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CLERK OF COURT
KANAWHA COUNTY CIRCUIT COURT

**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. Lorenzen

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

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter came before the Court this 27th day of November 2019 upon Plaintiff's Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims. The Plaintiff, WW Consultants, Inc. (hereinafter "Plaintiff"), by counsel, Paul M. Mannix, Esq., and Defendant, Pocahontas County Public Service District (hereinafter "Defendant" or "PSD"), by counsel, Michael D. Dunham, 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. This matter was commenced with the filing of the complaint on February 6, 2018, alleging various causes of action related to the design and construction of a large wastewater treatment facility and collection system in Pocahontas County, West Virginia, wherein Plaintiff was to provide certain design and consulting services

155

during the construction of the wastewater treatment plant and related facilities and PSD was the project's owner. *See* Pl's Mot., p. 1-2; *see also* Def's Resp., p. 1, Compl., ¶8.

2. On April 2, 2018, PSD filed its Answer and Counterclaim of the Pocahontas County Public Service District. *See* Ctrclm. The Counterclaim alleges the following causes of action by PSD against Plaintiff: Breach of Standard of Care and Professional Negligence (Count I) and Breach of Contract (Count II). *Id.* at 25-29. Relevant to the instant motion for partial summary judgment is Count I. Paragraph 12 of PSD's Counterclaim against Plaintiff contains twenty-eight individual allegations of professional negligence (Count I), labeled as 12(a) through 12(cc). *Id.* at 26-28.
3. On August 1, 2019, the Plaintiff 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)¹ of the Counterclaim because Defendant did not support those allegations with expert testimony. *See* Pl's Mot. Summ. J.
4. On October 17, 2019, Defendant filed its Response to WW Consultants, Inc.'s Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims, alleging expert testimony is not needed due to the common knowledge exception because they relate to "obvious breaches of the standard of care that present noncomplex matters for a trier of fact". *See* Def's Resp., p. 2, 3.
5. On October 24, 2019, Plaintiff filed its Reply to Public Service District's Response to WW Consultant's Motion for Partial Summary Judgment, reiterating its argument

¹ These claims are set forth in paragraph 12(a) through 12(cc) of PSD's Counterclaim. *See* Pl's Mot., Ex. A.

that expert support is needed and refuting Defendant's argument that the matter is noncomplex, causing it to fall under the common knowledge exception. See Reply, p. 2-3.

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

STANDARD OF LAW

Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987). Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted). However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the

evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

CONCLUSIONS OF LAW

In this matter, Plaintiff alleges summary judgment in its favor as to Paragraphs 12(a), 12(b), 12(d), 12(f), 12(g), 12(h), 12(i), 12(j), 12(k), 12(l), 12(n), 12(o), 12(p), 12(q), 12(r), 12(v), 12(y), 12(z), 12(aa), and 12(bb) of PSD's Counterclaim, contained in its cause of action for professional negligence (Count I), is appropriate because Defendant did not adequately support its claims for professional negligence by expert testimony establishing the standard of care and requisite breach of standard of care. *See* Pl's Mem., p. 2, 5-24. Specifically, Plaintiff avers that because of this, Defendant cannot prove the elements of negligence. *Id.* at 4-6. Further, Plaintiff argues PSD's experts and/or their corporate designee did not adequately provide evidence of damages, an essential element of negligence. *Id.* at 5-6. For this reason, Plaintiff contends no genuine issue of material fact exists related to the claims at issue, and it is entitled to judgment as a matter of law. *Id.* at 6.

As an initial matter, with regard to Plaintiff's motion, Plaintiff is admonished to be familiar with the trial court rules that limit memoranda to twenty pages. *See* Tr. Ct. R. 22.01.

Defendant PSD filed its Answer and Counterclaim alleging a cause of action by PSD against Plaintiff for Breach of Standard of Care and Professional Negligence (Count I). *See* Ctrclm., p. 25-28. Specifically, paragraph 12 of PSD's Counterclaim against Plaintiff contains twenty-eight individual allegations of professional negligence (Count I), labeled as 12(a) through 12(cc). *Id.* at 26-28. In this motion, Plaintiff seeks summary judgment as to twenty of these twenty-eight allegations of professional negligence contained in Count I of the Counterclaim

against it. Specifically, Plaintiff seeks summary judgment as to paragraphs 12(a), 12(b), 12(d), 12(f), 12(g), 12(h), 12(i), 12(j), 12(k), 12(l), 12(n), 12(o), 12(p), 12(q), 12(r), 12(v), 12(y), 12(z), 12(aa), and 12(bb) of PSD's Counterclaim, all of which are contained in its cause of action for professional negligence (Count I).

