



THE IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

Civil Action No. 16-C-7000

THIS DOCUMENT APPLIES TO:

THEODORE CARTER and
REBECCA CARTER, husband
and wife,

Plaintiffs,

v.

Civil Action No. 15-C-1074 KAN

CENTRAL REGIONAL WEST
VIRGINIA AIRPORT AUTHORITY, et al.,

Defendants.

**ORDER REGARDING PLAINTIFFS' MOTION FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT AND MOTION FOR A HEARING**

The Presiding Judges have reviewed Plaintiffs Theodore and Rebecca Carter's *Motion for Leave to File Second Amended Complaint* (Transaction ID 61229260), Defendant Central West Virginia Regional Airport Authority, Inc.'s Response (Transaction ID 61288872) and Plaintiffs' Reply (Transaction ID 61314874). The Presiding Judges have also reviewed *Plaintiffs' Motion for a Hearing on their Motion for Leave to File a Second Amended Complaint* (Transaction ID 61405209) and the Airport Authority's Response (Transaction ID 61432354). Having heard the parties' arguments and conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously **DENY** Plaintiffs' *Motion for Leave to File Second Amended Complaint* (Transaction ID 61229260) because: 1) the amendment would unduly prejudice the Airport Authority and its attorney; and 2) the proposed amendment does not "relate back" to the filing of Plaintiffs' original complaint and is, therefore, futile because it is barred by the two year statute of limitations.

Rule 15(a) of the West Virginia Rules of Civil Procedure provides that leave of court to amend a pleading, “shall be freely given when justice so requires.” As recognized by the Supreme Court of Appeals of West Virginia in the seminal case of *Brooks v. Isinghood*, 213 W.Va. 675, 584 S.E.2d 531 (2003),

5. “The purpose of the words ‘and leave [to amend] shall be freely given when justice so requires’ in [Rule 15\(a\) W.Va. R.Civ.P.](#), is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under [Rule 15](#) when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.” Syllabus Point 3, [Rosier v. Garron, Inc.](#), 156 W.Va. 861, 199 S.E.2d 50 (1973).

“Although a trial court must possess a substantial reason to deny a request for leave to amend, leave to amend is by no means automatic. Courts employ a number of factors in assessing the propriety of a motion for leave to amend: undue delay, bad faith, dilatory motive, undue prejudice to the opposing party, futility in allowing an amendment, and whether the movant previously obtained leave to amend.” Robin Jean Davis, *et al.*, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 15(a) at 479 [Juris Publishing 2017]. Furthermore, “[a] trial court’s discretion to deny leave to amend is particularly broad where the plaintiff has previously amended the complaint.” *Id.* at 480.

As the Supreme Court has observed, “[d]elay and the accompanying element of prejudice to the other parties are critical factors that must be considered when a party seeks to amend pleadings, especially when the party seeking the amendments has suffered an adverse ruling or finds itself in an unfavorable posture due to settlement between the parties.” *Id.* citing *Martin Oil v. Philadelphia Life Insurance Co.*, 203 W.Va. 266, 507 S.E. 2d 367 (1997).

This case has been pending since June 1, 2015, and extensive discovery has been

conducted, including interrogatories, requests for production of documents, requests for admission and numerous depositions. On April 26, 2017, this Court granted Plaintiffs' supplemental motion to amend their complaint to conform to the evidence, effective *nunc pro tunc* to January 30, 2017, the date of the filing of the parties' *Stipulation of Consent to Amend Complaint*. See *Order Granting Supplemental Motion to Amend Complaint to Conform to the Evidence* (Transaction ID 60522082).

