



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

CIVIL ACTION NO. 16-C-7000

THIS DOCUMENT APPLIES TO:

Central West Virginia Regional Airport Authority, Inc.,

v.

Civil Action No. 15-C-1022 KAN

Triad Engineering, Inc., et al.

**ORDER REGARDING RULINGS ISSUED DURING
PRETRIAL CONFERENCE ON FEBRUARY 8, 2019**

On February 8, 2019, the Presiding Judges conducted a Pretrial Conference in the above-styled case during which numerous motions were heard. Having reviewed the parties' motions, responses, and replies, and heard the arguments of counsel, and having conferred with one another to insure uniformity of their decisions, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges issued unanimous rulings on the following motions:

DISPOSITIVE MOTIONS

1. *Defendant Tencate's Motion for Summary Judgment* (Transaction ID 62722016) is **DENIED**, subject to renewal at the conclusion of Plaintiff's case. Plaintiff shall prepare a proposed order.
2. *Johnston-Morehouse-Dickey Company d/b/a JMD's Motion for Summary Judgment* (Transaction ID 62849878) is **DENIED**, subject to renewal at the conclusion of Plaintiff's case. Plaintiff shall prepare a proposed order.
3. *Plaintiff's Motion for Summary Judgment on its Declaratory Judgment Claim against Traveler's Indemnity Company* (Transaction ID 62847853) is **DENIED** as untimely.

Additionally, Plaintiff is estopped from asserting a declaratory judgment claim for the cost of its defense in the Keystone Drive property owners' cases after those cases have been settled. Any claim for declaratory judgment should have been asserted in the Keystone Drive property owners' cases while they were pending. Travelers Indemnity Company shall prepare a proposed order.

4. *Defendant Cast & Baker Corporation's Motion for Summary Judgment* (Transaction ID 62848370) is **DENIED** because there are material issues of fact regarding whether Defendant Cast & Baker Corporation followed the design plan for the Reinforced Soil Structure ("RSS") at the end of Yeager Airport's Runway 5. Plaintiff shall prepare a proposed order.
5. *Defendant Michael Baker International, Inc.'s Motion for Summary Judgment* (Transaction ID 62849176) is **MOOT** in light of Defendant Michael Baker International, Inc.'s settlement of the claims against it.
6. *Defendant Novel Geo Environmental, LLC's Motion for Summary Judgment as to Counts I, II, III, and IV of Plaintiff's Third Amended Complaint, and as to Plaintiff's Claim for Punitive Damages* (Transaction ID 62849836) is **MOOT** in light of Defendant Novel Geo Environmental, LLC's settlement of the claims against it.

MOTIONS IN LIMINE

7. *Defendants JMD, Tencate, Cast & Baker, MBI and Novel's Motion in Limine to Exclude any Evidence Related to a Claim for Punitive Damages or Alternative Motion to Bifurcate* (Transaction ID 62813324). Defendants' motion to exclude any evidence related to a claim for punitive damages is **DENIED**, subject to renewal at the conclusion of the Plaintiff's case. The parties' motion to bifurcate punitive damages from the case in chief is **GRANTED**. The parties shall meet and confer and prepare an agreed proposed order.

8. *Plaintiff's General Motions in Limine* (Transaction ID 62849876). Plaintiff's motion numbers 1-5, 7-10, 12-23, and 25-31 are **GRANTED**; motion number 6 is **GRANTED** as to trial, but the Court will allow inquiry regarding the American Tort System during voir dire; motion number 11 is **DENIED**; and motion number 24 is **WITHDRAWN**.
9. *Plaintiff's Motion in Limine to Preclude the Defendants from Commenting, Suggesting or Presenting Evidence or Testimony that the Cost of Repair Exceeds the Market Value* (Transaction ID 62849911) is **HELD IN ABEYANCE**. Defendants shall make a proffer of their evidence to the Court on February 22, 2019.
10. *Plaintiff's Motion in Limine to Preclude any Comments, Questions and/or Testimony Regarding any Payments the Airport Authority Received from Collateral Sources* (Transaction ID 62849940) is **GRANTED**. Plaintiff shall prepare a proposed order.
11. *Plaintiff's Motion in Limine to Preclude Cross Examination of Plaintiff's Expert James Collins' Opinions Pertaining to Issues on Damages and any Reference to Related Deposition Testimony* (Transaction ID 62849976) is **DENIED**. Defendants shall prepare a proposed order.
12. *Plaintiff's Motion in Limine to Preclude the Defendants from Referring to Tencate's 1996 Technical Note as a Product Installation Guide, and/or Manual, and from Making any Affirmative Statements that the 1996 Technical Note was Provided to Either Triad and/or Cast and Baker* (Transaction ID 62850028) is **GRANTED**, subject to revisiting this issue as the evidence comes in at trial. Plaintiff shall prepare a proposed order.
13. *Plaintiff's Motion in Limine to Preclude Comments, Questions or Testimony Suggesting that Ed Hill was Serving as Counsel for the Airport Authority* (Transaction ID 62870258) is **GRANTED** as agreed upon by the parties.

