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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Juan Ortiz,

10 Plaintiff,

11 v.

12 Fluor Enterprises Incorporated, et al.,

13 Defendants.
14

No. CV-17-00325-TUC-JAS

ORDER

15 Pending before the Court are Defendants *AZZ Inc.*'s ("AZZ") and Atkinson
16 Industries, Inc.'s ("Atkinson") Motion to Dismiss Plaintiff's Second Amended Complaint
17 for Wrongful Death (Doc. 116) and Motion to Dismiss Cross-Claim by Jacobs Field
18 Services Americas, Inc. f/k/a Aker Kvaerner Industrial Contractors, Inc. (Doc. 112) and
19 Joint Defendants' Motion to Dismiss Complaint for Failure to Comply with A.R.S.
20 § 12-2602 (Doc. 130). All the motions have been fully briefed and are ripe for the Court's
21 consideration. (Docs. 118, 119, 123, 124, 132, 134.) Based on the following reasoning,
22 the Motion to Dismiss Plaintiff's Second Amended Complaint for Wrongful Death (Doc.
23 116) will be denied, and the Motion to Dismiss Cross-Claim by Jacobs Field Services
24 Americas, Inc. f/k/a Aker Kvaerner Industrial Contractors, Inc. (Doc. 112) will be
25 granted, in part, and denied, in part, and the Motion to Dismiss Complaint for Failure to
26 Comply with A.R.S. § 12-2602 (Doc. 130) will be granted, in part, and denied, in part.
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1 **Procedural History**

2 On April 5, 2017, Plaintiffs filed a complaint in the Arizona Superior Court in
3 Pima County for the wrongful death of Bryan Ortiz. (Doc. 1–3.) On July 11, 2017,
4 Defendant Aker Solutions Inc. removed this matter to this Court. (Doc. 1.) On April 5,
5 2018, Plaintiffs filed the First Amended Complaint. (Doc. 49.) Among other changes, the
6 First Amended Complaint added AZZ as a defendant. (Doc. 49.) On April 27, 2018, AZZ
7 represented to the Court that they had no involvement in this matter, but instead the
8 correct party was their subsidiary, Atkinson, (Doc. 58). This motion was later withdrawn
9 after a stipulation by the parties (Doc. 66). On May 7, 2018, the parties filed a stipulation
10 that Plaintiffs would disclose expert affidavits in compliance with A.R.S. § 12-2602(b)
11 by June 22, 2018. (Doc. 67.) The Court granted the parties’ stipulation. (Doc. 69.) On
12 June 22, 2018, Plaintiffs served a preliminary expert opinion affidavit to Defendants.
13 (Doc. 93.) Plaintiffs later served an amended expert affidavit. On June 22, 2018,
14 Plaintiffs filed the Second Amended Complaint, which added Atkinson as a defendant.
15 (Doc. 92.) The Second Amended Complaint alleges that AZZ and Atkinson both
16 engineered, designed, and constructed the solution extraction and electrowinning
17 substations. *Id.* at 3. Further, Plaintiffs allege that the design and construction of the
18 electrowinning substation was faulty, which caused the death of Bryan Ortiz. *Id.* at 7–8.
19 Aker Kvaerner filed an answer and cross-claim against AZZ, Atkinson, and Defendant
20 Beta Engineering L.L.C. (“Beta”), alleging a right of indemnity against the
21 cross-defendants. (Doc. 98).

22 **Legal Standard**

23 ***Failure to State a claim***

24 Rule 8 of the Federal Rules of Civil Procedure requires that a pleading contain a
25 “short and plain statement of the claim showing that the pleader is entitled to relief.”
26 Although detailed factual allegations are not required, a pleading must provide more than
27 “unadorned, the-defendant-unlawfully-harmed-me accusation[s].” *Ashcroft v. Iqbal*, 556
28 U.S. 662, 678 (2009). “Threadbare recitals of the elements of a cause of action, supported

1 by mere conclusory statements, do not suffice.” *Id.*

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
3 claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550
4 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual
5 content that allows the court to draw the reasonable inference that the defendant is liable
6 for the misconduct alleged.” *Id.* Merely being consistent with liability is insufficient. *Id.*

7 The Court may consider documents attached to the complaint, documents
8 incorporated by reference in the complaint, or matters of judicial notice without
9 converting the motion to dismiss into a motion for summary judgment. *United States v.*
10 *Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).

11 A party shall not be given leave to amend if amendment would be futile.
12 *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011).

13 ***Indemnification***

14 Arizona law states that common law indemnification requires that “the indemnity
15 plaintiff must show, first, it has discharged a legal obligation owed to a third party;
16 second, the indemnity defendant was also liable to the third party; and third, as between
17 itself and the defendant, the obligation should have been discharged by the [indemnity]
18 defendant.” *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 197 P.3d 758, 764 n. 2 (Ariz. Ct.
19 App. 2008); see *KnightBrook Ins. v. Payless Car Rental Sys. Inc.*, 409 P.3d 293, 295
20 (Ariz. 2018). Common law indemnity will only be provided to those who were only
21 passively or secondarily negligent. *Evans Withycombe, Inc. v. Western Innovations, Inc.*,
22 159 P.3d 547, 551 (Ariz. Ct. App. 2006). The right to indemnity accrues not based on
23 what a plaintiff has alleged, but instead once liability for a cause of action is established;
24 “the indemnitee is not required to make actual payment.” *INA, Ins. Co. of North America*
25 *v. Valley Forge Ins.*, 722 P.2d 975, 980 (Ariz. Ct. App. 1986). These claims may be
26 brought before they fully accrue as cross-claims or third-party claims. Fed. R. Civ. P. 13,
27 14; 16 Ariz. R. Civ. P. 13, 14; 1 THE LAW OF NEGLIGENCE IN ARIZONA § 15.04[5]
28 (2018).

1 A party may be vicariously liable for an independent contractor when “the
2 employer delegates performance of a special duty to an independent contractor and the
3 latter is negligent.” *Wiggs v. City of Phoenix*, 10 P.3d 625, 627 (Ariz. 2000) (en banc)
4 (quoting *Ft. Lowell-NSS Ltd. P’ship v. Kelly*, 800 P.2d 962, 967 (Ariz. 1990) (en banc)).
5 This special duty is often referred to as a non-delegable duty. *See id.* at 626–27.

6 “In Arizona, a common-law indemnity claim may be asserted by a contractor
7 against its subcontractors.” *Evans Withycombe, Inc.*, 159 P.3d at 553.

8 **A.R.S. § 12-2602**

9 Section 12-2602 of the Arizona Revised Statutes protects licensed professionals
10 from frivolous lawsuits. *Bertleson v. Sacks Tierney, P.A.*, 60 P.3d 703, 707 (Ariz. Ct.
11 App. 2002). It requires claimants bringing a claim against a “licensed professional,” as
12 defined by Section 12-2601(3) of the Arizona Revised Statutes to: certify if “expert
13 opinion testimony is necessary to prove the licensed professional’s standard of care or
14 liability for the claim,” and if expert opinion testimony is needed, the claimant must
15 provide a preliminary expert opinion affidavit containing the following information: “1.
16 The expert’s qualifications to express an opinion on the licensed professional’s standard
17 of care or liability for the claim. 2. The factual basis for each claim against a licensed
18 professional. 3. The licensed professional’s acts, errors or omissions that the expert
19 considers to be a violation of the applicable standard of care resulting in liability. 4. The
20 manner in which the licensed professional’s acts, errors or omissions caused or
21 contributed to the damages or other relief sought by the claimant.” A.R.S. 12-2602(A, B).
22 If the claimant fails to provide a preliminary expert opinion after the claimant has
23 certified that expert testimony is necessary or after the court has ordered the claimant to
24 file a preliminary expert affidavit then the court “shall dismiss the claim against the
25 licensed professional without prejudice” A.R.S. § 12-2602(E).

26 “The court may extend the time for compliance with this section on application
27 and good cause shown or by stipulation of the parties to the claim.” A.R.S. § 12-2602(C).

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1 **Discussion**

2 ***Motion to Dismiss Complaint for Failure to State a Claim***

3 Plaintiffs allege sufficient facts, when taken as true, to state a plausible claim.
4 First, Plaintiffs allege that AZZ and Atkinson undertook the task of engineering,
5 designing, and constructing the relevant facilities at the mine. (Doc. 92 at 3.) This
6 undertaking would clearly place a duty on them to conduct this task in a safe manner.
7 Plaintiffs allege that the walkways were not safe and that there were serious breaches on
8 the Defendants' duty and that those breaches caused the death of Bryan Ortiz. *Id.* at 7–8.
9 The Plaintiffs sufficiently gave notice of a plausible claim for wrongful death.

10 Atkinson further argues that the claim should be dismissed as untimely. (Doc. 116
11 at 11.) The parties agree that the applicable statute of limitations is A.R.S. § 12-542,
12 which states that claims for wrongful death shall be initiated within two years. (Doc. 116
13 at 4; *see* Doc. 118 at 5–6.) This means that the statute of limitations in this case expired
14 on April 10, 2018. The Plaintiffs assert that Rule 15(c)(1)(C) of the Federal Rules of
15 Civil Procedure permits the amendment to “relate back” to the previous pleading. (Doc.
16 118 at 5–6.) AZZ and Atkinson argue that Rule 15 does not allow for relation back for
17 two reasons: first, that Rule 15 does not apply when a party is added and not “changed,”
18 and second, Plaintiffs have failed to show that the decision to not initially include
19 Atkinson was a mistake. (Doc. 116 at 11.)

20 In *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498 (9th Cir. 1994), the plaintiff
21 did not include Pan Ocean in a complaint filed three days before the expiration of the
22 limitations period. *Id.* at 1500. The plaintiff did include Panobulk, which was Pan
23 Ocean's claims agent. *Id.* at 1503. They shared an attorney who defended against the
24 plaintiff's claims in the lawsuit. *Id.* In response to plaintiff's motion for summary
25 judgment, Panobulk asserted that Pan Ocean was the correct party. *Id.* at 1500. The
26 plaintiff moved to add Pan Ocean pursuant to 15(c), well after the statute of limitations
27 had expired. *Id.* The district court allowed the additional defendant and relation back
28 pursuant to Rule 15(c). *Id.* Pan Ocean appealed to the Ninth Circuit. *Id.* The notice

1 requirement was satisfied by serving Panobulk because there was “sufficient community
2 of interest” between the two parties. *Id.* at 1502–03. The mistake was evident by the
3 complaint erroneously asserting Panobulk’s relationship to the incident in question, that
4 the mistake was not pointed out to the plaintiff, and additionally, plaintiff’s counsel filed
5 an affidavit. *Id.* at 1503–04. The Ninth Circuit affirmed the motion to add Pan Ocean and
6 relate the amendment back to the original complaint. *Id.* at 1504.

7 Adding a party is implicated by Rule 15(c); Rule 15 does not require a change in
8 the party or party name as suggested by Atkinson. *See id.* at 1500. The Court believes
9 that Plaintiffs mistakenly omitted Atkinson because of a misunderstanding in the
10 relationship between AZZ and Atkinson. This belief is confirmed as when Plaintiffs were
11 informed of the mistake, they took efforts to correct it and amended the complaint to
12 include Atkinson in the litigation. (Doc. 92.) Finally, Atkinson does not assert that they
13 did not receive notice of the claims (Doc. 123 at 7) and the close relationship between
14 AZZ and Atkinson means that when Atkinson received notice when AZZ received notice,
15 *see Pan Ocean Shipping Co.*, 23 F.3d at 1503–04. The Second Amended Complaint
16 relates back to the First Amended Complaint, filed prior to the expiration of the statute of
17 limitations period.

18 Therefore, AZZ’s and Atkinson’s motion to dismiss for failure to state a claim
19 (Doc. 116) shall be denied.¹

20 AZZ and Atkinson have requested oral argument. (Doc. 116.) The Court finds that
21 oral argument would not aide the Court in its decision. The request for oral argument is
22 denied.

23 ***Motion to Dismiss Cross-Claims***

24 Cross-Claimant’s cross-claim is conclusory and contains some scrivener’s errors.

25 _____
26 ¹ The Court did not consider the attachments to AZZ’s and Atkinson’s motion to dismiss
27 for failure to state a claim (Doc. 116-1). The Court believes that it could consider such a
28 public record, as its reliability has yet to be questioned by either party. (See Doc. 116,
Doc. 118.) However, AZZ and Atkinson only included this item to argue that Plaintiffs
should not be allowed to amend. (Doc. 123 at 4–5.) As the Court does not need to
determine if leave to amend is appropriate, the document is irrelevant to the Court’s
determinations.

1 First, it appears that Cross-Claimant states that the Cross-Defendants have an obligation
2 to defend the Cross-Claimant,² but in the cause of action and the request for relief never
3 request that the Cross-Defendants defend them. In the Response to the Motion to
4 Dismiss, Cross-Claimant does not provide a legal basis as to why the Cross-Defendants
5 have a duty to provide a defense for the Cross-Claimant. *See INA, Ins. Co. of North*
6 *America v. Valley Forge Ins.*, 722 P.2d 975, 982 (Ariz. Ct. App. 1986) (“The duty to
7 defend, however, is not the same as the duty to indemnify.”) Therefore, to the extent that
8 the cross-claim is requesting that the Cross-Defendants defend the Cross-Claimant, it is
9 dismissed.

10 The Cross-Claimant is entitled the cause of action as “Common Law/Implied
11 Indemnity,” which the Cross-Claimant later states should have read “Common Law
12 Indemnity & Contribution.” (Doc. 119 at 7.) This creates confusion as to the origin of
13 Cross-Claimant’s allegations against the Cross-Defendants.

14 Once the conclusory statements are removed from the cross-complaint, the
15 relevant facts left are that Cross-Defendants performed work for the Cross-Claimant at
16 the mine where Bryan Ortiz died. (Doc. 98.) The Court is able to understand that
17 Cross-Claimant is being sued for wrongful death and that the Cross-Defendants, if they
18 were independent contractors, owed Cross-Claimant a duty to perform their work up to
19 particular standards. This is insufficient to state a claim for indemnity. The
20 Cross-Claimant must include allegations sufficient for the Court to understand that the
21 Cross-Claimant was not primarily negligent and that the delegated duty was a special or
22 non-delegable duty. The Cross-Claimant should also include sufficient facts to conclude
23 that the Cross-Defendants were in fact independent contractors. However, the Court is
24 not convinced that amendment would be futile and will allow amendment. Therefore, the
25 cross-claim by Aker Kvaerner will be dismissed with leave to amend as to AZZ and

26
27 ² This confusion is increased in paragraph 8 of the cross-claim, which reads that
28 “Cross-Defendant tenders the defense and requests indemnification from each
Cross-Defendant.” The Court believes that this sentence should have read
“Cross-Claimant tenders the defense and requests indemnification from each
Cross-Defendant.”

1 Atkinson.

2 AZZ and Atkinson requested attorneys' fees pursuant to A.R.S. § 12-341.01. First,
3 AZZ and Atkinson were not completely successful. Second, this award is within the
4 Court's discretion. The Court denies this request.

5 AZZ and Atkinson have requested oral argument. (Doc. 112.) The Court finds that
6 oral argument would not aide the Court in its decision. The request for oral argument is
7 denied.

