IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0485

WW CONSULTANTS, INC.,

Petitioner

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., PIPE PLUS, INC., and POCAHONTAS COUNTY PUBLIC SERVICE DISTRICT,
Respondents

REPLY BRIEF OF PETITIONER

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Respondents' arguments collectively result in an outcome that is not only inequitable but also contrary to the language and intent of the law. Essentially, Respondents ask this Court to affirm the Business Court's erroneous rulings that effectively allow the Pocahontas County Public Service District ("PSD") to file suit against WW Consultants, Inc. ("WWC"), circumvent the discovery process by failing to provide critical information regarding the scope of the PSD's liability and damages claims until after the close of discovery, prevent WWC from asserting its own claim against third parties, and then block WWC from attributing fault to the same entities as uninsured non-parties from whom the PSD will likely not be able to collect any judgment. This sort of procedural fencing should not be permitted, and the Business Court's January 14, 2021, February 4, 2021, April 16, 2021, and May 18, 2021 Orders should be vacated to allow WWC's claims to proceed on the merits

I. WWC's Notice of Intent to Attribute Fault to Orders Construction Company and A3-USA, Inc. was Properly and Timely Filed.

The Business Court erred when it granted Orders Construction Company ("OCC") and A3-USA, Inc.'s ("A3") Motions to Strike WWC's Notice of Intent to Attribute Fault because it was filed within 180 days of the service of the Amended Counterclaim, which was filed on May 11, 2020.

WWC's Opening Brief included a detailed discussion of the procedural history of this case. However, the distinctions between the PSD's original Counterclaim and the Amended Counterclaim bear repeating. The PSD asserted its original twenty-paragraph Counterclaim on March 28, 2018 against WWC only. 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 Standard Form of Agreement Between Owner and Engineer for Professional Services ("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 April 20, 2020, the PSD moved for leave to file an Amended Counterclaim to include claims not only against WCC, but also against Pipe Plus, Inc. ("Pipe Plus") and A3-USA, Inc. ("A3"). On April 27, 2020, WWC filed a Motion for Leave to Join New Parties and a proposed Third-Party Complaint against Orders Construction Company ("OCC"), Pipe Plus, and A3, whose scope of work had been implicated by additional documents produced by the PSD after the close of discovery that contemplated remedial work and construction of a new building to house the headworks at a cost of $1.5 million ("Headworks Improvement Claim"). 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 related to the Headworks Improvement Claim. WWCAppx.000332-000503.

Although Respondents maintain that the Headworks Improvement claim was not a "new" claim, this argument is contradicted by the fact that the PSD itself did not assert claims against Pipe Plus and A3 until the PSD filed its Amended Counterclaim on May 11, 2020. 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. WWCAppx.000332-000352.

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. Thus, Respondents argue that WWC should have known that the PSD's original Counterclaim implicated Pipe Plus's and A3's work even before the PSD, who possessed the documents that implicated them, saw the need to add them as additional parties to its counterclaim.

The timing of the PSD's experts' depositions and subsequent reports further confirms that the Headworks Claim was, in fact, new. The PSD's 30(b)(7) designee, Lloyd Coleman, was deposed on July 9, 2019. WWCAppx.000232. The PSD's retained experts, Jack Coberly and Jack Ramsey, were deposed on July 10, 2019. WWCAppx.000197-000228; 000231. It was not until October 15, 2019, that the PSD produced preliminary construction cost estimates dated July 2019 and October 2019. WWCAppx.000282-000295.

These estimates – particularly the July 2019 estimate – could not have been prepared overnight or even in a matter of days. Preparation of the estimates had to be underway at the time Coleman, Coberly, and Ramsey were deposed. Inexplicably, Coleman, Coberly, and Ramsey never mentioned during their July 2019 depositions that additional estimates were being prepared or even contemplated at that time. WWCAppx.000231-000232.

Upon receipt and review of the PSD's October 15, 2019 supplemental discovery responses, WWC immediately moved to strike the PSD's New Headworks Improvement claim on the grounds that the PSD had asserted an entirely new claim and that the "supplemental discovery responses" amounted to an untimely new expert disclosure. WWCAppx.000230. WWC also argued that the

PSD's initial discovery responses and the testimony from the PSD's retained experts and corporate designee never mentioned that the PSD was contemplating construction of an entirely new headworks building at a cost of up to $1.5 million. WWCAppx.000231. In support of its Motion to Strike, WWC cited this Court's explanation of the importance of the discovery process in *Graham v. Wallace*, 214 W.Va. 178, 184-85, 588 S.E.2d 167, 173-74 (2003):

> The discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party's evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict.