14. *Defendants' Motion in Limine to Prohibit "Golden Rule" Arguments* (Transaction ID 62813324) is **GRANTED** as unopposed. *See Plaintiff's Omnibus Memorandum in Response to Unopposed Motions in Limine* (Transaction ID 62895793).
15. *Defendants' Omnibus Motion in Limine* (Transaction ID 62813534) is **GRANTED** as unopposed. *See Plaintiff's Omnibus Memorandum in Response to Unopposed Motions in Limine* (Transaction ID 62895793).
16. *Defendants' Motion in Limine to Exclude any Evidence Concerning Insurance* (Transaction ID 62813534) is **GRANTED** as unopposed. *See Plaintiff's Omnibus Memorandum in Response to Unopposed Motions in Limine* (Transaction ID 62895793).
17. *Defendants' Motion in Limine to Sequester Fact Witnesses* (Transaction ID 62813324) is **GRANTED** as unopposed. *See Plaintiff's Omnibus Memorandum in Response to Unopposed Motions in Limine* (Transaction ID 62895793).
18. *Defendant Novel Geo Environmental, LLC's Motion in Limine to Preclude Opinions of Dr. David Sykora and Elizabeth Mathieson Relating to Novel* (Transaction ID 62849681) is **MOOT** in light of Novel's settlement of the claims against it.
19. *Triad's Motion in Limine Against Cast & Baker Regarding "Professional Services"* (Transaction ID 62813429). The Court **ORDERS** the parties to meet and confer and to submit a proposed curative instruction to the Court **no later than 12:00 p.m. on February 20, 2019**.
20. *Defendants' Motion in Limine Objecting to the Suggestion of a Specific Monetary Amount* (Transaction ID 62813534) is **WITHDRAWN**.
21. *Defendants' Motion in Limine to Prohibit Plaintiff from Suggesting a Dollar Figure* (Transaction ID 62813534) is **WITHDRAWN**.

- 22. Defendants' Motion in Limine to Prohibit Plaintiff from Mentioning any Offers or Conditions of Settlement** (Transaction ID 62813534) is **GRANTED**. Defendants shall prepare a proposed order.
- 23. Cast & Baker's Motion in Limine to Limit Triad's Recoverable Damages** (Transaction ID 62849258) is **GRANTED**. Defendant Cast & Baker shall prepare a proposed order.
- 24. Defendants' Joint Motion in Limine to Preclude Testimony of Bradley D. Wolfe, PE** (Transaction ID 62849384) is **MOOT** in light of the fact that Bradley D. Wolfe, PE, is not on Plaintiff's witness list.
- 25. Defendants' Joint Motion in Limine to Place Defendant Triad Engineering, Inc. on the Verdict Form at Trial** (Transaction ID 62849944) is **HELD IN ABEYANCE**. The Court **ORDERS** the parties to meet and confer and provide the Court with a proposed solution to this issue on February 22, 2019,
- 26. Defendants' Joint Motion in Limine to Preclude Certain Testimony of James Collin, Ph.D. and Ryan Berg, P.E.** (Transaction ID 62850036) is **DENIED**. Plaintiff shall prepare a proposed order.
- 27. Defendant Novel's Motion to Strike and Motion in Limine to Preclude Allegations that Novel Failed to Properly Train its Employees/Agents** (Transaction ID 62884917) is **MOOT** in light of Novel's settlement of the claims against it.
- 28. Defendant Michael Baker International, Inc.'s Motion in Limine to Exclude Testimony of Michael Baker Containing Inadmissible Hearsay and Prohibiting any Party from Seeking to Elicit Such Testimony at Trial** (Transaction ID 62850089) is **MOOT** is in light of MBI's settlement of the claims against it.

