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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

2008 MAR 11 PM 2:24
CATHY L. HARRIS, CLERK
KANAWHA CO. CIRCUIT COURT

C & O MOTORS, INC.,

Plaintiff,

v.

Civil Action No. 06-C-305

WEST VIRGINIA PAVING, INC.,
a West Virginia corporation,

Defendant.

ORDER

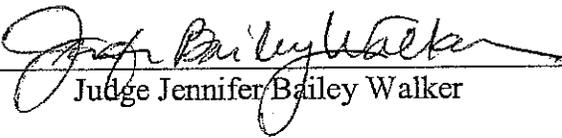
On the 28th day of February, 2008, came the Plaintiff, by counsel, Mary Jo Swartz and the Defendant, West Virginia Paving, Inc., by counsel, Larry G. Kopelman upon the Plaintiff's Motion for Award of Damages and the Defendant's Motion to Reconsider the Court's ruling granting Summary Judgment to the Plaintiff.

Upon those issues the Court does find that this Court's Order issued April 30, 2007, is final, that the Defendant's Motion for Reconsideration is denied and that the Court's finding of Summary Judgment in favor of the Plaintiff is appealable. Defendant shall be entitled to an appeal window which shall be ten days from the date of entry of this Order to allow the Defendant to appeal this Court's decision of Summary Judgment as against the Defendant, and in favor of the Plaintiff, to the West Virginia Supreme Court of Appeals.

It is therefore, **ORDERED** and **ADJUDGED** that the Defendant shall have ten days from the date of entry of this Order to allow the Defendant to file an appeal to the West Virginia Supreme Court of this Court's Order dated April 30, 2007.

The Court notes the exception and objection of the Plaintiff.

ENTERED 11th day of March 2008.


Judge Jennifer Bailey Walker

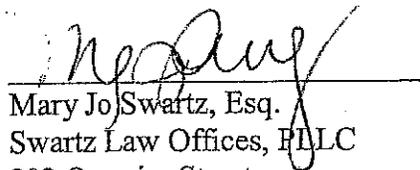
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CLERK OF THE COURT OF APPEALS
OF THE SUPREME COURT OF WEST VIRGINIA
March, 2008 12
Cathy S. Hutton

Approved by:



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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
C & O MOTORS, INC.,

Plaintiff,

v.

WEST VIRGINIA PAVING, INC.,

Defendant.

CIVIL ACTION NO. 06-C-305
(Judge Walker)

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CLERK OF COURT
KANAWHA CO. DISTRICT COURT

ORDER

This matter came before this Court on the Plaintiff, C&O Motors, Inc.'s ("C&O"), Motion for Summary Judgment, and the Defendant, West Virginia Paving's, Motion for Joinder of Persons Needed for Just Adjudication Pursuant to Rule 19 of the Rules of Civil Procedure. Having considered the Motions, Memoranda in Support thereof, Responses of the other parties, argument of counsel, deposition transcripts and exhibits, and appropriate legal authority, and for the reasons set forth herein, this Court hereby **GRANTS** C&O's Motion for Summary Judgment and **DENIES** West Virginia Paving's Motion for Joinder.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STANDARD

A party is entitled to summary judgment when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See *W. Va. R. Civ. P.*, 56(c). In considering a motion for summary judgment, all material facts must be construed in the light most favorable the non-moving party. See *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459

S.E.2d 329 (1995). A material fact cannot be "conjectural or problematic," and the non-moving party produce more than a "scintilla" of evidence in response to the motion. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party is not responsible for disproving the non-movant's claims, rather the movant must only show that there is insufficient evidence to support the non-movant's case. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party is entitled to summary judgment if the non-moving party cannot point to one or more disputed facts capable of leading a rational trier of fact to return a verdict in favor of the non-moving party. *Fayette County Natl. Bank v. Lilly*, 199 W. Va. 349, 352, 484 S.E.2d 232, 235 (1997).

