No. 18-1140

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

Nicholson Construction Company,

Defendant Below, Petitioner,

v.

Best Flow Line Equipment, L.P.,

Defendant Below, Respondent

From the Circuit Court of Monongalia County, West Virginia
Civil Action No. 17-C-193

RESPONDENT'S RESPONSE BRIEF

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I. STATEMENT OF THE CASE

This case arises from a workplace incident that occurred on May 19, 2015, in Monongalia County, West Virginia, where Plaintiff Tucker-Stephen G. Bell ("Tucker Bell") was an extraterritorial, non-temporary employee, working in the course of his employment for Petitioner Nicholson Construction Company ("Nicholson"). (JA_21 at ¶¶ 17, 18). Specifically, Plaintiffs allege that Tucker Bell was operating a drill rig to drill foundation pilings as part of the expansion of a baghouse ("Baghouse Expansion Project" or "Project") at Defendant Longview Power Plant ("Longview"), and that during the drilling process a water swivel became unthreaded and/or detached from the pipe nipple and struck Tucker Bell in the back of his head. (JA_21, 22 at ¶¶ 25, 26, 27).

The project, which was intended to upgrade the Longview's pollution control system, was being overseen pursuant to a contractual agreement by Defendant Southern Environmental, Inc. ("SEI"). (JA_366-474).[1] SEI in turn subcontracted with Tucker Bell's employer, Nicholson to perform various projects on the Baghouse Expansion Project, including drilling work. (JA_1081-1102). Given that the Project was being performed in West Virginia and partly supported by public funds, Longview required SEI, along with any subcontractors selected by it, to cover all employees working on the project with West Virginia Workers' Compensation insurance. (JA_1083 and 1101). Nicholson contractually agreed not only to provide Workers' Compensation insurance for its employees, (JA_403, 717, 1008) but also agreed to incorporate

[1] The project being working on by Petitioner Nicholson and Tucker Bell was part of a pollution control upgrade to the Longview Power Plant which had received substantial public dollars through the West Virginia Economic Development Authority. *See* "State helps power generators pay for equipment," The West Virginia Gazette, December 17, 2010, https://www.wvgazettemail.com/news/state-helps-power-generators-pay-for-equipment/article_4e1e3767-9b8e-5440-913d-ee6138beb731.html (West Virginia Economic Development Authority has allocated...$20.6 million to Longview Power for pollution control equipment on its power plant under construction near Morgantown).

and abide by the terms of the contract between Longview and SEI. (JA_403, 717, 1008). While Nicholson tries to avoid the impact of these contractual obligations, by failing to reference them to this Court, it is without question that Nicholson's employees were entitled to West Virginia Workers' Compensation insurance and all of the benefits associated with it, including the ability to file and prosecute a deliberate intent action against their employer.[2]

Despite Tucker Bell's obvious right to seek West Virginia Workers' Compensation for his injury, immediately following his injury, while he still remained in a coma, Nicholson unilaterally chose to file a Workers' Compensation claim for him in Pennsylvania. (JA_841-843). While this fact is ultimately irrelevant to this Court's determination of the issues raised on appeal by Nicholson it is worth noting, as Defendant Nicholson continues to argue that Tucker Bell's election of and receipt of Pennsylvania Workers Compensation benefits divests West Virginia of jurisdiction over his claims and ultimately Best Flow's cross-claims. However, in its zeal to find any potential excuse to avoid its liability, Nicholson fails to advise the Court, that it, and not Tucker Bell chose to file the initial Workers' Compensation claim in Pennsylvania. (JA_44-843). Further, despite Nicholson's claims to the contrary, Tucker Bell has produced evidence that he commenced a timely claim for benefits under the West Virginia Workers' Compensation Act. (JA_847).[3]

As a result of Tucker Bell's injuries, Plaintiffs filed a civil action on May 4, 2017, against the various Defendants. On June 5, 2017, Best Flow answered Plaintiffs' Complaint denying Plaintiffs' allegations and asserting various cross-claims against the other Defendants including

[2] SEI by separate appeal seeks to invoke Pennsylvania law and claim a statutory employer defense to the allegations against it. SEI's contractual acquiescence to West Virginia Workers' Compensation insurance coverage, however, the contract language demonstrates that its arguments lack all merit.

[3] ***Exhibit B*** to the Affidavit of Heather Bell is a copy of the Employee's and Physician's Report of Occupational Injury form (WC–1) that was executed by Heather Bell the day after the subject work-related incident, May 20, 2015, as well as by Dr. Roger Tillotson, MD on August 15, 2015. (JA_847) The submission of this form initiates the workers' compensation claim process in West Virginia. As evidenced by the stamp on the Report, it was timely received on August 19, 2015. *Id.*

cross-claims against Nicholson for contribution, apportionment, and intentional spoliation of evidence. *See* (JA_44-79).[4]

On July 31, 2017, Plaintiffs sought leave to amend their Complaint, which was granted on August 9, 2017. (JA_ 128-172,273-274). On August 15, 2017, Plaintiffs filed their Amended Complaint and subsequently Best Flow answered Plaintiffs' Amended Complaint again denying any wrongdoing *in toto* and asserting various cross-claims including cross-claims against Nicholson for contribution, implied indemnity, intentional spoliation, general negligence, contribution as to Plaintiffs' claims of loss of consortium, and apportionment of fault. (JA_275-308,475-524).

On September 15, 2017, Nicholson filed its Motion to Dismiss Best Flow's cross-claims. (JA_563-586). On this same date, Nicholson also filed its Motion to Dismiss Plaintiffs' First Amended Complaint in which Nicholson argued Plaintiffs' claims for deliberate intent were barred by the two year statute of limitations. (JA_533-562). Best Flow responded to Nicholson's Motion to Dismiss on September 26, 2017. *See* (JA_643-672).

On August 31, 2018, the Court entered an Order Denying, In Part, and Granting, In Part, Nicholson Construction Company's Motion to Dismiss the Plaintiffs' First Amended Complaint. (JA_848-856). The Court's Order denied Nicholson's Motion to Dismiss as to Plaintiffs' spoliation claims, but granted the Motion as to Plaintiffs' claims for deliberate intent and loss of consortium. *See* (JA_848-856).

On October 24, 2018, the Court entered an Order Denying, In Part, and Granting, In Part, Nicholson Construction Company's Motion to Dismiss Best Flow's Cross-claims. (JA_909-914). The Court's Order denied Nicholson's Motion to Dismiss as to Best Flow's spoliation claims,

[4] Nicholson has a history of serious Occupational Safety and Health Administration ("OSHA") violations, and has experienced at least one other similar incident to the one alleged to have occurred by Plaintiffs.

but granted the Motion as to Best Flow's claims for implied indemnity, contribution, and implied indemnity as to Plaintiffs' claims for loss of consortium. (JA_909-914). In the October 24, 2018, Order, the Court found that Best Flow's cross-claims against Nicholson were barred by a two year statute of limitations stating:

> [c]onsistent with the Court's Order entered August 31, 2018, that Plaintiffs' deliberate intent claims are barred by the applicable statute of limitations, the Court GRANTS Defendant Nicholson's Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.'s Cross-Claims for Deliberate Intent, Contribution, and Implied Indemnity.

See (JA_913-914).

On November 5, 2018, Best Flow sought reconsideration of the Court's October 24, 2018 Order arguing to the Court that its claims for contribution and implied indemnity are not subject to a two year statute of limitations. (JA_921-931). The Court by Order dated November 27, 2018, agreed and reversed its previous Order as to Best Flow and entered an Order denying Nicholson's Motion to Dismiss. (JA_1132-1137). It is from this denial that Nicholson appeals.

II. SUMMARY OF ARGUMENT

The Circuit Court in its Order of November 27, 2018, was correct to deny Nicholson's Motion to Dismiss Best Flow's cross-claims for contribution and implied indemnity under W.Va.R.Civ.P. 12(b)(6). Further, the Circuit Court was correct in its determination that it did have subject matter jurisdiction over the claims asserted against Nicholson in this matter and as a consequence Best Flow's cross-claims. The rationale for such determination is simple. Tucker Bell was a non-resident, non-temporary employee that was employed on a West Virginia construction project when he was injured while performing services in this State. Both pursuant to West Virginia law, as well as, contracts between the various companies working on the project Tucker Bell was required to be covered under West Virginia's Workers' Compensation

scheme and is entitled to all the benefits of that system including the ability, where appropriate, to file a deliberate intent claim against his employer.[5] Because Tucker Bell is an appropriate employee to be covered under West Virginia law, the Circuit Court has subject matter jurisdiction over all of the claims asserted in this matter including Best Flow's cross-claims. Moreover, despite Nicholson's assignments of error to the contrary, issues surrounding the application of Pennsylvania law and the issue of comity are irrelevant as this is a West Virginia accident governed by West Virginia law.

