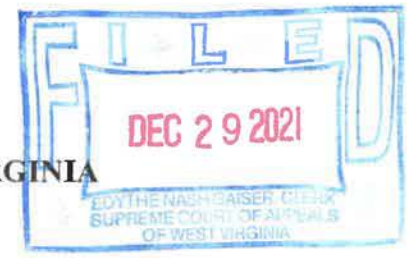

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0485

WW CONSULTANTS, INC.

Petitioner

v.

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

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

Respondents

RESPONSE BRIEF OF ORDERS CONSTRUCTION COMPANY, INC.

John D. Hoblitzell, III (WVSB #9346)
Camille E. Wartts (WVSB #13370)
Kay Casto & Chaney, PLLC
P.O. Box 2031
Charleston, WV 25327-2031
(304) 345-8900
Fax: (304) 345-8909
jdhoblitzell@kaycasto.com
cwartts@kaycasto.com
Counsel for Orders Construction Company, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. The design of the Snowshoe wastewater treatment plant 2

B. The construction of the plant 3

C. The timeline of the current litigation as it relates to Orders 7

SUMMARY OF ARGUMENT 13

A. WWC's negligence and contribution claims are untimely and/or precluded by contract 13

B. WWC's negligence and contribution, claims are precluded by statute 16

C. The limited indemnity obligation in Orders' contract with the PSD does not require Orders to indemnify or defend WWC 16

D. The defective and untimely contingent Notice of Intent to Attribute Fault was appropriately struck 17

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 19

ARGUMENT 20

A. Standard of Review 20

B. The circuit court was right to dismiss WWC's contribution and negligence claims against Orders 21

i. The circuit court correctly found WWC's negligence and contribution claims were time barred 21

ii. The Circuit Court correctly held that West Virginia's several liability statute, W.Va. Code §§ 55-7-13c precludes WWC's negligence and contribution claims 27

C. The Circuit Court was right to dismiss WWC's express indemnification claims against Orders 27

i. WWC is not entitled to indemnification for any design negligence or negligence in the supervision of contractors or subcontractors 28

ii. WWC cannot as a matter of law, be liable for damages caused by Orders alleged negligent acts or omissions 30

iii. WWC's new argument that Orders' concrete work is implicated by the "new" Headworks Claim still does not entitle it to indemnification 31

iv. The circuit court correctly determined Orders has no contractual duty to defend WWC 32

D. The circuit court was right to strike WWC's untimely and improper contingent Notice of Intent to Attribute Fault to parties to a case 35

i. WWC's defective contingent Notice of Intent to Attribute Fault was untimely 35

ii. W.Va. Code §55-7-13d does not support the filing of a contingent notice seeking to attribute fault to a party 38

CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Boone v. Activate Healthcare, LLC., 245 W. Va. 476, 859 S.E.2d 419, 422 (2021) 20
Bradford v. Indiana & Michigan, Elec Co, 588 F.Supp. 708 (S.D.W. Va. 1984)..... 25
Bradford v. West Virginia Solid Water Management Board, 2021 WL 5317246, __S.E.2d__ (Nov. 16, 2021)..... 39
Bruceton Bank v. United States Fidelity & Guar. Ins. Co., 199 W. Va. 548, 486 S.E.2d 19 (1997) 34
Charleston Area Medical Center v. Parke-Davis, 215 W.Va. 15, 614 S.E.2d 15, 17-18 (2005) 25, 26
Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995)..... 20
Citynet v. Toney, 235 W.Va. 79, 772 S.E.2d 36, 37-8 (2015) 27
Cotiga Dev. Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626, 628 (1962)..... 27
Emily Crow, et al. v. Yvonne Rojas, Case No. 5:17-cv-00130-FPS 36
Estate of Burns by and Through Vance v. Cohen 2019 WL 4463318, (S.D. W.Va. Sept. 17, 2019) 36
Gaither v. City Hosp., 199 W.Va. 706, 708, 487 S.E.2d 901, 903 (1997) 22
Hensel Phelps Const. Co. v. Davis & Burton Contractors, Inc., 2013 WL 623071, *3, n. 5 (S.D.W. Va. 2013) 25
Howell v. Luckey 205.W.Va. 445, 446, 518S.E.2d 873 (1999) 25, 26
Kaydon Acquisition Corp. v. Custum Mfg., Inc., 301 F. Supp. 2d 945, 957 (N.D. Iowa 2004) ... 33
Mulvey Construction, Inc. v, Bitco General Life Insurance Corp., 2015 WL 6394521 (S.D. W.Va. 2015)..... 33
Shaffer v. Acme Limestone Co., 206 W. Va. 333, 349, 524 S.E.2d 688, 704 (1999) 31
State ex rel. Biafore v. Tomblin, 236 W. Va. 528, 782 S.E.2d 223, 225 (2016)..... 39
State ex rel. Lorenzetti v. Sanders, 235 W. VA. 353, 360-61, 774 S.E.2d 19, 26-7 (2015) 39
State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995)..... 20
Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995)..... 20
United Rentals Hwy. Techs v. Wells Cargo, 289 P.3d 221 (Nev. 2012)..... 33
Wolfe v. Forbes, 159 W. Va. 34, 217 S.E.2d 899 (1975) 39

Statutes

W. Va. Code §55-2-6a 26
W. Va. Code §55-2-12 ..... 15, 21
W. Va. Code §55-2-21(b) 15, 21, 22, 25, 26
W. Va. Code §55-7-13c 15, 27, 31
W. Va. Code §55-7-13c(a)..... 27

W. Va. Code §§ 55-7-13c(h)(1) through (h)(3) 27
W. Va. Code §55-7-13d 10, 12, 17, 18, 19, 36, 38
W. Va. Code §55-7-13d(a)(2) 10, 18, 19, 35, 36, 38

Other Authorities

Ralph W. Beckwith, et al. v. Pocahontas County Public Service District, Case No. 10-1279-PSD-C, Commission Order, August 22, 2012 3

Treatises

Miller's Standard Insurance Policies Annotated, Vol I, Part 2 Policies: Commercial Lines, Form CG 00 01 04 13(7th ed.) 34

STATEMENT OF THE CASE

This case began as a suit by WW Consultants, Inc. ("WWC") to collect fees it alleged it was owed by the Pocahontas County Public Service District ("PSD"). WWC's predecessor firm, Wastewater Management, Inc., was the design engineer of record for the design and construction of a wastewater treatment plant and collection system built by the PSD to serve Snowshoe Mountain and surrounding areas in Pocahontas County.[1] WWC's original fee claim was resolved during a mediation, but certain counterclaims asserted by the PSD against WWC alleging professional design negligence and breach of contract remained. This appeal concerns the dismissal of WWC's third-party claims against Orders Construction Company, Inc. ("Orders") and others and involves two primary questions: 1) whether this Court will accept WWC's protestations it was not aware of potential third-party claims until the filing of an Amended Counterclaim by the PSD in May of 2020 or whether this Court will recognize, as the circuit court did, that WWC's new position is inconsistent with its own prior admissions and pleadings; and 2) whether it will apply clear and unambiguous contractual and statutory language as written.

The circuit court properly dismissed third-party claims filed by WWC against Orders and others and properly struck a contingent Notice of Intent to Attribute Fault filed by WWC. WWC's third-party claims were filed in response to allegations made in the PSD's Amended Counterclaim asserting that WWC was negligent in its design of the plant and collection system and that WWC breached its contract for the design and construction of the plant. The Record demonstrates the circuit court ruled correctly, and if this Court applies the clear text of the applicable contractual and statutory provisions as written, then an affirmance of the circuit court's rulings must follow.

[1] In this Brief, when WWC is referred to it encompasses both Wastewater Management, Inc., and WW Consultants, Inc.

A. The design of the Snowshoe wastewater treatment plant.

The central thrust of the PSD's Amended Counterclaim and WWC's Third-Party Complaint pertains to alleged design deficiencies in the Headworks of the plant. The Headworks are the initial stage of the treatment process where wastewater enters the plant and where debris is—using screens specified by WWC— screened out before wastewater enters the rest of the plant for treatment. WWCAppx.000344 (Am. Counterclaim, ¶¶27-29); 000563, 000605-613 (Orders Motion to Dismiss at 3 and Ex. 2). The purported "new" Headworks Claims pertain to the PSD's assertion that it will have to incur up to $1,500,000 to replace screens that WWC specified in its design with a new screening system. WWCAppx.000284-393 (EL Robinson repair proposal).

The PSD's effort to design and construct a new wastewater treatment plant and collection system has been years in the making. In 2010, the PSD was sued by the West Virginia Department of Environmental Protection ("WVDEP") for water quality violations at three separate plants at Snowshoe Village, the Inn at Snowshoe, and Silver Creek. WWCAppx.000341 (Am. Counterclaim, ¶6). In 2011, WWC was selected by the PSD to be the engineer of record for the design of the project. WWCAppx.000342-343 (Am. Counterclaim, ¶¶9-16). Prior to 2011, another engineering firm had been working for the PSD to design a centralized wastewater treatment plant. WWC was hired after the PSD board became dissatisfied with the prior firm's site selection. *See* WWCAppx.000199 (Depo. Lloyd Coleman 42:24-44:11). After WWC was hired, it proposed a decentralized plan utilizing multiple treatment plants that it claimed would be more efficient and cheaper than the centralized plant previously proposed. WWCAppx.000010 (Compl. ¶9). The PSD was ordered by the Public Service Commission ("PSC") to seek approval from the WVDEP as to whether its decentralized plan was reasonable. What WWC fails to mention is that the PSC, after

an extensive fact-finding process, found WWC's claims it could design a cheaper decentralized system to be utterly baseless and ordered the PSD to proceed with a centralized plant and system.[2]

WWC then spent the next several years designing the project and completed its design by December 2013. WWCAppx.000012 (WWC Compl., ¶23); WWCAppx.000343 (Am. Counterclaim, ¶17). WWC's design consisted of a centralized wastewater treatment plant utilizing a membrane bioreactor treatment system and the collection system to collect and transport wastewater to the plant. WWCAppx.000343-344 (Am. Counterclaim, ¶¶17-27).[3] The plant was to have a capacity to treat an average daily flow of 550,000 gallons with a peak factor of three. *Id.*, ¶30. WWC was charged with preparing bid documents and evaluating the bids and then, as the owner's representative, with overseeing and monitoring the construction of the project. *Id.*,¶35. The estimated cost for the construction of the system was $27,890,914; with the plant estimated to cost $12,572,000. WWCAppx.000344-345 (*Id.*,¶¶31, 37).

