

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
-HUNTINGTON DIVISION-**

**WEST VIRGINIA-AMERICAN WATER COMPANY,  
a West Virginia corporation,**

**Plaintiff,**

v.

Civil Action No.: 3:08-1264  
Judge: \_\_\_\_\_

**NICHOLS CONSTRUCTION, L.L.C.,  
a Delaware limited liability company,**

**Defendant.**

**COMPLAINT**

COMES NOW the plaintiff, West Virginia-American Water Company, by and through its counsel, Mark E. Troy and the law firm of BAILEY & WYANT, PLLC, and for its Complaint against the defendant, Nichols Construction, L.L.C., alleges, avers and complains as follows:

**Parties, Venue and Jurisdiction**

1. That the plaintiff, West Virginia-American Water Company (hereinafter "WVAWC"), is and was at all times relevant a West Virginia corporation, licensed to do business in and doing business in the State of West Virginia, and having a principal place of business located in Charleston, Kanawha County, West Virginia. Accordingly, WVAWC may properly be characterized as a citizen of the State of West Virginia currently and at all times relevant. At all times relevant, WVAWC also owned and operated a water distribution system in Huntington, Cabell County, West Virginia and, as a component of that system, owned and operated a twenty-four inch (24") water main line located along Sixth Avenue in downtown Huntington.

2. That the defendant, Nichols Construction, L.L.C. (hereinafter “Nichols Construction”), is a Delaware limited liability company, licensed to do business and doing business in West Virginia, and having a principal place of business located at Route 627, Dry Fork Road, Vansant, VA 24656. Nichols Construction maintains as its registered agent for service of process in West Virginia, CT Corporation System, 707 Virginia Street, East, Charleston, WV 25301.

3. That on or about January 22, 2008, Nichols Construction, while performing excavation work relative to the installation of telecommunications conduit in the vicinity of 12<sup>th</sup> Street and Sixth Avenue in Huntington, Cabell County, West Virginia, dug into and ruptured WVAWC’s twenty-four inch (24”) water main line in said vicinity, causing WVAWC to incur damages for which it seeks a recovery herein. Such damages include but are not limited to main line repair costs totaling more than \$100,000.00, repair costs for adjacent lines which were damaged by increased pressure following the shut-down of the main line, purchases of replacement water for customers who lost potable water service, damages related to business interruption and loss of water revenues, annoyance, aggravation, inconvenience and other consequential and related damages.

4. That jurisdiction is proper in this Court under **28 U.S.C. § 1332** because the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between citizens of different states.

5. That venue is proper in this Court under **28 U.S.C. § 1391(a)** in that WVAWC resides in this district and a substantial part of the events or omissions giving rise to the claim occurred within this district.

**Facts**

6. That, on or about January 9, 2008, the defendant gave notice of its intent to perform the above-described excavation work to Miss Utility of West Virginia (hereinafter "Miss Utility"), and in said notice indicated that (1) it had marked its dig site in white paint and (2) indicated that the depth of its excavation work would extend to a depth of only thirty-six inches (36"). Moreover, the defendant provided the following additional information to utilities in the area, relative to its excavation work: "Site begins at the above inters[ection of 12<sup>th</sup> Street and 6<sup>th</sup> Avenue] and extends 187 ft. east on left side of rd. and from there extend [*sic*] south 80 ft. Mark everything within white painted areas to include the entire intersec[tion]."

7. That WVAWC received the above notice of the defendant, from Miss Utility on January 9, 2008, and on January 10, 2008, had the area described in the notice marked so as to identify WVAWC's utility lines intersecting and coming within two feet of the defendant's marked and described excavation work, as required by *W.Va. Code § 24C-1-3(d)*.

8. That on or about January 22, 2008, while using a directional boring device, the defendant went well below its stated depth of 36", as well as several feet south of the indicated direction of its dig, such that its directional boring device came into contact with and ruptured WVAWC's 24" water main located more than two feet horizontally from said indicated path, and buried roughly two feet below the stated maximum depth of the defendant's excavation work.

**Count I - Negligence**

9. WVAWC repeats and re-alleges the allegations of paragraphs 1 through 8, above, as if the same were set forth verbatim herein.

10. That the line rupture described above was caused by the defendant's following negligent acts, among others:

- a. Negligently failing to advise Miss Utility of the true depth, direction and location of its excavation work in the vicinity of 12<sup>th</sup> Street and 6<sup>th</sup> Avenue in Huntington, West Virginia;
- b. Negligently failing to properly mark its intended excavation work in the vicinity of 12<sup>th</sup> Street and 6<sup>th</sup> Avenue in Huntington, West Virginia such that WVAWC could ascertain the true depth, path and location of such work for purposes of marking/protecting its water main line; and/or
- c. Negligently operating its directional boring device such that said device deviated from the noticed path of the defendant's excavation work and penetrated WVAWC's 24" water main in the area.

11. That, as a direct and proximate result of the defendant's negligence, WVAWC suffered a ruptured 24" water main and resulting repair and other damages which exceed the minimum jurisdictional requirements of this Court, and for which WVAWC seeks a recovery herein.

**Count II - Violation of Statute**

12. WVAWC repeats and re-alleges the allegations of paragraphs 1 through 11, above, as if the same were set forth verbatim herein.

13. That the defendant's negligent acts, described above, constitute violations of the *West Virginia Underground Facilities Prevention Act*, i.e., *W.Va. Code § 24C-1-1, et seq.*

14. That as a direct and proximate result of the defendant's violation of the *Act*, and other wrongful acts described above, WVAWC suffered a ruptured 24" water main and resulting repair

and other damages which exceed the minimum jurisdictional requirements of this Court, and for which WVAWC seeks a recovery herein.

**Count III - Res Ipsa Loquitur**

15. WVAWC repeats and re-alleges the allegations of paragraphs 1 through 14, above, as if the same were set forth verbatim herein.

16. That the defendant should be held liable to the plaintiff under the evidentiary principle of *res ipsa loquitur*, to the extent that (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Simply put, there is and can be no dispute that the defendant dug into and ruptured the plaintiff's water main as a result of the defendant deviating from its noticed and/or intended excavation path, which conduct was solely carried out by the defendant and which conduct was within the scope of the defendant's duty to the plaintiff.

**Prayer**

**WHEREFORE**, the Plaintiff prays for judgment against the defendant in an amount that will fully compensate it for all damages it has incurred as a result of the defendant's negligent and otherwise wrongful omissions and commissions described above, including but not limited to all repair costs, purchases of replacement water for customers who lost potable water service, damages related to business interruption and loss of water revenues, annoyance, aggravation, inconvenience and other consequential and related damages, together with pre- and post-judgment interest, attorneys' fees and costs associated with this action, and all other relief this Honorable Court deems just and appropriate.

**THE PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL ISSUES TO TRIABLE.**

**WEST VIRGINIA-AMERICAN WATER COMPANY,  
By Counsel:**

/s/ Mark E. Troy

**MARK E. TROY, ESQ. (WV BAR NO. 6678)**

**BAILEY & WYANT, P.L.L.C.**

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