

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

CASE NO: _____

v.

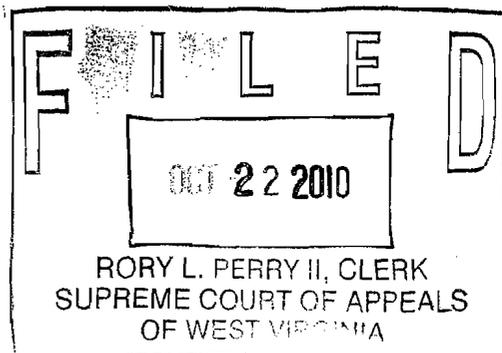
THUNDERING HERD DEVELOPMENT, LLC,
a West Virginia Limited Liability Company, and
THD INVESTORS 7, LLC., a West Virginia Limited Liability Company, and
S&ME, INC., a foreign corporation, and
CTL ENGINEERING OF WEST VIRGINIA, INC.,
a West Virginia Corporation, and
BIZZACK, INC., a foreign corporation,

Respondents.

BRIEF OF S&ME, INC., IN OPPOSITION TO PETITION FOR APPEAL
FILED BY J.A. STREET & ASSOCIATES, INC., TO ORDERS FILED
BY THE HONORABLE JUDGE F. JANE HUSTED ON JULY 20, 2010 AND
SEPTEMBER 28, 2010 IN CIRCUIT COURT OF CABELL COUNTY,
CIVIL ACTION NO. 03-C-490

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CIVIL ACTION NO. 03-C-490**

NOW COMES the Respondent S&ME, Inc. (“Respondent”), by counsel, Christopher D. Negley and Shuman McCuskey & Slicer, PLLC, and hereby files its Response in Opposition to the Petition for Appeal filed by J.A. Street & Associates, Inc. (“Petitioner”).

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

Petitioner’s appeal arises from a decision granting Summary Judgment to the Respondent’s Motion to Dismiss certain parts of a cross-claim asserted by Petitioner.¹ The trial Court, citing the statute of limitations contained in West Virginia Code § 55-2-12(c), ruled that portions of the Petitioner’s cross-claim were actually independent causes of action that Petitioner had knowledge

¹The case remains active and Petitioner received special dispensation to file the instant appeal.

of prior to filing the cross-claim.² Accordingly, these claims needed to be filed within the applicable statute of limitations.

While the Respondent generally refers the Court to the *Order Granting S & ME, Inc., 's Partial Motion to Dismiss Amended Cross Claims Asserted by J.A. Street & Associates, Inc.*, for a thorough review of the facts in this appeal, Respondent will briefly address the important facts that the trial Court believed dispositive of the issue.

Respondent provides engineering services. In early 2001 Respondent contracted with Thundering Herd Development, LLC (“THD”), to provide geotechnical services for a planned retail development in Barboursville, West Virginia. Thereafter, THD contracted with various other entities for site development and construction including Petitioner who was hired by THD to construct the site. Respondent had no duties involving construction or site development.

The site contains several sections. Of interest to this appeal is the portion known as “Shops A” which lies on the western section of the site. It is uncontroverted that in late 2002 evidence of settlement damage began appearing at the Shops A site.

Thereafter, THD requested that Respondent come back to the scene and assess the potential problem. A report was generated by the Respondent detailing its findings and conclusions.

Through the beginning of 2003 and into 2004 Petitioner and other contractors on the site attempted to address the problem through a series of meetings on the site regarding a potential fix. In fact, Petitioner began working on a repair in 2003.

²The portions of the cross-claim dealing with alleged indemnification and/or contribution are unaffected by the Court’s ruling.

On June 9, 2003, THD filed suit against the Respondent asserting claims of negligence and breach of contract. Respondent was the only named defendant.³ More than four years later, on December 11, 2007, THD filed an Amended Complaint naming both Respondent and Petitioner as defendants. Procedurally, both Petitioner and Respondent filed cross-claims against each other. Moreover, Petitioner has filed third-party complaints against other entities.

