

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2018 JUL -5 A 10:30

CATHY S. GATSON, CLERK *rc*
KANAWHA COUNTY CIRCUIT COURT

**STATE OF WEST VIRGINIA, ex rel. PATRICK MORRISY,
ATTORNEY GENERAL, and THOMAS J. SMITH, in his
official capacity as SECRETARY OF TRANSPORTATION and
COMMISSIONER OF HIGHWAYS, WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION,**

PLAINTIFFS,

Civil Action No.: 17-C-41

v.

Judge: James H. Young, Jr.

**CRH, PLC; OLDCASTLE, INC.;
OLDCASTLE MATERIALS, INC.;
WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA PAVING, INC.;
SOUTHERN WEST VIRGINIA ASPHALT, INC.;
KELLY PAVING, INC.;
CAMDEN MATERIALS, LLC;
AMERICAN ASPHALT & AGGREGATE, INC.;
AMERICAN ASPHALT OF WEST VIRGINIA, LLC;
BLACKTOP INDUSTRIES AND EQUIPMENT COMPANY,**

DEFENDANTS.

**ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF
PERSONAL JURISDICTION**

On the 28th day of June 2018, this matter came before the Court upon Defendants', CRH, plc, Oldcastle, Inc., and Oldcastle Materials, Inc., motions to dismiss for lack of personal jurisdiction. Defendants CRH, Oldcastle, and Oldcastle Materials appeared by counsel, Booth Goodwin, Esq. Plaintiffs appeared by counsel, Isaac Forman, Esq., J. Zak Ritchie, Esq., and Michael B. Hissam, Esq.

Thereupon, the Court after hearing argument of the parties and upon reviewing the parties' pleadings, briefs, and legal authority and after conducting a full evidentiary hearing finds as follows:

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STANDARD OF REVIEW

The parties put forth two differing standards of review to apply in analyzing Defendants' motions to dismiss for lack of personal jurisdiction. The confusion appears to stem from two different understandings of the Supreme Court of Appeals of West Virginia's decision in *State ex rel. Bell Atlantic-West Virginia v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997). After reviewing the appropriate case law, the Court agrees with Defendants and shall apply the higher preponderance of the evidence standard.

In *State ex rel. Bell Atlantic-West Virginia v. Ranson*, the Supreme Court of Appeals of West Virginia laid out two differing standards the trial court is to apply when analyzing a motion to dismiss for lack of personal jurisdiction. 201 W.Va. 402, Syl. Pt. 4, 497 S.E.2d 755 (1997). The Court instructed the trial court to use the more lax *prima facie* standard when the Court made its ruling based upon the pleadings, affidavits and other documentary evidence. *Id.* However, if the Court "conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence." *Id.* In *Ranson*, the Court used the *prima facie* standard, but stated in footnote eight that "the parties do not indicate that a full evidentiary hearing was ever conducted on the personal jurisdiction issue." Therefore, the Court in *Ranson* did not use the preponderance of the evidence standard.

Here, despite the fact live witness testimony was not provided by the agreement of the parties, both parties acquiesced on the record that the hearing would be conducted as a pretrial evidentiary hearing. As a result, Defendants conceded the evidentiary hearing would be Defendants only chance arguing the jurisdictional issue and they could not relitigate the issue at

trial. Therefore, the Court, as instructed in *Ranson* will apply a preponderance of the evidence standard in determining whether the Court has personal jurisdiction over the Defendants.

ANALYSIS

I. Personal jurisdiction in West Virginia – a brief summation.

Defendants assert the Court lacks personal jurisdiction to determine this matter. Personal jurisdiction can be subdivided into two categories: general and specific jurisdiction. General jurisdiction exists when a defendant has “substantial, continuous, and systematic” contacts with the forum state. *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, Syl. Pt 5, 788 S.E.2d 319, 323 (2016). These contacts must be substantial enough to render a defendant “essentially at home” in the forum state. *Id.*

Alternatively, specific jurisdiction requires a different analysis and is determined on a case-by-case basis. A court may assert specific jurisdiction over a nonresident defendant when the claim or allegation arises out of or relates to a defendant’s contacts or activities in the state by which a defendant “purposefully avails itself of conducting activities in the state so long as the exercise of jurisdiction is constitutionally fair and reasonable.” *Id.* at Syl. Pt. 8. This fair and reasonable inquiry may include, but is not limited to, considering “the burden on the defendant, the interests of the state, the interest of the plaintiff in obtaining relief, the interstate judicial system’s interest in obtaining efficient resolution of controversies, and the shared interests of states in furthering fundamental substantive social policies.” *Id.* at Syl. Pt. 10. Cases need to be analyzed on a case specific basis and not all factors need to be present in all cases to find specific jurisdiction exists. *Id.* The specific jurisdiction analysis protects a defendant’s interests as the “purposeful availment requirement . . . ensures that a defendant will not be haled into a jurisdiction as a result of isolated, fortuitous, or random acts.” *Id.* at Syl. Pt. 9.