The law governing negligence claims in West Virginia is well-settled. The West Virginia Supreme Court of Appeals has explained that to prevail in a negligence suit "it is incumbent upon the plaintiff to establish, by a preponderance of the testimony, three propositions: (1) a duty which the defendant owes him; (2) a negligent breach of that duty; (3) injuries received thereby, resulting proximately from the breach of that duty." *Webb v. Brown & Williamson Tobacco Co.*, 121 W.Va. 115, 118, 2 S.E.2d 898, 899 (1939) (citations omitted).

"It is the general rule that want of professional skill can be proved only by expert witnesses. However, cases may arise where there is such want of skill as to dispense with expert testimony." Syl. pt. 3, *Totten v. Adongay*², 175 W. Va. 634, 634, 337 S.E.2d 2, 2 (1985) citing Syl. pt. 2, *Howell v. Biggart*, 108 W.Va. 560, 152 S.E. 323 (1930); see also *SBA Network Servs., LLC v. Tectonic Eng'g & Surveying Consultants, P.C.*, No. 1:12CV164, 2014 WL 3797426, at *1 (N.D.W. Va. Aug. 1, 2014)(applying *Totten's* expert testimony requirement to case involving professional negligence claim against professional engineering consultant/designer of a telecommunications tower site and roadway).

West Virginia Rules of Evidence Rule 702 provides that expert opinion testimony may be allowed if it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" W. Va. R. Evid. 702. The essence of Rule 702 is that of "assisting" the factfinder's

² The Court notes the common knowledge exception set forth in *Totten* applies to "medical situations". See *Totten v. Adongay*, 175 W.Va. 634, 337 S.E.2d 2 (1985) (The "common knowledge" doctrine alleviates the need for expert testimony when medical situations are routine or non-complex).

comprehension through expert testimony. *See Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 654 n. 17, 461 S.E.2d 149, 160 n. 17 (1995) (“Helpfulness to the jury ... is the touchstone of Rule 702.”). *Sheely v. Pinion*, 200 W. Va. 472, 478, 490 S.E.2d 291, 297 (1997).

This Court recognizes that expert testimony is not mandatory in all civil litigation. As the Supreme Court of Appeals stated in *Sheely v. Pinion*,

Neither Rule 702 nor the law in general mandate expert testimony in all civil litigation.⁹ *See Tanner*, 194 W.Va. at 654, 461 S.E.2d at 160, wherein we stated that “[a]lthough expert testimony may be a helpful and effective method of proving emotional distress and its relationship to the act complained of, it is not always necessary.”

200 W.Va. at 478-79 (internal citations omitted).

Instead, the West Virginia Supreme Court of Appeals precedent demonstrates that whether expert testimony will be necessary is determined on a case-by-case basis, considering whether the facts and claims at issue are within the common knowledge and experience of the average juror. *J.C. by & through Michelle C. v. Pfizer, Inc.*, 240 W. Va. 571, 581, 814 S.E.2d 234, 244 (2018).

For example, the West Virginia Supreme Court of Appeals found that “questions involving the ... appropriate warnings for lifttrucks are not within the common knowledge and experience of a lay juror.” *Watson v. Inco Alloys Int’l, Inc.*, 209 W.Va. 234, 243, 545 S.E.2d 294, 303 (2001); *see also Crawford v. Gen. Motors Corp.*, No. 5:06CV62, 2007 WL 1960611, at *3 (N.D.W.Va. July 2, 2007) (noting that West Virginia courts “have not addressed whether expert testimony is required to prove that an airbag system was defective”; predicting that West Virginia would do so; and holding that “expert testimony is required in this case because the issue of whether an airbag was defectively designed or manufactured is well beyond the understanding of the average layman.”); *SBA Network Servs.*, at *2 n.3 (“Although West

