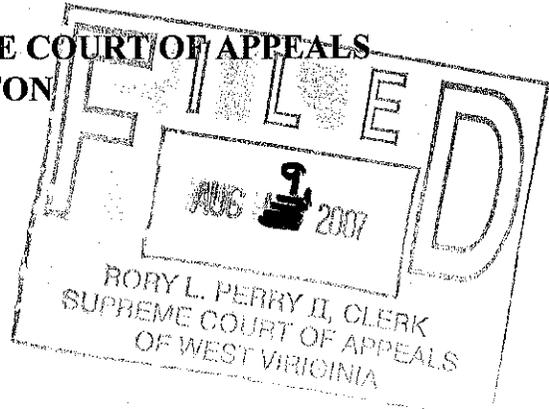


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
AT CHARLESTON**



**GREGORY J. MUTO, by
his Administrator and next friend,
LINDA MUTO, and
LINDA MUTO, his widow,
Plaintiffs,**

**S. Ct. No. 33506
Grant Co. Civil Case No. 06-C-51**

v.

**LARRY SCOTT, individually,
and
LARRY SCOTT, LTD. CO
and
LARADO CONSTRUCTION SALES, LLC.
and JOHN DOE CONTRACTORS,
ARCHITECTS, CONSULTANTS,
DESIGNERS AND ENGINEERS,
for: concrete work, construction, design
installation, excavation, and other aspects of
building and construction.
Defendants.**

BRIEF OF PLAINTIFF GREGORY J. MUTO

**JULIE GOWER ROMAIN
WV STATE BAR ID #5544
211 ADAMS STREET, SUITE 600
FAIRMONT, WV. 26554**

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Defendants.**

BRIEF OF GREGORY J. MUTO

ISSUE: Whether, where Plaintiffs originally filed their Complaint against John Doe contractors, architects, consultants, designers and engineers for concrete work, construction, design, installation, excavation, and other aspects of building and construction during the two years following injuries Gregory Muto received as a direct result of the improvement of real property, and thereafter amended his Complaint prior to any Answer by a Defendant, and within one hundred twenty days

of filing of the same, to include a specific Defendant who was a contractor for the construction and design of the improvement, a canal, the Plaintiffs' claims are barred by the two-year statute of limitations for personal injury or are timely made pursuant to the ten-year statute of repose set forth in West Virginia Code § 55-2-6a.

I. PROCEDURAL HISTORY

Linda Muto filed her Complaint in this action on June 28, 2006, setting forth claims against John Doe Defendants described as contractors, architects, consultants, designers and engineers for concrete work, construction, design, installation, excavation, and other aspects of building and construction. Thereafter, Plaintiff identified Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC as additional defendants. Plaintiffs amended their Complaint, adding Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC as additional Defendants, and retaining the John Doe Defendants, all prior to any service upon or Answer filed by a Defendant. (See Amended Complaint) Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC were served with the Amended Complaint within one hundred twenty (120) days of the filing of the original Complaint.(See Return of Service) Defendants filed their Motion To Dismiss made pursuant to *West Virginia Rule of Civil Procedure* Rule 12(b)(6) with the Circuit Court of Grant County. The Circuit Court of Grant County Granted

Defendants' Motion to Dismiss, applying the two-year statute of limitations for personal injury actions and finding that the Defendant had no notice of the filing of the Complaint within the two-year period following Plaintiffs' injuries. Plaintiff Linda Muto, the widow and Administrator of the estate of Plaintiff Gregory Muto timely filed her Petition for Appeal in this case on May 18, 2007. By Order entered July 10, 2007, the Court granted her Petition for Appeal. Linda Muto now submits her Brief in support of her Petition.

STATEMENT OF THE CASE

Plaintiff Gregory Muto, now deceased, and his wife, Linda Muto, were visitors at Smoke Hole Cabins on July 4, 2004. At that time, Smoke Hole Cabins, located in Grant County, West Virginia, was undergoing improvements and renovation and a ditch or canal, over six feet deep, over one hundred yards long, and bisecting the Smoke Hole Cabins property, was located on the premises. The said canal was ground level, unlit, and unenclosed, with no barriers or warnings. One bridge, lit only by the porch lights from cabins some twenty feet away, crossed the canal. Gregory Muto fell into the canal while attempting to cross the Smoke Hole Cabins property during the nighttime hours to visit friends in another cabin. Gregory Muto fractured his right knee, vertebrae T1, T2 and T3 and injured his hip, back,

hands and other parts of his body. Gregory Muto remained in the canal through the night, unable to escape due to his injuries.