B. The construction of the plant.

Orders is a fourth generation, family-owned construction company based in Kanawha County, West Virginia. In 2014, after WWC completed its design work, Orders bid on the contract

---

[2] *See Ralph W. Beckwith, et al. v. Pocahontas County Public Service District*, Case No. 10-1279-PSD-C, Commission Order, August 22, 2012. *Ralph W. Beckwith, et al. v. Pocahontas County Public Service District*, Case No. 10-1279-PSD-C, Commission Order, August 22, 2012. http://www.psc.state.wv.us/scripts/WebDocket/ViewDocument.cfm?CaseActivityID=351701&NotType=WebDocket (last accessed Dec. 2, 2021). WWC's proposed decentralized system was described as "insufficient and inadequate from many perspectives" by the WVDEP, and PSC staff commented that the plan did not present an "apples-to-apples" cost comparison between a centralized and decentralized system. *Id.* at 7-8. Ultimately, the PSC found that the "continued refusal" to build a centralized system was "unreasonable" and refused to permit additional engineering work on a decentralized system. *Id.* at 12. While WWC initially claimed its decentralized system would save $10 million, once actually questioned under oath about those claims, its principal engineer, David Rigby, admitted those savings were illusory and there was no significant cost benefit to a decentralized option. *Id.* at 13-14. Ultimately, the PSC concluded the "[t]he District's own engineer was not able to demonstrate any appreciable savings over the centralized options" and that a decentralized system was not in the public interest. *Id.* at 20.

[3] The plant utilizes a membrane bioreactor ("MBR") process to treat wastewater. In general, an MBR system refers to a biological process where microbes are used to degrade pollutants that are then filtered from the water by a series of submerged membranes.

to construct the wastewater treatment plant. WWCAppx.000345 (*Id.*¶36). Orders contracted with the PSD effective April 19, 2015. *Id.* (*Id.*, ¶¶37, 41); WWCAppx.000581-591 (Ex. 1 to Orders Mot. to Dismiss, Contract).[4]

While WWC attached select portions of Orders' contract to its Third-Party Complaint, the contract also included contract specifications prepared by WWC. WWCAppx.000588 (Contract p. 5, Art. 9.01); WWCAppx.000569-603(Contract Specifications cover page and Table of Contents, §00010). With respect to the Headworks, WWC's design specified the precise type, model, and manufacturer for the screens to be used. WWCAppx.000606, 610 (Specifications at §11310-2, ¶2,02.A (rotating belt screen), §11320-2, ¶2.01.A (coarse bar screen)). The $1.5 million repair estimate provided by the PSD at issue in the alleged "new" Headworks Claim calls for the removal of these screens and their replacement with new, different coarse screens/grit plant and fine screens. WWCAppx.000282-293.[5]

Orders' contract with the PSD contains a limited indemnity obligation in Paragraph 7.18 of the Standard General Conditions:

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),**

[4] Two other contracts were awarded to Pipes Plus, Inc. for work on pump stations and on a collection system. *Id.* ¶¶34, 40.

[5] The plans for the proposed upgrades are at WWCAppx.000284-000290. The estimates are at WCCAppx.000291-293. There are three estimates: 1) a fine screen replacement only; 2) replacing one fine screen and adding a new course screen/grit unit; and 3) replacing both fine screens and adding a new course screen/grit unit.

> 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.
>
> ...
>
> 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.

WWCAppx.000475 (Third-Party Compl., Ex. 1, ¶7.18) (Emphasis added).[6]

This indemnity obligation is not broad based, does not entitle WWC to indemnification regardless of fault, and does not include an obligation to defend WWC. Rather, the indemnity obligation is limited to damages and losses arising out of or related to the performance of the Work and that are attributable to bodily injury or injury to or destruction of tangible property other than the Work itself.[7] The obligation is also limited only to those damages or losses caused by a negligent act or omission of Orders. Finally, the indemnity obligation specifically excludes indemnification for liability imposed on WWC arising out of its design work.

---

[6] Paragraph 7.18.B provides that the indemnity obligations are not limited by any limitation on the amounts of benefits payable by Orders or its Subcontractors under workers' compensation or other laws.

[7] The "Work" is defined in the contract as "The entire construction or the various separately identifiable parts thereof required to be provided under the Contract Documents. Work includes and is the result of performing or providing all labor, services, and documentation necessary to produce such construction; furnishing, installing, and incorporating all materials and equipment into such construction; and may include related services such as testing, start-up, and commissioning, all as required by the Contract Documents." WWCAppx.000442(Third-Party Compl., Ex. 1, ¶1.01.47).

The plant was constructed between the spring of 2015 and the spring of 2017. WWC points in its Brief to various delays in the project. *See* Petr's Br. at 3-5. These included the aforementioned WWC induced delays to study a decentralized plant option. WWC also alleged there were delays due to Orders' failure to meet design specifications; namely with respect to precast concrete panels for a structural precast concrete tank system. *Id.* at 3. The precast panels for the tanks in the plant were installed as a result of a change order that changed the design of the tanks from a poured in place concrete tank system to a precast system. The change order was reviewed and approved by the PSD and WWC in July 2015.[8] WWCAppx.000013-15 (WWC Compl. ¶¶34-51). WWC inspected and approved the installation of the tanks. It states that while there was no evidence of structural deficiencies, the surface finish was an issue. WWCAppx.000014 (*Id.*, ¶¶37-38). WWC alleged that additional problems with alignment of tension cable holes and missing cables arose and that the tanks leaked and that plans were proposed to address and mitigate the issues. Ultimately, it alleged in March of 2016 it rejected change order requests submitted to address the issues with the tanks. WWCAppx.000015 (*Id.*, ¶¶44-47). WWC asserted that these issues caused it to incur additional engineering fees and expenses, which were a portion of the fees and expenses it claimed were owed by the PSD and which it filed suit over on February 6, 2018. WWCAppx.000007-26 (*Id.*). WWC's fee claims were settled during mediation well before the filing of the PSD's Amended Counterclaim and are not part of this case.[9] WWCAppx.000346 (Am. Counterclaim, ¶51). In any event, despite what WWC now claims about when it first learned

[8] WWC only states in its Brief and in its original Complaint that the PSD approved the change order. But, change orders also had to be approved by WWC as the engineer unless the proposed change order *did not* involve the performance or acceptability of the work, the design, or other engineering or technical matters. *See* WWCAppx.000481 (Contract, Art. 11). The change from poured in place to precast concrete tanks could not have been made without WWC's approval.

[9] As discussed in Section C.iii, *infra,* of the Argument portion of this Response, these precast tanks are not located in the Headworks.

Orders' work was allegedly at issue, the allegations in its Complaint and the arguments in its Brief demonstrate two things: 1) that at the time the alleged concrete work was performed in the spring of 2016 it believed the work was not performed correctly; and 2) that it believed at the time that it was damaged by the work as it alleged it was forced to incur additional engineering fees.

The issues regarding the precast concrete tanks were addressed during construction to the satisfaction of the PSD and the plant was substantially complete on May 16, 2017. WWC prepared, certified, and filed with the PSC a Certificate of Substantial Completion. WWCAppx.000346 (*Id.*,¶46). The PSD alleges that, after startup, it became apparent that the plant was not functioning as designed; specifically, that "[it] cannot process the amount of wastewater that the District contracted with WWC to design." *Id.*, ¶48.

C. The timeline of the current litigation as it relates to Orders.

WWC filed suit against the PSD on **February 6, 2018**, and the litigation has taken a circuitous path since. WWC sought to recover fees allegedly owed by the PSD. Part of WWC's claims were based on the allegation it performed additional engineering work because of what it alleged were deficiencies with the precast concrete panels on the precast tank system. Count II of its Complaint was for breach of contract specifically related to the precast panels. WWCAppx.0000018-20. (WWC Compl., Count II).

March 28, 2018, the PSD served its original Counterclaim against WWC asserting 28 claims of design negligence, which included allegations that the plant does not process the amount of wastewater it was designed to process, that the WWC specified fine screens in the Headworks were improper and not the type recommended by the MBR supplier, and that WWC accepted defective precast panels. WWCAppx.000053-54 (Counterclaim, ¶12(a) through (cc)). Even though WWC made issues with the alleged deficiencies in the precast tanks part of its Complaint

and even though its acceptance of panels were made a part of the PSD's Counterclaim, WWC took no action to initiate third-party practice.

November 2019: After a year and a half of litigation, WWC moved for partial summary judgment and on November 27, 2019, the circuit court dismissed all but seven of the PSD's design negligence claims. WWCAppx.000300-310. Around the same time, the PSD filed its third supplemental responses to WWC's requests for production where it produced the Headworks repair plan and estimates.[10] WWCAppx.000282-295. WWC moved to strike what it characterized as the "new" Headworks Claim on November 1, 2019. WWCAppx.000230-299.

