

In the Circuit Court of Kanawha County, West Virginia

WW CONSULTANTS, INC.,
Plaintiff,

v.

Case No. CC-20-2018-C-115
Judge Christopher C. Wilkes

**POCAHONTAS COUNTY PUBLIC
SERVICE DISTRICT,**
Defendant

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter came before the Court this 23rd day of September, 2024. The Plaintiff, Pocahontas County Public Service District, by counsel, has filed Plaintiff's Motion for Partial Summary Judgment for Its "Headworks" Claim, or, Alternatively, Plaintiff's Motion for Partial Summary Judgment That the Headworks Improvement Project is a Public Convenience and a Necessity Under West Virginia Law and Thus No Issue of Material Fact Exists as to the Construction of the "Headworks" Improvement Project of the Snowshoe Regional Wastewater Plant. The Plaintiff, Pocahontas County Public Service District (hereinafter "Plaintiff"), by counsel, Christopher C. Negley, Esq., and Defendant, WW Consultants, Inc., (hereinafter "Defendant" or "WWC"), by counsel, Robert H. Sweeney, Jr., Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter surrounds the construction of a \$27 million wastewater treatment plant in Pocahontas County, West Virginia, that was constructed to treat

current wastewater emanating from the Snowshoe Mountain Resort while providing new wastewater treatment capability for residences and businesses located in the Linwood Valley area of the base of Snowshoe Mountain. See Compl.; see also Defs' Mem., p. 2. Plaintiff is the owner of the plant and WW Consultants was the engineer for the project. See Defs' Mem., p. 2. Plant construction commenced after the Plaintiff received a Certificate of Convenience and Necessity granted by the West Virginia Public Service Commission pursuant to West Virginia Code § 24-2-11. *Id.* Third-Party Defendant Orders Construction Company, Inc. was selected as the General Contractor for the plant while Third-Party Defendant Pipe Plus, Inc. and former Third-Party Defendant A3 USA, Inc. were selected as subcontractors. *Id.* at 6.

2. The Complaint was filed February 6, 2018, wherein WWC filed suit[\[1\]](#) against the PSD, its three board members in their official capacities, the DEP, and the West Virginia Water Development Authority. *Id.* at 7. Central to WWC's claims were allegations it had not been properly paid for its work on the project. *Id.* The PSD filed a Counterclaim[\[2\]](#), alleging breach of the standard of care and professional negligence and breach of contract. *Id.*

3. On August 28, 2019, this case was mediated before Judge Lorensen, Resolution Judge in this case, and at mediation all the claims of WWC were resolved and subsequently dismissed. *Id.*

4. On November 27, 2019, this Court entered its Order Granting Plaintiff's[\[3\]](#) Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims, dismissing certain claims, leaving only the following claims: that WWC's design did not (1) provide any method to field locate the collection system; (2) provide access to the course screen; (3) provide for the system to take the wastewater from the lagoon and to the wastewater treatment plant; (4) properly size waste sludge pumps

necessitating their replacement; (5) allow membrane racks in Train “A” to be picked up by the crane for repair and/or replacement; (6) properly size a membrane cleaning solution; (7) properly designed the MBR area resulting in that valves can only be accessed by climbing over safety railings and/or removal of grates, and (8) that WWC failed to supervise contractors so that proper as-built drawings for the force mains could be made. *Id.* at 8.

5. On October 19, 2019, the PSD filed its Third Supplemental Responses to WWC’s Request for Production of Documents, which included design drawings to replace the “Headworks” section of the Snowshoe Regional Wastewater Plant. *Id.* The headworks area of the wastewater treatment plant comprises the initial stage of the wastewater process and is designed to reduce the level of pollutants in the incoming domestic and industrial wastewater to allow for treatment and discharge. *Id.* Following a motion to strike, this Court reopened discovery on the Headworks claim. *Id.* at 9.

6. Subsequently, WWC and the PSD sought and received permission to file new, amended claims. *Id.* Thereafter, the PSD filed an Amended Counterclaim^[4] against WWC and new defendants Pipe Plus, Inc. and A3 USA, Inc., seeking relief for issues related to the Headworks section of the wastewater plant. *Id.* WWC, as counterclaim defendant, filed a Third-Party Claim against Orders Construction Co., Inc., Pipe Plus, Inc., and A3 USA, Inc. *Id.* Thereafter, the PSD dismissed its claims against A3 USA, Inc. and settled with Pipe Plus, Inc. *Id.* On September 10, 2024, the Court entered an Agreed Order of Partial Dismissal, finding that WWC had resolved all its disputes with Pipe Plus, Inc.

