

14-0084

**IN THE CIRCUIT COURT
OF LINCOLN COUNTY,
WEST VIRGINIA**

**GLEN H ANDERSON and
BRENDA ANDERSON,**

Plaintiffs,

v.

CIVIL ACTION NO. 02-C-64

**BJ SERVICES COMPANY, U.S.A.,
A Delaware Corporation; EQUITABLE
PRODUCTION COMPANY, a
Pennsylvania corporation; and
LARRY BALLARD, individually,**

Defendants.

**PROCEDURAL ORDER;
Denying Motion for Summary Judgment**

Posture

On or about October 12, 2007, came the Plaintiffs, Glen H. Anderson and Brenda Anderson (hereinafter referred to as "Plaintiffs") by counsel, Heather M. Langeland of DiTrapano, Barrett & DiPiero, PLLC, and came the Defendants, B.J.Services Company, U.S.A., Equitable Production Company, and Larry Ballard (hereinafter referred to as "Defendants") by counsel, Dennis C. Sauter and Matthew A. Nelson of Jackson Kelly, PLLC, to proceed with a pre-trial status conference, at which time dispositive motions and responses were entertained by the Court, all pursuant to the applicable provisions of Rule 12(c), Rule 16(d), and of Rule 56(c) of the West Virginia Rules of Civil Procedure.

Brief Procedural History

The Plaintiffs seek recovery for injuries Plaintiff Glen H. Anderson allegedly sustained on or about June 12, 2000, while working in Kentucky for BJ Services Company, U.S.A., on a gas well owned by Eastern States Oil and Gas, and Equitable Production Company, a successor corporation to Eastern. Plaintiffs, Glen H. Anderson and Brenda Anderson, filed the instant action in the Circuit Court of Lincoln County, West Virginia, on or about May 23, 2002.

Plaintiffs advanced a deliberate intent cause of action against BJ Services (Mr. Anderson's employer at the time of the accident), arising under West Virginia Code § 23-4-2 of the West Virginia Worker's Compensation Act, and a negligence cause of action against Larry Ballard and Equitable Production Company. Plaintiffs also seek recovery for loss of consortium allegedly suffered by Plaintiff Brenda Anderson. Plaintiffs allege that Mr. Anderson was rendered totally and permanently disabled as a result of the Defendants' conduct. Defendants filed their answer to said complaint on or about August 12, 2002, asserting, *inter alia*, that Plaintiff's claims were barred due to the applicable statute of limitation. After closure of the pleadings, Defendants timely moved for judgment thereon pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure, asserting that Plaintiffs were not entitled to recover even if all the allegations in the Complaint were true because the Complaint was filed after the expiration of the applicable statute of limitations and should therefore be dismissed.

WHEREUPON, the Court notes that service of responses to all outstanding discovery requests have been previously made and the time for completion of discovery expired, with no real discovery issues outstanding on the issues subject to this motion. All parties have been given reasonable opportunity to present, and have presented all material made pertinent to such a motion.

THEREUPON, the Court further notes that matters outside the pleadings have been presented by all parties and are included by the Court. Therefore, the Court shall treat Defendant's Motion for Judgment on the Pleadings as one for summary judgment and said Motion shall be disposed of as provided for in Rule 56(c) WVRCP. As a result of which, the Court has determined that all necessary and relevant facts have been generated for consideration by the Court and the issues are now mature for the following determinations to be made by the Court.

DISCUSSION OF FACTS AND LAW.

Introduction of the Standard

In regard to any Motion for Judgment on the Pleadings the standard for granting or denying such relief is set forth in the express language of Rule 12(c) of the West Virginia Rules of Civil Procedure:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.
WVRCP 12(c) Motion for Judgment on the Pleadings.

Our Supreme Court has further provided, with regard to the present circumstances, "When a motion for judgment on the pleadings is converted into a motion for summary judgment, the requirements of [the] summary judgment rule become operable." Blake v. Charleston Area Medical Center, Inc., 498 S.E.2d 41 (W.Va. 1997).

