

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

WW CONSULTANTS, INC.,

Plaintiff,

VS.

Civil Action No.: 18-C-115

Presiding Judge: Christopher C. Wilkes

Resolution Judge: Michael D. Lorensen

POCAHONTAS COUNTY PUBLIC  
SERVICE DISTRICT, et al.,  
Defendants.

**ORDER GRANTING A-3 USA, INC.'S  
MOTION TO DISMISS THIRD-PARTY COMPLAINT**

This matter came before the Court this 30<sup>th</sup> day of March 2021 upon A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint. The Plaintiff, WW Consultants, Inc. (hereinafter "Plaintiff" or "WWC"), by counsel, Paul M. Mannix, Esq., and Third-Party Defendant, A-3 USA, Inc. (hereinafter "Defendant" or "A-3"), by counsel, John W. Burns, Esq., 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. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

**FINDINGS OF FACT**

1. In 2014, Orders Construction Company, Inc. (hereinafter "Orders")<sup>1</sup> bid on a project to construct the consolidated wastewater treatment plant near Snowshoe Mountain in Pocahontas County, West Virginia, which was being built by

<sup>1</sup> The Court notes Orders Construction Company, Inc. was a former third-party defendant in this matter. Orders was dismissed by an Order Granting Orders Construction Company, Inc.'s Motion to Dismiss Third-Party Complaint entered January 14, 2021. See Ord., 1/14/21.

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KANAWHA COUNTY CIRCUIT COURT

- Defendant/Counterclaim Plaintiff Pocahontas County Public Service District (hereinafter “PSD”). *See* Th. Pty. Def’s Mem., p. 2. Orders was the low bidder and contracted with the PSD for the construction of the plant. *Id.* A-3 secured a bid to supply certain component parts used in the construction of the wastewater treatment plant. *Id.* The plant was substantially complete on May 16, 2017. *Id.*
2. This matter was commenced with the filing of the complaint on February 6, 2018, wherein WWC sought to recover fees allegedly owed by the PSD. *Id.* The PSD was the project’s owner and WWC was the engineer of record on the project, providing certain design and consulting services during the construction of the wastewater treatment plant and related facilities. *See* Compl., ¶8.
  3. On April 2, 2018, PSD filed its Answer and Counterclaim of the Pocahontas County Public Service District, alleging twenty-eight individual allegations of professional negligence. *See* Ctrclm, p. 26-28.
  4. On August 1, 2019, the WWC filed a Motion for Partial Summary Judgment on Pocahontas County Public Service District’s Counterclaims, seeking judgment as a matter of law in its favor on 20 of the 28 counterclaims PSD asserts in paragraph 12 (professional negligence)<sup>2</sup> of the Counterclaim because Defendant did not support those allegations with expert testimony. *See* Pl’s Mot. Summ. J. This motion was fully briefed, and on November 27, 2019, this Court granted said motion and dismissed a vast majority of the design negligence claims. *See* Ord., 11/27/19; *see also* Th. Pty. Def’s Mem., p. 2. After the entry of this Order, seven design negligence claims remained. *Id.*

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<sup>2</sup> These claims are set forth in paragraph 12(a) through 12(cc) of PSD’s Counterclaim. *See* Pl’s Mot., Ex. A.

5. On April 20, 2020, the PSD moved the Court for leave to permit it to amend its Counterclaim in this matter to add two additional counterclaim defendants due to newly produced evidence. The Court, finding good cause existed, and considering there was no objection from WWC, granted said motion for leave by Order entered on May 4, 2020.
6. On April 29, 2020, WWC moved the Court for leave to permit it to file a third-party complaint against three third-party defendants due to newly produced evidence. The Court, finding good cause existed, and considering there was no objection from the PSD, granted said motion for leave by Order entered on May 4, 2020.
7. On May 12, 2020, the PSD filed its First Amended Counterclaim, asserting claims against WWC for design professional negligence and breach of contract. *See Am. Ctrclm*, ¶¶53-63. On July 6, 2020, after asserting claims against A-3 in the Amended Counterclaim focused on its supply of products used in the screens that were installed in the Headworks area of the plant, the PSD voluntarily dismissed its counterclaim against A-3. *See Notice of Voluntary Dismissal*, filed 7/6/20; *see also Am. Ctrclm*, ¶¶68-71.
8. On May 18, 2020, WWC filed its Third-Party Complaint against Orders, A3-USA, Inc., and Pipe Plus, Inc. With respect to A-3, WWC asserted it was entitled to common law contribution and implied indemnity. *See Th. Pty. Def's Mem.*, p. 3; *see also WWC's Th. Pty. Compl.*, ¶¶34-38.
9. The instant motion to dismiss followed. On July 22, 2020, A-3 filed the instant A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint, arguing that the Third-Party Complaint against it should be dismissed because: 1) WWC fails to state a claim for

contribution as set forth in the negligence cause of action because common law claims for contribution are precluded by West Virginia's several liability statute; and 2) WWC's basis for implied indemnification has no basis in law. *See* Th. Pty. Def's Mot., p. 2.

