

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

MARKWEST LIBERTY MIDSTREAM
& RESOURCES, L.L.C.,
Plaintiff/Counterclaim Defendant,

v.

CIVIL ACTION NO. 16-C-66
JUDGE H. CHARLES CARL, III

BILFINGER WESTCON, INC.,
Defendant/Counterclaim Plaintiff/
Third Party Plaintiff,

v.

MARKWEST LIBERTY BLUESTONE, LLC,
MPLX LP, MARKWEST ENERGY PARTNERS
LP, THE HARTFORD STEAM BOILER
INSPECTION & INSURANCE COMPANY OF
CONNECTICUT, TEAM INDUSTRIAL
SERVICES, INC., FURMANITE AMERICA, INC.,
O'DONNELL CONSULTING ENGINEERS, INC.,
CEMI, LLC, AND QUALITY INTEGRATED
SERVICES, INC.,
Third Party Defendants.

**ORDER DENYING THE HARTFORD STEAM BOILER INSPECTION AND
INSURANCE COMPANY OF CONNECTICUT'S
MOTION TO DISMISS THIRD-PARTY COMPLAINT**

This matter came before the Court this 6th day of June 2019, upon Third-Party Defendant The Hartford Steam Boiler Inspection and Insurance Company of Connecticut's *Motion to Dismiss Third-Party Complaint*. The parties have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process. Therefore, upon the full consideration of the issues, the record, and pertinent legal authorities, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This matter arises out of certain civil, structural, piping, mechanical, and electrical construction work performed by Defendant Bilfinger Westcon, Inc. (“Defendant” or “Bilfinger” or “Westcon”) in relation to three contracts (“Contracts” or “Mobley Contracts”) for a construction project at Plaintiff MarkWest Liberty Midstream & Resources, L.L.C.’s (“Plaintiff” or “MarkWest”) Mobley Processing Plant, an oil and natural gas processing facility located in Wetzel County, West Virginia (“Mobley Site”). *See* Am. Ctrclms., p. 6. The Mobley site originally consisted of four natural gas facilities, and Plaintiff sought to construct a fifth facility referred to as the Mobley V Processing Plant. *Id.* It is this construction project which is at the heart of the instant civil action.

2. It is undisputed that Plaintiff and Defendant entered into three separate contracts for Defendant’s work on the expansion project. *Id.* The Contracts are: the Mobley V and Flare, Residue, and PSV Piping Lump Sum Construction Contract (“Contract 1”) entered May 19, 2015 (*See* Compl., Ex. A); the Mobley Inlet Compression Lump Sum Contract (“Contract 2”) entered October 5, 2015 (*See* Compl., Ex. B); and the Mobley NE Corner Lump Sum Construction Contract (“Contract 3”) entered October 7, 2015 (*See* Compl., Ex. C).

3. This matter commenced with the filing of the Complaint on June 16, 2016, alleging Breach of Contract (Count I); Negligence/Gross Negligence (Count II); Fraud (Count III); Negligent Misrepresentation (Count IV); and Specific Performance (Count V). *See* Compl, ¶¶ 120-163. These Counts surround the civil, structural, piping, mechanical and electrical construction work for the construction of a natural gas facility involved in the transportation and processing of natural gas and natural gas liquids produced in Northern West Virginia. *Id.* at ¶¶ 2-4.

4. On December 4, 2018, this Court dismissed Plaintiff's tort claims against Defendant based on the gist of the action doctrine. Counts II, III, and IV of the Complaint against Defendant (negligence/gross negligence, fraud, and negligent misrepresentation, respectively) were dismissed with prejudice. The remaining causes of action are breach of contract and specific performance (Counts I and V, respectively).