Virginia also recognizes the ‘common knowledge’ exception to the expert testimony requirement ... that exception is inapplicable to this case, which involves construction and engineering related matters that are beyond the common knowledge of a lay juror.”). *cited by Id.*

In the Count I of their Counterclaim, PSD asserts claims alleging professional negligence against Plaintiff based on the design of the wastewater treatment plant. In support of its claims, PSD identified Eric Coberly and Jack Ramsey³ as expert witnesses in this matter. Plaintiff proffered in the instant motion that Coberly and Ramsey were identified as experts to articulate the applicable standard of care Plaintiff owed to PSD and how, if at all, Plaintiff breached that standard of care. *See* Pl’s Mem., p. 5.

The Court, when analyzing the discovery in this case, considers that Plaintiff points out several instances involving the allegations contained in Paragraphs 12(a), 12(b), 12(d), 12(f), 12(g), 12(h), 12(i), 12(j), 12(k), 12(l), 12(n), 12(o), 12(p), 12(q), 12(r), 12(v), 12(y), 12(z), 12(aa), and 12(bb) of PSD’s Counterclaim, wherein these experts, Coberly and Ramsey, have either not rendered an opinion as to standard of care or opined that it was not breached.

By way of illustration, with regard to Paragraph 12(a), regarding the location of the wastewater treatment plant and accompanying facilities, PSD’s expert patently testified that he did not opine that Plaintiff breached “any violation of the standard of care.” Specifically, Mr. Coberly⁴ testified as follows on the issue of Plaintiff’s potential or alleged violation of standard of care:

Q: With the PSD making that determination and selecting a site and choosing not to follow the Thrasher site, did you conclude that

³ The Court notes Mr. Ramsey’s expert analysis and testimony is limited to ten specific claims contained in paragraphs 12(b), 12(e), 12(h), 12(p), 12(r), 12(s), 12(t), 12(u), 12(aa), and 12(cc) of the Counterclaim. *See* Pl’s Mem., p. 5.

⁴ The Court notes Mr. Ramsey did not address this issue. *See* Pl’s Mem., p. 6.

there was any violation of the standard of care by WW Consultants in following the requests and direction from the PSD?

A: No.

See Pl's Mot., Ex. I, p. 52; *see also* Pl's Mem., p. 6-7.

Similarly, with regard to Paragraph 12(g) of the Counterclaim, asserting that Plaintiff breached a standard of care by designing a wastewater treatment plant and accompanying facilities that utilize a pressurized collection system, Mr. Coberly⁵ plainly testified that he did not come to any conclusion of a violation of standard of care. Specifically, Mr. Coberly succinctly testified as follows:

Q: Have you come to any conclusion that there's a violation of standard of care by WWC on this issue?

A: No.

See Pl's Mot., Ex. I, p. 71; *see also* Pl's Mem., p. 10.

In other instances, Plaintiff pointed to evidence showing that PSD's experts plainly testified that they did not analyze a particular subparagraph's standard of care allegation, and would not be testifying as to the same at trial. As another example, with regard to Paragraph 12(d), Plaintiff pointed out that PSD's experts failed to provide expert opinion demonstrating that Plaintiff violated the standard of care by showing that PSD's expert stated it would not be testifying as to that issue at all at trial. Plaintiff proffered deposition testimony evidencing that PSD's expert, Mr. Coberly, testified that would not be testifying at trial based on the issue contained in Paragraph 12(d), the counterclaim relating to the lack of electric, phone, Internet, water main lines, and service lines to the plant. Specifically, Mr. Coberly testified as follows:

⁵ The Court notes this was not an issue addressed by Mr. Ramsey. *See* Pl's Mem., p. 10.

Q: There's a claim in 12(d) of the counterclaim relating to the lack of electronic [*sic*], phone, Internet, water main lines, service lines to the plant. Have you analyzed this issue?

A: No.

Q: Is it fair to say you will not be coming to trial testifying on that particular issue?

A: Correct.

See Pl's Mot., Ex. I, p. 59-60; *see also* Pl's Mem., p. 8.

