

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0485



WW CONSULTANTS, INC.,

Petitioner

FILE COPY

v.

**(On appeal from the Business Court Division of
the Circuit Court of Kanawha County, Civil
Action No. 18-C-115)**

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

BRIEF OF PETITIONER

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ASSIGNMENTS OF ERROR

WW Consultants, Inc.'s ("WWC") Notice of Appeal included the following Assignments of Error:

1. The Circuit Court erred in ruling that West Virginia's several liability statute, W.Va. Code §55-7-13, prevented WWC's contribution claim against A3-USA ("A3") and dismissed the contribution claim.
2. The Circuit Court erred in dismissing WWC's claim for implied indemnity against A3.
3. The Circuit Court erred in striking WWC's Notice of Intent to Attribute Fault to Orders Construction Company ("OCC") and A3.
4. The Circuit Court erred in dismissing WWC's claim for negligence and contribution against OCC because the claim was not time-barred.
5. The Circuit Court erred in dismissing WWC's express indemnification claim against OCC because WWC did not seek indemnity for its own negligence.
6. The Circuit Court erred in dismissing WWC's claim for negligence and contribution against Pipe Plus, Inc. ("Pipe Plus") because the claim was not time-barred.
7. The Circuit Court erred in dismissing WWC's claims for express and implied indemnity against Pipe Plus.

However, for purposes of the Argument, we have combined certain Assignments of Error and taken others "out of order to group like claims together for efficient organization and disposition." *Crystal Mt. W.Va., LLC v. Cty. Comm'n of Ohio Cty.*, 2020 W.Va. LEXIS 396 (W.Va. 2020). Accordingly, the Assignments of Error are grouped accordingly herein:

1. The Business Court erred in striking WWC's Notice of Intent to Attribute Fault to Orders Construction Company and A3-USA.

2. The Business Court erred in dismissing WWC's express indemnification claims against OCC and Pipe Plus.

3. The Business Court erred in dismissing WWC's claim for implied indemnity against A3 and Pipe Plus.

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

5. The Business Court erred in ruling that West Virginia's several liability statute, W.Va. Code §55-7-13d, prevented WWC's contribution claim against A3 and dismissed the contribution claim.

STATEMENT OF THE CASE

This case arises out of the design and construction of a large wastewater treatment facility and collection system in Pocahontas County, West Virginia ("the Project") that was designed by WWC for operation by the Pocahontas County Public Service District ("PSD"). WWCAppx.000010. On January 6, 2011, the PSD and WWC (through its predecessor entity, Waste Water Management) entered into a contract titled "Standard Form of Agreement Between Owner and Engineer for Professional Services" ("the Agreement"). *Id.* The Agreement required WWC, as Lead Engineer, to provide certain design and consulting services in connection with refurbishment of the PSD's existing wastewater treatment facilities and construction of new facilities that would allow the PSD to provide expanded regional wastewater treatment services. *Id.* WWC's designs for the Project contemplated a decentralized wastewater treatment system utilizing multiple sewage plants, which presented a more efficient and less expensive solution than the centralized plans that were proposed by other potential contractors. *Id.*

All wastewater treatment plants, including the one at issue in this case, include a headworks system. Wastewater is collected and received in the treatment plant at the headworks. WWCAppx.000344. The headworks, as “the initial stage of the complex treatment process,” is designed to protect the operation of downstream equipment and enhance the efficiency of the wastewater treatment process. *Id.* The headworks incorporates a system of screens and filters that are designed to reduce or eliminate large solids like wood, cloth, paper, and plastics and to handle grit and excessive amounts of oil or grease. The headworks in the Project consisted of fine screens and course screens that were to be housed in an area of the wastewater treatment plant. WWCAppx.000345.

Construction of the Project was advertised as three separate contracts for bid and divided into two phases. WWCAppx.000344. Pipe Plus, Inc. (“Pipe Plus”) was the successful bidder on the pump stations and collection system contracts, and Orders Construction Company, Inc. (“OCC”) successfully bid the wastewater treatment plant construction contract. WWCAppx.000345. OCC subsequently hired A3-USA, Inc. (“A3”) to supply a membrane bioreactor system and related components that were eventually installed in the wastewater treatment plant. *Id.*

From its inception, the Project experienced a series of delays through no fault of WCC. Shortly after the Agreement was executed, Snowshoe Mountain, Inc. and five area landowners filed an action before the West Virginia Public Service Commission (“PSC”) to stop the project and force construction of a previously-designed centralized single-plant system. WWCAppx.000010. On May 10, 2011, the PSC ordered the PSD to consult with the West Virginia Department of Environmental Protection (“WVDEP”) on the feasibility of a decentralized system. *Id.* Following a February 14, 2012 meeting, the WVDEP ordered WWC to provide additional

engineering design alternatives. *Id.* at 11. A plan for the project was eventually approved, and Phase I of the project was completed in 2012. *Id.*

On February 7, 2013 the PSD filed a petition for approval of a Phase II engineering contract. *Id.* On April 25, 2013, the PSC entered an Order that authorized the PSD to contract with WWC for Phase II of the project. WWCAppx.000012. WWC completed its engineering work in 2013, but the PSD was unable to timely secure easements that were necessary to begin construction of Phase II of the Project. WWCAppx.000013. The PSD finally obtained the easements in January 2015. *Id.* As a result, the closing on construction bids was delayed until April 29, 2015, and construction on Phase II ultimately began in mid-2015. *Id.* As a result of these ongoing delays, although WWC's engineering work had been ongoing since 2011, it was not paid for any of its work until at least 2013 and, in some cases, was not paid until April 2015. *Id.*

The Project also experienced delays as a result of OCC's failure to meet certain design specifications. WWCAppx.000014. Pursuant to a Change Order approved by the PSD on July 18, 2015, OCC was to install precast concrete panels for a structural precast concrete tank system per WWC's specifications. WWCAppx.000013. When the precast concrete panels were delivered and erected, WWC and the PSD found the panels to be of varying quality, many of which did not meet the surface quality and alignment requirements of WWC's specifications. WWCAppx.000014. The panels were inspected by WWC's engineers, and despite the unsatisfactory surface finish, there was no evidence of any structural damage or issues. *Id.*