Further, W. Va. Code § 56-3-33, commonly referred to as West Virginia's Long Arm Statute, confers jurisdiction over a nonresident who engages in any one of the seven acts enumerated within the statute. These include:

1. Transacting any business in this State;
2. Contracting to supply services or things in this State;
3. Causing tortious injury by an act or omission in this State;
4. Causing tortious injury in this State by an act or omission outside this State if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
5. Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this State: Provided, that he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
6. Having an interest in, using, or possessing real property in this State; or
7. Contracting to insure any person, property or risk located within this State at the time of contracting.

W. Va. Code § 56-3-33.

West Virginia's second Long-Arm Statute is more narrow as it only applies to for-profit corporations that are incorporated under a law other than West Virginia. *State ex rel. Ford Motor Co. v. McGraw*, 237 W. Va. 573, 581, 788 S.E.2d 319, 327 (2016). For purposes of asserting

jurisdiction, the statute specifies that a foreign corporation will be deemed to be transacting business in West Virginia if the following is met:

1. The corporation makes a contract to be performed, in whole or in part, by any party thereto in this State;
2. The corporation commits a tort, in whole or in part, in this State; or
3. The corporation manufactures, sells, offers for sale or supplies any product in a defective condition and that product causes injury to any person or property within this State notwithstanding the fact that the corporation had no agents, servants or employees or contacts within this State at the time of the injury.

W. Va. Code § 31D-15-1501. West Virginia's Long Arm Statutes have been found to be "coextensive with the full reach of due process." *In re Cleotex Corp.*, 124 F. 3d 619, 627 (4th Cir. 1997).

Below the Court will first analyze Oldcastle and Oldcastle Materials together as the factors creating personal jurisdiction over the two corporations are largely the same. The Court will then proceed to do a personal jurisdiction analysis for CRH, Inc.

II. The Court has specific jurisdiction over Oldcastle, Inc. and Oldcastle Materials, Inc. as the claims alleged arose from the Oldcastle Defendants contacts within West Virginia.

Plaintiffs assert that the Court has both general and specific personal jurisdiction over Oldcastle and Oldcastle Materials. The Court disagrees that general jurisdiction exists. However, the Court finds by a preponderance of the evidence that it has jurisdiction under West Virginia's Long Arm Statutes and through specific jurisdiction.

A. General jurisdiction does not exist over Oldcastle or Oldcastle Materials as neither corporation can be said to be at home in West Virginia.

Plaintiffs allege that general jurisdiction exists because (1) Oldcastle Materials, Inc.'s website lists Dunbar, West Virginia as the location of its "Midatlantic Division" and (2) Oldcastle and Oldcastle Materials provide technological and administrative services to Defendants West Virginia Paving, Inc., Southern West Virginia Paving, Inc. and Southern West Virginia Asphalt, Inc. A lone claim made on a website is a far cry from the substantial, continuous, and systematic contacts, which render a defendant "at home" in a forum state and are required for the Court to assert general jurisdiction. Further, while the technological and administrative services provided to other subsidiary Defendants are certainly contacts with the forum state, the Court believes that these contacts are more properly analyzed under a specific jurisdiction analysis as these conducts are not as substantial and continuous enough to rise to the level of making Oldcastle or Oldcastle Materials "at home" in West Virginia. Therefore, the Court finds that the Plaintiffs have failed to prove by a preponderance of the evidence that the Court has general jurisdiction over Oldcastle or Oldcastle Materials.

B. Jurisdiction over Oldcastle and Oldcastle Materials exists under West Virginia's Long Arm Statutes.

Based on the allegations made in the complaint and in the responsive pleadings, the Court finds by a preponderance of the evidence that Oldcastle and Oldcastle Materials have engaged in acts enumerated in W.Va. Code § 56-3-33 and W.Va. Code § 31D-15-1501. Thus, the Court finds that it has jurisdiction over the Oldcastle Defendants.

The Plaintiffs have alleged that Oldcastle and Oldcastle Materials have (1) transacted business in this state; (2) have contracted to supply services or things in this state; (3) caused tortious injury by an act or omission in this state; and (4) caused tortious injury in this state if he

or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

W.Va. Code § 56-3-33.

