IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0485

WW CONSULTANTS, INC.,

Petitioner

v.

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

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

Respondents

BRIEF OF RESPONDENT PIPE PLUS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES:

CASES:

RULES OF PROCEDURE:

STATEMENT OF THE CASE

Respondent Pipe Plus, Inc. (hereinafter "Pipe Plus") is asking this Court to affirm the decision of the Circuit Court of Kanawha County to grant Pipe Plus's Motion for Partial Summary Judgment and to dismiss WW Consultants, Inc.'s (hereinafter "WWC") claims for contribution, express indemnification, implied indemnity and breach of contract against Pipe Plus.

Petitioner's recitation of the factual record in this matter is inadequate for the Court's consideration of the Circuit Court's decision. Further, Pipe Plus submits that the full nature and scope of this action's procedural history will aid the Court.

Accordingly, Pipe Plus supplements Petitioner's Statement of the Case as follows:

A. Supplemental Facts

Pipe Plus is a construction company based in Putnam County, West Virginia. Pipe Plus bid on a project to construct pump stations and a wastewater collection system near Snowshoe Mountain in Pocahontas County, West Virginia being built by Pocahontas County Public Service District (hereinafter the "PSD"). WWCAppx.000344-000345. Pipe Plus was the low bidder and contracted with PSD for the construction of the pump stations and wastewater collection system. *Id.* Pipe Plus entered into contracts with PSD to construct the collection system and pump stations, respectively known as Contracts #1 and #2, effective April 24, 2015 (hereinafter the "Contracts"). WWCAppx.001224. A separate contract known as Contract #3 was awarded to Orders Construction Company, LLC (hereinafter "OCC") for the construction of the wastewater treatment plant that included the construction of the headworks. WWCAppx.000344-000346. Pipe Plus did not perform work on the headworks or wastewater treatment plant.

The pump stations and collection system were substantially complete on May 16, 2017, and WWC prepared, certified, and filed with the Public Service Commission Certificates of Substantial Completion. WWCAppx.000346. The only issue raised in the PSD's Amended Counterclaim that implicated Pipe Plus's work on the pump stations and collection system were the PSD's allegation that the as-built plans did not include the field locations of the collection system lines. WWCAppx.000346-000347.

B. Supplemental Procedural History

Pipe Plus entered into a mutual release with the PSD in which the PSD and Pipe Plus released all claims against and between them in the action pending before the Circuit Court of Kanawha County in exchange for a payment of $25,000 from Pipe Plus to the PSD. The Circuit Court entered an Agreed Partial Dismissal Order dismissing all claims between the PSD and Pipe Plus on July 15, 2021. WWCAppx.001563-001564.

SUMMARY OF THE ARGUMENT

The Business Court did not err in dismissing WWC's express indemnification claims against Pipe Plus. Pipe Plus's indemnification obligation set forth in the contracts between Pipe Plus and the PSD is not broad based and have not been triggered. Under the applicable contract provisions, the indemnification obligations are limited to damages and losses arising out of or related to the performance of the contract work that are attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property other than the contract work itself. The obligation is further limited to only those damages and losses caused by Pipe Plus's negligent acts or omissions. WWC's design negligence, negligent supervision of contractors and failure to prepare as-built drawings and maps are WWC's

own independent acts and are the basis of the PSD's claims against WWC. Such acts are specifically excluded from Pipe Plus's indemnification obligation and no finding has yet been made that WWC is subject to damages and losses arising out of Pipe Plus's negligence versus its own negligence. Further, Pipe Plus does not owe WWC a duty to defend it against the PSD's claims and the contracts do not make any provision for such a duty.

The Business Court did not err in dismissing WWC's claim for implied indemnity against Pipe Plus. In order for a party to successfully assert a claim for implied indemnification, it must be without fault. WWC's liability in the claims asserted against it by the PSD are based upon its own independent acts including design negligence, failure to supervise contractors and to prepare as-built drawings and maps. Because the PSD has alleged multiple claims of direct, independent negligence against WWC and has alleged that WWC, by its own actions, breached its contract with the PSD, WWC has no legally cognizable claim for implied indemnity against Pipe Plus. Additionally, the settlement and release of all claims between the PSD and Pipe Plus extinguish WWC's claim for implied indemnity against Pipe Plus.

The Business Court did not err in dismissing WWC's claims for negligence and contribution against Pipe Plus because those claims were time barred. As for the implied indemnity claim, the settlement of claims between the PSD and Pipe Plus extinguishes WWC's claim for contribution against Pipe Plus. Even if the settlement did not extinguish the claim for contribution against Pipe Plus, WWC's claims for contribution are precluded by West Virginia's several liability statute. Further, WWC's third-party complaint is time barred as it was filed more than one hundred and eighty (180) days from the date of service of process of the original complaint and after the time remaining on the applicable two-year statute of limitations for negligence claims.

The Business Court did not err in ruling that West Virginia's several liability statute, W.Va. Code § 55-7-13, prevented WWC's contribution claim against A-3 USA, Inc. (hereinafter "A3") and in dismissing the contribution claim against A3. WWC's claims for contribution against A3 are precluded by West Virginia's several liability statute and the limited and narrow exceptions to that statute are inapplicable here.