On February 20, 2006, Plaintiffs filed their claim for negligence against Smoke Hole Cabins in Grant County Circuit Court Case No. 06-C-10. The Defendant in that matter was unwilling to provide pre-discovery identification of the contractors who had worked on, or were responsible for, the construction, design and condition of the canal. Plaintiffs therefore filed their John Doe Complaint in the instant case on June 28, 2006 and within the two-year statute of limitations for personal injury tort actions. Thereafter Plaintiffs, within five days of receipt of discovery responses identifying the Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC, as the persons or entities responsible for portions of the design, planning or construction of the canal, and prior to any Answer or response by a Defendant, amended their Complaint in the instant case to add the Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC. The Defendants were served with the Amended Complaint on October 3, 2006, and within the statutory 120 day period set by West Virginia Rule of Civil Procedure Rule 4(k).

Defendants thereafter filed their Motion To Dismiss, moving the Court to

dismiss Plaintiffs' Amended Complaint on two grounds. First, Defendants argued that they had no notice of Plaintiffs' claim within the two-year statute of limitations period applicable to torts and therefore, Plaintiffs did not meet their burden for amendment of the Complaint under West Virginia Rule of Civil Procedure Rule 15(c). Secondly, Defendants argued that because they had no notice of the Plaintiffs' claims within the two-year limitations period for personal injury claims, then dismissal pursuant to West Virginia Rule of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief may be granted applied.

Following oral argument held on January 9, 2007, the Circuit Court of Grant County, in its Order dated January 11, 2007, applied the four-prong test set forth in Syllabus Point 4, Brooks v. Isinghood, 213, W.Va. 675; 584 S. E. 2d 531 (2003) and found that: (1) Plaintiffs had asserted claims in their Amended Complaint identical to those set forth in the original Complaint; (2) Defendant did not receive notice of the filing of the original Complaint until served with the Amended Complaint; (3) The Defendants did not know that they would have been named in the original Complaint but for a mistake on the part of Plaintiffs; and (4) Defendants had notice of the case during the period provided for service of the Complaint and they should have been named as Defendants within the statutory period for filing of the original Complaint. The Court granted Defendants' Motion

to Dismiss, finding that Plaintiffs had made no mistake of fact or law in the filing of their original Complaint and had therefore not met their burden for relation back of amendments pursuant to West Virginia Rule of Civil Procedure Rule 15(c)(3). (See ORDER GRANTING DEFENDANTS' MOTION TO DISMISS) Plaintiffs now appeal the ORDER of the Circuit Court of Grant County on the basis that Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC were timely served with the Amended Complaint within the applicable ten-year statute of repose applicable to contractors and designers making improvements to real property.

STANDARD OF REVIEW

The Court's review of an order granting a motion to dismiss a complaint is de novo. "It is well-established that, "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770; 461 S.E.2d 516 (1995). Syl. pt. 1, Bradshaw v. Soulsby, 210 W.Va. 682; 558 S.E.2d 681 (2001)." Syllabus Point 1, King v. Heffernan, 214 W.Va. 835; 591 S.E.2d 761 (2003). This Court has also held that, "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syllabus Point 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138; 459 S.E.2d 415 (1995)." Roy v. D'Amato, 218 W. Va. 692; 629 S. E. 2d 751

(2006).

ARGUMENT

The issue involved in this appeal is whether amendment of a Complaint is timely made when certain Defendants were identified as “John Doe” in the original Complaint, additional named and identified Defendants were added in the amendment of the Complaint, and the harm or injury resulted from the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property or the defective or unsafe condition of any improvement to real property, which is subject to a ten-year statute of repose. Plaintiffs filed their Complaint in this case on June 28, 2006 and within the applicable two-year statute of limitations for personal injury claims. *West Virginia Code* § 55-2-12. Plaintiffs named as Defendants “John Doe Contractors, Architects, Consultants, Designers and Engineers for: concrete work, construction, design, installation, excavation, and other aspects of building and construction.” Prior to any responsive pleading or Answer by a Defendant, Plaintiffs amended their Complaint to also name Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC. in addition to the John Doe Defendants. *West Virginia Rule of Civil Procedure* Rule 15(a) provides:

“ A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served.” *Id.*

Without filing an Answer or responsive pleading, Defendants moved the Circuit Court to dismiss Plaintiffs’ Amended Complaint pursuant to West Virginia Rule of Civil Procedure Rule 12(b)(6) for failure to state a claim upon which relief may be granted. As a basis for their claim that Plaintiffs’ Complaint fails to state a claim upon which relief may be granted, Defendants assert that they had no notice of the filing of the original Complaint within the two-year period following the personal injury. *Defendants’ Motion To Dismiss*, ¶ 7. Plaintiffs argued that the Defendants were served with the Amended Complaint within the allotted time for service pursuant to *West Virginia Rule of Civil Procedure* Rule 4(k) and that any misidentification of the Defendants was a misnomer, and verbally argued at the hearing of Defendants’ Motion that the harm to the Plaintiff Gregory Muto was not only foreseeable but probable, and that the applicable statute of repose for Defendants who have engaged in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property is ten years pursuant to West Virginia Code § 55-2-6a. The Court granted Defendants’ motion on the basis that the Defendants had no notice of the Complaint

within the two-year tort statute of limitations period and because Defendants did not know that they had been named in the original Complaint. However, the Court failed to apply the applicable statute for claims against persons or entities who have engaged in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property set forth in West Virginia Code § 55-2-6a.

Plaintiffs filed their claims against John Doe Contractors, Architects, Consultants, Designers and Engineers within the two-year statute of limitations for torts set forth in *West Virginia Code* § 55-2-12. Thereafter, Plaintiffs amended their Complaint. Plaintiffs did not substitute Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC. for the John Doe Defendants, but merely added the Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC. as parties Defendant to Plaintiffs' Amended Complaint. The original John Doe Defendants remained as parties to the action. (following filing of the Plaintiffs' Amended Complaint, the Circuit Court changed the style of the case in it's ORDER granting the Defendant's motion to dismiss, omitting Plaintiffs' continued inclusion of the John Doe Defendants.) Therefore, Plaintiffs' Complaint against the original John Doe Defendants was timely filed. The Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC were additionally named in the

Amended Complaint, which was filed within ten years of the injuries received by Plaintiff Gregory Muto as a result of, and during the construction of, the improvements to the Smoke Hole Cabins property.

West Virginia Rule of Civil Procedure Rule 15(c) regarding relation back of amendments provides:

“ An amendment of a pleading relates back to the date of the original pleading when:

(1) relation back is permitted by the law that provides that the statute of limitations applicable to the action; or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing paragraph (2) is satisfied and, within the period provided by Rule 4(k) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identify of the proper party, the action would have (sic) brought against the party. Id.

Plaintiffs' Amended Complaint should relate back to the time of filing of the original Complaint, as the original Complaint was filed within the two-year statute

of limitations for torts and the Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC were named in the Amended Complaint during the applicable statute of repose. The applicable statute of repose for claims against contractors, designers, architects and the like is set forth in *West Virginia Code* § 55-2-6a, which provides:

“No action whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, or, to recover damages for any injury to real or personal property, or, for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, may be brought more than ten years after the performance or furnishing of such services or construction: Provided, That the above period shall be tolled according to the provisions of section twenty-one (§ 55-2-21) of this article. The period of limitations provided in this section shall not commence until the improvement to the real property in question has been occupied or accepted by the owner of real property, whichever comes first.” *Id.*

This Court has consistently applied the ten-year statute of repose to personal injuries sustained as a result of the improvements to real property. In Louk v. Isuzu Motors, 198 W. Va. 250, 260; 479 S. E. 2d 911,921 (1996) the Court applied the ten year statute of repose to a claim for injuries sustained as a result of the improvement of a roadway, stating: “We note that W.Va. Code § 55-2-6a (1983)

