IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CLAY MUSIC CORP.,

Plaintiff Below, Petitioner,

v. **Court No. No. 24-ICA-457**

MOUNTAINEER GAS COMPANY, **Kanawha Co. Civil Action No. 22-C-385 (Consolidated with CAN 22-C-694 & CAN 23-C-657)**

Defendant Below, Respondent.

PETITIONER'S BRIEF

David R. Barney, Jr., Esquire (W.Va. Bar No. 7958)
Thompson Barney
2030 Kanawha Boulevard, East
Charleston, West Virginia 25311
Telephone: (304) 343-4401
Facsimile: (304) 343-4405
drbarneywv@gmail.com

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

CASES:

STATUTES & REGULATIONS:

RULES:

OTHER LEGAL PUBLICATIONS:

II. ASSIGNMENTS OF ERROR

1. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss with the incorrect Rule 12(b) standard under the West Virginia Rules of Civil Procedure when sufficient facts were alleged in the Complaint.

2. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss when it erred on the law regarding the discovery rule and its application when sufficient facts were alleged in the Complaint.

3. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss when it erred on the law regarding negligence and its application when sufficient facts were alleged in the Complaint.

4. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss when it erred on the law regarding intentional spoliation and its application when sufficient facts were alleged in the Complaint.

IV. STATEMENT OF THE CASE

Procedural History

On August 2, 2023, Petitioner, Plaintiff Below, Clay Music Corp. ("Clay Music") filed its Complaint making claims for negligence and intentional spoliation against Respondent, Defendant Below, Mountaineer Gas Company ("Mountaineer"). Clay Music-Appx. pgs. 16-25. On September 7, 2023, Mountaineer filed a Motion to dismiss which was briefed by the parties.[1] Clay Music-Appx. pgs. 8, 26-38. On September 18, 2023, the Court entered an Order regarding briefing and submission of proposed Orders. Clay Music-Appx. pgs. 9, 39-40. On October 6, 2023, Clay Music filed its Response Brief and submitted its proposed Order. Clay Music-Appx. pgs. 9, 41-67. On October 10, 2023, Mountaineer filed it Reply Brief and then submitted its proposed Order on October 17, 2023. Clay Music-Appx. pgs. 9, 68-82

About a year later, on October 21, 2024, the Circuit Court entered a sweeping Order exactly as prepared by defense counsel and submitted to the Circuit Court granting the Motion, without a hearing on the Motion, which fully adopted in its entirety Mountaineer's error-filled proposed Order. Clay Music-Appx. pgs. 15, 83-90. This Order erred on the Rule 12(b) standard under the West Virginia Rules of Civil Procedure, erred on the law regarding the discovery rule, erred on law regarding negligence and erred on the law regarding intentional spoliation. Consequently, on November 15, 2024, Clay Music files this Notice of Appeal seeking the reversal of the Circuit Court's October 21, 2024, Order granting Mountaineer's Motion to dismiss. Clay Music-Appx. pg. 15.

[1] On September 7, 2023, the Circuit Court entered an "*Agreed Order granting Motion to consolidate two related cases*" which consolidated *Clay Music Corp. v. Mountaineer Gas Company* (being Kanawha County Civil Action No. 23-C-657) into *Janet Danberry v. Mountaineer Gas Company, et al.* (being Kanawha County Civil Action No. 20-C-385). Clay Music-Appx. pg. 8. Plaintiff Janet Danberry has since settled her case. Clay Music-Appx. pg. 11.

Statement of Facts

Plaintiff Clay Music is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business located at 3171 West Dupont Avenue, Belle, WV 25015. Clay Music-Appx. pg. 17 (Complaint at ¶ 1). At all times material hereto, Clay Music had two machines located at 103 Beaver Plaza, Beaver, WV 25813 (the "Premises"), which was a building owned by Shop-A-Minit and a business known as "Judy's." Clay Music-Appx. pg. 18 (Complaint at ¶ 5). At all times material hereto, Mountaineer held itself out as a licensed, qualified, and experienced utility provider in the State of West Virginia. Clay Music-Appx. pg. 18 (Complaint at ¶ 6). The utility services provided by Mountaineer include, but are not limited to, the distribution of natural gas and the maintenance, service, and/or repair of a natural gas distribution system. Clay Music-Appx. pg. 18 (Complaint at ¶ 7). Mountaineer installed an underground natural gas distribution line (the "Gas Line") which was located in the vicinity of the Premises; however, Mountaineer's Gas Line did not run onto, through, and/or underground at the Premises, nor did Mountaineer's Gas Line supply and/or distribute natural gas to the Premises. Clay Music-Appx. pg. 18 (Complaint at ¶ 8).

