

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

TUCKER-STEPHEN G. BELL,
HEATHER M. BELL, individually
and as Guardians and Next Friends of
COLTON T. BELL and TUCKER M.
BELL, minor children; and
TUCKER-STEPHEN G. BELL and
RANDI L. PETERS as Guardians and
Next Friends of CHASE G. BELL, a
minor child,

Plaintiffs,

v.

CASE NO.: 17-C-193
Judge Russell M. Clawges, Jr.

BEST FLOW LINE EQUIPMENT, L.P.,
SOUTHERN ENVIRONMENTAL, INC.,
LONGVIEW POWER, LLC,
CASAGRANDE S.P.A.,
CASAGRANDE USA, INC.,
INTERNATIONAL DRILLING
EQUIPMENT, INC., and
NICHOLSON CONSTRUCTION COMPANY,

Defendants.

**ORDER DENYING, IN PART, AND GRANTING, IN PART, DEFENDANT
NICHOLSON CONSTRUCTION COMPANY'S MOTION TO DISMISS**

This matter came before the Court on the 10th day of October 2017, on Defendant Nicholson Construction Company's ("Nicholson") Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure. Plaintiff appeared by counsel, Carl A. Frankovitch and Matthew R. Zwick. Defendant Best Flow Line Equipment, L.P. appeared by counsel, J. David Bolen and Ellen M. Jones. Defendant Southern Environmental, Inc. appeared by counsel, Jordan E. Berty. Defendant Longview Power, LLC appeared by counsel, Brandy D. Bell. Defendant Casagrande appeared by counsel, Nathaniel D. Griffith. Defendant International

Drilling Equipment, Inc. appeared by counsel, Peter T. DeMasters. Defendant Nicholson Construction Company appeared by counsel, Tonya P. Shuler and Rita Massie Biser.

The Court heard arguments of counsel and took the motion under advisement. The Court has studied the motion, response, and the memoranda of law submitted by the parties; considered the arguments of counsel; and reviewed pertinent legal authorities. As a result of these deliberations, the Court is ready to rule.

FACTS and PROCEDURAL HISTORY

On May 19, 2015, Plaintiff Tucker-Stephen Bell was working in the course of his employment for Defendant Nicholson, at Defendant Longview Power Plant in Madsville, Monongalia County, West Virginia, when he suffered an injury. Plaintiff, who is a Pennsylvania resident, had worked in West Virginia for a period exceeding thirty (30) calendar days in the 365-day period prior to the accident. Nicholson is incorporated under the laws of the Commonwealth of Pennsylvania and maintains its principal place of business in Cuddy, Pennsylvania.

Plaintiff was operating a drill rig when he was injured. According to the Complaint, a 3-inch water swivel unthreaded and/or detached from the pipe nipple that connected it to the drill rig, causing the hose and swivel to whip in the air and strike the back of Plaintiff's head. As a result, the hard hat Plaintiff was wearing was cracked, causing damage to his skull. Upon being struck by the swivel, Plaintiff fell approximately 5 ½ feet from the drill rig platform to the ground.

Defendant Best Flow Line Equipment, L.P. ("Best Flow") is a manufacturer and

distributor of drilling parts such as swivel joints, hoses, fittings, and valves. Defendant Southern Environmental, Inc. ("SEI") is a contractor that engages in producing, supplying, repairing, rebuilding, and upgrading air pollution control equipment in the United States and internationally. Defendant Longview Power, LLC owns and operates a coal-fired power plant. SEI was hired by Longview Power to produce, supply, repair, rebuild, expand, and/or upgrade air pollution control equipment and the baghouse at Longview Power Plant.

Defendants Casagrande S.p.A. and Casagrande USA are manufacturers and distributors of foundation equipment, including commercial drilling rigs. Casagrande S.p.A. is the parent company of Casagrande USA, Inc. Defendant International Drilling Equipment, Inc. ("IDE") is a dealer, suppliers, seller, and/or distributor of geotechnical and foundation equipment and tooling, and is the exclusive distributor of foundation equipment manufactured by the Casagrande Defendants.

Defendant Nicholson Construction Company is a geotechnical contractor, specializing in the design and installation of deep foundation elements, earth retention systems and ground treatment. Nicholson was a subcontractor hired by SEI to design and install the foundation pilings for the Fabric Filter Building at Longview Power Plant.