limits actions for the "planning, design, surveying, observation or supervision of any construction" of improvements to real property to ten years, with certain exceptions. While we leave to another day the further definition of "reasonable length of time" within the context of a Sewell type case, we hold that an action for the negligent planning and design of an access road to lead from a business location to a highway, with resulting encroachment on the public way, is subject to the limitation of actions provisions of W.Va. Code § 55-2-6a." *Id.* Furthermore, "(T)his Court has indicated that the purpose of this statutory enactment was to set an arbitrary time period after which no action, whether in contract or tort, may be initiated against architects and builders. The Court has also indicated that pre-existing statute of limitations for both contract and tort actions continued to operate within the outside limits set by the statute. See Gibson v. West Virginia Department of Highways, 185 W. Va. 214;406 S.E.2d 440 (1991), and Shirkey v. Mackey, 184 W. Va. 157; 399 S.E.2d 868 (1990)." Thomas v. Gray Lumber Company, 199 W. Va. 556, 563; 486 S. E. 2d 142,149(1997). The ten-year statute of repose applicable to "architects and builders" is applicable to Plaintiffs' claims against the Larry Scott defendants. "Commonly referred to as an "architects and builders statute," W.Va. Code § 55-2-6a limits the time within which actions can be brought against architects, engineers, and others in the construction industry who are responsible for "the planning, design, surveying, observation or supervision of any construction or the

actual construction of any improvement to real property." Basham v. General Shale, 180 W.Va. 526; 377 S.E.2d 830, 833 (1988). Specifically, the statute provides, in part, that "no action, whether in contract or in tort, for indemnity or otherwise . . . may be brought more than ten years after the performance or furnishing of such services or construction." Shirkey v. Mackey, 184 W. Va. 157, 159-169; 399 S. E. 2d 868, 869-870 (1990). In Gibson v. West Virginia Department of Highways, 185 W. Va. 214; 406 S.E.2d 440 (1991), the Court further clarified the differences between a statute of limitations and a statute of repose. The Court explained that "A 'statute of repose' differs from a 'statute of limitations.' Generally, the time limitation in the latter begins to run when the cause of action accrues. The time limitation in a statute of repose, however, 'begins to run from the occurrence of an event unrelated to the accrual of a cause of action.' School Bd. of the City of Norfolk v. U.S. Gypsum, 234 Va. 32, 37, 360 S.E.2d 325, 327 (1987) . Furthermore, the expiration of the time extinguishes 'not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued.' Id. at 37, 360 S.E.2d at 327-28." Gibson v. West Virginia Department of Highways, 185 W. Va. 214, 217; 406 S.E.2d 440 442-443 (1991). And the Court concluded that "Briefly summarized, W. Va. Code, 55-2-6a, limits the time period in which a suit may be filed for deficiencies in the planning, design, or supervision of construction of an improvement to real property to ten years. This period commences

on the date the improvement is occupied or accepted by the owner of the real property, whichever occurs first. Id. at 217 and 443. Wherefore, Plaintiffs in the instant matter filed their Amended Complaint within the applicable time to bring claims against these Defendants.

At the hearing of this matter, counsel for the Plaintiffs advised the Court of the applicable statute of repose regarding improvement to real property and stated:

“Your Honor, Rule 55, and I will be glad to get the precise cite for the Court, Your Honor. But Rule 55, regarding the improvement to real property, states that a defendant who has engaged in the construction or improvement of real property, which this certainly was, and because of those improvements, there has been an injury, which there is, is not disputed here, then the period of repose is ten years. And our Court certainly intended that people who provide construction, architecture and other support in the construction of improvements to real property be subject to being brought in within that ten year period.” (See *Hearing Transcript P. 22*)

Counsel further argued:

“ Your Honor, our Court has talked about in other cases, when the

Defendant pled surprise, our Court has talked about whether or not the type of injuries sustained were foreseeable. We're talking about a six, probably a ditch which is six foot wide by six foot deep. I know that my client, my six foot client, standing in it, it was over his head. Level to the ground. No barrier. In a recreation area. Certainly I would think utilized by both families and small children, on a holiday weekend. I don't think at that point, Your Honor, the risk of harm is beyond foreseeable. I think we're into the realm that it is probable. It just happened to occur with my client." (*See Hearing Transcript p. 24.*)

Finally, counsel for the Plaintiffs advised the Court of the statutory cite and stated:

"Your Honor, that statute would be West Virginia Code Section 55-2-6(a). And I have a copy available, Your Honor, if I'll be glad to provide to the Court, if you would like to review it now."

"That statute provides, Your Honor, that, it addresses deficiencies, injuries or wrongful death resulting from improvements to real property, limitations of actions in suits, and states that:

“No action, whether in contract or tort, for indemnity or otherwise, nor for contribution or indemnity to recovery damages, for any deficiencies in the construction...” and all that. “...or to recover damages for any injury to real or personal or for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, may be brought more than ten years after the performance or furnishing of such services or construction.”