An unknown puncture hole was made to the underground subject Gas Line at issue. This puncture was over 2-inches in length and, at the time, would have permitted a voluminous amount of natural gas to escape the Gas Line such that Mountaineer either knew or should have known that a considerable leak had occurred if Mountaineer was properly monitoring and/or inspecting its lines and the natural gas usage in the area at the time that the puncture was made in the subject Gas Line at issue. Clay Music-Appx. pg. 18 (Complaint at ¶ 9). Upon further information and belief, Mountaineer failed to inspect, test, monitor, repair, warn, and/or otherwise use reasonable care to make the Gas Line safe for the public. Clay Music-Appx. pg.

19 (Complaint at ¶ 10). On July 18, 2021, a gas Explosion and fire (the "Explosion") occurred at the Premises because natural gas leaked from an underground Gas Line and migrated into a nearby underground sewer line for the Premises where in turn unignited natural gas accumulated in the Premises until such time that it ignited causing the Explosion. Clay Music-Appx. pg. 19 (Complaint at ¶ 11).

Not until the end of August of 2021, did Clay Music know or, by the exercise of reasonable diligence, should have known what caused the Explosion and who caused the Explosion. Clay Music-Appx. pg. 19-20 (Complaint at ¶ 12). Clay Music was not a natural gas customer of Mountaineer at that location and the Premises did not even receive natural gas. After the Explosion, an investigation was undertaken and the final results were not reported to Clay Music until late August 2021. There were inspections of the Gas Line and of Shop-A-Minit's sewer lines. Immediately after the Explosion, upon information and belief, an employee of Mountaineer came to the Premises, cut out a section of the sewer line and stole a key section of the sewer line pipe from the owner of the property and thwarted efforts to fully video, inspect, test and retain the entire sewer pipeline which prevented and/or delayed Clay Music from coming to a conclusion regarding the Explosion. In fact, as investigators were attempting to run video through the entire sewer line to determine causes of the Explosion when Mountaineer employee sawed off, removed and concealed a section of the sewer line and, upon information and belief, removed it from the Premises in his truck. Mountaineer did not have permission from the owner of the Premises to take the key section of the sewer line being tested. Mountaineer took the sewer line in an effort to conceal and cover up its actions and liability. Clay Music-Appx. pgs. 17-24 (Complaint at ¶s 12, 13, 26(j), 20-31 & 33). To this day, Mountaineer still denies that its Gas Line was the cause of the Explosion and blames the sewer line.

Mountaineer still has failed to return the section of the stolen sewer line in question to allow for proper testing analysis and inspection. Clay Music-Appx. pg. 20 (Complaint at ¶ 13). Again, in mid/late August 2021, Mountaineer returned to the Premises and removed a section of the sewer line without the permission of the owner. Mountaineers' removal, theft and concealment of the sewer line delayed and impeded Clay Music's ability to fully inspect and test in order to determine the cause of the Explosion and the identity of the wrongdoer. Mountaineer also lied about the location of the first part of the sewer line they stole. Clay Music-Appx. pg. 20 (Complaint at ¶ 14). When confronted, Mountaineer representatives claimed it was not taken off the Premises, but, in fact, reburied it in the ground with other piping. *Id*. However, when this trench was re-excavated, it was not there. *Id*. Mountaineer's theft and removal of the section of sewer line was seen by an eyewitness at the Premises. *Id*. The dishonest conduct of Mountaineer resulted in delaying the running of the statute of limitations and also constitutes spoliation of evidence. *Id*. The actions by Mountaineer were done to hinder and delay the investigation of the cause of the Explosion and the identity of the responsible entities. *Id*.