Plaintiffs allege that Oldcastle and Oldcastle Materials implemented a calculated strategy in which the Oldcastle Defendants deployed resources into the West Virginia asphalt market with the purpose and effect of unlawfully monopolizing the market and artificially raising asphalt prices. In order to pull off this scheme, Plaintiffs allege that Defendants Oldcastle and Oldcastle Materials acted and held themselves out as the North American “arm” of CRH. See *States Opposition to the Motions to Dismiss Filed by Defendants CRH, PLC, Oldcastle, Inc., and Oldcastle Materials, Inc.*, p. 4. As CRH’s “North American arm,” the Oldcastle Defendants oversaw and actively participated in the supervision and direction of the business of its subsidiaries. According to Plaintiffs, the direction ultimately pointed toward illegal activity through monopolization and price fixing.

Plaintiffs allege Oldcastle and Oldcastle Materials exerted authority over its West Virginia subsidiaries, helped acquire assets located in West Virginia, and oversaw mergers. *Id.* at p. 4. Plaintiffs further contend that the Oldcastle Defendants provided “sophisticated human, financial, and legal capital to design and implement their acquisition and joint venture strategies in West Virginia.” *States Supplemental Opposition to the Motions to Dismiss Filed by Defendants CRH, PLC, Oldcastle, Inc., and Oldcastle Materials, Inc.*, p. 3. Plaintiffs allege the Oldcastle Defendants approved “annual budget[s], capital expenditures, and acquisitions.” *Id.* at p. 4. Finally, Plaintiffs allege that the Oldcastle Defendants set the prices at all the asphalt plants located in West Virginia and Kentucky. *Id.* at p. 6. In summation, Plaintiffs essentially allege that

Oldcastle and Oldcastle Materials acted as the “treasury,” *Id.* at p. 5, and the mastermind behind the alleged monopolization scheme of the West Virginia asphalt market.

Based on the pleadings and arguments made by the parties, the Court finds by a preponderance of the evidence that Oldcastle and Oldcastle Materials: (1) transacted business in this state by financing operations and acquisitions, approving mergers, and directing an allegedly illegal business strategy to monopolize the West Virginia asphalt market; (2) contracted to supply services or things in this state by participating and directing their subsidiaries business dealings; and (3) derived substantial revenue in this state. W.Va. Code § 56-3-33. Therefore, the Court finds by a preponderance of the evidence that it has jurisdiction under West Virginia’s Long Arm Statute

C. The Oldcastle Defendants’ activity within the state allow the Court to assert specific jurisdiction as the Defendants purposefully availed themselves to the forum state.

Due to Oldcastle and Oldcastle Materials’ extensive contacts with the forum state, as largely detailed above, the Court finds by a preponderance of the evidence that it has specific jurisdiction over the Oldcastle Defendants.

The Oldcastle Defendants’ activities in West Virginia were numerous and significant. These activities make clear that the Oldcastle Defendants purposefully availed themselves to the forum. Oldcastle and Oldcastle Materials helped direct and pursue acquisitions. *States Supplemental Opposition to the Motions to Dismiss Filed by Defendants CRH, PLC, Oldcastle, Inc., and Oldcastle Materials, Inc.*, p. 3. The Oldcastle Defendants provided human, financial, and legal resources to its subsidiaries to help achieve the acquisition strategy. *Id.* at p. 3. The Oldcastle Defendants gave their approval over and helped facilitate the complained of acquisitions. *Id.* at p. 4. Oldcastle, Inc. acted as the “treasury” providing financing to complete

these acquisitions and provided legal services. *Id.* at p. 4. Oldcastle Materials conducted business and had people working on its behalf in West Virginia. *Id.* at p. 5.

Given the nature of the claim against the Oldcastle Defendants, it is clear to the Court that the claim arose from the Oldcastle Defendants' activities within the state and that the Oldcastle Defendants purposefully availed themselves to the state by conducting these activities within the state. Plaintiffs allege that the Oldcastle Defendants orchestrated an illegal business scheme that ultimately led to the monopolization and price fixing of the West Virginia asphalt market. Clearly, Plaintiffs' claim arose from these alleged activities. Further, given the Oldcastle Defendants' numerous activities within the forum, the Court cannot be said to be asserting jurisdiction over the Oldcastle Defendants' isolated, fortuitous, or random acts within the state.

