

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

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. and the Court's May 30, 2025, Findings and Order denying ECS's request for summary judgment on MSPE's professional negligence and breach of warranty claims. ECS now moves under W. Va. R. Civ. P. 60(a) seeking clarification and rulings on the remainder of its motion—specifically, MSPE's theories of joint venture liability and its claims for punitive damages and attorneys' fees.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. All previous Findings of Fact as proffered in the May 30, 2025, Findings and Order govern this Supplemental Findings and Order.

2. ECS contends that MSPE did not adequately plead or support a joint venture theory and that the record lacks any evidence of shared profit, mutual control, or a common purpose. ECS argued in their previously filed Proposed Findings that any such theory should be dismissed as legally deficient under West Virginia law.
3. MSPE, in their Proposed Findings, stated that it has alleged a theory of coordinated activity or joint enterprise, citing ECS's involvement authoring geotechnical reports incorporated into the Project Manual and disseminated to prospective bidders. According to MSPE, these documents served as a basis for its bid and the planning and execution of its work. MSPE further asserted that ECS and other Defendants acted together in shaping the site conditions that led to the alleged slope failure.
4. Before addressing such positions in this document to clarify the record, it was this Court's intention, as part of the May 30, 2025, Findings and Order, to dismiss Defendant ECS's Motion for Summary Judgment for the foregoing reasons. None of the findings, *infra*, consist of a reconsideration of the record or the pleadings by this Court. These findings reflect the opinion of this Court both on May 30, 2025, and on this day.
5. The Court FINDS that while a formal, conventional joint venture may not have been pled, factual disputes remain concerning ECS's participation in a broader joint enterprise or coordinated conduct. The factual allegations and the context of the project point to possible shared responsibility for a common undertaking. See *Eastern Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 400, 549 S.E.2d 266, 274 (2001) (recognizing a "special relationship" between design professionals and contractors based on foreseeability and reliance).

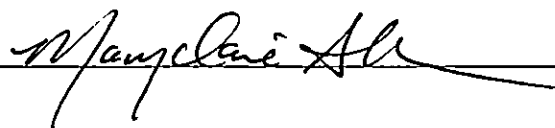
6. The integration of ECS's June 23, 2017, geotechnical report into the Project Manual, which was made available to bidders such as MSPE, along with ECS's continued involvement through 2019 in the site work, raises triable questions regarding its knowledge of subsurface conditions and its role in the resulting slope failure. MSPE asserts that ECS failed to detect and advise the Owner, Terradon, and any bidders of the existence of the pre-existing slip, a claim that implicates more than passive reporting and suggests potential coordination.
7. Given the nature of this multi-party commercial project and the overlapping roles among project participants, the Court finds that factual disputes remain as to whether ECS engaged in a form of concerted action or assumed a position that exposed it to liability beyond contractual privity. Accordingly, ECS's motion for summary judgment on the joint venture or joint enterprise theory is DENIED.
8. With respect to punitive damages and attorneys' fees, ECS argues that MSPE has not established the type of malicious, intentional, or reckless conduct necessary to support punitive damages under W. Va. Code § 55-7-29(a). ECS also asserts that there is no statutory or contractual basis for shifting attorneys' fees.
9. MSPE alleges that ECS's failure to identify a known or knowable pre-existing subsurface slip plane—despite its duty as the project's geotechnical engineer of record and its repeated engagements on the Project through 2019—as grounds for a finding of gross negligence or recklessness, which are questions of fact not appropriate for resolution at the summary judgment stage. MSPE also asserts that this failure directly impacted its performance and led to substantial economic harm.

10. Under West Virginia law, punitive damages require clear and convincing evidence that a defendant acted with actual malice or reckless and outrageous indifference to the health, safety, and welfare of others. While ECS may ultimately prevail on the merits, this determination involves a factual assessment of ECS's state of mind and conduct at the time of the alleged omissions. *See* W. Va. Code § 55-7-29(a).
11. The Court finds that the question of ECS's "mental state" is not appropriately resolved on summary judgment where significant factual development remains. The record does not compel a ruling that punitive damages are categorically unavailable at this stage.
12. As to attorneys' fees, while the Court notes the absence of a clear contractual or statutory right to such fees, it is premature to foreclose potential recovery pending a full development of the record. While MSPE has not identified a fee-shifting mechanism, the issue is more appropriately addressed post-trial or by separate motion. ECS's motion on this issue is therefore also DENIED.
13. The Court is aware of pending motions and responses related to trial bifurcation, including those filed on or after June 20, 2025. The Court makes no ruling on bifurcation at this time and reserves all issues related to trial structure.

Accordingly, the Court ORDERS that ECS's *Motion for Summary Judgment* as to Sections III and IV regarding MSPE's Crossclaims against ECS be, and hereby are, DENIED.

It is so **ORDERED**.

ENTERED: \_\_\_\_\_



  
Maryclaire Akers, Judge  
Kanawha Co. Circuit Court

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