In the event that the Court declined to strike the new claim, WWC requested an opportunity to conduct discovery into the recently-asserted allegations.

The PSD's Response to WWC's Motion to Strike PCPSD's New Headworks Improvement Claim is telling. The PSD did not compellingly argue that the claim was not new or, in fact, offer any explanation for the five-month delay in producing the July 2019 estimate. It did not seek to explain or justify the failure of its corporate designee and retained engineering experts to disclose the existence or preparation of these estimates in response to direct questions regarding repairs that were allegedly necessary and/or damages allegedly incurred by the PSD.

Instead, the PSD demurred and acknowledged that "[a]s an alternative to its Motion to Strike, WWC states that the Court could consider reopening discovery to allow for further review of the Headworks claim, further expert work and perhaps the joining of additional parties." Significantly, the PSD did "not oppose WWC's position and would welcome a Status Conference with the Court to begin the process." WWCAppx.000315-000317 (referenced in Order).

When the PSD eventually filed its Motion to File an Amended Counterclaim on April 20, 2020, it stated that "[d]iscovery has revealed that certain other parties, to-wit, contractor Pipe Plus, Inc. and subcontractor A3-USA, Inc. were allegedly negligent in the construction of certain parts or the whole of the wastewater plant." WWCAppx.000325. Further, the PSD indicated that "[a]s a direct result, the counterclaim plaintiff seeks leave of this Court to amend its counterclaim and file direct causes of action against Pipe Plus, Inc. and A3-USA, Inc. for alleged negligence and other causes of action." *Id.*

Respondents' position now is directly contrary to the PSD's position when it sought leave from the Business Court to amend its counterclaim. The PSD acknowledged then that it was not aware of Pipe Plus's and A3's alleged negligence until it conducted discovery. The Court below took the PSD at its word and permitted it to file an Amended Counterclaim and add additional parties. WWCAppx.000324. For the same reasons, WWC was not and could not have been aware of any such alleged negligence at the time the original Counterclaim was filed. Indeed, the PSD's Amended Counterclaim made WWC aware of the need to file its Notice of Intent to Attribute Fault.

Finally, the Notices of Nonparty Fault were filed only after OCC, Pipe Plus, and A3 moved for summary judgment and/or dismissal of WWC's crossclaims and third-party claims against them. The Notices would not have been necessary and, according to Respondents, could not have been filed while those parties remained in the case. However, when Respondents prevailed on their motions and the crossclaims and third-party claims were dismissed based on an incorrect application of the statute of limitations, Respondents still argue that the Notices were improperly filed. WWC has consistently maintained that the Notices were filed as an alternative pleading to protect WWC's rights in the event that OCC and A3 were dismissed from this case.

WWCAppx.001130-001131. There is nothing in the statute or in case law that prohibits this approach.

Thus, the Business Court erred when it granted OCC and A3's Motions to Strike WWC's Notice of Intent to Attribute Fault. Respondents acknowledged in their Response that "the 180-day period starts to run from the service of the filing that first puts the defendant on notice of the potentially at fault nonparty." *See* Response at p. 36. Contrary to the Business Court's findings, that filing was not the original Counterclaim, but the Amended Counterclaim that was filed on May 11, 2020. It was error to strike the Notice, as it was filed on November 4, 2020, within 180 days of service of the Amended Counterclaim, and the Business Court's Order should be vacated.

II. WWC Asserted Viable Express Indemnification Claims Against OCC and Pipe Plus.

A. Respondents' Indemnification Obligations to WWC Have Been Triggered.[1]

The Business Court erred when it dismissed WWC's express contractual indemnity claims against OCC and Pipe Plus because the Amended Complaint alleges that A3 and Pipe Plus's negligent work caused the PSD's alleged loss of use of the wastewater plant, which directly triggers OCC and Pipe Plus's indemnity obligations. The indemnity agreement in the contracts between the PSD and OCC and the PSD and Pipe Plus require OCC and Pipe Plus are much broader than the Business Court found. Pipe Plus and OCC are required to indemnify and hold harmless WWC:

> [F]rom and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professional 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

[1] Based on a review of the record, WWC's current counsel believed that the Amended Counterclaim implicated OCC's concrete work. Accordingly, counsel indicated as much in WWC's Opening Brief. After receiving OCC's Motion for Leave to Supplement the Record and Appendix, which clarified the location of OCC's concrete work, WWC agrees that the concrete work was not a part of the Headworks Improvement Claim.