At the end of August of 2021, Clay Music determined, for the first time, that the Explosion was caused to occur because of the negligent and/or reckless actions and/or omissions of Mountaineer with regard to an underground Gas Line leaking gas into a key section of a sewer line causing the Explosion. Clay Music-Appx. pg. 20 (Complaint at ¶ 15). As a direct and proximate result of the negligence and recklessness of Mountaineer, Clay Music sustained substantial damage to its two (2) machines and loss of revenue from the machines. Clay Music-Appx. pg. 20 (Complaint at ¶ 16). As a direct and proximate result of the negligence and recklessness of Mountaineer, Clay Music sustained additional losses in the manner of additional business expenditures and/or lost business revenues. Clay Music-Appx. pg. 21 (Complaint at ¶

17). As a direct and proximate result of the negligence and recklessness of Mountaineer, Clay Music sustained additional losses including the loss of use of the property and annoyance and inconvenience. Clay Music-Appx. pg. 21 (Complaint at ¶ 18). As a direct and proximate result of the negligence and recklessness of Mountaineer, Clay Music has sustained damages in an amount in excess of $4,900.00 per month to date. Clay Music-Appx. pg. 21 (Complaint at ¶ 19).

V. SUMMARY OF ARGUMENT

Clay Music had no idea that Mountaineers' gas escaped from its Gas Line, got trapped in a sewer line, and blew it up the business where it had two (2) machines. In fact, the business does not even receive gas service and there was no expectation that there would be any gas in the Premises. The gas and sewer lines are deep underground, off the property and could not be observed or viewed without excavation. Mountaineer's gas, from a cracked line, leaked into a sewer line which transported gas through a small sewer pipe into the business which then ignited and caused the Explosion. A cause of this nature can only be discovered by the retention of experts, forensic analysis, removal of significant dirt and testing and examination of all pipes involved which takes a significant amount of time and expertise. Furthermore, on two (2) separate occasions Mountaineer intentionally interfered with experts trying to determine the cause of the Explosion by removing and leaving the scene with critical sections of pipe which thwarted efforts to determine causation.

The Circuit Court erred in granting Mountaineer's Motion to dismiss and entering Mountaineer's proposed Order. In the Circuit Court's Order granting the Motion, it erred when it failed to consider and apply the proper standard, considerations and liberal notice pleading; it erred on the law regarding the discovery rule and its application when sufficient facts were alleged in Clay Music's Complaint; it erred on the law regarding negligence and its application

when sufficient facts were alleged in Clay Music's Complaint; and it erred on the law regarding intentional spoliation and its application when sufficient facts were alleged in Clay Music's Complaint. Likewise, the Circuit Court erred when it rejected Clay Music's proposed Order denying the Motion to dismiss which properly addressed these issues. Consequently, the Circuit Court's Order should be reversed by this Court.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Based upon the assignments of error set forth by Petitioners, counsel for Petitioners believe that oral argument is unnecessary under Rule 18(a)(4) of the *West Virginia Rules of Appellate Procedure* because the facts and legal arguments are presented adequately in the briefs and record on appeal and the decisional process would not be aided significantly by oral argument. However, if this Court determines that oral argument is appropriate, in accordance with Rules 19 and 20 of the *West Virginia Rules of Appellate Procedure*, then oral argument should be limited to twenty (20) minutes.

VII. STANDARD OF REVIEW

A Circuit Court's decision that a Complaint fails to state a claim on which relief can be granted is a ruling of law, and an appellate court reviews such a decision *de novo*. *See* Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995) ("Appellate review of a Circuit Court's Order granting a motion to dismiss a Complaint is *de novo*.").

Petitioner's arguments in this appeal challenge the Circuit Court's interpretation and application of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. As the West Virginia Supreme Court has often stated, "[a]n interpretation of the West Virginia Rules of Civil

Procedure presents a question of law subject to a *de novo* review." Syl. pt. 4, *Keesecker v. Bird*, 200 W.Va. 667, 490 S.E.2d 754 (1997).

VIII. ARGUMENT

1. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss with the incorrect Rule 12(b) standard under the West Virginia Rules of Civil Procedure when sufficient facts were alleged in the Complaint.

Rule 8(f) of the West Virginia Rules of Civil Procedure dictates that courts liberally construe pleadings so "as to do substantial justice." *Accord, Cantley v. Lincoln Cty. Comm'n*, 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007) ("A trial court considering a motion to dismiss under Rule 12(b)(6) must liberally construe the complaint so as to do substantial justice.").

