

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.

CASE NO.: 06-C-51

**LARRY SCOTT, individually,**  
**LARRY SCOTT LTD. CO., and**  
**LARADO CONSTRUCTION SALES, LLC,**  
DEFENDANTS.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter came before the Court, the Honorable Phil Jordan presiding, on January 9, 2007 for a hearing on Defendants' Motion to Dismiss the Plaintiff's complaint against them. The Plaintiff was present by her counsel, Julie Gowen Romain. Defendants were present by their counsel, Michael D. Lorensen. Both parties presented argument on Defendants' Motion to Dismiss. The Court, having considered the parties' arguments at the hearing, their written arguments filed with the Court, and the pertinent legal authority, hereby **GRANTS** Defendants' Motion to Dismiss.

On July 4, 2004, Gregory Muto and his wife leased a cabin at Smoke Hole Log Cabins in Grant County<sup>1</sup>. That night, while going to another cabin to see friends, Mr. Muto fell into a ditch located on the property and sustained injuries. Mr. Muto has since died (presumably not from anything related to this fall). The two-year statute of limitations for filing this claim ended on July 4, 2006. On

---

<sup>1</sup> The Plaintiff has also filed suit against the property owner, Smoke Hole Cabins, Inc. At the hearing, Plaintiff's counsel represented that she would probably be filing a motion to consolidate the two cases in the near future.

June 28, 2006, the Plaintiff, Mr. Muto's wife and Administrator of his estate, filed this claim on behalf of her husband and herself seeking damages for the injuries he received. The Plaintiff's original complaint 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."

On September 28, 2006, the Plaintiff filed an Amended Complaint naming as defendants Larry Scott, L. Scott Ltd. Co., and Larado Construction Sales, LLC. Defendants move to dismiss this case against them because the amended complaint was not filed within the statute of limitations and does not meet the requirements for relating back to the original complaint as set forth in the West Virginia Rules of Civil Procedure ("WVRCP"), Rule 15(c).

#### LEGAL STANDARD

WVRCP 15(c) states the requirements amended pleadings must meet to relate back to the date of the original pleading. For purposes of this case, the applicable language of WVRCP 15(c) provides:

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

(3) The amendment changes the party or the naming of the party against whom a claim is asserted, [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], and within the period provided by Rule 4(k) for service of the summons and complaint [120 days], 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 identity of the proper party, the action would have [been] brought against the party.

From this statute, the West Virginia Supreme Court established four requirements that an amended pleading must meet in order to relate back to the original pleading:

Under [WVRCP] 15(c)(3), an amendment to a complaint changing a defendant or naming of a defendant will relate back to the date the plaintiff filed the original complaint if: (1) the claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint; (2) the defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named; (3) the defendant either knew or should have known that he or she would have been named in the original complaint had it not been for a mistake; and (4) notice of the action and knowledge or potential knowledge of the mistake was received by the defendant within the period prescribed for commencing an action and service of process of the original complaint.

Syl. Pt. 4, Brooks v. Isinghood, 213 W.Va. 675 (2003). All four requirements must be met before an amended complaint can relate back to the original complaint's filing date.

The Plaintiff argues that West Virginia no longer requires that all four requirements be met in order for an amendment to relate back. The Plaintiff cites Brooks v. Isinghood as establishing a different, two prong test for relation back of amendments, overruling the four point test set out by the Court in Maxwell v. Eastern Associated Coal Corp., 183 W.Va. 70 (1990). The Plaintiff's argument stems from syllabus point nine of Brooks, which reads:

Under the 1998 amendments to Rule 15(c)(3) of the [WVRCP], 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.*, 183 W.Va. 70, 394 S.E.2d 54 (1990) conflicts with this holding, it is hereby modified.

The Plaintiff interprets this syllabus point as stating that only two requirements must be met for an amendment to relate back. However, the Plaintiff misreads Brooks and syllabus point nine. Syllabus point nine does not reduce the four requirements of WVRCP 15(c) to two requirements; rather syllabus point nine enlarges the time for the defendant to receive notice of the action from the statute of limitations to the statute of limitations plus 120 days (the time for service of the original complaint). Under Maxwell, the defendant must have received notice of the action within the statute of limitations. The West Virginia Supreme Court did not intend to negate the four part test for WVRCP 15(c) through syllabus point nine. If it had so intended, it would not have considered all four parts of the test in Brooks, and it would not have set forth the four point test as syllabus point four of Brooks.

#### ANALYSIS

**1. The claim asserted in the amended complaint arose out of the same conduct, transaction, or occurrence as that asserted in the original complaint.**

In this case the Plaintiff only amended her original complaint to substitute the Defendants for John Doe. The claim against John Doe in the original complaint and the claim against Defendants in the amended complaint are

identical. Therefore, the amended complaint meets this requirement for relating back to the filing date of the original complaint.

**2. The defendant named in the amended complaint received notice of the filing of the original complaint and is not prejudiced in maintaining a defense by the delay in being named.**

Defendants did not receive notice of the filing of the original complaint until they received the amended complaint. The original complaint named John Doe as the defendant because when the Plaintiff filed the original complaint she did not know who had constructed Smoke Hole Cabins. Consequently, the original complaint was not served on anyone.

The West Virginia Supreme Court, in Brooks, *supra*, held that for the purposes of the WVRCP 15(c) requirements, “the form of notice may be either formal or informal, and does not require service of the original complaint or summons upon the party affected by the amendment.” Syl. Pt. 6. However, at the hearing, Defendants argued, and the Plaintiff did not contradict, that only the Plaintiff knew that the original complaint had been filed. The Plaintiff did not know whom to name as the defendant. The Plaintiff has presented no argument or evidence that Defendants knew about the filing of the original complaint before Defendants received the amended complaint. Defendants had no knowledge of the lawsuit until they received the amended complaint. Therefore, allowing the Plaintiff’s amended complaint to relate back to the original complaint’s filing date allows the Plaintiff to circumvent the two-year statute of limitation.

3. The defendant either knew or should have known that he would have been named in the original complaint had it not been for a mistake.<sup>2</sup>

The foremost consideration for this requirement of WVRCP 15(c) revolves around whether the Plaintiff's failure to name Defendants as a party in the original complaint was a mistake. "A court considering whether a mistake has occurred should focus on whether the failure to include the proper defendant was an error and not a deliberate strategy." Syl. Pt. 7, Brooks, *supra*. In this case, the Plaintiff's original complaint named "John Doe" as the defendant. At the hearing, the Plaintiff's counsel admitted that they filed the lawsuit against "John Doe" because they did not know Defendants' true identities. The Plaintiff's amended complaint substitutes Larry Scott and his companies for John Doe.

The Plaintiff argues, that under WVRCP 15(c) a plaintiff may file a lawsuit against "John Doe" and later amend the suit to name the true defendants as long as the true defendants receive notice of the case within 120 days after the expiration of the statute of limitations. Contrarily, Defendants argue that the Plaintiff's attempt to relate her amended complaint back to her "John Doe" complaint distorts the purpose of WVRCP 15(c) and allows the Plaintiff to extend the legislatively prescribed statute of limitations by 120 days.

---

<sup>2</sup> The Plaintiff also argues that naming the wrong defendant is only a misnomer and therefore, under W. Va. Code § 56-4-29, must be raised either by answer or by affidavit. Consequently, the Plaintiff contends that Defendants' subject of their motion to dismiss is impermissible under WVRCP 12(b). However, "a misnomer is involved when the correct party was served so that the party before the court is the one plaintiff intended to sue, but the name or description of the party in the complaint is deficient in some respect." Brooks v. Isinghood, 213 W. Va. at 688. The Plaintiff's original complaint did not bring Defendants before the Court. Therefore, this argument is without merit.

According to Brooks, the purpose of WVRCP 15 “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 . . . when . . . the adverse party is not prejudiced by the sudden assertion of the subject of the amendment.” Syl. Pt. 5. Allowing the Plaintiff to file a “John Doe” complaint and later amend the complaint to name the true defendants after the statute of limitation has run contradicts the stated purpose of WVRCP 15.

The applicable statute of limitation for this case, W.Va. Code § 55-2-12, states that a claim for damages due to personal injuries must be filed within two years of the action resulting in injury. Defendants have a right to rely on this statute of limitation and believe that they will not be sued for an accident occurring more than two years prior to the filing of a lawsuit. WVRCP 15 does not negate a defendant’s right to rely on a statute of limitation because it requires that the defendant may only be sued after the statute of limitation in cases of which the defendant was aware and in which the defendant knew he should have been named.

