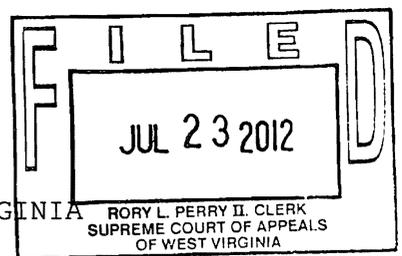


NO. 12-0203

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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CHARLESTON

---

JOHNNIE FLUKER, JR.,

Plaintiff,

v.

Civil Action No. 09-C-110

DAN CAVA, STEVEN HALL, SONNY NICHOLSON,  
AND DAN'S CAR WORLD, LLC, D/B/A  
DAN CAVA'S TOYOTA WORLD,

Defendants,

DAN CAVA, STEVEN HALL, AND  
DAN'S CAR WORLD, LLC, D/B/A  
DAN CAVA'S TOYOTA WORLD,

Third-Party Plaintiffs,

v.

NATIONAL UNION FIRE INSURANCE COMPANY  
OF PITTSBURGH, Pa.,

Third-Party Defendant.

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FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA  
HONORABLE DAVID R. JANES, JUDGE

---

**AMENDED BRIEF OF THE APPELLANTS, DAN CAVA, STEVEN HALL  
AND DAN'S CAR WORLD, LLC D/B/A DAN CAVA'S TOYOTA WORLD**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST  
VIRGINIA

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HONORABLE DAVID R. JANES, JUDGE

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**AMENDED BRIEF OF THE APPELLANTS, DAN CAVA, STEVEN HALL  
AND DAN'S CAR WORLD, LLC D/B/A DAN CAVA'S TOYOTA WORLD**

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST  
VIRGINIA

**I. Statement of the Kind of Proceeding  
and Nature of the Ruling Below**

On April 3, 2009, a civil action was instituted against the appellants alleging that the plaintiff was unlawfully discriminated against due to his race. Record at Page 00001. On June 23, 2010, the appellants filed a motion seeking leave to file a third-party complaint against the appellee based upon the refusal of the appellee to provide insurance coverage pursuant to an insurance policy purchased by the appellants from the appellee. Record at 00069.

On November 12, 2010 the circuit court granted the motion of the appellants for leave to file the third-party complaint. Record at 00080. The third-party complaint was subsequently promptly filed on December 2, 2010. Record at 00082.

On August 30, 2011, the appellee filed a motion for summary judgment asserting that certain claims asserted in the third-party complaint were barred by the statute of limitations in spite of West Virginia Code § 55-2-21 which tolls the running of any statute of limitations with respect to third-party complaints during the pendency of the underlying action. Record at 00093. Ignoring this statutory section, the circuit court, on January 3, 2012, granted the motion for summary judgment with respect to those claims against the appellee. It is from this Order that the appellants appeal. Record at 00210.

## **II. Assignments of Error**

The appellants, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, respectfully assert that the Circuit Court of Marion County, West Virginia, was wrong in refusing to apply West Virginia Code § 55-2-21 to toll any statute of limitations with respect to all of the allegations contained in the third-party complaint against the appellee. The circuit court's decision has the effect of multiplying legal proceedings and amounts to a waste of judicial economy.

## **III. Statement of Facts**

1. The appellee sold an employer's liability coverage policy to the appellants with an effective date of November 22, 2006. Coverage under this policy and renewals thereof were consistently purchased on behalf of the appellants up through and including the policy at issue in this action with an inception date of February 27, 2009, and an expiration date of February 27, 2010. Record at 00084.

2. The EEOC complaint filed on behalf of the plaintiff, Johnnie Fluker, Jr., was dismissed with a finding of no probable cause by the Equal Employment Opportunity Commission. Accordingly, there is no preclusive effect or other detriment suffered by the appellee as a consequence of any EEOC investigation. Record at 00084.

3. The motion to file the third-party complaint against the appellee was served on Jun 23, 2010. Record at 00069.

4. On November 12, 2010, the circuit court granted the appellants leave to file the third-party complaint which was subsequently filed on December 2, 2010. Record at 00080 and at 00082.

5. The appellants gave appropriate and proper notice of the institution of this civil action to the appellee, however, the appellee failed to take any action with respect to said notice, resulting in a judgment with respect to liability being entered against the appellants. Record at 00025.

6. The appellants, without any assistance from the appellee, filed a motion to vacate the judgment as to liability, which was subsequently granted by the circuit court. Record at 00093.

7. The appellee filed a motion for summary judgment asserting that the third-party complaint was not timely filed with respect to certain causes of action despite the pending notice for leave to file the third-party complaint.

#### **IV. Summary of Argument**

The circuit court incorrectly concluded that the third-party complaint filed by the appellants against the appellee was not tolled by the operation of West Virginia Code § 55-2-21. The circuit court took an unduly narrow view of West Virginia Code § 55-2-21 and this Court's decision in J. A. Street & Associates, Inc., v. Thundering Herd Development, LLC, 2011 WL 7431493 (W.Va.

Sup. Ct. 2011).<sup>1</sup> Accordingly, pursuant to West Virginia Code § 55-2-21 the third-party complaint and all allegations thereof was timely filed.

#### **V. Statement Regarding Oral Argument**

Pursuant to Rule 19(a), the appellants, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, believe that oral argument should be held in this case as it involves the error in the application of this Court's decision in J. A. Street & Associates, Inc., v. Thundering Herd Development, LLC, 2011 WL 7431493 (W.Va. Sup. Ct. 2011) and West Virginia Code § 55-2-21. Further, oral argument pursuant to Rule 19(a) is warranted, as this case involves a fairly narrow issue of law.

#### **VI. Points and Authorities**

##### **State Cases**

J.A. Street & Associates, Inc. v. Thundering Herd Development, LLC, 2011 WL .7431493 (W.Va. Sup. Ct. 2011)

Magnet Bank v. Barnett, 187 W.Va. 435, 419 S.E.2d 696 (1992)

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Wilt v. State Automobile Mutual Insurance Company, 203 W.Va. 165, 506 S.E.2d 608 (1998)

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<sup>1</sup> This opinion has been withdrawn from the bound volume, therefore, the WestLaw citation is being utilized.

## **Statutes and Regulations**

West Virginia Code § 55-2-21

## **Rules of Appellate Procedure**

West Virginia Rules of Appellate Procedure Rule 19(a)

## **Rules of Civil Procedure**

West Virginia Rules of Civil Procedure Rule 14

West Virginia Rules of Civil Procedure Rule 14(a)

## **VII. Discussion**

### **A. Standard of Review**

As the circuit court entered summary judgment in favor of the appellants, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, this Court's review is de novo. Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994). The circuit court in this action was incorrect in granting summary judgment, based upon a misapplication of the law.

### **B. The Circuit Court Incorrectly Applied West Virginia Code § 55-2-21 and Narrowly Construed the Decision of West Virginia Supreme Court of Appeals Improperly Refusing to Toll Certain Allegations of the Third-Party Complaint.**

The motion for summary judgment should have been denied as West Virginia Code §55-2-21 provides that any statute of limitation is tolled with respect to claims which may be asserted by third-party complaint after the filing of a civil action and during its

pendency. The motion to file the third-party complaint and the third-party complaint were filed during the pendency of the above-styled action. Record at 00069 and at 00082.

The appellee asserted that the statute of limitations with respect to the extra-contractual claims of the third-party complaint expired on November 16, 2010, however, the motion to file the third-party complaint was filed well before this date on June 23, 2010. Record at 00069. Accordingly, any statute of limitation with respect to the allegations of the third-party complaint were tolled and thus the third-party complaint was timely filed.

The appellee sold the employer's liability coverage policy at issue in this action to the appellants on or about November 22, 2006. Record at 00084. Coverage under this policy or renewals thereof were consistently purchased on behalf of the appellants up through and including the date of the allegations of the complaint. Record at 00084.

The motion to file a third-party complaint against the third-party defendant, National Union Fire Insurance Company of Pittsburgh Pennsylvania, was served on June 23, 2010. Record at 00069. On November 12, 2010 the circuit court granted the appellant leave to file the third-party complaint which was subsequently filed on December 2, 2010. Record at 00080.

The statute of limitations with respect to the claims asserted in the third-party complaint did not expire as this civil action is pending and the third-party complaint was filed during the pendency

of this action. West Virginia Code §55-2-21 provides as follows:

After a civil action is commenced, the running of any statute of limitations 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.

As the third-party complaint was filed during the pendency of the above-styled civil action any statute of limitations with respect to the third-party defendant was tolled by the operation of West Virginia Code §55-2-21. Accordingly, the motion for summary judgment should have been denied.

The circuit court relied upon two decisions of this Court in granting the motion for summary judgment. Those actions are Wilt v. State Automobile Mutual Insurance Company, 203 W.Va. 165, 506 S.E.2d 608 (1998) and Noland v. Virginia Insurance Reciprocal, 224 W.Va. 372, 686 S.E.2d 23 (2009). However, neither of those actions involved the filing of a third-party complaint during the pendency of the original action.<sup>2</sup>

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<sup>2</sup> Additionally, neither of these actions addressed the applicability of West Virginia Code § 55-2-21, which tolls any statute of limitations during the pendency of the original action for claims including those asserted by a third-party complaint.

This Court recently addressed this issue in J.A. Street & Associates, Inc. v. Thundering Herd Development, LLC, et al., 2011 WL 7431493 (W.Va. Sup. Ct. 2011) stating that the language of West Virginia Code § 55-2-21 is nondiscretionary, mandatory and clearly provides that during the pendency of a civil action the statute of limitations with respect to any "crossclaim" that has been or may be asserted therein is tolled.<sup>3</sup>

The third-party complaint at issue in this action was filed with leave of the circuit court. Record at 00080. Further, the appellee did not object to or move to dismiss the third-party complaint.<sup>4</sup> Record at 00302.

The circuit court granted leave to file the third-party complaint pursuant to Rule 14 of the West Virginia Rules of Civil Procedure. Record at 00080. Accordingly, the statute of limitations with respect to the allegations contained in the third-party complaint are tolled as a matter of law by the express, nondiscretionary and mandatory language of West Virginia Code § 55-2-21.

The reliance by the circuit court upon the language in J.A. Street, regarding a crossclaim is misplaced. The third-party complaint was properly before the circuit court and all of the

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<sup>3</sup> The decision in J.A. Street, involved whether the statute of limitations had expired with respect to a **crossclaim** asserted in that action as opposed to a third-party complaint at issue in this action.

<sup>4</sup> The motion for leave to file a third-party complaint was filed on June 23, 2010 well within the time period asserted by the third-party defendant to be the statute of limitations.

allegations contained in the third-party complaint revolved around the same operative facts. Record at 00084.

Those operative facts, include the following:

- (1) The allegations by the plaintiff that the appellants engaged in wrongful conduct towards the plaintiff;
- (2) The purchase by the appellants of insurance coverage from the appellee;
- (3) Whether or not the insurance coverage sold by the third-party defendant to the appellants provides coverage for the allegations asserted against the defendants by the plaintiff; and,
- (4) Whether the appellee engaged in wrongful conduct in refusing to defend or otherwise act appropriately with respect to the purchased insurance coverage.

All of these questions and assertions are raised by the complaint, the defenses of the defendants, the allegations of the third-party complaint and the defenses thereto by the appellee. Record at 00001; at 00009; at 00039; at 00050; at 00059; at 00084; and, at 00220.

The appellee did not assert that the third-party complaint was not appropriate pursuant to Rule 14 of the West Virginia Rules of Civil Procedure. Record at 00220. In fact, the appellee filed a counter-claim with respect to the third-party complaint seeking a declaratory judgment regarding the availability of insurance coverage. Record at 00220. Clearly, there is a logical relationship between all of the allegations of the third-party complaint and the allegations of the original complaint filed by the plaintiff.

Rule 14(a) of the West Virginia Rules of Civil Procedure, provides that a third-party plaintiff may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party complaint in this action falls precisely within the confines of this rule. Record at 00084.

This Court addressed Rule 14(a) of the West Virginia Rules of Civil Procedure in Magnet Bank v. Barnett, 187 W.Va. 435, 419 S.E.2d 696 (1992). In Magnet Bank, it was determined that a claim is defined transactionally and has nothing to do with the legal theory upon which a party relies. This Court further stated:

The fact that the third-party complaint may be based upon a different legal theory from the underlying case is irrelevant; the question is whether the assertion of liability against the third-party defendant is derivative of the same transaction, occurrence or nucleus of operative fact as the underlying claim by the plaintiff. If the transactional relatedness is present, impleader is proper even if the third-party complaint will be tried to the Court while the underlying action will be tried to a jury. In sum, it is clear that the remedial purpose of Rule 14 requires that it be interpreted liberally to promote its underlying purposes.

