

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
JARRETT'S THIRD-PARTY CLAIMS AGAINST ECS**

ORDER

This matter came before the Court upon ECS Mid-Atlantic, LLC's November 7, 2024, Motion for Summary Judgement Regarding Jarrett'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 rules 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. ECS and the Owner (through Smith Packett Med-Com, LLC) entered into a Master Services Agreement (“MSA”) on November 7, 2016, which set forth the terms for work performed between the two companies. *Motion* at 2.

6. On March 16, 2017, ECS presented the Owner (through Smith Packett Med-Com, LLC) with a “Proposal for Subsurface Exploration and Geotechnical Analysis” which outlined the terms of ECS’s work and incorporated the MSA by reference. *Id.*

7. 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.*

8. 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.

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

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

11. Jarrett would not have known of the pre-existing slip from the bidding documents, which included the ECS report.

12. This Project Manual became part of Jarrett's contract documents. *Motion* at 6.

13. 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.

14. Jarrett alleges "ECS as a design professional, owed a duty of care to [Jarrett], as a contractor which was employed by the same project owner as the design professionals, and which relied upon the design professionals' work... due to the special relationship..." *Jarrett's Third-Party Complaint* at ¶34.

15. On or about January 8, 2019, a slope failure occurred in the slope below the Project's A wing. *Jarrett's Third-Party Complaint* at ¶4.

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

17. On June 18, 2020, Jarrett filed a third-party complaint against ECS asserting two theories: (a) Design Professional Negligence and (b) Breach of Warranty *Jarrett's Third-Party Complaint*.

18. On November 7, 2024, ECS moved for summary judgement on Jarrett's crossclaims.

19. On November 22, 2024, Jarrett filed a Response in Opposition (Jarrett's "Response").

20. On November 27, 2024, ECS filed a reply in further support of its Motion (ECS's "Reply").

21. The Court finds the issues ripe for adjudication.

CONCLUSIONS OF LAW

THE SUMMARY JUDGMENT STANDARD

1. A Motion for Summary Judgment is governed by W. Va. R. Civ. P. 56, which states that "...[t]he 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). The summary judgment procedure provided by this rule is not a substitute for a trial by the court or a jury of an issue of fact, but it involves a determination that, as a matter of law, there is no genuine issue of fact to be tried. *Hatten v. Mason Realty Co.*, 135 S.E.2d 236 (W. Va. 1964). A party who moves for summary judgment has the burden of showing that the action involves no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Gillespie v. City of Charleston*, 177 S.E.2d 354 (W. Va. 1970).

2. Roughly stated, a "genuine issue" for purposes of W. Va. R. Civ. P. 56(c) is simply one half of a trial worthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict for that part. The opposing half of a trial worthy issue 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. *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995). If it appears that there is a genuine issue to be tried, the motion for summary judgment is denied and the case is allowed to proceed to trial in the usual way. *Employers' Liab. Assurance Corp. v. Hartford Accident & Indem. Co.*, 151 W. Va. 1062, 158 S.E.2d 212 (1967).

3. On a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue. *Wheeling Kitchen Equip. Co. v. R. & R. Sewing Ctr., Inc.*, 154 W. Va. 715, 179 S.E.2d 587 (1971). Rule 56 does not create a right on the part of the court to invade the province of the jury, but on the contrary, the function of the jury as the trier of fact remains unimpaired. Even in a case in which the trial judge is of the opinion that she should direct a verdict for one or the other of the parties on factual issues involved, she should, nevertheless, ordinarily hear evidence and upon a trial direct a verdict, rather than to try the case in advance on a motion for summary judgment. *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 2376 (1964).

THE STANDARD OF CARE APPLICABLE TO ECS

4. ECS, as a design professional, must exercise the degree of skill, care and diligence as engineers ordinarily exercise under like circumstances. *Teter v. Old Colony Co.*, 441 S.E.2d 738, 739, n.15 (W. Va. 1994).