> or destruction of tangle property (other than the Work itself), including the loss of use resulting therefore, 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."

WWCAppx.000363; 000368 (emphasis added). Respondents fail to address the inclusion of the word "all" in the indemnity agreement, which imposes a broad indemnity obligation based only on a causal connection to the work performed by OCC and Pipe Plus. *Id.* In short, "all" means "all"; the indemnification obligation is not limited to OCC and Pipe Plus's several liability. OCC and Pipe Plus must indemnify WWC for all of the PSD's alleged damages if any of the damages resulted in any part, no matter how small, from OCC and Pipe Plus's negligent act or omission.

The obligation is further limited to claims, costs, losses, and damages "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. . ." West Virginia courts recognize the "expansive" nature of phrases like "arising out of." *Huggins v. Tri-Cty. Bonding Co.*, 175 W. Va. 643, 649, 337 S.E.2d 12, 17 (1985). Accordingly, West Virginia decisions apply "arising out of" exclusions broadly. *See, e.g.*, *State ex rel. Nationwide Mut. Ins. Co.*, 236 W. Va. 228, 237-38, 778 S.E.2d 677, 686-87 ("your work" exclusion barred coverage for damage caused by insured's own contractor and exclusion in advertising coverage for injury "arising out of" knowingly false statements barred coverage for defamation claim); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 225 W. Va. 300, 316, 693 S.E.2d 53, 69 (2010) (professional services exclusion for personal injury that "aris[es] out of any act, malpractice, error or omission committed by any 'insured' in conduct of any profession" (emphasis omitted). Following this lead, federal courts "applying West

Virginia law have ... interpreted the phrase 'arising out of' broadly." *Allied World Surplus Lines Ins. Co. v. Day Surgery Ltd. Liab. Co.*, 451 F. Supp. 3d 577, 585 fn.5 (S.D.W.Va. 2020).

The language in the Indemnity Agreement is even broader than the "arising out of" language that West Virginia courts have broadly construed, because it applies to claims "arising from or relating to" the performance of the Work. This Court made clear in *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 690 S.E.2d 322 (2009), that such contract language must be construed to encompass all claims with a "logical relationship" to an agreement. There, the court construed a forum-selection clause applying to actions brought "in connection with" the contract. *Id.* at 147, 341. Considering "the 'usual, ordinary and popular meaning' of the phrase 'in connection with,'" the court found the "intended scope of the forum-selection clause to be quite broad." *Id.* "The word 'connection' in the context herein used, is generally understood to mean '[t]he condition of being related to something else by a bond of interdependence, causality, logical sequence, coherence, or the like; relation between things one of which is bound up with, or involved in another.'" *Id.* (*quoting* II The Oxford English Dictionary 838-39 (1970 re-issue)). "Thus, so long as the claims ... bear a logical relationship to the [agreement], they fall within its scope, regardless of whether they sound in contract, tort, or some other area of the law." *Id.* The court then cited various federal authorities from other jurisdictions concluding that "in connection with" was similar in breadth to "arising from," "related to," and "arising in relation to," requiring only a "logical or causal connection" to pull a claim within its scope. *Id.* at 147-48, 341-42.

The Amended Counterclaim clearly asserts claims that arise out of work performed by Pipe Plus and OCC and that resulted in loss of use of the wastewater treatment plant. The Amended Counterclaim alleges that Pipe Plus negligently constructed the plant's collection system (described as a "system of underground pipes and maintenance structures that are used to convey wastewater to a

wastewater treatment facility"), which resulted "in the District's wastewater plant failing to operate as designed." Likewise, the Amended Counterclaim alleges that OCC contracted with A3 to manufacture components for the Headworks section of the plant, including the screens that are directly at issue, and that A3 negligently performed its work, "resulting in the District's wastewater plant failing to operate as designed." Essentially, the Amended Complaint alleges that the PSD lost its plant's intended use as a result of the negligent work of Pipe Plus and A3. There is no dispute that OCC subcontracted with A3 to perform work on the plant, which triggers OCC's duty to indemnify and hold harmless WWC from claims, costs, losses, and damages caused by any negligent act or omission of OCC's subcontractors.

Respondents further argue that their indemnification obligation would be limited to fault allocated to the indemnitor. Thus, because of several liability, WWC would never be entitled to indemnity for its own fault. But this is not what the contract language provides. The contract requires the indemnitor to indemnify for *all* fault, so long as the it was caused, in some part, by the indemnitor's negligence. The Southern District of West Virginia construed virtually identical indemnity language in *Maxum Indem. Co. v. Westfield Ins. Co.,* 2011 U.S. Dist. LEXIS 7230. In *Maxum*, the indemnification clause provided as follows:

> To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property . . ., *but only to the extent caused by the negligent acts or omissions of the Subcontractor*, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

(Subcontract § 4.6.1) (emphasis added). The language is, as noted, virtually identical to the language in the contract at issue in this case. Judge Copenhaver summarized the indemnity obligation as follows:

> Stated more succinctly and as relevant to this matter, the provision mandates that [the indemnitor] indemnify [the indemnitee] from any claim arising out of bodily injury or death caused, in whole or in part, by [indemnitor's] negligent acts or omissions in performing the Subcontract, whether or not [indemnitee] was also partially responsible for the claim.

Id. at 14. The *Maxum* Court confirmed that the indemnitor had the obligation to indemnify the indemnitee for the *entire* loss if there is *any* negligence on the part of the indemnitor. *Id.* at 23. ("Accordingly, this court concludes that Kanawha Valley was obliged to indemnity Agsten for *any* damages arising from the construction accident.").

Maxum addresses the precise issue presented here, with the precise contract language. Applied to this case, *Maxum* holds that if there is *any* negligence on the part of Orders, it must indemnify WWC for *all* damages arising from the suit. In short, the "all" language reflects the scope of indemnity required, so long as there is any negligence on the part of the indemnitor.

B. The Design Exception Does Not Extinguish OCC and Pipe Plus's Duty to Defend and Indemnify WWC.

The Business Court erred in concluding that the claims asserted by the PSD against WWC only implicated WWC's design work, thus triggering the Indemnification Agreement's "design exception." The Indemnification Agreement includes the following exception:

> 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.

As discussed in WWC's Opening Brief, 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. The Amended Counterclaim alleges by its plain language that OCC's subcontractor, A3, negligently manufactured components, including the screens, that failed to meet WWC's specifications but were nevertheless installed in the facility. WWCAppx.000345, ¶43. OCC is required to indemnify WWC for all claims, costs, loss, or damage 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," and the allegations against A3 fall within the scope of that requirement.

Likewise, the Amended Counterclaim alleges that Pipe Plus was hired to construct a collection system that consisted of underground pipes and maintenance structures. *Id.* at ¶44-45. The Amended Complaint does not allege that WWC incorrectly designed the collection system. Rather, the Amended Complaint alleges that Pipe Plus negligently constructed the collection system. WWCAppx.000349, ¶65-66. These allegations also fall squarely within the scope of the Indemnity Agreement.

C. Pipe Plus and OCC are Required to Indemnify WWC for Defense Costs.

The Business Court erred in holding that the indemnity agreement does not impose an obligation on Pipe Plus and OCC to defend WWC against the PSD's claims asserted in the Amended Complaint. Pipe Plus and OCC are required to indemnify WWC for its attorneys' fees and litigation costs because the plain and clear language in the indemnity agreement extends to all defense costs as

it specifically includes attorneys' fees and court, arbitration or other dispute resolution costs. Attorneys' fees and other litigation expenses are expressly included as "costs" under the agreement.

Respondents all rely heavily on *Mulvey Construction, Inc. v. Bitco General Life Ins. Corp.*, 2015 U.S. Dist. LEXIS 143508 (S.D.W.Va. 2015) to argue that no duty to defend exists unless such a duty is expressly included in the indemnification agreement. *Mulvey* addresses a wholly different issue than the one presented here and does so under Virginia law. *Mulvey*'s central question was whether an indemnity contract met the specific requirements set forth in an insurance policy issued by Bitco for a third party to receive reimbursement for its defense costs under the Supplemental Payments provision, under Virginia law.[2] Thus, the District Court in *Mulvey* was construing the insurance policy's supplementary payment requirements, rather than the question of whether a duty to defend existed under the contract between the parties.

Judge Faber noted in *Mulvey* that the insurance policy required the assumption of an "explicit duty to defend." Because the agreement at issue did not include such an explicit duty, "the requirement of the supplementary payments provision was not met" and the insurer was not required to provide coverage. This is entirely different from the analysis that should be employed in this case. The question is not whether the contracts between the PSD and OCC and the PSD and Pipe Plus meet a specific set of requirements to trigger coverage under an insurance policy. Rather, this case turns on whether the claims asserted by the PSD fall within the scope of the indemnification agreement in those contracts, which require OCC and Pipe Plus to hold harmless WWC for all costs, specifically including attorney's fees.

[2] Under West Virginia law, this inquiry may not even be necessary because the insured would be entitled to a defense as a first party insured under the holding in *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 508 S.E.2d 102 (1998). In an earlier opinion issued in *Mulvey*, the Court recognized this important distinction.

OCC incorrectly argues that the indemnity provision in this case "specifically excludes any obligation to defend." *See* Response at p. 32. At most, the indemnity provision is silent as to OCC and Pipe Plus's duty to defend. After relying on *Mulvey*, a case interpreting the requirements of an insurance policy under Virginia law, Respondents claim that the reasonable inquiry required by *Bruceton Bank v. United States Fid. & Guar. Ins. Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997) does not apply because *Bruceton* is an "insurance case" that "discusses an insurer's duty to defend." Although Respondents cited to case law from Ohio and Nevada that purportedly would relieve them of the duty to defend WWC, Respondents have not discussed any on-point, binding West Virginia case law that limits *Bruceton*'s reasonable inquiry requirement to the insurance context or that would be more applicable to the interpretation of the indemnity agreement in this case.

Again, 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*, 199 W.Va. at 548, 486 S.E.2d at 19. 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. These claims should not have been dismissed at the Rule 12(b)(6) stage without the opportunity to develop evidence and perform *Bruceton*'s reasonable inquiry.

Ultimately, however, this would appear to be the proverbial "six of one, half-dozen of another." Whether characterized as a duty to defend or a duty to indemnify for defense costs, OCC and Pipe Plus are required to pay WWC's defense costs to the extent those costs fall within their respective indemnity agreements.

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

WWC acknowledges that Pipe Plus's settlement with the PSD extinguishes WWC's claims for contribution and indemnity as to Pipe Plus. However, WWC's claim for implied indemnity from A3 remains viable and should not have been dismissed.

A3's Response oversimplifies the PSD's claims and ignores the PSD's specific allegations that A3's manufactured components "failed to meet [WWC's] specifications but were installed anyway." WWCAppx.000345. Further, the PSD asserted an independent negligence claim against A3 for "constructing its portion of the wastewater plant in a negligent manner resulting in the District's wastewater plant failing to operate as designed." WWCAppx.000349.

A3 relies on *Bourne v. Mapother & Mapother, PSC*, 998 F.Supp.2d 495, 506 (S.D.W.Va. 2014) to argue that WWC's allegedly negligent supervision is an independent act of negligence. However, *Bourne* addressed liability for negligent supervision in an employment context. This case is much more similar to *Dunn v. Kanawha Co. Bd. of Education,* 194 W.Va. 40, 459 S.E.2d 151 (1995), in which this Court held 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.

A3 manufactured the screens that form the primary basis of the Headworks Claim and supplied component parts of the wastewater treatment system installed at the Project. WWCAppx.000345. The PSD has alleged that these component parts were negligently manufactured and/or installed. WWCAppx.000349. A3 is therefore similarly situated to the supplier or manufacturer of a defective product. As discussed in detail in WWC's Opening Brief, WWC's liability arises from an alleged failure to recognize A3's defective component parts, WWC would be comparable to a distributor whose only mistake was not detecting the defective condition of the

product sold. Under *Dunn*, this relationship gives rise to a claim for implied indemnity.

Dunn allows WWC to seek indemnification from A3 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 long-recognized right under West Virginia law of indemnification against A3, and it was error to dismiss these claims.

IV. WWC's claims for negligence and contribution against OCC and Pipe Plus were not time-barred.

As discussed in detail above, the PSD itself asserted in its Motion for Leave to File Amended Counterclaim that it sought to join A3 and Pipe Plus because "[d]iscovery has revealed that certain other parties, to-wit, contractor Pipe Plus, Inc., and subcontractor A3-USA, Inc., were allegedly negligent in the construction of certain parts or the whole of the wastewater plant." WWCAppx.000325. The PSD was certainly aware as of the May 16, 2017 date of substantial completion that Pipe Plus and A3 were involved in the construction of the wastewater plant because the PSD contracted with Pipe Plus and with OCC, who subcontracted with A3. WWCAppx.000332-000503. It would therefore appear that the discovery rule was applied to the PSD's negligence claim against A3, which would otherwise have been time-barred by the time the PSD filed the Amended Counterclaim on May 11, 2020.

The same time period applies to WWC's negligence claims against OCC and Pipe Plus. WWC received the PSD's supplemental discovery responses on or about October 15, 2019. WWCAppx.000282-000295. The PSD filed its Motion to File an Amended Counterclaim on April 20, 2020. WWCAppx.000325. The PSD filed its Amended Counterclaim on May 11, 2020. WWCAppx.000332-000503. WWC filed its Third-Party Complaint on May 13, 2020. WWCAppx.000332-000503. Again, how could WWC have been expected to know that its claims purportedly accrued in 2017 if the PSD apparently lacked sufficient knowledge to seek leave to join

A3 and Pipe Plus prior to April 20, 2020?

The answer to this question is simple: it could not. WWC first learned that the PSD intended to assert the previously-undisclosed Headworks Claim on or about October 15, 2019. WWCAppx.000282-000295. WWC learned the scope of those claims and was able to discern the parties involved when the PSD filed the Amended Counterclaim on May 11, 2020. WWCAppx.000332-000503. 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).

Thus, the limitations period began to run from the time 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. This has been the law in West Virginia for decades.

In addition to the discovery rule, federal courts sitting in West Virginia have 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).

Respondents argue, based on *Howell v. Luckey*, 205 W.Va. 445, 446, 518 S.E.2d 873 (1999) and *Charleston Area Medical Center v. Parke-Davis*, 215 W.Va. 15, 17-18, 614 S.E.2d 15, 17-18 (2005) that third-party negligence and contribution claims must be filed before settlement

or judgment in the primary suit. WWC does not disagree with Respondents' position and agrees, as this Court noted in *Parke-Davis*, that "'[t]he 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." *Parke Davis*, 215 W.Va. at 14, 614 S.E.2d at 14 (quoting *Howell*, 205 W.Va. at 449, 518 S.E.2d at 877). *Parke Davis* holds that such claims may only be asserted through third-party impleader in an action brough by the injured party against a tortfeasor. *Id.* at Syl. Pt. 6. WWC has, in fact, attempted to take that approach by bringing its negligence and contribution claims against OCC and Pipe Plus in this suit, only to have those claims erroneously blocked long before the limitations period has expired. Thus, the Business Court erred when it dismissed the negligence and contribution claims because they were timely filed under *Bradford*, *Hensel Phelps*, *Howell*, and *Parke Davis*.

V. 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.

The Business Court erred when it concluded that W.Va. Code 55-7-13 entirely eliminated impleader claims in West Virginia for contribution and indemnity. The seminal West Virginia State Court case on point is *Markwest Liberty Midstream & Resources, LLC v. Bilfinger Westcon, Inc., et al.*, Civil Action No. 19-C-88, in which the Business Court itself held 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. The Business Court incorrectly departed from its own precedent and WWC petitions this Court to reverse the Business Court's decision.

Respondents do not address the Business Court's determination in *Markwest* that the inchoate right to contribution remains good law in West Virginia. Respondents also fail to address this Court's recent holding in *State ex rel. Chalifoux v. Cramer*, 2021 W.Va. LEXIS 317 (2021), in which this Court stated that "[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." *Cramer*, 2021 W.Va. LEXIS 317, at pp. 4-5. This Court has never prohibited a party from asserting a third-party claim for contribution. Again, the Court's language was permissive, not mandatory. Had this Court wished to prohibit the filing of third-party claims for contribution, it certainly could have done so.

Under long-standing West Virginia law, "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?" *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 603, 390 S.E.2d 796, 802 (1990) (citing *Sydenstricker v. Unipunch Prod., Inc.*, 169 W.Va. 440, 448, 288 S.E.2d 511, 517 (1982). Here, Respondents 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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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 18th day of January, 2022, a true copy of the foregoing "***Reply Brief of Petitioner***" were served upon the following individuals by U.S. Mail and email:

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