Rule 12(b)(6) Motions to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. *See John W. Lodge Distributing Co. Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

The policy of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to decide cases upon their merits, and "if the Complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." *John W. Lodge*, 161 W.Va. at 605, 245 S.E.2d at 158-59, citing *United States Fidelity & Guaranty Co. v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965). The West Virginia Supreme Court of Appeals has long recognized that "[t]he purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the Complaint. Further, for the purposes of the Motion to dismiss, the Complaint is construed in the light most favorable to the plaintiff, and

its allegations taken as true." *Id*. at 604-05, 158; *see also Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008); *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 655 S.E.2d 509 (2007). The allegations in the Complaint clearly show that Mountaineer interfered with the discovery of their wrongdoing, spoliated evidence and as a result of their conduct tolled the statute of limitations. These allegations are required to be taken as true for purposes of a Rule 12(b) Motion to dismiss.

"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." Syl. pt. 3, *Chapman v. Kane Transfer Company*, 160 W.Va. 530,236 S.E.2d 207 (1977), quoting *Conley v. Gibson*, 355 U.S. 41,45-46,78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *see also West Virginia Canine College, Inc. v. Rexroad*, Syl. Pt. 2, 191 W.Va. 209, 444 S.E.2d 566 (1994).

Recently, the West Virginia Supreme Court of Appeals issued an opinion in *Mountaineer Fire & Rescue Equipment, LLC, et al. v. City National Bank of WV, et al.*, 854 S.E.2d 870, 883 (W.Va. 2020), which affirmed that West Virginia is and remains a notice-pleading state. *Id*., at Ft Nt. 4. That means:

> In light of the purpose behind the Rules of Civil Procedure, this Court has steadfastly held that, to survive a motion under Rule 12(b)(6), a pleading need only outline the alleged occurrence which (if later proven to be a recognized legal or equitable claim), would justify some form of relief. "The complaint must set forth enough information to outline the elements of a claim or permit inferences to be drawn that these elements exist." *Fass v. Nowsco Well Serv., Ltd.*, 177 W.Va. 50, 52, 350 S.E.2d 562, 563 (1986). "[A] complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is." *Scott Runyan PontiacBuick, Inc.*, 194 W.Va. at 776, 461 S.E.2d at 522.

"[A] trial court should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the plaintiff to relief." *Cantley v. Lincoln Cty. Comm'n*, 221 W.Va. at 470, 655 S.E.2d at 492. Hence, dismissal under Rule 12(b)(6) is not warranted merely because the pleading fails to state all of the elements of the particular legal theory advanced; instead, the circuit court should examine the allegations as a whole to determine whether they call for ***relief on any possible theory***. Moreover, a party is not required to establish a prima facie case at the pleading stage (emphasis added).

* * *

"[A] complaint is sufficient against a motion to dismiss under Rule 12(b)(6), ***if it appears from the complaint that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely are not appropriate***." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1219 (3rd Ed. 2020) (emphasis added). As one court stated,

> if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

Fresquez v. Minks, 567 F. App'x 662, 664 (10th Cir. 2014).

Finally, a pleading is only required to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). *See also Refrigerated Trans., Inc. v. North Carolina Occidental Fire and Cas. Co.*, 705 F.2d 821, 825 (6th Cir. 1983) (The function of a pleading is "to give the opposing party fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved."). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512. *See also Sticklen v. Kittle*, 168 W.Va. 147, 163, 287 S.E.2d 148, 157 (1981)("Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the

> Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.").

Id., at 883-4.

In the Complaint, as outlined above, Clay Music alleged that it had no idea that Mountaineers' gas escaped from its line, got trapped in a sewer line, and blew it up the business where it had two (2) machines. Clay Music-Appx. pgs. 17-25. Clay Music alleged that the business does not even receive gas service and there was no expectation that there would be any gas in the Premises. *Id*. The gas and sewer lines are deep underground, off the property and could not be observed or viewed without excavation. *Id*. Clay Music further alleged that Mountaineer's gas, from a cracked line, leaked into a sewer line which transported gas through a small sewer pipe into the business which then ignited and caused the Explosion. *Id*. A cause of this nature can only be discovered by the retention of experts, forensic analysis, removal of significant dirt and testing and examination of all pipes involved which takes a significant amount of time and expertise. *Id*. Importantly, Clay Music alleged that, on two (2) separate occasions Mountaineer intentionally interfered with experts trying to determine the cause of the Explosion by removing and leaving the scene with critical sections of pipe which thwarted efforts to determine causation. Clay Music-Appx. pgs. 17-24 (Complaint at ¶s 12, 13, 26(j), 20-31 & 33). These Complaint averments should have been construed in the light most favorable to Clay Music, its allegations were to be taken as true and given a liberal notice pleading analysis. That did not happen.