The initial cross-claim filed by Petitioner occurred on January 14, 2008. In its cross-claim the Petitioner sets forth several negligence causes of actions including a claim that Respondent negligently failed to identify potential ground water problems at Shops A. Moreover, the cross-claim sought specific damages for sums it expended to repair parts of the entire site unrelated to the Shops A section.

On December 8, 2009, the Petitioner filed its *Motion for Leave to Amend Cross Claims*. In this motion the Petitioner asserted monetary damages it spent repairing the Shops A portion of the development. It is this cross-claim that forms the instant appeal.

Respondent filed its Motion to Dismiss the cross-claim pursuant to West Virginia Code § 55-2-12(c) before the Circuit Court of Cabell County. Respondent argued that the statute of limitations applied to the cross-claim as clear evidence existed that Petitioner had knowledge of the problem in 2003 (or more than *six years* prior to instituting the cross-claim.) Moreover, Respondent argued that the cross-claim was, essentially, an independent claim for economic recovery since the property that was damaged was owned by THD and not by Respondent. Thus, the cross-claim did not arise from the underlying action. *See* W.Va. Rule of Civil Procedure 13(g).

³The suit asserted claims for the entirety of the development. However, for this appeal, the important area only involves the Shops A portion of the site. Also, a companion case was filed by Target Corporation, a retailer on the site in federal Court. That suit has been resolved.

In adopting the Respondent's argument, the trial Court focused both on the nature of the claim and when the claim matured. Here, the Court, relying on the evidentiary record before it, concluded that "by April, 2003, and at the latest, November 2003" the Petitioner "knew or should have known" that elements for a cause of action existed. Further, the trial Court found that the proposed cause of action was a "separate, independent" claim that arose at the THD development site and was thus unrelated to any indemnification and/or contribution claims that the Petitioner may have against the Respondent or other entities.

The Court then reviewed the matter pursuant to the *Dunn* discovery doctrine to see whether the claim should be tolled. *Dunn v. Rockwell*, 689 S.E.2d 255, 2009 W. Va. LEXIS 127 (W. Va. 2009). Initially, the Court noted that statute of limitations begins running for the plaintiff when it is obvious that something is "wrong." *McCoy v. Miller*, 213 W. Va. 161, 578 S.E.2d 355 (2003). Here, the record is replete with the evidence that the parties discussed the problem at Shops A in 2003 and, moreover, Petitioner even attempted to fix the problem during this time. Thus, the Court reasoned that the Petitioner was in possession of the relevant facts to determine whether a cause of action existed in 2003.

The Court then turned to the parts of the *Dunn* opinion regarding whether the Court should toll the running of the statute of limitations. The factors here involve "fraudulent concealment" and whether "some other" tolling doctrine applied. The trial Court quickly dismissed the former noting that even the Petitioner's filings do not allege fraudulent concealment.

For the latter the Court reviewed W.Va. Code § 55-2-21 which provides, *inter alia*, a tolling provision for all "cross-claims."

In rejecting Petitioner's argument that the code section applied to Petitioner's cross-claim, the Court held that the statute does not apply to any "independent" actions that are simply masquerading as cross-claims. Here, the evidence was clear that Petitioner's cause of action was separate and distinct from a cross-claim as contemplated by West Virginia law.

Applying the law to the facts, the Court found that Petitioner had knowledge of an independent action against the Respondent dating back to 2003. Thus, all such claims were time-barred under W.Va. Code § 55-2-12(c) after two years.

II. Standard of Review.

The Respondent agrees with Petitioner regarding the Standard of Review for the Court.

III. Facts.

The Respondent disagrees with the factual assertions made by the Petitioner in both substance and form. Regarding the substance of the fact section, Respondent specifically addresses that portion of the Petition stating that THD filed the initial 2003 suit against the Respondent "solely relating to the claim arising from the 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 located." Petition, page 2. The next sentence then states that THD's Amended Complaint then "broadened the focus" of the Complaint to Building A. Petition, pages 2 and 3.

