

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 GRANTING IN PART AND DENYING IN PART MOTION FOR PARTIAL
SUMMARY JUDGMENT ON PLAINTIFF'S DAMAGES**

This matter came before the Court this 6th day of February, 2025. The Defendant and Third-Party Plaintiff, WW Consultants, Inc., (hereinafter “WWC” or “Defendant”), by counsel, has filed WW Consultants, Inc.’s Motion for Partial Summary Judgment on Plaintiff’s Claim for Damages. The Plaintiff, the Pocahontas County Public Service District (hereinafter “Plaintiff” or “the PSD”), by counsel, Christopher D. Negley, and Defendant, WW Consultants, Inc., 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 WWC’s Mot., p. 1.

Plaintiff Pocahontas County Public Service District (hereinafter “the PSD”) is the owner of the plant and WW Consultants was the design engineer for the project. *Id.*; *see also* court file.

2. The PSD is in the process of modifying the plant with the Headworks Improvement Project (hereinafter “HIP”). *See* WWC’s Mot., p. 1. In order to pay for the cost of the HIP, the PSD has applied for and obtained financing, including loans and grants. *Id.* at 1-2. This includes grants totaling \$2,575,400. *Id.* at 2.

3. On November 7, 2024, WWC filed the instant WW Consultants, Inc.’s Motion for Partial Summary Judgment on Plaintiff’s Claim for Damages, arguing evidence from the PSD’s expert witnesses establishes that the \$2,575,400 in grants do not qualify as damages under West Virginia law as these grants do not have any repayment obligation and are not reflected on the books of the PSD as a liability. *See* WWC’s Mot., p. 4. WWC argues that they are akin to gifts (as described by one of the PSD’s experts) and as such, cannot be deemed to be “injuries and losses” which are in need of compensation. *Id.* Specifically, the request for relief is that this Court grant the motion and grant partial summary judgment on Plaintiff’s claims for damages, and to further preclude Plaintiff from introducing the grants as evidence of damages at the trial. *Id.* at 5; *see also*, Reply, p. 6.

4. On November 20, 2024, the PSD filed Plaintiff’s Response in Opposition to Defendant’s Motion for Partial Summary Judgment and Integrated Memorandum of Law on Plaintiff’s Claim for Damages, arguing the motion should be denied due to the collateral source rule. *See* Pl’s Resp., p. 4.

5. On January 3, 2025, WWC filed its Reply, arguing that the collateral source rule does not provide the Plaintiff with any basis to prevent the Court from granting the motion. *See* Reply, p. 6.

6. 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

WWC seeks an order granting partial summary judgment in its favor on “Plaintiff’s claims for damages, and to further preclude Plaintiff from introducing the grants as evidence of damages at the trial”. See WWC’s Mot., p. 5. WWC argues evidence from the PSD’s expert witnesses establishes that the \$2,575,400 in grants do not qualify as damages under West Virginia law as these grants do not have any repayment obligation and are not reflected on the books of the PSD as a liability. *Id.* at 4. WWC argues that they are akin to gifts (as described by one of the PSD’s experts) and as such, cannot be deemed to be “injuries and losses” which are in need of compensation. *Id.*

As an initial matter, the PSD’s Amended Counterclaim contains two counts against WWC: Count I (Breach of Standard of Care and Professional Negligence); and Count II (Breach of Contract). See Reply, p. 2.

To succeed on a negligence claim in West Virginia, a plaintiff must “show four basic elements: duty, breach, causation, and damages.” *Hersh v. E-T Enterprises, Ltd. P’ship*, 232 W. Va. 305, 310 (2013) superseded by statute on other grounds as recognized in *Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo County*, 235 W. Va. 283, 291 n. 12 (2015). With regard to damages, the aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant’s injurious conduct. *Kessel v. Leavitt*, 204 W. Va. 95, 187, 511 S.E.2d 720, 812 (1998).

In *Kessel*, the West Virginia Supreme Court of Appeals said:

In this manner, “[c]ompensatory damages indemnify the plaintiff for injury to property, loss of time, necessary expenses, and other actual losses. They are proportionate or equal in measure or extent to plaintiff’s injuries, or such as

measure the actual loss, and are given as amends therefor.” 5C Michie's Jur. *Damages* § 7, at 46–47 (1998) (footnotes omitted). “[T]he general rule in awarding damages is to give compensation for pecuniary loss; that is, to put the plaintiff in the same position, so far as money can do it, as he would have been [in] if ... the tort [had] not [been] committed.” 5C Michie's Jur. *Damages* § 18, at 63 (footnote omitted).

Id. at 187, 511 S.E.2d at 812.

Likewise, under long standing West Virginia law, the measure of damages in a case of breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have been prevented. *Ohio Valley Builder's Supply Co. v. Witzel Constr. Co.*, 108 W. Va. 354, 151 S.E. 1 (1929). In other words, the person injured is to be placed in the same position he would have been in if the contract had been performed. *Id.* at 15-16. A plaintiff in a contract action is only entitled to be put in the same economic position that it would have been in had the contract not been breached. *C & O Moors, Inc. v. GMC*, 323 Fed. Appx. 193, 197-198 (4th Cir.2009), *citing Ohio Valley Builders Supply Co. v. Witzel Constr. Co.* and 22 Am. Jur. 2d *Damages* § 28 (2003) ("The sole object of compensatory damages is to make the injured party whole for losses actually suffered; the plaintiff cannot be made more than whole, make a profit, or receive more than one recovery for the same harm. . . . The plaintiff is not entitled to a windfall, and the law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken."). *C & O Motors*, 323 Fed. Appx. at 197-98.