Having settled with all other Defendants except the Airport Authority¹, Plaintiffs are now trying to avoid the Airport Authority's assertion of immunity from liability and that punitive damages are not allowed under The Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1, *et seq.*, by seeking leave of court to amend their complaint, "to add Charles Bailey, the Airport's private attorney and presumably independent contractor not subject to governmental immunity or the limits on damages or theories of liability." See *Plaintiffs' Motion for a Hearing on their Motion for Leave to File a Second Amended Complaint* (Transaction ID 61405209), p. 2. Plaintiffs support their motion by asserting that, "evidence recently obtained, clearly shows that Mr. Bailey is a major player in the events described in the Proposed Amended Complaint." *Id.*

The Presiding Judges have reviewed Plaintiffs' proposed second amended complaint, the discovery attached as exhibits to the parties' briefs, including the affidavit of John Wellford²,

¹ Plaintiffs represent in their motion for leave to file a second amended complaint that they have entered into a settlement with Defendants John Wellford and Corotoman, Inc., but do not disclose any details of the purported settlement with two Defendants who failed to respond to Plaintiffs' amended complaint.

² In support of their motion, Plaintiffs submitted an affidavit from Defendant John Wellford that, on its face, appears to be inconsistent with Mr. Wellford's prior deposition testimony. The Airport Authority asserts Mr. Wellford's affidavit is a "sham affidavit" procured in exchange for a "settlement" that was not made in good faith. *Resp.* p.1 ("After more than two years of litigation, more than fifteen depositions and the exchange of thousands of pages of documents, Plaintiffs seek to amend their Complaint based on an extra-judicial statement from a party procured in exchange for a "settlement" with that party – a party that never responded to Plaintiffs' complaint and was in default. The procurement of statements in exchange for a "settlement" against a party in default is dubious at best.") *Resp. to Plaintiffs' Motion for a Hearing* p. 2, footnote 1

and the deposition testimony of John Wellford and several other witnesses. Based on its review, the Court **FINDS** that Plaintiffs are seeking to amend their complaint to assert facts and theories of liability against the Airport Authority and the Airport Authority's attorney that are inconsistent with the extensive discovery conducted by the parties over the past two years, and are directly contradicted by the Airport Authority's answers to request for admissions:

As the responses to the request for admissions make clear, neither Mr. Bailey nor anyone affiliated with the Airport Authority was part of, or participated in, any fraud or conspiracy related to the destruction of Plaintiffs' home. Specifically, Mr. Bailey did not make any of the statements the proposed second amended complaint attributes to him (*See* Response to Request Nos. 11, 14 and 15), the Airport Authority's Incident Log was not fraudulently altered by Mr. Bailey or anyone else (*See* Response to Request Nos. 12, 16, 17, 18, 19, 21, 22, and 26), and the subject log entries Plaintiffs claim were fraudulently entered actually represent contemporaneously written notes the Airport Authority produced to Plaintiffs months ago (*See* Response to Request Nos. 17, 18, 20, 21 and 22).

Page 2 of the Airport Authority's *Response to Plaintiffs' Motion for a Hearing on their Motion for Leave to File a Second Amended Complaint* (Transaction ID 61432354) and the Airport Authority's *Responses to Plaintiffs' Second Set of Requests for Admissions and Related Interrogatories and Production Requests*, attached as Exhibit 1. If the Court were to allow Plaintiffs to amend their complaint to introduce allegations contrary to the record developed during the course of discovery and specifically denied by the Airport Authority it would prejudice both the Airport Authority and the Airport Authority's attorney, the new defendant Plaintiffs seek to add in their second amended complaint, by requiring them to expend time, resources and expense re-litigating and conducting further discovery of facts the current parties have already developed and extensively discovered over the last two years. On that basis alone Plaintiffs' motion should be denied.

In addition to the prejudice to the Airport Authority and the proposed new defendant, Plaintiffs' motion for leave to file a second amended complaint to add the attorney of the Airport

Authority is also futile. Any claims Plaintiffs have asserted against the Airport Authority's attorney in their proposed second amended complaint for acts or omissions allegedly committed on or about the time the Carters' home was demolished in March 2015 are time barred. Furthermore, Plaintiffs' argument that their proposed second amended complaint adding the Airport Authority's attorney should "relate back" to the filing of the original complaint under Rule 15(c)(3) of the West Virginia Rules of Civil Procedure is without merit.