The Respondent views this as significant because the statement incorrectly states that the original action filed by THD against the Respondent concerned only areas outside of Shops A. Such a statement then gives credence to the idea that Shops A became important only upon the filing of

the Amended Complaint in 2007, which is inside of the two-year statute of limitations found applicable to the cross-claim by the trial Court.

However, Petitioner's recitation of the time line is incorrect. Petitioner has designated the original Complaint before this Court. Counts I and II of the original Complaint do refer to the Target store area of the development which are outside of Shops A and is consistent with Petitioner's statement. However, the third cause of action in the Complaint is titled "Negligence, Remainder of Development" and specifically refers to problems associated with settling of fill material in other areas of the development. Complaint, ¶¶'s 31 through 36. Thus, the question of Shops A existed in the 2003 action.

As to the form of Petitioner's facts, this Court has held repeatedly that trial Courts receive deference to their fact finding and that this Court will only disturb those facts under most unusual circumstances.⁴

In the case at bar, the trial Court filed a twenty-page Order exhaustively detailing the factual history of the claim, the evidence submitted on behalf of the parties, and the legal arguments before it. It then applied those facts to the law and issued its final Order dismissing the cross-claim. Accordingly, under *Brown* this Court should refrain from "re-fact finding" as sought by the Petitioner. Rather it should rely on the factual findings made by the Circuit Court in determining whether to accept Petitioner's Petition.

⁴"The deference accorded to a circuit court sitting as fact finder may evaporate if upon review of its findings the appellate court determines that: (1) a relevant factor that should have been given significant weight is not considered; (2) all proper factors, and no improper factors, are considered, but the circuit court in weighing those factors commits an error of judgment; or (3) the circuit court failed to exercise any discretion at all in issuing its decision." Syl Pt. 1, *Brown v. Gobble*, 196 W.Va. 559, 474 S.E.2d 489 (1996).

IV. Argument.

A. THE COURT PROPERLY APPLIED WEST VIRGINIA CODE § 55-2-21, THE COURT WAS CORRECT IN DETERMINING THAT PETITIONER'S "CROSS-CLAIM" WAS, IN FACT, AN INDEPENDENT CLAIM SUBJECT TO THE STATUTE OF LIMITATIONS; ACCORDINGLY THE STATUTE DOES NOT APPLY AND THIS COURT SHOULD REJECT PETITIONER'S APPEAL

Petitioner is correct that West Virginia Code § 55-2-21 tolls the statute of limitations for cross-claims. However, Petitioner is incorrect that the statute "fits the circumstances" of this case and that its cross-claim must be allowed. Petition, pages 7 and 8. Rather, as the trial Court properly found, the claim filed against the Respondent may be have been styled a "cross-claim," it was not. Rather, it was independent cause of action that matured several years before it was filed.

This Court has held that it is a "fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used." *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 472 S.E.2d 411 (1996). Moreover, "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." Syllabus Point 1, *Miners in General Group v. Hix*, 123 W.Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee-Norse Co. v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982). Finally,

a statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908). See also *Davis Memorial Hospital v. West Virginia State Tax Commissioner*, 222 W.Va. 677, 671 S.E.2d 682 (2008).

In this case Petitioner would have the Court narrowly focus on the words “cross-claim” as opposed to the factual evidence supporting the trial Court’s decision. In doing so the Respondent notes that this is the Petitioner’s own doing as it chose to litigate its claim as a “cross-claim” long after the statute of limitations expired as to its cause of action against the Respondent.

The cases cited above stand for the proposition that words have both meaning and context. West Virginia Code Chapter 55, Article 2 does not define “cross-claim.” However, the term is covered in the West Virginia Rules of Civil Procedure wherein cross-claims are allowed when “arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein . . .” W. Va. R. C. Pr. 13(g).