As the precast concrete panel work continued, other issues and problems were discovered including tension cable holes that did not align, missing cables, cables that could not be pulled to the specified tension stress, under strength grout, and concrete cracks. *Id.* Again, a structural engineering inspection was conducted, and the panels were deemed to be structurally sound. *Id.*

As a result of these ongoing issues, however, WWC was ultimately required to perform additional work to correct the deficiencies. WWCAppx.000015. WWC submitted a payment proposal for this additional work to the PSD, and a payment dispute arose when the PSD's Board of Directors rejected this proposal. *Id.*

The Phase II contract initially contemplated a completion date of October 1, 2016. *Id.* However, the actual work on the Project continued until at least May 31, 2017. WWCAppx.000016. Thus, WWC provided engineering services during this ongoing construction for an unanticipated additional eight (8) months. *Id.* To address the increased costs associated with this additional work, WWC submitted a Proposed Eighth Amended Letter of Agreement to the PSD on June 12, 2017. *Id.* The PSD failed to timely respond to this Proposed Eighth Amended Letter of Agreement, and WWC filed suit on February 6, 2018. *Id.*

WWC's Complaint asserted six causes of action. WWCAppx.000016-000026. Counts I-IV arose out of the PSD's breach of the Agreement through the PSD's failure to pay WWC for work performed in connection with the Project. WWCAppx.000016-000022. Count V asserted direct claims against three members of the PSD's Board, seeking to hold them personally liable for willful misconduct in the performance of their duties. WWCAppx.000022-000023. Finally, WWC sought to have a special receiver appointed to maintain access to the funds allocated for the Project and ensure that the funds were not released back to the funding agencies. WWCAppx.000023-000026.

The PSD filed an Answer and a twenty-paragraph Counterclaim against WWC on March 28, 2018. WWCAppx.000028-000058. Paragraph 12 of the Counterclaim described in detail twenty-eight (28) separate specific alleged instances of professional negligence by WWC related to defective design features and/or faulty construction administration. WWCAppx.000053-

000055. Paragraph 18 of the Counterclaim included six (6) specific alleged breaches of the Agreement. WWCAppx.000055-000056. Significantly, however, the Counterclaim did not allege that the headworks would require extensive repair or construction. Rather, the Counterclaim alleged that only three isolated issues existed in the area of the headworks: 1) remote location of the control panels for the screens; 2) lack of heat in the headworks area resulting in equipment freeze-up; and 3) lack of access to the course screen. WWCAppx.000053-000054.

On November 6, 2018, WWC served Interrogatories and Request for Production of Documents to the PSD to obtain more information about the nature of the PSD's claims and the damages the PSD sought to recover. WWCAppx.000231. Specifically, Request for Production No. 5 asked the PSD to "produce any and all documents that identify or summarize the damages that have allegedly been suffered by the PCPSD as a result of the issues identified in the Counterclaim filed by PCPSD." WWCAppx.000014. The PSD did not serve responses to WWC's Requests for Production until January 25, 2019. WWCAppx.000282. Although the PSD produced several documents that purported to substantiate its damages claims, there was no indication that the PSD believed that the headworks area required extensive repairs. *Id.*

The Court's Scheduling Order required the PSD to serve expert witness disclosures by April 1, 2019. WWCAppx.000231. On April 4, 2019, several days after the disclosure deadline, the PSD filed an Expert Witness Disclosure designating Eric Coberly and Jack Ramsey of E.L. Robinson as the PSD's retained expert witnesses. WWCAppx.000168-000189; 000231. The PSD's disclosure did not include any expert reports prepared by Coberly or Ramsey. *Id.* Accordingly, WWC's counsel deposed Coberly and Ramsey on July 10, 2019. WWCAppx.000197-000228; 000231. Neither Coberly nor Ramsey testified that the headworks area needed significant additional construction. WWCAppx.000231-000232.

WWC also deposed Lloyd Coleman, the PSD's corporate designee, on July 9, 2019. WWCAppx.000232. Coleman was designated to testify, in relevant part, as to the PSD's alleged damages related to each alleged defect or issue in the Counterclaim. WWCAppx.000232; 000273-000280. Just like Coberly and Ramsey, Coleman never testified that the PSD believed the building that housed the headworks should be replaced or extensively repaired. In fact, Coleman testified that the PSD was able to address the headworks issue by purchasing a crane for "two or three thousand dollars." WWCAppx.000291-000292.

It was therefore quite a surprise to WWC when, on October 15, 2019, after litigating this case for over two years and a month after discovery closed on September 15, 2019, the PSD served its Third Supplemental Response to Requests for Production of Documents. WWCAppx.000282-000295. The Third Supplemental Response to Request No. 5 directed the PSD to attached documents that "regard Headworks improvement/replacement." WWCAppx.000283. WWC's review of the documents revealed a brand-new claim. For the first time, the PSD alleged that the headworks of the Project were defective and required replacement at an estimated cost of \$1.5 million ("the Headworks Improvement Claim"). WWCAppx.000282-000295. This project was not identified in the PSD's Counterclaim, not included in the PSD's prior discovery responses, and not identified by the PSD's experts during their depositions.

Significantly, the PSD's Third Supplemental Responses included three cost estimates prepared by E.L. Robinson (the company with which the PSD's retained experts are affiliated): two dated July 2019 and one dated October 2019. WWCAppx.000291-000293. Although the expert depositions and the 30(b)(7) deposition were noticed prior to July 2019, the PSD never indicated that it had asked its experts to prepare any cost estimates for replacement of the headworks building or that replacement of the fine screens and construction of a new grit unit was

even being contemplated. The PSD never even indicated that its experts' work was still ongoing. In fact, the PSD has never explained why the July 2019 estimates were not produced for approximately three months, why they were not mentioned during the July 9-10, 2019 depositions of Coberly, Ramsey, or Coleman, or why they were not produced prior to those depositions.

