA 281. The Respondent filed a cross-claim against Nicholson Construction (JA 77-79), and subsequently, an amended cross-claim, (JA 511-521) identifying the following theories of liability: (1) contribution; (2) implied indemnity; (3) deliberate intent liability; (4) negligent spoliation; and (5) intentional spoliation. The Petitioner, Nicholson Construction, filed a motion to dismiss the cross-claims and memorandum in support, asserting that the trial court lacked subject-matter jurisdiction, that the cross-claims were barred by the exclusivity and immunity provisions of the Pennsylvania Workers' Compensation Act, that the cross-claims were barred by the West Virginia several liability statute, and that Best Flow was not entitled to implied indemnity because it was not without fault. JA 563-586.

Initially, on October 24, 2018, the Circuit Court of Monongalia County issued an ORDER DENYING, IN PART, AND GRANTING, IN PART, DEFENDANT NICHOLSON CONSTRUCTION COMPANY'S MOTION TO DISMISS CROSS-CLAIMS OF BEST FLOW LINE EQUIPMENT, L.P., holding that the two-year statute of limitations barred the Respondent Best Flow's cross-claims for deliberate intent, contribution and implied indemnity, but that the claims for spoliation required factual development

that made dismissal of the spoliation claims improper. JA 909-914. The Respondent Best Flow subsequently filed a Motion to Amend Order Pursuant to Rule 59(e) on November 5, 2018, arguing that the statute of limitations was not applicable to the deliberate intent claim as it was only a theory of liability for contribution and indemnity, and not an independent cause of action. JA 921-931. Petitioner Nicholson Construction argued that the dismissal was proper and in accordance with applicable law pursuant to its previously-stated arguments, specifically including that Pennsylvania properly applied and provided immunity to Nicholson for Best Flow's crossclaims. JA 1126-1131.

On November 27, 2018, the Circuit Court of Monongalia County issued an AMENDED ORDER DENYING DEFENDANT NICHOLSON CONSTRUCTION COMPANY'S MOTION TO DISMISS CROSS-CLAIMS OF BEST FLOW LINE EQUIPMENT, L.P., reversing its previous order and denying Nicholson's motion to dismiss Best Flow's Cross-Claims in its entirety. The Order was designated as final pursuant to Rule 54(b). JA 1132-1137. It is from this Order which the Petitioner Nicholson seeks relief.

SUMMARY OF ARGUMENT

The Respondent's cross-claims against the Petitioner should have been dismissed because they are wholly derivative of the claims of the underlying Plaintiffs, Mr. Bell and his family. Mr. Bell was an out-of-state employee working for an out-of-state employer (Petitioner Nicholson Construction) who was injured while working in West Virginia. Regardless of whether Mr. Bell could have legally availed himself of the benefits and privileges of the West Virginia Workers' Compensation Act, the fact is that he did not; his claim for benefits was and continues to be singularly paid through the Pennsylvania Workers Compensation Act. The statute of limitations on all of Mr. Bell's claims under the West Virginia Workers' Compensation Act have run. The trial

court should have applied Pennsylvania law to this action and thereafter found that no cause of action exists because Petitioner Nicholson Construction is immune from all common law claims arising from the subject work-place accident by virtue of the Pennsylvania Workers' Compensation Act, including those cross-claims brought by the Respondent. *See* 77 Pa. Stat. Ann. § 481. The Pennsylvania's Workers' Compensation Act under which Mr. Bell has received benefits is the exclusive remedy available as to this Pennsylvania employer.

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

Finally, the trial court erred in failing to apply Pennsylvania law to the spoliation claims against the Petitioner as the facts underlying the spoliation claims against this Petitioner arose in the Commonwealth of Pennsylvania, between residents of Pennsylvania, and from allegedly injurious conduct occurring in Pennsylvania, and therefore are insufficient to confer jurisdiction in West Virginia over the subject matter of said claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate as the dispositive issues in this matter have not been authoritatively decided and the decisional process would likely be significantly aided by oral argument. Further, consolidated argument in this case and the matters of docket No. 18-1124 and No. 1139 may additionally benefit the decisional process of the Court.

