IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 21-0485

WW CONSULTANTS, INC.,

Petitioner,

v.

A-3 USA, INC., ORDERS CONSTRUCTION COMPANY, INC., PIPES PLUS, INC., and POCAHONTAS COUNTY PUBLIC SERVICE DISTRICT,

Respondents.

AMENDED BRIEF OF RESPONDENT, A-3 USA, INC.

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STATEMENT OF THE CASE

Pursuant to West Virginia rule of Appellate Procedure 10 (d), Respondent A-3 USA, Inc. ("A3"), provides this Statement of the Case as it deems to be necessary to correct inaccuracies and/or omissions in the Petitioner's Brief.

This matter originated when WW Consultants, Inc. ("WWC"), whose predecessor firm was the design engineer for the design and construction of the wastewater treatment plant and collection system built by the Pocahontas County Public Service District ("PSD") to serve Snowshoe Mountain and surrounding areas in Pocahontas County, filed suit against PSD to collect fees it alleged it was owed. WWC's original fee claim was resolved during mediation, but certain counterclaims asserted by the PSD alleging professional design negligence and breach of contract by WWC survive. This appeal concerns the dismissal of WWC's third-party claims.

The Circuit Court properly dismissed the third-party claims filed by WWC against A3 and others improperly struck a contingent Notice of Intent to Attribute Fault filed by WWC. WWC's third-party claims were filed in response to allegations made in an Amended Counterclaim filed by the PSD alleging that WWC was negligent in its design of the plant and sewer system and that WWC breached its contract with the PSD for the design and construction of the plant. A review of the record in this matter demonstrates the Business Court ruled correctly and if this Court applies the clear text of the applicable statutory provisions as written and case law discussing and applying the same, then an affirmance of the Business Court's rulings must follow.

Additionally, Petitioner WWC incorrectly characterizes the role of A3 in its brief that it was hired by Orders Construction Company ("OCC") to supply a membrane bioreactor system and related component parts that were eventually installed in the wastewater treatment plant. Rather, A3 secured a bid through OCC to supply membrane bioreactor system component parts that met the specifications set by WWC. *WWC Appx.001418-001426.* Further, Petitioner indicates that the

Amended Counterclaim filed by the PSD alleged that the screens manufactured by A3 failed to meet WWC specifications. *WWCAppx.000345*. After the filing of PSD's Amended Counterclaim, A3 demonstrated to PSD that it played no role in designing or providing any screens for the treatment plant but rather, they were provided by a different entity. As a result, PSD voluntarily dismissed all claims against A3. *WWC Appx.000554.*

SUMMARY OF THE ARGUMENT

The Business Court's dismissal of A3 and OCC were well-reasoned, correct and should be affirmed. The striking of WWC's Notice of Intent to Attribute Fault should also be affirmed. The Business Court correctly ruled that Petitioner, WWC does not have a claim for contribution against Respondent, A3, because common law claims for contribution are precluded by West Virginia's several liability statute.

In 2015, West Virginia's law on joint and several liability changed pursuant to West Virginia Code § 55-7-13c, where Defendants in a civil action are to be held separately, and not jointly, liable for any damages awarded. Specifically,

> 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) (emphasis added).

Similarly, WWC has no legally viable claim for implied indemnity against A3. In order to be entitled to implied indemnity, one must be without fault. *See Hager v. Marshall*, 202 W. Va. 577, 585, 505 S.E.2d 640, 648 (1998). The PSD alleged multiple claims of direct, independent negligence against WWC and has alleged that WCC, by its own actions, breached its contract with the PSD. Logically, if WWC proves it is entirely without fault, there will be no judgment against it. However, if WWC is found to be at fault, then it cannot prevail on an implied indemnity claim.

A3 adopts and joins in the arguments made by OCC in its brief regarding whether the Business Court erred in striking WWC's Notice of Intent to Attribute Fault to OCC and A3.