Thus, the relevant timeline in this case can be succinctly illustrated as follows:

February 6, 2018	Suit filed by WWC
March 28, 2018	PSD's Counterclaim filed
November 6, 2018	WWC's Interrogatories and Requests for Production served, requesting support for all claims and damages
January 25, 2019	PSD's Responses to Interrogatories and Requests for Production served, with no indication or discussion of the Headworks Improvement Claim
April 1, 2019	Expert disclosures due
April 4, 2019	PSD's disclosure filed with no mention of the Headworks Improvement Claim
July ?, 2019	E.L. Robinson prepared preliminary construction cost estimates for Headworks Improvement Claim
July 9, 2019	Deposition of PSD's Rule 30(b)(7) designee, Lloyd Coleman, regarding damages claims. No testimony regarding Headworks Improvement Claim.
July 10, 2019	Depositions of PSD's retained experts, Eric Coberly and Jack Ramsey of E.L. Robinson. No testimony regarding recent estimates, ongoing work, or Headworks Improvement Claim.
September 15, 2019	Discovery closed.
October 15, 2019	Headworks Improvement Claim, including preliminary construction cost estimates dated July 2019 and October 2019, disclosed with Third Supplemental Responses.

As WWC did not learn of the Headworks Improvement Claim until a month after the close of discovery and therefore did not have the opportunity to conduct discovery on the new claim, WWC promptly filed a Motion to Strike the Headworks Improvement Claim on November 1, 2019. WWCAppx.000230-000299. In response, the PSD argued that a \$1.5 million cost estimate that was not previously disclosed was not a “new” claim but was “refined information as to what had been previously provided.” WWCAppx.000314. Despite the PSD’s position that the Headworks Improvement Claim was not “new,” it did not object to reopening discovery on that issue. *Id.*

On March 4, 2020, implicitly recognizing that the claim was newly asserted, the Court entered an Order permitting the PSD to pursue the Headworks Improvement Claim but allowing WWC to conduct additional discovery and join new parties. WWCAppx.000312-000317. On April 27, 2020, WWC filed a Motion for Leave to Join New Parties and a proposed Third-Party Complaint against OCC, Pipe Plus, and A3, whose scope of work had been implicated by the new Headworks Improvement Claim. The PSD also moved for leave to file an Amended Counterclaim to include claims not only against WCC, but also against Pipe Plus, and A3. With leave of the Court, the PSD filed its Amended Counterclaim on May 11, 2020, and WWC filed its Third-Party Complaint on May 13, 2020, setting forth claims against OCC, Pipe Plus, Inc. and A3 for negligence/contribution, contractual defense and indemnity, and breach of contract. WWCAppx.000332-000503.

The Amended Counterclaim was drastically different from the PSD’s original twenty-paragraph Counterclaim and further illustrates the new information and allegations related to the Headworks Improvement Claim. WWCAppx.000332-000352. The Amended Counterclaim consisted of more than sixty paragraphs, included background information about the Project, and discussed in detail the headworks and the role it plays in a wastewater treatment plant. *Id.* The Amended Counterclaim also alleged, again for the first time, that the screens manufactured by A3

failed to meet WWC's specifications and that Pipe Plus negligently constructed the plant's collection system. WWCAppx.000345.

On July 2, 2020, OCC moved to dismiss WWC's Third-Party Complaint. WWCAppx.000558-686. OCC argued that WWC's claims against OCC were barred by the applicable statute of limitations, that WWC's claim for implied indemnity is no longer viable in West Virginia, and that WWC's claim for express indemnity was outside the scope of the contractual indemnification provision. *Id.* On July 23, 2020, WWC filed its Brief in Opposition to OCC's Motion to Dismiss, arguing that WWC's claims against OCC for negligence, contribution, and indemnification are not barred by the statute of limitations because WWC filed its claim against OCC only five (5) months after learning about the PSD's new Headworks Improvement Claim, well within the applicable two-year statute of limitations, and after obtaining the Court's permission to file the claims against the new parties. WWCAppx.000691-000738. Further, WCC argued that West Virginia's current several liability statute has not abrogated claims for contribution or implied indemnity and that the contract required OCC to indemnify WCC for the PSD's Counterclaim. *Id.* A3 and Pipe Plus filed similar motions on July 22, 2020 and February 22, 2021, respectively. WWCAppx.000687-000690; 001219-001404.

On November 4, 2020, within 180 days from the date the PSD filed the Amended Counterclaim and while the Motions to Dismiss the Third-Party Complaint still remained pending, WWC filed a Notice of Intent to Attribute Fault to OCC and A3 ("the Notice"). WWCAppx.000999-001002. The Notice clearly stated that WWC maintained that the claims asserted in the Third-Party Complaint were valid and that Orders and A3 should remain parties to the case as Third Party Defendants. *Id.* In the alternative, however, the Notice advised that WWC intended to attribute fault to Orders and A3 to the extent they were dismissed as parties. *Id.*

On January 14, 2021, the Business Court entered an Order granting OCC's Motion to Dismiss, dismissing it from this action with prejudice. WWCApx.001149-001165. In its opinion, the Court concluded that: (1) WWC's claim for negligence and related claims for indemnification and contribution were time-barred by the two-year statute of limitations in W.Va. Code §55-2-12; (2) WWC's claim for contractual indemnification failed because, under Section. 7.18. C of the contract, OCC has no obligation to indemnify WWC for WWC's allegedly negligent design; and (3) WWC has no legally viable claim of implied indemnity against OCC because there was no special relationship upon which implied indemnity could be based. *Id.* On January 28, 2021, WCC filed a Motion to Alter Judgment, which was denied by the Business Court on April 12, 2021. WWCApx.001164-001173;001501-001510.