In regard to any Motion for Summary Judgment, then, the standard for granting or denying such relief is set forth in the express language of Rule 56(c) of the West Virginia Rules of Civil Procedure. In interpreting the test set forth in Rule 56(c), the Supreme Court provides:

The test for whether a motion for summary judgment should be granted is essentially the same as the "rather restrictive standard" applied when ruling on motions for judgment on the pleadings. 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. Gunn v. Hope Gas, Inc., 402 S.E.2d 505 (W. Va. 1991).

Further, the Court has held recently that the burdens of proof in attempting to meet this test are allocated between the moving party(s) and opposing party(s), respectively, as follows:

A. Burden of the Moving Party:

A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such summary judgment. Smith v. Sears, Roebuck & Co., 447 S.E.2d 255 (W. Va 1994). Although, on a motion for summary judgment, an adverse party may not rest upon the mere allegations or denials of his pleadings, the moving party still will not be entitled to summary judgment unless the record demonstrates he has met his initial burden of establishing that there is no genuine issue as to any material fact. Ramey v. Ramey, 180 W.Va. 230 (1990).

B. Burden of the Opposing Party:

When the moving party presents depositions, interrogatories or affidavits or otherwise indicates there is no genuine issue as to any material fact, the resisting party to avoid summary judgment must present some evidence that the facts are in dispute. Williams v. Precision Coil, Inc., 459 S.E. 2d 329 (W. Va. 1995)... by offering more than a "scintilla of evidence"...sufficient for a reasonable jury to find in a non-moving party's favor. Painter v. Peavy, 451 S.E. 2d 755 (W.Va. 1994).

The Supreme Court has more recently, however, provided another facet for the Court to consider by the issuance of Fayette County National Bank v. Gary C. Lilly, et al, 199 W. Va. 499 (1997). In the Lilly case, the Court held as follows in the first two syllabus points:

1. A motion for summary judgment should be granted only when (a) it is clear that there is no genuine issue of fact to be tried and (b) inquiry concerning the facts is not desirable to clarify the application of the law [inserted letters supplied]. Cited from Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y., 148 W. Va. 160 (1963);
2. Roughly stated, a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed 'material' facts. A material fact is one that had the capacity to sway the outcome of the litigation under the applicable law. Cited from Syl. Pt. 5, Jividen v. Law, 194 W. Va. 705 (1995).

Finally, the West Virginia Legislature has specifically provided that, as in the present case, when seeking recovery for a deliberate intent cause of action arising under W.Va. Code § 23-4-2(d)(2)(ii)(A) – (E) of the West Virginia Worker's Compensation Act:

[T]he court shall dismiss the action upon motion for summary judgment if it finds, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) do not exist, and the court shall dismiss the action upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find each every one of the facts required to be proven by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) W.Va. Code § 23-4-2(c)(2)(iii)(B).

When examined within this context, the Court has determined that the relevant facts and the applicable law here create a justiciable issue.

Arguments of the Parties

Defendants' Assertions

The Defendants assert that they are entitled to summary judgment because Plaintiffs are not entitled to recover even if all the Complaint's allegations are true, because Plaintiffs' claims are time-barred. In essence, Defendants argue as follows. Plaintiffs' claims against Defendants accrued in Kentucky more than one year before their lawsuit was filed in West Virginia, and should, therefore, be barred by the Kentucky one-year statute of limitations for personal injuries. For all claims that accrue outside of West Virginia, continues the argument, W.Va. Code § 55-2A-2 requires this Court to apply the statute of limitations which would bar Plaintiffs' claim, per Hayes v. Roberts and Schaefer Co., 452 S.E.2d 459, 461 (W.Va. 1994). Plaintiffs' claims accrued outside of this State. Thus, in the present case, Ky. Rev. Stat. Ann. § 413.140., the one-year Kentucky statute of limitations for personal injury claims, is the applicable statute, given this case's precise factual similarity to Hayes. Therefore, Hayes requires that W.Va. Code § 55-2A-2 operate to apply the Kentucky one-year statute of limitations for personal injury claims, barring Plaintiffs' claims, and entitling Defendants to summary judgment. Id.