ARGUMENT

A. THE CIRCUIT COURT LACKED SUBJECT-MATTER JURISDICTION OVER THE CLAIMS AGAINST THE PETITIONER.

This Court has consistently held that "[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). Whether the forum court has jurisdiction over the subject matter of a given cause of action is a threshold issue. *See, e.g.*, syl. pt. 5, State ex rel. Dale v. Stucky, 752 S.E.2d 330 (W. Va. 2013) ("Whenever 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.").

In the case of Easterling v. American Optical Corporation, 529 S.E.2d 588 (W. Va. 2000), when presented with a cause of action under West Virginia law for deliberate intent, brought by an out-of-state employee against an out-of-state employer, this Court held that:

> [a] non-resident employee who is injured in this State *and is protected under the terms and provisions of the workers' compensation laws of a foreign state* shall not be entitled to the benefits and privileges provided under the West Virginia Workers[']Compensation Act, including the right to file and maintain a deliberate intention cause of action under W.Va. Code §23-4-2(c)(2)(1994).

Easterling at 529 S.E.2d 598 (emphasis added), quoting Gallapoo v. Wal-Mart Stores, Inc., 475 S.E.2d 172 (W. Va. 1996).

The Easterling Court declined to establish a "per se exclusion for a tort claim against an out-of-state employer for injuries to an out-of-state employee that occurred in West Virginia" but acknowledged "certain limitations on such an action" which it defined as follows:

> [w]e hold that the courts of West Virginia have subject matter jurisdiction over a cause of action brought by an out-of-state employee against an out-of-state employer for an injury occurring in West Virginia, where the complaint can be fairly read as setting out a cause of action under the laws of the foreign jurisdiction wherein the employer is situate, and wherein the employer is obligated to carry some form of workers' compensation.

Easterling at 598.

In the case at bar there is no dispute that the out-of-state employee, Mr. Bell, was covered under and received benefits pursuant to the Pennsylvania workers' compensation system. Under Pennsylvania law, the Pennsylvania Workers' Compensation Act is the exclusive remedy available to an injured Pennsylvania employee against a Pennsylvania employer. *See* 77 Pa. Stat. Ann. § 481.

The Respondent maintains that it's crossclaims against the Petitioner should survive because Mr. Bell *could have* made a claim for West Virginia workers' compensation benefits under West Virginia's statutory scheme by virtue of the amount of time Mr. Bell had worked in West Virginia in the 365 days before his accident. Additionally, Mr. Bell produced a completed West Virginia Workers' Compensation Employees' and Physicians' Report of Occupational Injury or Disease [JA 847]. However, no evidence was produced in opposition to Petitioner's motions to show that a claim was either filed or accepted under the West Virginia workers' compensation statutory scheme and/or that any benefits were ever paid in response to said document. The trial court subsequently ruled that Mr. Bell's right to bring a cause of action under West Virginia's deliberate intent exception to employer immunity was barred by the applicable statute of limitations. JA 848-856. It should additionally be acknowledged that Mr. Bell's right to bring a

claim for benefits under the West Virginia workers' compensation system is now barred by the applicable statute of limitations. See W.Va. Code § 23-4-15 (2010).

At the time that the Petitioner filed its motion to dismiss the cross-claims of the Respondent, the underlying Plaintiffs, Mr. Bell and his family, had missed the deadline to obtain benefits under the West Virginia Workers Compensation Act and had missed the statute of limitations for a claim under West Virginia Code §23-4-2. Despite the Respondent's arguments that Mr. Bell's claim for benefits arising from his workplace injury could have been processed through the West Virginia workers' compensation statutes, Mr. Bell's workplace injury was in fact solely processed and governed by the Pennsylvania workers' compensation statutes.