5. Meanwhile, on July 13, 2018, Defendant Bilfinger Westcon, Inc. filed a Third-Party Complaint entitled "First Amended Counterclaims of Bilfinger Westcon Inc. and Third-Party Complaint", alleging the following causes of action against Third-Party Defendant The Hartford Steam Boiler Inspection and Insurance Company of Connecticut (hereinafter "HSB"): "Contribution" against Third-Party Defendants The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, Furmanite America, Inc., TEAM Industrial Services, Inc., CEMI, LLC, Quality Integrated Services, Inc., and O'Donnell Consulting Engineers, Inc. (Count X); and "Indemnity" against Third-Party Defendants The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, Furmanite America, Inc., TEAM Industrial Services, Inc., CEMI, LLC, Quality Integrated Services, Inc., and O'Donnell Consulting Engineers, Inc. (Count XI). *See Am. Ctrclms.*, p. 40-45. Westcon alleges Third-Party Defendant HSB is a "global specialty insurer and reinsurer, which provides *inter alia* inspection services for boilers, pressure vessels, and other types of equipment" throughout North America. *Id.* at 4. According to the Amended Counterclaims, HSB's involvement in the Mobley Contracts and this civil action is alleged to have been based upon the following: "HSB was the authorized inspector for the code repair performed on the T-501 and T-531 vessels at Mobley" and "HSB, as the authorized inspector, was responsible for evaluating and approving the repairs, the inspections, and the standards that Furmanite and TEAM used". *Id.* at 40. Further, it is alleged in the Amended

Counterclaims that “HSB reviewed Furmanite and TEAM’s documentation and approved Furmanite and TEAM’s work and the standards they used. HSB approved applying ‘R stamps’ to the vessels, indicating that the repairs were satisfactory and that the Vessels were safe to operate.” *Id.* at 41. Finally, Westcon alleges in the Amended Counterclaims that HSB shared a special relationship with it in connection with the inspection, approval, and fitness for service evaluation of the vessel repairs and are the parties responsible for the injuries as alleged by Plaintiff. *Id.* at 42. Specifically, with regard to HSB’s alleged special relationship with Westcon, Westcon alleges the following in the Amended Counterclaims: HSB, as the authorized inspector, had a special relationship with Westcon in regard to the Vessels and was responsible for evaluating and approving the repairs, the testing of the repairs, and the standards that Furmanite and TEAM used to test and inspect the vessels and HSB “approved the work and inspections, indicating that the repairs were satisfactory and that the Vessels were safe to operate”. *Id.* at 42-43.

6. On September 10, 2018, Third-Party Defendant The Hartford Steam Boiler Inspection and Insurance Company of Connecticut filed the instant The Hartford Steam Boiler Inspection and Insurance Company of Connecticut’s Motion to Dismiss Third-Party Complaint. *See Th. Pty. Def’s Mot.*, p. 1-2.

7. On October 18, 2018, Third-Party Defendant Quality Integrated Services, Inc. filed Third-Party Defendant Quality Integrated Services, Inc.’s Partial Joinder in Motion to Dismiss of the Hartford Steam Boiler and Inspection Company of Connecticut, joining in and adopting the arguments set forth by HSB related to the extinguishment of contribution claims in tort as set forth in its Argument Section of its Memorandum of Law in Support of Motion to Dismiss the Third-Party Complaint. The Court notes Third-Party Defendant Quality Integrated

Services, Inc.'s Motion to Dismiss Third-Party Complaint was resolved by a separate Order on said Motion.

8. Furthermore, on October 26, 2018, Defendant Bilfinger Westcon Inc. filed Bilfinger Westcon, Inc.'s Omnibus Response in Opposition to the Motions to Dismiss Third-Party Complaint Filed by the Hartford Steam Boiler Inspection & Insurance Company of Connecticut, O'Donnell Consulting Engineers, Inc., and Quality Integrated Services, Inc.

9. On November 13, 2018, HSB filed its Reply to Bilfinger Westcon Inc.'s Omnibus Response in Opposition to the Motions to Dismiss Third-Complaint [*sic*] Filed By The Hartford Steam Boiler Inspection & Insurance Company of Connecticut, O'Donnell Consulting Engineers, Inc., and Quality Integrated Services Inc.

10. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF REVIEW

11. This matter comes before the Court upon a motion to dismiss. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). "Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008). "We recognized, however, that liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading." *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

12. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits. *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

13. In this matter, Third-Party Defendant HSB seeks this Court to dismiss the following Amended Counterclaims against it: “Contribution” against it and others (Count X); and “Indemnity” against it and others (Count XI). *See* Th. Pty. Def’s Mot., p. 1. The Court will take these issues up in turn.