The Order submitted by Mountaineer and adopted by the Circuit Court failed to identify and address this standard for a Rule 12(b)(6) Motion to dismiss which is a sufficient ground to reverse the Circuit Court's decision. Clay Music-Appx. pgs. 84-90. The averments in the

Complaint were to be construed in the light most favorable to Clay Music, and its allegations were to be taken as true. The Circuit Court's Order failed to make these considerations which are error. In fact, the averments in the Complaint were not construed in the light most favorable to Clay Music, and its allegations were not taken as true. Likewise, there was no consideration whether Clay Music may be entitled to any form of relief (even if the particular relief it demands and the theory on which it seems to rely are not appropriate). Again, that is error. Had the Circuit Court addressed this Rule 12(b)(6) standard, then it would have denied Mountaineer's Motion to dismiss. Clay Music' Complaint, as outlined above, set forth claims, negligence and intentional spoliation, upon which relief could be granted. Instead, the Circuit Court improperly weighed the facts against Clay Music which is not the standard and is error. Clay Music submitted a proposed Order which set forth the proper standard and considerations, but it was rejected by the Circuit Court. Again, that is error.

In addition, the Circuit Court failed to address the liberal notice pleading of Rule 8(f) for Clay Music's Complaint. Under the West Virginia standard, a pleading is only required to provide fair notice of what Clay Music's claims are and the grounds upon which they rests. Clay Music's Complaint satisfied this standard in its detailed claims for negligence and intentional spoliation. Again, the Circuit Court's Order weighed the facts against Clay Music which is not the standard and is error. Clay Music submitted a proposed Order which set forth the proper standard, but it was rejected by the Circuit Court.

At this stage, Clay Music clearly and sufficiently alleged enough facts to state a claim for negligence and intentional spoliation upon which relief could be granted to it. As such, based upon the above referenced standard, Mountaineer's Motion to dismiss should have been denied on this basis and the Court should have entered Clay Music's proposed Order denying the

Motion. However, the Circuit Court ignored these averments in the Complaint and West Virginia law when granted Mountaineer's Motion to dismiss and entered Mountaineer's proposed Order. That decision was reversible error and this Court should reverse the Circuit Court on this issue.

2. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss when it erred on the law regarding the discovery rule and its application when sufficient facts were alleged in the Complaint.

In Syllabus Point 3 of *Stemple v. Dotson*, the West Virginia Supreme Court of Appeals held that "[w]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of a reasonable diligence should know, of the nature of his injury, "***and determining that point in time is a question of fact to be answered by the jury***" (emphasis added). *Id*., 184 W.Va. 317, 400 S.E.2d 561 (1990). In *Stemple*, the plaintiffs brought an action for breach of contract and fraudulent concealment of termite damage against the former owners of their home. The circuit court granted summary judgment in favor of the defendants based on the statute of limitations because the applicable time period to file suit had expired. On appeal, the West Virginia Supreme Court of Appeals reversed that decision, finding that the issue of when the claim occurred for purposes of the statute of limitations "***was a question of fact for the jury***." Thus, it is clear under West Virginia law that the determination of that point in time when the injured person knew, or by the exercise of reasonable diligence, should have known, of the nature of the injury, is to be answered by the jury.