Likewise, on March 30, 2021, the Court entered an Order granting A3's Motion to Dismiss based on the statute of limitations and lack of a special relationship that would give rise to implied indemnity. WWCApx.001460-001470. WWC filed a Motion to Alter Judgment on April 13, 2021. On April 16, 2021, the Court entered an Order granting Pipe Plus's Partial Motion for Summary Judgment. WWCApx.001511. This Order granted summary judgment on the same rationale as was applied to OCC's Motion to Dismiss. *Id.* Finally, on May 18, 2021, the Business Court entered an Order denying WWC's April 13, 2021 Motion to Alter Judgment and affirming the rulings contained in the Court's March 30, 2021 Order. WWCApx.001555-001562.

Although it is from the May 18, 2021 Order that WWC now appeals, WWC also respectfully requests that this Court review and reserve the following Orders of the Business Court:

1. January 14, 2021 Order Granting Orders' Motion to Dismiss Third Party Complaint (WWCApx.001149-001163);

2. February 4, 2021 Order Granting Orders Construction Company and A3-USA's Joint Motion to Strike Notice of Non-Party Fault (WWCApx.001174-001184); and
3. April 16, 2021 Order Granting Pipe Plus's Motion for Partial Summary Judgment (WWCApx.001511-001524).

Review of these additional Orders is appropriate because the May 18, 2021 Order was the first final and appealable Order entered in this case. This Court has held that “[w]here an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken.” Syl. Pt. 6, *Riffe v. Armstrong*, 197 W.Va. 626, 477 S.E.2d 535 (1996). All of these Orders involve claims related to the allocation of fault between third-party counterclaim defendants, and they could not have been previously appealed.

SUMMARY OF ARGUMENT

W.Va. Code § 55-7-13d(a)(2) allows a party to attribute fault to a nonparty by filing a Notice to Attribute Fault within 180 days after service of process. In this case, the nonparty fault statute was not triggered until the PSD's Amended Counterclaim was served on WWC on or about May 11, 2020. The Amended Counterclaim implicated work performed by OCC and A3 for the first time. Thus, WWC had 180 days from May 11, 2020 to file its Notice to Attribute Fault. WWC filed the Notice on November 4, 2020, within 180 days of service of the Amended Counterclaim. The Business Court therefore erred in holding that WWC's Notice to Attribute Fault was not timely filed.

Further, the Business Court erred in dismissing WWC's claims for express indemnity against OCC and Pipe Plus under W.Va. R. Civ. P. 12(b)(6) without, at a minimum, resolving

factual issues related to OCC and Pipe Plus's duty to defend WWC against the PSD's claims. The Amended Complaint triggered the indemnity provisions in the contracts between WWC and OCC and Pipe Plus in that the Amended Complaint alleged that work performed by OCC and/or Pipe Plus was defective.

The Business Court also erred by dismissing WWC's claims for implied indemnity against A3 and Pipe Plus. WWC asserted its claim for indemnification against Pipe Plus and A3 pursuant to Rule 14, which permits a defendant to bring a third-party complaint against "a person not a party to the action who is or may be liable to him for **all** or part of the plaintiff's claim." W. Va. R. Civ. P. 14 (emphasis added). The PSD's Amended Complaint alleged that WWC had supervisory responsibilities, as the "district representative" for the Project. WWC's liability, if any, would potentially rest on a failure to detect the defective components of the system supplied by A3 and Pipe Plus, rather than from WWC's alleged supervisory role. WWC should be permitted to seek indemnity against A3 and Pipe Plus as the parties directly and primarily at fault.

WWC's claims for negligence and contribution against OCC, A3, and Pipe Plus are subject to a two-year statute of limitations. This two-year period is subject to the discovery rule; accordingly, the clock begins to run from the time that WWC knew or should have known that OCC, A3, and Pipe Plus's work was allegedly defective, not the date of substantial completion of the Project. The PSD did not assert the Headworks Improvement Claim until October 15, 2019 at the very earliest, and the PSD did not file its amended Complaint until May 11, 2020. Thus, WWC timely filed its claims on May 13, 2020, and the Business Court erred in dismissing the Third-Party Complaint as untimely.

Finally, the Business Court erred in holding that W.Va. Code § 55-7-13d abolished claims for contribution. This decision was directly contrary to the Business Court's prior ruling in

Markwest Liberty Midstream & Resources, LLC v. Bilfinger Westcon, Inc., et al., Civil Action No. 19-C-88, that “the legislature did not abolish a defendant’s right to seek contribution” and that the “inchoate right of contribution existed prior to the enactment of §55-7-13d and remains good law.”

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

WWC requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. This appeal concerns the Business Court’s “error in the application of settled law,” “unsustainable exercise of discretion where the law governing that discretion is settled,” and the “insufficient evidence” to support the Circuit Court’s ruling. W. Va. R. App. P. 19(a).

ARGUMENT

I. Legal Standard

Generally, a *de novo* standard of review applies to a trial court’s order granting a motion to dismiss. *Savarese v. Allstate Ins. Co.*, 223 W.Va. 119, 123-24, (2008) (citing syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 157-58, 640 S.E.2d 217, 220-21 (2006); *Johnson v. C.J. Mahan Constr. Co.*, 210 W.Va. 438, 441, 557 S.E.2d 845, 848 (2001)).

Clear questions of law and issues of statutory interpretation are also reviewed *de novo*. *Id.* at 124, 260 (quoting syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”)).

The Assignments of Error presented herein either arise from the granting of a motion to dismiss or, in the case of the Assignments of Error related to application of the nonparty fault and comparative fault statutes, W.Va. Code § 55-7-13d, involve questions of law or statutory interpretation. Accordingly, a *de novo* standard applies.

II. The Business Court erred in striking WWC's Notice of Intent to Attribute Fault to Orders Construction Company and A3-USA.

W.Va. Code § 55-7-13d(a)(2) provides for allocation of fault to nonparties as follows:

§ 55-7-13d. Determination of fault; imputed fault; when plaintiff's criminal conduct bars recovery; burden of proof; damages; stay of action; limitations; applicability; severability.

(a) Determination of fault of parties and nonparties. –

...

(2) Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault[.]

W.Va. Code § 55-7-13d(a)(2).