14. HSB sets forth the following arguments for why the cause of action for Contribution should be dismissed: (1) Statute of limitations; (2) Contribution claims no longer exist in West Virginia; and (3) Contribution claims do not exist for a tortfeasor accused of fraud. *See* Th. Pty. Def’s Mem., p. 7, 11- 13. Further, HSB sets forth the following arguments for why the cause of action for Indemnification should be dismissed: (1) Statute of limitations; and (2) failure to state a claim upon which relief can be granted. *Id.* at 7-9.

Statute of Limitations (both Contribution (Count X) and Indemnification (Count XI))

15. First, HSB argues the Court should dismiss Westcon’s contribution cause of action (Count X) and indemnification cause of action (Count XI) because they are time barred by the statute of limitations. *See* Th. Pty. Def’s Mem., p. 7.

16. As an initial matter, the Court acknowledges the applicable statute of limitations for contribution and indemnification, the causes of action contained in Counts X and XI of the Amended Counterclaims. Contribution and indemnification are governed by the two-year statute of limitations found in West Virginia Code § 55-2-12.

17. Further, the West Virginia Supreme Court of Appeals has repeatedly stated that the statute of limitations begins to run when a plaintiff has knowledge of the fact that something

is wrong and not when he or she knows of the *particular nature* of the injury. *See Harrison v. Seltzer*, 165 W.Va. 366, 371, 268 S.E.2d 312, 315 (1980); *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 712, 487 S.E.2d 901, 907 (1997); *McCoy v. Miller*, 213 W.Va. 161, 166, 578 S.E.2d 355, 360 (2003) cited by *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005).

18. HSB argues the actions at the heart of the causes of action against it are time-barred because they are alleged to have taken place in 2015 and 2016. *See Th. Pty. Def's Mem.*, p. 8. Specifically, HSB alleges the following:

Westcon admits that it did the welding in July 2015. It provided MarkWest with documentation and information regarding the welding on or about April 20, 2016. MarkWest notified Westcon that it appeared that the welding was not examined to the ASME Code. On May 20, 2016, O'Donnell issued the O'Donnell Report to Westcon, which stated that the Vessels could not be legally operated. As a result of the O'Donnell Report, Westcon was aware of the welding issues on May 20, 2016, if not earlier. On June 22, 2016, Westcon was served with the Complaint. June 22, 2016 is the latest date by which Westcon would have known of the welding issues.

Id. (internal citations omitted).

19. Therefore, HSB argues June 22, 2018 would have been the latest deadline for Westcon to file a timely suit. *Id.* at 9. HSB does not dispute that the Third-Party Complaint would have been timely filed in January 2018.

20. Westcon argues that because it filed its Motion to file Amended Counterclaims and a Third-Party Complaint in January of 2018, along with the proposed Amended Counterclaims, including claims against Third-Parties, it satisfied the statute of limitations¹. *See Def's Resp.*, p. 6-7. As a matter of law, the filing of the amended complaint with the Court on a motion for leave to amend "is sufficient to toll a statute of limitations regardless of other

¹ This includes the deadline that HSB argued, June 22, 2018.

technical requirements under the rules". *Charlton v. M.P. Indus., Inc.*, 173 W. Va. 253, 256, 314 S.E.2d 416, 419 (1984).

21. Here, Westcon filed its Motion for Leave to Amend on January 4, 2018 and properly submitted the proposed Amended Counterclaims and Third-Party Complaint at that time. At that time, this civil action was still in Wetzel County Circuit Court, before Judge Cramer. Thereafter, on February 2, 2018, Judge Cramer moved the West Virginia Supreme Court of Appeals to refer the case to the West Virginia Business Court Division. Then, the West Virginia Supreme Court of Appeals granted said Motion to Refer on April 10, 2018. Subsequently, the case was assigned a presiding and resolution judge in the Business Court Division. After that, the undersigned then heard oral argument on the Motion to Amend on July 6, 2018. Westcon received the Court's order granting it permission to file its Amended Counterclaims and Third-Party Complaint on July 11, 2018 and filed the same on July 13, 2018.