November 5, 2019: WWC, tendered to Orders contending WWC was entitled to be defended and indemnified under Orders' contract. In this tender letter, which it made an exhibit to its Third-Party Complaint, it pointed not to the alleged "new" Headworks Claims, but to the allegations in the PSD's *original March 28, 2018, Counterclaim* as implicating Orders' work:

> This firm represents WW Consultants, Inc., ("WWC"), in connection with the above-referenced lawsuit. Pocahontas County Public Service District ("PCPSD") engaged WWC to provide design and engineering services for the construction of a waste water treatment plant ("WWTP") located in Pocahontas County West Virginia (the "Project"). The District has asserted a claim against WWC, alleging 28 different design deficiencies in the WWTP (the "Lawsuit"). **While PSD alleged certain design deficiencies in the WWTP, several of the allegations implicate the construction work on the Project and/or the equipment supplied**, including: (1) a claim that the WWTP lacks capacity, (2) inadequacy of the fine screens, (3) construction of the ceiling in the EQ room and sludge room, (4) installation of defective precast panels, (5) inadequate feed system, (6) undersized waste sludge pumps, (7) undersized solution cleaning tank, (8) water pipe freezes in the attic space, and (9) a failure to submit as-built drawings. (***See* paragraph 12(b), 12(f), 12(l), 12(o), 12(p), 12(s), 12(u), 12(x), and 12(aa) of the enclosed Counterclaim).**

WWCAppx.000396-398. (Nov. 5, 2019, Tender letter, Ex. B to Third-Party Complaint) (Emphasis added).

[10] Three options to correct WWC's design deficiencies ranging in cost from $274,000 to $1,573,500 were presented. WWCAppx.000291-293.

Though affirmatively alleging in its Third-Party Complaint that it believed the PSD's *original* Counterclaim implicated Orders work on the plant and despite affirmatively relying on the *original* Counterclaim for the basis for its tender, WWC does not reference this letter at all in its Brief.

March 16, 2020: The circuit court, instead of striking the "new" Headworks Claims, reopened discovery and permitted potential amendment of pleadings, joinder of parties, and additional discovery. WWCAppx.000311-371, (Or. Granting in Part Motion to Strike, at ¶17).

May 11, 2020: The PSD filed its First Amended Counterclaim asserting claims against WWC for design professional negligence (Count I) and breach of contract (Count II). WWCAppx.000347-349 (Am. Counterclaim, ¶¶53-63)[11]. The Amended Counterclaim did not assert any new claims but provided more detail with respect to the PSD's existing claims regarding the Headworks. It also did not assert any claims regarding the precast concrete tanks or panels in the plant. Specifically, the PSD alleged WWC breached the standard of care applicable to engineers by:

> **a.** *Designing* a wastewater treatment plant and accompanying facilities that failed to process wastewater at the designed rate due to the Headworks and screening issues related thereto;
>
> **b.** Failing to provide field locations for the collection system;
>
> **c.** Failing to *properly design* the lagoon;
>
> **d.** Failing to *design* a proper waste sludge pump;
>
> **e.** Failing to *properly design* membrane racks in Train "A"'
>
> **f.** Failing to *properly design* the membrane cleaning solution tank;
>
> **g.** Failing to supervise contractors so that proper as-builts of the force mains could be made; and

[11] The PSD also added Pipes Plus, Inc., and A3-USA,Inc.("A3") as Counterclaim Defendants.

h. *Designing* the MBR area so that valves can only be accessed by climbing over safety railings or by removing grates.

WWCAppx.000347 (*Id.*, at ¶55).

May 18, 2020: More than three years after substantial completion, more than two years after the PSD filed its original Counterclaim, and more than 180 days after the PSD served its discovery with its updated damages claims and WWC's November 5, 2019, tender letter, WWC filed its Third-Party Complaint against Orders asserting negligence/contribution claims, express indemnification claims, and breach of contract claims. WWCAppx.000353-503.

July 2, 2020: Orders moved to dismiss, asserting that WWC's negligence and contribution claims were time barred, that even if they were timely they were prohibited by West Virginia's several liability statute, that WWC failed to state a claim for express indemnification under the contract, and that WWC failed to state a claim of breach of contract. WWCAppx.000558-686.

November 3, 2020: More than two years after the PSD filed its original Counterclaim and nearly a year after WWC claimed it was entitled to a defense and indemnification from Orders, WWC created out of thin air a new substantive filing; a contingent Notice of Intent to Attribute Fault against a party to a case. WWCAppx.000999-1002. Orders, A3, and the PSD moved to strike this filing as not permitted by law because it attempted to attribute fault to a party – not a nonparty as provided by W. Va. Code §55-7-13d – and as untimely. WWCAppx.001003-1128. By Order entered February 4, 2021, this contingent Notice was struck as untimely. In striking this Notice, the circuit court also agreed that the plain language of W. Va. Code §55-7-13d(a)(2) applied to nonparties but did not address the issue of whether such a filing was legally permitted. WWCAppx.001174-1184.

January 14, 2021: The circuit court dismissed WWC's Third-Party Complaint against Orders. WWCAppx.001149-1163. It held that WWC's negligence claims accrued at least as early

as when the PSD filed its original Counterclaim and were time barred that WWC did not state a claim for implied indemnity, that WWC was not entitled to express contractual indemnity based upon the plain language of Orders' contract with the PSD, and that its contribution claims, in addition to being time barred, were expressly barred by the contract and that the limited indemnity obligation, including the express exclusion of indemnification for design negligence claims, "would not have any force or effect if a party could still be sued for contribution." WWCAppx.001160.

January 27, 2021: WWC moved to alter the circuit court's judgment dismissing its claims against Orders, but this motion was denied by Order entered April 12, 2021. WWCAppx.001164-1173 (Motion to Alter); WWCAppx.001501-1510 (Or. On Mot. To Alter). In denying WWC's motion to alter, the circuit court again confirmed that WWC's statute of limitations accrued when the PSD served its original Counterclaim, that WWC relied upon the original Counterclaim allegations in support of its November 2019 tender, and that the "new" Headworks Claims were not new, but were a more detailed version of the PSD's previously asserted claims:

> It is apparent from the review of the record that the Court considered all the matters before the Court, including that **multiple considerations supported a finding that the statute of limitations would begin to accrue at the time the PSD's original counterclaim was filed**, including the fact that **WWC relied on the allegations in the original counterclaim as the basis for its November 2019 tender letter**.
>
> ...
>
> **The assertion of the Headworks Claims has no bearing on when WWC knew there were possible third party claims regarding the project and as such, does not require this Court to change its determination regarding the date of the accrual of the statute of limitations in this matter.** The Court also considers the thrust of the Headworks Claims is that because of the alleged issues with the design of the Headworks, the plant cannot process the capacity of wastewater it was designed to process. The original Counterclaim also specifically alleged that because of design negligence of WWC, the plant cannot process the amount of wastewater it was designed to process. Additionally, the original Counterclaim alleged that WWC 'failed to provide for heat in headworks area resulting in equipment freeze up.' **The Headworks Claims are a more detailed version of the claims already asserted in the PSD in the original Counterclaim**.

WWCAppx.001507-1508 (Or. On Mot. To Alter, pp. 7-8) (internal citations omitted) (Emphasis added).

Additionally, A3 moved to dismiss WWC's Third-Party Complaint. WWCAppx.000687-690. On March 30, 2021, A3's Motion was appropriately granted. WWCAppx.001460-1470. WWC also moved to alter or amend the dismissal of A3. In so doing, it asked the circuit court to certify both the dismissal of A3 and the dismissal of Orders as final. On **May 18, 2021**, the circuit court denied this motion, but certified only the dismissal of A3 as final under Rule 54(b). WWCAppx.001555-1562. In its motion seeking to alter the order dismissing Orders, WWC did not ask that the circuit court certify its dismissal order as final. WWCAppx.001561 (Or. Denying Mot. To Alter Judgment in Favor of A3 at 7). WWC's Notice of Appeal followed on June 15, 2021, more than thirty days after the granting of Orders' Motion to Dismiss and the denial of WWC's Motion to Alter the judgment dismissing Orders. *See* Notice of Appeal, No. 21-0485.

WWC knew for years before filing its Third-Party Complaint that Orders was the contractor on the plant. WWC observed and signed off on Orders' work at the time it was completed. WWC reviewed and certified Orders' work as meeting project specifications when it certified the plant as substantially complete in 2017. The allegations in WWC's original Complaint that Orders' work on the precast concrete tanks was deficient was an explicit basis for its fee claim against the PSD. Yet despite all of this, WWC took no action for over two years to assert third-party claims against Orders or to timely file a notice of nonparty fault under W. Va. Code §55-7-13d. Now, however, WWC argues that it was only with the alleged "new" Headworks Claims and amended Counterclaim that it first learned of the existence of potential claims against Orders. This position ignores the entire history of the project and resulting litigation. For the reasons set forth herein, the circuit court's dismissal of WWC's claims against Orders should be affirmed.

SUMMARY OF ARGUMENT

WWC asserts seven assignments of error grouped into five sections for briefing. Petr's Br. at 1-2. Only three of the seven assignments pertain to Orders: 1) that the circuit court erred in striking WWC's defective and untimely contingent Notice of Intent to Attribute Fault; 2) that the circuit court erred in dismissing WWC's dilatory negligence and contribution claims against Orders as time barred; and 3) that the circuit court erred in dismissing WWC's express indemnification claim against Orders. WWC is not appealing the circuit court's dismissal of Count Three of its Third-Party Complaint against Orders for breach of contract. WWC also does not appeal the circuit court's dismissal of its implied indemnity claim against Orders. *See* Notice of Appeal, Petr's Br. at 1-2 "Assignments of Error, WWCAppx.0000362-366 (Third-Party Compl., Wherefore Paragraph of Negligence Count, ¶¶26-33).[12] Orders' Response will only address the assignments of error that pertain to it.

