

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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OCT 26 2010
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

J.A. STREET & ASSOCIATES, INC.,
a corporation,

Petitioner,

v.

THUNDERING HERD DEVELOPMENT, LLC.,
a West Virginia limited liability company,
THD INVESTORS 7, LLC., a West Virginia
limited liability company, **S&ME, INC.,** a corporation,
CTL ENGINEERING OF WEST VIRGINIA, INC.,
a West Virginia corporation, and **BIZZACK, INC.,** a
foreign corporation;

Respondents.

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PETITION FOR APPEAL
FROM Orders of Circuit Judge F. Jane Husted
Entered September 28, 2010 and July 20, 2010
In Cabell County Circuit Court Case No. 03-C-490

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DESIGNATION OF RECORD ON APPEAL

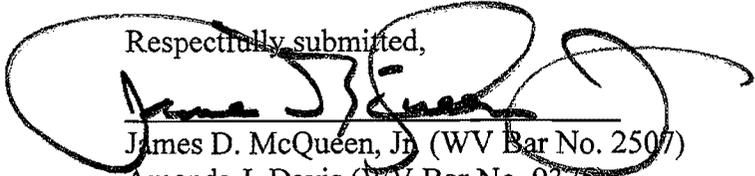
TO THE CLERK OF SAID COURT:

NOW COMES the Defendant J.A. Street, and submits this Designation of Record on Appeal, and requests that the following items be contained in the record of this appeal:

1. S&ME's Partial Motion to Dismiss, including exhibits
2. JA Street's Response to S&ME's Partial Motion to Dismiss, including exhibits
3. Order Granting S&ME's Partial Motion to Dismiss
4. JA Street's Rule 59 Motion to Alter or Amend, including exhibits
5. Order Granting in Part and Denying in Part JA Street's Rule 59 Motion to Alter or Amend
6. Docket Sheet
7. Hearing Transcript dated July 6, 2010
8. Hearing Transcript dated August 6, 2010
9. Deposition of JA Street, dated June 21, 2010.
10. Deposition Transcript of Jeff Harless, dated June 22, 2010.
11. Deposition Transcript of George Cross, dated June 23, 2010.
12. Exhibits for depositions in Thundering Herd v. S&ME, et. al.
13. Complaint
14. Amended Complaint
15. JA Street's Answer, Counterclaim and Crossclaim against S&ME.

WHEREFORE, Defendant J.A. Street respectfully requests that these matters be contained within the record of this appeal.

Respectfully submitted,



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I. The kind of proceeding and nature of the ruling in the lower court.

This case involves a construction dispute related to the development of the Merritt Creek Shopping Center that is located along Interstate 64, about one mile east of the Huntington Mall. The development includes a Target store, a Home Depot store, and numerous smaller retail outlets, some of which are contained in a building originally referred to as "Shops A," that is located on the lower or western edge of the development. This development was the subject of another suit in federal court, instituted by Target. While this case is somewhat complicated because of the technical nature of the dispute, the size of the development, and the number of parties involved, the issues presented on appeal relate solely to the statute of limitations applicable to Petitioner's amended cross-claim against S&ME.

The Petitioner appeals from the trial court's grant of partial summary judgment that extinguishes the Petitioner's amended cross-claim seeking recovery of remediation costs it occurred in 2003 to repair Shops A. Thundering Herd Development filed this suit in 2003 solely against S&ME and solely relating to claims arising from a slope failure adjacent to the Target Store that is located on the opposite end of the development, a significant distance from Shops A (sometimes referred to as Building A) upon which Petitioner's independent cross-claim against S&ME is principally based. On December 11, 2007, Thundering Herd Development amended the complaint to name Petitioner as a defendant, and to broaden the focus of the original complaint to areas beyond the Target slope failure, including Building A. On January 14, 2008, Petitioner filed its answer, counterclaim and a cross-claim against S&ME based on a negligence theory seeking, *inter alia*, to recover sums that it expended in an effort to remediate settlement or subsidence damage that was occurring with respect to Building A.

The lower court, in its ruling granting partial summary judgment to dismiss Petitioner's cross-claim, determined that, under Rule 54(b) of the West Virginia Rules of Civil Procedure, its ruling was a final judgment, to permit an appeal from the July 10, 2010 order and the September 28, 2010 order *nunc pro tunc*.

II. Standard of Review.

This Court applies a *de novo* standard of review of the trial court's grant of summary judgment and applies that same standard for granting summary judgment that a circuit court must apply. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); *Wetzel v. Employers Service Corp., of W.Va.*, 221 W.Va. 610, 656 S.E.2d 55 (2007). Under this standard, "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning facts is not desirable to clarify application of law." *Wetzel*, 656 S.E.2d at 59 (quoting Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)).

III. Statement of facts.

Petitioner, hereinafter "Street," asserts that the facts, as enumerated in the Circuit Court's Orders granting Respondent's Partial Motion for Summary Judgment, are incorrect and do not paint the full picture of the issues in question. Thundering Herd Development filed this case in 2003 solely against S&ME and solely relating to a claim arising from a slope failure adjacent to the Target store that is located on the opposite end of the development, a significant distance from Building A upon which Street's independent cross-claim against S&ME is principally based. On December 11, 2007 Thundering Herd Development amended the complaint in part to

name Street as another party defendant, and to broaden the focus of the original complaint's to areas beyond the Target slope failure, including Building A.

On January 14, 2008, Street filed its answer, counterclaim and first cross-claim against S&ME under a theory of negligence seeking, *inter alia*, to recover sums that it expended in an effort to remediate settlement or subsidence damage that was occurring with respect to Building A. This is one of the claims the lower court dismissed. S&ME argues that Street was first aware of the requisite elements of the claim in 2003. However, that characterization somewhat misses the point. S&ME points to a June 2, 2003 letter from J.A. Street, President of J.A. Street & Associates, to Leonard Lawson, Chairman of the Board of Bizzack. Bizzack was an earth moving contractor on the Merritt Creek Development and a subcontractor under Street's contract with THD. In that letter Mr. Street states "we have, and always will, stand up for our sub-contractors, as we have for Bizzack on this project, when they are not responsible, but it is hard for me to argue for you on the settlement when specifications and the soil reports require eight inch lifts and it was put in with two foot lifts." (*Exhibit 1 to Street's Response to S&ME's Partial Motion to Dismiss*).

Thus, S&ME claims that in 2003 Street understood the cause of the settlement to be Bizzack's actions or inactions which, it contends, is a failure of Bizzack to comply with the specifications. This failure, however, is not the factual basis for Street's claim against S&ME, and even if partially correct, does not apply to Street's claims against S&ME. Instead, it lends support to the conclusion that Street did not know, or have reason to know, of a significant problem with groundwater that is the basis for its claim against S&ME.

The factual basis for Street's claim against S&ME is a report authored by George Cross, a professional engineer at Foundation Systems Engineering, a consultant hired by THD to assess

the damage to Retail Building A and other areas of the development other than the Target slope failure, which Cross authored on **May 31, 2007**. He performed a geotechnical evaluation of the Merritt Creek Shopping Center for THD and offered recommendations to remediate damage at the Building A location. (*Mr. Cross's report was attached as Exhibit 2 to Street's Response to S&ME's Partial Motion to Dismiss*). The purpose of Mr. Cross' examination of the site was to address the building issues that became a major subject of the amended complaint filed in December, 2007. This report, authored just months before Street filed its cross-claim against S&ME, concluded,

“Review of the floor slab settlement information indicates that the building movement has been influenced by several factors including the depth of the soil, the areas of groundwater and lateral spreading of the fill soil under the building.” (Page 7)

Mr. Cross conducted several soil borings in the location of Shops A and found that significant groundwater was present on the site at several boring locations. The report, at Page 5, notes groundwater located at 36 feet and 25 feet at two test locations. In one of those tests, the water rose to 25 feet in just 15 minutes. This means that a hole was drilled and within 15 minutes the water had filled 25 feet of that hole. In another test boring location, water rose to 17 feet in only two hours. Mr. Cross observed the groundwater “slowly seeping” into another test location. He also noted that “a significant rate of groundwater flow was observed seeping into [two test locations] located at the toe of the field embankment along Merritt Creek Road.”

Noticeably absent from S&ME's initial geotechnical report in 2001, and recommendations it made for remediation of Shops A in 2003, is an analysis of how to deal with the presence of this significant groundwater. (*Exhibit A (sub-exhibit C), attached to S&ME's Partial Motion to Dismiss*). Street is claiming that S&ME negligently failed to investigate or to detect the groundwater under Building A that was not discovered until Mr. Cross's May 2007

report. Hence, S&ME is the target of J.A. Street's cross-claim in a broader context. The shale fill material, which S&ME recommended using, deteriorates when exposed to water, causing the fill material to spread laterally. As noted in S&ME's report, attached to S&ME's motion as Exhibit A, there is no discussion of groundwater or how to handle that groundwater or, importantly, the effect of that groundwater on the engineered fill material which S&ME recommends. Indeed, there was no boring done by S&ME in the vicinity of Retail Building A in order to evaluate the presence or effect of groundwater on the site. Even when S&ME did further boring in 2003 to assist Street in the design of the remediation of Retail Building A, there is no reference to the effect of groundwater as a contributing cause of the damage, perhaps to conceal S&ME's earlier omission.

Although Street maintains that the statute of limitations for its cross-claim against S&ME is statutorily tolled, if the discovery rule applies, there is ample testimony to create a genuine issue of material fact as to its application. In 2003, S&ME, a geotechnical engineering firm, was hired to evaluate the reasons and cause for settlement under the building A (sometimes referred to as "Shops A"). Jim Street testified that S&ME's work in 2003 revealed no problem with groundwater (*see* Street deposition, page 291, lines 2-10), and that his company's first notice of a major problem due to groundwater was the May 2007 report of Foundation Systems, Inc. Both Mr. Street and his site manager, Jeff Harless, testified that during construction of the pads, there were no problems with the presence of water and that they had to add water at times. (*See* Street deposition page 299, line 9-14, Harless deposition page 161, line 16-19). Mr. Street said there was no inkling of groundwater as an issue when Thundering Herd, S&ME, and J.A. Street were discussing settlement problems in the Shops A building during 2002 and 2003. (*See* Street

deposition, page 304, line 22-page 305, line 9). When he received recommendations from S&ME in 2003 as to how to fix the problem, no concern about groundwater was expressed.

The testimony of George Cross, a geotechnical engineer employed by Foundations System, Inc., in late 2006, to consult and evaluate the cause of the Shops A settlement, indicates that post construction monitoring in September 2006 was the first noted detection of groundwater in the Shops A area. (*See* Cross deposition, page 62, line 8-page 66, line 5). After describing how a geotechnical engineer can assess groundwater through the use of borings (*See* Cross deposition, page 26, line 23-page 27, line 8), he points out that he could find no prior borings or monitoring at the lower end of the development, where the Shops A building is located. In his own borings in May 2007, he found extensive groundwater flowing under Shops A. *See* Cross Report of May 2007, page 9, and Cross deposition, page 87, line 4.

Further, Cross testified that the settlement at Shops A was caused or heavily influenced by groundwater. (*See* Cross deposition pg. 94, line 22-page 95, line 15). He says that groundwater could have been addressed in the site construction methods if detected or known. (*See* Cross deposition, page 96, line 8-page 97, line 20). He believes that groundwater contributed to the settlement and continued deterioration under Shops A. (*See* Cross deposition, page 113, line 24- page 114, line 19). Cross found the groundwater under Shops A to be under pressure and to be an influence on building movement. (*See* Cross Deposition, page 139, line 20, and page 148, lines 4-21).

Thus, there is competing testimony not considered or referenced in the lower court's order granting partial summary judgment to dismiss J.A. Street's cross-claim against S&ME. Such testimony is sufficient to create a genuine issue of material fact on the question of when the statute of limitations begins to run on Street's cross-claim, if it is not tolled as a matter of law.

IV. Assignment of error.

1. West Virginia Code §55-2-21 tolled the running of the statute of limitations as to JA Street's claims against S&ME as a matter of law.
2. Issues relating to the discovery rule as a means of tolling the statute of limitations for a claim are factual in nature and not appropriate for decision on dispositive motion if there are genuine issues of material fact.

V. Discussion of law.

1. Pursuant to West Virginia Code §55-2-21, the statute of limitations was tolled as to J.A. Street.

The West Virginia Legislature has enacted laws designed to protect the counter-claims, cross claims and third-party claims of parties joined to litigation after the initial action was filed. Specifically, West Virginia Code §55-2-21 states:

→ § 55-2-21. Statutes of limitation tolled on claims assertable in civil actions when actions commence

After a civil action is commenced, the running of any statute of limitation shall be tolled for, and only for, the pendency of that civil action as to any claim which has been or may be asserted therein by counterclaim, whether compulsory or permissive, cross-claim or third-party complaint: Provided, that if any such permissive counterclaim would be barred but for the provisions of this section, such permissive counterclaim may be asserted only in the action tolling the statute of limitations under this section. This section shall be deemed to toll the running of any statute of limitation with respect to any claim for which the statute of limitation has not expired on the effective date of this section, but only for so long as the action tolling the statute of limitations is pending.

This statute is very clear and broadly unambiguous. It applies to “any statute of limitations . . . for the pendency of that civil action.” It specifically denotes a cross-claim as an

included claim within the statute. It expressly states that it “shall be deemed to toll the running of any statute of limitation with respect to any claim” Thus, as a matter of law, the above statute tolls that running of the statute of limitations as to Street’s cross-claim complaint against S&ME.

As a matter of common sense and fairness, the statute fits the circumstances of this case in an important and appropriate manner. The suit in this action was filed on June 9, 2003, which is less than two years after the September 21, 2001 slope failure initially giving rise to this litigation. It should be noted that the original complaint filed by THD made no reference whatsoever to damages derived from settlement at Building A, only to the slope failure at the Target Store located on the opposite end of the development, a significant distance from Building A. Street’s cross-claim against S&ME is related to problems with Building A, not the Target Store, and to the presence of previously undetected groundwater, a major contributing cause of damage that was unknown to Street or any other party before the May 2007 report of George Cross. Moreover, until the filing of the December 2007 amended complaint of THD, naming Street for the first time, there were no claims pending with reference to the Building A damage. Under Street’s theory of recovery, S&ME negligently failed to investigate and detect the presence or effect of significant groundwater under building A in 2003. Thus, Street did not have a good faith factual basis, as a general contractor, to state such a claim until May 2007.

The above-quoted statute does not need interpretation, but it appropriately applies to these circumstances in terms of a fair and equitable relationship to the claims Street was responding to in January 2008, when it filed the cross-claim in question.

1. Issues Relating to the Discovery Rule as a means of tolling of the Statute of Limitations for a Claim are Factual in Nature and Not Appropriate for Decision on Dispositive Motion if there are Genuine Issues of Material Fact.

The West Virginia Supreme Court of Appeals has held “in tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a cause or relation to the injury.” Syl. 4, *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

In this instance, Street was injured because it incurred significant expenses and costs in an effort to repair the Shops A area. The identity of the person, or entity, who owed a duty of care to Street was not known until May 2007, when George Cross authored his report. It is important to note that Street is not a geotechnical engineering firm; it is a general contractor. S&ME is a geotechnical engineering firm. As such, Street could not have known that groundwater was a significant contributing cause of the settlement until a geotechnical engineer examined it and reached an appropriate conclusion as to how to account for it in construction methods. Finally, until Cross’s report, Street could not have known that the conduct of S&ME was a major factor in causing it to incur these expenses. Indeed, S&ME contracted with Street in 2003 to consult and to assist in planning the fix of Building A, and S&ME did not then suggest to Street that there was a potential problem with groundwater or assist Street in designing a fix that accounted for the significant groundwater presence in the area of Building A, which is at the lowest elevation in the development and the area most likely to be harmed by surface and

subsurface water. Instead, S&ME blamed the settlement problems on Street's subcontractors who placed and tested the fill material.

The lower court focuses only on when it became apparent that something had gone wrong and made broad assumptions regarding Petitioner's duty to investigate the problem. (See Order, pg. 12). When it became apparent that there was a problem with Shops A, Petitioner contacted S&ME to investigate and determine a fix for the problem. Petitioner had every reason to believe that S&ME was competent to identify the problem and determine the fix for the problem. Upon receiving S&ME report, Street followed the recommendations for the repair, which S&ME had determined were caused by problems with the fill.

Clearly, most of the areas of inquiry pertinent to a statute of limitations defense in this case are factual in nature and must be resolved by the trier of fact. The West Virginia Supreme Court of Appeals recognized this fact at Syl. 5 *Dunn v. Rockwell*, 689 S.E.2d 255 (W. Va. 2009), which states:

A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the

resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.

Thus, the only legal decision is what statute of limitations applies. The remaining inquiries are factual. As such, the May 31, 2007 date on which Foundation Systems Engineering and George Cross prepared the report is the earliest date upon which the statute of limitations could begin to run. This is mere months before J.A. Street filed its cross-claim against S&ME for the expenses it incurred to follow the recommendations of S&ME to perform remedial work in 2003. The cross-claim was filed on January 14, 2008. This is well within the two year tort statutory limitation; indeed, it is well within one year. Accordingly, determining when J.A. Street knew, or by the exercise of reasonable diligence should have known, of the elements of its possible cause of action against S&ME is a factual question that should be directed to the jury, if at all. This inquiry is not a legal inquiry but a factual inquiry as to when Street knew, or should have known, of its cause of action against S&ME. This Court recently reaffirmed its position that statute of limitations issues are factual and present issues to be decided by the jury. Syl. Pt. 1, *Perrine v. E.I. Du Pont*, 225 W.V.a 482, 694 S.E.2d 815 (2010). Clearly, had Street derived information about the existence or severity of the groundwater problem from S&ME in 2003 when it conducted its remedial geotechnical analysis to assist in the fix of the Building A property, there would be a different factual and legal analysis, including consideration of the contract statute of limitations.

VI. Conclusion.

WHEREFORE, J.A. Street and Associates respectfully requests that this Court grant its petition for appeal and remand the case back to the Circuit Court with further instructions.

A large, stylized handwritten signature in black ink, appearing to read "James D. McQueen", is written over a horizontal line.

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PETITION FOR APPEAL
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CERTIFICATE OF SERVICE

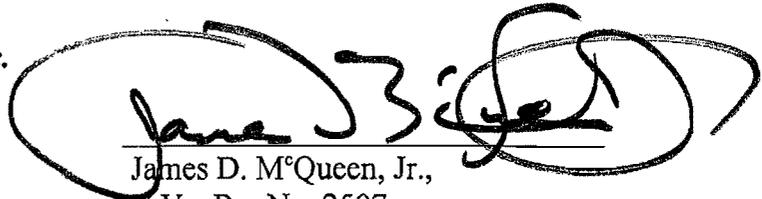
The undersigned, counsel for Petitioner, J.A. Street & Associates, Inc., hereby certifies that on the 1st day of October, 2010, the attached "Petition for Appeal" was mailed to the Clerk of the Circuit Court of Cabell County and to the counsel listed below:

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