Further, it is Tucker Bell's right to file a deliberate intent action, and not whether he exercised his right in filing such action or if such action was timely, that presents Best Flow with the ability to seek, through contribution and its related claims, that Nicholson be responsible for its fair share of any liability for the alleged damages claimed by Plaintiffs. West Virginia has long recognized a product manufactures' right to seek contribution from an employer for deliberate intent actions in causing an accident like the one at bar.[6] Nicholson makes no argument to the contrary. Rather, it argues that apportionment and not contribution must be utilized in this case because of the Legislature's amendment of the joint and several liability statutes. Such amendment, however, occurred after Plaintiffs' causes of action accrued such that joint and several liability still attaches to the parties; thus, leaving contribution as the only viable option for Best Flow to ensure that Nicholson is held responsible for its actions.

Finally, the Circuit Court was correct in finding that West Virginia law controls with respect to the claims of spoliation asserted by Best Flow. Spoliation has long been considered a

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[5] *See Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 144, 475 S.E. 2d 138, 144 (1996)(once an employer is "subject to provision of the workers' compensation chapter" its employees are "entitled to all benefits and privileges under the Act, including the right to file a direct deliberate intention cause of action[.]"). *See also, Russell v. Bush & Burchett*, 210 W. Va. 699, 559 S.E.2d 36 (2001)(finding that a Kentucky resident, who was injured while working on a Kentucky construction project, and had filed a Kentucky workers compensation claim, was entitled to bring a deliberate intent action against his employer in West Virginia).

[6] *Sydenstricker v. Unipunch Prods.*, 169 W.Va. 440, 288 S.E.2d at 516-17 (1982)(a product manufacture can seek contribution from a plaintiff's employer through the use of the deliberate intent statute).

procedural rule under West Virginia law such that West Virginia Courts will apply West Virginia spoliation law to matters present before it.[7] Moreover, Nicholson's argument that because it destroyed the evidence in Pennsylvania (where it alleges there is no rule or law prohibiting such destruction) there is no remedy in West Virginia is simply absurd. Allowing Nicholson to escape West Virginia's spoliation law after moving its property to another state and then losing that property in its entirety is contrary to the public policy designed to protect the rights of local litigants to fully prosecute and defend their claims. To adhere to Nicholson's position would lead to absurd results, whereby any tortfeasors could, and undoubtedly would, conduct egregious forum shopping by removing evidence to a jurisdiction with more favorable spoliation laws. Because Best Flow lacks access to this destroyed evidence its ability to defend itself as to Plaintiffs' claims of defect have been impaired, and Best Flow may be subject to damages in this State because of the wrongful actions of Nicholson. Such conduct is certainly addressable under West Virginia law, and the Court was correct in reaching that determination.

III. STATEMENT REGARDING ORAL ARGUMENT

Best Flow does not believe that oral argument is necessary in this case. The facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. *See* W. Va. Revised R. App. P. 18(a). Best Flow further submits that this case would be appropriate for affirmance by memorandum decision. *See* W. Va. Revised R. App. P. 21(a), (c).

[7] *Williams v. Werner Enters.*, 235 W.Va. 32, 42, 770 S.E.2d 532, 542, 2015 W.Va. LEXIS 145, *30-32 (W.Va. Mar. 2, 2015).

IV. ARGUMENT

A. Standard of Review.

Petitioner Nicholson seeks an extraordinary remedy from this Court, the review and reversal of a Trial Court's denial of a Motion to Dismiss under Rule 12 of the West Virginia Rules of Civil Procedure. Traditionally, the denial of a Motion to Dismiss is an "interlocutory order" and, "therefore, not immediately appealable."[8] *See, e.g.*, Syl. pt. 2, *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 460 S.E.2d 54 (1995).[9] *See also*, *Hutchison v. City of Huntington*, 198 W. Va. 139, 147, 479 S.E.2d 649, 657 (1996) (indicating that this Court rarely addresses a circuit court's denial of a motion to dismiss since such an order is interlocutory).

To the extent that this Court has addressed this issue, it has traditionally only been following the entry of a final judgment. *See Ewing v. Bd. of Educ.*, 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998).[10] When a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of a Motion to Dismiss, this Court has reviewed the denial of the Motion *de novo*. *Id.* at 235, 548.

B. The Circuit Court has Subject Matter Jurisdiction over All Claims and Cross-claims against Nicholson because they arise under West Virginia Law in Response to a West Virginia Accident, and Seek West Virginia Remedies.

Unlike its arguments to the Court below, Nicholson focuses most of its appeal brief on the mistaken belief that West Virginia courts lack subject matter jurisdiction over it and its

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[8] While the Circuit Court, at the request of Nicholson, made the denial of its Motion a final and appealable decision, this Court is not bound by such determination and must ascertain on its own if it is proper to hear this appeal at this time. Parties to a lawsuit "cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking." Syl. Pt. 2, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995)." Syl. Pt. 1, *C & O Motors, Inc. v. West Virginia Paving, Inc.*, 223 W.Va. 469, 677 S.E.2d 905 (2009).

[9] A Motion to Dismiss should be granted only where "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996) (internal quotations omitted)). Motions to Dismiss are viewed with disfavor, and should rarely be granted. *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605-06, 245 S.E.2d 157, 159 (1978).

[10] ("Nevertheless, there do arise cases in which the presentation for appellate review of a circuit court's decision to deny a motion to dismiss is appropriate ***because the issue is raised in the context of an appeal from a final judgment***.") (Emphasis added).

actions occurring within this State. Nicholson advances these arguments despite the fact that Tucker Bell was injured in West Virginia, while performing work on a West Virginia project, funded in part by West Virginia tax dollars, pursuant to a contract to be performed in West Virginia, which required Nicholson to provide West Virginia Workers' Compensation coverage to its employees. *See Petitioner's Brief*, generally; (JA_403, 1083, 1101).

To reach this level of legal sophistry, Nicholson ignores the well pleaded facts of the Complaint and Amended Complaint choosing instead to insert its own extrinsic, and oftentimes misleading, facts and beliefs arguing to this Court that it should abandon not only its legal precedents, but also its common sense in reversing the Trial Court's denial of its Motion to Dismiss. Nicholson's obvious ploy is one that this Court has rejected time and time again. *See* Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977) ("The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"). The misleading "Nicholson Facts" upon which its appeal is based must be disregarded, and once disregarded the Trial Court's rulings as it pertains to Best Flow's cross-claims must be affirmed because the pleadings put forth facts that invoke the Trial Court's jurisdiction. (JA_ 18-22, 276-280, 776-79).

Specifically, Plaintiffs, and by incorporation Best Flow, have alleged the following facts concerning Tucker Bell's employment, which the Court must assume as true for purposes of this appeal:

> Defendant Nicholson was a subcontractor hired by Defendant SEI to design and install the foundation pilings for the Fabric Filter Building at Longview Power Plant.

> Plaintiff Tucker-Stephen G. Bell was an employee of Defendant Nicholson performing work in West Virginia on a non-temporary basis.
>
> In the preceding 365 day period, Plaintiff Tucker-Stephen G. Bell had performed work within the scope of his employment for Defendant Nicholson in the State of West Virginia for a period exceeding thirty (30) calendar days.
>
> Defendant Nicholson believed or reasonably should have believed that Plaintiff Tucker-Stephen G. Bell would be employed by Nicholson in the State of West Virginia for a period exceeding thirty (30) calendar days in a 365 day period.
>
> Plaintiff Tucker-Stephen G. Bell was required to be covered by West Virginia workers' compensation coverage under applicable West Virginia law, and is entitled to all benefits and privileges under the West Virginia Workers' Compensation Act.

(JA_278-80, 511-521). Further, this Court has stated, subject matter jurisdiction requires a showing that:

> (1) the court has the general power to grant the type of relief demanded under any circumstances; (2) the pleadings demonstrate that a set of facts may exist which could arguably invoke the court's jurisdiction; and (3) the allegation both with regard to the facts and applicable law are of sufficient substance to require the court to make, in an adversary proceeding, a reasoned determination of its own jurisdiction.

Saverse v. Allstate Ins. Co., 223 W.Va. 119, 131, 672 S.E.2d 255, 267 (2008).