Further, WWC's argument addressing the Business Court's order dismissing its claims for negligence and contribution against OCC and Pipes Plus as being time-barred did not directly involve A3. However, in addressing this argument in its Summary of Argument, WWC references

A3 together with OCC and Pipe Plus. *See* Petitioner's Brief, p. 13. As such, A3 adopts and joins in the arguments of OCC raised in its Brief addressing this issue.

Finally, Petitioner's argument addressing its Assignment of Error regarding the dismissal of its Express Indemnity claim against Pipes Plus and OCC does not pertain to A3 and as such, is not addressed in this Brief of Respondent.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The dismissal of the claims against A3 for indemnity and contribution involve the application of established legal issues and the application of a clear and unambiguous statute, W. Va. Code § 55-7-13 c. The facts and legal arguments are adequately presented in the briefs. Also, the striking of WWC's faulty contingent Notice of Intent to Attribute Fault involves the application of a clear and unambiguous statute, W. Va. Code § 55-7-13 d (h)(2), that should be applied as written. The facts and legal arguments are sufficiently presented in the briefs and oral argument would not significantly aid the decisional process on these issues.

ARGUMENT

Preliminarily, Petitioner sets forth five, separate Assignments of Error in its Brief for this Court's consideration.[1] Only three of Petitioner's five Assignments of Error are directed towards A3. Pursuant to West Virginia Rule of Appellate Procedure 10(d), Respondent addresses each of the three Assignments of Error directed towards A3 as follows:

I. Legal Standard

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. *Boone v. Activate Healthcare, LLC*, 245 W.Va. 476, 859 S.E.2d 419, 423 (2021) (citing syl. pt. 1, *Barber v. Camden Clark Mem'l Hosp. Corp*, 240 W.Va. 663, 815 S.E.2d 474 (2018). Furthermore, dismissal for failure to state a claim is only proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint. *West Virginia Regional Jail and Correctional Facility Authority v. Estate of Grove*, 244 W.Va. 273, 852 S.E.2d 773, 780 (2020).

II. The Business Court did not err in striking WWC's Notice of Intent to Attribute Fault to Orders Construction Company and A-3 USA.

A3 adopts and joins in the arguments of OCC addressing Petitioner's Brief on this issue.

IV. The Business Court did not err in dismissing WWC's claim for implied indemnity against A3 and Pipe Plus.

As with the argument regarding contribution discussed below, WWC has no legally viable claim for implied indemnity against A3. Although both contribution and implied indemnity arise from equitable principles, the right of implied indemnity is based upon the relationship between the allegedly liable parties. Pursuant to West Virginia law, to be entitled to implied indemnity, one

[1] In its Brief, Petitioner combines its seven Assignments of Error into five Assignments of Error for purposes of efficient organization and disposition.

must be without fault. *See Hager v. Marshall*, 202 W.Va. 577, 585, 505 S.E.2d 640, 648 (1998). For a valid claim of indemnity to exist, the parties must either have a contractual relationship giving rise to a claim for express indemnity or a special legal relationship giving rise to a claim for implied indemnity. *See Sydenstricker v. Unipunch Prods., Inc.*, 169 W.Va. 440, at 446-47, 288 S.E.2d 511 at 515-16 (1982).

With respect to a claim for implied indemnity, there is no special relationship which exists between WWC and A3 upon which a claim for implied indemnity can be based. Again, the determinative issue is whether one party is or would be required to pay for the liability of another. The Supreme Court of Appeals of West Virginia has explained:

> 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 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.*, 165 W.Va. 22, 268 S.E.2d 297, 299 (1980).

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. *See Sydenstricker*, 169 W.Va. at 446, 288 S.E.2d at 515.