Furthermore, argue Defendants, Plaintiffs' assertion that Kentucky's one-year statute of limitations for personal injury claims is inapplicable to a W.Va. Code § 23-4-2 deliberate intent claim is without foundation. Although civil, deliberate intent claims in West Virginia are subject to the two-year personal injury statute of limitations pursuant to W.Va. Code § 55-2-12(b), this Court should not apply Ky. Rev. Stat. Ann. § 342.185(1), the Kentucky two-year statute of limitations for "occupational injuries," arising under their worker's compensation scheme, because Kentucky's worker's compensation system only contemplates administrative remedies and does not allow an employee to file a direct, civil, deliberate intent claim against an employer.

Finally, W. Va. Code § 55-2A-2 is a valid legislative enactment approved and applied by our Supreme Court in Hayes and in McKinney v. Fairchild Int'l. Inc., 487 S.E.2d 913 (W. Va 1997). Ultimately, the West Virginia Legislature has decided that negligence and deliberate intent claims accruing in West Virginia are subject to a two-year statute of limitations and claims accruing outside West Virginia are subject to whichever statute of limitations would bar the claim, per W. Va. Code § 55-2A-2. Because of this case's precise factual similarity to Hayes, W. Va. Code § 55-2A-2 requires the Court to apply Ky. Rev. Stat. Ann. § 413.140, the one-year Kentucky statute of limitations for personal injury claims which would bar Plaintiffs' claims.

Plaintiffs' Response

Plaintiffs maintain that their claims are not time barred. In essence, Plaintiffs argue as follows. Kentucky law does not provide for an equivalent statutory deliberate intent claim under their worker's compensation scheme. Therefore, Plaintiffs' deliberate intent claim under W. Va. Code § 23-4-2 is not a "foreign claim," per W. Va. Code § 55-2A-1, et. Seq., but remains a statutory claim arising under the West Virginia Worker's Compensation Act. Because the Plaintiffs' deliberate intent claim is not a foreign claim, W. Va. Code § 55-2A-2 does not operate to apply Ky. Rev. Stat. Ann. § 413.140, the Kentucky one-year statute of limitations for personal injuries which would bar Plaintiffs' claim, as mandated by Hayes v. Roberts and Schaefer Co., 452 S.E.2d 459, 461 (W. Va. 1994). Instead, because this is a statutory claim arising under the West Virginia Worker's Compensation Act, this Court should apply the two-year statute of limitations for a deliberate intent claim brought pursuant to W. Va. Code § 23-4-2.

In the alternative, if this court must apply a Kentucky statute of limitations to Plaintiffs' claims, it should apply the most equivalent, logical, and, therefore, applicable statute of

limitations, i.e., Ky. Rev. Stat. Ann. § 342.185(1), the two-year Kentucky statute of limitations for “occupational injuries” arising under the Kentucky’s worker’s compensation scheme. Both the Kentucky and West Virginia rules of statutory construction strongly support applying the Kentucky two year statute of limitations: (1) the Kentucky two year statute is the more specific statute applicable to Plaintiffs’ claims. See Syllabus point 1, UMWA by Trumka v. Kingdom, 325 S.E.2d 120 (W.Va 1984); See Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 819 (Ky. 1992); and (2) the Kentucky two year statute of limitations must be applied because doubt as to the relevant applicable statute of limitation should be resolved in favor of the longer limitation period. See Cochran v. Appalachian Power Co., 246 S.E.2d 624, 628 (W.Va. 1978); See Troxell v. Trammel, 730 S.W.2d 525 (Ky. 1987). Accordingly, Plaintiffs’ claims are not time barred. Plaintiffs therefore move this Court for entry of their proposed Scheduling Order Setting a Trial Date.