Each of the foregoing requisites to establishing jurisdiction is met in this case.

Therefore, in considering this appeal, and specifically the issue of whether the Trial Court has subject matter jurisdiction over the claims against Nicholson, this Court must accept as true that Tucker Bell, an extraterritorial employee, was injured while employed in the State of West Virginia on a non-temporary basis and that he was covered under the West Virginia Workers' Compensation Act. (JA_278-80, 511-521). Once this Court assumes that posture, it must affirm

the Trial Court's Orders as to its finding of subject matter jurisdiction, because Nicholson's assertions are entirely predicated on an unsupported, contrary factual assertion that Tucker Bell was a temporary employee in the State of West Virginia who could not avail himself of the West Virginia court system for an accident occurring in this State.

i. The Trial Court has Subject Matter Jurisdiction over all Claims because Plaintiff Tucker Bell is an Extraterritorial, Non-Temporary Employee Entitled to Coverage and All Benefits under the West Virginia Workers' Compensation Act.

Nicholson contends that the Trial Court lacks subject matter jurisdiction over Plaintiffs' claims, and that the same extends to the entire suit, including Best Flow's cross-claims because: (1) a non-resident employee is barred from pursuing a deliberate intent claim against an out-of-state employer under the West Virginia Workers' Compensation Act, and (2) Tucker Bell received benefits pursuant to the Pennsylvania Workers' Compensation system, thus removing him from the West Virginia compensation system. These assertions are not only incorrect factually, but insufficient legally to support a claim for dismissal. The only relevant inquiry for purposes of subject matter jurisdiction is whether Tucker Bell was, or was required by law to be, covered by the West Virginia Workers' Compensation Act, not whether Plaintiff filed a Workers' Compensation claim in Pennsylvania, or availed himself of the benefits of the Pennsylvania Act.[11] *See Coburn v. C&K Indus. Servs.*, No. CIV. 5:07CV23, 2007 WL 2789468, at *1 (N.D.W. Va. Sept. 24, 2007).

Since the inception of the West Virginia Workers' Compensation Act, whether an employee was "temporary" or "nontemporary" has been an important consideration that has been

[11] Nicholson repeatedly argued to the Trial Court that Plaintiff Bell's claim for deliberate intent must be dismissed because he "affirmatively" chose to file his claim in Pennsylvania, despite knowing full-well that this statement was untrue.

afforded more weight than is customary in West Virginia's sister states. *Fausnet v. State Workers' Comp. Com'r, Workers Comp. Appeal Bd.*, 174 W.Va. 489, 493, 327 S.E.2d 470, 473 (1985). Nicholson exclusively relies on *Easterling v. American Optical Corporation*, 207 W.Va. 123, 529 S.E. 2d 588 (W.Va. 2000), for the proposition that a non-resident employee who receives Workers' Compensation benefits from another state is barred from pursuing a deliberate intent claim against an out-of-state employer under West Virginia law. Like most of Nicholson's brief, however, such a statement is only partially correct and omits key facts that undermine its entire argument.

Under West Virginia law, the Workers' Compensation scheme of another state is the exclusive remedy against the employer only where a non-resident employee is ***temporarily employed*** in West Virginia. *See*, Syl. Pt. 3, *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (W.Va. 1992) (Emphasis added) ("W.Va. Code § 23-2-1(c) (1975), makes the compensation law of another state the exclusive remedy against the employer for a non-resident employee who is ***temporarily employed in this state***, if such employee is injured in this state and is covered by his or her employer's workers' compensation in the other state"); *see also* Syl. Pt. 2, *Gallapoo v. Wal-Mart Stores*, 197 W.Va. 172, 475 S.E.2d 172 (1996) (Emphasis added). Once an employee, however, is no longer considered temporary under West Virginia's statutory scheme they are entitled to all benefits of West Virginia's Workers' Compensation system including the ability to bring a deliberate intent claim, if appropriate. *See Bell v. Vecellio & Grogan, Inc.*, 197 W.Va. 138, 144, 475 S.E. 2d 138, 144 (1996).

As noted above, for purposes of a Motion to Dismiss, Plaintiffs' allegations in their Complaint and Amended Complaint demonstrate conclusively that Tucker Bell was not temporarily employed in the State of West Virginia. (JA_ 18-22, 276-280, 776-79). Moreover,

Nicholson acquiesces that Tucker Bell was a non-temporary employee defined under the West Virginia Workers' Compensation Act, admitting the same within its Answer to the Plaintiffs' First Amended Complaint.[12] (JA_872). Further, West Virginia law does not exclude a non-resident, non-temporary employee from receiving the benefits of the West Virginia Act including the benefit of filing a deliberate intent action pursuant to W.Va. Code R. § 85-8-1, *et. seq.* Thus, the Trial Court correctly denied Nicholson's Motion to Dismiss.

Moreover, although conveniently omitted from Nicholson's brief, and as the Trial Court reasoned below, *Easterling* was decided prior to the enactment of W.Va. Code R. § 85-8-1, *et. seq.*[13] W. Va. Code R. 85-8-7.2 is dispositive of the issue of a non-temporary, extraterritorial employee seeking benefits pursuant to the West Virginia Act. (JA_852-853). Promulgated in 2008, W.Va. Code R. § 85-8-1, *et. seq., inter alia*, expands the employees entitled to coverage under the West Virginia Act to include non-resident employees working in West Virginia on a non-temporary basis. Specifically, W. Va. Code R. 85-8-7.2 provides, in relevant part:

> Extraterritorial employees who perform work in the State of West Virginia on a ***non-temporary basis*** (i.e., ***for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period***) and are not otherwise exempt from the West Virginia's workers' compensation laws ***must be covered with West Virginia workers' compensation coverage*** [].[14]

(Emphasis added).

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[12] "Defendant Nicholson Construction Company admits that Plaintiff Tucker-Stephen G. Bell performed work in West Virginia for Defendant Nicholson for a period exceeding thirty (30) calendar days within the 365-day period preceding May 19, 2015." (JA_872).

[13] The regulatory framework governing the West Virginia Workers' Compensation Act, and this Court's holding in *Easterling*, was updated in 2008, eight years after the *Easterling* decision. These Workers' Compensation rules were codified at W.Va. Code R. § 85-8-1 and clarify the individuals considered employees entitled to benefits under the act.

[14] By making it mandatory for any non-resident who is employed in West Virginia on a non-temporary basis to be covered with West Virginia Workers' Compensation coverage, West Virginia clearly intended to extend the benefits afforded by the West Virginia Workers' Compensation Act to such extraterritorial, non-temporary employees. W. Va. Code R. 85-8-7.2. (JA_836-837)

W. Va. Code R. 85-8-7.2 clarifies that non-resident employees working in West Virginia on a non-temporary basis (a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period), as Plaintiffs have alleged Tucker Bell to be, must be covered with West Virginia Workers' Compensation coverage, and, as such, are "subject to every provision of the workers' compensation chapter" and are "entitled to all benefits and privileges under the Act, including the right to file a direct deliberate intention cause of action[.]" *Bell*, at 197 W.Va. 138, 144 (1996). (JA_19-22). Thus, Nicholson's reliance on *Easterling* and avoidance of W.Va. Code R. § 85-8-1, *et. seq.*, is a misrepresentation of the current status of this area of law.

Equally fatal to Nicholson's argument is the definition of an "extraterritorial employee" set forth in W. Va. Code R. 85-8-3.7, which provides: "an employee who is not a resident of the State of West Virginia and who is subject to the terms and provisions of the workers' compensation law or similar laws of a state other than the State of West Virginia." W. Va. Code R. 85-8-3.7. Despite Nicholson's misrepresentations to the contrary, West Virginia law expressly contemplates non-temporary employees, such as Tucker Bell, being subject to another state's Workers' Compensation laws, but nonetheless being required to be covered by West Virginia Workers' Compensation and permitted to avail themselves of its remedies. Thus, Tucker Bell's alleged receipt of Pennsylvania Workers' Compensation benefits is not determinative of whether he can also maintain a West Virginia deliberate intent claim against Nicholson. *See also Coburn*, 2007 WL 2789468, at *1 (wherein an employer filed a Workers' Compensation claim in Pennsylvania on behalf of the plaintiff without his knowledge to avoid a suit on a deliberate intent claim under Ohio or West Virginia law, and the Court reasoned that the plaintiff's receipt of Pennsylvania Workers' Compensation benefits was not determinative of whether he could

maintain a West Virginia deliberate intent claim against his employer.). Therefore, whether Tucker Bell received Workers' Compensation benefits from another state is immaterial.