22. The Court finds it is undisputed that the proposed Amended Counterclaims and Third-Party Complaint was filed in a timely manner on January 4, 2018. This proposed pleading was later entered as the Amended Counterclaims and Third-Party Complaint without change once the Motion for Leave to Amend was granted after the case was transferred to the Business Court Division. This Court finds the unique procedural timeline of the instant civil action is of no fault to Westcon. Certainly, the Court finds no dilatoriness on the part of Westcon. The filing of the Motion to Refer by Judge Cramer, the approval and referral of this case to the Business Court Division by the Supreme Court of Appeals, and the subsequent assignment and transition to the undersigned were all outside of Westcon's control. However, importantly, it is undisputed that Westcon sought permission to amend and provided the proposed Amended

Counterclaims and Third-Party Complaint well before the date HSB argued the statute of limitations expired. *See* Th. Pty. Def's Mem., p. 9.

23. The Court considers HSB's argument set forth in the Reply that this "predicament" is the fault of Westcon's lack of diligence because Westcon did not advise the Court of the approaching statute of limitations deadline after filing the motion for leave in January 2018, did not ask for an expedited decision on the motion for leave, and "fail[ed] to mention the issue" in its reply to the motion to refer the instance case to the Business Court Division. *See* Th. Pty. Def's Reply, p. 5. The Court does not find this argument persuasive. Westcon and the other parties in this matter at the time followed all procedural steps in a diligent manner as this civil action transitioned to the Business Court Division.

24. To bar Westcon's claims because it was waiting on a "judge's signature on an order to amend, would be to lend impracticality and injustice to ...judicial processes and procedure." *Charlton*, 173 W. Va. at 256.

25. Further, the Court considers HSB's notice of the instant lawsuit. Before Westcon filed its Motion for Leave to Amend Counterclaims and File Third-Party Complaint on January 4, 2018, it had filed its Notice of Non-Party Comparative Fault Designation and served a subpoena on HSB related to the roles Westcon alleged it played relevant to this litigation. *See* Def's Resp., p. 7. HSB admits that Westcon filed a Notice of Non-Party Comparative Fault Designation wherein it designated HSB on December 19, 2016. *See* Th. Pty. Def's Reply, p. 5. HSB further admits that Westcon provided HSB with further notice of the litigation through a subpoena issued during April 2017. *Id.* Therefore, the Court finds that HSB, as a relevant party, was on notice of Westcon's claims.

26. Because Westcon sought permission to amend and provided its Amended Counterclaims and Third-Party Complaint well before the date HSB avers the statute of limitations expired, and HSB, as a relevant party, had notice, the Court finds HSB's argument that the statute of limitations bars the action for contribution shall be rejected. Accordingly, the Court will not dismiss Westcon's contribution cause of action (Count X) or Westcon's indemnification cause of action (Count XI) on this basis.

Failure to State an Indemnity Claim (Count XI)

27. Next, HSB argues that Westcon fails to state an indemnity claim. *See* Th. Pty. Def's Mem., p. 9. Specifically, HSB avers that Westcon fails to state an indemnity claim because it fails to plead "special relationship" present in the instant case. *Id.* at 9-10.

28. In general, "[t]he general principle of implied indemnity arises from equitable considerations. At the heart of the doctrine is the premise that the person seeking to assert implied indemnity-the indemnitee-has been required to pay damages caused by a third party-the indemnitor. In the typical case, the indemnitee is made liable to the injured party because of some positive duty created by statute or the common law, but the actual cause of the injury was the act of the indemnitor." Syl. Pt. 2, *Hill v. Joseph T. Ryerson & Son, Inc.*, W. Va., 268 S.E.2d 296 (1980).