“And it states, Your Honor, that the statute is applicable:

“...to persons who participated in the planning, design, surveying, observation, supervisor or construction of those improvements.” (*See Hearing Transcript p. 28.*)

Therefore, upon application of the proper statute of limitations or statute of repose, Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC had notice of the Plaintiffs’ claims against them during the applicable time for bringing claims against these Defendants and Plaintiffs have met the requirements of *West Virginia Rule of Civil Procedure* Rule 15(c). Although thoroughly considered by the Defendants, the Court, and the Plaintiffs, this Court’s prior holding in Brooks v. Isinghood, 213 W. Va. 675; 584 S. E. 2d 531 (2003) does not apply to the facts in the instant matter, as it addressed amendment of the

Complaint after running of the applicable statute of limitations, and following the time within which claims could have been brought against defendants in that case. Plaintiffs filed their claims against the John Doe Defendants, whom Plaintiffs have treated, for the purposes of their Amended Complaint, as entities separate and apart from Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC, within the two-year statute of limitations for personal injury claims. Thereafter, and within the ten-year statute for claims against improvers of real property, Plaintiffs added the Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC. The Defendants were served with the Amended Complaint within the 120 days following filing of the original Complaint and within the ten years allowed for claims against these Defendants. Even applying the Court's summarization of the application of Rule 15(c)(3) set forth in the Brooks opinion, where the Court stated: "We therefore hold that under the 1998 amendments to Rule 15(c)(3), before a Plaintiff may amend a complaint to add a new defendant, it must be established that the newly-added defendant (1) received notice of the original action and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the newly-added defendant, prior to the running of the statute of limitation or within the period prescribed for service of the summons and complaint, whichever is greater. To the extent that *Maxwell v. Eastern Associated Coal Corp.* conflicts with this holding it

is hereby modified.”, the Amended Complaint in this matter was timely filed and served. *Id.* at 547. At the hearing of this matter, counsel for Plaintiffs argued that as the Defendants had been served with the Amended Complaint, the Defendants were on notice of filing of the original Complaint. And, because the Amended Complaint was served upon the Defendants within the 120 days following filing of the original Complaint, the action has been brought against the newly named Defendants within the period prescribed for service of the summons and Complaint. Therefore, Plaintiffs should be allowed to proceed with their claims against Defendants Larry Scott, Larry Scott LTD. CO. and Laredo Construction Sales, LLC.

CONCLUSION

Plaintiffs have filed their claims against the John Doe Defendants within the two-year statute of limitations for personal injury claims and against the instant Defendants for injuries related to the improvement of real property during the applicable ten-year statute of repose set forth in West Virginia Code § 55-2-6a. The Court has dismissed Plaintiffs’ claims pursuant to *West Virginia Rule of Civil Procedure* Rule 12(b)(6). “A fundamental precept governing the review of a motion to dismiss a complaint for failure to state a cause of action is set forth in Syllabus

Point 3 of Chapman v. Kane Transfer Company, Inc., 160 W. Va. 530; 236 S.E.2d 207 (1977). That Syllabus Point states: "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." See also, John W. Lodge Distributing Company, Inc. v. Texaco, Inc., 161 W. Va. 603; 245 S.E.2d 157 (1978); Mandolidis v. Elkins Industries, Inc., 161 W. Va. 695; 246 S.E.2d 907 (1978); and Chapman v. Kane Transfer Company, Inc., supra." Coberly v. Coberly, 213 W. Va. 236, 238; 580 S. E. 2d 515, 517 (2003). Furthermore, " ...Rule 15, by its own terms, it to be construed liberally in order to promote the consideration of claims on their merits. Rule 15(a) states that leave to amend a complaint should be "freely given when justice so requires," and we have held that amendments to pleadings should rarely be denied. " The purpose of this policy is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments". Brooks v. Isinghood, 213 W. Va. 675; 584 S. E. 2d 531, 540 (2003). " The goal behind Rule 15, as with all the Rules of Civil Procedure, is to insure that cases and controversies be determined upon their merits and not upon legal technicalities or procedural niceties." Id. As the Plaintiffs filed their Amended Complaint in this matter prior to the expiration of the ten-year statute of repose for " architects and builders" it has been timely filed and the dismissal

should be reversed.

PRAYER FOR RELIEF

Wherefore, based upon this Court's application of Rule 15, and West Virginia Code § 55-2-6a, Plaintiffs' pray their Amended Complaint should stand, the Defendants be caused to answer for Plaintiffs' claims against them, and the dismissal of Plaintiffs' action be reversed and remanded to the Circuit Court of Grant County, West Virginia.

Respectfully submitted,
Gregory Muto, by his Administrator
and next friend, Linda Muto, and
Linda Muto, his widow, Plaintiffs
By counsel,



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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
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GREGORY J. MUTO, by
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LINDA MUTO, and
LINDA MUTO, his widow,
Plaintiffs,

S. Ct. No.
Grant Co. Civil Case No. 06-C-51

v.

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and
LARADO CONSTRUCTION SALES, LLC.
and JOHN DOE CONTRACTORS,
ARCHITECTS, CONSULTANTS,
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for: concrete work, construction, design
installation, excavation, and other aspects of
building and construction.
Defendants.

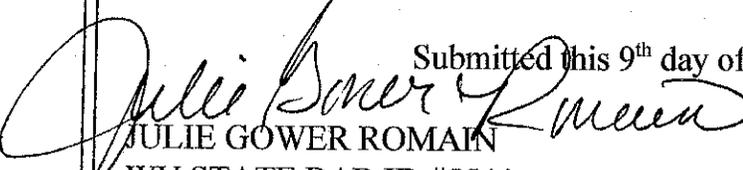
CERTIFICATE OF SERVICE

I, Julie Gower Romain, counsel for the Plaintiffs, certify that I have this 9th day of August, 2007, served upon counsel for the Defendants a true and accurate copy of: BRIEF OF GREGORY MUTO by depositing the same in the United States Mail with sufficient postage attached thereto and addressed to:

Michael D. Lorenson
Bowles Rice McDavid Graff & Love LLP

PO Drawer 1419
101 South Queen Street
Martinsburg, WV. 25401

Submitted this 9th day of August, 2007.


JULIE GOWER ROMAIN

WV STATE BAR ID #5544

211 ADAMS STREET, SUITE 600

FAIRMONT, WV. 26554

IN THE CIRCUIT COURT OF GRANT COUNTY, WEST VIRGINIA

GREGORY J. MUTO, by
his Administrator and next friend,
LINDA MUTO
and LINDA MUTO, his widow
Plaintiffs,

v.

Civil Case No. 06-C-51

LARRY SCOTT, Individually,
and
L. SCOTT LTD. CO.
and
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and
JOHN DOE CONTRACTORS,
ARCHITECTS, CONSULTANTS,
DESIGNERS AND ENGINEERS
for: concrete work, construction, design
installation, excavation, and other aspects of
building and construction
Defendants.

AMENDED COMPLAINT

Now come the Plaintiffs, the estate of Gregory J. Muto by his Administrator and next friend and widow, and Linda Muto, and Linda Muto, individually and state and complain as follows:

1. Gregory Muto was a resident of Harrison County, West Virginia, residing at 711 1/2 Duff Avenue, Clarksburg, Harrison County, West Virginia. Plaintiff Linda Muto is also a resident of Harrison County, West Virginia.
2. Smoke Hole Cavern, Inc., located at Highway 55, HC 59, Box 39, Seneca Rocks, West Virginia, 26884, owns and operates Smoke Hole Log Cabins, located in Grant

County, West Virginia.

3. Defendant Larry Scott is an individual who provided construction services at the Smoke Hole Log Cabins facility, having an address of HC 33, Box 922, Petersburg, West Virginia, 26847.
4. Defendant L. Scott Ltd. Co. is a West Virginia company which provided construction services at the Smoke Hole Log Cabins facility, having an address of HC 33, Box 922, Petersburg, West Virginia, 26847.
5. Defendant Larado Construction Sales, LLC. is a West Virginia company which provided construction services at the Smoke Hole Log Cabins facility, having an address of HC 33, Box 922, Petersburg, West Virginia, 26847.
6. On or about the 4th day of July, 2004, Gregory Muto and his wife, Linda Muto leased a cabin located at Smoke Hole Log Cabins in Grant County, West Virginia.
7. Friends and acquaintances of Plaintiffs also rented a cabin at Smoke Hole Cabins.
8. On July 4, 2004, there existed a manmade dry ditch or waterway, over six feet deep, with walls lined by cement blocks with a bottom of concrete which bisected the Smoke Hole Cabins property, some cabins being located on either side of the dry ditch or waterway.
9. On or about July 4, 2004, all but the very end borders of the ditch were open with no barriers, and nearly level with the surrounding ground, but for a bridge, midway said ditch, which crossed the bisected property.
10. The area surrounding the ditch had no lighting and the only lighting available was the small porch light bulbs on the cabins themselves, some ten to twenty feet away.