7. On August 6, 2024, Plaintiff PSD filed the instant motion, seeking summary judgment in its favor as to its Headworks claim against WWC. *Id.* at 10.

8. On August 29, 2024, WW Consultants, Inc. filed WW Consultants, Inc.’s

Response to the Plaintiff's Motion for Partial Summary Judgment for Its "Headworks" Claim, arguing the Headworks claim is not a claim that Plaintiff has asserted against WWC in its Amended Counterclaim. See Pl's Resp., p. 1. WWC further argues that Plaintiff's alternative request constitutes a request for declaratory judgment under West Virginia Code § 24-2-11, which governs the issuance of Certificates of Public Convenience and Necessity by the West Virginia Public Service Commission, and the Amended Counterclaim does not contain a declaratory judgment count, and even if it did, it would not be against WWC. *Id.* at 2.

9. On September 6, 2024, Plaintiff filed Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Partial Summary Judgment, arguing it has properly pled a claim for its Headworks portion of the Plant and reiterating its request for relief. See Pl's Reply, p. 1, 7. Specifically, Plaintiff argues the counterclaim specifically sought relief for issues related to the Headworks section of the Plant in Paragraphs 28, 29, 42, 52, and 55 of the Amended Counterclaim. *Id.* at 3.

10. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179

W.Va. 12, 17 (1987).

Therefore, “[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.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

CONCLUSIONS OF LAW

Plaintiff argues summary judgment should be awarded in its favor as to the Headworks claim against WWC because the Public Service Commission has determined that WWC’s design of the Headworks system failed to properly screen influent into the plant, that the coarse screens are situated in such a manner that maintenance is difficult and the design did not mandate grit removal equipment; thus, replacement of the Headworks is a public convenience and necessity pursuant to West Virginia law. See Pl’s Mot., p. 10. Alternatively, Plaintiff seeks an Order finding no material fact exists as to Plaintiff’s decision to construct the Headworks Improvement Project (hereinafter “HIP”)

to the Plant. See Reply, p. 7.

On the other hand, WWC argues the Headworks claim is not a claim that Plaintiff has asserted against WWC in its Amended Counterclaim, and the only two causes of action asserted against it are for Breach of Contract and Breach of Standard of Care/Professional Negligence. See Pl's Resp., p. 1-2. WWC further argues that Plaintiff's alternative request constitutes a request for declaratory judgment under West Virginia Code § 24-2-11, which governs the issuance of Certificates of Public Convenience and Necessity by the West Virginia Public Service Commission, and the Amended Counterclaim does not contain a declaratory judgment count, and even if it did, it would not be against WWC. *Id.* at 2.

Further, WWC argues even taking into account Counts 1 and 2 against it, Plaintiff has failed to establish no issues of fact remain with regard to the applicable standard of care, let alone WWC's deviation from it, including the fact that the PSC did not make a finding about, nor does it have jurisdiction to conclude, the applicable standard of care and any breach. *Id.* at 5-8. Finally, WWC argues this Court should allow for the completion of discovery as per the Scheduling Order before ruling on this motion. *Id.* at 9-10. Plaintiff argues that although the PSC did not use the "magic words" standard of care the PSC's findings clearly "follow engineering practices" and the Court should not disregard the findings, hold a trial, and require an expert testify that these findings do not meet the standard of care. See Reply, p. 5. The Court will address the arguments in turn.

First, the Court notes the motion argues that the PSC has determined that WWC's design of the Headworks system failed to properly screen influent into the Plant, that the coarse screens are situated in such a manner that maintenance is difficult, and the design did not mandate grit removal equipment, thus, replacement of the Headworks is a

public convenience and necessity pursuant to West Virginia law. See Pl's Mot., p. 10.

A Public Service District must seek Public Service Commission approval to construct any "plant, equipment, property, or facility for furnishing to the public any of the services enumerated in §24-2-1 of this code." W.Va. Code §24-2-11. The approval is obtained through the granting of a Certificate of Convenience and Necessity ("CCN") by the West Virginia Public Service Commission. W.Va. Code § 24-2-11.[5]

The Court can take judicial notice of this determination of the PSC. In fact, the Court considers Defendant averred in its Response that it does not contest that the decisions of the PSC related to the HIP were predicates for the Plaintiff to proceed, as a Certificate of Public Convenience and Necessity is required under West Virginia Code § 24-2-11. See Def's Resp., p. 8. However, there are two claims in the Amended Counterclaim against WWC: Count 1 – Breach of the Standard of Care and Professional Negligence; and Count 2 – Breach of Contract. *Id.* at 1-2. The requested relief is as to the "Headworks" claim generally, and Plaintiff details in the Reply that the counterclaim specifically sought relief for issues related to the Headworks section of the Plant in Paragraphs 28, 29, 42, 52, and 55 of the Amended Counterclaim. *Id.* at 3. These paragraphs fall within the Background section and Count 1. See Am. Ctrclm, p. 5-8.