FACTS

The material, undisputed facts in this matter are as follows:

1. Plaintiff, C&O Motors, Inc., (hereinafter "C&O") is a West Virginia corporation with its principal place of business at 202 5th Street, St. Albans, West Virginia. C&O is a motor vehicle dealer.
2. Defendant, West Virginia Paving, Inc. is a West Virginia corporation with its principal place of business at 2950 Charles Avenue, Dunbar, West Virginia.
3. Plaintiff has several car lots displaying new and used vehicles located along Route 60, McCorkle Avenue, St. Albans, West Virginia.

4. From April 25 through May 9, 2005, Defendant West Virginia Paving, Inc., engaged in a paving project along Route 60, McCorkle Avenue, St. Albans, West Virginia. It was a night job.

5. A typical West Virginia Paving project has approximately seven (7) employees on a crew. On this particular project there were 2 or 3 workers performing the milling, or grinding, of the pavement, using a milling machine. Those workers were employed by a subcontractor, Coady Construction, Inc., of Columbus, Ohio. Coady Construction, Inc. was a subcontractor of the Defendant. The remaining employees worked as a clean up crew. They would follow the milling machine and clean up the roadway of dust, tar, and debris. These employees worked for West Virginia Paving, Inc.

6. On the nights of May 3 and 4, 2005, the milling operation was performed along the section of Route 60 directly adjacent to C&O's new and used car lots.

7. During this milling operation, on the nights of May 3 and 4, 2005, dust, debris, and tar was churned up, became airborne, and was deposited onto a substantial number of C&O's vehicles which were parked in its new and used car lots.

8. C&O cleaned up some of the vehicles using its own staff—those which mostly had dust or debris on them. However, there were many vehicles covered with tar which could not be removed by a simple washing.

9. C&O contracted out the cleaning of these vehicles to San-Chem LLC. Workers from San-Chem would come and get the vehicles from C&O's lots

and take them to its facility for cleaning. C&O worked out a deal with San-Chem wherein it would pay a flat rate of \$40.00 per car for cleaning.

10. San-Chem cleaned vehicles for C&O from May 20 through July 13, 2005, for a total of \$5,740.00.

11. C&O first notified Defendant of its claims and injuries on or about May 25, 2005.

12. C&O presented Defendant with an invoice for \$5,740.00, and requested Defendant reimburse it for the cost of cleaning its vehicles

13. Defendant refuses to reimburse C&O for those charges.

14. Charles Wilson Crane, Jr. is the General Manager of West Virginia Paving, Inc. Mr. Crane testified that he is the one who decided not to reimburse C&O Motors, Inc. for the costs incurred in cleaning its new and used vehicles.

15. Mr. Crane does not dispute that C&O suffered damage to its vehicles as a result of the milling operation on May 3 and 4, 2006.

16. Mr. Crane does not dispute that C&O contracted out the cleaning of its vehicles to San-Chem.

17. Mr. Crane does not dispute that C&O incurred the charges set forth on the invoices sent to West Virginia Paving, Inc.

DISCUSSION

Plaintiff has set forth a claim of negligence based upon the facts set forth above. In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a

duty broken. Syl. Pt. 5, *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 567 S.E.2d 619 (2002); see also Syl. Pt. 1, *Parlsey v. General Motors Acceptance Corp.*, 167 W. Va. 866, 280 S.E.2d 703 (1981); Syl. Pt. 4, *Jack v. Fritts*, 193 W. Va. 494, 457 S.E.2d 431 (1995).

The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law. Syl. Pt. 3, *Lockhart, supra*; Syl. Pt. 5, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).

One who engages in affirmative conduct which a reasonable person would recognize exposes others or their property to a risk of injury and/or harm is under a duty to exercise reasonable care to prevent the threatened harm. Syl. Pt. 6, *Lockhart, supra*; Syl. Pt. 2, *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983).