29. "The requisite elements of an implied indemnity claim in West Virginia are a showing that: (1) an injury was sustained by a third party; (2) for which a putative indemnitee has become subject to liability because of a positive duty created by statute or common law, but whose independent actions did not contribute to the injury; and (3) for which a putative indemnitor should bear fault for causing because of the relationship the indemnitor and

indemnatee share.” Syllabus Point 4, *Harvest Capital v. West Virginia Dept. of Energy*, 211 W.Va. 34, 560 S.E.2d 509 (2002); see also *Bowyer v. Hi-Lad, Inc.*, 216 W. Va. 634, 640, 609 S.E.2d 895, 901 (2004).

30. As an initial matter, on a prior day, this Court dismissed Plaintiff’s tort claims against Defendant based on the gist of the action doctrine. With the dismissal of those claims, there are no remaining tort claims. As such, Westcon’s third-party claims against HSB for contribution and indemnity are moot insofar as they relate to the three now-dismissed claims asserted by Plaintiff in Counts II, III, and IV of its Complaint against Defendant (negligence/gross negligence, fraud, and negligent misrepresentation, respectively). Thus, Westcon’s indemnity claims against HSB must be dismissed to the extent Westcon seeks indemnification for the now-dismissed tort claims. The Court addresses the motion to dismiss the cause of action for indemnification for the breach of contract and specific performance, the remaining causes of action.

31. The Court notes the parties agree as to the elements of indemnification. The Court finds that, taken in the light most favorable to the third-party plaintiff, Westcon has properly pled each of the elements of indemnity. Westcon has also sufficiently pled a special relationship between it and HSB in its Amended Counterclaims.

32. First, it is clear that there has been shown an injury sustained by a third party, as Plaintiff has alleged millions of dollars in damages as a result of the loss of service of the subject vessels.

33. Second, the second element contemplates that a party seeking implied indemnity may not have independently contributed to such injury. Westcon has clearly and properly pled

that it is without fault with regard to the vessels. *See* Am. Ctrclms., ¶ 232. It even asserts the vessels as produced were not defective. *See* Def's Resp., p. 5. The dispute between Westcon and HSB surrounds which welding standard was appropriate to use when inspecting the welds on the vessels for fitness of service, and the evaluation and approval of the inspections to said welding standard(s). Further discovery is needed in this matter. Discovery may reveal, for instance, what if any, contract existed between Westcon and HSB and what it stipulated to as to the weld inspection standard HSB was to evaluate and approve. Discovery may also reveal an indemnification clause in the contract. Moreover, discovery may reveal, as another example, what, if any, contract existed between Westcon and Furmanite and/or TEAM, and what it stipulated to as to the weld inspection standard those entities and Third-Party Defendants were directed to utilize, as well as how that relates to how HSB was directed to evaluate and approve the inspections and standards used. At this stage, this cause of action cannot be dismissed.

34. The third element, that a putative indemnitor should bear fault for causing the injury because of the relationship the indemnitor and indemnitee share, has also been satisfied. Westcon has satisfied this element through sufficiently pleading this element in its factual allegations. It alleges a special relationship with HSB with regard to the vessels. As an initial matter, Westcon identifies and designates HSB as the "authorized inspector" for the non-destructive evaluations of the vessels. Westcon avers HSB was responsible for evaluating and approving the repairs, the inspections, and the standards that TEAM and Furmanite² used, and that as such, HSB was the "authorized inspector" for the code repair performed on the vessels. *See* Am. Ctrclms, p. 40. Further, it avers HSB "approved the welding at the API 1104 standard"

² Westcon alleges in the Amended Counterclaims that TEAM and Furmanite were responsible for performing non-destructive evaluation on the vessels and using the appropriate standards. *See* Am. Ctrclms, p. 5, 40.

and “approved applying ‘R stamps’ to the vessels, indicating that the repairs were satisfactory and that the vessels were safe to operate”. *See* Def’s Resp., p 4. Westcon contends it reasonably relied on HSB to professionally inspect and approve the work of the welds. *Id.* at 12.