As discussed at length in the Statement of the Case, *supra*, the PSD asserted the Headworks Improvement Claim on October 15, 2019, through supplemental discovery responses in which the PSD produced construction estimates that were prepared as early as July 2019. WWCApx.000291-000293. WWC moved to strike this newly-asserted claim on November 1, 2019, merely two weeks after the PSD filed its supplemental discovery responses. WWCApx.000230-000299. It was not until March 4, 2020, after the issue was fully briefed, that the Business Court issued an Order permitting the PSD to pursue the New Headworks Improvement Claim and allowing additional discovery and joinder of new parties related to this new claim. WWCApx.000312-000317. The PSD filed its Amended Counterclaim on May 11, 2020, joining

Pipe Plus and A3 as Counterclaim Defendants and alleging the Headworks Improvement Claim. WWCAppx.000332-000352. Shortly thereafter, WWC's counsel was served with the Amended Complaint pursuant to W.Va. R. Civ. P. 5(b), which started the 180-day deadline set forth in W.Va. Code § 55-7-13d(a)(2).

The PSD has attempted to characterize the Headworks Improvement Claim as a “refinement” of existing claims. It is clear from a comparison of the original Counterclaim, which included twenty paragraphs of allegations against a single entity (WWC), to the Amended Counterclaim, which consists of more than sixty paragraphs of allegations against three separate parties, that this is not merely a “refinement.” WWCAppx. 000028-000058; 000332-000352. It is clear that the scope of the claims expanded dramatically based on the indisputable fact that the PSD itself did not assert claims against A3 or Pipe Plus until the PSD filed the Amended Counterclaim on May 11, 2020.¹

WWC filed its Notice to Attribute Fault on November 4, 2020, less than 180 days later. WWCAppx.000999-001002. In response, OCC filed a Motion to Strike and the PSD filed an Objection to the Notice. WWCAppx.001003-001128. OCC and the PSD argued that the Notice to Attribute Fault was untimely because it was filed more than one-hundred and eighty (180) days after the *original Counterclaim* was filed by PCPSD on April 2, 2018. *Id.* This argument fails because the original Counterclaim did not include the Headworks Improvement Claim.

Any other reading would require clairvoyance on the part of the defendant, when the 180-day time frame is intended to do just the opposite. The statutory deadline was established to give the parties an opportunity to conduct discovery into the claims and defenses presented in a case so that they are able to timely discern any nonparty individuals or entities who may be partly or entirely at

¹ Significantly, the PSD did not assert any claims against OCC in the Amended Counterclaim. This is likely because OCC does not have insurance coverage for this claim and the PSD wishes to avoid OCC's placement on any verdict form.

fault. Here, WWC diligently conducted discovery. WWC served written discovery requests asking for information regarding the alleged negligence described in the original Counterclaim, and WWC took the depositions of the PSD's experts and corporate representative based on the information it received. There was no mention of the Headworks Improvement Claim for years. A defendant is not required to guess what claims a plaintiff may assert in an amended complaint months or even years after the original complaint is filed, particularly where that defendant has fully cooperated and participated in the discovery process.

A3, OCC, and the PSD would have this Court find that WWC should have filed a Notice to Attribute Fault as to the Headworks Improvement Claim in October of 2018, more than a year before the Headworks Improvement Claim was plead in the Amended Counterclaim. Under this theory, a party to a construction dispute would essentially be required to anticipate any claims that may be asserted or to file a Notice to Attribute Fault against every person or entity who performed work on a project. West Virginia law simply does not impose such a requirement.

The outcome urged by A3, OCC, and the PSD would also violate the statutory intent by allowing a plaintiff (or counterclaim plaintiff) to circumvent § 55-7-13d(a)(2) by filing a bare-bones initial complaint and then waiting 180 days to allege additional claims that implicate the fault of non-parties. As discussed in detail below, A3 and OCC have also taken the position that WWC does not have viable claims against them for express or implied indemnity or contribution. Under that scenario, a defendant would be precluded from filing a Notice of Nonparty Fault and simultaneously barred from asserting a third-party action.

Instead of having an allocation of fault for which it was severally liable, a defendant would be allocated all fault, but left without any method of securing contribution from the responsible party. This scenario is particularly applicable here, where the PSD had clearly retained an expert to evaluate

damages associated with a headworks claim, but did not provide the information to its expert witness, its corporate designee, or in discovery responses prior to the close of discovery. This allows the PSD to argue that WWC is responsible for the Headworks Improvement Claim, without any means of recourse, either through allocation to a nonparty or a third-party claim.

OCC also argued that W.Va. Code § 55-7-13(d) does not specifically permit filing the Notice to Attribute Fault as to an individual or entity that is currently a party to an action. However, OCC has not been able to identify any West Virginia case law that specifically prohibits such a filing. This argument further illustrates the circular reasoning behind this position. OCC simultaneously argued that it should not be a party because WWC cannot assert a contribution or indemnity claim against it, but also that WWC cannot file a Notice to Attribute Fault to OCC because it is a party. As discussed below, established West Virginia law allows WWC to join OCC and A3 as third-party defendants, and it was error for WWC's Third Party Complaints to be dismissed. It would be fundamentally unfair for a court to allow the PSD to assert a new claim that implicates additional parties, to deny WWC the opportunity to bring those additional parties in by way of a Third-Party Complaint, and then to also deny WWC its right under W.Va. Code §55-7-13(d) to attribute fault to OCC and A3 as non-parties with respect to the Headworks Improvement Claim.

The 180-day time period for WWC to file its Notice began running on the date that WWC was served with the Amended Counterclaim. At the earliest, the clock began to tick on May 11, 2020, when the Amended Counterclaim was filed with the Business Court. Accordingly, the Notice to Attribute Fault was timely filed on November 4, 2020, within the 180-day period referenced in W.Va. Code § 55-7-13d(a)(2).

