UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

DONNA MILLER, individually and
as Administratrix of the
ESTATE OF CHARLES MILLER,

Plaintiff,

vs. CIVIL ACTION NO. 2:00-0896

SMS SCHLOEMANN-SIEMAG, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending is Defendant's motion for summary judgment.[1] The Court GRANTS the motion in part as to the jurisdictional challenge and DISMISSES the case without prejudice to its continued prosecution in the Court of Common Pleas of Allegheny County, Pennsylvania.

I. INTRODUCTION

Prior to removal, Plaintiff Donna Miller, in her individual and representative capacity, filed in the state court a seven

[1]Plaintiff's motion to file a surreply also pends. The Court GRANTS the motion.

hundred (700) page packet of material containing the briefing, record, and hearing transcript relating to the motion to dismiss for lack of personal jurisdiction asserted by Defendant SMS Scholemann-Siemag Inc. (SMS).

At this earlier stage of the case, SMS challenged personal jurisdiction. The Court reviewed the packet and the briefing and concluded Plaintiff established a *prima facie* showing to support the exercise of personal jurisdiction at that time. The case has since been the subject of full discovery. Additional developments have also occurred, including Plaintiff's retention of new counsel, both of whom practice in Pennsylvania, SMS' home state.

Having now the benefit of a complete record, along with other facts unknown at the time of the initial ruling, the Court concludes personal jurisdiction is lacking.

II. FACTUAL BACKGROUND

In 1996, SMS, a Pennsylvania corporation, contracted with Hyundai Industries, Co., Ltd. (Hyundai) to design, build, and install a continuous steel casting machine for Dongkuk Steel Mill Ltd. (Dongkuk) in South Korea. The contract was negotiated and signed in Pennsylvania and South Korea. Neither the design, manufacture, nor any part of the performance of that contract, took place in West Virginia.

SMS entered subcontracts with other entities to facilitate the project. One subcontractor was Industrial Controls and Engineering, Inc. (ICE), which provided the machine's instrumentation. ICE later subcontracted with AIG. AIG was hired to resolve instrument calibration anomalies at the Dongkuk facility. Neither ICE nor AIG are West Virginia corporations. AIG contracted with BAS Technical Employment Placement Company (BAS), a West Virginia corporation, to actually perform the work.

BAS, in turn, employed Plaintiff's decedent, Charles Miller. The only apparent involvement SMS had in the hiring process was to be present for, and perhaps have some involvement in, a meeting with BAS and Miller in Pennsylvania. Eventually, Miller was dispatched by BAS to the Dongkuk facility. On December 28, 1997 Miller was performing repairs at the Dongkuk steel casting factory. A malfunction occurred during the manufacturing process causing molten steel to spill, melt through a blower fan assembly, and pour onto Miller. Miller suffered burns to over 2/3 of his body.

Miller was taken to several South Korean hospitals. Concerned with the level of care he was receiving, Plaintiff Donna Miller requested her husband be transported to a critical care burn unit in the United States. SMS refused her requests. Later, however, an SMS official presented Mrs. Miller a written proposal in her

hotel room. SMS agreed to pay the cost of transport provided the Millers promised, *inter alia*, not to treat the transport as an SMS admission of liability for the accident. Mrs. Miller's affidavit explains:

> Under the extreme duress of the circumstances in which I found myself, and without any alternative I signed the SMS . . . document so that my husband, Charles Miller, would be transported to the United States to receive proper treatment in a critical care burn treatment center equipped and staffed to treat his life-threatening third degree burns which covered over sixty-eight (68%) of his body . . . .

(Aff. of Donna Miller ¶ 11.) Unfortunately, Mr. Miller died of his injuries shortly after returning to the United States.

In November 1999 the widowed Plaintiff instituted this action against BAS and SMS in the Circuit Court of Kanawha County. She alleged a deliberate-intention claim against BAS pursuant to *West Virginia Code* Sections 23-4-2(b) and (c)(2)(ii), asserting BAS "took no steps to ensure safe work environments would be provided for its employees" at its assigned jobs. (Compl. ¶ 8.)

In its initial Memorandum Opinion, the Court compared the clarity of Plaintiff's claims against BAS with what appeared to be her less certain claims against SMS. Count IV reads:

> 56. Plaintiff realleges paragraphs 1 through 27 in Count IV of her Complaint.
>
> 57. The actions of the defendant SMS in requiring Donna Miller to execute under duress a release of claims

> before transporting the decedent Charles Miller to appropriate medical facilities is of such an outrageous and unconscionable nature as to shock the reasonable person. As such, this wilful and wanton conduct is of a nature to allow an award of punitive damages against defendant SMS.

(Id. ¶¶ 56 and 57.) Some of the incorporated allegations include:

> 19. Decedent Charles Miller was transported to various hospitals in [South] Korea where the conditions, including sterility of the facility and the qualifications of physicians, caused grave concern to decedent's wife, Donna Miller.
>
> 20. After repeated requests that her husband be transported to the United States for the best care given his horrific injuries, defendants agreed to pay for the substantial cost of such transportation only if Donna Miller signed a release of claims related to her husband's injuries.
>
> 21. Under duress and the extraordinary circumstances under which Donna Miller found herself, without advice or aid of counsel, she executed a release as the only means to have her husband transported to a reputable burn center in the United States.

(Id. ¶¶ 19-21.)

Prior to removal, SMS had pending before the Circuit Court of Kanawha County a motion to dismiss for lack of personal jurisdiction. As noted, the briefing was extensive. After some time, the presiding state judge informed the parties Plaintiff should submit a proposed Order denying the motion to dismiss. While the proposed Order was awaiting the judge's signature,

however, SMS removed.[2]

II. DISCUSSION

A. Governing Standard

Since no decision was entered by Judge King prior to removal, the Court reviewed the entire record submitted by the parties *de novo*. The Court has additionally reviewed the parties' summary judgment briefing on the jurisdictional question. The personal jurisdiction ruling earlier in the case was interlocutory in nature.

One applicable long arm statute[3] is found in *West Virginia Code* Section 31-1-15. Section 31-1-15 provides:

> Any foreign corporation which shall conduct affairs or do or transact business in this state without having been

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[2]Plaintiff moved to remand, denying BAS was fraudulently joined. The Court disagreed and dismissed BAS as a party:

> Taking all factual and legal considerations in Plaintiff's favor, there is no possibility she could establish a deliberate-intention claim [against BAS]. In short, she has failed conclusively to make any showing or prediction BAS "had a subjective realization and an appreciation of the existence of . . . [a] specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition."

Miller v. BAS Technical Employment, 153 F. Supp.2d 835, 838 (S.D. W. Va. 2001).

[3]See and compare W. Va. Code § 56-3-33; Harman v. Pauley, 522 F. Supp. 1130 (N.D. W. Va. 1981); Hill by Hill v. Showa Denko, K.K., 188 W. Va. 654, 425 S.E.2d 609 (1992).

> authorized so to do pursuant to the provisions of this article shall be conclusively presumed to have appointed the secretary of state as its attorney-in-fact with authority to accept service of notice and process on behalf of such corporation and upon whom service of notice and process may be made in this state for and upon every such corporation in any action or proceeding described in the next following paragraph of this section. . . .
>
> For the purpose of this section, a foreign corporation not authorized to conduct affairs or do or transact business in this state pursuant to the provisions of this article shall nevertheless be deemed to be conducting affairs or doing or transacting business herein (a) if such corporation makes a contract to be performed, in whole or in part, by any party thereto, in this state, [or] (b) if such corporation commits a tort, in whole or in part, in this state . . . . The making of such contract . . . [or] the committing of such tort . . . shall be deemed to be the agreement of such corporation that any notice or process served upon, or accepted by, the secretary of state pursuant to the next preceding paragraph of this section in any action or proceeding against such corporation arising from, or growing out of, such contract [or] tort . . . shall be of the same legal force and validity as process duly served on such corporation in this state.

Id. (emphasis added).

Although previously set forth in its prior Memorandum Opinion, the Court revisits the high points of the governing analysis from our Court of Appeals and the Supreme Court. In In re Celotex Corp., 124 F.3d 619 (4th Cir. 1997), the Court of Appeals discussed the standards for determining whether a defendant is subject to personal jurisdiction:

> In order for a court to validly exercise personal

> jurisdiction over a non-resident defendant: (1) a statute must authorize service of process on the non-resident defendant, and (2) the service of process must comport with the Due Process Clause.
>
> A court's exercise of personal jurisdiction over a non-resident defendant is consistent with the Due Process Clause if the defendant has sufficient "minimum contacts" with the forum such that requiring the defendant to defend its interests in the forum does not "offend 'traditional notions of fair play and substantial justice.'" Later cases have clarified that the minimum contacts must be "purposeful." This "purposeful" requirement rests on the basic premise that traditional notions of fair play and substantial justice are offended by requiring a non-resident to defend itself in a forum when the non-resident never purposefully availed itself of the privilege of conducting activities within the forum, thus never invoking the benefits and protections of its laws. Moreover, this "purposeful" requirement "helps ensure that non-residents have fair warning that a particular activity may subject them to litigation within the forum."

Id. at 627 (citations and quoted authority omitted). Our Court of Appeals also discussed recently the difference between specific and general jurisdiction:

> Determining the extent of a State's judicial power over persons outside of its borders under the International Shoe standard can be undertaken through two different approaches--by finding specific jurisdiction based on conduct connected to the suit or by finding general jurisdiction. If the defendant's contacts with the State are also the basis for the suit, those contacts may establish specific jurisdiction. In determining specific jurisdiction, we consider (1) the extent to which the defendant "purposefully avail[ed]" itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be

constitutionally "reasonable."

> On the other hand, if the defendant's contacts with the State are not also the basis for suit, then jurisdiction over the defendant must arise from the defendant's general, more persistent, but unrelated contacts with the State. To establish general jurisdiction over the defendant, the defendant's activities in the State must have been "continuous and systematic," a more demanding standard than is necessary for establishing specific jurisdiction.

ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 711-12 (4th Cir. 2002).

B. Analysis of Specific Jurisdiction

1. Intentional Infliction of Emotional Distress

The Court now turns to its earlier Memorandum Opinion concluding Plaintiff presented a *prima facie* case of personal jurisdiction. At that point in the case, the Court was left in the difficult position of attempting to divine what claims had been pled:

> In contrast to these two well-pled [negligence] claims, however, Count Four is enigmatic. Although Count Four appears aimed solely at the recovery of punitive damages, such damages are not recognized under the law to express a separate cause of action. See Miller v. Carelink Health Plans, Inc., 82 F.Supp.2d 574, 579 n. 6 (S.D. W. Va. 2000)(stating "Defendant claims the testimony creates a 'cause of action' for punitive damages; such damages are rather, of course, a form of relief. West Virginia law does not recognize an independent cause of action for punitive damages. See Cook v. Heck's, Inc., 176 W. Va. 368, 376 n. 3, 342 S.E.2d 453, 461 n. 3 (1986)").

The question then arises: if Mrs. Miller did not,

> and in fact could not, plead a separate and independent claim for punitive damages, what claim is made in Count Four?

Miller v. SMS Schloemann-Siemag, Inc., 203 F. Supp.2d 633, 639-40 (S.D. W. Va. 2002). The Court attempted to divine the claim presented, assuming a separate claim was indeed pled in Count Four beyond punitive damages. After carefully dissecting the complaint, the Court concluded Plaintiff had "sufficiently alleged, or could with further amendment allege, a claim on her own behalf for the tort of outrage surrounding the agreement" to transport her husband back to the United States. Id. at 640. Plaintiff never sought to amend the complaint following that ruling.

As the case has developed, the reason Plaintiff failed to move to amend earlier is clear. Indeed, it is now plain Plaintiff never intended to plead or pursue a tort-of-outrage claim from the outset. At summary judgment, SMS has presented the Court with an interrogatory response from Plaintiff filed earlier in the case:

> INTERROGATORY NO. 22
>
> Do you allege that SMS is liable for punitive damages? If so, then fully, specifically and in detail describe the following:
>
> (a) Each and every act or omission and/or commission on the part of SMS that you contend warrants the imposition of punitive damages;
>
> . . . .

ANSWER:

> (a) The reckless disregard for human life as evidenced in the numerous design, erection and training flaws with this caster[.]
>
> . . . .

(Ex. F, Def.'s Book of Exhibs.) Had Plaintiff intended to pursue a claim for intentional infliction of emotional distress, she would certainly have identified it in this interrogatory response. An intentional tort, as opposed to the identified negligence claims, is a far more suitable vehicle for recovering punitive damages.

The record thus undeniably establishes Plaintiff did not plead or pursue a claim for intentional infliction of emotional distress. Instead, Count Four is simply an inartful, and improper, attempt to state a separate and independent claim for punitive damages.

This finding is of substantial import in the jurisdictional inquiry. The Court found two separate bases for satisfaction of the long-arm statute. First, the Court concluded the agreement relating to Mr. Miller's medical air transport was to be performed, in part, in this State because it required Plaintiff to indefinitely forbear from treating the transport of her husband as an SMS admission of liability for his injuries. The Court also intimated the agreement was at issue because of Plaintiff's attempt to have it declared void.

As the case has fully developed, however, it is plain the forbearance under the agreement, and the requested voiding of it, are of little moment in comparison to the substantial negligence claims that make up the bulk of this action. Allowing the now seemingly insubstantial contract claim to serve as the predicate for exercising jurisdiction over the negligence claims would, in effect, have the tail wag the dog.

The second basis for finding compliance with the long-arm statute hinged on the fact Plaintiff had suffered some elements of her surmised intentional infliction of emotional distress claim in both Korea and the United States following her return after her husband's death. Since that claim was never pled originally nor pursued timely by amendment, however, it is plainly not a tort upon which one might base the exercise of long-arm jurisdiction. Although it appeared the agreement at one time had substantial relevance to the jurisdictional inquiry, it has eventuated into an insignificant issue in the case.[4]

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[4]It is true Plaintiff now seeks, at this very late date, to amend her complaint to plead a tort-of-outrage claim. Plaintiff does not even attempt to show, however, that amendment would be proper in light of *Rule* 16(b) and the elapsed deadline for amendment of pleadings. Trial is but a month away. The deadline for amendment of pleadings expired in October 2001.

Plaintiff also asserts SMS has somehow waived its challenge to personal jurisdiction by "filing non-jurisdictional motions in this

(continued...)

Turning to the second, due process component of the jurisdictional analysis portends a similar result. There are three factors requiring analysis under the due process component of the specific-jurisdiction inquiry. The first two factors examine (1) the extent to which SMS "purposefully avail[ed]" itself of the privilege of conducting activities in West Virginia, thus invoking the benefits and protections of its laws, and (2) whether Plaintiff's claims arise out of those West Virginia related activities.

As the Court of Appeals recently noted, purposeful availment is suggested "'where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum.'" Christian Science Bd. of Directors of First Church of Christ, Scientist v. Nolan, 259 F.3d 209, 217 (4th Cir. 2001)(quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985))(emphasis added).

The Court originally observed the "continuing obligation" prong might be satisfied from the agreement requiring Mrs. Miller,

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[4](...continued)
Court." (Oppos. Br. at 10 n.3.) SMS has consistently maintained the absence of such jurisdiction, however, from the case's inception.

both individually and in her representative capacity, to forbear perpetually from asserting that SMS implicitly admitted liability by agreeing to transport her injured husband to the United States. It is important to note, however, SMS has no continuing obligation under the agreement. It appears to have fully discharged its obligations once Mr. Miller was successfully transported. This fact, taken with the now diminished importance of the agreement would certainly provide only a very slender reed upon which to base either purposeful availment or show significant activities by SMS in this State.

The third and final consideration for specific jurisdiction under the due process clause is whether the exercise of judicial power over SMS would be constitutionally reasonable. Christian Science *supra* guides the inquiry:

> In determining whether jurisdiction is constitutionally reasonable, we may evaluate "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." More generally, our reasonableness analysis is designed to ensure that jurisdictional rules are not exploited "in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent."

Christian Science, 259 F.3d at 217.

The potential burdens on SMS do not appear onerous. Its home state is contiguous to this forum, and it certainly appears financially able to finance the litigation here. Further, the Court initially cited Lee v. Walworth Valve Co., 482 F.2d 297, 299-300 (4th Cir. 1973) for the proposition that a state has "a paternal interest in the recovery by one of its citizens of appropriate compensation, if there is a substantive cause of action." Lee went on to state "To the extent that Mrs. Lee, or she and her dependents, deprived of the support of her husband, might become a public charge, or charges, South Carolina [her residence] has an immediate interest in her vindication of any private right of action she may have for the wrongful death of her husband." Id.

Although this is of some significance, such a state interest is present in virtually every case where an in-state plaintiff hales a foreign corporation into his or her jurisdiction. Accordingly, this factor is not dispositive and cannot drive the analysis.

The Court next examined Mrs. Miller's interest in obtaining convenient and effective relief. The Court observed there are a host of difficulties, financial and otherwise, encountered by a private citizen in prosecuting extra-territorial litigation, especially when the accident occurred in a foreign country. At the

prior juncture in the litigation Plaintiff was represented by West Virginia counsel. She has since retained substitute counsel who are headquartered in SMS' home state of Pennsylvania. Her new counsel are no doubt more familiar and comfortable with the Pennsylvania court system and, importantly, there is a civil action in Pennsylvania brought by Plaintiff already pending against SMS.

In light of these changed circumstances, it is constitutionally unreasonable to continue to exercise specific jurisdiction over SMS.

Lacking jurisdiction over any claim or defense related to the agreement, there is likewise no basis upon which to exercise pendant personal jurisdiction over SMS concerning the two negligence claims.

C. Analysis of General Jurisdiction

The Court originally concluded, in the alternative, that Plaintiff sufficiently alleged a *prima facie* case of general jurisdiction. As the Court then noted, a finding of general jurisdiction would have required SMS' contacts with this state to have been "continuous and systematic" in nature. The Court then observed a plaintiff's burden on that jurisdictional issue at the early stage of the case was not a heavy one.

Since the entry of the earlier Memorandum Opinion, the Court

of Appeals re-affirmed the admonition "'the threshold level of minimum contacts sufficient to confer general jurisdiction is significantly higher than for specific jurisdiction.'" ALS Scan, 293 F.3d at 715 (quoted authority omitted).

As noted in the earlier Memorandum Opinion, Plaintiff asserted *inter alia*, the following:

1. In the roughly six years preceding the accident, SMS earned revenue from at least two West Virginia entities in excess of $55 million;

2. SMS' transactions with West Virginia entities include:

    1. A $53 million dollar rebuild of a caster at Weirton Steel (Weirton) in Weirton, West Virginia, concluding in 1991;

    b. A $1 million dollar project with Weirton in 1998;

    c. Invoicing to Weirton for work performed in the state totaling in excess of $100,000.00 since 1990;

    d. Over 71 visits to Weirton in just the last five years;

    e. The 1990 caster rebuild, in addition to the multi-million dollar, original installation in 1964, involved a year or more of work in West Virginia.

Upon re-examination, these contacts are insufficiently regular and continuous to support the exercise of general jurisdiction. SMS' activities in the state appear limited to work for two, large corporate customers. This would seem to stretch the continuous and systematic requirement beyond the understanding of that phrase as

understood by our Court of Appeals as currently constituted.[5]

III. CONCLUSION

Based on the foregoing, the Court FINDS and CONCLUDES SMS lacks minimum contacts with the State of West Virginia sufficient to support the exercise of personal jurisdiction here. Accordingly, the Court GRANTS that portion of SMS's summary judgment motion seeking dismissal for lack of personal jurisdiction. The remainder of the motion is DENIED without prejudice. The case is DISMISSED WITHOUT PREJUDICE.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record via facsimile and to post a copy on the Court's website at www.wvsd.uscourts.gov.

ENTER: February 21, 2003

_____
Charles H. Haden II
United States District Judge

Harry F. Bell, Jr.
Jonathan R. Mani

Arnd N. von Waldow
Douglas E. Cameron

[5]In making its earlier determination, the Court was guided by Judge Niemeyer's careful analysis in ESAB. ESAB discusses several cases in which the Court of Appeals has either approved or disapproved the exercise of general jurisdiction. The Court then noted the instant case bore a marked resemblance to one of the cases analyzed in ESAB, Lee v. Walworth Valve Co., 482 F.2d 297 (4th Cir. 1973). It is important to note, however, Judge Niemeyer expressed some doubt about Lee's continued viability. See ESAB, 126 F.3d at 624 ("Our decisions since Lee make clear that even the contacts in Lee were marginal.").

BELL AND BANDS PLLC
Charleston, West Virginia

Warren A. Hampton
HAMPTON & McCREARY
Uwchland, Pennsylvania

Mark L. Parisi
Richard H Maurer
WHITE AND WILLIAMS LLP
Philadelphia, Pennsylvania

For Plaintiff

REED SMITH SHAW & McCLAY, LLP
Pittsburgh, Pennsylvania

For Defendant

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vs. CIVIL ACTION NO. 2:00-0896

SMS SCHLOEMANN-SIEMAG, INC.,

Defendant.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered today, the Court ORDERS as follows:

1. That portion of SMS's summary judgment motion seeking dismissal for lack of personal jurisdiction is GRANTED;

2. That the remainder of the motion is DENIED without prejudice; and

3. The case is DISMISSED WITHOUT PREJUDICE and STRICKEN from the docket.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: February 21, 2003

_____
Charles H. Haden II
United States District Judge