In this case, the Circuit Court resolved Mountaineer's Rule 12(b) Motion to dismiss, without consideration of relevant material facts and evidence pertaining to the standards set forth

by the West Virginia Supreme Court of Appeals. The Circuit Court failed to address Mountaineer's spoliation of evidence and efforts it undertook to delay and conceal their wrong doing. The law requires Clay Music's allegations in the Complaint to be view in favor of Clay Music, taken as true and viewed as liberal notice pleading at this stage in the proceedings. *See Forshey*, *Supra*; *Highmark West Virginia, Inc. v. Jamie*, *Supra*; *Mountaineer Fire & Rescue*, *Supra*. In the Circuit Court's Order granting Mountaineer's Motion, it alludes to pictures and otherwise argues the weight of the evidence which, as outlined in the aforementioned "Standard of review," is an insufficient basis for such a Motion. Furthermore, Mountaineer relies on the decisions in *Roberts v. W. Va. Am. Water Co.* and *Metz v. E. Associated Coal, LLC*. *Id*., 221 W.Va. 373, 655 S.E.2d 119 (2007); and *Id*., 239 W.Va. 157, 165, 799 S.E.2d 707 (2017). These cases clearly are distinguishable from this present case. These cases did not concern a situation where there was gas infiltration into a building with no gas service and where the pipes are away from the structure and not observable to the public, all of which require expert assistance to determine the causation of the gas. In addition, these cases did not involve spoliation and theft of critical evidence directly related to Clay Music's ability to discover the nature of the wrong and the identity of the wrongdoer. As will be further discussed below, neither of these cases concerned situations where the defendant, such as Mountaineer, was alleged to have committed fraudulent concealment, removing, theft, cover-up and spoliation. That is what is being alleged in this case. These are the critical allegations in Clay Music's Complaint, which were to be construed in the light most favorable to it and the allegations are to be taken as true, which should have prevented the application of the statute of limitations.

In *Wooten v. Roberts*, the West Virginia Supreme Court of Appeals again reiterated and specifically held "[w]here a cause of action is based on tort or on a claim of fraud, the statute of

limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence, should know, of the nature of his injury, and ***determining that point in time is a question of fact to be answered by the jury***." (*emphasis added*) Syl. Pt. 4, *Id*., 205 W.Va. 404, 518 S.E.2d 645 (1999). Therefore, the West Virginia Supreme Court of Appeals specifically directs that the jury resolve these factual issues pertaining to the statute of limitations.

In *Perrine v. E.T. Dupont De Nemours*, the West Virginia Supreme Court of Appeals again reversed a trial judge by holding that the determination of the statute of limitations is question of fact for the jury, and not the trial judge. *Id*., 225 W.Va. 482, 516-520, 694 S.E. 2d 815, 849-853 (2010). The *Perrine* Court specifically held that the determination of when the Plaintiff possessed the requisite knowledge sufficient to begin the running of the statute of ***limitations is a question of fact for the jury***. *See Id*. The West Virginia Supreme Court of Appeals again stated that the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence, should know of the nature of his injury, and determining ***that point in time is a question of fact to be answered by the jury***. In so holding, the West Virginia Supreme Court of Appeals reversed the trial judge and remanded the matter for the jury to make a full determination of all the statute of limitations issues. *See Id*.

Likewise, in *Gaither v. City Hospital, Inc.*, the West Virginia Supreme Court of Appeals held that "[i]n a great majority of cases, the issue of whether or not a claim is barred by the statute of limitations is a question of fact for the jury." *Id*., 199 W.Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997). In *Gaither*, the West Virginia Supreme Court of Appeals held that the discovery rule is applicable to all tort actions. *Id*., at 909-10. Furthermore, in Syllabus Point 2 of *Mack-Evans v. Hilltop Healthcare Center, Inc.*, the West Virginia Supreme Court of Appeals specifically set forth the appropriate five-step factual analysis to be followed in making an

analysis on the statute of limitations. *Id*., 226 W.Va. 257, 700 S.E.2d 317 (2010). The *Mack-Evans* Court held that "[a] five-step analysis should be applied to determine whether a cause of action is time barred. First, the court should identify the applicable statute of limitations for each cause of action. Second, the court (or if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitations began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither*.

Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed the facts or engaged in any other act or omission that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that a defendant fraudulently concealed facts, which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitations is tolled.

Fifth, the court or jury should determine if the statute of limitations period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact. Syl. Pt. 5, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009). Therefore, the West Virginia Supreme Court of Appeals has determined and made clear that the statute of limitations is a question of fact to be resolved by the jury. *See Mack-Evans*, *Supra*.