35 The Court finds Westcon has sufficiently pled this element. Dismissal at this stage would be inappropriate, as more factual development is needed in this litigation to determine the rights and responsibilities of Westcon and HSB, especially with regards to the application and choice of the “appropriate” standard, and the evaluation and approval of that choice. It is not known what standard Westcon directed its inspectors, TEAM and Furmanite, to inspect to, if any, and if so what affect that had on HSB’s evaluation processes. The Court notes Westcon contends that the use of the API 1104 standard is lawful in West Virginia. *See* Def’s Resp., p. 12. It is not known what Westcon and HSB contracted to, if any contract exists at all. It is not known what the exact duties of the “authorized inspector” are at this point in the litigation. It is not known if the parties are bound by any indemnification clauses. However, at this stage, Westcon has properly pled the elements for indemnification and dismissal would not be appropriate.

36. In sum, the Court finds the elements of indemnification have been properly pled, and HSB is not entitled to dismissal at this stage. The tort causes of action having previously been dismissed, the indemnification cause of action remains as to the contractual causes of action. The Court notes a tortious breach of contract could also be found by the trier of fact. For all of these reasons, the Court will not dismiss the cause of action for indemnification (Count XI).

Statutory Right to Contribution (Count X)

37. HSB next argues the statutory right to contribution was eliminated in 2015 when the West Virginia legislature repealed West Virginia Code § 55-7-13. *See* Th. Pty. Def's Mem., p. 11.

38. As an initial matter, on a prior day, this Court dismissed Plaintiff's tort claims against Defendant based on the gist of the action doctrine. With the dismissal of those claims, there are no remaining tort claims against Westcon for HSB to contribute to. As such, Westcon's third-party claims against HSB for contribution are moot insofar as they relate to the three now-dismissed claims asserted by Plaintiff against Defendant in Counts II, III, and IV of its Complaint against Defendant (negligence/gross negligence, fraud, and negligent misrepresentation, respectively).

39. The only remaining claims of Plaintiff against Defendant are for breach of contract and specific performance. The Court finds the issue is not ripe for dismissal at this time. There are factual matters that need resolved with regard to HSB's obligation to Westcon. Specifically, this civil action as it relates to HSB is centered around HSB's evaluation and approval, as the authorized inspector, of Third-Party Defendants TEAM and Furmanite's examinations of the welds on the vessels to an API 1104 standard instead of the ASME Boiler and Pressure Vessel Safety Code, as well as HSB's approval of the application of the "R stamp" to the vessels, indicating that they were authorized to be put into use. There exist claims that the welds on the vessels were examined to an API 1104 standard instead of the ASME Boiler and Pressure Vessel Safety Code. Further, it is alleged that subsequently, the inspection standard was misrepresented by the affixation of an ASME stamp to the vessels. Paragraph 2.2.2 of Contract 1, Contract 2, and Contract 3 states that Plaintiff must be satisfied with all testing described in Exhibit A, the Scope of Work. *See* Compl., Ex. A, ¶ 2.2.2; *see also* Ex. B, ¶ 2.2.2,

Ex. C, ¶ 2.2.2. In Exhibit A of Contracts 1, 2, and 3, the Scope of Work is described. In Exhibit A of Contracts 2 and 3, it is specified that the pressure vessels and pressure safety valves are to be constructed in accordance with the current edition of the “ASME VIII Div. 1” industry code and standard. *See* Compl., Ex. B, Ex. A., p. 3; *see also* Ex. C, Ex. A, p. 3. Westcon alleges it hired HSB as the authorized inspector to evaluate and approve the non-destructive evaluation (“NDE”) using the appropriate standards on the vessels (which was performed by TEAM and Furmanite). *See* Def’s Resp., p. 4. It was also alleged that “[u]pon conclusion of the vessel welding, all parties were satisfied with the welding work”, including an authorized inspector, Plaintiff, and Plaintiff’s “quality control person”. *Id.*

40. The Court also notes it’s being argued by Westcon that “MarkWest used this this pressure vessel issue as a pretext to terminate the Mobley Contracts” and that reviews have shown that the vessels could have been operated for years without incident, even being inspected to the API 1104 standard instead of the ASME Boiler and Pressure Vessel Safety Code. *Id.* at 5. The Court finds discovery will reveal if Westcon articulated what standard the vessels the parties were to have used when performing the inspection, as well as the evaluation and approval of the inspection. Further factual development is also needed as to whether HSB knew what standard to evaluate to pursuant to Plaintiff’s wishes (as stated in the Mobley Contracts). Discovery will also flesh out if any other entities inspected and approved the use of the API 1104 standard, and when. For these reasons, the Court finds the contribution claim shall not be dismissed on this basis.