On May 4, 2017, Plaintiffs filed this action. In the initial Complaint, Plaintiffs asserted claims for negligent and intentional spoliation, as well as claims for loss of spousal and parental consortium against Nicholson. By Amended Complaint, filed August 17, 2017, Plaintiffs added two claims of deliberate intent pursuant to West Virginia Code Sections 23-4-2(d)(2)(i)-(ii) of the West Virginia Worker's Compensation Act. The First Amended Complaint contains the following causes of action against Defendant Nicholson:

- Count XV – Deliberate Intent under West Virginia Code Section 23-4-2(d)(i)
- Count XVI – Deliberate Intent under West Virginia Code Section 23-4-2(d)(ii)
- Count XVII – Intentional Spoliation
- Count XVIII – Negligent Spoliation
- Count XIX – Loss of Spousal Consortium
- Count XX – Loss of Parental Consortium

On September 18, 2017, Defendant Nicholson filed its Motion to Dismiss Counts XV, XVI, XVII, XVIII, XIX, and XX of the Amended Complaint. Nicholson argues first that this Court does not have subject matter jurisdiction over Plaintiffs' claims against Nicholson. Nicholson further argues that the claims of deliberate intent are barred by the applicable statute of limitations and the claims of spoliation are not viable under Pennsylvania law. Therefore, Nicholson contends that all claims against it should be dismissed.

Plaintiffs insist that this Court has subject matter jurisdiction over their claims, that they have sufficiently pled their claims for negligent and intentional spoliation of evidence and loss of spousal and parental consortium, and that West Virginia law controls this case.

DISCUSSION

“Whenever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket.” Syl. Pt. 1, Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc., 158 W.Va. 492 (1975).

The standard applied to Rule 12(b)(6) motions is well established. In analyzing the complaint, the Court must accept the allegations as true, and construe the same in the light most

favorable to the Plaintiff. "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." Syllabus, Flowers v. City of Morgantown, 166 W.Va. 92 (1980).

Counts XV and XVI – Deliberate Intention

A. Subject Matter Jurisdiction

Nicholson contends that this Court does not have subject matter jurisdiction over the deliberate intent claims because Plaintiff is a Pennsylvania employee bringing an action against his Pennsylvania employer. Nicholson relies on Easterling v. American Optical Corp., 207 W.Va. 123 (2000) as support for this position. However, Easterling was decided before West Virginia Code of State Rules, Rule 85-8-7 became effective. Rule 85-8-7 states, in pertinent part:

Extraterritorial employees who perform work in the State of West Virginia on a non-temporary basis (i.e., for a period exceeding thirty (30) calendar days in any three hundred and sixty-five (365) day period) and are not otherwise exempt from West Virginia's workers' compensation laws must be covered with West Virginia workers' compensation coverage unless they enter into an agreement with their employer described under subsection 7.4. of this section. An employer of extraterritorial employees has a duty to immediately advise its West Virginia private carrier when it reasonably believes it will be employing extraterritorial employees in the State of West Virginia on a non-temporary basis, so that premium can be adjusted accordingly. W.Va. Code St. R. § 85-8-7.2.

An employer and an employee who are both subject to the workers' compensation laws of a state other than West Virginia may enter into a written agreement in which the employer and employee both agree to be bound by the laws of the other state: *Provided*, That any employee entering into such an agreement must physically work for the employer entering into such agreement outside of the State of West Virginia for a period of not less than thirty (30) calendar days in any three

hundred and sixty-five (365) day period, and the employer must comply with the workers' compensation laws of the other state(s). Failure to meet these circumstances shall cause any agreement contemplated under this section to be void from its beginning: *Provided, further*, That an agreement entered into by an employer carrying West Virginia workers' compensation coverage shall immediately be provided to the employer's West Virginia carrier so that premium can be adjusted accordingly. If an employee who has entered into an extraterritorial agreement as described in this subsection is injured, the extraterritorial employee's exclusive workers' compensation remedy is under the laws of the state to which the employee has agreed to be bound. W.Va. Code St. R. § 85-8-7.4.