Finally, the Court finds that it is both fair and just to bring the Oldcastle Defendants into the forum. Plaintiffs allege the Oldcastle Defendants were unjustly enriched by receiving excess revenue due to illegal activity that passed vertically through the Oldcastle Defendants' subsidiary chain. This excess revenue is allegedly attributed to the unlawful business scheme that the Oldcastle Defendants helped orchestrate. As such, the Court finds that burden on the Oldcastle Defendants to defend themselves in this forum are vastly outweighed when balanced against the interests of the Plaintiffs in obtaining relief, the interests of the state, and the interest of the judicial system in obtaining efficient resolution of controversies. Thus, it is both fair and just for the Oldcastle Defendants to answer these allegations within the state. Therefore, the Court finds by a preponderance of the evidence that it has specific jurisdiction over the Oldcastle Defendants.

III. CRH's contacts with the forum state allows the Court to assert jurisdiction under West Virginia's Long Arm Statutes and provides for specific jurisdiction.

Plaintiffs assert that the Court has specific personal jurisdiction over CRH. Plaintiffs do not appear to assert, nor does the Court find, that general jurisdiction exists over CRH. However, the Court finds by a preponderance of the evidence that jurisdiction exists under West Virginia's Long Arm Statutes and through specific jurisdiction.

A. General jurisdiction does not exist over CRH.

Upon review of the *State's Opposition to CRH, PLC's Motion to Dismiss for Lack of Personal Jurisdiction*, Plaintiffs do not appear to assert that the Court has general jurisdiction over CRH. Further, nothing proffered during oral argument at the July 28, 2018, evidentiary hearing persuaded the Court that general jurisdiction exists. As such the Court finds by a preponderance of the evidence that it lacks general jurisdiction over CRH.

B. Jurisdiction over CRH exists under West Virginia's Long Arm Statutes.

Based on the allegations made in the complaint and in the responsive pleadings, the Court finds by a preponderance of the evidence that CRH engaged in acts enumerated in W.Va. Code § 56-3-33. Thus, providing the Court with jurisdiction over CRH under West Virginia's Long Arm Statutes.

As more thoroughly explained above, W. Va. Code § 56-3-33 provides that certain enumerated acts confer personal jurisdiction to the Court over a non-resident. Among these enumerated acts, the Court finds that CRH has (1) transacted business in this State and has (2) derived substantial revenue from goods used or consumed or services rendered in the State. W. Va. Code § 56-3-33. For these reasons the Court finds by a preponderance of the evidence that it has jurisdiction over CRH through the Long Arm Statutes of West Virginia.

C. The Court has jurisdiction over CRH as CRH purposefully availed itself to the forum state through its activities in the forum state.

As noted in *State ex rel. Ford Motor Co*, the issue of specific jurisdiction requires a case-by-case analysis. 237 W. Va. 573, Syl. Pt 5, 788 S.E.2d 319, 323 (2016). After undergoing this analysis the Court finds by a preponderance of the evidence that CRH has purposefully availed itself to the forum state through its contacts and activities within West Virginia.

CRH first entered into the West Virginia asphalt market with the acquisition of the Shelly Company in 2000. *State's Opposition to CRH, PLC's Motion to Dismiss for Lack of Personal Jurisdiction*, p. 5. Since that time, CRH has touted its presence in West Virginia as part of a larger selling point holding itself out as a major player in the national asphalt market. *Id.* at p. 5-6.

CRH is the parent of Oldcastle and Oldcastle Materials. The corporate structure of the vertically integrated companies demonstrate that management and financing of major decisions by each company run down the subsidiary chain. Likewise, profits from business generated within the state flow up to the corporate chain to CRH. Additionally, CRH's consolidated financial records show extensive involvement in business activity within the state of West Virginia.

Therefore, as CRH is alleged to have received fruits of an illegal business scheme through excess profits and inflated earnings per share, the Court finds that it is both fair and just to require CRH to answer these allegations in West Virginia. Further, the Court finds that CRH's burden of defending this suit in the state are far outweighed by the interests of the state, interest of the Plaintiffs, and interest of the judicial system in obtaining efficient resolution of controversies. Therefore, the Court finds that CRH's contacts with West Virginia are more than sufficient for the Court to exert specific jurisdiction over CRH. As such, the Court finds by a

preponderance of the evidence that Plaintiffs allegations arise out of CRH's activities with in West Virginia and CRH has purposefully availed itself to the forum state giving the Court specific jurisdiction over CRH.