The standard of care for a professional engineer in West Virginia is to exercise the degree of skill, care, and diligence as engineers ordinarily exercise under like circumstances." *Teter v. Old Colony Co.*, 190 W. Va. 711, 722, 441 S.E.2d 728, 739, n. 15 (1994). With regard to claims of professional malpractice, expert testimony is generally required. *Chafin v. Boal*, 896 S.E. 2d 677, 687 (W. Va. 2023). Engineers are design professionals subject to allegations of professional negligence. See Syl. Pt. 6, *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 394, 549 S.E.2d 266, 268 (2001).

Here, Plaintiff must provide expert testimony regarding the standard of care related to a wastewater treatment plant, and whether WWC deviated from that standard of care. The motion, the sixteen exhibits attached thereto, and the decisions of the PSC related to the HIP do not suffice. Expert testimony is needed. Although the Court finds it can take judicial notice of the decisions of the PSC related to the HIP (and that Defendant does not disagree that the PSC made these decisions related to the HIP), the Court cannot conclude that no genuine issue of material fact remains as to Counts 1 and 2, or any parts thereto. Importantly, the Court notes the PSC did not make any findings regarding WWC failing to meet an applicable standard of care, let alone expert findings. See Def's Resp., p. 8.

Plaintiff argues in the Reply that the failure to use the "magic words" standard of care is not fatal to this Court's ability to grant summary judgment in its favor; rather the PSC decision "follow[ed] engineering practices" and was based on the inability of the Plant to properly process wastewater, which it argues is "evidence on standard of care". See Reply, p. 3, 5. The Court concludes the law related to the requirement of expert testimony here is clear. Further, if the PSC's decision is evidence regarding the standard of care, Plaintiff has not satisfied Rule 56's requirement that it show that no genuine issue of material fact remains. For these reasons, the Court finds Plaintiff's argument unconvincing.

Further, the Court notes Defendant's averment that it needs to conduct the remaining discovery left before the discovery cutoff date of October 31, 2024, including depositions scheduled for mid-October of certain individuals with the PSC, the WV Water Development Authority, and the West Virginia Infrastructure and Jobs Development Council ("WVIJDC"). See Def's Resp., p. 9-10. Because this Court has determined that expert testimony is necessary regarding Plaintiff's requested relief, the Court finds no

prejudice in adjudicating and denying the instant motion at this time.

Accordingly, Plaintiff's Motion for Partial Summary Judgment for Its "Headworks" Claim, or, Alternatively, Plaintiff's Motion for Partial Summary Judgment That the Headworks Improvement Project is a Public Convenience and a Necessity Under West Virginia Law and Thus No Issue of Material Fact Exists as to the Construction of the "Headworks" Improvement Project of the Snowshoe Regional Wastewater Plant must be DENIED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion for Partial Summary Judgment for Its "Headworks" Claim, or, Alternatively, Plaintiff's Motion for Partial Summary Judgment That the Headworks Improvement Project is a Public Convenience and a Necessity Under West Virginia Law and Thus No Issue of Material Fact Exists as to the Construction of the "Headworks" Improvement Project of the Snowshoe Regional Wastewater Plant is hereby DENIED. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office electronically.

Enter: September 23, 2024

[1] At this time, WW Consultants was the Plaintiff in this matter. After WW Consultants's claims were resolved, on September 13, 2023, the Court entered an Order realigning the parties to their present positions left on the claims remaining.

[2] At this time, the PSD was a Defendant in this matter. After WW Consultants's claims were resolved, on September 13, 2023, the Court entered an Order realigning the parties to their present positions left on the claims remaining.

[3] The Plaintiff at this time was WW Consultants.

[4] At this time, the PSD was a Defendant/Counterclaim Plaintiff.

[5] The language in this section removing some PSC jurisdiction for PSDs with 4,500 customers and annual combined gross revenue of \$3 million was enacted in 2020. In any event, in 2011, when the underlying part of the case began, the PSD had 588 customers. Today it has 525 residential and commercial customers. See prop. ord.,

citing Annual Reports filed by the District and available online at the PSC's website.

/s/ Christopher C. Wilkes

Circuit Court Judge

13th Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.