The circuit court's dismissal of Orders and A3 and granting of the Motion for Partial Summary Judgment of Pipes Plus were well-reasoned, correct, and should be affirmed. Similarly, as there is no basis in law for a contingent notice of intent to attribute fault, the striking of WWC's untimely and defective contingent Notice of Intent to Attribute Fault should be affirmed.

A. WWC's negligence and contribution claims are untimely and/or precluded by contract.

WWC's timeliness argument rests upon the fiction that it was not until the "new" Headworks Claims were first asserted by the PSD in its Amended Counterclaim that the statute of limitations began to run for WWC's third-party negligence/contribution claims. Petr's Br. at 25. The PSD's Amended Counterclaim alleges that WWC was negligent in its design of the

[12] In the "WHEREFORE" Paragraph of its negligence count, WWC asked Orders to be judged liable to it for "contribution and/or common law indemnity…" WWCAppx.000363.

wastewater treatment plant and collection system and that it breached its contract with the PSD by failing to perform certain contractual obligations it owed the PSD. WWCAppx.000330-352 (Am. Counterclaim). WWC completed its design work in 2013, well before Orders was awarded the construction contract. WWCAppx.000343 (*Id.*, ¶¶16-17); WCCAppx.000012 (WWC Compl., ¶23). Since it prepared bid documents and evaluated the bids and then, as owner's representative, observed Orders' work during the project, it was in a position at the time the work was performed to verify compliance with the project specifications. Substantial completion was on May 16, 2017. WWCAppx.000346 (Am. Counterclaim, ¶46).

WWC filed suit on February 6, 2018, to collect fees it claims were owed it. In its suit it pointed to alleged issues with precast concrete tanks installed by Orders in 2015–2016 in support of its claims. WWCAppx.000013-15; 000018-20 (WWC Compl.,¶¶34-51, 75-96). On March 28, 2018, the PSD served its original Counterclaim against WWC alleging 28 separate claims of design negligence and claiming WWC breached its contract. WWCAppx.000051-56 (Counterclaim). This Counterclaim specifically alleged that the plant did not process the capacity it was designed to process, that there were inadequate or insufficient fine screens in the Headworks, and that it approved and allowed defective precast concrete tanks to be installed. WWCAppx000053-55 (*Id.*,¶¶12(b), (f), (o)). WWC did not move to add additional parties and it did not file a notice of nonparty fault.

Instead, WWC proceeded to litigate. Some 19 months later, the circuit court dismissed a majority of the PSD's design negligence claims on summary judgment. WWCAppx.000300-311 (Or. Granting Mot. for Partial Summary Judgment).[13] Around the same time, the PSD supplemented discovery by providing a range of repair estimates for remedying the screening

[13] A chart summarizing the circuit court's ruling on WWC's partial motion for summary judgment with respect to the 28 design-defect Counterclaim allegation may be found at WWCAppx.000614-616.

issues that exist due to WWC's failure to specify appropriate screens in the Headworks. WWCAppx.000282-295 (PSD Third Supp. Document Production).

On November 5, 2019, WWC, for the first time, advised Orders that it believed Orders was obligated to indemnify it from the PSD's design negligence claims. WWCAppx.000365, 000396-398 (Third-Party Compl, ¶30, Ex. B. to Third-Party Compl.). In its letter WWC explicitly asserted the PSDs original March 28, 2018, Counterclaim implicated Orders' work.

WWC's efforts to strike the "new" Headworks Claims were unsuccessful and it consented to the filing of an Amended Counterclaim. On May18, 2021, WWC belatedly filed its Third-Party Complaint against Orders. Based on WWC's claims and admissions in its own pleadings, the circuit court appropriately found WWC's third-party negligence and contribution claims to be time barred and dismissed them. WWCAppx.001149-1163 (Or. Granting Orders Mot. to Dismiss).

Further, the circuit court's dismissal of WWC's contribution claims was not dependent on its ruling on the statute of limitations. The circuit court found that the contribution claims were precluded by the indemnity provision in Orders' contract with the PSD, holding that the activity WWC sought contribution for was "specifically contracted between . . . the parties to be deemed not to be indemnifiable, via the indemnity exceptions contained in Paragraph 7.18.C." WWCAppx.001160 (*Id.* at 12). WWC does not appeal this part of the circuit court's ruling and has waived any arguments that this aspect of the circuit court's order was erroneous. Therefore, even if the contribution claims were timely and were not precluded by W. Va. Code §55-7-13c, the circuit court's dismissal of them must stand.

WWC's Third-Party Complaint was filed more than three years after substantial completion and more than two years since the filing of the PSD's original Counterclaim and was untimely under W. Va. Code §55-2-12 and W. Va. Code §55-2-21(b). WWC's efforts to explain

away what was either an intentional, strategic decision not to initiate third-party practice or simply lack of diligence fail in the face of its own pleadings.

B. WWC's negligence and contribution claims are precluded by statute.

WWC's negligence and contribution claims are precluded by statute. In granting A3's Motion to Dismiss, the circuit court found that WWC's third-party claims are barred by West Virginia's several liability statute. This Court should affirm that ruling and Orders' adopts and joins the positions advanced by A3.

C. The limited indemnity obligation in Orders' contract with the PSD does not require Orders to indemnify or defend WWC.

WWC is not entitled to be defended or indemnified by Orders from the PSD's design negligence claims and the circuit court's dismissal of WWC's contractual indemnity claims was correct. WWC's position is based on a misapplication of clear contractual language and relies on inapplicable law regarding an insurer's duty to defend under an insurance policy.

The indemnity obligation in Paragraph 7.18 of Orders' contract is limited in scope. It required Orders to indemnify and hold harmless, but not defend, WWC and the PSD from claims that arise out of or relate to the performance of the "Work" as defined in the contract, *provided* such claims are attributable to bodily injury or damage to tangible property other than the Work itself. The indemnity obligation is further limited to the extent losses are caused by Orders' negligence. WWCAppx.000475 (Standard General Conditions, ¶7.18 Ex. B to Third-Party Compl.).

In addition to its limited applicability, there are also two express exceptions to the indemnity obligation. No indemnity is owed to WWC for claims or losses arising out of (1) its preparation or approval of or failure to prepare or approve "maps, Drawings, opinions, reports,

surveys, Change Orders, designs, or specifications;" or (2) its giving or failing to give directions or instructions if such is the primary cause of the injury or damage." *Id.*

In its Brief, WWC exclusively focuses on the latter exclusion in Paragraph 7.18.C.2 by arguing that the circuit court erred by not concluding such failures were the primary cause of the loss. Petr's Br. at 20. However, no such primary cause inquiry is necessary. WWC overlooks the fact that the PSD's allegations against WWC are rooted in its alleged negligent *design*. These claims are unequivocally excluded from any indemnity obligation under Paragraph 7.18.C.1, which has no such "primary cause" qualifier.

While WWC claims for the first time in its Brief that the "new" Headwords Claim implicates allegedly defective concrete work on the precast tanks on the project, that does not matter. Petr's Br. at 21. *First*, the PSD's Amended Counterclaim does not assert claims related to the precast concrete panels or tanks and they are not at issue. *Second,* such a claim relates to losses allegedly attributable to damage to the work, which is excluded from the indemnity obligation. *Third*, WWC never raised claims or arguments that the work on the precast panels was implicated by the Amended Counterclaim or triggered any indemnity obligation in its arguments and briefings below. It raises this issue for the first time on appeal and its arguments in this respect should be disregarded.

D. The defective and untimely contingent Notice of Intent to Attribute Fault was appropriately struck.

Recognizing its third-party claims were in peril, on November 3, 2020, WWC twisted the notice of nonparty fault provision contained in W.Va. Code §55-7-13d beyond its plain meaning by creating and filing a legally baseless contingent Notice of Intent to Attribute Fault to parties to the action. WWCAppx.000999-1002. WWC offers no persuasive argument demonstrating the circuit court's striking of its Notice was erroneous.

First, WWC misunderstands Orders and A3's argument and ignores its own filings when it asserts their position would lead to unfair results, would "require clairvoyance on the part of the defendant," and would allow a plaintiff to sand-bag a defendant by filing a barebones pleading and then amending to add more detail after the 180-day period ran. *See* Petr's Br. at 16-17. Orders and A3 never argued that the 180-day period runs from the service of process of the original pleading. Recognizing that W. Va. Code §55-7-13d(a)(2) does not specify that it is service of process of the original complaint that triggers the 180-day period and citing case law holding the relevant service of process is that which first puts a defendant on notice of the potential fault of nonparties, they argued that *in this case*, based on WWC's own filings, it was the PSD's service of its original Counterclaim that put WWC on notice of the potential fault of nonparties. WWCAppx.001006-1007 (Mot. to Strike at pp 4-5); WWCAppx.000396-398 (Nov. 5, 2019, tender letter); WWCAppx.000013-15 (WWC Compl, ¶¶34-51, allegations re: precast panels). The circuit court agreed, noting that in its original Counterclaim, the PSD specifically alleged the plant lacked capacity, there was no access to the course screens located in the Headworks, and that the fine screens were not the type specified by the MBR supplier. WWCAppx.001180-1181 (Or. Granting Mot. to Strike at 7-8). Even adopting the position that WWC urges herein—that it is the service of process of the first filing that puts one on notice of the potential fault of nonparties—its defective notice was still untimely and properly struck.

Second, though the circuit court did not reach the issue of whether WWC's contingent Notice of Intent to Attribute Fault to existing parties was permitted under W. Va. Code §55-7-13d(a)(2), WWC nevertheless argues that it may provide such a notice and faults Orders and A3 for failing to identify any case law that prohibits such a filing.[14] WWCAppx.001182 (*Id.* at 9);

[14] The circuit court agreed with Orders and A3 that though the "plain language of West Virginia Code §§55-7-13d clearly indicates it applies to nonparties to a civil action, because [it] has found that the notice must be stricken as it

Petr's Br. at 18. However, that is of no consequence. W. Va. Code §55-7-13d(a)(2) is clear and unambiguous and Orders and A3 need not point to case law interpreting a clear statute when the text of the statute provides the answer. W. Va. Code §55-7-13d(a)(2) by its plain language applies to the potential fault of *nonparties*. The legislature used the word *nonparties* seven times in a single paragraph in the statute.

WWC's claims of unfairness ring hollow. Any unfairness to it is—like with its dilatory attempts to assert negligence/contribution claims—solely of its own making. WWC's entire argument rests on the fiction that it had no idea Orders' work was potentially implicated by the PSD's claims until the Amended Counterclaim was filed on May 11, 2020. To believe this, this Court must ignore WWC's own Complaint, the PSD's original Counterclaim, the discovery served in the case, and WWC's own statements in its November 5, 2019, tender letter. Faced with the clear impact of its own filings and writings, WWC's response is to ask the Court to ignore them.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

WWC asserts three assignments of error as to Orders, none of which require oral argument. *See Petr's Br.,* Assignments of Error ##3, 4, and 5, at p. 1.

The dismissal of WWC's untimely negligence/contribution claims and the dismissal of its contractual indemnity claims involve the application of well-established and oft-litigated legal issues and the facts and legal arguments are adequately presented in the briefs. Similarly, the striking of WWC's faulty contingent Notice of Intent to Attribute Fault involves the application of a clear and unambiguous statute, W.Va. Code §55-7-13d(a)(2), that should be applied as written. Further, as to whether WWC's defective Notice of Intent to Attribute Fault was timely, the facts

---

is untimely, [it] need not address the parties' contentions regarding the applicability of W. Va. Code §55-7-13d to named parties to a civil suit." WWCAppx.001182.

and legal arguments are sufficiently presented in the briefs and oral argument would not significantly aid the decisional process on this point.

ARGUMENT

A. Standard of Review.

This matter involves two primary issues: the granting of Orders' Motion to Dismiss and the striking of WWC's contingent Notice of Intent to Attribute Fault.

With respect to the granting of Orders' Motion to Dismiss, a *de novo* standard of review applies. *See* Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995); *Boone v. Activate Healthcare, LLC.,* 245 W. Va. 476, 859 S.E.2d 419, 422 (2021).

With respect to the striking of WWC's contingent notice of Intent to Attribute Fault, clear questions of law and issues of statutory interpretation are also reviewed under a *de novo* standard of review. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995). However, if the issue involves mixed questions of law and fact, underlying factual findings are typically reviewed under a clearly erroneous standard while questions of law are subject to *de novo* review. *See Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). In striking WWC's untimely and improper contingent Notice of Intent to Attribute Fault, the circuit court made certain Findings of Fact relevant to its determination. *See* WWCAppx.001174-001178. These factual findings are to be assessed under a clearly erroneous standard, while the issues of what service of process triggers the 180-day period and whether such a notice can be filed as to existing parties are assessed under a *de novo* standard.

B. The circuit court was right to dismiss WWC's contribution and negligence claims against Orders.

i. The circuit court correctly found WWC's negligence and contribution claims were time barred.

WWC affirmatively pled in its Third-Party Complaint that it believed at least as early as the March 28, 2018, service of the PSD's original Counterclaim that Orders' work was implicated by the PSD's claims. It even incorporated its November 5, 2019, tender letter into its Third-Party Complaint. That letter unequivocally grounds WWC's claim for indemnification on the PSD's original Counterclaim. WWCAppx.000396-398. Belatedly realizing the import of that assertion, WWC now asserts it did not realize Orders' work was implicated until the filing of the Amended Counterclaim. The circuit court did not fall for this, and neither should this Court.

A third-party plaintiff has "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 a non-party person or entity." W.Va. Code § 55-2-21(b) (Emphasis added). WWC's claims for contribution and implied indemnity in the "Negligence" count of its Third-Party Complaint are "personal action[s] for which no limitation is otherwise prescribed" and are governed by a two-year statute of limitations.[15] W. Va. Code §55-2-12. In tort actions, the discovery rule is applicable to the running of the statute of limitations. The rule provides that the statute begins to run when a plaintiff knows or should, by the exercise of reasonable diligence 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

[15] WWC does not appeal the circuit court's dismissal of its "common law," i.e., implied, indemnity claim against Orders.

breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." Syl. Pt. 4, *Gaither v. City Hosp.*, 199 W.Va. 706, 708, 487 S.E.2d 901, 903 (1997).

Because WWC brought its Third-Party Complaint in its capacity as a Counterclaim Defendant, it was the service of the PSD's original Counterclaim that triggered WWC's 180-day period to file a third-party complaint pursuant to the clear text of W. Va. Code §55-2-21(b). The PSD served its original Counterclaim on March 28, 2018, and the 180–day deadline ran on September 24, 2018. WWC filed its Third-Party Complaint on May 18, 2020, more than two years, much less 180 days, after the original Counterclaim. Accordingly, WWC's filing was untimely.

WWC does not dispute that its negligence claims, including its contribution claim, are governed by a two-year statute of limitations and that the circuit court applied the correct statute. Petr's Br. at 24-25;. WWC erroneously contends the circuit court erred in applying the discovery rule. *Id.* at 25. However, a review of the Record shows the circuit court did not err in concluding WWC's claim accrued when it was served with the PSD's original Counterclaim.

First, WWC was charged with preparing and evaluating the bids and then, as owner's representative, with overseeing and monitoring the construction of the project, it has known since the beginning of the project who built the plant. Additionally, WWC was observing Orders' work during construction and was in a position at the time the work was performed to verify compliance with the project specifications. WWC acknowledges this in its Brief when it discusses, citing *its own Complaint against the PSD,* the precast concrete issue in 2016 that allegedly caused it to incur extra engineering fees. Petr's Br. at 4-5. Substantial completion was on May 16, 2017, WWC did not file its Third-Party Complaint until May of 2020, nearly three years later. WWCAppx.000346 (Am. Counterclaim, ¶46); WWCAppx.000359-503 (Third-Party Compl.) WWC knew the entities

it contends may have owed it a duty and who it contends may have breached that duty at least as early as the filing of the PSD's original Counterclaim, if not earlier.

Next, the PSD served its original Counterclaim on March 28, 2018, more than two years before WWC filed its Third-Party Complaint. The circuit court correctly concluded WWC knew this original Counterclaim potentially implicated Orders work. While WWC argues it first knew of its own injury or potential injury when the PSD filed its Amended Counterclaim, WWC's representations are wholly inconsistent with the Record and WWC's own filings. The PSD's Amended Counterclaim realleges those items of design negligence that were not previously dismissed on summary judgment and adds more detail about the Headworks. The "new" Headworks Claim consists of the design negligence claims and related screening issues that caused the plant to lack capacity, all of which were asserted in the PSD's original Counterclaim WWCAppx.000347 (Am. Counterclaim, ¶55); WWCAppx.000053-55 (Counterclaim, ¶12). The circuit court recognized these were not, in fact, new claims. In its Order denying WWC's Motion to Alter it reaffirmed the Headworks Claims are simply "a more detailed version of the claims already asserted by the PSD in the original Counterclaim." WWCAppx.001507-1508 (Order Denying Mot. to Alter at 7-8). Simply put, there was nothing new in the Amended Counterclaim that gave rise to any third-party claims against Orders that was not present in the PSD's original Counterclaim. As such, the circuit court was correct in determining that the statute of limitations on WWC's claims accrued and began to run at the latest when the PSD served its original Counterclaim on WWC on March 28, 2018.

Furthermore, WWC's discovery rule arguments are undermined by its own pleadings. In its Brief, WWC asserts the "clock" should not run until the "new" Headworks Claim was filed in May 2020. Petr's Br at 25. In making this argument, WWC asks the Court to ignore its own 2018

Complaint allegations relating to allegedly deficient concrete work. Additionally, in its Third-Party Complaint, it specifically alleges that it tendered its defense to Orders on November 5, 2019, on the basis of the allegations in the PSD's original Counterclaim. *See* WWCAppx.000013-15 (WWC Compl., ¶¶34-51; WCCAppx.000365 (Third-Party Compl. ¶ 30); WWCAppx.000396-398 (Nov. 5., 2019, tender letter). Far from relying on PSD's assertion of the "new" Headworks Claim as the basis for its third-party claims, WWC explicitly relies in its tender letter on the allegations in the PSD's original Counterclaim, writing:

> [t]he District has asserted a claim against WWC, alleging 28 different deficiencies in the WWTP (the "Lawsuit). While PSD alleges certain deficiencies in the WWTP **several of the allegations implicate the construction work on the Project and/or the equipment supplied**, including: (1) a claim that the WWTP lacks capacity, (2) inadequacy of the fine screens, (3) construction of the ceiling in the EQ room and sludge room, (4) installation of defective precast panes, (5) inadequate feed system, (6) undersized was sludge pumps, (7) undersized solution cleaning tank, (8) water pipe freezes in the attic space and (9) a failure to submit as-built drawings. **(*See* paragraph 12(b), 12(f), 12(l0, 12(o), 12(p), 12(s), 12(u), 12(x) and 12(aa) of the enclosed Counterclaim).**

WWCAppx.000396 (Emphasis added).

Given its involvement during construction, WWC was on notice that issues with the plant could implicate Order's work as early as the substantial completion date and its own Complaint allegations confirm as much. Regardless, the circuit court correctly determined WWC was on notice that Orders work was potentially implicated by the filing of the PSD's original Counterclaim in March of 2018. Yet WWC did nothing for more than two years. The circuit court correctly found the filing of WWC's Third-Party Complaint to be untimely.

Finally, the circuit court correctly rejected WWC's argument that a contribution claim accrues, and the statute of limitations runs "from the time of payment in excess of the plaintiff's proportionate share" because it is inconsistent with West Virginia law. Petr's Br. at 26; WWCAppx.001149-1163 (Or. Granting Orders Mot. to Dismiss). WWC's reliance on 36-year-old case law that pre-dates both the abolition of joint and several liability and the 2016 amendments

to W.Va. Code §55-2-21 would lead to absurd results today. Relying on *Bradford v. Indiana & Michigan, Elec Co*, 588 F.Supp. 708 (S.D.W. Va. 1984) for the proposition that a contribution claim accrues, and the statute of limitations runs "from the time of payment in excess of the plaintiff's proportionate share," WWC argues that its third-party claims are timely and would not accrue until it makes an excess payment. *Id.* at 714; Petr's Br. at 27. However, the district court in *Bradford* found that the contribution and indemnity claims asserted there fell under federal admiralty jurisdiction, not West Virginia law and, therefore, applied "the equitable doctrine of laches rather than a specific statute of limitations period." *Bradford,* 588 F.Supp. at 714. Moreover, the cases the district court in *Bradford* cited to for the position that an action for indemnity arises from the time of payment of settlement and for contribution from the time of payment of an excess share were federal district court cases from Maryland and Massachusetts not any cases from the West Virginia Supreme Court of Appeals. *Id.* at 714. In the *Hensel Phelps* case cited by WWC, the district judge simply cited back to *Bradford* in a footnote but provided no other analysis. *Hensel Phelps Const. Co. v. Davis & Burton Contractors, Inc.*, 2013 WL 623071, *3, n. 5 (S.D.W. Va. 2013). Neither case actually applied West Virginia law and neither case can be squared with this Court's holdings in cases such as *Charleston Area Medical Center v. Parke-Davis*, 215 W.Va. 15, 614 S.E.2d 15, 17-18 (2005) or *Howell v. Luckey* 205.W.Va. 445, 446, 518S.E.2d 873 (1999)

Under applicable West Virginia Supreme Court of Appeals caselaw, WWC was required to file its third-party negligence and contribution claims before settlement or judgment. *See* Syl. Pt. 5 *Howell v. Luckey* 205.W.Va. 445, 446, 518 S.E.2d 873 (1999); Syl . Pt. 6 *Charleston Area Medical Center v. Parke-Davis*, 215 W.Va. 15, 17-18. 614 S.E.2d 15, 17-18 (2005). WWC argues that its claim does not accrue, and the statute does not begin to run, until it pays more than its proportionate share. However, by that time, even under pre-2015 law, it had no claim to bring in

the first place. WWC's position would render W.Va. Code §55-2-21(b) a nullity. In short, since 2015, WWC can only be severally liable and, therefore, absent statutory exceptions not present here, cannot be liable for damages in excess of its own proportionate share.

Aside from failing to explain how its reliance on non-binding federal court decisions squares with this Court's decisions in *Howell* and *Parke-Davis*, WWC's position would lead to a duplicity of actions and a waste of judicial resources. Under WWC's theory, a party could litigate a case for years through to settlement or judgment and then it would have an additional two years to bring its contribution claim. Then, that case could proceed through months or years of litigation and any defendant in that second case who believed there may be other responsible parties would also then have two years after a judgment for an excess share to bring their claims.[16] As the later-added parties would not have participated in the original case, discovery will be repeated. And, as time passes, documents will be lost, memories will fade, and the ability of later-added third-parties to defend against the claims will be prejudiced. This is precisely the result the Court aimed to prevent with its holdings requiring third-party contribution claims to be asserted before settlement or judgment in the initial case.

In this case, under WWC's theory, it could proceed through a trial sometime in 2022 and then if it was assessed with a judgment it could wait another two years, until sometime in 2024, to assert a new claim for contribution and the cycle of litigation would begin again. What an absurd and wasteful result, especially when WWC admits it knew of its potential claims from the outset of this litigation, if not earlier, and did nothing!

[16] In construction cases at least, the builders statute of repose would ultimately put an end to the cycle, but this statute is not generally applicable to all negligence/contribution claims. *See* W. Va. Code §55-2-6a.

ii. The Circuit Court correctly held that West Virginia's several liability statute, W.Va. Code §§ 55-7-13c, precludes WWC's negligence and contribution claims.

W. Va. Code §55-7-13c(a) provides that liability for defendants "shall be several only and may not be joint." W. Va. Code §55-7-13(c)(a). There are several, limited, statutory exceptions where liability may be joint. *See e.g.,* W. Va. Code §§ 55-7-13c(a) and W. Va. Code §§ 55-7-13c(h)(1) through (h)(3). WWC admits none of these circumstances are present here.

The circuit court correctly found that W. Va. Code §55-7-13c precluded WWC's third-party negligence and contribution claims against A3. This holding applies with equal force to WWC's third-party negligence/contribution claims against Orders. If this Court affirms the circuit court's dismissal of WWC's claims against A3, it must also affirm the dismissal of WWC's contribution/negligence claims against Orders and need not address whether they were timely. Orders adopts and incorporates A3's Response on this point as if fully set forth herein and urges this Court to affirm the circuit court's dismissal of WWC's third-party claims against A3.

C. The Circuit Court was right to dismiss WWC's express indemnification claims against Orders.

Orders' contract with the PSD clearly and unambiguously does not require Orders to defend or indemnify WWC from the PSD's claims. Whether a contract is ambiguous is a question of law and when, as here, a contract's terms are clear and unambiguous, they are to be applied and not construed. *See* Syl. Pts. 1 & 2, *Citynet v. Toney*, 235 W.Va. 79, 772 S.E.2d 36, 37-8 (2015). When terms are clear and unambiguous, "[i]t is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them." Syl. Pt. 3, *Id.*; *see also* Syl. Pt. 3, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626, 628 (1962). The

circuit court correctly determined WWC is not entitled to indemnification from Orders under the limited indemnity provision in Orders' contract with the PSD.

i. WWC is not entitled to indemnification for any design negligence or negligence in the supervision of contractors or subcontractors.

The limited indemnity provision in Section 7.18 of Orders' contract provides that WWC is only entitled to be indemnified and held harmless from:

> "costs, losses, and damages...arising out of or relating to the performance of the Work, provided, that any such claim, costs, 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 resulting therefore, **but only to the extent caused by any negligent act or omission of Contractor...**"

WWCAppx.000475 (General Conditions, ¶7.18.A) (Emphasis added). Moreover, the provision specifically excludes any obligation of Orders to indemnify WWC for WWC's design negligence:

> 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.(General Conditions, ¶7.18.C) (Emphasis added).

As much as WWC would like it to be otherwise, Orders only has an obligation to indemnify WWC for its losses or damages if they arise out of the performance of the Work and are attributable to personal injury or damage to tangible property (other than the Work), and only to the extent they are caused by Orders' negligent acts or omissions. But as a matter of law, WWC can only be severally liable for its proportionate share of damages caused by its own acts or omissions. Given this, the limited, "to the extent of" indemnity provision is not triggered by the PSD's Amended Counterclaim.

Nevertheless, WWC, in its Brief, continues to minimize the nature of the PSD's claims against it. *See* Petr's Br. at 20. WWC only addresses those allegations relating to its alleged failure to supervise by arguing that those claims are excluded from the indemnity obligation under Paragraph 7.18.C.2 only if they are the primary cause of the injury. *Id.* In so doing, WWC asks the Court to disregard the multiple direct allegations of independent, professional design negligence against WWC that are squarely excluded from any indemnity obligation under Paragraph 7.18.C.1, which has no such "primary cause" qualifier.

In its Amended Counterclaim, the PSD asserts that WWC was negligent in the *design* of the Headworks, in failing to provide field locations for the collection systems, in the *design* of the waster sludge pump, in the *design* of the membrane racks in Tank "A", in the *design* of the membrane cleaning solution tank, in the supervision of contractors related to the preparation of as-builts for the force mains, and in the *design* of valves in the MBR area. WWCAppx.000347 (Am. Counterclaim at ¶55). Additionally, the PSD alleges that WWC breached its professional services contract by failing to complete an operation & maintenance manual for equipment, failing to provide as-builts of certain facilities, failing to prepare an asset management plan, failing to provide engineering support for the first year of operations, signing off on a final payment application when punch list items remained, and submitting invoices exceeding allowable reimbursements without obtaining prior approval from the PSD. WWCAppx.000348 (*Id.*, ¶61).

All of these allegations fall squarely within the exceptions to indemnity in Paragraph 7.18.C. With respect to the professional negligence allegations, no indemnity is required for the alleged design failures pursuant to Paragraph 7.18.C.1. Similarly, WWC's alleged failure to provide as-builts or field locations in the collection system constitute failures to prepare maps, drawings, reports, or surveys under Paragraph 7.18.C.1. Its alleged failure to supervise contractors

related to as-builts of the force mains constitutes a failure to give directions under Paragraph 7.18.C.2.[17] Similarly, with respect to the PSD's breach of contract allegations, its failure to complete O&M manuals, failure to provide as-builts, and failure to prepare an asset management plan all give rise to liability arising from the alleged failure to prepare drawings, opinions, surveys, reports, maps, or specifications, etc. *Id.,* ¶61(a), (b), (c). WWC's approval of a final pay application, failure to provide ongoing engineering support per its contract, and its submission of excessive expense reimbursements can only involve its own actions under its contract with the PSD and cannot be reasonably seen as negligent acts or omissions of Orders that expose it to liability for damages. Because the liability claims against WWC all constitute conduct outside of Orders' indemnity obligation, WWC's contractual indemnity and breach of contract claims were properly dismissed by the circuit court.

ii. WWC cannot, as a matter of law, be liable for damages caused by Orders' alleged negligent acts or omissions.