Plaintiff argues that he is required to be covered by West Virginia Workers' Compensation, as he was a non-temporary employee working in West Virginia, and that he is entitled to all benefits and privileges of the West Virginia Workers' Compensation Act. The Court agrees. It has not been alleged that Plaintiff and Nicholson entered into an agreement in which they agreed that they would be bound by the laws of Pennsylvania. Therefore, Plaintiff is not precluded from this action.

B. Relation Back

West Virginia Rules of Civil Procedure, Rule 15 states, in pertinent part, as follows:

An amendment of a pleading relates back to the date of the original pleading when:

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action; or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing paragraph (2) is satisfied and, within the period provided by Rule 4(k) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have brought against the party.

“Pursuant to Rule 15, W.Va.R.C.P., amendments relate back when the cause of action sought to be added grows out of the specified conduct of the defendant that gave rise to the original cause of action. If, however, the supplemental pleading creates an entirely new cause of action based on facts different from those in the original complaint, the amended pleading will not relate back for statute of limitations purposes.” Syl. Pt. 7, Dzinglski v. Weirton Steel Corp., 191 W.Va. 278 (1994).

Nicholson argues that the deliberate intent claims are barred by the two-year statute of limitations. Plaintiff’s accident occurred on May 19, 2015, and the deliberate intent claims were not asserted until the First Amended Complaint, filed August 15, 2017. Nicholson argues that the deliberate intent claims do not relate back to the original pleading, which were claims of spoliation. Nicholson points out that when Plaintiff added the deliberate intent claims he also added six additional paragraphs of factual allegations.

Plaintiff insists that his claims against Nicholson for loss of spousal and parental consortium in the original Complaint arose out of the conduct, transaction, and occurrence that resulted in the injuries to him. Plaintiff argues that the deliberate intent claims share a common nucleus of operative facts with the claims for loss of spousal and parental consortium. The Court is not persuaded.

The Court FINDS that Plaintiffs’ deliberate intent claims are barred by the applicable statute of limitations. Accordingly, the Court GRANTS Defendant Nicholson’s Motion to Dismiss Counts XV and XVI of the Complaint.

Counts XVII and XVIII - Spoliation

Following the accident that injured Plaintiff Tucker-Stephen Bell, the swivel, hose, and other component parts of the subject drill rig were removed for the purpose of determining the cause of the incident. Nicholson claims that the component parts were removed from the state of West Virginia, then taken to and subsequently stored at Nicholson's business in Cuddy, Pennsylvania. Nicholson argues that Plaintiff's spoliation claims arise wholly in the Commonwealth of Pennsylvania, between residents of Pennsylvania, and from allegedly injurious conduct occurring at Nicholson's principal place of business in Pennsylvania. Thus, Nicholson argues there exists no sufficient nexus to the State of West Virginia upon which to confer jurisdiction over these claims. In addition, Nicholson contends that Pennsylvania law would apply, and claims of spoliation are not cognizable under the laws of Pennsylvania.

Plaintiff disputes that it is settled that Nicholson destroyed or discarded the component parts in Pennsylvania. Plaintiff maintains that he has not alleged that the spoliation of the parts of the drill rig took place outside of West Virginia. Plaintiff also argues that West Virginia law applies to the spoliation claims because the injury suffered by the Plaintiffs as a result of the spoliation occurred in West Virginia.

The Court FINDS that there are issues that require factual development. Accordingly, the Court DENIES Defendant Nicholson's Motion to Dismiss Counts XVII and XVIII of the Complaint.

Count XIX and XX – Consortium

Nicholson contends that the loss of consortium claims are not viable against it as these

claims are derivative of an underlying personal injury claim. Nicholson argues that no legally cognizable personal injury claim was asserted against it; therefore, Plaintiff cannot maintain any derivative claims for loss of consortium. The Court agrees. Accordingly, the Court GRANTS Defendant Nicholson's Motion to Dismiss Counts XIX and XX of the Complaint.

ORDER

WHEREFORE, it is ORDERED that the Court GRANTS Defendant Nicholson Construction Company's Motion to Dismiss Counts XV, XVI, XIX and XX. It is further ORDERED that the Court DENIES Defendant Nicholson Construction Company's Motion to Dismiss Counts XVII and XVIII.

The Court further directs the Clerk of the Circuit Court of Monongalia County to distribute certified copies of this order to the parties and/or counsel of record.