10. On August 18, 2020, WWC filed its Brief in Response to A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint, averring that A-3's arguments seeking dismissal are not supported by West Virginia law and the instant motion should be denied. *See* WWC's Resp., p. 3.

11. No Reply was filed.

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

#### **STANDARD OF LAW**

First, this matter comes before the Court upon a motion to dismiss under Rule 12(b)(6). "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).

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

In this matter, A-3 filed the instant A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint, arguing that the Third-Party Complaint against it should be dismissed because: 1) WWC fails to state a claim for contribution as set forth in the negligence cause of action because common law claims for contribution are precluded by West Virginia's several liability statute; and 2) WWC's basis for implied indemnification has no basis in law. *See Th. Pty. Def's Mot.*, p. 2. Considering the record, the relevant law, and the briefing by the parties, the Court finds as follows:

### Contribution Cause of Action

The Court first examines A-3's first argument, that WWC fails to state a claim for contribution as set forth in the negligence cause of action because common law claims for contribution are precluded by West Virginia's several liability statute. *See Th. Pty. Def's Mot.*, p. 2. Specifically, A-3 argues the contribution claim should be dismissed because of the abolishment of common law contribution in West Virginia in 2015 when the West Virginia legislature repealed West Virginia Code § 55-7-13. *See Th. Pty. Def's Mem.*, p. 4.

Syllabus Point 4 of *Sydenstricker v. Unipunch Prod., Inc.* states as follows:

The doctrine of contribution has its roots in equitable principles. The right to 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. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share.

169 W. Va. 440, 441, 288 S.E.2d 511, 513 (1982).

The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages? *Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (1990). The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. *Id.*

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

As the Supreme Court of Appeals of West Virginia has noted, these statutes "purport to fully occupy 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.*, 774 S.E.2d 555, 567 n.12 (W. Va. 2015).

W. Va. Code § 55-7-13c(a) provides that "[i]n any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint." Defendants may only be held liable for the amount of compensatory damages allocated to that defendant based on its percentage of fault. W. Va. Code § 55-7-13c(a). The statute provides an initial exception to this general rule where two or more defendants "consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission." *Id.* In such cases, liability may be joint and a right of contribution from other defendants exists. *Id.* No such allegations are made in either the Complaint or Third-Party Complaint. *See Th. Pty. Def's Mem.*, p. 4.

The Court also notes none of the other exceptions allowing joint and several liability apply. *See* Th. Pty. Def's Mem., p. 5. W. Va. Code § 55-7-13c(h)(1) through (3) provides for joint and several liability if the conduct involved driving under the influence, controlled substances, or other drugs, the defendant's conduct constitutes criminal conduct, or the defendant's conduct constitutes an illegal disposal of hazardous waste. The Court concludes that no allegations of conduct fitting these descriptions are made in the Complaint or Third-Party Complaint. *See* Th. Pty. Def's Mem., p. 5.

As an initial matter, here, the Court has reviewed the Third-Party Complaint, and agrees with A-3 and finds that the claim for contribution is contained within the negligence count. *See* Th. Pty Compl., ¶¶34-38. Specifically, WWC alleges in the Third-Party Complaint's negligence count that A-3 "had a duty to supply a membrane bioreactor ('MBR') system and related components that functioned properly and met the requirements of the Contract Documents and complied with applicable industry standards" and that in "the event that PCPSD proves its allegations and causes of action at trial...PCPSD damages were caused by the negligence and carelessness of A3-USA in connection with any defects in the MBR system and the component parts in the [waste water treatment plant]". *Id.* at ¶¶35-37.

Wherefore, WWC pleads in the Third-Party Complaint's negligence count that it demands "that judgment be entered in its favor and against A-3 USA and that A-3 USA be adjudged solely liable to [the PSD] and/or liable to WWC for contribution and common law indemnity and otherwise liable for any and all damages proven by [the PSD] and that the Court award such other relief as may be deemed just and appropriate". *Id.* at ¶38.

With regard to the paragraphs, including the "Wherefore" paragraph, asserting contribution by A-3, the Court finds such contribution claims cannot be maintained, as the facts

and allegations of conduct do not fit any of the exceptions to West Virginia's several liability law. The Court finds West Virginia's several liability statute, as amended in 2015, precludes any claim of contribution by WWC in this instance, because none of the exceptions apply.

The Court notes WWC's argument that a previous Business Court Division trial court decision by Judge Carl found that contribution was not totally abolished, citing a trial court order wherein Judge Carl declined to dismiss a contribution cause of action based on the same argument raised in the case at bar. *See* Pl's Resp., p. 7.