Fraudulent concealment, removing, theft, cover-up and spoliation was pled properly in Clay Music's Complaint such that a jury could easily conclude that the statute of limitations has been tolled by the alleged actions of Mountaineer. Clay Music-Appx. pgs. 17-24 (Complaint at

¶s 12, 13, 26(j), 20-31 & 33). In Count I of Clay Music's Complaint, entitled "*Negligence*" (Clay Music-Appx. pgs. 21-24 (Complaint at ¶s 20-31), Clay Music alleges misconduct of Mountaineer, including the "[*r*]*emoving, stealing, concealing and spoliating key sections of the sewer line*." Clay Music-Appx. pg. 23 (Complaint at ¶ 26(j)). Moreover, under Count II of Clay Music's Complaint, entitled "Intentional Spoliation" (Clay Music-Appx. pgs. 24-25 (Complaint at ¶s 32-35), Clay Music alleges that "*Defendant Mountaineer intentionally and knowingly spoliated certain pieces of the subject sewer line and has otherwise tried to conceal evidence in this matter*." Clay Music-Appx. pgs. 24 (Complaint at ¶ 33). As such, Clay Music set forth claims upon which relief can be granted under any legal theory, but the Circuit Court improperly ignored these averments and law which it granted Mountaineer's Motion to dismiss.

The question as to when Clay Music became aware of this fraudulent concealment, removing, theft, cover-up and spoliation is a question of fact. Further, whether or not the statute of limitations has been additionally tolled by this misconduct by Mountaineer as properly pled by Clay Music also is a question of fact. Again, the determination whether this conduct tolled the statute of limitations for Clay Music's claims is for jury consideration. Syl. Pt. 4, *Miller v. Monongalia County Board of Education*, 210 W.Va. 147, 556 S.E.2d 427 (2001). As aforementioned, in *Miller v. Monongalia County Board of Education*, the West Virginia Supreme Court of Appeals explained that fraudulent concealment is an equitable doctrine that operates to estop a defendant, like Mountaineer, from asserting the statute of limitations as a bar to a claim because that defendant in some way prevented the plaintiff, such as Clay Music, from getting the information needed to pursue a claim. *Id*., *see also Bailey v. Glover*, 88 U.S. 342 (1874). Clay Music made the proper averments to avoid the statute of limitations.

The West Virginia Supreme Court of Appeals took a closer examination of the meaning of what "*a claimant knows or by reasonable diligence should know of his claim*" in syllabus point one of *Gaither*, *Supra*. The discussion in *Gaither* resulted in the West Virginia Supreme Court of Appeals holding that: "[i]n tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury." *Id*. at Syl. Pt. 4. Immediately following the announcement of this point of law in the body of the opinion, the Court emphasized the objective of the holding by saying the "discovery rule tolls the statute of limitations until a plaintiff, acting as a reasonable, diligent person, discovers the essential elements of a possible cause of action, that is, discovers duty, breach, causation and injury." *Id*., at 714, 487 S.E.2d at 909.

The West Virginia Supreme Court of Appeals, in *Dunn v. Rockwell*, also specifically held that where allegations of civil conspiracy arise as a result of several defendants acting in concert to fraudulently conceal from the plaintiff the existence of a cause of action, one conspirators act of fraudulent concealment, if within the scope of the conspiracy, tolls the statute as to the other alleged conspirators and the tolling effect applies also to the ***substantive wrongs underlying the conspiracy***. *Dunn*, *Supra*. In the present case, Clay Music asserted fraudulent concealment, removing, theft, cover-up and spoliation claims against Mountaineer. Therefore, under this specific holding of the West Virginia Supreme Court of Appeals, the statute of limitations on all of the substantive wrongs is tolled until the last act of concealment is determined by the trier of fact. Therefore, substantial questions of fact exist regarding the alleged acts of fraudulent

concealment, removing, theft, cover-up and spoliation and should not be adjudicated on a mere Rule 12(b)(6) Motion.

Here, the Circuit Court merely did a cursory review of West Virginia law on the discovery rule. Clay Music-Appx. pgs. 84-90. Then, the Circuit Court weighed the averments in the Complaint and, based upon the weighing of facts, held that Clay Music failed to plead properly the discovery rule. *Id*. The Circuit Court did not construe the averments in the Complaint in the light most favorable to Clay Music, take the allegations as true or do a liberal notice pleading analysis. In fact, the Circuit Court ignored the averments which demonstrated the discovery rule was applicable to this case. That is reversible error.