11. Gregory Muto, while traversing the property to visit another cabin during the nighttime hours, and near the area of a bridge crossing the ditch or waterway, fell into the said unenclosed ditch or waterway, suffering injury to his knee, hip, back, hands and other body parts and specifically receiving a fracture of vertebrae T1, T2, and T3 and his right knee.

12. Gregory Muto remained in said ditch or waterway, unable to escape, until he was discovered during the early morning hours of July 4, 2004.

13. Defendants are those individuals who engaged in the construction of the dry ditch or waterway and charged with assuring that the construction of the dry ditch or waterway was carried out and maintained in such a manner as to prevent injury to the public and visitors to Smoke Hole Log Cabins.

COUNT I

Plaintiffs restate those paragraphs set forth above and further state:

14. Defendant(s) are those persons and entities engaged in the construction, installation, concrete work, design, excavation, and other aspects of the construction and installation of the ditch, waterway, or canal.

15. Plaintiffs, and particularly Plaintiff Gregory Muto, were engaged in a reasonable use of said family recreational area when injured.

16. The ditch or waterway dissecting the family recreational area, level to the ground, having only one unlit bridge as a means to traverse the waterway, and unprotected by a railing or other barrier, represented an unreasonably dangerous condition likely to result in foreseeable harm to visitors and renters of the cabins.

13. Gregory Muto was severely injured as a result of his fall into said unprotected

ditch, receiving severe injury and several fractured bones in his body.

17. Gregory Muto and his wife, Linda Muto entered the property as a result of having rented a cabin from Smoke Hole Log Cabins. Gregory Muto was a customer in reasonable use of the family recreation area when he received his injuries.

18. Defendant(s) failed to erect such barriers, warnings or lighting and failed to use such reasonable care in leaving an open ditch, waterway or canal bisecting the Smoke Hole Cabins property as to cause the property to be reasonably safe for its intended purpose.

19. Defendants(s) knew or should have known that the Smoke Hole Cabins is used for a family recreation facility.

20. Defendant(s) knew or should have known that the open ditch or waterway or canal created an unreasonably dangerous hazard in the family recreation area.

21. Defendant(s) negligently failed to erect a barrier, warnings, or lighting, around the open canal, ditch or waterway, in disregard for the safety of the Smoke Hole Cabins visitors.

22. The injuries sustained by Gregory Muto due to a fall into said canal, ditch or waterway were a direct result of Defendant(s) negligence.

23. Plaintiffs' injuries were foreseeable in light of the regular use of the premises.

COUNT II

Plaintiffs restate those paragraphs set forth above and further state:

24. Due to the injuries received by Gregory Muto, Linda Muto has incurred loss of her husband's love, support and services.

25. Linda Muto has incurred damages as a result of the loss of her husband's love, support, and services.
26. The construction of the dry ditch or waterway represents an improvement to the Smoke Hole Log Cabins property.
27. Defendants owed a duty to the users of Smoke Hole Log Cabins, Inc. to conduct said construction in a manner which did not present an unreasonably dangerous hazard in or on the Smoke Hole Cabins recreation location.
28. This action was previously filed by Plaintiffs on June 28, 2006 and identifying Larry Scott, Individually, L. Scott Ltd. Co., and Larado Construction Sales LLC. as John Doe defendants. Plaintiffs now amend their Complaint for identification of Larry Scott, Individually, L. Scott Ltd. Co., and Larado Construction Sales LLC as members of the John Doe Defendants previously named.

Plaintiffs demand a trial by jury.

Wherefore, Plaintiffs demand:

- A. Judgement in favor of Plaintiffs and against Defendant(s)
- B. Actual damages
- C. Punitive damages
- D. Such other, further relief as this Court may deem just.