29. *Defendant JMD's Motion in Limine to Preclude any Evidence Related to CEC's June 17, 2004 Quantity Estimate Letter* (Transaction ID 62850149) is **DENIED**. Plaintiff shall prepare a proposed order,
30. *Nicolon and JMD's Motion in Limine to Preclude any Evidence Related to Fire Pit Road and/or Carpenter Slip* (Transaction ID 62850179) is **HELD IN ABEYANCE**. The Court **ORDERS** the parties to make a proffer of evidence under Rule 404(b) of the West Virginia Rules of Evidence on February 22, 2019.
31. *Defendant's Joint Motion in Limine to Preclude Plaintiff from Presenting any Documents and Testimony Relating to US Airways Incident as Evidence* (Transaction ID 62850239) is **GRANTED in part and DENIED in part**. The Court will allow Plaintiff to present the photograph of the US Airways airplane on the EMAS, but **ORDERS** the parties to meet and confer and submit a proposed, agreed cautionary instruction for the Court's consideration **no later than 12:00 p.m. on February 20, 2019**.
32. *Nicolon's Motion in Limine to Prohibit Plaintiff from Asserting a Position at Trial Which is Different from the Testimony of its Rule 30(b)(7) Witnesses* (Transaction ID 62850293) is **GRANTED**. Nicolon shall prepare a proposed order.
33. *Defendants' Joint Motion in Limine to Exclude Unfairly Prejudicial Evidence Regarding Keystone Drive Residents* (Transaction ID 62850431) is **GRANTED in part and DENIED, in part**. Plaintiff is allowed to present a Rule 1006 summary of its damages, including costs and expenses incurred regarding Keystone Drive Residents.
34. *Defendant Nicolon's Motion in Limine to Preclude Plaintiff from Presenting Lostumbo's Marketing Papers and Presentation and All Related Testimony as Evidence* (Transaction ID 62850736) is **DENIED**. Plaintiff shall prepare a proposed order.

35. *Plaintiff's Motion in Limine to Exclude Evidence or Testimony of Robert Bachus, Ph.D. Related to Eleventh Hour Production* (Transaction ID 62909072) and *Plaintiff's Supplemental Motion in Limine to Exclude Evidence or Testimony of Robert Bachus, Ph.D. Related to Eleventh Hour Production* (Transaction ID 62930807) are **MOOT** in light of the parties' agreement to allow Plaintiff to take an additional deposition of Dr. Bachus.
36. *Plaintiff's Motion for Leave to File Outside the Deadline Plaintiff's Motion in Limine to Preclude Representations that Triad Engineering, Inc. was Plaintiff's Agent* (Transaction ID 62944555) is **GRANTED**. Plaintiff shall prepare a proposed order.

OTHER MOTIONS

37. *Defendants' Joint Motion to Obtain New Liaison Counsel for Defense* (Transaction ID 62937874) is **GRANTED**. Attorney Michael P. Markins is hereby **APPOINTED** to serve as Liaison Counsel to the Construction Defendants and attorney Teresa Dumire is hereby relieved of her obligations as Liaison Counsel to the Construction Defendants. The Court wishes to extend its thanks and appreciation to Ms. Dumire for her service as Liaison Counsel for the Construction Defendants during the majority of the Yeager Airport Litigation.
38. *Cast & Baker Corporation's Motion to Convert its Cross-Claim Against Triad into a Counterclaim* (Transaction ID 62916080) is **DENIED**. Triad shall prepare a proposed order.
39. *Cast & Baker Corporation's Objections to Triad Engineering, Inc., Westfield Insurance Company, Cincinnati Insurance Company, and Architects & Engineers Insurance Company's Agreed Partial Dismissal Orders* (Transaction ID 6290580) filed in Civil Action No. 15-C-1022 KAN and (Transaction ID 62906643) filed in Civil Action No. 17-C-825 KAN ("Taxiway A Case") are noted and preserved.

OTHER MATTERS

40. The parties having met and conferred, and having informed the Court they are in agreement, with the exception of certain proposed paragraphs, the Court **ORDERS** the parties to file and serve a joint proposed order denying *The Travelers Indemnity Company's Motion for Summary Judgment Regarding Insurance Coverage* (Transaction ID 62579412), granting *Triad's Motion for Partial Summary Judgment against Travelers* (Transaction ID 62578588), and granting *Westfield Insurance Company's Motion for Summary Judgment on Coverage Issues with Respect to Travelers Policies* (Transaction ID 62579818), as to the issue of duty to defend **no later than 12:00 p.m. on February 19, 2019**. The joint proposed order shall specifically identify the remaining paragraphs upon which the parties have failed to reach agreement.
41. Having ruled on numerous pretrial matters, the Court **ORDERS** the parties to meet and confer, and to file and serve the parties' joint proposed voir dire, joint jury instructions, joint verdict forms, joint pretrial conference memoranda, and a joint proposed method for conducting jury strikes **no later than 12:00 p.m. on February 20, 2019**.
42. The Court will complete its pretrial conference at **1:00 p.m. on February 22, 2019**, in Courtroom Four, also known as the Ceremonial Courtroom, on the second floor of the Kanawha County Courthouse, located at 409 Virginia Street, East, in Charleston, West Virginia. Any pretrial issues not addressed on February 22, 2019, will be addressed **at 1:00 p.m. on February 27, 2019**, in Courtroom Four, also known as the Ceremonial Courtroom, on the second floor of the Kanawha County Courthouse, located at 409 Virginia Street, East, in Charleston, West Virginia.

It is so **ORDERED**.

ENTER: February 12, 2019.

/s/ Derek C. Swope
Lead Presiding Judge
Yeager Airport Litigation