The indemnity obligation only requires Orders indemnify WWC for claims, losses, and damages that are "attributable to bodily injury…or to injury to or destruction of tangible property (other than the Work itself)…," and only "to the extent caused by any negligent act or omission of [Orders]." WWCAppx.000475 (General Conditions, ¶7.18.A).

This is not a third-party personal injury or property damage claim. This is a claim by the PSD against WWC seeking recovery from WWC for damages the PSD alleges are the direct and proximate result of WWC's own, independent design negligence. No theories of liability have been advanced pursuant to which WWC could be held liable to the PSD for Orders' negligent acts or omissions. If WWC is to be held liable, it will be because a jury found it was independently negligent in its roles as designer and owner's representative. And because WWC can only be

[17] The claims regarding as-builts of the force mains do not pertain to Orders' contract to construct the plant.

severally liable for its own acts or omissions, there cannot be a situation where WWC is exposed to claims, losses, costs, or damages caused by Orders. *See* W. Va. Code §55-7-13c. For this reason, the circuit court's dismissal of WWC's contractual indemnification and breach of contract claims was appropriate and should be affirmed.

iii. WWC's new argument that Orders' concrete work is implicated by the "new" Headworks Claim still does not entitle it to indemnification.

Questions that are raised for the first time on appeal should not be considered by the court. *See Shaffer v. Acme Limestone Co.*, 206 W. Va. 333, 349, 524 S.E.2d 688, 704 (1999). WWC's assertion that the "new" Headworks Claim asserted in PSD's Amended Counterclaim implicated alleged deficiencies in Orders' concrete work is raised for the first time on appeal and should not be considered by this Court. *See* Petr's Br. at 4-5, 21.

In its Brief, WWC includes a discussion of issues that arose on the project in 2015–2016 with precast concrete panels that were installed for a precast concrete tank system on the plant. Petr's Br. at 4-5; WWCAppx.000013-15(WWC Compl.). These precast tanks are the only concrete work on the project discussed in WWC's Brief. Later in the Brief, and without any citation to any support in the Record, WWC asserts that Orders' concrete work was implicated in the "new" Headworks Claim asserted in the Amended Counterclaim. *See* Petr's Br. at 21.

This is the first time such an assertion has been made. The Amended Counterclaim makes no allegations relating to the precast concrete tanks. WCCAppx.000330-352. Allegations regarding the precast concrete tanks are also absent from WWC's Third-Party Complaint. WWCAppx.000359-372. In its briefing on Orders' Motion to Dismiss the Third-Party Complaint, WWC never raised the claim that the concrete work on the precast concrete tanks was implicated by the "new" Headworks Claim. WWCAppx.000691-709. And, in its Motion to Alter the judgment dismissing Orders, WWC never raised any arguments or claims that the concrete work

on precast tanks was implicated. WWCAppx.001164-1173. Indeed, the approximately $1.5 million repair estimate that WWC claims was newly disclosed as part of the "new" Headworks Claim, contains no line items for work related to purported deficient concrete work in the tanks. *See* WWCAppx.000293 (PSD Third Supp. Document Production).[18]

WWC's new claim that the Headworks Claims implicated work on the precast tank system is a red herring. WWC never previously raised issues with the precast concrete tanks in relation to the Headworks because the tanks are in a separate area of the plant. *See* WWAppx.Supp000001 (Sheet WW-A-02, Longitudinal Section View).[19] The Amended Counterclaim allegations regarding the Headworks relate to screening issues and alleged issues with precast concrete panels on the precast tank system are not part of this case. Even if the concrete work is implicated, indemnification is still not owed under the contract because Paragraph 7.18.A only requires indemnification from claims and losses attributable to third-party property damage. Finally, because WWC never raised the argument that the alleged "new" Headworks Claims implicated Orders' concrete work below, WWC's new argument should not be considered by this Court on appeal.

iv. The circuit court correctly determined Orders has no contractual duty to defend WWC.

Orders' contract with the PSD expressly does not include an obligation to defend. WWC's allegations to the contrary are without merit. While the indemnity provision may potentially require Orders to indemnify WWC from some damages, this potential future obligation is separate

[18] Drawings showing the proposed repair work scope are in the record and likewise do not implicate the tanks. *See* WWCAppx.000284-293.

[19] On December 2, 2021, Orders and A3 filed their Motion for Leave to Supplement the Record and Appendix to add plan view of the plant to the Record and Appendix in this case so that the Court could better understand the layout of the plant and see where the tanks actually are located in relation to the headworks. This Motion was pending at the time this Response was filed.

and distinct from a duty to assume a defense. In *Mulvey Construction, Inc. v, Bitco General Life Insurance Corp.*, 2015 WL 6394521 (S.D. W.Va. 2015), District Judge Faber, in determining whether the supplemental payments provision of an insurance policy provided for the payment of a potential indemnitee's defense costs, assessed whether a duty to defend existed under a contractual indemnity provision with similar, yet broader, language than at issue here.[20] Like here, the indemnity provision in *Mulvey* provided for the indemnitee to "indemnify and hold harmless" but did not explicitly require the indemnitee to "defend." The court noted that "[t]here is a difference between an obligation to reimburse legal costs pursuant to an indemnity agreement and an explicit duty to defend." *Id. at* *12.[21] Judge Faber explained that a duty to defend is separate from the duty to indemnify and that a contract that contains indemnification and hold harmless provisions "still does not impose an independent duty to defend." *Id.* (internal citations omitted); *see also Kaydon Acquisition Corp. v. Custum Mfg., Inc.*, 301 F. Supp. 2d 945, 957 (N.D. Iowa 2004) (language requiring a party "indemnify and hold harmless" another does not impose a contractual duty to defend); *United Rentals Hwy. Techs v. Wells Cargo*, 289 P.3d 221 (Nev. 2012) (strictly construing duty to defend language when indemnification, like here, was "to the extent caused by" and holding no duty to defend exists).[22]

---

[20] The indemnity provision in *Mulvey* provided that the subcontractor "indemnify and hold harmless Owner, Architect and Contractor ... from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or arising from performance of Subcontractor's Work under this Agreement, provided such claim, damage loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) ..., to the extent caused in whole or part by any neglect, act or omission of Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder..." *Mulvey Constr., Inc.* 2015 WL 6394521, at *9.

[21]Because there was explicit duty to defend in the contract at issue, the supplemental payments provision of the insurance policy at issue in *Mulvey* was not met.

[22] In *United Rentals*, the indemnity obligation specifically called for the indemnitee to "...indemnify, *defend* and hold the General Contractor [and] Owner harmless..." *Id.* at 223-24(Emphasis added). Yet even with the specific obligation to defend included in that contract, because of the "extent caused by" limitation, no duty to defend was owed.

WWC, while acknowledging Orders' contract does not include a duty to defend, nevertheless tries to read one into it and claims the circuit court was required to conduct a factual inquiry to determine if a duty to defend was owed. Petr's Br. at 21-22. However, in the non-insurance context where the indemnity provision specifically excludes any obligation to defend, no such inquiry is required. WWC cites in its Brief to a single, inapplicable, case for its claim that a duty to defend is owed. *See* Petr's Br. at 21-22. That case, *Bruceton Bank v. United States Fidelity & Guar. Ins. Co.,* 199 W. Va. 548, 486 S.E.2d 19 (1997) is an *insurance case* and discusses an *insurer's duty to defend.*

While it is true that in the context of an insurer's duty to defend, the duty exists if the underlying allegations are reasonably susceptible of an interpretation they may be covered by the terms of the insured's policy, that is not the case here.[23] The primary purpose of a *contract of insurance* is for an insurer to provide indemnification and a defense to its insured from covered claims and losses. Orders, however, is not an insurer and has never received a dime from WWC (or anyone else) in premium dollars. The purpose of Orders' contract with the PSD was not to insure and defend WWC from covered losses, but to build a wastewater treatment plant for the PSD. While the duty to defend in the insurance context may be broader than the duty to ultimately indemnify, that is not the case in the non-insurance context and WWC has pointed to no case that so holds. By comparison, Orders has cited to multiple cases explicitly holding it is not. WWC fails to even mention, much less attempt to distinguish, these cases in its Brief. In addition to Orders' limited "to the extent of" indemnity obligation, because of the absence of any express language requiring Orders to defend WWC, there is no obligation to assume WWC's defense. Additionally,

[23] Most insurance policies specifically provide in the express language of the insuring agreement itself that the insurer "will have the right and duty to defend the insured. . ." WWCAppx.000760-762(*Miller's Standard Insurance Policies Annotated,* Vol I, Part 2 Policies: Commercial Lines, Form CG 00 01 04 13(7th ed.))

because no finding of damages to WWC resulting from Orders' negligence has been made, no indemnity obligations have been triggered. Therefore, the circuit court correctly determined Orders owed no duty to defend WWC.

D. The circuit court was right to strike WWC's untimely and improper contingent Notice of Intent to Attribute Fault to parties to a case.

i. WWC's defective contingent Notice of Intent to Attribute Fault was untimely.

When assessing the percentage of fault for a plaintiff's alleged damages, the actions of a nonparty may be considered under two circumstances: (1) when a nonparty settles with a plaintiff; and (2) if a defendant gives timely notice no later than 180 days after service of process upon the defendant that a nonparty is or may be at fault. *See* W. Va. Code §55-7-13d(a)(2). More specifically, the statute states:

> 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 Ann. § 55-7-13d(a)(2) (Emphasis added).