Notwithstanding the academic arguments regarding Mr. Bell's previous legal right to bring any type of claim under the West Virginia workers' compensation, the fact remains that Mr. Bell acquiesced to the protection of the terms and provisions of the workers' compensation laws of the state of Pennsylvania for more than two years and cannot now, because of the running of the various statutes of limitations, legally avail himself of the benefits and privileges provided under the West Virginia Workers' Compensation Act.

Under the plain language of the Easterling decision, in the absence of the availability of a deliberate intent claim in either the forum (West Virginia) or the foreign state (Pennsylvania), the trial court erred in failing to dismiss the Respondent's crossclaims against the Petitioner based upon deliberate intent for lack of subject matter jurisdiction.

B. THE CIRCUIT COURT ERRED IN FAILING TO APPLY PENNSYLVANIA LAW AND FINDING THAT PENNSYLVANIA WOKERS' COMPENSATION IS THE EXCLUSIVE REMEDY FOR ALL CLAIMS AGAINST THE PETITIONER IN THIS CASE.

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure provides that a trial court may dismiss a pleading for failure to state a claim upon which relief can be granted. W. Va. R. Civ. P. 12(b)(6) (2014). It is well established that Rule 12(b)(6) "enables a circuit court to weed out unfounded suits." State ex rel. McGraw v. Scott Runyan Pontiac Buick, Inc., 461 S.E.2d 516, 522 (W. Va. 1995). While only a "short and plain" statement of the claim is required, a party may not "fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint." *Franklin D. Cleckley, et al.*, Litigation Handbook on West Virginia Rules of Civil Procedure 199 (4th ed. 2012). Thus, it has been held that 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). The trial court erred in failing to dismiss the Respondent's crossclaims against the Petitioner pursuant to this Rule.

Petitioner Nicholson Construction is immune from all common law claims arising from the subject work-place accident by virtue of the Pennsylvania Workers' Compensation Act. *See* 77 Pa. Stat. Ann. § 481. The Pennsylvania's Workers' Compensation Act is the exclusive remedy available to an injured Pennsylvania employee against a Pennsylvania employer. Regardless of Respondent's arguments regarding the potential availability of West Virginia workers' compensation benefits to Mr. Bell, there can be no dispute that Mr. Bell received benefits only under the Pennsylvania Workers' Compensation Act, and not the West Virginia Workers' Compensation Act.

The Pennsylvania statute expressly provides, in relevant part:

> (a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes [sic], his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.

77 Pa. Stat. Ann. § 481. *See also,* Warner v. B. Pietrini & Sons, No. 618 EDA 2016, 2017 WL 3142526, at *7 (Pa. Super. Ct. July 25, 2017) ("[i]t is well established under Pennsylvania law that the Workers' Compensation Act provides the exclusive remedy to a claimant against his or her employer."); Santiago v. Pennsylvania National Mutual Casualty Insurance Co., 613 A.2d 1235, 1242 (Pa. Super. 1992). The purpose of the Act's 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." LeFlar v. Gulf Creek Indus. Park No. 2, 515 A.2d 875, 879 (Pa. 1986), *citing* Tsarnas v. Jones & Laughlin Steel Corp., 412 A.2d 1094, 1097 (Pa. 1980) (emphasis added). Thus, the courts of Pennsylvania have held that this immunity is nearly absolute. *See,.e.g.,* 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).

This Court has previously held that "if a damage suit is brought in the forum state by the employee against the employer . . ., the forum state will enforce the bar created by the exclusive remedy statute of a state that is liable for workers' compensation[.]" Easterling at 598, quoting Arthur Larson & Lex K. Larson, Vol. 9, Larson's Workers' Compensation Law, §88.11 (1999). Benefits were only paid under the Pennsylvania workers' compensation system and at this point only Pennsylvania can be liable for such benefits as the statute of limitations has run on any claim for benefits under the West Virginia workers' compensation statutory scheme. See W.Va. Code §

23-4-15 (2010) ("unless filed within the six months period, the right to compensation under this chapter is forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional[.]")

"The rationale for applying the substantive workers' compensation law of the foreign state is that the dominate interest is in the state that is the residence of the parties rather than in the state that is the location of the negligent [or intentional] conduct and the injury." Easterling at 598 (internal citations omitted). The legal and actual unavailability of any claim by Mr. Bell under the West Virginia Workers' Compensation Act (as opposed to any theoretical past availability) supports the application of Pennsylvania law in this matter. "[A] defendant will be accorded immunity from tort . . . if he is given such immunity by the workmen's compensation statute of any state under which he is required to provide insurance against the particular risk and under which the plaintiff has already obtain an award for the injury." Restatement (Second) of Conflict of Laws §184 cmt. b (1971).

The trial court erred when it failed to apply the Pennsylvania workers' compensation immunity/exclusivity provisions and dismiss the crossclaims of the Respondent against the Petitioner.

C. THE CIRCUIT COURT ERRED IN FAILING TO FIND THE RESPONDENT'S CROSS-CLAIMS WERE BARRED BY PRINCIPLES OF COMITY.

The doctrine of comity dictates that Pennsylvania law be applied to the claims at issue.

> Comity is a court-created doctrine through which the forum court may give the laws or similar rights accorded by another state effect in the litigation in the forum state. Comity is a flexible doctrine and rests on several principles. One is legal harmony and uniformity among the co-equal states. A second, grounded in essential fairness, is that the rights and expectations of a party who has relied on foreign law should be honored by the forum state. Finally, and perhaps most important, the forum

> court must ask itself whether these rights are compatible with its own laws and public policy." Syllabus Point 1, Pasquale v. Ohio Power Co., 187 W.Va. 292, 418 S.E.2d 738 (1992).

Russel v. Bush & Burchett, Inc., 559 S.E.2d 36 (W.Va. 2001) (Finding availability of the West Virginia deliberate intent statute for an out-of-state resident injured in Kentucky where the construction project was a state funded bridge project and the contractor had agreed to provide West Virginia workers' compensation coverage.)

> "Courts sometimes use the term 'comity' as a shorthand term to explain why a forum court is deferring to the law or rulings of another jurisdiction. However, 'comity' is used in Syllabus Point 1 of *Pasquale* in its meaning as a choice-of-laws analytic approach that may lead to either applying or declining to apply the law of another jurisdiction."

Russel at fn. 4. This Court has held that "whether a deliberate intent cause of action... may be brought against an employer because of an injury that occurred in a *situs* other than West Virginia is not determined by the doctrine of *lex loci delicti*, but under the principles of comity." Russel at 703, citing Bell v. Vecellio & Grogan, 475 S.E.2d 138, 144-145 (W.Va. 1996). Just as our Court has ruled that the West Virginia Workers' Compensation Act was not intended to deprive a West Virginia employee of protection based on the mere fortuity that the employee was injured in another state, so should this Court rule that an out-of-state employer should not be stripped of the absolute immunity provided under the workers' compensation laws of its home state by the mere fact that a non-resident employee was injured in West Virginia. See e.g. Bell v. Vecellio & Grogan, Inc., 475 S.E.2d 138 (W.Va. 1996) (discussing decisions regarding the application of the West Virginia Workers' Compensation Act to *West Virginia* employees injured outside of West Virginia.) This is especially true in the instance where the non-resident employee has failed to timely avail himself of the potential rights and benefits of the West Virginia Workers' Compensation Act.

D. THE CIRCUIT COURT ERRED IN ALLOWING THE RESPONDENT TO ASSERT CROSS-CLAIMS FOR CONTRIBUTION AND INDEMNITY AGAINST THE PETITIONER BASED UPON DELIBERATE INTENT

The Respondent's common law claims of contribution and indemnity both arise from equitable principles and are designed to remedy those scenarios wherein one party has been held liable, either partially (contribution) or wholly (indemnity), for the fault of another. It has been consistently held that "the right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation." Sydenstricker v. Unipunch Prod., Inc., 288 S.E.2d 511, 516 (W. Va. 1982).[1] Claims of contribution have traditionally allowed the party who overpaid the ability to recover against the other jointly responsible party. Id. As the Sydenstricker Court explained, "[i]t is this *common or joint liability to the plaintiff* on the part of joint tortfeasors that gives rise to a cause of action for contribution." Id. (emphasis added). In this case, the Respondent's cross-claims for contribution must fail because there is no joint liability.

As a general rule, the West Virginia workers' compensation employer immunity precludes garden variety common law claims between co-defendants arising from an employee injury (not based upon deliberate intent). Sydenstricker, at 516-17 ("where, as here, the right of contribution is initially grounded in common liability in tort, courts have held that a joint tortfeasor employer is immune from a third-party contribution suit because he is initially immune from tort liability to his injured employee by virtue of the workmen's compensation statutory bar of such tort actions."). Applying the Pennsylvania Workers' Compensation employer immunity, it becomes clear that the Petitioner may not be held liable to the Respondent cross-claimant herein.

[1] Although the *Sydenstricker* case remains "good law" on several points to date, the underlying premise which forms the basis of the Court's 1982 decision has changed given the enactment of West Virginia Code § 55-7-13c in 2015.

In discussing the application of workers' compensation immunity to the case at bar, it is important to distinguish the ultimate holding in *Sydenstricker*, which permitted a common law claim for contribution against an employer by the manufacturer of an allegedly defective product. Significantly, the Court's holding in that case was wholly dependent upon the manufacturer's ability to access the statutory exception to Workers' Compensation immunity provided by the deliberate intent provisions of the West Virginia Workers' Compensation Act. Sydenstricker, 288 S.E.2d at 517 ("However, where the Workman's Compensation Act provides an express exception from immunity against suits by an employee in a tort area, it follows that a suit grounded on this exception would enable a third party to maintain an action in contribution."). This exception, however, is unavailable to the Respondent cross-claimant in this matter as Pennsylvania law and its exclusivity provisions apply. As set forth in more detail in the foregoing assignments of error, the West Virginia deliberate intent law is simply not available under the facts and procedural posture of this case.

Furthermore, and in contrast to a claim for contribution which arises from joint liability, claims for indemnity arise from the relationship between the allegedly liable parties.

> The general principle of implied indemnity arises from equitable considerations. At the heart of the doctrine is the premise that the person seeking to assert implied indemnity – the indemnitee – has been required to pay damages caused by a third party – the indemnitor. In the typical case, the indemnitee is made liable to the injured party because of some positive duty created by statute or the common law, but the actual cause of the injury was the act of the indemnitor.

Syl. pt. 2, Hill v. Joseph T. Ryerson & Son, Inc., 268 S.E.2d 296 (W. Va. 1980).

It is well established that because implied indemnity is based upon the principles of restitution, the putative indemnitee must be without fault to recover on a claim of implied indemnity. Sydenstricker, 288 S.E.2d at 515. In the underlying tort case filed by Mr. Bell and his

family, independent claims of liability have been alleged against the Respondent; Plaintiffs in the underlying matter have asserted seven separate claims of liability against the Respondent Best Flow. JA 275-306. The Court in *Sydenstricker* held that such allegations precluded the assertion a claim of implied indemnity. Id. at 516 ("In a products liability case such as the one involved here, where the third party is the manufacturer, he is not accorded a right of implied indemnity against the employer because, having made a defective product, he is not fault free . . . this is the predicate for a claim of implied indemnity.") Moreover, for a valid claim of implied indemnity to exist, the parties must have a special legal relationship whereby one party may be held liable for another party's actions. Id.; *see also,* Sydenstricker, 288 S.E.2d at 515. The Respondent's cross-claims for implied indemnification against the Petitioner must additionally fail because there is no special relationship between these parties.

