

FILED

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION**

2021 MAY 18 AM 11:38

**WW CONSULTANTS, INC.,**

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**Plaintiff,**

**VS.**

**Civil Action No.: 18-C-115**

**Presiding Judge: Christopher C. Wilkes**

**Resolution Judge: Michael D. Lorensen**

**POCAHONTAS COUNTY PUBLIC  
SERVICE DISTRICT, et al.,  
Defendants.**

**ORDER DENYING WW CONSULTANTS, INC.'S  
MOTION TO ALTER JUDGMENT IN FAVOR OF A-3 USA, INC.**

This matter came before the Court this 18<sup>th</sup> day of May 2021 upon WW

Consultants, Inc.'s Motion to Alter Judgment In Favor of A-3 USA, Inc. Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. The Plaintiff, WW Consultants, Inc. (hereinafter "Plaintiff" or "WWC"), by counsel, Paul M. Mannix, Esq., and Third-Party Defendant, A-3 USA, Inc. (hereinafter "Defendant" or "A-3"), by counsel, John W. Burns, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

**FINDINGS OF FACT**

1. In 2014, Orders Construction Company, Inc. bid on a project to construct the consolidated wastewater treatment plant near Snowshoe Mountain in Pocahontas County, West Virginia, which was being built by Defendant/Counterclaim Plaintiff Pocahontas County Public Service District (hereinafter "PSD"). See Ord., 1/14/21.

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- Orders was the low bidder and contracted with the PSD for the construction of the plant. *Id.* Orders entered into a contract with the PSD to construct the plant, effective April 19, 2015. *Id.* The plant was substantially complete on May 16, 2017. *Id.*
2. This matter was commenced with the filing of the complaint on February 6, 2018, wherein WWC sought to recover fees allegedly owed by the PSD. *Id.* The PSD was the project's owner and WWC was the engineer of record on the project, providing certain design and consulting services during the construction of the wastewater treatment plant and related facilities. *See Compl.*, ¶8.
  3. On or about April 2, 2018, PSD filed its Answer and Counterclaim of the Pocahontas County Public Service District, alleging twenty-eight individual allegations of professional negligence. *See Ctrclm*, p. 26-28.
  4. On August 1, 2019, the WWC filed a Motion for Partial Summary Judgment on Pocahontas County Public Service District's Counterclaims, seeking judgment as a matter of law in its favor on 20 of the 28 counterclaims PSD asserts in paragraph 12 (professional negligence)<sup>1</sup> of the Counterclaim because Defendant did not support those allegations with expert testimony. *See Pl's Mot. Summ. J.* This motion was fully briefed, and on November 27, 2019, this Court granted said motion and dismissed a vast majority of the design negligence claims. *See Ord.*, 11/27/19. After the entry of this Order, seven design negligence claims remained.
  5. On April 20, 2020, the PSD moved the Court for leave to permit it to amend its Counterclaim in this matter to add two additional counterclaim defendants due to newly produced evidence. The Court, finding good cause existed, and considering

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<sup>1</sup> These claims are set forth in paragraph 12(a) through 12(cc) of PSD's Counterclaim. *See Counterclaim.*



there was no objection from WWC, granted said motion for leave by Order entered on May 4, 2020.

6. On April 29, 2020, WWC moved the Court for leave to permit it to file a third-party complaint against three third-party defendants due to newly produced evidence. The Court, finding good cause existed, and considering there was no objection from the PSD, granted said motion for leave by Order entered on May 4, 2020.
7. On May 12, 2020, the PSD filed its First Amended Counterclaim, asserting claims against WWC for design professional negligence and breach of contract. *See Am. Ctrclm, ¶¶53-63.*
8. On May 18, 2020, WWC filed its Third-Party Complaint against Orders Construction Company, Inc., A3-USA, Inc., and Pipe Plus, Inc. With respect to A-3, WWC asserted it was entitled to common law contribution and implied indemnity. *See WWC's Th. Pty. Compl., ¶¶34-38.*
9. A motion to dismiss followed. On July 22, 2020, A-3 filed A-3 USA, Inc.'s Motion to Dismiss Third-Party Complaint, arguing that the Third-Party Complaint against it should be dismissed because: 1) WWC fails to state a claim for contribution as set forth in the negligence cause of action because common law claims for contribution are precluded by West Virginia's several liability statute; and 2) WWC's basis for implied indemnification has no basis in law. *See Th. Pty. Def's Mot. to Dismiss, p. 2.*
10. The motion to dismiss was fully briefed. On March 30, 2021, this Court entered its Order granting A-3's Motion to Dismiss, agreeing that the Contribution claims cannot be maintained because the allegations do not fit any of the exceptions to West Virginia's several liability law, and West Virginia's several liability statute, as

amended in 2015, precludes any claim of WWC in this instance. *See* Ord., 3/30/31, p. 7-8. Further, with regard to the indemnity cause of action, the Court found that WWC has no legally viable claim for indemnity against A-3. *Id.* at 10. It is from this Order that WWC files the instant motion to alter judgment.

11. On April 13, 2021, WWC filed the instant WW Consultants, Inc.'s Motion to Alter Judgment In Favor of A-3 USA, Inc. Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, arguing that its claim for contribution/negligence should not be dismissed because contribution claims are not abolished in West Virginia and it has properly pled such a claim. *See* Pl's Mot., p. 8. Further, WWC argues the indemnification claims should not be dismissed because a special relationship exists between it and A-3 because WWC's design relies on and is based on A-3's design of the MBR system. *Id.* at 9.
12. On April 13, 2021, a Briefing Order was entered on the instant motion. On April 28, 2021 A-3 filed A-3 USA, Inc.'s Response to WW Consultants, Inc.'s Motion to Alter Judgment Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, arguing the Court's conclusions in its March 30, 2021 Order were proper. *See* Th. Pty. Def's Resp., 2.
13. No Reply was filed. The Court notes WWC filed and provided a proposed order on the instant motion on May 7, 2021, and a revised proposed order on May 13, 2021.
14. The Court now finds the instant Motion is ripe for adjudication.

#### **CONCLUSIONS OF LAW**

This matter comes before the Court upon a motion to alter judgment brought pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Rule 59(e) simply states that "[a]ny



motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment". W. Va. R. Civ. P. 59.

Further, the West Virginia Supreme Court of Appeals has provided guidance on when a trial court should grant a Rule 59(e) motion to alter or amend. Specifically, in syllabus point 2 of *Mey v. Pep Boys–Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals said:

A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Syl. pt. 1, *Acord v. Colane Company*, 228 W.Va. 291, 719 S.E.2d 761 (2011); *see also* *Hinerman v. Rodriguez*, 230 W. Va. 118, 123, 736 S.E.2d 351, 356 (2012).

Also, a motion to alter or amend judgment may be used to correct manifest errors of law or fact or to present newly discovered evidence. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 717 S.E.2d 235 (2011).

In the present case, none of the grounds for reconsideration are present. The Court, after review of the pleadings and the court file, finds there are no manifest errors of law or fact to be corrected. It is apparent from the review of the record that the Court considered all the matters before the Court, including the available case law regarding contribution claims and West Virginia's current several liability statute, the fact that no special relationship existed between the parties, and the fact that the PSD's Amended Counterclaim against WWC provides claims that all relate to the design of the project.

Specifically, the Court examined all available case law with regard to the contribution argument. With the instant motion, WWC has not presented any controlling authority contrary

to this Court's analysis and decision. Rather, by arguing this Court should have followed "appropriate persuasive authority", it is simply disagreeing with this Court's decision. *See Th. Pty. Def's Resp.*, p. 6, 7. WWC did not present new evidence not previously available to the Court coming to light, or any change in controlling law on the issue of contribution since the entry of this Court's March 30, 2021 Order. *Id.* at 6. Instead, in the instant motion, WWC relied on the same cases it discussed in its Response to the underlying motion. *Id.* at 7. WWC simply did not demonstrate a clear error of law upon which to alter or amend a judgment regarding the Court's conclusion that because none of the exceptions to West Virginia's several liability statute exist, WWC's contribution claim must be dismissed. Therefore, the instant motion is dismissed as to this issue.

Next, the Court finds it examined facts and arguments related to the indemnity claim. WWC cites no authority or recently discovered evidence in order to support its claim in the instant motion that a special relationship exists between it and A-3. *See Th. Pty. Def's Resp.*, p. 8. The Court has already considered the arguments presented to it in the instant motion, and has concluded that, plainly, no special relationship exists. *Id.* The Court has been presented with no evidence of a manifest error regarding its conclusion in its March 30, 2021 Order that no special relationships were proffered between WWC and A-3 upon which a claim for implied indemnity could be based. WWC has not met the high standard needed for a Rule 59(e) motion to alter by showing an obvious injustice or manifest error of law. The arguments it made in the instant motion are essentially reiterations of the arguments already rejected by this Court in its Order and in the briefing on the underlying motion. Therefore, the instant motion is dismissed as to this issue.



The Court notes A-3 has requested an award of attorney's fees in conjunction with responding to the instant motion. *See* Th. Pty. Def's Resp., p. 11. Although the Court is denying the instant motion to alter or amend, the Court declines to award such attorney's fees.

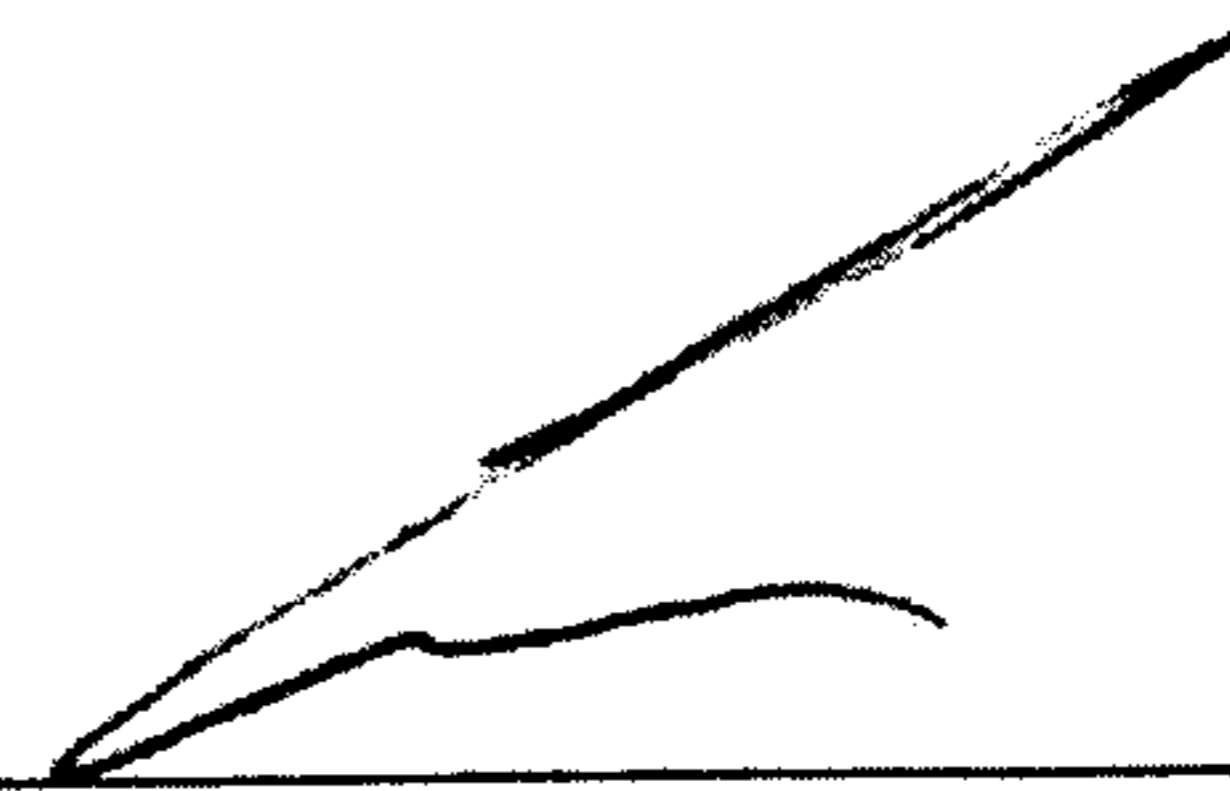
For all of these reasons, the Court finds WWC has presented no clear error in the Court's findings in its March 30, 2021 Order regarding the dismissal of the negligence/contribution and indemnity claims. This Court has rejected WWC's arguments contained in the instant motion when granting A-3's Motion to Dismiss. Although WWC reiterates its position, WWC's arguments in the instant motion simply do not demonstrate a clear error of law upon which to alter or amend a judgment.

Accordingly, the Court declines to reconsider or alter or amend its determinations contained in its March 30, 2021 Order Granting A-3, USA, Inc.'s Motion to Dismiss Third-Party Complaint. The Court finds that A-3's request for dismissal of the third-party complaint against it was properly granted, and declines to alter said dismissal.

### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that WW Consultants, Inc.'s Motion to Alter Judgment In Favor of A-3 USA, Inc. Pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure is hereby DENIED. Third-Party Defendant A-3 USA, Inc. remains DISMISSED WITH PREJUDICE from this action. There being no just reason for delay, finding all claims against A-3 are adjudicated, the Court directs entry of judgment as to the dismissal of A-3 pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure. This is a FINAL ORDER.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel and *pro se* parties of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



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CHRISTOPHER C. WILKES, JUDGE  
BUSINESS COURT DIVISION