The Business Court did not err in striking WWC's Notice of Intent to Attribute Fault to OCC and A3. WWC's Notice of Intent to Attribute Fault is time barred as it was filed more than one hundred and eighty (180) days from the date of service of process of the original complaint.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

ARGUMENT

A. Legal Standard

Generally, a *de novo* standard of review applies to a trial court's order granting a motion to dismiss. *Savarese v. Allstate Ins. Co.*, 223 W.Va. 119,123-24, (2008) (citing syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 710, 461 S.E.2d 516 (1995); *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 151-58, 640 S.E.2d 217, 220-21 (2006); *Johnson v. C.J. Mahan Constr. Co.*, 210 W.Va. 438, 441, 557 S.E.2d 845, 848 (2001)).

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

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

B. The Business Court did not err in dismissing WWC's claims for express indemnification against Pipe Plus and OCC and in finding Pipe Plus and OCC own no duty to defend to WWC

i. Pipe Plus's express indemnification obligations to WWC have not been triggered

Pipe Plus's contractual indemnity obligation is contained in Section 7.18 of the General Conditions of the contracts between the PSD and Pipe Plus which reads as follows:

> *7.18 Indemnification*
>
> A. To the fullest extent permitted by Laws and Regulations, and in addition to any other obligations of Contractor under the Contract or otherwise, **Contractor shall indemnify and hold harmless Owner and Engineer,** and the officers, directors, members, partners, employees, agents, consultants and subcontractors of each and any of them **from and against all claims, costs, losses, and damages** (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) **arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself),** including the loss of use resulting therefrom **but only to the extent caused by any negligent act or omission of Contractor,** any Subcontractor, any Supplier, or any individual or

entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable.

WWCAppx.000368 (emphasis added).

The exceptions to this indemnity obligation are set forth in Paragraph 7.18.C of the contract and read as follows:

> 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 Order, 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.001236 (emphasis added). [1, 2]

Pipe Plus's obligation to indemnify WWC and the PSD set forth in the indemnification provisions above are not broad based, do not entitle WWC to indemnification regardless of its fault, and do not impose an obligation on Pipe Plus to defend WWC. Rather, any 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, sickness, disease, or death, or to injury to or destruction of tangible property (other than the Work itself) ..." WWC seeks indemnification for claims in the PSD's Amended

[1] Paragraph 7.18.B provides that the indemnity obligations are not limited by any limitation on the amounts of benefits payable by Pipe Plus or its Subcontractors under workers' compensation or other laws. WWCAppx.001404.

[2] The "Work" is defined 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 al l 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.001403.

Counterclaim that allege deficiencies in the work performed by Pipe Plus. WWCAppx.000368-000369. The PSD's claims for deficiencies in the work specified in Pipe Plus's contracts are not attributable to bodily injury, sickness, disease, death or injury to or destruction of tangible property other than the work specified in the contracts. Accordingly, the PSD's claims are not covered by the limited indemnity provided for in the applicable provisions of Pipe Plus's contracts with the PSD.

Pipe Plus's express indemnity obligation is further limited to losses and damages "to the extent caused by a negligent act or omission of [Pipe Plus]." WWCAppx.000368. WWC is not entitled to indemnification for any damages or losses it may suffer that are caused by its negligence. The indemnity obligations specifically exclude indemnity for any liability imposed on WWC arising out of WWC's design work. In its Amended Counterclaim, the PSD alleged that 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 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 h) designing the MBR area so that valves can only be accessed by climbing over safety railings or by removing grates. WWCAppx.000347.

All of these allegations fall squarely within the exceptions to indemnity in Paragraph 7.18.C of the General Conditions. With respect to the professional negligence allegations, no indemnity is required for the alleged design failures pursuant to Paragraph 7.18.C.l. 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. WWC's 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. Similarly, with respect to PSD's breach of contract allegations, WWC's failure to complete Operation & Maintenance 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. WWCAppx.000348. 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 Pipe Plus that expose it to liability for damages. These liability claims against WWC all constitute conduct specifically excluded from Pipe Plus's indemnity obligation.

Pipe Plus further denies that any action or omission to act by Pipe Plus is the primary cause of the PSD's damages incurred by the PSD for which it has filed claims against WWC, particularly with respect to the preparation and provision of any maps or drawings that WWC was responsible for under its separate design agreement with the PSD. WWC has not identified with any specificity the alleged deficiencies in Pipe Plus's work on the pump stations or collection system other than Pipe Plus's alleged failure to provide as-built field locations and depths for the collection system. Pipe Plus did not perform work on the

headworks located in the wastewater treatment plant which were within the scope of work of Contract #3 between the PSD and OCC, and Pipe Plus's work is not implicated in the PSD's Headworks Improvement Claim. All claims between the PSD and Pipe Plus, including the PSD's allegation that Pipe Plus failed to provide the as-built field locations and depths for the collection system, have been settled and dismissed pursuant to the mutual release entered into by Pipe Plus and the PSD.

Additionally, "[s]ubject matter jurisdiction does not exist over claims that are not ripe for adjudication." *State ex rel. Universal Underwrites Ins. Co. v. Wilson,* 239 W.Va. 338, 801 S.E.2d 216 (2017), Syl. Pt. 3. "The ripeness doctrine 'seeks to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* 239 W.Va. at 345, 801 S.E.2d at 223. While a plaintiff does not need to "await consummation of threatened injury" and the claim is ripe if the plaintiff faces an injury that is "certainly impending," there still must exist a live dispute. *Id.* at n. 15 (citations and quotations omitted). However, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed, may not occur at all." *Id.* 239 W.Va. at 346, 801 S.E.2d at 224. In *State ex rel. Universal Underwriters,* 239 W.Va. 338, 801 S.E.2d 216, the claimants filed bad-faith, Unfair Trade Practices Act, and breach of contract cross-claims against Zurich even though Zurich had retained counsel and was providing the claimants a defense subject to a reservation or rights while it pursued a declaratory judgment action. *Id.* 239 W.Va. at 340-42, 801 S.E.2d at 218-20. The Court found these cross-claims were not ripe because they were contingent upon future events that had not, and indeed, may not ever occur. *Id.* 239 W.Va. at 346-47, 801 S.E.2d at 224-25.