As held in Syllabus Points 4, 7, 8 and 9 of *Brooks v. Isinghood*,

4. Under [Rule 15\(c\)\(3\) of the West Virginia Rules of Civil Procedure \[1998\]](#), an amendment to a complaint changing a defendant or the naming of a defendant will relate back to the date the plaintiff filed the original complaint if: (1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint; (2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the defendant either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake; and (4) notice of the action, and knowledge or potential knowledge of the mistake, was received by the defendant within the period prescribed for commencing an ****535 *679** action and service of process of the original complaint.

7. Under [Rule 15\(c\)\(3\)\(B\) of the West Virginia Rules of Civil Procedure \[1998\]](#), a "mistake concerning the identity of the proper party" can include a mistake by a plaintiff of either law or fact, so long as the plaintiff's mistake resulted in a failure to identify, and assert a claim against, the proper defendant. A court considering whether a mistake has occurred should focus on whether the failure to include the proper defendant was an error and not a deliberate strategy.

8. "Where a plaintiff seeks to change a party defendant by a motion to amend a complaint under [Rule 15\(c\) of the West Virginia Rules of Civil Procedure](#), the amendment will relate back to the filing of the original complaint only if the proposed new party defendant, prior to the running of the statute of limitations, received such notice of the institution of the original action that he will not be prejudiced in maintaining his defense on the merits and that he knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Syllabus, *Maxwell v. Eastern Associated Coal Corp., Inc.*, 183 W.Va. 70, 394 S.E.2d 54 (1990).

9. Under the 1998 amendments to [Rule 15\(c\)\(3\) of the West Virginia Rules of](#)

Civil Procedure, before a plaintiff may amend a complaint to add a new defendant, it must be established that the newly-added defendant (1) received notice of the original action and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the newly-added defendant, prior to the running of the statute of limitation or within the period prescribed for service of the summons and complaint, whichever is greater. To the extent that the Syllabus of *Maxwell v. Eastern Associated Coal Corp.*, 183 W.Va. 70, 394 S.E.2d 54 (1990) conflicts with this holding, it is hereby modified.

Applying *Brooks* to this case, the claims asserted by Plaintiffs in the proposed second amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint. Additionally, the Airport Authority's attorney received notice of the filing of the original complaint. However, as it has already been established, the attorney for the Airport Authority will be prejudiced in defending against Plaintiffs' claims because he will be required to expend time, resources and expense re-litigating and conducting further discovery of facts the parties have already extensively developed and discovered.

More importantly, based on the facts of this case and the extensive discovery record, it is clear Plaintiffs knew the identity of the Airport Authority's attorney from the inception of their case. There is no dispute that Plaintiffs met with Charles Bailey, the Airport Authority's attorney, and signed a handwritten easement prepared by Mr. Bailey. The easement that is at this center of this case states:

I, Ted Carter & his wife Rebecca Carter do hereby grant & convey to Central West Virginia Regional Airport Authority "Yeager Airport" to dig & excavate [*sic*] a ditch of undetermined width & dimension in the yard of my property to potentially stop flooding resulting from a slip on the Yeager side of the hill that has ***created an emergency situation***. Yeager will pay the sum of \$5,000.00 for permission to obtain the easement which may be permanent in nature. Yeager will also compensate you for any other damages or injuries to your property resulting from the constructin [*sic*] of the easement.

(emphasis added). The easement was signed by both the Carters and the Airport Authority's attorney. Thus, Plaintiffs were well aware of Mr. Bailey's identity from the beginning and there

is no mistake of law or fact that prevented them from naming him as a defendant in this case.