For this Court to accept Nicholson's theory, it must make a factual finding that Tucker Bell was merely a temporary employee in this State, something that is contrary to the facts pled by the Plaintiffs in their Amended Complaint, is unsupported by the record before this Court, and improper upon review of a Motion to Dismiss. (JA_19-22). Because Plaintiffs have sufficiently pled and Nicholson has acquiesced that Tucker Bell, a non-resident, worked for Nicholson in the State of West Virginia for a period exceeding thirty (30) days in the 365 day period preceding the subject accident occurring in West Virginia, he was required by law and Nicholson's contractual obligations to be covered by West Virginia Workers' Compensation coverage. Thus, Tucker Bell's status as a non-temporary, extraterritorial employee entitles him to "all benefits and privileges under the [West Virginia Act], including the right to file a direct deliberate intention cause of action" against Nicholson. (JA_19-22, 279, 853), *See Bell*, 197 W.Va. at 144.

C. The Principals of Comity Support the Application of West Virginia Law Under the Circumstances at Issue in this Matter.

The factors in a doctrine of comity analysis weigh irrefutably in favor of the Plaintiffs' ability to bring a deliberate intention action against Nicholson under West Virginia law. Nicholson, citing *Russell v. Bush & Burchett*, contends, with no analysis of the doctrine itself, that the doctrine requires the application of Pennsylvania law to this case, and precludes Plaintiffs' deliberate intention claim. *See Brief of Petitioner* at pp. 10-11[15]; *Russell v. Bush & Burchett*, 210 W. Va. 699, 559 S.E.2d 36 (2001). Rather than supporting its claim, *Russell*

[15] Although not addressed by Nicholson, when analyzing the doctrine of comity, the following facts are considered: (1) legal harmony and uniformity among the co-equal states should be promoted; (2) the rights and expectations of a party who has relied on foreign laws should be honored; and (3) the forum court must determine whether the foregoing rights are compatible with the laws and public policy of its jurisdiction with the greatest consideration of the three given to the final principle. (JA_684) *citing Pasquale*, 187 W.Va. at 300.

requires the exact opposite result than that claimed by Nicholson. In fact, *Russell* presents an almost identical factual scenario and addresses much of the same claims that Nicholson now seeks to have this Court address.

In *Russell*, the plaintiff, a Kentucky resident, working for a Kentucky company, on a project that spanned West Virginia and Kentucky, was injured in Kentucky while working on the Kentucky portion of the project. *Id.* at *38-40. Importantly, the plaintiff in *Russell* affirmatively sought and was granted Kentucky Workers' Compensation payments without seeking those same payments from West Virginia's compensation system. *Id.* at *41 n.6. Following the incident, the plaintiff and his wife filed a lawsuit in the Circuit Court of Kanawha County alleging deliberate intention against his employer and negligence against the West Virginia Department of Highways ("DOH"); the Circuit Court dismissed both claims, dismissing the deliberate intent claim against the employer based on the choice-of-law doctrine *lex loci delicti*, the law of the *situs* of the injury, after the employer contended that Kentucky law was controlling. *Id.* at *38-40. This Court, however, vacated the dismissals and remanded, stating that the doctrine of comity, and not *lex loci delicti*, controlled when the *situs* of the accident was other than West Virginia. *Id.* at *40. In its application of the doctrine, this Court noted the importance of the contractual relationship between the employer and the DOH wherein the employer contractually agreed that all of its employees on the project "would be covered by the West Virginia Workers' Compensation Fund and Act." *Id.* at *40-41. This Court then stated:

> This requirement by the DOH strongly evidences an affirmative public policy of this State, clearly communicated to [the employer], that all persons working on the Tug Fork bridge project would have all of the benefits of West Virginia workers' compensation law, including its 'deliberate intent' provisions.

Id. Therefore, this Court held that based on this foregoing contractual requirement that the employer was "unquestionably aware of and contractually agreed to comply with []" the public policy "that a full range of rights provided to workers under West Virginia law should protect and be available to workers on a West Virginia state-funded construction project." *Id.* This Court noted no countervailing factors that would "weigh heavily against applying West Virginia law in this circumstance." *Id.* at *41.

Exactly like the employer in *Russell,* Nicholson was contractually obligated to Defendant SEI to provide Workers' Compensation coverage for its employees, such as Tucker Bell, who were working on the West Virginia project, which was partially funded with public funds. (JA_1083 and 1101). Specifically, the contract provided:

> **Article 6; insurance**
> Prior to the start of Subcontractor's Work, ***Subcontractor shall procure and maintain in force for the duration of the Work, Workers Compensation Insurance***, Employers Liability Insurance, Comprehensive General Liability Insurance and ***all insurance required of Contractor under the contract Documents.*** Contractor and Owner shall be named as additional insured on each of these policies, except Workers Compensation.
>
> 3.0 INSURANCE
>
> 3.1 During the course of the work Nicholson will maintain Workmen's Compensation Insurance for all Nicholson employees employed at the site of work; Statutory Limits

(JA_1083 and 1101) (Emphasis added).

A review of the contractual insurance obligations of Defendant SEI, that were incorporated within its contract with Nicholson, evidence that not only was Nicholson contractually obligated to provide Workers' Compensation coverage, it was also required to provide ***West Virginia Workers' Compensation coverage***, the *situs* of the work performed.

> Paragraph B. [] Before commencing work, Supplier shall provide and shall require its subcontractors to provide the following types of insurance in amounts not less than indicated herein. []
>
> 1) ***Worker's Compensation Insurance in accordance with the statutory requirements of the location in which the Work is performed.***

(JA_403, 717, 1008) (Emphasis added).

Here, as Nicholson had a contractual obligation to obtain and provide West Virginia compensation coverage for Tucker Bell, it was on notice that West Virginia law would be applicable, and, pursuant to *Russell*, comity commands the application of West Virginia Workers' Compensation law to this case.[16]

Moreover, if this Court was willing, as it was in *Russell*, *supra*, to extend the deliberate intent exception to a Kentucky resident, who was injured in the Commonwealth of Kentucky, while working on a Kentucky project, and who affirmatively filed for and received Kentucky Workers' Compensation benefits, certainly this same ability would extend to a non-temporary employee working in West Virginia, who was injured in West Virginia, and covered under the West Virginia Workers' Compensation scheme. For Nicholson to argue otherwise while citing this case to the Court is not only irrational, but demonstrates the lengths that it would go to avoid its clear responsibility for this injury and Tucker Bell's subsequent alleged damages. The Court's analysis of Nicholson's appellate requests can and should end at this point and its appeal be denied.

Notably, comity also "does not require the application of the substantive law of a foreign state when that law contravenes the public policy of [West Virginia]. *Id. citing Paul v. Nat'l Life*,

[16] Even more telling is because Tucker Bell was a non-temporary employee in this State; Nicholson was required by law to cover Plaintiff with West Virginia Workers' Compensation coverage. Whether Nicholson complied with the law or not is irrelevant to the ultimate determination in this matter as Tucker Bell is entitled to all the privileges of working in this State and that includes the ability to file a deliberate intent claim and receive compensation under the West Virginia system.

177 W. Va. 427, 352 S.E.2d 550 (1986)(*citing Dallas v. Whitney*, 118 W.Va. 106, 188 S.E. 766 (1936). Thus, if the Court believes that it needs to continue with this comity analysis it must consider that, without a doubt, Pennsylvania's nearly absolute employer immunity, which prohibits tort recovery regardless of the intentional wrongdoing of an employer, and that has "never acknowledged or recognized [an intentional tort] exception to the exclusivity provisions" of its Act, is incompatible and irreconcilable with West Virginia's deliberate intention exception. *Barber v. Pittsburgh Corning Corp.*, 521 Pa. 29, 555 A.2d 766 (1989) (addressing the Pennsylvania Occupational Disease Act, but analogized to the WCA because of the close statutory language); *see Dean v. Handy & Harman*, 961 F. Supp. 798, 802 (M.D. Pa. 1997); *Alston v. St. Paul Insurance Cos.*, 612 A.2d 421, 426 (Pa. 1992); *Uon v. Tanabe Intern. Co., Ltd.*, 2010 U.S. Dist. LEXIS 128889*, *9 (E.D. Pa. 2010) ("[t]he employer's shield from tort liability on work-related injuries under the [Pennsylvania Workers' Compensation Act] is virtually impenetrable no matter how willful or wanton the employer's conduct[]").[17]

Thus, because Nicholson had an express contractual obligation to provide West Virginia compensation coverage to Tucker Bell, and it is undeniable that Pennsylvania's compensation laws are inharmonious with West Virginia's deliberate intention exception, the comity analysis categorically results in the Plaintiffs' ability to bring a deliberate intent action, and Best Flow's ability to bring its cross-claims, against Nicholson pursuant to West Virginia law. (JA_1083, 1101 and JA_403, 717, 1008).