The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result? Syl. Pt. 7, *Lockhart, supra*; Syl. Pt. 3, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

In the matters of negligence, liability accrues to a wrongdoer, not because of a breach of a contractual relationship, but because of a breach of duty owed

which results in an injury to others. Syl. Pt. 8, *Lockhart supra*; Syl. Pt. 2, *Sewell, supra*.

Where one plans a work which necessarily involves a trespass on premises of another, he cannot justify the wrongful act by the plea that the work is done by an independent contractor. Syl. Pt. 2, *Sun Sand Co. v. County Court of Fayette County*, 96 W. Va. 213, 122 S.E. 536 (1924).

Where the resultant damages are such as might have been reasonably contemplated as a consequence of the work directed to be done, the employer of an independent contractor doing the work is liable. *Sun Sand Co., supra*.

The protection afforded private persons in the possession, use and enjoyment of their property by Article III, Section 9 of the Constitution of this State prevents the damage of private property for public use without just compensation. A defendant cannot escape liability for damage to abutting land consequent to such improvement on the ground that another agency without supervision and control actually did the work. *Morgan v. City of Logan*, 125 W. Va. 445, 24 S.E.2d 760 (1943).

Charles Wilson Crane, Jr., now the General Manager of West Virginia Paving, Inc., was the General Superintendent over the Route 60 paving project (the "Project"). He was responsible for scheduling, job costing, material procurement, margin forecasting, and visited the site at least every other shift during the operation.

The milling portion of the Project commenced in the Town of Jefferson on or about April 25, 2006. The milling operations were performed at night to reduce

traffic problems. The operations proceeded West on Route 60 from the Town of Jefferson, and by May 3, 2006, they had reached the portion of Route 60 running adjacent to the C&O properties. It took two nights to mill that portion of Route 60, before again moving westward towards the Amandaville Bridge, where it culminated.

West Virginia Paving entered into a contract with its subcontractor, Coady Construction ("Coady"), out of Columbus, Ohio, to perform the milling portion of the Project. Coady brought its milling machine, a service truck and a water truck to the Project. The milling machine is "the big machine that actually tears up the road."

The first thing that happens in a milling operation is that the subcontractor, in this case, Coady, sprays water on the milling head, which is the piece with teeth on it. The purpose of the water is for cooling and dust control. West Virginia Paving follows behind the milling machine with a loader with an enclosed broom attachment. The broom attachment gathers debris into a bucket which is then poured into a truck. Sometimes a grader will also be used for clean up. The grader will "window material to a small pile" which then can be picked up by the broom attachment. West Virginia Paving also utilized a tractor broom and a rubber-tire backhoe for the purpose of picking up debris off the road surface.

Mr. Crane admitted that, despite these efforts to minimize the amount and dust and debris, there was still an amount of dust and debris that does not get self-contained by the process described above.

According to Mr. Crane, if someone had a complaint about one of their projects, the complaint would be forwarded to a claims person, Lori Hall. She would ask someone involved with that particular operation about the legitimacy of the claim, and if the claim was deemed legitimate "based upon our . . . gross negligence or some type of accident," a decision would be made whether to compensate that individual or not.

C&O did not call West Virginia Paving to complain. C&O did not speak with Lori Hall. C&O made arrangements for their vehicles to be cleaned, procured the invoices from San-Chem, who did the cleaning, and then sent its own invoice to West Virginia Paving for reimbursement. At no time did anyone at West Virginia Paving attempt to contact anyone at C&O about the invoices, or advise them that they could file a complaint by calling Lori Hall. Rather, West Virginia Paving, through its then-controller, Scott Withrow, sent the invoices back to C&O saying he did not know what they were.

C&O's counsel telephoned Scott Withrow to explain the invoices. Mr. Withrow indicated he would need additional evidence of damage, and so photographs of the vehicles were forwarded to him. Mr. Withrow subsequently advised C&O's counsel that West Virginia Paving would not reimburse C&O for the damage to its vehicles. Again, at no time did Mr. Withrow ever advise C&O or its counsel that there was some formal claim process which it needed to go through in order to have its claim reviewed.