In other words, cross-claims arise from dependent actions wherein one party may be liable to a second party should liability be found. That is the “common, ordinary and accepted meaning” and context for cross-claims. *Id.* Thus, cross-claims have no place in separate actions as is the case with the THD Development.

Accordingly, the trial Court was correct in looking past the term “cross-claim” and actually determining the true nature of the claim. Therefore, this Court should reject Petitioner’s Petition for Appeal.

B. NO QUESTION OF FACT EXISTS AS TO THE DISCOVERY RULE, THUS THE COURT WAS PROPER TO RULE UPON THE MOTION TO DISMISS AND THIS COURT SHOULD REJECT PETITIONER'S APPEAL

Petitioner's second argument involves the discovery rule as it pertains to the tolling of the statute of limitations. Here, Petitioner argues that a question of fact exists as to whether Petitioner had knowledge of its cause of action against Respondent.

"Statutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time; such statutes represent a statement of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power." Syl. Pt. 1, *Stevens v. Saunders*, 159 W. Va. 179, 220 S.E.2d 887 (1975). "The plaintiff or his attorney bears the responsibility to see that an action is properly and timely instituted." *Id.*, at Syl Pt. 4.

"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 causal relation to the injury." Syl. Pt. 4, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

"Under the discovery rule set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), whether a plaintiff "knows of" or "discovered" a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible

cause of action.” Syl. Pt. 4, *Dunn v. Rockwell*, 689 S.E.2d 255, 2009 W. Va. LEXIS 127 (W.Va. 2009). Lastly,

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.

Id., at Syl. Pt. 5.

Petitioner’s brief argues that it did not know of the potential for a cause of action until May of 2007 when it received a report from an expert opining that groundwater was causing settlement problems in Shops A area. This report, according to Petitioner, creates a question of fact as when Petitioner became aware of the problem.

The trial Court dismissed this argument and this Court should as well. Regardless of what the actual problem was, the record is clear that Petitioner was on notice of a problem as far back as 2003.

As noted by the Trial court, the *president* of Petitioner testified that he was personally aware of the settlement problem as early as April 22, 2003, when he reviewed a letter from his project

manager Pat Breeding attributing the problem to fill placement. Breeding testified the problem at Shops A was initially noticed in 2002 which is more than seven years before Petitioner filed its “cross-claim” for damages.

As the trial Court properly noted, Petitioner has its own duty to investigate when potential problems are noted. The Petitioner failed in that duty and this Court should not allow it to now claim ignorance that a cause of action existed.

As the *Dunn* Court reiterated “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)” *Id.*, Syl. Pt. 5.

Here, as the trial Court ruled, there can be no doubt that had the Petitioner actively investigated the settlement issue in 2002 or 2003, then it would have known whether the “elements of the possible cause of action existed at that time. The fact that an expert opined four years later as to causality cannot be construed as meaning the Petitioner had no knowledge of a “possible” cause of action under *Dunn* and *Gaither*.

Thus, the trial Court was correct in determining that no factual issue existed as to whether Petitioner had knowledge under *Dunn*. Accordingly, this Court should reject Petitioner’s Petition for Appeal.

VI. Conclusion.

WHEREFORE for the reasons in this Brief and for any other reason appearing to this Court Respondent S & ME Inc., hereby Prays for an Order rejecting the Appeal filed by Petitioner J.A. Street & Associates, Inc.

S & ME, INC.
By Counsel



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CERTIFICATE OF SERVICE

I, Christopher D. Negley, counsel for the Respondent, S & ME, Inc., do hereby certify that a true copy of the foregoing *Brief of S&Me, Inc., in Opposition to Petition for Appeal Filed by J.a. Street & Associates, Inc., to Orders Filed by the Honorable Judge F. Jane Husted on July 20, 2010 and September 28, 2010 in Circuit Court of Cabell County, Civil Action No. 03-C-490* was served upon the following by U. S. Mail, postage prepaid and addressed as follows:

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