5. Under *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 549 S.E.2d 266 (2001), the West Virginia Supreme Court of Appeals recognized that a design professional such as ECS owed a duty of care to a contractor like Jarrett:

...[W]e expressly hold that a design professional (e.g. an architect or engineer) owes a duty of care to a contractor, who has been employed by the same project owner as the design professional and who has relied upon the design professional's work product in carrying out his or her obligations to the owner, notwithstanding the absence of privity of contract between the contractor and the design professional, **due to the special relationship that exists between the two.** Consequently, the contractor may, upon proper proof, recover purely economic damages in an action alleging professional negligence on the part of the design professional.... The contractor is a member of a limited class compiled of those contractors bidding on a particular project. Moreover, the facts that the contractor must rely on design documents to calculate his or her bid and, if successful in bidding, to construct the project, and may be further subject to oversight by the design professional during actual construction of the project, fulfill the

requirement of the foreseeability of harm that would result from negligence on the part of the design professional. Finally, this resolution properly places the duty of care on the party who is in the best position to guard against the type of negligence herein asserted. (Emphasis added)

Eastern Steel, 549 S.E.2d at 401.

6. The West Virginia Supreme Court of Appeals in *White v. AAMG Constr. Lending Ctr.* 226 W. Va. 339, 700 S.E.2d 791 (2010) explained what constituted a “special relationship” Citing *Aikens v. Debow*, 208 W. Va. 486, 500, 541 S.E.2d 576, 590 (2000), the Court stated that:

The existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general. It may be evident from the defendant’s knowledge or specific reason to know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered. Such special relationship may be proven through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff or an identifiable class and can arise from contractual privity or other close nexus.

White, Id. at 799.

7. The Court concludes that the existence of a special relationship between Jarrett and ECS is manifest from the facts of this matter. Jarrett has been affected differently from society in general because it had overall responsibility for the management of The Crossings project. Further, Jarrett undertook warranty obligations to the Owner for all of the multi-prime contractors who had to rely on the bidding documents. ECS had to know, or should have known, that the information it provided to Terradon would be relied on not only by Terradon to formulate the grading plan, but also by every contractor who bid on and was awarded a contract based on the bidding documents, and that those individuals could be injured as a result of its conduct and potential damage. The Court concludes that a special relationship existed between ECS, the geotechnical EOR for The Crossings, and Jarrett, the Construction Manager and contractor for the project.

8. The Court further finds that material issues of fact as to whether ECS exercised the degree of skill, care and diligence as engineers ordinarily exercise under like circumstances. Jarrett has provided evidence that ECS failed to detect a pre-existing slip on the property, which ECS's own expert said was present. Jarrett has also presented evidence that ECS's Brandon Quinn approved the Terradon grading plan which required the placement of 15 to 17 feet of fill on the existing slope beneath the A wing. The Court was also provided with the testimony of John James, a professional engineer, who concluded that the slope failure occurred because of the 15-plus feet of fill on top of the undisclosed pre-existing slide. These all raise issues of fact as to whether ECS met the applicable standard of care.

9. Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues of fact for jury determination when the evidence to such issues is conflicting or where the facts, even though undisputed, are such that reasonable persons may draw different conclusions from them. *Harris v. R.A. Martin*, 204 W. Va., 397, 402, 513 S.E.2d 179, 172 (1998).

10. This record before the Court raises issues of material fact as to whether ECS exercised the degree of skill, care and diligence as engineers ordinarily exercise under like circumstances. As a result, ECS's motion for summary judgment is **DENIED**.

The objections and exceptions of ECS are noted and preserved.


The Circuit Clerk is directed to provide an executed copy of this order to the Business Court Division and to all counsel of record.

It is so **ORDERED**.

ENTERED: May 29, 2025


Maryclaire Alters, Judge
Kanawha Co. Circuit Court

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