Further, “[t]he collateral source rule excludes payments from other sources to plaintiffs from being used to reduce damage awards imposed upon culpable defendants.” Syllabus Point 1, *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434 (2014); Syllabus Point 11, *Ilosky v. Michelin Tire Corp.*, 172 W.Va.435, 307 S.E.2d 603 (1983).

The Court notes the case of *Simms v. United States*, 839 F.3d 364, 368 (4th Cir.

2016), wherein the Court applied West Virginia law utilized the collateral source rule in a negligence case (“Here, the fact that Simms has not had to pay out-of-pocket for C.J.’s past medical care does not obviate her injury. Simms has a legal obligation to support her child and the weight of that obligation increased as a result of Valley Health’s negligence. And the fact that Medicaid has, to date, paid C.J.’s medical costs does not change this analysis”).

The West Virginia Supreme Court of Appeals explained:

The collateral source rule is a long-standing principle in West Virginia law and has been “a staple of American tort law since before the Civil War.” “The collateral source rule excludes payments from other sources to plaintiffs from being used to reduce damage awards imposed upon culpable defendants.” The collateral source rule protects payments made to or benefits conferred upon an injured party from sources other than the tortfeasor by denying the tortfeasor any corresponding offset or credit against the injured party’s damages. Even though these collateral sources mitigate the injured party’s loss, they do not reduce the tortfeasor’s liability. The collateral source rule “operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party.

Kenney, 233 W. Va. 620, 626, 760 S.E.2d 434, 440 (2014)(footnotes omitted).

The Court in *Kenney* further illustrated a long list of examples:

Examples of collateral sources that are inadmissible to reduce a defendant’s liability, in both our jurisprudence and that of other states, are legion. Benefits to a plaintiff protected by the collateral source rule come from sources as diverse as life insurance, health insurance, accident insurance, workers’ compensation, sick pay, vacation pay gratuitous nursing care by a relative, charity, remarriage, disability insurance, veteran’s and military hospitals, tax savings, private or government pension programs such as Social Security, or other government programs like Medicare and Medicaid. The cases from this jurisdiction and others are clear: Only benefits received from the original tortfeasor, the tortfeasor’s agent, or a joint tortfeasor reduce a tort defendant’s liability.

Id. at 628–30, 442–44 (footnotes omitted).

The Court considers the Supreme Court directed that the items listed are not exhaustive. “This list is not absolute...’The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him.” *Id.* at n. 25 (citing *Restatement (Second) of Torts* § 920A, cmt. b). Also, the Court considers that the rule applies to gratuitous payments from third parties. *Id.* at Syl. Pts. 4-5.

The rule that collateral source benefits are not subtracted from a plaintiff's recovery applies to proceeds or benefits from sources such as insurance policies, whether maintained by the plaintiff or a third party; employment benefits; services or benefits rendered gratuitously (whether free, discounted, or later written off); and social legislation benefits. The law does not differentiate between the nature of these collateral source benefits, so long as they did not come from the defendant or a person acting for the defendant. Syl. Pt. 4, *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434, 436 (2014); see also *Ilosky v. Michelin Tire Corp.*, 172 W.Va. 435, 307 S.E.2d 603, 615 (1983) (“The purpose of the collateral source doctrine is to prevent reduction in the damage liability of defendants simply because the victim had the good fortune to be insured or have other means of compensation.”).

Here, the parties do not appear to dispute the financing amounts and sources of each. See Pl’s Resp., p. 2; see also WWC’s Mot., p. 2. The PSD has obtained the following for the financing of the HIP, which includes grants totaling \$2,575,400:

- a. \$1,409,080 from a West Virginia Infrastructure and Jobs Development Council (hereinafter “WV IJDC”) loan, payable at 1% interest for 40 years;
- b. \$1,385,000 from the West Virginia Water Development Authority Economic Enhancement Grant Fund;

- c. \$25,000 from a grant from the Pocahontas County Commission;
- d. \$1,000,000 from a WV IJDC grant; and
- e. \$165,000 from a WV IJDC “bid overrun” grant.

See WWC’s Mot., p. 2.

The Court notes that the PSD characterizes (b) as \$1,410,400 from the West Virginia Water Development Authority Economic Enhancement Grant Fund, and that ultimately the Pocahontas County Commission also granted the Plaintiff \$25,000, from which the same amount was then deducted from the EEGF award. See Resp., p. 2.

The PSD argues that payments from any third party source are admissible as damages under the collateral source rule, and that all the grants discussed in the subject motion are collateral sources and thus constitute damages recoverable by the PSD. *Id.*; see also *Id.* at 4. On the other hand, WWC argues that in this case, the collateral source rule would provide the Plaintiff with a \$2,575,400 windfall. See Reply, p. 4.

The Court, weighing the aims of the collateral source rule with the rule prohibiting a double recovery, finds and concludes the following: the motion is denied as to the collateral source rule in that the PSD is permitted to prove the amount of damages in connection with proving its claims at the heart of this civil litigation. However, the motion is granted as to the motion’s request that the Court should preclude the PSD from introducing grants as evidence of damages at the trial. Moreover, the Court is not precluded from considering as to whether the amounts may be appropriate for setoff against an award, if any, that is found by the jury in this matter.

For these reasons, this Court finds the instant motion shall be granted in part and denied in part.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that WW Consultants, Inc.’s

Motion for Partial Summary Judgment on Plaintiff's Claim for Damages is hereby GRANTED IN PART AND DENIED IN PART. 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 at West Virginia Business Court Division, electronically.

Enter: February 6, 2025

/s/ Christopher C. Wilkes
Circuit Court Judge
8th 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.