Here, the indemnity provisions apply only to the extent that WWC's damages and losses are caused by the negligence of Pipe Plus in limited circumstances. There is no obligation to indemnify WWC for any liability imposed on it arising out of its preparation or approval of or failure to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs, or specifications. There is also no obligation to indemnify WWC for any liability arising out of the giving or failure to give instructions or directions. Any indemnity obligation is contingent upon future events – namely a finding that WWC is subject to damages and losses arising out of Pipe Plus's negligence versus its own negligence. This is a future, speculative event that may not, and likely will not ever happen; especially as WWC can only be severally liable, there are no vicarious liability claims asserted against WWC, and nowhere in the PSD's Amended Counterclaim does it seek to hold WWC liable as a matter of law for the acts of others.

ii. Pipe Plus does not owe WWC a duty to defend

With respect to WWC's claim that Pipe Plus owes WWC a duty to defend, Pipe Plus's contracts with the PSD do *not* include any such obligation and WWC's allegations to the contrary are without merit.[3] While the indemnity provision may potentially require Pipe Plus to indemnify WWC from some damages in limited circumstances, the potential future obligation to indemnify is separate 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

[3] WWC asserts Pipe Plus owes it a duty to defend and requests that Pipe Plus assume WWC's defense in Paragraphs 49, 51, 53, and 54 of its Third-Party Complaint. WWCAppx.000369-000370.

indemnity provision with similar, yet broader language than at issue here.[4] Like here, the indemnity language at issue in *Mulvey* provided for the indemnitee to "indemnify and hold harmless" but it 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* *34.[5] 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.* at *34-35. (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 when alleged indemnitee's negligence was not proximate cause of accident).[6]

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[4] 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 *28 (emphasis added).

[5] 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.

[6] 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.

Here, in addition to Pipe Plus's limited indemnity obligation, there is no obligation to assume WWC's defense in the absence of any express language requiring Pipe Plus to defend WWC. Because no finding of damages to WWC resulting from Pipe Plus's negligence has been made, no indemnity obligations have been triggered.

WWC cites *Bruceton Bank v. United States Fid. & Guar. Ins. Co.*, 199 W.Va. 548, 553, 486 S.E.2d 19 (1997) for the proposition that a 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." *See* Petitioner's Brief at 21. *See also* WWCAppx.001485. The duty to defend in *Bruceton Bank* is in the context of an insurance company's obligations to its insured if the underlying allegations are reasonably susceptible of an interpretation they may be covered by the terms of the insured's policy. The primary purpose of a contract of insurance is for an insurer to provide indemnification and a defense to its insured. Pipe Plus, however, is not an insurer and has never received any compensation from WWC (or anyone else) in premium dollars. The purpose of its contract with PSD was not to insure and defend WWC from covered losses, but to build the collection system and pump stations. 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. *See e.g., Heppler v. JM Peters Co.*, 73 Cal. App. 4th 1265, 1282, 87 Cal. Rptr. 2d 497, 512 (1999) ("Insurers have a distinct and free-standing duty to defend their insureds as opposed to indemnitors, whose duty to defend is not triggered until it is determined that the proceeding against the indemnitee is embraced by the indemnity."); *Kaydon Acquisition Corp. v. Custom Mfg., Inc.*, 301 F. Supp. 2d 945, 958 (N.D. Iowa), order clarified on reconsideration, 317 F. Supp. 2d 896 (N.D. Iowa 2004) (distinguishing

indemnity agreements from insurance policies and holding language in an indemnity provision requiring a party "indemnify and hold harmless" another does not impose a duty to defend)[7].

WWC's arguments that the indemnity language in Paragraph 7.18, which requires Pipe Plus to indemnify WWC from "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)" implies a duty to defend is unavailing. *See* Petitioner's Brief at 21. *See also* WWCAppx.001485. All the parenthetical does is further define what is included in term "damages." It does not impose an independent duty to defend. For example, the indemnity language *Mulvey Construction, Inc. v. Bitco Life Insurance Corp.*, 2015 WL 6394521 (S.D.W.Va. 2015) had very similar language yet Judge Faber still found no duty to defend existed and noted the ultimate obligation to "reimburse legal costs pursuant to an indemnity agreement" is different than "an explicit duty to defend." *Id.* at *34. Here, Pipe Plus has an obligation to indemnify and hold harmless only if the losses are attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property that arises out of or relates to the

[7] Most insurance policies also include an obligation to defend in the express language of the insuring agreement itself. For example, Coverage A of the standard form ISO CGL Coverage Form provides that the insurer "will have the right and duty to defend the insured against any suit" seeking damages because of bodily injury or property damage. *See e.g.* Miller, Susan J., *Miller's Standard Insurance Policies Annotated*, Vol. I - Part 2; Policies: Commercial Lines, Form CG 00 01 04 13(71h ed.). Attached as Exhibit 1 to Reply of Pipe Plus, Inc. to WW Consultant's Response in Opposition to Pipe Plus, Inc.'s Motion for Partial Summary Judgment. WWCAppx.000761-000762. In some situations, however, such as with an excess policy or where there is a large self-insured retention that includes defense costs within the retention amount, there may not be any duty to defend unless and until the primary policy or retention amount is exhausted. *See e.g. Forecast Homes, Inc. v. Steadfast Ins. Co.*, 181 Cal. App. 4th 1466, 1474, 105 Cal. Rptr. 3d 200, 206 (2010)("Defense obligations of excess insurers arise only when primary insurance coverage is exhausted."); *Walsh Constr. Co. v. Zurich Am. Ins. Co.*, 72 N.E.3d 957, 965 (Ind. Ct. App. 2017)("[U]nder plain language of the SIR endorsement, Zurich has no obligation under the CGL policy to defend or indemnity [named insured or additional insured] until [named insured] has satisfied the $500,000 SIR amount.").

performance of the work and only to the extent those losses are caused by a negligent act or omission of Pipe Plus. The language cited by WWC only describes the type of damages that it may potentially be reimbursed for if the indemnity obligation is triggered, it does not impose an independent duty to defend.[8]

Pipe Plus has cited numerous cases that focus on contractual indemnity in the non-insurance context holding that an indemnity provision that provides for an indemnitee to "indemnify and hold harmless" an indemnitor is separate and distinct from, and does not include, a duty to defend.

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

i. WWC has no implied indemnity claim as it cannot be fault free

To be entitled to implied indemnity, one must be without fault. *See Hager v. Marshall*, 202 W.Va. 577, 585, 505 S.E.2d 640, 648 (1998). WWC goes to great lengths to shoehorn itself into the position of an innocent seller in the chain of distribution who is sued in a strict liability product liability case. *See* Petitioner's Brief at 22-24. *See also* WWCAppx.001481-001483. This claim is preposterous.

First, this is not a strict liability product case where a plaintiff is relieved of the burden of proving the manufacturer or distributor of a product was negligent; it is a basic negligence case. If WWC is found liable, it will necessarily be because of its own actions.

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[8] Questions about an insurer's duty to defend are generally construed liberally in favor of an insured. *See Tackett v. Am. Motorists Ins Co.*, 213 W.Va. 524,529,584 S.E.2d 158, 163 (2003). The same considerations are not present here. The agreement with the PSD was a standard form agreement selected by WWC. WWCAppx.001245-1284. In such a situation any ambiguities should be construed against WWC. *See e.g. Harrell v. Cain*, 242 W.Va. 194, 832 S.E.2d 120, 131 (2019) (an axiom of contract law is that an ambiguous document is construed against the drafter); *Powell v. CSX Transportation, Inc.*, 2020 WL 2750367, *6 (S.D.W.Va. May 27, 2020).

While it is true that in the strict liability product realm an innocent seller has implied indemnity claims against the manufacturer of a defective product, that is because, for public policy reasons, courts have determined an injured party should "not have to bear the cost of [their] injury simply because the product manufacturer is out of reach." *Dunn v. Kanawha County Bd. of Ed.*, 194 W.Va. 40, 46 459 S.E.2d 151, 157 (1995). For this reason, the seller is also strictly liable "based solely upon its relationship to the product and [its liability] is not related to any negligence or malfeasance." *Id.* Accordingly, a seller has an implied indemnity remedy against the manufacturer. However, that remedy does not exist if the seller contributes to the defect or is otherwise independently negligent. As noted in *Dunn*, "[i]f a seller in some way contributes to a product defect, the seller and manufacturer are jointly responsible for damages the product causes, and the seller has no right to seek implied indemnity." *Id.*, 194 W.Va. at 47,459 S.E.2d at 158. Instead of supporting WWC's implied indemnity claim, *Dunn* supports its dismissal.

Second, there is no way WWC can be found liable without being found negligent. WWC argues that liability is being asserted against it in its "supervisory capacity", that it would not have created the alleged defects, and that, for this reason, it is akin to an innocent seller in a strict liability scenario. Petitioner's Brief at 22-23. WWCAppx.001481-001482. However, WWC's arguments in this respect not only confuse two distinct theories of liability, they grossly simplify the PSD's claims against it and ignore the PSD's multiple claims that are based not on any alleged supervisory role but on WWC's own, independent professional design negligence and its own independent breach of contract. WWCAppx.000347-000348. Even if the PSD's claims were only based on WWC's negligent supervision, WWC would still not be entitled to implied indemnification because

the alleged failure to properly supervise would be its own, independent act of negligence and not a situation where it is made to pay though it is without fault. *Bourne v. Mapother & Mapother, P.S.C.*, 998 F.Supp.2d 495, 506 (S.D.W.Va. 2014) ("A negligence action based on the failure to supervise or train is one of primary liability. That is, the principal negligently supervises its agents such that harm proximately results to a third party. This is different than the vicarious liability imposed by the doctrine of respondeat superior. A direct act or omission by a principal is required to hold it primarily liable under a negligent supervision theory.").[9]

This is a situation where, if WWC proves it is entirely without fault, there will be no judgment against it, and if it is found to be at fault, then it cannot prevail on an implied indemnity claim. Recognizing this "no-win situation," Judge Cophenhaver dismissed an implied indemnity third-party claim in *French v. XPO Logistics Freight, Inc., 2020, WL 1879472 (S.D.W.Va. Apr. 15, 2020)*, at *2. *See also Travelers Property Casualty Company of America v. Mountaineer Gas Company*, 2017 WL 384214 9, *2 (S.D.W.Va. Sept. 1, 2017) (granting summary judgment on implied indemnity claim and noting, "[w]ere [third-party plaintiff] to prove that it was entirely without fault, then it would have no need to