Mr. Crane testified that he was the one who made the decision not to reimburse C&O for the damage to its vehicles resulting from West Virginia

Paving's operations on Route 60. One factor which he considered was that C&O did not file its claim through the appropriate West Virginia Paving channels. Another factor he considered in denying the C&O claim was the timeliness in which C&O notified West Virginia Paving of the damage.

Mr. Crane admitted there was no written policy at West Virginia Paving as to how complaints are handled. As to the timeliness factor, the milling operation which caused the debris to be deposited on C&O's vehicles occurred on the nights of May 3 and 4, 2005. The first invoice C&O addressed to West Virginia Paving is dated May 25, 2005. Mr. Crane concedes that amount of time would not be considered untimely.

Finally, Mr. Crane conceded that the milling operation caused the tar residue to become adhered to the C&O vehicles, that C&O incurred costs associated with having those vehicles cleaned, and that C&O's claim was legitimate.

Clearly, there is not one issue of material fact to be resolved in this matter. It is merely a question of applying the facts set forth herein to the law. Based upon Mr. Crane's testimony and his own admissions:

- 1) The escape of dust and tar was a foreseeable result of the Defendant's work;
- 2) The Defendant had a duty to prevent foreseeable harm to adjoining property owners;
- 3) The Defendant breached this duty;
- 4) Plaintiff's vehicles suffered damage as a result; and

5) The amount of the cleaning charges is not disputed and is conceded to be reasonable.

Applying the facts above to the general law of negligence set forth in *Sewell, supra.*, this Court concludes that Defendant knew that tar and dust would be dispersed as a result of its milling operations, and that some of this tar and dust would necessarily settle on property that was located immediately adjacent to the milling operation. As has been discussed, C&O was able to wash off the dust that settled on its vehicles; however, some of the vehicles also had tar imbedded into the finishes, which had to be professionally removed. It is for the professional cleaning of these latter vehicles that C&O seeks reimbursement.

WHEREFORE, based upon the Motions, Memoranda in Support thereof, Responses of the other parties, argument of counsel, deposition transcripts and exhibits, and appropriate legal authority, and for the reasons set forth herein, this Court hereby **GRANTS** C&O Motors Inc.'s Motion for Summary Judgment.

DEFENDANT'S MOTION FOR JOINDER

Defendant, West Virginia Paving, Inc., has moved that Plaintiff, C&O Motors, Inc. should be required to join the sub-contractor, Coady Construction, Inc. as a defendant in this lawsuit, on the grounds that Coady is a necessary party pursuant to Rule 19 of the West Virginia Rules of Civil Procedure.

Rule 19 governs the joinder of persons needed for just adjudication. The test for determining whether a party should be joined under this Rule is whether:

- (1) in the person's absence complete relief cannot be accorded among those already parties; or
- (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a

practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

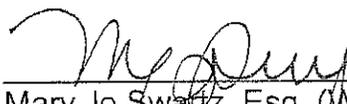
This matter does not require Coady's presence to give complete relief to the existing parties, nor does Coady's absence subject the existing parties to a substantial risk of multiple or inconsistent obligations, and Coady has no interest in this action. That is the test for deciding whether an absent person should be joined. Defendant has not offered any factual basis as required under Rule 19 to force Plaintiff to join Coady. If it desires, Defendant can seek indemnity against Coady for any judgment entered against herein.

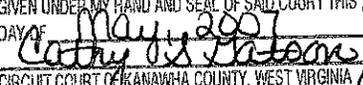
WHEREFORE, this Court **DENIES** Defendant West Virginia Paving, Inc.'s Motion for Joinder.

DATED this 30th day of April, 2007.


HON. JENNIFER BAILEY WALKER

Presented for entry by:


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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 1
DAY OF May, 2007
 CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 4