WWC has not asserted the existence of any positive duty created by statute or common law upon which it could be held legally liable for the actions of A3. Moreover, while WWC may argue that it is without fault, the PSD has affirmatively alleged that WWC's independent design negligence proximately caused its injuries and damages. If WWC is found liable, it is necessarily because a jury found that it was negligent in its design and/or supervision of the project, thus rendering the doctrine of implied indemnity inapplicable. Further, the only party to which A3 had any contractual relationship with regarding the project in question was OCC. No contractual

relationship whatsoever directly existed between A3 and WWC. As a result, no legal claim for implied indemnity can exist between A3 and WWC.

In support of its claim for indemnification against A3, Petitioner relies upon the Court's decision in *Dunn v. Kanawha County Bd. of Ed.*, 194 W. Va. 40, 459 S.E.2d 151 (1995) and strains to shoehorn itself into a position of a seller in the chain of distribution who is sued in a strict product liability case. However, Petitioner's reliance on *Dunn*, a strict liability product liability case, is misplaced and inapposite to the case *sub judice*, which sounds in negligence and breach of contract.

In *Dunn*, the Court held that the seller had a right to seek implied indemnity against the manufacturer because the strict liability of a party in the chain of distribution was based solely upon its relationship to the product, and not to any alleged negligence. *Dunn v. Kanawha County Bd. of Ed.*, 194 W. Va. 40, 459 S.E.2d 151 (1995). Unlike the factual predicate in the *Dunn* case, the instant matter is not a strict liability product liability case. Rather, the PSD's claims against WWC are based upon WWC's own independent professional design negligence and its own independent breach of contract. Petitioner conflates these distinct legal theories. In fact, Petitioner's reliance upon *Dunn* actually supports dismissal of its implied indemnity claim.

While it is true that in the strict product liability realm an innocent seller has implied indemnity claims against the manufacturer of the defective product, that is because, for public policy reasons, courts have determined an injured party should "not have to bear the cost of [their] injury simply because the product manufacturer is out of reach." *Id.*, 194 W.Va. 47, 459 S.E.2d 157 (1995). For this reason, the seller is also strictly liable "based solely upon its relationship to the product and [its liability] is not related to any negligence or malfeasance." *Id.* Accordingly, a seller has an implied indemnity remedy against the manufacturer. But, that remedy does not exist if the seller contributes to the defect or is otherwise independently negligent. As noted in *Dunn*, "[i]f a

seller in some way contributes to a product defect, the seller and manufacturer are jointly responsible for damages the product causes, and the seller has no right to seek implied indemnity." *Id.,* 194 W.Va. at 47, 459 S.E.2d at 158.

Further, WWC cannot be found liable without being found negligent. WWC also argues in its brief that liability is being asserted against it in its "supervisory capacity," that it would not have created the alleged defects, and that, for this reason, it is akin to an innocent seller in a strict liability scenario. However, WWC's arguments in this respect confuse two distinct theories of liability in that they overly simplify the PSD's claims against it and ignore the PSD's multiple claims that are based not on an alleged supervisory role but rather, on WWC's own, independent professional design negligence and its own independent breach of contract. *See* WWC Appx.000347, 000348. Even if the PSD's claims were only based on WWC's negligent supervision, WWC would still not be entitled to implied indemnification because the alleged failure to properly supervise would be its own, independent act of negligence and not a situation where it is made to pay though it is without fault. *See Bourne v. Mapother & Mapother, P.S.C.,* 998 F.Supp.2d 495, 506 (S.D.W.Va. 2014) ("a negligence action based on the failure to supervise or train is one of primary liability. That is, the principal negligently supervises its agents such that harm approximately results to a third party.")

In the current matter, if WWC proves it is entirely without fault, there will be no judgment against it, and if it is found to be at fault, then it cannot prevail on an implied indemnity claim. Recognizing this "no-win situation," Judge Copenhaver dismissed an implied indemnity third-party claim in *French v. XPO Logistics Freight, Inc.*, 2020 WL 1879472 *2 (S.D.W. Va., April 15, 2020), *See also Travelers Property Casualty Company of America v. Mountaineer Gas Company,* 2017 WL 3842149, *2 (S.D.W.Va. Sept. 1, 2017) (granting summary judgment on implied indemnity

claim and noting, "[w]ere [third-party plaintiff] to prove that it was entirely without fault, then it would have no need to recover from [third-party defendant]. If, on the other hand, [third-party plaintiff] were proven to be partially at fault for the incident, then [third-party plaintiff] could not recover under an implied indemnity claim.").