The Respondent cannot maintain a legally cognizable claim for contribution or implied indemnity and the circuit court erred in failing to dismiss such claims.

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

Effective May 25, 2015, the West Virginia Legislature enacted West Virginia Code § 55-7-13c, which provides that co-defendants in a civil action are to be held severally, and not jointly, liable for any damages awarded. Specifically, the statute states:

> In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount.

W. Va. Code § 55-7-13c(a) (2017). Joint liability may only be imposed upon defendants "who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission," and claims for contribution are expressly limited to those circumstances. Id. In other words, unless the co-defendants have consciously conspired to commit the wrong, one party will never be obligated to pay more than its *pro tanto* share. Id.

There is no allegation in this matter that the Petitioner and the Respondent acted in deliberate concert, nor could such an allegation be sustained if it were so alleged. Accordingly, the Petitioner and the Respondent cannot be held jointly liable to Mr. Bell under West Virginia Code § 55-7-13c.

This Court has not had the opportunity to examine this statute. However, the plain language of the statute makes clear that ultimately, the jury would be obligated to allocate liability among all co-defendants to the underlying action. Consequently, even assuming the jury found each of the named defendants liable to some extent, the Respondent Cross-Claimant cannot, pursuant to West Virginia Code § 55-7-13c(a), be obligated to pay more than its *pro tanto* share. As a result, no legal claim for contribution can arise between these parties, and dismissal of the Respondent's cross-claims was appropriate pursuant to Rule 12(b)(6).

F. THE CIRCUIT COURT ERRED IN FAILING TO APPLY PENNSYLVANIA LAW TO THE DISMISSAL OF RESPONDENT'S CROSS-CLAIM FOR SPOLIATION.

Pursuant to the doctrine of *lex loci delicti*, the trial court was required to apply the law of the place of the claimed injury to test the substantive viability of the spoliation claims. McKinney v. Fairchild Int'l, Inc., 487 S.E.2d 913, 922 (W. Va. 1997). Notably, the spoliation of evidence claims asserted in this matter do not arise from the subject accident itself, but rather from acts or omissions committed subsequent to the subject accident by a Pennsylvania resident in the state of Pennsylvania and allegedly resulting in injury to other Pennsylvania residents. Thus, the trial court

should have applied Pennsylvania law to test the viability of the spoliation claims against this Petitioner. Id.

The Supreme Court of Pennsylvania has expressly held that spoliation, whether negligent or intentional, does not constitute a separate cause of action under Pennsylvania law. Elias v. Lancaster Gen. Hosp., 710 A.2d 65, 68 (Pa. Super. Ct. 1998) ("spoliation of evidence is not recognized as a separate cause of action under Pennsylvania law."); Pyeritz v. Pennsylvania, 32 A.3d 687, 692 (Pa. 2011) ("we have never imposed a duty in tort not to commit negligent spoliation of evidence, and we now hold that such a cause of action is not viable in Pennsylvania"). Thus, with respect to Defendant Nicholson Construction, there exists no sufficient nexus to the State of West Virginia upon which to confer jurisdiction over the subject matter of the Plaintiffs' claims. *See, e.g.,* Savarese v. Allstate Ins. Co., 672 S.E.2d 255 (W. Va. 2008); Mize v. Commonwealth Mining, LLC, No. 16-0413, 2017 WL 1348516 (W. Va. Apr. 7, 2017). The trial court committed error in failing to dismiss the Respondent's cross-claim against this Petition based upon spoliation of evidence.

CONCLUSION

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

Respectfully submitted,

NICHOLSON CONSTRUCTION COMPANY
PETITIONER

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