Further, Plaintiff alleges the element of damages has not been supported through witness testimony in some of the aforementioned claims contained in paragraph 12 of the Counterclaim. Plaintiff proffers that evidence that PSD suffered actual damages would need to be established by either Coberly or Ramsey or Lloyd Coleman, who was produced by PSD to address all issues in the Notice of Deposition of Corporate Designee, including identifying damages incurred by PSD for each claim. *Id.* at 5-6; *see also Id.*, Ex. C.

Plaintiff has likewise pointed out several instances where Coberly, Ramsey, and/or Coleman have testified that they were not aware of any specific damages that have been suffered with regard to specific subparagraphs of Paragraph 12. *See* Pl's Mem., p. 8, 9

The Court has reviewed the detailed analysis of each of the disputed subparagraphs from paragraph 12 of the Counterclaim contained in the instant briefing. The Court declines to undertake a detailed analysis of each individual subparagraph's allegations in this order, but instead finds that clearly all of the allegations contained in each the subparagraphs is beyond the keen of the average lay juror.

As an initial matter, the Court notes that by its very nature, cases which have been referred to the Business Court Division by our Chief Justice must be complex in nature. *See* Tr.

Ct. R. 29. Further, the Court's review of the allegations regarding the design of the wastewater treatment facility, as well as its review of *Totten* and its progeny, reveal this case does not rise to the open and obvious nature of the evidence meant to fall under the common knowledge exception to our general rule requiring expert support for professional negligence claims.

By way of example, PSD argues that it is within the common knowledge exception that the location of a wastewater treatment facility makes it more costly for it to pump sewage uphill rather than down. *See* Def's Resp., p. 4. However, the Court finds it is not within the ken of an average juror to know what the standard of care required of an architect or engineer requires him or her to do. The Court notes Plaintiff proffered several other factors that could be relevant in determining location, such as cost, accessibility, easements, property disputes, and governmental approvals⁶. *See* Pl's Reply, p. 6. The Court agrees with Plaintiff in this instance that is not within the common knowledge of an average juror to know whether a particular wastewater treatment site selection amounts to proof of negligence. *Id.* at 7.

The Court finds it is implicit in professional negligence actions that an expert has to establish what the standard of care is. Only in extremely limited circumstances is the common knowledge exception applicable. Here, there are no allegations contained in paragraph 12 that are so factually obvious that a lay juror can glean it from the facts. This is the Court's overriding factor in analyzing the Counterclaim and the instant motion, wherein PSD dissects the project into compartmentalized claims of wrongdoing. Whereas the Court considers the whole project needs to be considered as to one determination: whether or not those instances claiming to be professional negligence did in fact – when considering the project as a whole – meet the standard of care required. Therefore, Plaintiff's motion on those grounds is granted, the Court finding that

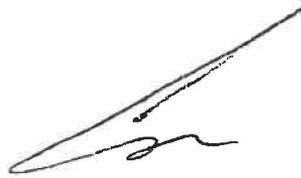
⁶ The Court further notes that Plaintiff avers it was PSD who chose the location site. *See* Pl's Reply, p. 6.

PSD is required to prove, by expert testimony, to establish the standard of care when considering the project as a whole. Therefore, with regards to Paragraphs 12(a), 12(b), 12(d), 12(f), 12(g), 12(h), 12(i), 12(j), 12(k), 12(l), 12(n), 12(o), 12(p), 12(q), 12(r), 12(v), 12(y), 12(z), 12(aa), and 12(bb) contained within Count I of PSD's Counterclaim, the instant motion is GRANTED. The remaining counts of the Counterclaim remain at issue and will proceed forward in this matter.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims should be GRANTED. Summary judgment is granted in favor of the Plaintiff as to Paragraphs 12(a), 12(b), 12(d), 12(f), 12(g), 12(h), 12(i), 12(j), 12(k), 12(l), 12(n), 12(o), 12(p), 12(q), 12(r), 12(v), 12(y), 12(z), 12(aa), and 12(bb) of PSD's Counterclaim, contained in its cause of action for professional negligence (Count I). 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.

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CHRISTOPHER C. WILKES, JUDGE
 BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA,
 COUNTY OF KANAWHA, SS
 I, CATHY S. BATSON, 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 2nd
 DAY OF Dec 2019
Cathy S. Batson CLERK
 CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA