

FILED

November 18, 2011

released at 3:00 p.m.

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

Workman, Chief Justice, concurring, in part, and dissenting, in part:

I concur with the majority's holding that W. Va. Code § 55-2-21 (1981) (Repl. Vol. 2008) tolls the statute of limitation during a pending civil action as to any cross-claim that has been or may be asserted therein. I also concur with the new syllabus point created by the majority in this case which sets forth the factors to be considered in determining whether a cross-claim arises out of the same transaction or occurrence as the original action. I dissent, however, to the majority's decision to remand this case to the circuit court to determine whether the claims asserted by J. A. Street & Associates, Inc., ("Street") in December 2009 constitute cross-claims or independent causes of action. I would have applied the new test created by the majority in Syllabus Point 9 and concluded that as a matter of law, the claims asserted by Street in December 2009 are in fact cross-claims.

Upon review of the record, it is clear that the amended cross-claims asserted by Street on December 8, 2009, arise out of the same transaction as the original action. The allegations in both the original action and the amended cross-claims stem from the construction of the Merritt Creek Farms Development and, in particular, from the preliminary

geotechnical evaluation of the site that was prepared by S&ME, Inc. (“S&ME”). In that regard, the original action filed by Thundering Herd Development, L.L.C., (“THD”) alleged that S&ME had negligently provided recommendations with respect to the site preparation for the Target store location as well as the remainder of the development resulting in unanticipated settling of the fill material on certain portions of the property. Likewise, Street’s amended cross-claims alleged that S&ME negligently failed to perform a thorough, complete and competent geotechnical exploration and investigation of the construction site and that it negligently failed to discover the presence or effect of ground water resulting in the settling of the fill material at the Shops A site and causing Street to incur costs to repair the settlement damage.

Although this litigation was initiated in 2003, the plaintiff, THD, did not amend its complaint to assert a cause of action against Street until 2007. Until then, Street had no need or reason to initiate litigation of its own against S&ME. Given all the above, resolution of both the original action and the cross-claims will require consideration of the same facts and law. The same evidence will support or refute both the complaint and the cross-claims. Also, without question, there is a logical relationship between the original claim and the cross-claims.

Because the cross-claims asserted by Street clearly arise out the same transaction as the original action, there was no need for this Court to remand this case to the circuit court to make a determination on this issue. The circuit court's order granting S&ME's motion for partial summary judgment should have been reversed, and this case should have been remanded for further proceedings with a finding that the claims asserted by Street in December 2009 clearly are proper cross-claims that are not barred by the applicable statute of limitation pursuant to W. Va. Code § 55-2-21.

For the reasons set forth above, I concur, in part, and dissent, in part, to the majority's decision in this case. I am authorized to state that Justice Ketchum joins me in this separate opinion.