In Magnet Bank, the plaintiff sought to recover money borrowed by the defendants. The defendants filed a third-party complaint against an attorney who failed to properly record a lease which would have affected the liability of the defendants to the bank.

The circuit court reasoned that the original claim by the bank was to collect on a debt while the third-party claim centered on the theory of attorney malpractice in failing to record the lease and dismissed the third-party complaint. This Court reversed, finding a sufficient factual nexus to warrant the filing of a third-complaint pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure. In reaching this conclusion this Court reaffirmed the purpose of Rule 14(a) of the West Virginia Rules of Civil Procedure is to eliminate circuity of actions when the rights of all parties center upon a common factual situation.

This result was also reached in Walker v. Option One Mortgage Corporation, 220 W.Va. 660, 649 S.E.2d 223 (2007). In Walker, this Court stated that one of the primary goals of any system of justice is to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts. Accordingly, in Walker, this Court permitted the filing of a third-party complaint which would further the purpose of Rule 14 to eliminate circuity of actions when the rights of all three parties center upon a common factual situation.

In this action all the claims asserted originate from a common nucleus of fact, to-wit: the allegations of the plaintiff against the appellants.<sup>5</sup> The third-party complaint involves the claim by

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<sup>5</sup> It is important to note that the appellee did not seek to strike the third-party complaint, nor allege that the third-party complaint was inappropriate pursuant to Rule 14 of the West Virginia Rules of Civil Procedure. Record at 00220.

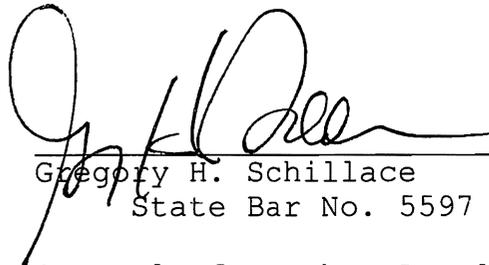
the appellants that there is insurance coverage for the claims of the plaintiff and that the insurance company did not act appropriately in its handling of this claim. Record at 00084. This matter clearly results from a common nucleus of fact.

Accordingly, as West Virginia Code § 55-2-21 is clear, nondiscretionary, and mandatory any statute of limitations with respect to claims of the appellants against the appellee involving the common nucleus of fact as alleged by the plaintiffs complaint were tolled. Accordingly, the circuit court erred in granting the motion for summary judgment.

#### **VIII. Conclusion**

Based upon the foregoing, the appellants, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World, respectfully requests that the January 3, 2012 Order of the Circuit Court of Marion County, West Virginia be reversed.

Dated this 20<sup>th</sup> day of July, 2012.



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Gregory H. Schillace  
State Bar No. 5597

Counsel for the Appellants, Dan Cava, Steven Hall and Dan's Car World, LLC d/b/a Dan Cava's Toyota World

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HONORABLE DAVID R. JANES, JUDGE

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**CERTIFICATE OF SERVICE**

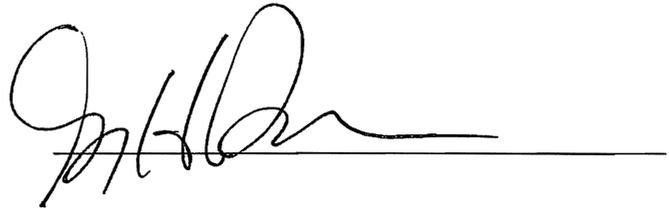
I hereby certify that on the 20<sup>th</sup> day of July, 2012, I served the foregoing **AMENDED BRIEF OF THE APPELLANTS, DAN CAVA, STEVEN HALL AND DAN'S CAR WORLD, LLC D/B/A DAN CAVA'S TOYOTA WORLD** upon all opposing parties by depositing a true copy thereof in the

United States mail, postage prepaid, in envelopes addressed as follows:

Katherine L. Dooley, Esquire  
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A handwritten signature in black ink, appearing to read "M. Nelson", is written over a horizontal line. The signature is fluid and cursive.