FINDINGS AND CONCLUSIONS

UPON MATURE CONSIDERATION OF WHICH, including the entire record in this matter, the submissions of the parties and the legal arguments of Counsel, the Court hereby makes the following findings of fact and conclusions of law:

(1) That based upon the pleadings in this matter, the Court has determined that it has jurisdiction and venue over the subject matter and the parties, in accordance with the applicable provisions of West Virginia Code § 56-1-1 et seq., and Rule 56(c) of the West Virginia Rules of Civil Procedure; and,

(2) That in accordance with the recent decisions of the West Virginia Supreme Court of

Appeals, as said summary judgment standards are outlined herein above in the "Discussion" section, and noting in particular the controlling aspects of Hayes v. Roberts & Schaefer Co., 452 S.E.2d 459 (W.Va. 1994), Bell v. Vecellio & Grogan, Inc., 475 S.E.2d 138 (W.Va. 1996), Russell v. Bush & Burchett, Inc., 559 S.E.2d 36 (W.Va.2001), of West Virginia Code § 55-2A-2, and of West Virginia Code § 55-2-12, the Court has determined that the WVRCP Rule 56(c) Motion for Summary Judgment, as moved for by the Defendants and as responded to by Plaintiffs in this case, on the issue of the applicable statute of limitations, given the findings of relevant undisputed facts and the applicable conclusions of law are determinative of the issues presented; and

(3) That, as set forth in the record in this action, it appears undisputed that the date Plaintiff Glen H. Anderson allegedly suffered injury was on or about June 12, 2000; and

(4) That Plaintiffs' Complaint was filed in the Circuit Court of Lincoln County on or about May 23, 2002; and

(5) That Defendants' filed their answer to Plaintiffs' Complaint on August 12, 2002; and

(6) That, Defendants' pending Motion for Summary Judgment (originally a Motion for Judgment on the Pleadings) was filed on July 16, 2003; and

(7) That Plaintiffs' Complaint advances a direct deliberate intent cause of action against BJ Services (Mr. Anderson's employer at the time of the accident), arising under West Virginia Code § 23-4-2(d)(2)(ii)(A) – (E) of the West Virginia Worker's Compensation Act, and a negligence cause of action against Larry Ballard and Equitable Production Company. Plaintiffs also seek recovery for loss of consortium allegedly suffered by plaintiff Brenda Anderson; and

(8) That, a “claim” is “any right of action which may be asserted in a civil action or proceeding and includes, but is not limited to, a right of action created by statute.” Hayes v. Roberts and Schaefer Co., 452 S.E.2d 459, 461 (W.Va. 1994); and,

(9) That Plaintiffs’ deliberate intent claim against the Defendants is a right of action created by statute, arising under West Virginia Code § 23-4-2(d)(2)(ii)(A) – (E) of the West Virginia Worker’s Compensation Act.

(10) That, A claim accrues “when and where the injury was sustained.” *Id.*; and,

(11) That, Plaintiffs’ deliberate intent claim against the Defendants accrued on June 12, 2000, in Belcher, Kentucky *Id.*; and

(12) That W.Va. Code § 55-2A-2, a borrowing statute based upon choice of law principles, applies the statute of limitations of a foreign jurisdiction where a claim accrues in that foreign jurisdiction, and where the limitation period of the foreign jurisdiction is shorter than the limitation period in West Virginia and would bar the claim; and

(13) That under W.Va.Code § 55-2A-2, when a person files a personal injury claim in West Virginia more than one year after the injury occurred in Kentucky, Kentucky’s one-year statute of limitations for personal injuries, rather than West Virginia’s two-year statute of limitations for personal injuries, is applicable because the Kentucky period of limitations would bar the claim. Hayes v. Roberts and Schaefer Co., 452 S.E.2d 459 (W.Va. 1994)