[9] WWC's response confuses a negligent supervision claim with a vicarious liability claim. *Petitioner's Brief at 22-23. WWCAppx.001481-001482.* For example, in *Taylor v. Cabell Huntington Hospital, Inc.*, 208 W.Va. 128, 538 S.E.2d 719 (2000), though the West Virginia Supreme Court of Appeals did not ultimately consider the viability of a negligence supervision claim in a case governed by respondeat superior when the employer defendant conceded it would be liable for the acts of its nurse employee, it did state that "(t]he appellant's claim of negligent supervision must rest upon a showing that the hospital failed to properly supervise Nurse Grim and, as a result, Nurse Grim committed a negligent act which proximately caused the appellant's injury." *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W.Va. 128, 134, 538 S.E.2d 719, 725 (2000)(emphasis added). In *Taylor*, the issue was mooted because the jury ultimately found the nurse employee, who was also named, not to be negligent. However, the point remains that – contrary to a vicarious liability theory of liability – a negligent supervision claim requires an affirmative act of negligence on the part of the entity doing the supervisions; in this case WWC. While a negligent supervision claim also requires separate negligence on the part of the one that was to be supervised, it remains a claim for primary liability on the part of the one that is to supervise.

recover from [third-party defendant]. If, on the other hand, [third-party plaintiff] were proven to be partially at fault for the incident, then [third-party plaintiff] could not recover under an implied indemnity claim."); *See also Schoolhouse Ltd. Liability Co. v. Creekside Owners Ass 'n.*, 2014 WL 1847829, *4 (W.Va. 2014) (memorandum decision) (settlement extinguishes implied indemnity claim where, as part of settlement, the plaintiff releases claims against non-settling defendants that are based on any and all claims wherein the non-settling defendant could be liable for the acts of the settling defendants.)[10]

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

ii. The settlement and release of claims between Pipe Plus and the PSD extinguish WWC's implied indemnity claim against Pipe Plus

Furthermore, all claims between the PSD and Pipe Plus have been settled and released extinguishing WWC's claim for implied indemnity against Pipe Plus. As discussed above, WWC's claims are claims based on WWC's own independent acts of negligence and are not based upon WWC's vicarious liability for Pipe Plus's actions. This Court has held that "[i]n non-product liability multi-party civil actions, a good faith settlement between a plaintiff and a defendant will extinguish the right of a non-settling defendant to seek implied indemnity unless such non-settling defendant is without fault." *Hager v. Marshall*, 202

[10] As a result of the settlement that included vicarious liability claims, the Court found: "[a]s it currently stands, if Schoolhouse is found to be at fault for its own actions, inaction, or conduct under the independent theories of liability that have been asserted against it, Schoolhouse would not be able to seek implied indemnity as it would not be fault-free. Conversely, if Schoolhouse is found to be without fault, there would be nothing to indemnify as it will not be made to pay damages on either the independent claims asserted against it, or on any "claims for vicarious liability for work performed by or products supplied by the Settling Defendants that Creekside made or could have made against any remaining party Defendant[,]" which have been dismissed." *See Schoolhouse Liab. Co.* 2014 WL 1847829, at *5.

W.Va. 577, 505 S.E.2d 640 (1998) at 580-581. Here WWC is not without fault and faces potential liability on non-vicarious claims asserted against it by the PSD which are based upon WWC's own, independent acts of negligence, not those of Pipe Plus. Accordingly, the settlement and release of all claims between the PSD and Pipe Plus extinguish WWC's claim for implied indemnity against Pipe Plus where WWC is not without fault.

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

i. The settlement and release of claims between Pipe Plus and the PSD extinguish WWC's claim for contribution against Pipe Plus

Following the Business Court's Order on April 16, 2021 granting Pipe Plus's Motion for Partial Summary Judgement and dismissing WWC's claims against Pipe Plus, Pipe Plus settled all claims between it and the PSD. The Business Court entered an agreed order dismissing all claims between the PSD and Pipe Plus on July 15, 2021. WWCAppx.001563-001564.

This Court has held that a "party in a civil action who has made a good faith settlement with the plaintiff prior to a judicial determination of liability is relieved from any liability for contribution." *Board of Educ. v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990) at Syl. Pt. 6. In *Board of Educ. v. Zando, Martin & Milstead, Inc.*, engineering firm Zando, Martin & Milstead, Inc. (hereinafter "ZMM") was engaged by the Board of Education of McDowell County (hereinafter the "Board") to design and supervise the construction of a new school. *Id.* at 182 W.Va. 597, 601. After several deficiencies in the construction of the school were identified, the Board brought an action for negligence in the Circuit Court of Kanawha County against ZMM alleging that ZMM

failed to properly design and supervise the construction of the school building. *Id.* ZMM then filed a third-party complaint against the general contractor and a firm that performed soil testing at the site. The Board also filed an alternative complaint against the contractor and soil testing firm and ultimately settled with both parties. *Id.* at 182 W.Va. 597, 602. The Board's claims against ZMM were not resolved and a jury verdict in the amount of $1,000,000 was returned and judgement in the same amount was entered against ZMM. *Id.* Following the settlement of the Board's Claims against the contractors, the Circuit Court dismissed ZMM's cross-claims for contribution against the contractor and the soil testing firm. *Id.* at 182 W.Va. 597, 606.

On appeal, this Court held that the settlements were made in good faith and extinguished ZMM's claims for contribution against both the contractor and soil testing firm. This Court reasoned that the rule that a party who settles with the plaintiff prior to verdict is discharged from any liability for contribution furthers a strong public policy favoring out-of-court settlements. *Id.* at 182 W.Va. 597, 604. "No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party." *Id.* at 182 W.Va. 597, 605 citing Unif. Contribution Among Tortfeasors Act, 1955, § 4(b), comment, 12 U.L.A. at 99.

Here, like the settlements between the Board and contractors, a settlement and release of all claims between the plaintiff, the PSD, and contractor, Pipe Plus, has been reached and an order dismissing those claims has been entered by the Business Court. Accordingly, the engineer's, WWC, claim for contribution against Pipe Plus in relation to claims filed by the PSD against WWC that arise from the same project and transaction have

been extinguished by the settlement between the PSD and Pipe Plus.

ii. West Virginia's several liability statute precludes any claim of contribution by WWC against Pipe

Even if WWC's claim for contribution was not extinguished by the settlement and release of claims between the PSD and Pipe Plus, West Virginia's several liability statute now precludes WWC's claim for contribution. It is well established that "[t]he right of contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation." *Sydenstricker v. Unipunch Prods., Inc.*, 169 W.Va. 440, 288 S.E.2d 511 (1982) at Syl. Pt. 4. Guided by equitable principles, claims of contribution allow the party who overpaid the ability to recover against the other jointly responsible party. *Id.*

This longstanding West Virginia law on joint and several liability, however, has changed. Pursuant to W.Va. Code § 55-7-13c, defendants in a civil action are to be held severally, and not jointly, liable for any damages awarded. Specifically,

> In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount.

W.Va. Code § 55-7-13c(a).

There is an exception to several liability, however, when "two or more defendants ... consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission." *Id.* In this limited situation, any person held jointly liable has a right of

contribution from other defendants acting in concert. *Id.* The PSD does not allege that WWC and Orders consciously conspired to pursue a common plan to commit tortious acts.

Additional exceptions to several liability are set forth in W.Va. Code § 55-7-13c(h)(1) through (3). These provide for joint and several liability if: (a) the conduct involves driving under the influence, controlled substances, or other drugs; (b) the defendant's conduct constitutes criminal conduct; or (c) the defendant's conduct constitutes an illegal disposal of hazardous waste. *Id.* No conduct fitting any of these exceptions is alleged anywhere in the Counterclaim, Amended Counterclaim, or Third-Party Complaint.

As the West Virginia Supreme Court of Appeals has noted, this statutory scheme "fully occup[ies] the field of comparative fault and the consideration of 'the fault of parties and nonparties to a civil action[.]" *Modular Bldg. Consultants of W.Va., Inc. v. Poerio, Inc.*, 235 W.Va. 474, 486, 774 S.E.2d 555, 567, n. 12 (2015). Applying this ruling, United States District Judge Kleeh, in September 2019, in *Clovis v. JB. Hunt Transport, Inc.*, 2019 WL 4580045 (N.D. W.Va. Sep. 20, 2019), dismissed a third-party complaint for contribution for failure to state a claim. In *Clovis*, the third-party plaintiffs, trucking company J.B. Hunt and its driver, filed a third-party complaint against Ryder Truck Rental for negligence and seeking contribution. *Id.* at *2. Ryder moved to dismiss on the basis that the 2015 revisions to West Virginia's comparative negligence scheme essentially abolished claims for contribution. The Court agreed and held that since no allegations triggering joint and several liability under the statute were made, no right of contribution existed. *Id.* at *3-4, 9.

Because WWC can only ever be liable for damages caused by its conduct, it will not pay more than its share of any judgment.[11]

iii. WWC's contribution and negligence claims are time barred.

Given the abolition of third-party contribution claims except in very limited circumstances and the lack of a viable implied indemnity claim, the Court need not address Orders' alternative argument regarding the timeliness of WWC's third-party negligence claims.

Nevertheless, recognizing its delay, WWC all but ignores the clear import of W.Va. Code § 55-2-21(b) on its third-party tort claims. Pipe Plus does not dispute that Rule 14(a) of the West Virginia Rules of Civil Procedure provides for the procedure by which a defendant may bring in a third-party defendant. However, while Rule 14 provides for the procedure for third-party practice, the third-party complaint must still state a substantive claim and must still be timely. *See e.g. Lewis v. City of Bluefield*, 48 F.R.D. 435,437 (S.D.W.Va. 1969); Syl. Pt. 4, *Bluefield Sash & Door Co. v. Corte Const. Co.*, 158 W.Va.

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[11] Pipe Plus acknowledges that this Court has not definitively ruled on this issue, and it is aware of one West Virginia Circuit Court decision by Judge Carl in the Business Court Division, which is slightly older than Judge Kleeh's ruling in *Clovis,* holding that a contribution claim may still be brought and that the statutory amendments did not unequivocally extinguish the right to contribution. *See e.g. Order Denying Hartford Steam Boiler Inspection and Insurance Company of Connecticut's Motion to Dismiss Third-Party Complaint,* entered June 6, 2019 in the case of *Markwest Liberty Midstream & Resources, LLC* v. *Bilfinger Westcon, Inc., et al.,* Case No. 1 6-C-66, Circuit Court of Wetzel County (BCD). WWCAppx.001326-001343. Also, while in the context of cross-claims and not third-party claims, Judge Gaujot, in the Circuit Court of Monongalia County entered a stipulation and voluntary dismissal order on November 5, 2019 in the case of *David A. Rusko, et al.* v. *Sigma Alpha Epsilon Fraternity, et al.,* Civil Action No. 19-C-88 wherein the parties agreed W.Va. Code § 55-7-13a-d adequately allowed for the apportionment of liability among the defendants and that cross-claims for contribution and indemnity were not required. WWCAppx.001344-001349. These Orders, as well as other case law not in the West Virginia Reports, South Eastern Reporter, or the United States Reports are attached as **Exhibit 6** to Memorandum of Law in Support of Pipe Plus, Inc.'s Motion for Partial Summary Judgment. WWCAppx.001290-001397.