Because the PSD has alleged multiple claims of direct, independent negligence against WWC and has alleged that WWC, by its own independent actions, breached its contract with the PSD, WWC has no legally cognizable claim for implied indemnity.

V. The Business Court did not err in dismissing WWC's claims for negligence and contribution against OCC and Pipe Plus because the claims were time-barred.

The order of the Business Court related to this Assignment of Error and Argument did not pertain to A3. However, Petitioner refers to A3 with regard to this Assignment of Error in its Summary of Argument. (*See* Petitioner's Brief, p. 13). As such, A3 adopts and joins in the arguments of OCC addressing this issue in its brief.

VI. The Business Court did not err in ruling that West Virginia's several liability statute, W.Va. Code § 55-7-13c, prevented WWC's contribution claim against A3 and dismissed the contribution claim.

It is well-established that "the right of 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." Syl. Pt. 4, *Sydenstricker v. Unipunch Prods., Inc.*, 169 W.Va. 441, 288 S.E.2d 513, *Beverly v. Thompson*, 229 W.Va. 684, 735 S.E.2d 559 (2012). Guided by equitable principles, claims of contribution allow the party who overpaid the ability to recover against the other jointly responsible peer party. *See Sydenstricker v. Unipunch Prods., supra.* Nowhere in its Brief does WWC dispute that it can only be severally liable for compensatory damages in direct proportion to its own percentage of fault under W.Va. Code §55-7-13c.

In 2015, West Virginia's law on joint and several liability changed pursuant to West Virginia

Code § 55-7-13c, where Defendants in a civil action are to be held separately, and not jointly, liable for any damages awarded. Specifically,

> 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).

W. Va. Code § 55-7-13c (a).

There is an exception to several liability, however, when "two more defendants... consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission." *Id.* In this limited situation, any person held jointly liable has a right of contribution from other defendants acting in concert. Instantly, PSD did not allege that WWC and A3 or OCC consciously conspired to pursue a common plan to commit tortious acts. As such, this exception to West Virginia's several liability law does not apply in the current matter.

Additional exceptions to several liability are set forth in West Virginia Code § 55-7-13c (h) (1) through (3). These exceptions provide for joint and several liability if: (a) the conduct involved driving under the influence, controlled substances, or other drugs; (b) the defendant's conduct constitutes criminal conduct; or (c) the defendant's conduct constitutes an illegal disposal of hazardous waste. *Id.* No allegations or conduct fitting any of these exceptions was alleged against A3 or OCC anywhere in the Counterclaim, Amended Counterclaim, or WWC's Third-Party Complaint. As such, none of these exceptions to West Virginia's several liability law apply in this matter.

WWC bases its argument on this issue almost entirely on this the decision in *Markwest Liberty Midstream & Resources, LLC v. Bilfinger Westcon, Inc., et al.*, Civil Action No. 19-C-88. While the Circuit Court of Wetzel County (Business Court Division), in *Markwest*, did hold that a

third-party claim for contribution was not equivocally extinguished by the legislature's passage of HB2002 in 2015, it made that ruling with only a passing reference to *Modular Bld. Consultants of W.Va. Inc., v. Poerio, Inc.*, 235 W.Va. 474, 774 S.E.2d 555 (2015). A closer reading of *Modular* supports a different result that is consistent with the rulings of three separate Federal District Courts that have addressed this issue since the June 2019 ruling in *Markwest.*