III. The Business Court erred in dismissing WWC's express indemnification claims against OCC and Pipe Plus.

The contracts between the PSD and OCC and the PSD and Pipe Plus require OCC and Pipe Plus to indemnify WWC for defective work performed on the Project by OCC and Pipe Plus. Specifically, both contracts include Paragraph 7.18, which states as follows:

7.18 Indemnification

- A. To the fullest extent permitted by Laws and Regulations, and in addition to any other obligations of Contractor under the Contract or otherwise, Contractor shall indemnify and hold harmless Owner and Engineer, and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.

WWCApx.000363; 000368.

Thus, to the extent WWC was sued as a result of defective work by OCC and Pipe Plus, OCC and Pipe Plus are contractually obligated to defend and indemnify WWC, as the Project Engineer, for the PSD's claims. In the event that the PSD prevails at trial, the alleged defective conditions listed in the Amended Counterclaim arise, at least in part, out of OCC and Pipe Plus's work, as opposed to any design defects. This triggers OCC and Pipe Plus's contractual defense and indemnification obligations to WWC.

OCC and Pipe Plus both attempted to circumvent their contractual duties to WWC by claiming that the alleged defects in the PSD's Amended Counterclaim fall entirely within the

following exceptions to the contracts' indemnity clause:

- C. The indemnification obligations of Contractor under Paragraph 7.18.A shall not extend to the liability of Engineer and Engineer's officers, directors, members, partners, employees, agents, consultants and subcontractors arising out of:
 - 1. the preparation or approval of, or the failure to prepare or approve maps, Drawings, opinions, reports, surveys, Change Orders, designs or Specifications; or
 - 2. giving directions or instructions, or failing to give them, **if that is the primary cause of the injury or damage.**

Id. (emphasis added).

OCC and Pipe Plus argued, and the Business Court mistakenly agreed, that WWC's alleged failure to supervise constitutes a failure to give directions under Paragraph 7.18.C.2, and therefore that OCC and Pipe Plus do not owe WWC a contractual duty of indemnification. However, WWC's alleged failure to supervise only falls outside the indemnification clause if the alleged failure to supervise was the primary cause of the injury or damage. WWC has consistently maintained that it gave appropriate directions and instructions to OCC and Pipe Plus and properly supervised their work on the Project to the extent WWC had a duty to do so. Regardless, OCC and Pipe Plus each had an independent duty to perform their work in accordance with the contract documents. To the extent OCC and Pipe Plus's negligent work on the Project caused the allegedly defective conditions in the Project, their conduct is the primary cause of the damage incurred by the PSD, Section 7.18.C.2's exceptions do not apply, and WWC is entitled to contractual indemnification.

In this case, the PSD's Amended Counterclaim and the facts giving rise to the Headworks Improvement Claim trigger the contracts' indemnity provision. As to Pipe Plus, the Amended Counterclaim alleges that Pipe Plus breached its duty to the PSD by negligently constructing the

wastewater treatment plant's collection system. Although OCC is not named in the Amended Counterclaim, the Headworks Improvement Claim newly implicates OCC's concrete work on the Project.

The contracts between OCC and Pipe Plus and the PSD require OCC and Pipe Plus to indemnify WWC "against all claims, costs, losses, and damages (including but not limited to **all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs**) arising out of or relating to the performance of the Work" (emphasis added). Though WWC maintains that it is not liable in this action, the Headworks Improvement Claim arose out of the very "Work" described in the indemnity provision of the contracts quoted above. The PSD has alleged that deficient work was performed on the Project. This is precisely the kind of error or omission for which OCC and Pipe Plus agreed to indemnify and defend WWC. Therefore, under West Virginia law, OCC owes to WWC a duty to defend in this litigation.

At a minimum, however, OCC and Pipe Plus currently have a duty to defend WWC unless or until sufficient evidence is developed relieving them of this duty. In West Virginia, the duty to defend is tested by whether the allegations in the complaint in the underlying action "are reasonably susceptible of an interpretation that the claim may be covered" by the terms of the contract. *Bruceton Bank v. United States Fid. & Guar. Ins. Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997). If the allegations are reasonably susceptible to such an interpretation, the Court then "conduct[s] a reasonable inquiry into the facts" behind the allegations of the complaint to determine whether a contractual duty of defense and/or indemnification exists. *Id.* at 555.

The Business Court dismissed WWC's express indemnity claims against OCC and Pipe Plus at the Rule 12(b)(6) stage, without the reasonable inquiry required by *Bruceton Bank*. Thus, WWC

respectfully requests that the Business Court's Order be vacated and the claim remanded for appropriate discovery.

IV. The Business Court erred in dismissing WWC's claim for implied indemnity against A3 and Pipe Plus.

Implied indemnification is grounded in principles of equity and is meant to avoid the unfair outcome of one party having to pay for another's liability. "At the heart of the doctrine is the premise that the person seeking to assert implied indemnity – the indemnitee – has been required to pay damages caused by a third party – the indemnitor. In the typical case, the indemnitee is made liable to the injured party because of some positive duty created by statute or common law, but the actual cause of the injury was the act of the indemnitor." *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W.Va. 22, 24, 268 S.E.2d 296, 299 (1980). Thus, implied indemnification exists to protect a party such as WWC from paying damages that were caused by other responsible parties whom the PSD chose not to sue.

WWC asserted its claim for indemnification against Pipe Plus and A3 pursuant to Rule 14, which permits a defendant to bring a third-party complaint against "a person not a party to the action who is or may be liable to him for **all** or part of the plaintiff's claim." W. Va. R. Civ. P. 14 (emphasis added). WWC denies that its work on the Project was defective. However, if the PSD prevailed against WWC at trial, WWC may be held liable for defective conditions it did not create.

In the Amended Complaint, the PSD alleged that WWC had supervisory responsibilities, as the "district representative" for the Project. WWCAppx.000344. WWC, in any supervisory capacity it may have had, would not have actually created the defects the PSD alleges exist. Accordingly, WWC maintains that the PSD's claims arising out of WWC's alleged supervisory role fail as a matter of law. However, to the extent the PSD is able to pursue such claims, WWC's liability, if any, would potentially rest on a failure to detect the defective components of the system

supplied by A3 and Pipe Plus. In that event, WWC should be permitted to seek indemnity against A3 and Pipe Plus as the parties directly and primarily at fault.