802,805,216 S.E.2d 216,218 (1975), overruled by *Haynes v. City of Nitro*, 161 W.Va. 230,240 S.E.2d 544 (1977).[12]

W.Va. Code § 55-2-21(b) provides for the statute of limitations for all third-party claims, regardless of type. It provides:

> (b) Any defendant who desires to file a third-party complaint shall have one hundred eighty days from the date of service of process of the original complaint, or the time remaining on the applicable statute of limitations, whichever is longer, to bring any third- party complaint against any non-party person or entity: Provided, That any new party brought into litigation by a third-party complaint shall be afforded, from the date of service of process of the third-party complaint, an additional 180-day period, or the remaining statute of limitations period, whichever is longer, to file any third-party complaint of its own, and any applicable statute of limitation shall be tolled during this time period.

W.Va. Code Ann. § 55-2-21(b)[13]

A third-party plaintiff has one hundred and eighty (180) 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 file its complaint. *See* W.Va. Code § 55-2-2l(b). WWC's claims for contribution and indemnity in its "Negligence" count in 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. W.Va. Code § 55-2-12.

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[12] *Bluefield Sash* also held that there was no right of contribution between joint tort-feasors in the absence of a joint judgment and that a joint tort-feasor cannot implead a third-party defendant who is a joint tort-feasor under Rule 14(a). This holding was overruled by *Haynes*. *See Haynes* 161 W.Va. at 240, 240 S.E.2d at 550.

[13] W.Va. Code § 55-2-21(b) was added by the Legislature in 2016 in with the passage of S.B. 29. Previously, W.Va. Code § 55-2-21 simply tolled the statute of limitations on claims for which the statute of limitations had not already expired, including third-party claims, during the pendency of the civil action. See W.Va. Code § 55-2-21 (1981).

"In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." *Gaither v. City Hosp., Inc.,* 199 W.Va. 706, 708, 487 S.E.2d 901, 903 (1997)," Syl. Pt. 4. *Dunn v. Rockwell,* 225 W.Va. 43, 46, 689 S.E.2d 255, 258 (2009), Syl. Pt. 3.

WWC was charged with preparing and evaluating the bids and then, as the owner's representative, with overseeing and monitoring the construction of the project. Because of its role, WWC has known since the beginning of the project that Pipe Plus constructed the pump stations and collection system. Further, WWC observed Pipe Plus's work during construction and was in a position at the time the work was performed to verify compliance with the Specifications. In connection with its role, WWC prepared, certified and filed the Certificate of Substantial Completion with PSD for Pipe Plus's work on the project when substantial completion was achieved on May 16, 2017. Notably, WWC did not file its Third-Party Complaint until May of 2020, nearly three years later.

Further, PSD filed and served its original Counterclaim on March 28, 2018, more than two years before WWC filed its Third-Party Complaint. Since WWC brought its Third-Party Complaint in its capacity as a Counterclaim Defendant, it was the service of PSD's original Counterclaim on WWC in March of 2018 that triggered WWC's 180-day

period to file a third-party complaint. Therefore, WWC's deadline to file its Third-Party Complaint against Pipe Plus expired on September 24, 2018.

PSD's Amended Counterclaim essentially realleges those items of design negligence that were not previously dismissed on summary judgment and added the Headworks Claim. However, there was nothing new in the Amended Counterclaim that gave rise to any third-party claims against Pipe Plus that was not present in the PSD's initial Counterclaim against WWC alleging design negligence and breach of contract. The language of § 55-2- 21(b) is clear that the 180-day period runs from service of the "original complaint." Regardless of whether the 180-day period or the remaining time on the statute of limitations applies, WWC's Third-Party Complaint, filed more than three years after substantial completion and more than two years after the filing of the original counterclaim, is untimely.

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 plaintiffs proportionate share", WWC argues that its third-party claims are timely and would not accrue until it makes a payment in excess of its pro rata share. *Id.* 588 F. Supp. 708, 714.

First, since 2015, WWC can only be severally liable for the PSD's alleged damages in direct proportion to its fault, and cannot, therefore, be liable for damages in excess of its proportionate share absent several specific statutory exceptions that are not alleged by PSD. *See* W.Va. Code § 55-7-13c. Second, even if the cause of action does not accrue until there

is a payment of an excess share, WWC could not wait until such payment before filing its claim. Before the abolition of third-party contribution claims, it was required to bring such an action before settlement or judgment. 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). In essence, WWC is arguing 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 independent claim to bring in the first place. Its position would render W.Va. Code § 55-2-2l(b) a nullity.

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

It is well-established that "the right of contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his pro tanto share of the obligation." Syl. Pt. 4, *Sydenstricker v. Unipunch Prods., Inc.*, 169 W.Va. 440, 441, 288 S.E.2d 511, 513 (1982), *Beverly v. Thompson*, 229 W.Va. 684, 735 S.E.2d 559 (2012). Guided by equitable principles, claims of contribution allow the party who overpaid the ability to recover against the other jointly responsible peer party. *Sydenstricker v. Unipunch Prods.*, supra.

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

> in any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct

> proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount. W. Va. Code § 55-7-13c (a).

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

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

The West Virginia Supreme Court of Appeals has noted, this statutory scheme "fully occup[ies] the field of comparative fault and in the consideration of the 'fault of parties in non-parties to a civil action [.]" *Modular Bldg. Consultants of W. Virginia, Inc. v. Poerio, Inc.*, 235 W.Va. 474, 486, 774 S.E.2d 555, 567 n. 12 (2015). Applying this ruling, United States District Judge Kleeh, in September 2019, in *Clovis v. J.B. Hunt Transport, Inc.*, 2019 WL 4580045 (N.D. W.Va. Sep. 20, 2019), dismissed a third-party complaint for contribution for failure to state a claim. In *Clovis*, the third-party plaintiffs, trucking

company J.B. Hunt and its driver filed a third-party complaint against Ryder Truck Rental for negligence and seeking contribution. *Id.* at 2. Ryder moved to dismiss on the basis that the 2015 revisions to West Virginia's comparative negligence scheme essentially abolished claims for contribution. The Court agreed and held that since no allegation triggering joint and several liability under the statute were made, no right of contribution existed. *Id.* at*3-4. Because WWC can only ever be liable for damages caused by its own conduct, it will not pay more than its share of any judgment and its contribution claims must be dismissed.

F. The Business Court did not err in striking WWC's Notice of Intent to Attribute Fault to Orders Construction Company and A3-USA.

West Virginia law allows for the consideration of the fault of nonparties in two circumstances: 1) when a nonparty settles with a plaintiff; and 2) if the defendant gives timely notice. Notice must be given no later than 180 days after service of process upon the defendant that a nonparty is or may be at fault:

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

W. Va. Code § 55-7-13d(a)(2)(emphasis added).

In this case, 180 days from the filing of the PSD's original Counterclaim on March 28, 2018 was September 24, 2018. Despite its pleadings and communications in this case clearly demonstrating that it was the filing of the PSD's original Counterclaim that put it on

notice of the nonparties' potential fault, WWC now disregards its own pleadings and asserts it is the PSD's Amended Counterclaim that triggers its 180 period to give notice.

While it is the case that the 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 period, courts that have looked at the issue have determined the relevant "service of process" to be the filing that first puts a defendant on notice concerning the potential fault of nonparties. For example, District Judge Berger, in an order denying a motion to strike a notice of nonparty fault in the case of *Estate of Burns by and Through Vance v. Cohen*, 2019 WL 4463318, (S.D.W.Va. Sept. 17, 2019) held that the 180 period in W.Va. Code § 55-7-13d ran from the "interrogatory response which put the Defendant on notice" of the potential fault of nonparties. Id. at 4.[14] District Judge Stamp of the United States District Court for the Northern District of West Virginia also held it is the service of the first filing that puts the defendant on notice that starts the 180 day notice period in 2018 in *Emily Crow, et al. v. Yvonne Rojas*, Case No. 5:17-cv-00130-FPS. There, in denying plaintiffs' motion to strike a notice of nonparty fault, Judge Stamp wrote: " ... this Court reads the statute to say service of process that gives the defendant notice that a nonparty may be at fault." WWCAppx.001125-001128. In *Crow*, it was the service of an interrogatory response that was deemed to trigger the 180 day period.

In this case, this Court need not address the issue of whether it is the service of process of the original complaint, original counterclaim or the service of process of some other filing that triggers the 180 day period because WWC, in its Third-Party Complaint and

[14] 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.

November 5, 2019 Notice of Tender, points directly to the PSD's March 28, 2018 Counterclaim as the filing that first put it on notice of the potential fault of nonparties, writing:

> The District has asserted a claim against WWC, alleging 28 difference deficiencies in the WWTP (the "Lawsuit"). While PSD alleges certain design deficiencies . . . 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 water 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(1), 12(0), 12(p), 12(s), 12(u), 12(x) and 12(aa) of the enclosed Counterclaim).

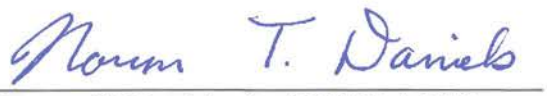
WWCAppx.000396-000398 (emphasis added).

WWC cannot, in good-faith, contend it was not on notice of the potential fault of OCC or A3 (which both deny) with the March 28, 2018 filing of the PSD's original Counterclaim when it specifically alleges in its Third-Party Complaint that the filing of the original Counterclaim was the basis for its November 2019 tender that alleged issues with the construction work and/or equipment supplied and when it says as much in its tender letter that it incorporated into its Third Party Complaint. WWC waited almost three years after it was first on notice of the potential fault of a nonparty before filing its Notice of Intent to Attribute Fault. WWC's Notice is untimely and must be struck.

CONCLUSION

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

PIPE PLUS, INC.,
By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0485

WW CONSULTANTS, INC.,

Petitioner

v.

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

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

Respondents

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner, hereby certifies that on the 29th day of December, 2021, a true copy of the foregoing "*Brief of Respondent Pipe Plus, Inc.*" were served upon the following individuals by U.S. Mail and email:

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