Respectfully submitted this 28th day of September, 2006.

The estate of Gregory Muto
by Linda Muto, his Administrator
and next friend,
and Linda Muto, his widow,
Plaintiffs, by counsel

Julie Gower Romain

Julie Gower Romain
211 Adams Street, Suite 600
Fairmont, WV. 26554
WV State Bar ID #5544

1 in the construction or improvement of real property,
2 which this certainly was, and because of those
3 improvements there has been an injury, which there
4 is, is not disputed here, then the period of repose is
5 ten years. And our Court certainly intended that
6 people who provide construction, architecture and
7 other support in the construction of improvements to
8 real property be subject to being brought in within
9 that ten year period.

10
11 And, Your Honor, the Defendant talks about how
12 Justice Starcher went through the four elements
13 contained in the federal decisions that the Defendant
14 has relied upon, but Your Honor, they, Judge Starcher
15 went through those elements talking about how they
16 didn't apply in that case. It wasn't because he was
17 citing those favorably or because he was, he liked
18 the outcomes that resulted from the use of those four
19 elements. He was talking about why they shouldn't
20 be applied; why we shouldn't use them anymore; why
21 we should overrule those prior decisions; how they
22 don't comport with the current version of the West
23 Virginia Rules of Civil Procedure. And following his
24 analysis, set out the two new rules that the, that
25

1 sustained were foreseeable. We're talking about a
2 six, probably a ditch which is six foot wide by six
3 foot deep. I know that my client, my six foot client,
4 standing in it, it was over his head. Level to the
5 ground. No barrier. In a recreation area. Certainly
6 I would think utilized by both families and small
7 children, on a holiday weekend.

8 I don't, I think at that point, Your Honor, the
9 risk of harm is beyond foreseeable. I think we're
10 into the realm that it is probable. It just happened
11 to occur with my client.
12

13 Your Honor, I will also indicate that I do intend
14 at some point, I believe, because of judicial economy,
15 to move the Court to consolidate these cases.

16 MR. LORENSEN: I'm sorry. I don't know what
17 the protocol here is. And I guess we really didn't
18 talk about it. Just this one point, the statute,
19 we did cite the statute relied upon, 55-2-12. I
20 read the Brief filed, probably two months after we
21 filed our original Motion. I didn't see anything
22 that said that any statute other than 55-2-12 applied.
23 So, the reason that you haven't heard argument about
24 that statute's repose is because it was not raised
25

1 or for an injury to a person, or for
2 bodily injury or wrongful death
3 arising out of the defective or
4 unsafe condition of any improvement
5 to real property, may be brought
6 more than ten years after the
7 performance or furnishing of such
8 services or construction."

9
10 And it states, Your Honor, that that statute is
11 applicable:

12 ". . . to persons who participated
13 in the planning, design, surveying,
14 observation, supervision or
15 construction of those improvements."

16 MR. LORENSEN: And, just so you know where we
17 come in on that, Judge. Of course, that is one
18 of the applicable limitations that might apply.
19 The two year statute for personal injury, that
20 doesn't say that the two year statute for personal
21 injury does not apply, where an action is filed more
22 than two years after the person was injured.
23

24 MS. ROMAIN: But, our point was, Your Honor,
25 our case wasn't filed more than two years afterwards.

COUNTY OF GRANT WEST VIRGINIA

I ROY W. HYRE OF H - TEAM SECURITY BEING

A CREDIBALE PERSON OVER THE AGE OF TWENTY-ONE, BEING DULY
SWORN, ON HIS OATH SAYS THAT HE EXECUTED
THE WITHIN SUMMONS AND COMPLAINT UPON Larry Scott
BY DELEVERING AN EXACT AND TRUE COPY THEREOF ON THE

3rd DAY OF October 2006 AT 1840 HOURS

SERVED UPON Donna Scott

Larry Scott's wife

LOCATION

Hc 33 Box 922
Petersburg WV 26847

CASE NUMBER 06-c-51

ATTEMPTED

~~_____~~
~~_____~~

THE FOREGOING INSTRUMENT WAS TAKEN AND SWORE TO OR
AFFIRMED BEFORE ME THIS 04th DAY OF October 2006

NOTARY SIGNATURE F. J. Kisamore

MY COMMISSION EXPIRES ON