(14) That, in Bell v. Vecellio & Grogan, Inc., 475 S.E.2d 138, 145 (W.Va. 1996) our Supreme Court of Appeals held: “Because the deliberate intention statute is part of the West Virginia worker’s compensation scheme, the appellant is entitled to all benefits under the West Virginia Worker’s Compensation Act[.]”; and

(15) That, the Bell Court explained in the Syllabus that a deliberate intent claim is a “direct statutory cause of action” that is “expressed within the worker’s compensation system[]”: “W.Va. Code § 23-4-2(c) (1991) represents the wholesale abandonment of the common law tort concept of a deliberate intent cause of action against an employer, to be replaced by a statutory direct cause of action by an employee against an employer expressed within the worker’s compensation system.” Syl. Pt. 2, Bell v.v Vecellio & Grogan, Inc., 475 S.E.2d 138 (W.Va. 1996).

(16) That, the Bell Court further explained also that the deliberate intent claim had blended into the West Virginia worker’s compensation scheme: “W.Va Code § 23-4-2(c)(2)(I)-(ii)(1991) has blended within the West Virginia worker’s compensation scheme, the directive that all employees covered by the West Virginia Worker’s Compensation Act are subject to every provision of the worker’s compensation chapter and are entitled to all benefits and privileges under the Worker’s Compensation Act, including the right to file a direct deliberate intention cause of action against an employer pursuant to W.Va Code § 23-4-2(c)(2)(I)-(ii)(1991).”Syl. Pt. 3, Bell v.v Vecellio & Grogan, Inc., 475 S.E.2d 138 (W.Va. 1996); and

(17) That, this Court concludes that a deliberate intent claim is by nature a statutory claim under the West Virginia Worker’s Compensation Act, and not a common law personal injury claim; and

(18) That, as set forth in the record in this action, it appears to be undisputed that Kentucky law does not provide for a deliberate intent cause of action under their worker’s compensation scheme; and

(19) That Kentucky law does, however, provide for a specific statute of limitation for claims for “work related injuries” under their workers’ compensation chapter (two years), and a more general statute for common law personal injury claims (one year); and

(20) That, the worker’s compensation laws of West Virginia are “remedial in [their] nature, and must be given a liberal construction to accomplish the purpose intended.” Syl. Pt. 4, State ex rel. McKenzie v. Smith, 569 S.E.2d 809 (W.Va. 2002); and

(21) That, the Court concludes that a deliberate intent claim under the West Virginia Worker’s Compensation Act is by nature a claim for a work related injury; and

(22) That, in Kentucky, claims for work related injuries are governed by the two-year limitation period found in Ky. Rev. Stat. § 342.185(1): “The statute of limitations for work related injuries is found in KRS § b342.185(1)[.]” Manalapan Mining Co., Inc. v. Lunsford, 204 S.W.3d 601, 602, (Ky. 2006). Said statute states that claims related to work related injuries may be filed within two years of the accident: “no proceeding under this chapter for compensation for an injury or death shall be maintained unless a . . . claim for compensation with respect to the injury shall have been made with the office within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself for the compensation.” Id.; Ky. Rev. Stat. § 342.185(1); and

(23) That whether a deliberate intention cause of action may be brought against an employer because of an injury that occurred in a situs other than West Virginia is not determined by the doctrine of *lex loci delicti* [choice of law principles], but under the principles of comity. W. Va. Code § 23-4-2(c); Russell v. Bush & Burchett, Inc., 559 S.E.2d 36 (W.Va. 2001)(certiorari denied 123 S.Ct. 96, 537 U.S. 819, 154 L.Ed.2d 26); and

(24) That, "Comity is a court-created doctrine through which the forum court may give the laws or similar rights accorded by another state effect in the litigation in the forum state. Russell v. Bush & Burchett, Inc., 559 S.E.2d 36, (W.Va. 2001); and.

(25) That, "Comity is a flexible doctrine and rests on several principles: one is legal harmony and uniformity among the co-equal states; a second, grounded on essential fairness, is that the rights and expectations of a party who has relied on foreign law should be honored by the forum state; and finally, and perhaps most important, the forum court must ask itself whether these rights are compatible with its own laws and public policy." Id.