This is consistent with this Court's holding in *Dunn v. Kanawha Co. Bd. of Education*, 194 W.Va. 40, 459 S.E.2d 151 (1995). *Dunn* provided a thorough discussion of West Virginia law regarding indemnification in the context of a strict product liability suit. Perhaps most importantly, the *Dunn* opinion stated that "[a] seller who does not contribute to the defect in a product may have an implied indemnity remedy against the manufacturer of the product when the seller is sued by the user." *Dunn*, Syl. Pt. 5. While this is not a strict products liability case, the same equitable principles apply.

In *Dunn*, multiple lawsuits were filed by numerous plaintiffs alleging injuries resulting from toxic chemical exposure. The plaintiffs asserted claims against the manufacturer and others in the chain of distribution, including entities who distributed and/or applied the product. The plaintiffs reached a settlement with the manufacturer, and the non-settling defendants subsequently sought common-law indemnity from the manufacturer. This Court ultimately found, *inter alia*, that the non-settling defendants could still pursue claims for implied indemnity against the settling manufacturer. *Id.* at Syl. Pt. 6.

WWC's position in this case is similar to that of an innocent party in the stream of commerce, such as the non-settling defendants in *Dunn*. A3 supplied component parts of the wastewater treatment system installed at the Project and, thus, A3-USA, can rightfully be viewed similar to the supplier of a defective product. Likewise, Pipe Plus actually performed the work that is implicated in the PSD's Amended Counterclaim. If WWC is held liable in its supervisory capacity, based on an alleged failure to recognize A3's defective component parts and/or Pipe Plus's defective work, WWC would be comparable to a distributor whose only mistake was not detecting

the defective condition of the product sold.

Accordingly, like an end-seller who can seek indemnification from a manufacturer or distributor, WWC should be permitted to seek indemnification from A3 and Pipe Plus to the extent the PSD is permitted to pursue claims against WWC for Project failures that were caused by defective components or defective construction as opposed to design errors. WWC has a right of indemnification against Pipe Plus and A3, whose acts were the actual cause of the injury. To hold otherwise would be inequitable and inconsistent with the principles of implied indemnity recognized by West Virginia courts.

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

As previously discussed, the PSD first sought damages related to the Headworks Improvement Claim in a supplemental discovery response in October of 2019, and WWC promptly moved to strike the new claim. When the Court ultimately allowed that claim to proceed and permitted the PSD to file an Amended Counterclaim including the Headworks Improvement Claim, WWC filed its Third-Party Complaint mere days after the PSD filed the Amended Counterclaim. The Third-Party Complaint alleged negligence claims against OCC and Pipe Plus and sought contribution from OCC and Pipe Plus.

The Business Court correctly noted that W.Va. Code § 55-2-21(b) governs statutes of limitations for third-party claims:

§ 55-2-21. Statutes of limitation tolled on claims assertible in civil actions when actions commence.

...

(b) Any defendant who desires to file a third-party complaint shall have one hundred eighty days from the date of service of process of the original complaint, or the time remaining on the applicable statute of limitations, whichever is longer, to bring any third-party complaint

against any non-party person or entity[.]

Further, the Business Court observed that claims for “[c]ontribution and indemnity are ‘personal action for which no limitation is otherwise prescribed’ and are governed by a two-year statute of limitations, pursuant to W.Va. Code § 55-2-12.”

West Virginia also recognizes the discovery rule with respect to tort claims. Under the discovery rule, the statute of limitations does not begin running until a claimant knows or by reasonable diligence should know of his claim. *Gaither v. City Hosp.*, 199 W.Va. 706, 487 S.E. 2d 901 (1997). The Business Court correctly cited the discovery rule:

[...] the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Id. at Syl. Pt. 4. However, after citing the discovery rule, the Business Court inexplicably failed to apply it to the facts of this case.

Under the discovery rule, the two-year statute of limitations clock should not begin to run on WWC’s contribution claim related to the Headworks Improvement Claim until the PSD filed the Amended Counterclaim in May 2020. Even assuming that WWC’s negligence and contribution claim accrued in October 2019 when the PSD first raised the Headworks Improvement Claim, WWC filed its the Third-Party Complaint in May 2020 – well within two years from October 2019, when WWC first learned of the New Headworks Improvement Claim, and within days of the filing of the PSD’s Amended Counterclaim.

The Business Court incorrectly held that the statute of limitations began to run from the May 16, 2017 date of substantial completion because WWC knew that OCC and Pipe Plus built portions of the Plant, that WWC was involved in the construction phase, and that WWC should

therefore have brought its claims against OCC and Pipe Plus within two years from May 16, 2017. Thus, the Business Court essentially held that the statute of limitations for a third-party contribution claim in a construction defect case should begin to run when construction was completed, before a problem was identified, and before litigation commenced. This is not only illogical in that it would result in claims for contribution being time-barred before an entity is even sued; it is also contrary to West Virginia law.

In addition to the discovery rule, West Virginia courts have also held that claims for indemnification and/or contribution accrue when the party seeking indemnification or contribution makes payment on an obligation for which he is held liable to the underlying plaintiff. *Bradford v. Ind. & Mich. Elec. Co.*, 588 F. Supp. 708 (S.D. W. Va. 1984); *Hensel Phelps Constr. Co. v. Davis & Burton Contractors, Inc.*, No. 3:11-1020, 2013 U.S. Dist. LEXIS 22207 (S.D. W. Va. Feb. 19, 2013).

The *Bradford* plaintiff was a seaman who was injured when the chair he was sitting in collapsed. He sued his employer, and the employer filed a third-party complaint against the manufacturer of the chair asserting a right to indemnity or contribution. The manufacturer filed a motion to dismiss arguing, in relevant part, that the claim for indemnity or contribution was time-barred because it was filed more than two years after the date plaintiff sustained his injuries. *Id.*

The court applied the equitable doctrine of laches instead of a specific statute of limitations. *Id.* at 714. However, in order to determine whether the employer exercised diligence in asserting its claim for indemnity or contribution, the court analyzed whether the claim was made within the applicable statute of limitations. The court focused on when the employer's claim accrued and, addressing both indemnity and contribution, stated:

The right of action for indemnity arises at and limitations begin to run from, the time of payment or settlement by one secondarily liable, and

the right of contribution arises at, and limitations begin to run from, the time of payment in excess of plaintiff's proportionate share..."

