

In the Circuit Court of Kanawha County, West Virginia

**MOUNTAIN STATE PIPELINE &
EXCAVATING, LLC,**

Plaintiff,

v.

**Case No. CC-20-20-C-350
Judge Maryclaire Akers**

**SMITH/PACKETT MED-COM, LLC,
SP WV, LLC
JARRETT CONSTRUCTION
SERVICES, INC.,
WV IL-AL INVEESTORS LLC,
CARTER BANK & TRUST ET AL,**

Defendants.

**COURT'S FINDINGS AND ORDER ON
ECS MID-ATLANTIC, LLC'S MOTION FOR SUMMARY JUDGMENT ON
MSPE'S CROSSCLAIMS AGAINST ECS**

ORDER

This matter came before the Court upon ECS Mid-Atlantic, LLC's November 7, 2024, Motion for Summary Judgement Regarding Mountain State Pipeline & Excavating, LLC's Crossclaims against ECS. The parties, by counsel, have fully briefed the issues necessary and upon full consideration of the issues, the record, and the pertinent legal authorities, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This civil action arises out of the construction of an assisted living and independent living facility at 500 Peyton Way, South Charleston, West Virginia (the "Project"). *See Complaint* ¶¶ 1, 9.

2. The Owner(s) of this Project, as the term has been used, are Smith/Packett Med-Com, LLC, SP W, LLC, and WV IL-AL Investors, LLC (hereinafter "Owner"). *See Motion* at 2.

3. The Owner hired Mountain State Pipeline & Excavating, LLC ("MSPE") as a civil contractor to construct the building pad the structure sits upon, including developing the adjacent slopes. *Id.*

4. The Owner also hired Jarrett Construction Services, Inc. (hereinafter "Jarrett") as a construction manager and general contractor pursuant to two separate contracts with the Owner. *See Response* at 6.

5. Before construction began on the project, the owner hired Co-Defendant ECS Mid-Atlantic, LLC, to perform a geotechnical analysis of the subsurface conditions on the property where the Owner's facility was to be located. The parties entered into this proposal on May 2, 2017. Therein, ECS Mid-Atlantic's proposal referenced back to a Master Service Agreement (hereinafter referred to as "MSA") entered into between the parties on November 7, 2016.

6. ECS was hired to perform soil test borings, preliminary site reconnaissance, and draft a report regarding its tests and observations. *Id.* ECS did not have a contract with any other party to this suit or the Project. *Id.*

7. The Owner put out a "Project Manual" for bid, which included a copy of a "Grading Plan" and an ECS report. *See Response* at 6.

8. The June 23, 2017, report did not contain any information that The Crossings site had any pre-existing slope failures or slides.

9. The bid documents did not disclose that there was a pre-existing slip on the property.

10. The Project Manual stated that the ECS's report was provided "for Bidder's convenience and are intended to supplement rather than serve in lieu of Bidder's own investigations." *Motion* at 5, citing Project Manual at 003132-1.

11. On or about January 8, 2019, a slope failure occurred in the slope below the Project's A wing.

12. ECS failed "to detect and advise the Owner, Terradon, and any bidders of the existence of the pre-existing slip." *Response* at 3.

13. Construction commenced in April 2018, and on January 8, 2019, a major slip occurred on the slope on the southern side of the "A" wing of the building pad. That slip and the reason for its occurrence is the key issue in dispute in this litigation. Eventually, a subsurface wall was designed and constructed to remediate the slope failure.

14. During the pre-suit investigation into the cause of the slip and resulting slope failure, it was alleged by various individuals that several parties may bear responsibility for causing the slip failure, including ECS Mid-Atlantic, whose professional exploration of the conditions of the property may have failed to reveal the existence of a pre-existing slope condition that may have contributed to the resulting failure.

15. Another contract was entered into between the two parties on January 21, 2019, wherein ECS agreed to provide additional geotechnical consulting services on this project. ECS's work on this project continued until at least September 29, 2019, when its professional engineers issued a field report concerning its findings at a site visit.

16. Upon the filing of this lawsuit by the Plaintiff, it was alleged that the several named Defendants, including the Owner, were legally responsible under various theories of liability. The Owner responded, in part, by denying the Plaintiff's claims, and by filing a counterclaim wherein

it asserted that the aforementioned acts and omissions, which included the Plaintiff failing to take the necessary steps to provide adequate drainage for the building site and fill area, and the inclusion, or failure to remove organic materials from the fill used on the project may have increased the cost of the Project and affected the progress of other contractors' and subcontractors' work and the workflow of the Project as a whole. The parties, by counsel, have fully briefed the issues as to ECS's Motion for Summary Judgment, as to MSPE and the other parties. This matter, and as to specifically ECS's Motion for Summary Judgment regarding MSPE, is ripe for adjudication.

CONCLUSIONS OF LAW

After careful consideration of the issues, the record, and the pertinent legal authorities, the Court FINDS, and CONCLUDES, as a matter of law, that taking the evidence in the light most favorable to the non-moving party, MSPE, genuine issues of material fact are in dispute as to ECS's alleged breaches of duty as the design professional geotechnical engineer of record for The Crossings Project, as alleged by MSPE, the contractor, in, *inter alia*, MSPE's Crossclaim against ECS seeking recovery for MSPE's economic damages and harm caused by ECS's negligent supply of information by ECS failing to disclose, and identify in 2017 Lot P's pre-existing defects and inadequacies for the proposed improvements. The Crossings Project, to be constructed thereon, which are actionable, and made actionable, under W. Va.'s law imposing a "special duty" of care on design professionals, like ECS, in situations, precisely as The Crossings Project. See, Syl. 1-9, *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001); Syl. 1-9, *Aikens v. Debow*, 208 W. Va. 386, 541 S.E. 576 (2000); Syl. 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

The Court FINDS and CONCLUDES, as a matter of law, that genuine issues of material fact are in dispute as to whether, in 2017, Lot P contained a deep-seated, pre-existing subsurface

slip plane, and as to whether ECS negligently supplied information to MSPE, and breached warranties owed to MSPE, regarding Lot P in ECS's 6/23/2017 Geotech Report, which failed to disclose, or identify to MSPE in 2017 Lot P's pre-existing, deep-seated, subsurface slip plane, thus requiring jury determination.

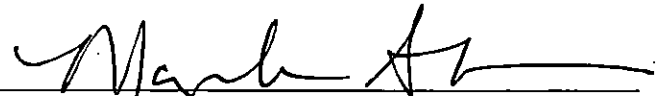
The Court FINDS and CONCLUDES, as a matter of law, that genuine issues of material fact are in dispute as to whether MSPE, in preparing MSPE's competitive bid for the Project's site preparation contract, relied detrimentally and justifiably upon ECS's 6/23/2017 Report of Geotechnical Investigation and Subsurface Exploration ("ECS" Geotech Report"), which was made a part of the Project Manual distributed to prospective bidders, like MSPE by which to solicit MSPE's competitive bid, as alleged under MSPE's Complaint allegations, and Crossclaims specifically as to ECS, actionable, and made actionable, under W. Va.'s law imposing a "special duty" of care on design professionals, like ECS, the Project's design professional geotechnical engineer of record in situations, precisely as The Crossing Project.

Accordingly, the Court ORDERS that ECS's *Motion for Summary Judgment* regarding MSPE's Crossclaims against ECS be, and hereby is, DENIED.

It is so **ORDERED**.

ENTERED: _____

May 29, 2025



Maryclaire Akers, Judge
Kanawha Co. Circuit Court

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