**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 THE OWNER'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 the crossclaims collectively filed against it by Smith/Packett Med-Com, LLC; SP WV, LLC; and WV IL-AL Investors, LLC (hereinafter collectively referred to as "the Owner"). The Owner filed its Response to Motion for Summary Judgment on November 22, 2024. Thereafter, ECS Mid-Atlantic, LLC, filed its reply to the Response to the Motion for Summary Judgment on November 27, 2024.

This matter having now been fully briefed for the Court, which has reviewed the same and all related exhibits attached hereto, the Court hereby finds and concludes as follows:

## 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 dated June 23, 2017. *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. ECS failed "to detect and advise the Owner, Terradon, and any bidders of the existence of the pre-existing slip." *Response* at 3.

12. 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.

13. 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.

14. Another contract was entered into between the Owner and ECS 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.

15. 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 Plainatiff'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 aera, 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.

16. In addition, the Owner also filed crossclaims against ECS alleging as an alternate theory of liability that ECS: 1) may have breached the terms of its contract(s) with the Owner; 2) breached an implied warranty owed to the Owner concerning the professional scope of its services and; 3) that ECS may be required to indemnify the Owner for any judgment entered against it by a proposed Jury or other judicial determination.

17. In response thereto, ECS has moved for summary judgment, premised not on a contention that its potentially flawed geotechnical work may have contributed to a slope failure that has cost a significant sum to remediate, but which is instead premised chiefly on issues related to its interpretation of certain contractual language present in the aforementioned MSA between the parties. However, as there exist genuine issues of material fact concerning the scope and duration of ECS's work and services, summary judgment is not appropriate.

**CONCLUSIONS OF LAW**

18. As the West Virginia Supreme Court of Appeals has distinctly articulated on numerous occasions, "credibility determinations, the weighing of evidence, and the drawing of

legitimate inferences from the facts are jury functions, not those of a judge." *Williams v. Precision Coil, Inc.* 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (internal quotations omitted).

19. The Court's precedent clearly establishes that doubt must be resolved against the party moving for summary judgment. In syllabus point six of *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W. Va. 160, 133 S.E.2d 770 (1963), the Court stated that "[a] party who moved for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved *against the movant* for such judgment." *Id.* at 161, 133 S.E.2d at 772, Syl. Pt. 6.

20. The Court further elaborated upon that standard in *Hanlon v. Chambers,* 195 W. Va. 99, 464 S.E.2d 741 (1995), explaining:

> The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment; in assessing the record to determine whether this is a genuine issue as to any material facts, **the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought.** The inferences to be drawing from the underlying affidavits, exhibits, answers to interrogatories, and ***depositions*** must be viewed in the light most favorable to the party opposing the motion.

*Id.* at 105, 464 S.E.2d at 747. (Emphasis added).

21. The West Virginia Supreme Court of Appeals has defined a genuine issue of fact as follows in syllabus point five of *Jividen v. Law,* 194 W. Va. 705, 461 S.E.2d 451 (1995):

> Roughly stated, **"genuine issue"** for purposes of *West Virginia Rule of Civil Procedure 56(c)* is simply one half of a trial worth issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of the trial worthy issues is present ***where the nonmoving party can point to one or more disputed "material" facts***. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

*Id.* at 707, 461 S.E.2d at 453, syl. Pt. 5 (Emphasis added).

22. ECS premises its Motion for Summary Judgment on three primary arguments: (a) the Owner's crossclaims against ECS are time barred by the language of the applicable contracts; (b) the Owner has not complied with certain procedural requirements in its contract with ECS; and (c) the Owner's counterclaims fail, as a matter of law, on their merits.

23. ECS asserts that due to language in the MSA between the two entities, the claims are time-barred. In support thereof, ECS cites to Clause 26.0, which reads as follows:

> **26.0 TIME BAR TO LEGAL ACTION** – Unless prohibited by law, and notwithstanding any Statute that may provide additional protection, CLIENT and ECS agree that a lawsuit by either party alleging a breach of thus agreement, violation of the Standard of Care, non-payment of invoices, or arising out of the Services provided hereunder, must e initiated in a court of competent jurisdiction no more than two (2) years from the time the party knew, or should have known, of the facts and conditions giving rise to its claim, and shall under no circumstances shall such lawsuit be initiated more than three (3) years from the date of substantial completion of ECS's services.

24. This particular clause is unclear as to whether the applicable, considerably shortened statute of limitations is two years or three years. As has long been established in West Virginia, ambiguous contract language is construed against the drafter. For instance, the case of *Lee v. Lee*, the court stated that "in base of doubt, the construction of a written instrument it to be taken **strongly against** the party preparing it" *Lee v. Lee*, 228 W. Va. 483 (2011) (Emphasis added). Similarly, in *Harrell v. Cain*, it was succinctly noted that "an ambiguous document is always construed against the drafter" *Harrell v. Cain*, 242 W. Va. 194 (2019). This principle is consistently applied across various **types of contracts**, including deeds and insurance policies, as seen in other cases such as *Energy Development Corp. v. Moss*, 214 W. Va. 577 (2003) and *Blake v. State Farm Mut. Auto Ins. Co.*, 224 W. Va. 317 (2009).

25. Stated another way, "[c]ontract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable

differences of opinion as to the meaning of words employed and obligations undertaken." *Syllabus Point 6, State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002). Under the circumstances presented here, it is clear that 1) the terms of this section are wholly inconsistent as evidenced by the fact that it clearly provides **two** proposed periods of limitation but fails to delineate which one is controlling and under what circumstances and; 2) the language is subject to reasonable differences of opinion between the parties that creates a genuine issue of material fact that should give this Court sufficient grounds in which to reject ECS's argument on such grounds.

26. ECS argues that the Bryan Scott correspondence of October 17, 2019, (attached as *Exhibit D* to ECS's Motion for Summary Judgment) is proof to establish that the Owner knew of the existence of its claims against ECS at that given point in time. A closer review of the correspondence reveals that Mr. Scott was simply placing ECS on notice that other parties, including MSPE and Jarrett, were contending that ***their clients*** may have been damaged by alleged failures of ECS. In addition, Mr. Scott noted that the Owner did **not**, at that time, agree with the contentions asserted by Jarrett to MSPE. For ECS to claim that the Owner knew **at that time** that it had a viable claim against ECS is simply an opinion to which reasonable minds can clearly differ. Nowhere in this correspondence does the Owner contend that ECS either 1) breached the terms of the contract or 2) violated the standards of care, both of which would be pre-requisites to trigger the two-year frame set forth in the MSA. It simply provides notice for ECS to contact its insurer about **the other parties' allegations**. Nothing more. Nothing less.

27. In addition, ECS's contention that it *"substantially completed"* its work on the project three (3) years before the Owner files its crossclaims are subject to differing interpretations as well. As set forth herein, ECS *continued* work on this project for the Owner up through **at least**

September of 2019. The Owner's crossclaims were filed in November of 2021, which is well within the requisite three-year time period. ECS cannot rely on the terms of an MSA that governs the scope of **all** services provided to the Owner on the Project by then claiming that only some of the services are subject to the time limitation.

28. Based on the evidence provided, there is at the least a "genuine issue of material fact" concerning whether the Owner relied on ECS throughout the entire scope of this project, and as a result, ECS's contention that it "substantially completed" its work in 2017 is clearly a factual issue that is in dispute. Because the parties have offered differing facts related to when ECS substantially completed its work on the project, summary judgment is not appropriate based on the time frames set forth in the MSA.

29. The second argument set forth by ECS requests that this Court dismiss the Owner's crossclaims because it failed to abide by certain "procedural" steps as se forth in the MSA. More specifically, ECS avers that somehow dismissal is warranted after three plus years of litigation because the Owner failed to 1) conduct a meeting with senior officials to discuss the claims; 2) failed to provide ECS with an Engineer's report setting forth the nature of the claims; and 3) failed to file suit in Virginia.

30. The Owner disputes the allegations that it never conducted any meetings with ECS's senior officials, contending that, at this point in the litigation process, not only have all of the parties met and conferred, but they have also all attended several mediation sessions with key senior officials in attendance. The Court finds that these events satisfy the meeting requirement of the MSA.

31. Nothing in the MSA warrants dismissal and doing so simply because of a technical deficiency would lead to an inequitable result given that the ECS cannot plead ignorance to the

nature of the Owner's crossclaims when it was **first** fully notified of the facts surrounding such claims when the Plaintiff initially brought forth this lawsuit, naming ECS as an original Defendant. As such, the Owner's **subsequently filed** crossclaims should not have caught ECS off guard to such a degree to warrant some form of dismissal.

32. Under Rule 13 (g) of the *West Virginia Rules of Civil Procedure,* "[a] pleading may state as a cross-claim any claim by one party against a co-party ***arising out of the transaction or occurrence that is the subject matter either of the original action*** or of a counterclaim therein or relating to any property that is the subject matter of the original action. (Emphasis added). Not only does Rule 13 permit such claims, but it also **compels** that such claims be brought in cases arising out of the same set of facts. Not only was the Owner permitted to assert such claims against ECS, but it was also, in fact, legally required to do so to avoid being collaterally estopped from bringing such claims at a later date and time, including bringing forth such claims against ECS in the Commonwealth of Virginia.