[17] *Poyer v. Newman & Co., Inc.*, 514 Pa. 32, 35-36, 522 A.2d 548 (1987); *Kostryckyj v. Pentron Lab. Techs, LLC*, 52 A.3d 333, 337–40 (Pa. Super. Ct. 2012); *Kohler v. McCrory Stores*, 532 Pa. 130, 136, 615 A.2d 27, 30 (1992) (work related injury claims are only allowed if there has been a "fraudulent misrepresentation which leads to an aggravation of an employee's pre-existing condition" or if the employee's injuries were caused by a co-worker for reasons of personal animus."); W.Va. Code § 23-4-2.

D. Nicholson's Assignments of Error are Incorrect because the Trial Court Properly held that Best Flow Stated Causes of Action for Indemnity and Contribution against Nicholson.

i. West Virginia Law Recognizes that Best Flow may Maintain a Claim of Contribution Against Defendant Nicholson Construction Regardless of Plaintiffs' Assertion of the Same.

Nicholson's legal arguments are predicated on the mistaken belief that Pennsylvania law unilaterally controls such that the Trial Court lacks jurisdiction over not only Plaintiffs' claims against the Defendants, but, by extension, any claim asserted by Best Flow. As aforementioned, this is incorrect under well-established principals that the law of West Virginia, as the *situs* of the accident and the state in which the civil action is pending, controls with respect to the duties and obligations of the parties. Not only does West Virginia law control, but also Best Flow's claims for contribution and indemnity for which deliberate intent is the manner of proof are viable in this State.

Nicholson incorrectly asserts that Best Flow's contribution cross-claim must fail, because it is immune from tort liability under the West Virginia Workers' Compensation Act and that liability to its employee, Tucker Bell, cannot form the basis of a contribution claim. *Petitioner's Brief* at pp. 12-14 citing *Sydenstricker v. Unipunch Prods.*, 169 W.Va. 440, 288 S.E.2d at 516-17 (1982). As discussed herein, and as Nicholson does not substantively challenge, West Virginia law, however, unequivocally vests Best Flow with the right to assert a claim for contribution for which deliberate intent is the manner of proof. Notably, in *Sydenstricker*, this Court unequivocally ruled that a claim for employer contribution was available to a product manufacturer under West Virginia law, holding:[18]

[18] W.Va. Code § 23-4-2 has been amended since *Sydenstricker*, but the provisions of § 23-4-2(c) remained consistent throughout the previous amendment process. The 2015 amendments, while modifying this section do not

> An employer who may have caused a 'deliberate intent' injury under *Mandolidis* to his employee should not escape some liability for that injury merely because the injured employee has another theory for recovery of his injuries as against a third party. . . .We, therefore, conclude that the deliberate intent exception contained in W.Va. Code 23-4-2, permits a defendant to bring a third-party action in contribution against the employer of the injured plaintiff.

Id. at 519. There cannot be a more unambiguous statement of West Virginia law regarding a product manufacturer's right to pursue a contribution claim against a plaintiff's employer than what was stated by this Court in *Sydenstricker*.

Best Flow's ability to assert its contribution claim against Nicholson also does not hinge upon Plaintiffs pursuing a cause of action for deliberate intent. *Id.* at 514. For example, in *Sydenstricker*, the plaintiff chose not to pursue an action in deliberate intent against his employer and instead sued several manufacturers of a punch press and its component parts after he was injured while using the same. *Id.* at 517. Regardless, the manufacturer defendants served a third-party complaint against the employer and sought contribution, alleging the employer was guilty of deliberate intent. *Id.* at 514. This Court ruled that the plaintiff's decision not to bring the available claim of deliberate intent did not exclude the named defendants from seeking contribution upon which deliberate intent was the manner of proof. *Id.* at 517. This Court again reached this conclusion in *Goodwin v. Hale*, 198 W.Va. 554, 482 S.E.2d 171 (1996), writing:

> [T]he deliberate intent exception contained in W.Va. Code § 23-4-2 (1994) does permit a defendant to bring a third-party action on a contribution theory against the employer of an injured plaintiff. However, the ultimate recovery can only be obtained if the employer was guilty of a 'deliberate intention' injury under W.Va. Code § 23-42-2(c)(2)(i) or (ii) (1994).

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substantially change the meaning of the sections or the rationale used by the Courts to allow a claim for contribution.

Goodwin, 198 W.Va. 554, 556-557 (W.Va. 1996), citing *Sydenstricker, supra.*[19]

Because West Virginia law controls the duties and obligations of the parties, Best Flow can undoubtedly assert a claim for contribution for which deliberate intent is the manner of proof.

ii. West Virginia Law Recognizes that a Claim for Contribution is Appropriate Even if Different Legal Theories are Asserted Against the Defendant and the Third-Party Defendant(s).

Nicholson claims that Best Flow's contribution claims should be barred because "the right to contribution arises when persons hav[e] a common obligation, either in contract or tort [. . .]." *See Petitioner Nicholson's Brief* at p. 12. (citing *Sydenstricker v. Unipunch Prods.*, 169 W.Va. 440, 452, 288 S.E.2d 511, 519 (W.Va. 1982). To the extent that Nicholson is attempting to argue that it cannot be jointly liable in tort because Best Flow's contribution claim is based upon different legal theories than those set forth in Plaintiffs' Amended Complaint, that reasoning is wholly contradicted by *Board of Educ. v. Zando, Martin & Milstead, Inc.* In *Zando*, this Court expressly stated:

> The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. Not only is judicial economy served, but such a procedure also furthers one of the primary goals of any system of justice--to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts. Moreover, as we have already indicated, joinder of

[19] Federal courts have also reached the same conclusion as this Court. In *West v. American Electric Power Company, Inc.*, the United States District Court for the Southern District of West Virginia found that "The Supreme Court of Appeals of West Virginia has held that, pursuant to [§23-4-2], joint tortfeasors employers are immune from third-party contribution suits where they would be immune to a suit filed by the employee, but that employers do not enjoy immunity where the employee could press the claim against the employer." *West v. American Electric Power Company, Inc.*, 2010 U.S. Dist. LEXIS 105932 (S.D. W.Va. Oct. 4, 2010), citing *Sydenstricker. See also Kirkhart v. PPG Indus.*, 2006 U.S. Dist. LEXIS 89974, *26-27 (N.D. W.Va. 2006) (December 12, 2006) (unpublished) ("[l]ikewise, the "deliberate intention" exception to an employer's immunity under the Workers' Compensation Act can also be utilized by third-party claimants"), citing *Sydenstricker*.

> contribution claims serves to ensure that those who have contributed to the plaintiff's damages share in that responsibility.

Board of Educ. v. Zando, Martin & Milstead, Inc., 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (W. Va. 1990), (citing *Bowman v. Barnes*, 168 W. Va. 111, 282 S.E.2d 613 (1981)) (Emphasis added). In *Syndenstricker*, *supra*, this Court stated "[t]he fact that the various tort claims asserted by the plaintiff involve different theories or causes of action does not prevent the defendants from being joint tortfeasors so long as their actions resulted in common liability to the plaintiff." *Sydenstricker*, at 517.

This Court further determined that the Trial Court in *Sydenstricker* erred in refusing to grant a verdict credit for the non-settling defendant for the good faith settlements that were entered into between the plaintiff and the other defendants. *Id.* at 802. This Court began by examining the right of inchoate contribution under West Virginia law, and determined:

> Thus, the right of inchoate contribution is not confined only to cases of joint negligence. Instead, it arises under any theory of liability which results in a common obligation to the plaintiff. Where, as here, the plaintiff seeks damages for a breach of contractual obligations, the named defendant is entitled to assert claims for contribution against other parties liable to the plaintiff for the same injury even though the defendant was not a party to the contract between the plaintiff and the other parties.

Id. This makes it abundantly clear that the focus is not on the legal theories asserted by Plaintiffs, but instead, on the Plaintiffs' injury. Therefore, it is inconsequential that different legal theories are asserted against Best Flow and Nicholson. In fact, in the seminal case on contribution in West Virginia, *Haynes v. Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (W. Va. 1977), this Court specifically approved a contribution claim based upon two completely different theories of negligence. In that case, a municipality was sued for personal injuries resulting from its alleged failure to abate a grade difference between a public road and railroad crossing that had

apparently been abandoned. *Id.* at 546. The City was sued, in part, for failure to maintain its road. *Id.* Conversely, a railroad company was sued by the plaintiff for its negligent removal of railroad ties and failing to otherwise properly maintain the crossing. *Id.* Thus, in finding whether a claim for contribution exists, the focus is not on the legal theories being asserted, but instead the injury and the causes of the injury. *Id.* This principle was later affirmed by this Court in *Zando*, stating:

> Our definition of the right of contribution in *Sydenstricker* makes no distinction among theories of recovery, but focuses on the common liability of the defendants for plaintiff's injuries. If those injuries arise from the combined actions of the defendants, they are jointly liable to the plaintiff and may seek inchoate contribution among themselves regardless of the theories of recovery asserted against them individually.

Zando at 806 (citing *Sydenstricker*, at 518 (1982)) (Emphasis added). Thus, "[c]ontribution rests on common liability, not on joint negligence or joint tort. Common liability exists when two or more actors are liable to an injured party for the same damages, even though their liability may rest on different grounds." *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love*, 209 W.Va. 318, 330, 547 S.E.2d 256, 268 (2001) (citing with approval *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 685, 756 A.2d 526, 536 (2000)). As can be seen from the *Zando* case, the fact that different legal theories are pursued against Nicholson and Best Flow is completely irrelevant.

Accordingly, Nicholson's argument that contribution is precluded because there is no joint liability between itself and Best Flow is wholly without merit.[20]

[20] To the extent this Court reverses the Trial Court's dismissal of Plaintiffs' loss of consortium claims, as it should; further support exists at law to support Best Flow's claims for contribution against Nicholson. Loss of consortium is recognized in West Virginia as a separate and distinct claim from a cause of action for deliberate intent and/or Workers' Compensation, and is a legally protected right. In *Parsons v. Shoney's*, the Southern District of West Virginia, interpreting West Virginia law, evaluated a husband's right to join in a *Mandolidis* action with a claim for loss of consortium. *Parsons v. Shoney's, Inc.*, 580 F. Supp. 129 (S.D. W.Va. 1983). The Court stated that the action for loss of consortium exists independently of the wife's ability to bring her claim, and that the consortium claim does not depend on "specific statutory authority – it stems from the marital relationship itself." *Id.* at 132; *See e.g.*

iii. Best Flow's Contribution Cross-claims are not Barred by a Statute of Limitations Defense.

Nicholson also claims that Plaintiffs' deliberate intent claim is barred by the applicable statute of limitations and, as such, the circuit court lacks subject matter jurisdiction as to Best Flow's claims for contribution for which deliberate intent is the manner of proof and implied indemnity pursuant to the same statute of limitations defense.[21] The trial court disagreed, however, correctly finding Best Flow's cross-claims were separate and distinct from the Plaintiffs' deliberate intent claim, and therefore not barred by the deliberate intent two year statute of limitations.[22] (JA_1136-37).

The statute of limitations for deliberate intent actions is two years, W.Va. Code § 23-42-2, *et. seq.*, but claims for contribution for which deliberate intent is merely the manner of proof and claims for implied indemnity are not governed by a two year statute of limitations because they arise as a result of the commencement of litigation and can be asserted at any time prior to the entry of judgment. *See e.g. Charleston Area Med. Ctr, Inc. v. Parke-Davis*, 217 W.Va. 15, 614 S.E.2d 15 (2005); *Howell v. Luckey*, 205 W. Va. 445, 518 S.E.2d 873, 1999 W. Va. LEXIS 98 (1999); *Haynes v. Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977).

King v. Bittinger, 160 W.Va. 129, 231 S.E.2d 239, 243-44 (W.Va. 1976); *Collins v. Dravo Contracting Company*, 114 W.Va. 229, 171 S.E. 757 (1933). Thus, the Plaintiffs' loss of consortium claims operate outside of the immunity afforded an employer under the West Virginia Workers' Compensation Act.

[21] Although the viability of Best Flow's claims do not hinge upon the success of Plaintiffs' claim for deliberate intent, Plaintiffs' deliberate intent claims are not barred by the statute of limitations and relate back pursuant to West Virginia Rule of Civil Procedure 15(c) because Plaintiffs' deliberate intent claim arose out of the same conduct, transaction, or occurrence as set forth in their initial Complaint as such claims arise out of the workplace accident described in express detail within the Complaint.

[22] Despite the Court's ruling on this statute defense, this defense was never raised or briefed by Nicholson as to Best Flow's cross-claims. Instead, the Circuit Court *sua sponte* dismissed Best Flow's indemnity and contribution claims pursuant to a two year statute of limitations after dismissing the Plaintiffs' deliberate intent claim pursuant to the statute of limitations. Upon reconsideration, however, the Court found that a two year statute of limitations was inapplicable to Best Flow's cross-claims. *See* (JA_109-127, JA_563-586, JA_740-746, JA_909-914, JA_921-931, JA_1126-1131, JA_1132-1137).

In asserting a claim for contribution for which deliberate intent is the manner of proof, this Court has determined that for purposes of such an action, Best Flow would stand in the place of Plaintiffs. *See Murphy v. E. Am. Energy Corp.*, 224 W.Va. 95, 680 S.E.2d 110 (2009). Thus, if the substantive ability of a plaintiff exists to bring a claim for deliberate intent, so too does the ability of a third-party to bring a claim for contribution for which deliberate intent is the manner of proof, regardless of whether the plaintiff actually brings such a claim or if he succumbs to a procedural defect such as the statute of limitations. *Howell v. Luckey*, 205 W. Va. 445, 518 S.E.2d 873, 1999 W. Va. LEXIS 98 (1999) ("Our right of contribution before judgment is derivative in the sense that it may be brought by a joint tortfeasor on any theory of liability that could have been asserted by the injured plaintiff."). The ability to bring the claim not whether the claim was actually brought allows Best Flow to pursue its claim for contribution under West Virginia law.

Because the Trial Court properly determined that Tucker Bell was an extraterritorial, non-temporary employee entitled to the benefits of the West Virginia Act, and had a substantive ability to assert a direct claim for deliberate intention against Nicholson, but for the procedural defect with that claim (*statute of limitations*), there is no question that Best Flow's claims for contribution for which deliberate intent is the manner of proof and indemnity are proper and unaffected by any statute of limitations defense. (JA_853).

iv. It is Inappropriate for a Trial Court to Dismiss a Claim for Implied Indemnity on a Motion to Dismiss Without a Determination of Fault.

Nicholson appears to argue that the Trial Court erred by not dismissing Best Flow's cross-claim for implied indemnity based on the fact that Plaintiffs have asserted a cause of action against Best Flow. *Petitioner's Brief* at pp. 13-14. As support for this proposition, Nicholson refers the Court to the general rule that in order for a party to recover for implied indemnity it

must be without fault. *Id.*at p. 13. Here, however, there has been no determination of fault. Simply because Plaintiffs have alleged acts and omissions on the part of Best Flow, this does not rise to the level of proof that Best Flow is responsible for this incident in any manner. As part of its cross-claim, Best Flow denied Plaintiffs' allegations of fault *in toto* and asserted that any such fault for the incident was due either to Tucker Bell's own negligence, the actions of the other Defendants, or unknown and unnamed third-parties. (JA _44-79, 475-524).

Certainly, Best Flow is entitled to pursue its claims until a fault determination has been made. Thus, dismissal would be inappropriate at the Motion to Dismiss stage, and the Trial Court must be affirmed.

E. West Virginia Code § 55-7-13c Enacted after the Accrual of Plaintiffs' Cause of Action Operates Prospectively, and not Retroactively.