In *Modular*, a motorist was injured in a collision with a truck owned by Modular that was picking up a storage container that had been leased by Poerio, Inc. from a construction site. *Modular*, 474 W.Va. at 477, 774 S.E.2d at 558. Poerio had a lease agreement that required it to indemnify Modular. *Id.* The plaintiff sued Modular, which then filed a third-party complaint against Poerio for contribution and indemnification under the lease. Modular settled and obtained a release from plaintiff of both itself and Poerio. *Id.* 474 W.Va. at 478, 774 S.E.2d at 559. The matter then went to trial on Modular's third-party claims and the jury found Poerio did not breach its lease and also found plaintiff was 60% at fault, which under West Virginia law, would have barred the plaintiff from recovery. *Id.* Most relevant to the matter at issue here was whether the plaintiff should have been on the verdict form since he was not a party to the third-party claim that went to trial.

Modular argued that W.Va. Code § 55-7-24, which required that the jury determine the proportionate fault of each party in the litigation at the time of verdict, meant that "consideration of the fault of non-parties is *per se* impermissible in West Virginia. *Id.* 235 W.Va. at 486, 774 S.E.2d at 567. The court disagreed and found that the reference in the statute to the proportionate fault of parties in the litigation at the time of verdict did not evidence a legislative intent that §55-7-24 "serve as an omnibus statute exclusively governing the apportionment of comparative fault in the consideration of fault of non-parties." *Id.* In so ruling, the *Modular* court specifically contrasted § 55-7-24 with the current statutory scheme enacted in HB 2002 and wrote:

> **In contrast**, H. B. 2002, which becomes effective on May 25, 2015, repeals both West Virginia Code § 55-7-24 and 55-7-13 and enacts a series of new statutes which in fact **do purport to fully occupy the field of comparative fault in the consideration of "the fault of parties in nonparties to a civil action** [.]" *H. D. 2002, 2015 Leg. 82nd Sess.* (W.Va. 2015) (to be codified at West Virginia Code § 55-7-13 A through 13 D).

Id., 235 W.Va. at 486, n. 12, 774 S.E.2d at 567 (*emphasis added*).

In holding that W.Va. Code § 55-7-24 did not evidence a legislative intent to alter the common law, the court in *Modular* specifically contrasted that statute with newly enacted W. Va. Code § 55-7-13a through 13d, which it stated did "fully occupy the field of comparative fault in the consideration of "the fault of parties in nonparties to a civil action."" *Id.* This is a strong statement by the Supreme Court of Appeals of West Virginia that HB 2002 did alter the common law. And, it is a distinction the Circuit Court in *Markwest* did not address, but which the Federal District Court in *Clovis v. J. B. Hunt Transport, Inc.*, 2019 WL 458-0045 (N.D.W.Va. 2019) and others did.

In *Clovis*, United States District Judge Kleeh, in September 2019, applied *Modular* and dismissed a third-party complaint for contribution for failure to state a claim. In *Clovis*, the third-party plaintiffs, trucking company J.B. Hunt and its driver filed a third-party complaint against Ryder Truck Rental for negligence and seeking contribution. *Id.* at 2. Ryder moved to dismiss on the basis that the 2015 revisions to West Virginia's comparative negligence scheme essentially abolished claims for contribution. The Court agreed, and held that since no allegations triggering joint and several liability under the statute were made, no right of contribution existed. *Id.* a t*3-4.

Also, the United States District Court of the Southern District of West Virginia, relying on *Modular's* holding that HB 2002 fully occupies the field of comparative fault in consideration of the fault of nonparties, dismissed a third-party contribution claim in *French v. XPO Logistics Freight, Inc.*, 2020, WL 187-9472 (S.D.W.Va. Apr. 15, 2020). *French* arose out of a motor vehicle accident long Interstate 77 in Kanawha County, defendant XPO Logistics owned and operated a