8 ***Motion to Dismiss Complaint Due to A.R.S. § 12-2602***

9 As a preliminary matter, Plaintiffs assert that Defendants Fluor and Aker Kvaerner
10 have agreed to "drop out of the motion." (Doc. 132 at 2.) Defendants Fluor and Aker
11 Kvaerner have not contradicted that assertion and the time to do so has passed. Therefore,
12 as to Defendants Fluor and Aker Kvaerner the Motion to Dismiss Complaint due to
13 A.R.S. § 12-2602 is denied as moot.

14 As to AZZ and Atkinson, Plaintiffs argue that they are not "licensed
15 professionals" as defined by A.R.S. § 12-2601(3). Neither AZZ nor Atkinson has
16 presented any contradictory evidence or assertions. Therefore, AZZ and Atkinson have
17 waived any argument that they are licensed professionals as defined by A.R.S.
18 § 12-2601(3). *See United States v. Scott*, 705 F.3d 410, 415 (9th Cir. 2012); *Norwood v.*
19 *Vance*, 591 F.3d 1062, 1068 (9th Cir. 2010). Arizona Revised Statutes Section 12-2602
20 only protects "licensed professionals" as defined by A.R.S. § 12-2601(3). *See Macy's.*
21 *Inc. v. H & M Constr. Co.*, No. CV-17-009900-PHX-SPL, 2018 WL 1586752, at *3 (D.
22 Ariz. Mar. 31, 2018); *Bertleson v. Sacks Tierney, P.S.*, 60 P.3d 703, 704 n.1 (Ariz. Ct.
23 App. 2002). Therefore, as to AZZ and Atkinson the Motion to Dismiss Complaint due to
24 A.R.S. § 12-2602 is denied.

25 As to Beta, the preliminary expert affidavits have been insufficient. (*See Docs.*
26 *132-2, 132-3.*) They have failed to provide Beta's acts, errors, or omissions that violated
27 the applicable standard of care, Beta's standard of care or liability for the claim, or the
28 way in which Beta's actions caused the injury in this case. *Id.* Plaintiffs in this matter

1 have not complied with or moved to extend the deadline for compliance with Section 12-
2 2602 of Arizona Revised Statutes set by this Court after a stipulation by the parties.

3 Because there has been no motion to continue the deadline or actual compliance
4 with the deadline, the Motion to Dismiss Complaint due to A.R.S. § 12-2602 is granted
5 as to Beta and Beta is dismissed from the Second Amended Complaint.

6 Defendants have requested oral argument. (Doc. 130.) The Court finds that oral
7 argument would not aide the Court in its decision. The request for oral argument is
8 denied.

9 **Conclusion**

10 Based on the above reasoning,

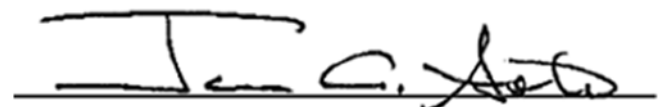
11 IT IS ORDERED that AZZ's and Atkinson's Motion to Dismiss Plaintiff's Second
12 Amended Complaint for Wrongful Death (Doc. 116) is denied.

13 IT IS FURTHER ORDERED that AZZ's and Atkinson's Motion to Dismiss
14 Cross-Claim by Jacobs Field Services Americas, Inc. f/k/a Aker Kvaerner Industrial
15 Contractors, Inc. (Doc. 112) is granted, in part, and denied, in part. Aker's cross-claim is
16 dismissed with leave to amend as to AZZ and Atkinson. AZZ's and Atkinson's request
17 for attorneys' fees (Doc. 112) is denied.

18 IT IS FURTHER ORDERED that the Joint Defendants' Motion to Dismiss
19 Complaint for Failure to Comply with A.R.S. § 12-2602 (Doc. 130) is denied, as to
20 Defendants Fluor, Aker Kvaerner, AZZ, and Atkinson, and granted, as to Defendant
21 Beta.

22 IT IS FURTHER ORDERED that the claims against Defendant Beta in the Second
23 Amended Complaint are dismissed without prejudice.

24 Dated this 30th day of November, 2018.

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26 

27 Honorable James A. Soto
28 United States District Judge