Nicholson argues that there is no longer a right to contribution because of the enactment of West Virginia Code § 55-7-13c, stating that co-defendants in a civil action are to be held severally, and not jointly liable for any damages awarded.[23] *See Petitioner's Brief* at pp. 14-15. Nicholson, however, provides no support for its position, especially because the apportionment statute at issue was enacted and became effective after Plaintiff Tucker's Bell's accident. *Id.* As such, at the time of the alleged injury, the liability of defendants was joint and several and was subject to West Virginia's modified joint and several liability schemes. Under West Virginia law, the basic purpose of the joint and several liability rule was to permit the injured plaintiff to select and collect the full amount of his damages against one or more joint tortfeasors. The effect of this rule, however, was mitigated between defendants in that they could seek comparative contribution from each other to ensure that each defendant paid its fair share of any liability. *See*

[23] While Nicholson raises this argument here, the Court below never addressed this issue or determined how it would apply the concepts of apportionment, joint and several liability, or contribution. Nicholson simply seeks to have Best Flow's contribution claim dismissed without any analysis of whether joint and several liability is still the appropriate mechanism to allocate fault.

generally, *Sitzes v. Anchor Motor Freight*, 169 W. Va. 698, 707, 289 S.E.2d 679, 685 (1982). This mitigation was further extended to those defendants seeking contribution from an employer by virtue of this Court's holding in *Sydenstricker v. Unipunch Prods.*, 169 W.Va. 440, 288 S.E.2d 511(1982). In effect prior to the enactment of the new apportionment statute, West Virginia, by statute and common law, had established a mechanism for plaintiffs to recover while ensuring that all defendants, including employers, were responsible for their respective share of any injury. Thus, while Nicholson couches its arguments in terms of apportionment versus contribution, Nicholson's actual argument is that West Virginia Code § 55-7-13c should be applied retroactively to deprive Plaintiffs of a substantive right to joint liability.[24]

Retroactivity, however, is simply not favored in the law. In analyzing statutory retroactivity, this Court has recognized on innumerable occasions that "a statute is always presumed to operate prospectively unless the intent it shall operate retroactively is clearly expressed by the terms or is necessarily implied from the language of the statute." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994); *see also Martinez v. Asplundh Tree Expert Co.*, No. 17-0039, 2017 W.Va. LEXIS 510 (June 16, 2017) at Syl pt. 2 ("The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect.") (internal citations omitted); *Roderick v. Hough*, 146 W. Va. 741,746, 124 S.E.2d 703 (1961).

[24] Best Flow's cross-claim seeks both contribution and apportionment from Nicholson depending on which statutory scheme is appropriate. If joint and several liability still applies to Plaintiffs' claims because of when those claims accrued then Best Flow's only remedy under West Virginia law is to seek contribution from all other potential tortfeasors. If the proper scheme is apportionment, Best Flow would not only be entitled to seek apportionment as to Nicholson, but would also be able to seek apportionment from potential non-parties to this litigation. Whether the appropriate allocation scheme is contribution or apportionment is ultimately irrelevant to Best Flow's claims. However, until this Court opines on the proper allocation method, Best Flow has applied the law as it was at the time of Tucker Bell's injury for purposes of allocation of fault to ensure that its interests are protected.

The law in West Virginia at the time the cause of action accrued, *i.e.* the date of injury, was that defendants were jointly liable with a right to contribution to offset that liability. This Court's most recent pronouncement on the issue of retroactivity was *Martinez v. Asplundh Tree Expert Co.*, No. 17-0039, 2017 W.Va. LEXIS 510 (June 16, 2017). In *Martinez*, this Court again analyzed retroactivity in the confines of the punitive damages statute, W.Va. § 55-7-29, and reiterated this Court's longstanding retroactivity considerations and analysis that must be applied prior to a statute's retroactive application. *Id.* at 616-18. With regard to W.Va. § 55-7-29, this Court found that because the statute was intended by the legislature to apply retroactively, it could indeed be applied in that manner, as it affected a party's collection or damages and not its vested or substantive right. *See Martinez, generally.* This Court reiterated that a substantive statute is one that "diminishes substantive rights or augments substantive liabilities and should not be applied retroactively to events completed before the effective date of the statute [...] unless the statute provides explicitly for retroactive application" while a remedial statute is a statute that relates to practice, procedure, remedies and does not affect substantive or vested rights". *Id* at 617, 587. (internal citations omitted). In further distinguishing the two statutory types, this Court has clarified that a substantive statute will not be applied to "pending cases or cases filed subsequently based upon facts completed before the statute's effective date" unlike a remedial statute that may have a retroactive application.[25] *Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329,334-35, 480 S.E.2d 538 (W. Va. 1996).

[25] While West Virginia has not addressed this issue, Courts that have addressed the concept of whether "joint and several liability statutes" create substantive or remedial rights have determined that such statutes create, define, and regulate rights, duties and obligations and are, therefore, substantive laws creating substantive rights. *See generally, Matthies v. Positive Safety Manufacturing Co.*, 2001 WI 82, 244 Wis. 2d 720, 628 N.W.2d 842 (Wis. 2001), (the Wisconsin Supreme Court reviewed whether a statute on contributory negligence that was amended after the plaintiff was injured, but before he filed his lawsuit, applied to limit the damages he could collect to an amount representative of each tortfeasor's causal negligence, holding "retroactive application of § 895.045(1)'s modification of joint and several liability is an unconstitutional violation of due process." *See also, Kempthorn, Inc. v. Wallace*, Case No. 98CA00087, 1998 Ohio App. LEXIS 4715, at *9 (Ct. App. Sep. 14, 1998) ("The legal principal of joint

The classification of a statute as either substantive or remedial is not alone determinative of its retroactive application; instead, even a remedial statute may not be applied retroactively to events completed prior to its enactment if it "diminishes substantive rights or ***augments substantive liabilities***" unless the statutory language expressly provides for its retroactive application. *Martinez, supra* at 586-87 (internal quotation marks omitted) (quoting Syl. pt. 2, *Pub. Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (W. Va. 1996)).This Court, in *Public Citizen*, further clarified that a remedial statute should not be applied retroactively if it would attach a "new legal consequence to a completed event." *Public Citizen* at *335.

Here, an analysis of § 55-7-13c, enacted six (6) days after Tucker Bell's accident, reflects that apportionment must not be applied retroactively, because it is a substantive right of a party, and doing so would undoubtedly augment the substantive liabilities of the parties. Thus, Best Flow's claim of contribution is appropriate in this case because the apportionment statute was enacted after Tucker Bell's accident, lacks language providing for either express or implied retroactivity, and its retroactive application would augment the substantive claims and liabilities of the parties.

F. West Virginia Law, Not Pennsylvania Law, Controls Best Flow's Claims of Spoliation of Evidence

Nicholson does not challenge the legal sufficiency of Best Flow's spoliation claims under West Virginia law, but instead argues that its actions in destroying the evidence associated with the West Virginia accident must be judged under Pennsylvania law. *Petitioner's Brief* at pp. 15-

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and several liability had been recognized long before the enactment of R.C. 2307.31(B)(2). We find such right to be substantive in nature and not merely remedial; therefore, the application of R.C. 2307.31(B)(2) to the case *sub judice* violates Section 28 of Article II of the Ohio Constitution.")

16. In support of this proposition, Nicholson argues, under the doctrine of *lex loci delicti*, that because it destroyed the items in Pennsylvania, that Pennsylvania is the actual site of Best Flow's injury. *Id.* On its way to reaching this conclusion, Nicholson ignores both law and fact surrounding the issue of spoliation. Although Best Flow does not dispute that a proper inquiry of the applicable law requires an analysis under the doctrine of *lex loci delicti*, Nicholson's unfounded supposition, however, that Pennsylvania is the place of injury, is patently incorrect.

This Court addressed a very similar issue in *Williams v. Werner Enters.*, 235 W.Va. 32, 42, 770 S.E.2d 532 (2015). In *Williams*, this Court expressly stated that in a product liability case, West Virginia spoliation rules are controlling:

> This Court has, therefore, consistently applied the common-law "*lex loci delicti* choice-of-law rules; that is, the substantive rights between the parties are determined by the law of the place of injury." The tort of intentional spoliation of evidence is, in part, a procedural rule designed to protect local courts from the deliberate destruction of evidence necessary to prosecute claims. Because Werner's disposition of the truck occurred in West Virginia, and allegedly impinged upon the plaintiffs' prosecution of a West Virginia product liability injury suit, West Virginia's intentional spoliation rules govern this case.

Williams v. Werner Enters., 235 W.Va. 32, 42, 770 S.E.2d 532, 542, (2015) (internal citations omitted). Moreover, West Virginia law recognizes that "where a cause that is put in motion in one jurisdiction results in injury in another, it is the law of the latter jurisdiction that controls the substantive rights of the parties." *Dallas v. Whitney*, 118 W.Va. 106, 188 S.E. 766 (1936).

Moreover, the "tort of intentional spoliation of evidence is, in part, a procedural rule designed to protect local courts from the deliberate destruction of evidence necessary to prosecute claims." *Werner*, at p. 542 n.21. Pursuant to *McKinney v. Fairchild Int'l, Inc.*, 199 W.Va. 718, 487 S.E.2d 913, 922 (1997), "West Virginia procedure applies to all cases before

West Virginia courts." Thus, regardless of whether the Trial Court applied the substantive law of Pennsylvania, it would apply the West Virginia procedural rule of spoliation of evidence according to *lex loci delicti*.