double-trailer tractor that slid on the wet interstate. The tractor and one trailer went off the highway and the second trailer blocked the road. Russell Smith was driving another vehicle and struck the trailer, blocking the road. He was, in turn, struck by a second tractor-trailer and was killed. *Id.* at *1. His estate sued XPO Logistics and its driver. They filed a third-party complaint seeking contribution and indemnity against the driver and operator of the second tractor-trailer that struck Mr. Smith's vehicle. *Id.* The third-party defendants moved to dismiss and, with respect to the contribution claims, relied on the new statutes enacted in 2015 in HB 2002. Judge Copenhaver, writing that the amendments amounted "to the near total abolition of claims for contribution," dismissed the third-party contribution claims because no facts were alleged which supported a finding of joint liability under the limited circumstances set forth in W.Va. Code §55-7-13c. *Id.* at *3 quoting *Bateman v CMH Homes, Inc.*, 2020 WL 597564,*2 (S.D.W.Va. Feb. 6, 2020). In *Bateman v CMH Homes, Inc.*, a decision issued two months before *French*, Judge Chambers allowed a cross-claim for contribution to proceed only because the plaintiffs alleged in their complaint fraudulent and intentional concealment which rose to the level of a conscious conspiracy to commit a tort that Judge Chambers found, was "expressly excepted from the statutory bar against contribution." *Bateman* 2020 WL 597564, at *2. *(Emphasis added).*

The three separate federal district courts that have been confronted with this issue since the ruling in *Markwest* have directly addressed that point and found there to be a statutory bar to contribution claims unless one of the specific statutory exceptions to several liability is alleged. This Court should follow the analysis of the super majority of courts that have addressed this issue and affirm the Business Court's ruling that WWC has no contribution claim against A3.

Because WWC can only ever be liable for damages caused by its own conduct, it will not

pay more than its share of any judgment and its contribution claims must be dismissed.[2]

Petitioner raises an identical Assignment of Error on this issue in relation to the contribution claims against OCC. As such, this Respondent joins in the arguments raised and relief requested by Orders regarding this issue.

[2] A3 acknowledges that the West Virginia Supreme Court of Appeals has not definitively ruled on this issue and it is aware of one West Virginia Circuit Court decision by Judge Carl in the Business Court Division, which is slightly older than Judge Kleeh's ruling in *Clovis,* holding that a contribution claim may still be brought and that the statutory amendments did not unequivocally extinguish the right to contribution. *See e.g. Order Denying Hartford Steam Boiler Inspection and Insurance Company of Connecticut's Motion to Dismiss Third-Party Complaint,* entered June 6, 2019 in the case of *Markwest Liberty Midstream & Resources, LLC v. Bilfinger Westcon, Inc., et al.,* Case No 16-C-66, Circuit Court of Wetzel County (BCD). Also, while in the context of cross-claims and not third-party claims, Judge Gaujot, in the Circuit Court of Monongalia County entered a stipulation and voluntary dismissal order on November 5, 2019 in the case of *David A. Rusko, et al. v. Sigma Alpha Epsilon Fraternity, et al.*, Civil Action No. 19-C-88 wherein the parties agreed W.Va. Code §§55-7-13a-d adequately allowed for the apportionment of liability among the other defendants and that cross-claims for contribution and indemnity were not required.

CONCLUSION

For the reasons set forth herein, A3 USA, Inc. respectfully requests that this Honorable Court affirm the Business Court's May 18, 2021 Order, as well as the Business Court's January 14, 2021, February 4, 2021, and April 16, 2021 Orders.

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Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent, A-3 USA, Inc., hereby certifies that on this 2nd day of June, 2022, a true copy of the foregoing *"Amended Brief of Respondent"* was served upon the following individuals by U.S. Mail and email:

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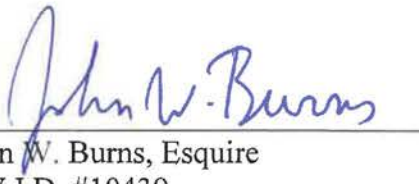

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