41. Having decided dismissal of the contribution is not proper for the remaining claims against Westcon based on its contractual obligations to Plaintiff, the Court turns now to to

HSB's argument that the statutory right to contribution was eliminated in 2015 when the West Virginia legislature repealed West Virginia Code § 55-7-13.

42. In 2015, the West Virginia Legislature passed HB 2002, which abolished joint and several liability by repealing West Virginia Code §§ 55-7-13 and § 55-7-24. In its place, the Legislature adopted a modified comparative fault standard through its enactment of West Virginia Code §§ 55-7-13a-d. This legislation substantially changed West Virginia's comparative fault regimen. The doctrine of modified comparative fault is codified in West Virginia Code § 55-7-13a, wherein liability is allocated to each applicable person/entity in proportion to with the percentage of fault assessed against them by the jury.

43. Prior to abolishing joint and several liability, proportionate fault attributed to judgment to non-parties and paid by a liable defendant could be recovered from the non-party by contribution, but a settling party could not seek contribution. Under the new system, liability is several and defendants are only responsible for their proportion of fault. Now, juries may consider the fault of non-parties. Further, defendants no longer need to file third-party complaints against non-parties if they wish to assert claims for contribution to have fault assessed against other potentially liable parties. However, they may, and the legislature did not abolish a defendant's right to seek contribution.

44. The Court in *Modular Bldg. Consultants of W. Va., Inc. v. Poerio, Inc.*, noted that “[i]f the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation. 235 W. Va. 474, 486, 774 S.E.2d 555 (2015). Although the Legislature joined twenty-seven other states and enacted a modified comparative fault system, it has not unequivocally extinguished the right to contribution. The inchoate right of contribution existed

prior to the enactment of § 55-7-13 and remains good law. Likewise, the right of contribution provides a mechanism through which a defendant may bring additional parties into an existing suit. Westcon has properly alleged that HSB is responsible for the alleged damages claimed by Plaintiff since it charged HSB with the approval and evaluation of the inspections of the welds on the vessels, naming it the “authorized inspector”. Discovery and further factual development in this matter will reveal the parties’ expectations and obligations as to the two standards. The Court notes this claim exists only as to the remaining contractual causes of action by Plaintiff. At this stage, the Court finds Westcon has properly pled a cause of action for contribution against HSB, and has alleged sufficient facts supporting the claims in the Amended Counterclaims. For this reason, the Court finds the contribution claim shall not be dismissed.

Failure to State a Claim for Contribution with Respect to Fraud (Count X)

45. Finally, HSB argues that Westcon fails to state a claim for contribution against it with respect to Plaintiff’s fraud claims against Westcon. *See Th. Pty. Def’s Mem.*, p. 13. Because Plaintiff’s fraud claims were dismissed by this Court’s Order entered December 4, 2018, the Court finds this argument must fail. Further analysis is unnecessary. HSB’s motion to dismiss is denied as to this argument as it is now moot.

CONCLUSION

WHEREFORE, the Court does hereby **ADJUDGE** and **ORDER** that Third-Party Defendant The Hartford Steam Boiler Inspection and Insurance Company of Connecticut’s *Motion to Dismiss Third-Party Complaint* is **DENIED**.

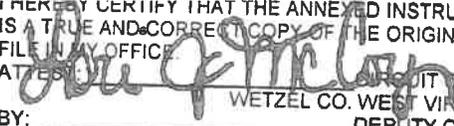
The Court notes the objections of the parties to any adverse ruling herein.

The Clerk shall transmit copies of this Order to all counsel of record.

ENTERED this 6th day of June 2019.



JUDGE H. CHARLES CARL, III
West Virginia Business Court Division

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT
IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON
FILE IN MY OFFICE.
ATTEST:  CIRCUIT CLERK
BY: _____ WETZEL CO. WEST VIRGINIA
DEPUTY CLERK