Here, Plaintiffs' injuries are their inability to prove their product liability case in West Virginia, and Best Flow's injury is its inability to fully defend against a product liability case in West Virginia, both of which are caused by Nicholson's spoliation. Further, Nicholson's argument again hinges on this Court adopting facts that Nicholson interjected into the record below, that the components at issue were disposed of in Pennsylvania by a Pennsylvania resident. Nowhere within Plaintiffs' Complaint or Amended Complaint have they pled that the components were disposed of by Nicholson in Pennsylvania. (JA_17-43, JA_275-308). Thus, consideration of this extrinsic fact is inappropriate for purposes of a Motion to Dismiss pursuant to the Rule 12(b)(6) standard. *See John W. Lodge Distrib. Co. v. Texaco*, 161 W.Va. 603, 604-05, 245 S.E.2d 157, 158 (1978).

Because Best Flow and Plaintiffs' injuries flowing from Nicholson's spoliation occurred in West Virginia, neither suffers a personal affront in Pennsylvania. Therefore, West Virginia's spoliation of evidence law governs this case.

i. Nicholson's Duty to Preserve Evidence Arose in West Virginia and the Application of Pennsylvania Law to these Claims is Contrary to the Public Policy Behind Spoliation.

Not only does Nicholson's spoliation impinge upon Best Flow's ability to defend this product liability injury suit and Plaintiffs' ability to prosecute the same, the duty to preserve the evidence also arose in West Virginia following Tucker Bell's accident while he was working for Nicholson at Longview in Monongalia County, West Virginia. (JA_279-80). Although Nicholson may have made the affirmative decision to move the component parts to

Pennsylvania, its decision does not and cannot affect the underlying duty to preserve evidence under West Virginia law.

Allowing Nicholson, or other Defendants, to escape West Virginia spoliation law by moving its property to another state and then losing that property in its entirety is contrary to the policy behind the law of spoliation, which protects the rights of local litigants to fully prosecute and defend their claims. To adhere to Nicholson's position would lead to absurd results, whereby any tortfeasors could, and undoubtedly would, conduct egregious forum shopping by removing evidence to a jurisdiction with more favorable spoliation laws. This Court should neither condone nor encourage such actions, and a ruling in favor of Nicholson on the spoliation claims in this circumstance would do both.

ii. Pennsylvania Law Recognizes the Spoliation Doctrine and Provides a Remedy Pursuant to the Same.

Even assuming *arguendo* that Pennsylvania law controls the parties' spoliation claims, Pennsylvania law does not leave the parties without a remedy.[26] Despite Nicholson's attempts to misdirect this Court into the mistaken belief that Pennsylvania law leaves the parties with no remedy for the spoliation of evidence, the Spoliation Doctrine is widely applicable in Pennsylvania when a party voluntarily assumes a duty to preserve evidence, and negligently or intentionally destroys that evidence, and Pennsylvania Courts may impose sanctions on parties

[26] The final count of Best Flow's cross-claim asserts a claim for general "Negligence as to Defendant Nicholson Construction Company" as to the manner in which it handled Best Flow's product and other items following the alleged injury. Nicholson did not address this count with the Trial Court and the count still remains viable. Best Flow, however, is aware that this Court has determined that there is no cause of action for negligent spoliation of evidence between parties to a civil action. Syl. Pt. 2, *Hannah v. Heeter*, 213 W.Va. 704, 708, 584 S.E.2d 560, 564 (2003). Best Flow, however, asserts that such prohibition is specifically designed for claims between plaintiff and defendant wherein the aggrieved party has a mechanism through sanction or adverse inference instruction to remedy the spoliation. *Id.* at Syl. pt. 3. To the extent that Nicholson would use its Reply to raise this issue, Best Flow objects as Nicholson failed to move to dismiss this count before the Trial Court, and as such, this issue has not been ruled on below.

that willfully or negligently spoliate evidence that they have a duty to preserve. *See Mount Livet Tabernacle v. Edwin L. Wiegand Div., Emerson Elec. Co.*, 2001 PA Super 232, 781 A.2d 1263.

In *Pirocchi v. Liberty Mut. Ins. Co.*, 365 F. Supp. 277 (E.D. Pa. 1973), the plaintiffs therein conceded that the employer was initially under no duty to take possession of evidence and preserve it for plaintiff's use in possible litigation. The employer, however, voluntarily assumed the duty to take possession of and preserve the evidence. Therefore, the Pennsylvania Court recognized:

> Under the general law of torts, a defendant may voluntarily assume a duty by affirmative conduct which would not exist in the absence of such conduct. Under the law of Pennsylvania, a person who makes an engagement, even though gratuitous, and actually enters upon its performance, will incur tort liability if his negligence thereafter causes another to suffer damages.

Pirocchi, 365 F. Supp. 277, 281 (internal citations omitted); *See also Croydon Plastics Co. v. Lower Bucks Colling & Heating*, 698 A.2d 625, 629 (Pa. Super. 1997) (internal citations omitted). Consistent with the vast majority of cases, *Pirocchi* stands for the proposition that a cause of action for spoliation arises from: (1) a specific request for preservation from the plaintiff; or (2) a voluntary assumption of a duty to preserve by affirmative conduct.

Nicholson's voluntary assumption of a duty to preserve evidence by its affirmative conduct subsequent to the accident has not only been pled by Plaintiffs in their Complaint and Amended Complaint, but is also separately reflected in a letter from Nicholson's previous counsel in response to a preservation demand. [27] (JA_36-38, JA_671-672).[28] This letter outlines

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[27] Nicholson's counsel in the instant appeal and underlying litigation were not the authors of the letter at issue. *See* (JA_672).

[28] "108. A representative, agent, and/or employee of Nicholson acknowledged that Nicholson retained the Swivel, hose, and other component parts of the Casagrande Drill Rig for the sole purpose of determining the cause of the incident in anticipation of Plaintiffs' claims and/or the impending civil litigation.

Nicholson's affirmative collection and retention of the components in anticipation of litigation, stating in relevant part:

> ***In response to the incident***, Nicholson dispatched its Shop Superintendent, Eddie Gibbs, to the job site from Nicholson's shop in Cuddy, Pennsylvania, to investigate. ***Mr. Gibbs collected the swivel and other components and transported them back to Cuddy in a Nicholson truck.*** At Nicholson's shop, Mr. Gibbs and other Nicholson employees examined these parts and ***placed them in a wooden skid box, labelled for storage with Mr. Bell's name and date of the incident, consistent with direction given by Nicholson's Manager of Safety***, Jason Timmons. ***Mr. Gibbs was instructed by Mr. Timmons and by Thomas Beggs, Nicholson's Vice President for Risk Management, to preserve these items for further use in any further investigation or potential litigation concerning Mr. Bell's injury.***

(JA_671) (Emphasis added).

As supported by Nicholson's own admissions, there is no question that pursuant to Pennsylvania law there is a remedy under the same for Nicholson's spoliation of evidence.

V. CONCLUSION

Respondent Best Flow Line Equipment Company, L.P., requests that the Circuit Court of Monongalia County's rulings, as they pertain to the denial of Petitioner Nicholson Construction Company's Motion to Dismiss the Cross-claims of Best Flow, be affirmed in full.

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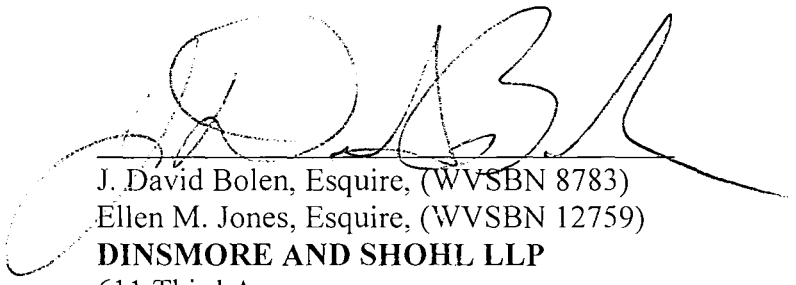
109. By acknowledging the retention of the Swivel, hose, and other component parts of the Casagrande Drill Rig and representing that the same would be retained, the Defendant Nicholson assumed a duty to the Plaintiffs to maintain the same." (JA_36-38).



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