The PSD did not enter into a settlement with A3 or Orders, so the issue is whether WWC's contingent Notice was timely. WWC's entire argument supporting its contention that the circuit court erred in striking WWC's Notice of Intent to Attribute Fault centers on the premise that the 180-day notice requirement should be calculated from May 11, 2020, the date the PSD served its Amended Counterclaim and officially asserted its "new" Headworks Claim. Petr's Br. at 12. The circuit court disagreed, and correctly determined WWC could have identified Orders and A3 as potentially at fault nonparties much earlier, as WWC admitted it was aware of the potential fault

of nonparties when the PSD filed its original Counterclaim.WWCAppx.001180 (Or. Granting Mot. to Strike at 7). WWC has not provided any law or persuasive argument demonstrating the circuit court's analysis and decision was wrong.

Contrary to WWC's assertions in its Brief, Orders and A3 never argued the 180-day period begins from service of the original complaint (in this case Counterclaim) as a matter of law. Petr's Br. at 16. Instead, they made the exact analysis WWC asserts should be made: that the 180-day period starts to run from the service of that filing that first puts the defendant on notice of the potentially at fault nonparty. WWCAppx.001006-1007 (Joint Motion to Strike at 4-5). In this case, however, that filing also happens to be the PSD's original 2018 Counterclaim. WWCAppx.001180. The circuit court agreed and acknowledged, just as federal district courts in this state have held, that the 180-day period within which to file a notice of nonparty fault under W.Va. Code §55-7-13d(a)(2) runs from the service of process of that filing which first puts a defendant on notice concerning the potential fault of nonparties. *See, Estate of Burns by and Through Vance v. Cohen* 2019 WL 4463318, (S.D. W.Va. Sept. 17, 2019)[24] (180-day period ran from the interrogatory that put the defendant on notice); *see also, Emily Crow, et al. v. Yvonne Rojas*, Case No. 5:17-cv-00130-FPS (it is the service of process that puts the defendant on notice that starts the 180-day notice period).

WWC's assertion that it learned for the first time that there were potentially at fault nonparties when the PSD served its Amended Counterclaim on May 11, 2020, wholly disregards the Record, as it is completely contrary to WWC's own pleadings and communications that

[24] Judge Berger also found the 180-day period in W.Va. Code §55-7-13d to be procedural and inapplicable in a federal lawsuit. That part of the holding is not applicable here. Regardless, looking to the filing that first put the defendant in that case on notice of the potential fault of a nonparty, she found the Notice of Nonparty fault was filed within 180 days of that first notice.

demonstrate it was the filing of the PSD's original Counterclaim that put WWC on notice of the nonparties' potential fault.

As noted by the circuit court, WWC admitted in its November 5, 2019, tender to Orders it was aware of the potential fault of nonparties from the filing of the original Counterclaim; specifically citing to the allegations in the original Counterclaim as the basis for its tender. WWCAppx.001180 (Or. Granting Mot. to Strike); WWCAppx.000396-398 (Ex. B to Third-Party Compl.) While WWC was on notice of the existence of potentially at fault nonparties with the service of process upon it of the original Counterclaim in March of 2018, it did nothing.

The circuit court also correctly concluded that the PSD's claims regarding the Headworks area of the plant were asserted in its original Counterclaim. WWCAppx.001180-81 (Or. Granting Mot. to Strike at 7-8). While WWC now declares that the "new" Headworks Claim in the PSD's Amended Counterclaim is the impetus for filing its contingent Notice of Intent to Attribute Fault and was when it first learned the Headworks were implicated, the Record demonstrates otherwise. The gist of the Headworks Claims in the Amended Counterclaim is that because of issues with the design of the Headworks, and "screening issues related thereto," the plant lacked capacity. WWCAppx.000347 (Am. Counterclaim, ¶ 55). Yet the PSD specifically alleged in its original Counterclaim the plant lacked capacity as designed, that there was no access to the coarse screens, which are located in the Headworks, and that WWC mandated improper fine screens (also located in the Headworks) in its design. WWCAppx.000053 (Counterclaim at ¶¶12(b), 12(c), 12(f)). As the circuit court recognized, it is without question that WWC was aware of the Headworks Claims on March 28, 2018, the service date of the PSD's original Counterclaim. The circuit court did not

err in concluding WWC's contingent Notice of Intent to Attribute Fault was untimely and in striking it.[25]

ii. W.Va. Code §55-7-13d does not support the filing of a contingent notice seeking to attribute fault to a party.

WWC's contingent Notice of Intent to Attribute Fault is defective and unsupported by West Virginia law. At the time it was filed, Orders and A3 were named parties to the case. Because the circuit court found that WWC's contingent Notice must be stricken as untimely, it did not address Orders' and A3's assertion that the Notice was defective as W.Va. Code §55-7-13d(a)(2) applies only to nonparties. Nevertheless, the circuit court agreed that the plain language of that provision "clearly indicates it applies to nonparties to a civil action." WWCAppx.001182. Because the statute is plain and unambiguous it should be applied as written.

In its Notice, WWC acknowledged Orders and A3 were parties to the case and it recognized there was no need to file a notice of intent to attribute fault to a named party, but considering the (likely) possibility that the circuit court would grant A3 and Orders' Motions to Dismiss, WWC filed its Notice of Intent to Attribute Fault to A3 and Orders as nonparties pursuant to W.Va. Code §55-7-13d(a)(2). WWCAppx.000999-1002. WWC's Notice is not authorized by the clear text of the statute, which states *seven times* in a single paragraph it applies to the fault of nonparties.

W. Va. Code §55-7-13d(a)(2), by its plain language, allows for the filing of a notice of *nonparty fault* and should be applied as written. WWC's argument that Orders and A3"[have] not been able to identify any West Virginia case law that specifically prohibits such a filing," is confounding as it ignores the plain language of the statute. Petr's Br. at 18. This Court has held

[25] Alternatively, the circuit court also concluded WWC knew of the potential fault of nonparties prior to the filing of the Amended Counterclaim, noting WWC admitted it knew of the existence of potentially at fault nonparties when PSD filed its third supplemental discovery responses related to the headworks, on October 15, 2019. WWCAppx.0001181. In either case, the Notice was untimely.

over and over again that when the language of a statute is clear and plain, it is to be applied as written without resort to interpretation. *See State ex rel. Lorenzetti v. Sanders*, 235 W. VA. 353, 360-61, 774 S.E.2d 19, 26-7 (2015); Syl. Pt. 6, *State ex rel. Biafore v. Tomblin*, 236 W. Va. 528, 782 S.E.2d 223, 225 (2016). WWC asks this Court to arbitrarily read into the statute that which it does not say. This Court should decline to do so. *See* Syl. Pt. 11, *Bradford v. West Virginia Solid Water Management Board*, 2021 WL 5317246, __S.E.2d__ (Nov. 16, 2021) (quoting Syl. Pt. 4, *Wolfe v. Forbes*, 159 W. Va. 34, 217 S.E.2d 899 (1975). Orders and A3 do not need to identify any case law resolving this issue when the issue is easily resolved by simply reading the clear statute and applying its text as written.

CONCLUSION

WHEREFORE, for the reasons set forth herein Orders Construction Company, Inc. respectfully request that this Honorable Court, affirm the circuit court's Order Granting Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint, Order Granting Orders Construction Company, Inc.'s and A-3 USA, Inc.'s Joint Motion to Strike Notice of Nonparty Fault, Order Denying WW Consultants Inc.'s Motion to Alter Judgment. For the same reasons, the court's Order Granting A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint, Order Denying WW Consultants Inc.'s Motion to Alter Judgment in Favor of A-3 USA, Inc., and Order Granting Pipe Plus, Inc.'s Motion for Partial Summary Judgment should also be affirmed.

Respectfully submitted this 29th day of December 2021.

ORDERS CONSTRUCTION COMPANY, INC.
By counsel.

John D. Hoblitzell, III (WVSB #9346)
Camille E. Wartts (WVSB #13370)
Kay Casto & Chaney, PLLC
P.O. Box 2031
Charleston, WV 25327-2031
(304) 345-8900
Fax: (304) 345-8909
jdhoblitzell@kaycasto.com
cwartts@kaycasto.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0485

WW CONSULTANTS, INC.

Petitioner

v.

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

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

Respondents

CERTIFICATE OF SERVICE

I certify that I served the foregoing ***Respondent, Orders Construction Company, Inc.'s Response Brief*** upon counsel of record via United States mail, postage prepaid:

Lee Murray Hall, Esq.
Sarah A. Walling, Esq.
Jenkins Fenstermaker, PLLC
P.O. box 2688
Huntington, WV 25726-2688
Counsel for WW Consultants, Inc.

Christopher D. Negley, Esq.
Shuman, McCuskey & Slicer, PLLC
1411 Virginia St. E., Suite 200
Charleston, WV 25311
Counsel for the Pocahontas County Public Service District

Norman T. Daniels, Jr. Esq.
Thomas E.G. Spears, Esq.
Daniels Law Firm, PLLC
300 Summers St., Suite 1270
P.O. Box 1433
Charleston, WV 25325
Counsel for Pipe Plus, Inc.

John W. Burns, Esq.
Gordon Rees Scully Mansukhani, LLP
707 Grant Street, Suite 3800
Pittsburgh, PA 15219
Counsel for A3-USA, Inc.

Scott Driver, Esq.
WV Dept. of Environmental Protection
601 57th St., SE
Charleston, WV 25304
Counsel for WVDEP

Date: December 29th, 2021

John D. Hoblitzell, III (WVSB #9346)
Camille E. Wartts (WVSB #13370)
Kay Casto & Chaney, PLLC
P.O. Box 2031
Charleston, WV 25327-2031
(304) 345-8900
Fax: (304) 345-8909
jdhoblitzell@kaycasto.com
cwartts@kaycasto.com
Counsel for Orders Construction Company, Inc.