Similarly, the court in *Hensel Phelps Constr. Co. v. Davis & Burton Contractors, Inc.*, No. 3:11-1020, 2013 U.S. Dist. LEXIS 22207 (S.D.W.Va. Feb. 19, 2013) held that claims for indemnification and contribution that those claims arose and the statute of limitations began to run, respectively, from either "the time of payment or settlement" or "the time of payment in excess of plaintiff's proportionate share." *Id.* at *11. This prevailing view is recognized not only by West Virginia courts, but in other jurisdictions as well. *Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp.*, 360 S.E.2d 342, 345 (Va. 1987) (right of action for indemnification and contribution arises on payment); *Pa. Mut. Cas. Ins. Co. v. Nicholson Constr. Co.*, 542 A.2d 123, 126 (Pa. Sup. Ct. 1988) (statute of limitations on contribution claim commences upon entry of judgment against joint tortfeasors); *Hager v. Brewer Equip. Co.*, 195 S.E.2d 54, 57 (N.C. Ct. App. 1973) (statute of limitations does not start running against right to indemnity until damages paid to the injured party).

This case is still pending. The statute of limitations' accrual date set forth in *Bradford* and *Hensel Phelps Construction Co.* – the "time of payment or settlement" or the "time of payment in excess of plaintiff's proportionate share" – has not yet occurred. As such, WWC's claims against Orders simply cannot be time-barred under West Virginia law.

VI. The Business Court erred in ruling that West Virginia's several liability statute, W.Va. Code §55-7-13, prevented WWC's contribution claim against A3 and dismissed the contribution claim.

Despite its own prior ruling to the contrary, the Business Court erroneously held that West Virginia Code §55-7-13d abolished claims of contribution. There is no such directive within the statutory language of §55-7-13d, and a prior ruling of the Business Court established that claims for contribution have not been statutorily abrogated. Judge Carl unequivocally ruled in *Markwest Liberty Midstream & Resources, LLC v. Bilfinger Westcon, Inc., et al.*, Civil Action No. 19-C-88

that “the legislature did not abolish a defendant’s right to seek contribution” and that the “inchoate right of contribution existed prior to the enactment of §55-7-13d and remains good law.” *Id.* at ¶¶ 43 and 44.

Markwest also arose from a contribution claim in connection with a construction dispute. Markwest Liberty Midstream Resources (“Markwest”) filed suit against Bilfinger Westcon, Inc. (“Bilfinger”) in connection with Bilfinger’s work on a construction project at a Markwest plant. Bilfinger then filed a third-party complaint seeking contribution and indemnification from various third-party defendants, including Hartford Steamboiler Inspection & Insurance Company (“Hartford”). In response, Hartford filed a Motion to Dismiss claiming that W.Va. Code § 55-7-13d abolished claims for contribution.

Judge Carl reasoned that although “the Legislature joined twenty-seven other states and enacted a modified comparative fault system, it has not unequivocally extinguished the right to contribution.” *Id.* Accordingly, the Court denied the Motion to Dismiss, finding that “[W. Va. § 55-7-13a-d] did not abolish a defendant’s right to seek contribution.” *Id.* at ¶ 43. Thus, the *Markwest* opinion made it clear that W.Va. § 55-7-13a-d did not abolish the right of contribution and that the inchoate right to contribution remains good law in West Virginia.

While this Court has not specifically addressed this issue, the *Markwest* Court reinforced that a notice of non-party fault is an option, not a mandate, and the third-party practice remains a viable avenue for seeking contribution from those not named by the plaintiff as a party to the case: “[D]efendants no longer need to file third-party complaints against non-parties if they wish to assert claims for contribution to have fault assessed against other potentially liable parties. However, they may, and the Legislature did not abolish a defendant’s right to seek contribution.” *See Markwest*, at p. 16. Similarly, when addressing the new procedure, this Court stated in 2020, “[u]nder this new

framework, defendants no longer need to file third party complaints against non-parties if they wish to assert claims for contribution to have fault assessed against other potentially liable parties.” *State ex rel. Chalifoux v. Cramer*, 2021 W.Va. LEXIS 317, at pp. 4-5. However, the Court nowhere prohibited a party from asserting a third-party complaint. Again, the Court’s language was permissive, not mandatory.

The “right of contribution is designed to moderate the inequity which existed in our law that enabled the plaintiff to cast the entire responsibility for an accident on one of several joint tortfeasors by deciding to sue only him.” *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 602, 390 S.E.2d 796, 801 (1990) (citing *Sydenstricker v. Unipunch Prod., Inc.*, 169 W.Va. 440, 448, 288 S.E.2d 511, 517 (1982)). As further explained in *Zando*: “The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff’s damages?” *Id.* at 802. Here, OCC and Pipe Plus breached a duty to the PSD that caused or contributed to the PSD’s damages. Thus, WWC’s claim for contribution meets the *Zando* standard, and the Business Court erred in dismissing it.

CONCLUSION

For the reasons set forth herein, WW Consultants, Inc. respectfully requests that this Honorable Court reverse 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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**WW CONSULTANTS, INC.,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on the 15th day of November, 2021, a true copy of the foregoing "*Brief of Petitioner*" and "*Appendix*" were served upon the following individuals by U.S. Mail and email:

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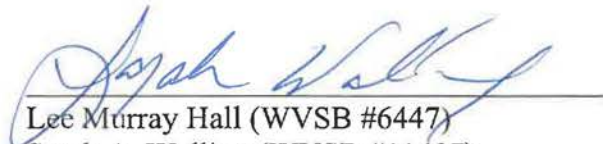
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