(26) That the rules of statutory construction in both Kentucky and West Virginia require that courts apply the more specific statute to a claim rather than the more general: "The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syllabus point 1, UMWA by Trumka v. Kingdom, 325 S.E.2d 120 (W.Va 1984); "The applicable rule of statutory construction where there is both a specific statute and a general statute seemingly applicable to the same subject is that the specific statute controls." Meyers v. Chapman Printing Co., Inc., 840 S.W.2d 814, 819 (Ky. 1992); and

(27) That any doubt as to the relevant applicable statute of limitation is hereinunder resolved in favor of the longer limitation period. See Cochran v. Appalachian Power Co., 246 S.E.2d 624, 628 (W.Va. 1978); See Troxell v. Trammel, 730 S.W.2d 525 (Ky. 1987).

(28) That the Court concludes that, because the Plaintiffs' deliberate intent claim is a statutory claim for a work related injury within the West Virginia worker's compensation chapter, the most logical and specific statute of limitations to apply from Kentucky would be Ky. Rev. Stat. § 342.185(1), the statute applicable to work related injuries – claims that are made

pursuant to Kentucky's worker's compensation chapter – and not the more general statute for common law personal injury claims (i.e. Ky. Rev. Stat. Ann. § 413.140); and

(29) That as a result of all of the above, looking to the fundamental nature of Plaintiffs' deliberate intent claim, this Court must conclude that Ky. Rev. Stat. Ann. § 342.185(1) (the two-year Kentucky statute of limitations for work related injuries arising under Kentucky's worker's compensation scheme), is more specific, compatible and more in harmony with the nature of W.Va. Code § 23-4-2 (a statutory deliberate intention claim arising under the West Virginia Worker's Compensation Act), is more compatible with our public policy, and, under the principles of statutory construction and of comity, the most applicable statute of limitations appropriately "prescribed," by Kentucky law. W.Va.Code § 55-2A-2; and

(30) That in this case West Virginia's two-year statute of limitations, pursuant to W.Va.Code § 55-2-12(b), is the proper statute of limitations prescribed by the law of West Virginia; and

(31) That therefore, under either West Virginia or Kentucky law, W.Va.Code § 55-2A-2 does not operate to bar Plaintiff's claims; and

(32) That as a result of all of the above, it is reasonable and proper to DENY Defendants' Motion for Summary Judgment as a matter of law; and

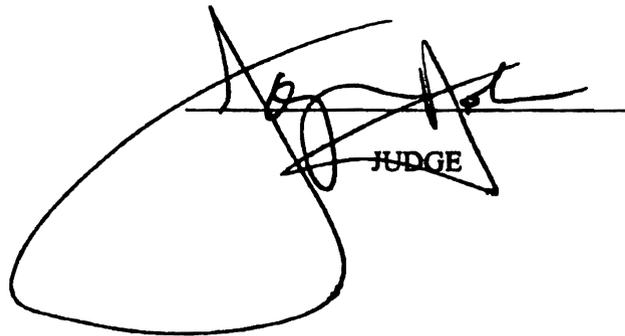
(33) That given the Court's ruling, it is just and proper to note for the record the Defendants' objections and exceptions to same.

All of which is hereby ADJUDGED, ORDERED and DECREED.

It is further hereby ORDERED, ADJUDGED AND DECREED that the Clerk of this Court shall provide timely notice of this Supplemental Order, following its entry, by forwarding a certified copy hereof upon all parties of record, in accordance with the applicable provisions of

Rules 10.01-12.06, as well as 24.01, of the West Virginia Trial Court Rules by USPS First Class Mail, Certified Return Receipt Requested; by hand delivery; or by facsimile transmission.

ENTER this the 12th day of November 2008


JUDGE

2nd

CIV
Entered 11-12-08
Order Booked 11-12-08
DULY ENTERED IN
Term 20

Clerk
West Virginia Trial Court