The Court notes and considers that Judge Carl's order is not binding on this Court. While the Court considers continuity of decisions, this Court has examined the available case law, importantly including cases that have come out since Judge Carl's order, including *Clovis v. J.B. Hunt Transp., Inc.*, No. 1:18-CV-147, 2019 WL 4580045 (N.D.W. Va. Sept. 20, 2019), *French v. XPO Logistics Freight, Inc.*, No. 2:18-CV-1544, 2020 WL 1879472 (S.D.W. Va. Apr. 15, 2020), and *Bateman v. CMH Homes, Inc.*, No. CV 3:19-0449, 2020 WL 597564 (S.D.W. Va. Feb. 6, 2020).

In *Clovis*, the Court dismissed a third-party complaint's contribution claim for failure to state a claim in September 2019. *Clovis v. J.B. Hunt Transp., Inc.*, No. 1:18-CV-147, 2019 WL 4580045 (N.D.W. Va. Sept. 20, 2019). The third-party plaintiffs, J.B. Hunt trucking company, 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 statutes essentially abolished claims for contribution. The Court agreed, and held that since no allegation triggering joint and several liability under the statutes was made, no right of contribution existed. *Id.* at \*3-4.



In *French*, the Court, in April 2020, found that the third-party plaintiffs did not allege any facts in the third party complaint that would fall into any of the above-discussed exceptions to the relevant statute and found that contribution was abolished except for the aforementioned exceptions contemplated by the statute. *French v. XPO Logistics Freight, Inc.*, No. 2:18-CV-1544, 2020 WL 1879472, at \*3 (S.D.W. Va. Apr. 15, 2020).

In *Bateman*, the Court, in February 2020, found that resulted in “the near total abolition of claims for contribution”, except for the previously discussed exceptions contemplated by the statute. *Bateman v. CMH Homes, Inc.*, No. CV 3:19-0449, 2020 WL 597564, at \*2 (S.D.W. Va. Feb. 6, 2020). The Court notes that in *Bateman*, the Court did not dismiss the contribution claim, because allegations of conduct fitting these one of the exceptions was made in the Third-Party Complaint. *Id.*

Guided by the recent available case law, because none of the exceptions to West Virginia’s several liability law apply in this matter, the Court must find that the contribution claim must be dismissed. *See* Th. Pty. Def’s Mem., p. 5. For all of these reasons, the Court finds and concludes that the contribution claim must be dismissed.

#### Indemnity Cause of Action

Further, with regard to the indemnity claim, contained in paragraphs 34-38 of the Third-Party Complaint, A-3 argues WWC’s “claim for implied indemnity has no basis in law”. *See* Th. Pty. Def’s Mot., p. 2. Specifically, A-3 argues this is because the parties do not have a contractual relationship giving rise to a claim for express indemnity or a special legal relationship giving rise to a claim of implied indemnity. *See* Th. Pty. Def’s Mem., p. 6.

The general principle of implied indemnity arises from equitable considerations. *Ruckdeschel v. Falcon Drilling Co., L.L.C.*, 225 W. Va. 450, 452, 693 S.E.2d 815, 817 (2010), at

Syl. Pt. 6. “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.” *Id.*

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 indemnitee share.” *Harvest Capital v. West Virginia Department of Energy*, 211 W. Va. 34, 560 S.E.2d 509 (2002), Syl. Pt. 4.

Here, WWC has no legally viable claim for implied indemnity against A-3. The Court considers there have been no special relationships proffered between WWC and A-3 upon which a claim for implied indemnity can be based. *See* Th. Pty. Def’s Mem., p. 7. With regard to WWC’s fault, PSD has affirmatively alleged WWC’s design negligence caused its injuries and damages. *Id.* The jury could find WWC is liable and was negligent in its design and supervision of the project, thus rendering the doctrine of implied indemnity inapplicable. For all of these reasons, no legal claim of implied indemnity may exist between these parties. *Id.* The Court also notes that the only party to which A3 has any contractual relationship with regard to the project at the heart of this civil action is Orders Construction. *Id.* A-3 has proffered to the Court that “no contractual relationship whatsoever directly exists between A3 and WWC”. *Id.* For all of the foregoing reasons, no claim for implied indemnity may exist between the parties.

In conclusion, for all of the foregoing reasons, the Court finds the instant A-3 USA, Inc.’s Motion to Dismiss Third-Party Complaint must be granted. Therefore, there being no remaining

causes of action against it, Third-Party Defendant A-3 USA, Inc. must be dismissed with prejudice from this civil action.

**CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint is hereby GRANTED. Third-Party Defendant A-3 USA, Inc. is hereby DISMISSED WITH PREJUDICE from this action. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel and *pro se* parties of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



CHRISTOPHER C. WILKES, JUDGE  
BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30<sup>th</sup>  
DAY OF March 2021  
Cathy S. Gatson CLERK  
Circuit Court of Kanawha County, West Virginia Kidd

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Order Granting A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint