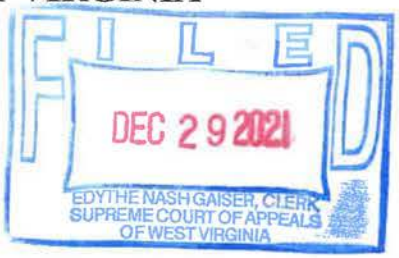
IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

Docket No. 21-0485



WW CONSULTANTS, INC.

PETITIONER,

v.

(On appeal from Business Court Division, Circuit Court of Kanawha County, Civil Action No. 18-C115)

A3 USA, INC., ORDERS CONSTRUCTION COMPANY, PIPES PLUS, INC., AND POCAHONTAS COUNTY PUBLIC SERVICE DISTRICT,

RESPONDENTS.

RESPONDENT POCAHONTAS COUNTY PUBLIC SERVICE DISTRICT'S SUMMARY RESPONSE

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STATEMENT OF THE CASE

Respondent, Pocahontas County Public Service District ("District"), is a public corporation and political subdivision of the state of West Virginia providing water production and wastewater processing to customers throughout Pocahontas County with the exception of persons living within the corporate limits of Hillsboro and Marlinton.

As set forth in Petitioner's brief, the case before the Court arises from the District's construction of a new wastewater plant to serve the Snowshoe Resort and Linwood Valley area of Pocahontas County. Further, Respondent acknowledges that the issues before the Court in the instant matter, to-wit, the claims of dismissal asserted by Petitioner against A3 USA, Inc., Orders Construction Company and Pipes Plus, Inc., only tangentially impact the claims that the District is presently asserting against the Petitioner. Nonetheless the District files this brief to correct and provide context to several assertions made by the Petitioner as to the District's project.

Precast Concrete Panels. Petitioner spends several pages of its Statement of the Case providing the Court with background on the concrete panels that form part of the walls of the wastewater project. While the District agrees that the precast concrete panel issue did consume the time of the District, the Petitioner, Orders Construction Company and Mack Industries, the subcontractor responsible for producing the precast concrete panels, ultimately the District and its construction contractors and subcontractors were able to reach a satisfactory conclusion to the issue prior to the filing of the Counterclaim.

Headworks. The District disagrees with the characterization as the "Headworks" claim as a "new claim" (*Petitioner's Brief*, pages 10-13). The "headworks" of any wastewater plant is the initial stage of wastewater processing that is designed to reduce the level of pollutants in the incoming wastewater through a screening process. Here, large (and untreatable) waste is removed

through a screening process from the wastewater process so that the domestic and industrial wastewater can be treated more efficiently farther down the processing line. The Counterclaim specifically refers to the screening process. Answer and Counterclaim of the Pocahontas County Public Service District Joint Appendix 000028-000058, excerpt from JA000053 at paragraph (f)).

The question of whether the headworks constituted a "new" claim was heavily litigated below by both the District and the Petitioner. *See* Order Granting In Part Motion to Strike PCPSD's New Headwork Improvement Claim, Joint Appendix, pages 000312-000317. In the Order Judge Wilkes, sitting as Circuit Court of Kanawha County through the Court's Business Division, held that the District had properly pled the headworks but that discovery on the issue was needed to fully develop the evidence before trial.

There was **no** finding that the claim was "new"; rather, the only finding was that the Petitioner be given time to properly evaluate the claim and, further, given that there was **no** trial even scheduled at the time, Petitioner would not suffer any harm by the Court's action.

Similarly, Judge Wilkes considered the issue again in the context of a non-party notice filed by the Petitioner against Respondents A3 USA, Inc., and Orders Construction Company. In this issue these parties filed a motion to strike Petitioner's notice of nonparty fault against them on the grounds of untimely and defective notice.

In ultimately granting this Motion, Judge Wilkes noted that the statutorily prescribed 180 day period began running at a time consistent with the filing of the District's counterclaim of April 2, 2018. Here, the Court specifically held that "claims regarding the headworks area of the wastewater treatment plant were asserted by the PSD in its original Counterclaim filed April 2, 2018." Order Granting Orders Construction Company, Inc.'s and A-3 USA, Inc., Joint Motion to Strike Notice of Nonparty Fault Joint Appendix 001174-001183 (quote from page 001180).

Further, in the same Order the Court wrote that it "finds that to the extent that WWC now contends it is the headworks area claims that trigger the notice that there may be potentially at fault nonparties, it was **still aware** of them on April 2, 2018." Order, page 6, Joint Appendix 001181. Emphasis added.

In short, the Circuit Court has reviewed this issue in multiple instances and in multiple ways and has consistently ruled that the Petitioners were well aware of the District's headworks claim when its counterclaim was filed on April 2, 2018.

The District assets that the Court should refrain from revisiting this well-trodden path.