However, a complaint filed against “John Doe” does not put a party on notice of the action because no one can be served with the complaint. Likewise, the true defendant cannot know that he should have been named in the original complaint, because the original complaint is non-existent to him. Furthermore, a “John Doe” complaint is not truly a mistake on the Plaintiff’s part. This is not a case where the Plaintiff originally named a defendant which she later learned was not the true party and therefore had to amend her complaint. The Plaintiff filed

her claim against "John Doe" knowing that he was not the correct defendant because the Plaintiff did not know the true defendant's identity. The Plaintiff strategically chose to file a complaint against "John Doe" because she had not yet discovered Defendants' identities.

In footnote six of Brooks, the West Virginia Supreme Court stated that "John Doe" complaints may sometimes relate back to the filing of the original complaint. The Court explained that denying relation back for amendments to "John Doe" complaints rewards defendants who obfuscate in order to prevent plaintiffs from determining their identity. However, the Court also stated that "John Doe" relation back usually only occurs in cases where "the plaintiff's ability to name the correct defendant is dependent upon the police or correctional department's willingness to comply with discovery requests and supply the officer's name." Brooks, 213 W.Va. at 684, fn 6. "In most cases, the plaintiff has alternative means of finding out the defendant's true identity." Id.

In the present case, the Plaintiff had two years to discover Defendants' true identities. The Plaintiff has presented no evidence that Defendants' engaged in any nefarious or deceitful behavior to hide their identities from the Plaintiff. The Plaintiff's necessity to file a "John Doe" complaint did not stem from any actions of Defendants. Therefore, the Plaintiff's amended complaint cannot relate back to the original complaint's filing date because Defendants did not know, and could not have known, that they should have been named as Defendants in the original complaint.

**4. Notice of the action and knowledge or potential knowledge of the mistake was received by the defendant within the period prescribed for commencing an action and service of process of the original complaint.**

The present case presents a conundrum under this requirement of WVRCP 15(c). Under this requirement, a defendant must receive notice of the case and that he should have been named as a defendant either within the running of the statute of limitation or within 120 days of the filing of the original complaint, whichever comes latest. The Plaintiff's statute of limitations ended on July 4, 2006. The Plaintiff's 120 days for service of the original complaint ended on October 28, 2006. Therefore, to meet WVRCP 15(c)'s fourth requirement, Defendants needed to have knowledge that they should have been named in the original complaint by October 28, 2006.

Defendants did not know about the case or that they should be named as defendants until they received the amended complaint. However, the Plaintiff filed her amended complaint on September 28, 2006. Therefore, once the amended complaint was served on Defendants, they had notice of the case and that they should have been named as defendants. Defendants knew about the case and their role therein by October 28, 2006, but only because the amended complaint was filed.

However, the Plaintiff failed to meet the third requirement of WVRCP 15(c); therefore, this requirement is not dispositive of Defendants' Motion to Dismiss.

CONCLUSION

Based on the analysis above, the Court **FINDS** that the Plaintiff's decision to name John Doe as the defendant in her original complaint is not a mistake for the purposes of WVRCP 15(c). Therefore, the Plaintiff has failed to meet the requirements for relating her amended complaint back to the filing date of her original complaint. Consequently, the Plaintiff filed her complaint against Defendants after the expiration of the statute of limitations.

**THEREFORE**, Defendants' Motion to Dismiss the Plaintiff's complaint against them is **GRANTED**.

The Clerk **SHALL** forward an attested copy of this Order to Attorney Julie Gower Romain, 211 Adams St., Suite 600, Fairmont, WV 26554, Attorney Michael D. Lorensen, Bowles Rice McDavid Graff & Love, 101 South Queen St., P.O. Drawer 1419, Martinsburg, WV 25401, and all parties of record.

Nothing further to be done in this matter, it shall be removed from the Court's docket and placed among the cases ended.

DONE and ENTERED this 11th day of January 2007.

**ENTERED JAN 16 2007**

Phil Jordan  
The Honorable Phil Jordan, Circuit Judge  
21st Judicial Circuit

A COPY  
ATTEST  
Betty C. Mooney  
CLERK CIRCUIT COURT