Enter

August 31, 2018



Russell M. Clawges, Jr., Judge
17th Judicial Circuit, Division II.

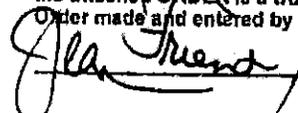
ENTERED:

Aug 31, 2018

DOCKET LINE 245, Jean Friend, Clerk

STATE OF WEST VIRGINIA, SS:

9 I, Jean Friend, Clerk of the Circuit/Family Court of Monongalia County State aforesaid do hereby certify the attached ORDER is a true copy of the original Order made and entered by said Court.

 Circuit Clerk

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

TUCKER-STEPHEN G. BELL, ET AL.,)	
)	
PLAINTIFFS,)	CIVIL CASE NO.: 17-C-193
)	
v.)	Judge Russell M. Clawges, Jr.
)	
BEST FLOW LINE EQUIPMENT, L.P.,)	
ET AL.,)	
)	
DEFENDANTS.)	
)	

ORDER GRANTING MOTIONS FOR ENTRY OF FINAL JUDGMENT

On the 12th day of October 2018, came Plaintiffs, Tucker-Stephen G. Bell, Heather M. Bell, individually and as Guardians and Next Friends of Colton T. Bell and Tucker M. Bell, Minor Children, and Tucker-Stephen G. Bell and Randi L. Peters, as Guardians and Next Friends of Chase G. Bell, a Minor Child ("Plaintiffs"), by counsel, with a Motion asking the Court to amend its August 31, 2018 Order Denying, in Part, and Granting, In Part, Defendant Nicholson Construction Company's Motion to Dismiss pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, or in the alternative, to certify said Order as a final and appealable order pursuant to Rule 54(b).

On the 20th day of November 2018, came Defendant Southern Environmental, Inc. ("SEI"), by counsel, with an unopposed Motion asking the Court to certify its November 1, 2018 Order Denying Defendant Southern Environmental, Inc.'s Motion to Dismiss as final and appealable order pursuant to Rule 54(b).

Having considered the pleadings and otherwise being sufficiently advised in the premises, the Court does hereby DENY Plaintiffs' Motion to Amend the Court's August 31, 2018 Order pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure.

The Court further finds that it is proper to certify its aforesaid Orders of August 31, 2018 and November 1, 2018, as final and appealable orders pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. The Court finds that the August 31, 2018 Order completely disposes of substantive claims

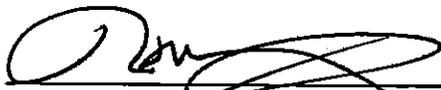
of the Plaintiffs and also possesses the requisite degree of finality. The Court finds that the issues decided in the November 1, 2018 Order are sufficiently related the issues decided in the August 31, 2018 Order such that, in the interest of judicial economy, said Order should likewise be certified as final and appealable at this time. Furthermore, the Court finds that certifying said Orders as final will not prejudice any of the parties involved and further finds that there is no just reason to delay the categorization or certification of the Orders as final and appealable orders.

As such, this Court hereby **GRANTS** the Motions for Entry of Final Judgment of Plaintiffs and SEI and hereby **ORDERS** that this Court's August 31, 2018 Order and November 1, 2018 Order be certified as final and appealable orders, in all respects, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. Accordingly, the parties shall file their notices of appeal within thirty (30) days of entry of this Order in accordance with the West Virginia Rules of Appellate procedure.

IT IS SO ORDERED.

The Clerk is directed to send certified copies of this Order to all counsel of record.

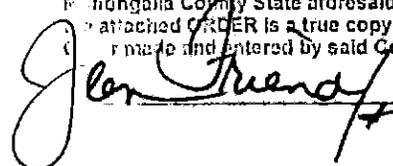
Entered this 29th day of November, 2018.


Honorable Judge Russell M. Clawges, Jr.

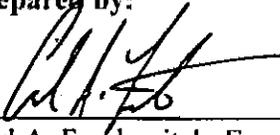
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DOCKET LINE 319 _____ Clerk

STATE OF WEST VIRGINIA, SS:

I, Glen Friend, Clerk of the Circuit/Family Court of Boone County, State aforesaid do hereby certify that the attached ORDER is a true copy of the original made and entered by said Court.


Glen Friend
Circuit Clerk

Prepared by:



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