The Court further FINDS that Plaintiffs' assertion that "evidence recently obtained, clearly shows that Mr. Bailey is a major player in the events described in the Proposed Amended Complaint" is disingenuous at best. Counts Six and Seven of Plaintiffs' Amended Complaint are titled "Demolition of Plaintiffs' Home - Superceding Acts of Negligence by Airport, Corotoman and Wellford" and "Demolition of Plaintiffs' Home – Other Wrongful Acts of Airport, Corotoman and Wellford," respectively. Because the attorney for the Airport Authority prepared and signed the easement that is at the crux of this case there is no doubt Plaintiffs knew the identity of Mr. Bailey and could have easily included him in their amended complaint if they had wanted to do so. Interestingly, Plaintiffs assert that,

[t]he newly discovered evidence from the August 2017 document dump by the Airport and Nationwide, as well as the Wellford affidavit, layers on top of what has already been set forth by the Carters in their filed Amended Complaint. The newly discovered evidence helps to explain why the Airport has engaged in concealment and/or fraud, and should be considered by a jury. If it is discovered that a person who is part of the concealment and/or fraud is not an employee of the Airport, the Carters should be permitted to add that person as a party to the lawsuit, just as they had added John Wellford and Corotoman, Inc.

Reply, p. 3 Plaintiffs knew from the beginning that Mr. Bailey was the Airport Authority's attorney and not an employee. It was only after Plaintiffs settled with all other Defendants in this case and were faced with the Airport Authority asserting immunity and a bar to punitive damages under The Governmental Tort Claims and Insurance Reform Act, West Virginia Code § 29-12A-1, *et seq.*, that Plaintiffs make the strategic decision to add the Airport Authority's attorney. Because Plaintiffs' failure to add the Airport Authority's attorney as a party appears to be a deliberate strategy, as opposed to a mistake, their motion seeking leave to file a second amended complaint must be denied on this basis as well.

The Court also FINDS that neither *Muto v. Scott*, 244 W.Va. 350, 352, 686 S.E.2d 1, 3

(2008) nor *Plum v. Mitter*, 157 W.Va. 773, 204 S.E.2d 8 (1974), discussed by Plaintiffs on pages 13-15 of their Reply, are applicable to the circumstances of this case. In Syllabus Point 6 of *Muto*, the Supreme Court held that,

6. Under [Rule 15\(c\)\(3\)\(B\) of the West Virginia Rules of Civil Procedure](#), a “mistake concerning the identity of the proper party” may include the circumstance where the complaint names a “John Doe” defendant due to the plaintiff’s lack of knowledge of the proper defendant where the filing of the “John Doe” complaint is not part of a deliberate strategy to achieve an advantage and ****4** the plaintiff’s lack of knowledge is not due to the plaintiff’s dilatory conduct in identifying the proper defendant prior to the expiration of the applicable statute of limitations.

In this case, there is no such “John Doe” defendant that must be identified. Plaintiffs were well-acquainted with the Airport Authority’s attorney and could have amended their complaint to include any alleged acts or omissions of Mr. Bailey if they chose to do so.

In *Plum v. Mitter*, the Supreme Court held that, where the original complaint erroneously included past and future medical expenses, amendment of the complaint to add the parents of a minor plaintiff after the statute of limitations expired related back to the filing of the original complaint. The fact that the defendant was required to defend against a claim he may have thought was barred was not prejudice because this was a legitimate claim against which the defendant could have been expected to defend. Here, it is unlikely that the Airport Authority’s attorney, who has no attorney-client relationship with the Plaintiffs, could expect that he would be required to defend against claims by the Plaintiffs of fraud in the destruction of their home, particularly when the discovery conducted by the parties and the Airport Authority’s responses to requests for admission directly contradicts such claims.

Accordingly, for the foregoing reasons, Plaintiffs’ *Motion for Leave to File Second Amended Complaint* (Transaction ID 61229260) is **DENIED**.

It is so **ORDERED**.

ENTER: January 26, 2018.

/s/ John A. Hutchison
Lead Presiding Judge
Yeager Airport Litigation