

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., and
NICHOLSON CONSTRUCTION COMPANY,

Defendants.

**AMENDED ORDER DENYING DEFENDANT
NICHOLSON CONSTRUCTION COMPANY'S MOTION TO DISMISS
CROSS-CLAIMS OF BEST FLOW LINE EQUIPMENT, L.P.**

This matter came before the Court on the 20th day of November 2018, on Defendant Best Flow Line Equipment, L.P.'s ("Best Flow") Motion to Amend Order Pursuant to Rule 59(e), filed November 5, 2018. 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 Nicholson Construction Company

appeared by counsel, Tonya P. Shuler.

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 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. By Order entered August, 31, 2018, the Court Granted the Motion as to Counts XV, XVI, XIX, and XX.

Defendant Best Flow filed its Answer to Plaintiff's Amended Complaint on September 8, 2017. Within its Answer, Best Flow asserted Cross-Claims against Nicholson for deliberate intention, contribution, implied indemnity, spoliation, and general negligence. Nicholson filed its Motion to Dismiss Cross-Claims on September 18, 2017. Nicholson makes many of the same arguments as it did in its Motion to Dismiss Plaintiffs' Claims: that this Court does not have subject matter jurisdiction over Plaintiffs' claims against Nicholson, that the claims of deliberate intent are barred by the applicable statute of limitations, and that the claims of spoliation are not viable under Pennsylvania law. Therefore, Nicholson contends that all cross-claims against it should be dismissed.

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).

An employer may be held liable to a defendant manufacturer upon the theory of contribution and/or implied indemnity based upon allegations by the defendant manufacturer that the employer was guilty of willful, wanton, and reckless misconduct or intentional tort toward the plaintiff employee resulting in plaintiff employee's personal injuries. Sydenstricker v. Unipunch Products, Inc., 169 W.Va. 440, 444-445 (1982).

Deliberate Intention / Contribution / Implied Indemnity / Loss of Consortium

Best Flow argues that it is not asserting a deliberate intent cause of action as part of its cross-claim. Rather, Best Flow asserts that its claims are for contribution and implied indemnity for which deliberate intent is merely the manner in which the proof must be offered. Best Flow further argues that its cross-claims are separate and distinct from the Plaintiffs' deliberate intent claim; therefore, Best Flow's claims are not barred by the two year statute of limitations. The Court agrees.

Therefore, the Court DENIES Defendant Nicholson's Motion to Dismiss Defendant, Best

Flow Line Equipment, L.P.'s Cross-Claims for Deliberate Intention, Contribution, and Implied Indemnity. The Court further DENIES Defendant Nicholson's Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.'s Cross-Claims for Contribution and Implied Indemnity as to Plaintiffs' claims for Loss of Consortium.

Spoliation

Consistent with the Court's Order entered August 31, 2018, the Court FINDS that there are issues that require factual development regarding the alleged spoliation of parts of the drill rig. Therefore, the Court DENIES Defendant Nicholson's Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.'s Cross-Claims for Spoliation.

ORDER

ACCORDINGLY, based on the foregoing, it is hereby ORDERED that Defendant Nicholson's Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.'s Cross-Claims is DENIED.

The Court further ORDERS that this Order is designated as a final order under W.Va. R. Civ. Proc 54(b) and is now appealable immediately.

The Court 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

November 27, 2018



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

Nov. 27, 2018

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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
CROSS-CLAIMS OF BEST FLOW LINE EQUIPMENT, L.P.**

This matter came before the Court on the 10th day of October 2017, on Defendant Nicholson Construction Company's ("Nicholson") Motion to Dismiss Cross-Claims of Best Flow Equipment, L.P. 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

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Defendant Best Flow filed its Answer to Plaintiff's Amended Complaint on September 8, 2017. Within its Answer, Best Flow asserted Cross-Claims against Nicholson for deliberate intention, contribution, implied indemnity, spoliation, and general negligence. Nicholson filed its Motion to Dismiss Cross-Claims on September 18, 2017. Nicholson makes many of the same arguments as it did in its Motion to Dismiss Plaintiffs' Claims: that this Court does not have subject matter jurisdiction over Plaintiffs' claims against Nicholson, that the claims of deliberate intent are barred by the applicable statute of limitations, and that the claims of spoliation are not viable under Pennsylvania law. Therefore, Nicholson contends that all cross-claims against it should be dismissed.

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).

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An employer may be held liable to a defendant manufacturer upon the theory of contribution and/or implied indemnity based upon allegations by the defendant manufacturer that the employer was guilty of willful, wanton, and reckless misconduct or intentional tort toward the plaintiff employee resulting in plaintiff employee’s personal injuries. Sydenstricker v. Unipunch Products, Inc., 169 W.Va. 440, 444-445 (1982).

Deliberate Intention / Contribution / Implied Indemnity / Loss of Consortium

Consistent with the Court’s Order entered August 31, 2018, that Plaintiffs’ deliberate intent claims are barred by the applicable statute of limitations, the Court GRANTS Defendant Nicholson’s Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.’s Cross-Claims for Deliberate Intention, Contribution, and Implied Indemnity. Likewise, the Court GRANTS

Defendant Nicholson's Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.'s Cross-Claims for Contribution and Implied Indemnity as to Plaintiffs' claims for Loss of Consortium.

Spoliation

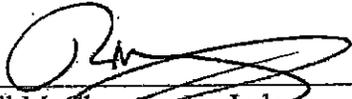
Consistent with the Court's Order entered August 31, 2018, the Court FINDS that there are issues that require factual development regarding the alleged spoliation of parts of the drill rig. Therefore, the Court DENIES Defendant Nicholson's Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.'s Cross-Claims for Spoliation.

ORDER

ACCORDINGLY, based on the foregoing, it is hereby ORDERED that Defendant Nicholson's Motion to Dismiss Defendant, Best Flow Line Equipment, L.P.'s Cross Claims is GRANTED, in part, and DENIED, in part.

The Court 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.

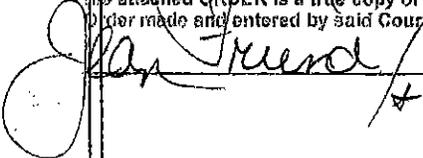
Enter October 24, 2018



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

ENTERED: Oct 24, 2018
DOCKET LINE 285 Jean Friend, Clerk

STATE OF WEST VIRGINIA, SS:
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