33. Moreover, West Virginia law has stressed that the purpose of Rule 13 is to be so construed as to do substantial justice. *W. Va. R. Civ. P. 8(f).* By adopting the Rules of Civil Procedure, this Court intended that all of these rules be construed liberally and fairly so as to seek justice for all of the parties involved. *See Dishman v. Jarrell,* 165 W. Va. 709, 271 S.E.2d 348 (1980). The purpose of Rule 13 is to "prevent the **fragmentation of litigation**, multiplicity of actions and to conserve judicial resources." *Provident Life and Accident Insurance Co v. U.S.,* 740 F.Supp. 492, 496 (E.D.Tenn.1990) *as cited in Sorsby v. Turner,* 201 W. Va. 571, 575, 499 S.E.2d 300, 304 (1997).

34. Acceptance of ECS's position that the claims against it must be pursued in a **separate** civil action in Virginia would contravene the clearly established public policy of this state and the Court's inherent interest in consolidating resources and preserving judicial economy.

35. ECS's final argument in support of its Motion for Summary Judgment is a panoply of jargon whereby it reaches the conclusion that there is no merit to the Owner's crossclaims. The Owner asserts three basic claims against ECS for 1) breach of contract; 2) breach of warranty and; 3) an obligation to indemnify the Owner.

36. As noted, ECS was hired to perform subsurface exploration and geotechnical analysis for the Owner prior to the commencement of construction on the project. In layman's terms, and as set forth in subsection a of the ECS proposal (contract), ECS was to provide the Owners with *"information on site conditions including surface drainage, geologic conditions, and special site features."* Knowing that the Owner was relying upon and hired ECS for its particular professional knowledge of the geotechnical requirements necessary for construction of a large, four-story independent living facility on the site of its geotechnical work, ECS may have contributed to the resulting slope failure by failing to provide certain key information to the Owner concerning the existence of a pre-existing slip on the property.

37. Consequently, when the slope **did** ultimately fail, it appears that ECS 1) may have breached the terms of its contract by failing to discovery such information and that 2) it may have breached the quality of its work wherein it ***warranted*** that such professional services would be rendered in accordance with the requisite standard of professional care.

38. As set forth in more detail in the *Report of Doug Clark, P.E.,* the Owner's expert has opined that ECS contributed to the slope failure and therefore breached the terms of its proposal by and the quality of the work it warranted through the following actions or inactions:

*1. **ECS failed to identify the pre-existing historic landslide** located at the site that was identifiable by the soils and geologic mapping, the predevelopment site topographic mapping, visual site evidence, and Test Boring S-4.*

*2. ECS recommended embankment construction, including slopes at 2H:1V benched into the existing slope. No specific treatments to address stability such as fill foundation keys, drains or other stabilization measures were recommended.*

*3. **ECS's limited stability analysis** for the Wing A **slope failed to account for the historic landslide conditions**, and the rock toe designed by Terradon and **approved by ECS** was **insufficient to prevent future failure of the embankment.** ECS was unable to produce files of their slope stability analysis during discovery, so they could not be reviewed for this report.*

*4. ECS reviewed and approved Terradon's "Typical Section Fill Slope" and grading plan Drawing C3.00. The grading plan did not show the location of the groin ditches where the rock toe was intended to drain.*

*5. During rock toe construction, Terradon's field representative identified a 5' thick fat clay deposit in the excavation and contacted ECS. Brian Wyatt at ECS told him that was expected and to continue with rock toe placement as planned. **ECS failed to understand the presence of this material indicated the presence of landslide prone soils or an existing slope failure.***

39. The actions or inactions of ECS, as set forth in the foregoing *expert* opinions of Mr. Clark certainly create, at a minimum, a genuine issue of material fact as to whether ECS breached its contract and breached the warranties owed to the Owner. As such, the Owner's claims have sufficient merit to survive the Motion for Summary Judgment.

**WHEREFORE,** for the foregoing reasons, **IT IS HEREBY ORDERED** that ECS Mid-Atlantic, LLC's Motion for Summary Judgment regarding the Owner's crossclaims be **DENIED.** All such objections to the entry of this Order are hereby preserved for the record.

It is so **ORDERED.**

**ENTERED:** May 29, 2025

Maryclaire Akers, Judge
Kanawha Co. Circuit Court

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