CONCLUSION

The Court finds by a preponderance of the evidence that it has jurisdiction over Oldcastle, Oldcastle Materials, and CRH through specific jurisdiction, as Plaintiffs' allegations arose from the Defendants activities within the forum state. Defendants purposefully availed themselves to the forum state through these actions. As such, the Court finds that Defendants actions cannot be classified as isolated, fortuitous or random. Further, the Court finds that it has jurisdiction under West Virginia's Long Arm Statutes as the Defendants' actions include activities specifically enumerated in W.Va. Code § 56-3-33 and W.Va. Code § 31D-15-1501. This is not to say that Plaintiffs will ultimately be able to prove the illegal allegations as alleged in the complaint. Rather, for the purposes of these motions, the Court finds that Plaintiffs have proven by a preponderance of the evidence personal jurisdiction over Oldcastle, Oldcastle Materials, and CRH. Therefore, the Defendants' motions to dismiss for lack of personal jurisdiction are **DENIED**.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that Defendants motions to dismiss for lack of personal jurisdiction are **DENIED**.

All accordingly which is **ORDERED** and **DECREED**.

Enter this 3rd day of July 2018.

ORDER
ENTER:

[Signature]
HONORABLE JAMES H. YOUNG, JR.

Date: 7/5/18
Certified copies sent to:
☒ counsel of record
☐ parties
☐ other (please include)
By: Judge Young
Judge Wilkes
☒ certified/let class mail
☐ fax
☐ hand delivery
☐ interdepartmental
Other directives accomplished.
B. Cavender
Deputy Circuit Clerk

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 5th
DAY OF July 2018.
[Signature] CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

State of WV, ex rel. Patrick Morrissey, Attorney General, et al vs. Oldcastle, Inc., et al. and City of Charleston, et al. vs. West Virginia Paving, Inc., et al., Business Court Case, Civil Action No. 17-C-41, Kanawha County

***Beverly Selby, Kanawha Co. Administrator
Phone: 304-357-0369***

Counsel for Plaintiffs (Special Assistant AGs):

Benjamin L. Bailey, Esq.
Michael B. Hissam, Esq.
Isaac R. Forman, Esq.
J. Zak Ritchie, Esq.
Bailey & Glasser, LLP
209 Capitol Street
Charleston, WV 25301
Phone: 304-345-6555
Email: bbailey@baileyglasser.com
MHissam@baileyglasser.com
iforman@baileyglasser.com
zritchie@baileyglasser.com

Resolution Judge:

***Honorable Christopher C. Wilkes
Berkeley County Judicial Center
380 W. South Street, Suite 4400
Martinsburg, West Virginia 25401***

Steven A. Travis, Esq.
Deputy General Counsel
State Capitol, Bldg: 1, Room E-206
1900 Kanawha Blvd., East
Charleston, WV 25305
Phone: 304-558-2021
Email: stravis@baileyglasser.com

Jonathan T. Storage, Esq.
General Counsel
WV DOT/DOH Legal Division
1900 Kanawha Blvd., East
Bldg. Five, Room A-517
Charleston, WV 25305
Phone: 304-558-2823
Email: jstorage@baileyglasser.com

Douglas L. Davis, Esq.
Assistant Attorney General
Consumer Protection / Antitrust Division
Post Office Box 1789
Charleston, WV 25326-1789
Phone: 304-558-8986
Email: ddavis@baileyglasser.com

**Counsel for Oldcastle, Inc., Materials, Inc.
West Virginia Paving, Inc., Southern West
Virginia Paving, Inc., Southern West Virginia
Asphalt, Inc. and Camden Materials, LLC:
R. Booth Goodwin, Esq.**

Carrie Goodwin Fenwick, Esq.
Richard D. Owen, Esq.
Lucas R. White, Esq.
Goodwin & Goodwin, LLP
Post Office Box 2107
Charleston, WV 25328-2107
Phone: 304-346-7000
Email: rbg@goodwingoodwin.com
cgf@goodwingoodwin.com
rdo@goodwingoodwin.com
lrw@goodwingoodwin.com

Counsel for Kelly Paving, Inc.:

Michael J. Farrell, Esq.
Megan Farrell Woodyard, Esq.
Farrell, White & Legg, PLLC
Post Office Box 6457
Huntington, WV 25772-6457
Phone:
Email: mjf@farrell3.com
mef@farrell3.com

**Counsel for American Asphalt and Aggregate,
Inc., American Asphalt of West Virginia, LLC,
And Blacktop Industries and Equipment Company:**

Charles M. Johnstone, II, Esq.
David A. Dobson, Esq.
Johnstone & Gabhart, LLP
1125 Virginia Street, East
Charleston, WV 25321
Phone:
Email: sjohnstone@wvlaw.net
ddobson@wvlaw.net

***Business Court Division
West Virginia Supreme Court of Appeals
Berkeley County Judicial Center
380 W. South Street, Suite 2100
Martinsburg, WV 25401***