LEGAL STANDARD

The Respondent District agrees with the Petitioner that the Court applies a *de novo* standard regarding the Circuit Court's finding as to non-party fault under W. Va. Code § 55-7-13d(a (2). Further, the Respondent District agrees that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

ARGUMENT

A. THE CIRCUIT COURT PROPERLY FOUND THAT THE NOTICE ON NONPARTY FAULT WAS UNTIMELY, THE PETITIONER HAD FULL KNOWLEDGE OF THE DISTRICT'S HEADWORK CLAIM ON APRIL 2, 2018

Petitioner's Brief attempts, erroneously, to inflate knowledge of a claim with full discoverable knowledge for trial. As this Court is undoubtedly aware, West Virginia remains a notice pleading jurisdiction. "All the pleader is required to do is to set forth sufficient information to outline the elements of his claim. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleadings. The standard required to

overcome the motion is a liberal one, requiring a light burden of proof." *John W. Lodge Distrib. Co., Inc.*, 161 W.Va. at 605-606, 245 S.E.2d at 159. "It is well established that "complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995); *Accord, Mandolidis v. Elkins Indus., Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978); *John W. Lodge Distrib. Co., Inc.*, 161 W. Va. 603, 245 S.E.2d 157 (1978).

In this case the Petitioner has attempted *ad nauseum* and without success to characterize the headworks claim as somehow new and thus, for this appeal point, dispositive as to the date that the notice of nonparty fault began. Petitioner is simply wrong.

The Circuit Court considered all of this in the context of two arguments, to-wit, the Petitioner's original motion to strike the claim and Petitioner's late claim of nonparty fault.

Neither of these arguments were persuasive below for good reason. The District clearly set forth the allegation that provided notice to the Petitioner of its intention to file a claim relating to the headworks. Moreover, as the Circuit Court noted below, the only issue was that the provable nature of the claim was still being compiled while the case was pending.

Thus, the Court reasoned that the Petitioner should be given time to evaluate the evidence of the claim prior to the trial. That is consistent with the rules of discovery set forth by this Court. Moreover, there is no conceivable reading of the Circuit Court's Order that translates to a finding that the claim did not exist until 2019; rather, only that the claim needed to be considered by the Petitioner prior to trial.

Petitioners now appear before the Court and, again, claim to be blindsided by the headworks. That is simply incorrect. This Court should affirm the Circuit Court who correctly

analyzed the claim and found that the headworks claim had existed since the inception of the Counterclaim.

Lastly, the District would be remiss not to reply to the footnote in the Petitioner's brief speculating as to why the District did not bring a direct claim against Orders Construction Company. Besides being rank speculation, this is generally inapposite of anything remotely being litigated before this Court and should be given exactly zero weight. Moreover, and ironically, the footnote is contained on the same page wherein the Petitioner claims that it needs "clairvoyance" on the headworks claim.

B. WWC's EXPRESS INDEMNIFICATION CLAIM

Respondent District offers no argument on the Circuit Court's decision to dismiss the Petitioner's express indemnification claim against Orders Construction Company and Pipes Plus, Inc.

C. WWC's IMPLIED INDEMNIFICATION CLAIM

Respondent District offers no argument on the Circuit Court's decision to dismiss the Petitioner's implied indemnification claim against A-3 USA, Inc. and Pipes Plus, Inc.

D. WWC'S CLAIMS FOR NEGLIGENCE AND CONTRIBUTION AGAINST ORDERS CONSTRUCTION COMPANY AND PIPE PLUS, INC.

Petitioner's argument before this Court on this Count begins, again, with a flawed premise, that the District's headworks claim was a "new" claim beginning with a District's production of documents related to the repair of the headworks. Petitioners cite no case law that a plaintiff must have, at the time an action commences, fully discoverable information regarding every possible scenario recovery contained within the Complaint.

Petitioners cite no case law as it knows that W. Va Rule of Civil Procedure 26 was designed to allow every party the opportunity to have meaningful review of every document another party

intends to rely on in proving its case in court. In the case *sub judice* the Court recognized that the development of concrete plans to correct a deficiency clearly pled may, in the repair of a multi-million dollar wastewater plant, not run on the same schedule as the Court. Thus, the Court reasoned the proper method to resolve this discovery dispute (and, despite Petitioners continuing to mischaracterize the headworks claim as "new," this issue was – and is - simply a discovery dispute) was to provide Petitioners the ability to fully discover the claim and, additionally, to file additional third-party claims if it believed these were necessary.

The Court, in no discernable way was making a finding that the statutory deadline was being tolled. *See* Order Granting In Part Motion to Strike PCPSD's New Headwork Improvement Claim, Joint Appendix, pages 000312-000317 and Order Granting Orders Construction Company, Inc.'s and A-3 USA, Inc., Joint Motion to Strike Notice of Nonparty Fault Joint Appendix 001174-001183 both of which demonstrate the Court's careful analysis of the headworks claim.

Thus, Respondent District agrees with the Court that the Petitioner's claims are time-barred as found by the Circuit Court.

E. WWC'S CLAIMS FOR CONTRIBUTION FROM A-3 USA, INC.

Respondent District offers no argument on the Circuit Court's decision to dismiss the Petitioner's claim for contribution from A-3 USA, Inc.

CONCLUSION

Wherefore, by the arguments contained herein, Respondent Pocahontas County Public Service District prays for an Order affirming the decision of the Circuit Court of Kanawha County, Business Division, as set forth in this Response.

POCAHONTAS COUNTY
PUBLIC SERVICE DISTRICT
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CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, Pocahontas County Public Service District, does hereby certify that on the 29th day of December 2021, I served the foregoing **Respondent Pocahontas County Public Service District's Summary Response** to the following counsel of record:

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