In addition to the alleged facts that there was gas infiltration into the subject Premises without gas service and the pipes were away from the building and not readily observable, there are substantial legitimate allegations of fraudulent concealment, removing, theft, cover-up and spoliation as set forth in the Complaint. In fact, there is clear and substantial evidence that the tortuous conduct of Mountaineer knowingly withheld and concealed important evidence from Clay Music about the causation of the Explosion. All of these elements have been appropriately pled in Clay Music's Complaint. These issues and determinations involve questions of fact that need to be resolved by a jury, and should not have been resolved in a Rule 12(b) Motion to dismiss, where evidence, depositions, discovery and credible testimony and vetted facts are not even considered.

Furthermore, the West Virginia Supreme Court of Appeals, in *Lemon v. Stilwell*, reversed the Orders of the Circuit Court of Kanawha County by holding that the statute of limitations is a question of fact for the jury, and that the five-step factual analysis set forth in *Dunn v. Rockwell* must be specifically followed by the trial court. *Id*., Case No. 12-0990 (W.Va.

Supreme Court Memorandum Opinion 2013). The *Lemon* Court found that the Circuit Court failed to apply the five-step analysis set forth in *Dunn*; therefore, it reversed the Circuit Court's Order granting Respondent's Motion to dismiss on the statute of limitations issue. The *Lemon* Court specifically emphasized that for the purpose of a Motion to dismiss, the Complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true. *John W. Lodge.*, 161 W.Va. at 605, 245 S.E.2d at 158. "Since the preferences to decide cases on their merits, courts presented with a Motion to dismiss for failure to state a claim construe the Complaint in the light most favorable to the Plaintiff, taking all allegations as true." *Saidlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008).

In addition to the West Virginia Supreme Court of Appeals, the Indiana Supreme Court has held that "[t]he doctrine of fraudulent concealment should be available to estop a Defendant from asserting the statute of limitations when he has either by deception or by violation of duty, concealed from the Plaintiff a material fact, thereby preventing the Plaintiff from discovering a potential cause of action." *Fager v. Hundt*, 610 N.E.2d 246, 251 (Ind. 1993). Other courts around the country also have followed this same holding. *See Aldrich v. McCullough Properties Inc.*, 627 F.2d 1036, 1042 (10th Cir. 1980) ("[t]he question of whether the Plaintiff should have discovered the basis of his suit under the doctrine of equitable tolling does not lend itself to a determination as a matter of law."); s*ee also Bennett v. Hill-Boren PC*, 52 So. 3d 364, 372-3 (Miss 2011); *Brawn v. Oral Surgery Associates*, 819 A.2d 1014, 1025-8 (Me 2003); *Mojave Elec. Co-op, Inc. v. Byers*, 942 P.2d. 451, 469-71, 189 Ariz. 292, 310-2 (Ariz. App. Div. 1 1997); *Shelton v. Fiser*, 8 S.W.3d 557, 561-3, 340 Ark 89, 95-7 (2000).

The Circuit Court's Order granting Mountaineer's Motion to dismiss completely fails to address the nature of the incident (gas infiltration into the Premises without such service and

underground pipes) and the wrongful conduct of Mountaineer in concealing and covering up the cause of the July 18, 2021, Explosion and its role in the Explosion. Mountaineer stole the sewer pipe at issue moments after the Explosion, removed the Gas Line and during subsequent causation testing again took critical evidence to avoid liability in a potential case. This Court should not reward Mountaineer for its outrageous conduct and efforts to benefit from its concealment and fraud as set forth in Clay Music's Complaint. The impact of Mountaineer's theft and concealment of critical evidence and its impact on the statute of limitations present questions of fact not suitable for a Rule 12(b) Motion to dismiss. In Syllabus Point 5 of *Dunn v. Rockwell*, the West Virginia Supreme Court of Appeals held that the statute of limitations is tolled when a defendant fraudulently concealed facts which prevented a plaintiff from discovering or pursuing the potential cause of action. *Id*., 225 W.Va. 43, 689 S.E.2d 255 (2009). This situation is exactly what Clay Music pled in its Complaint and would prove at trial.

In Syllabus Point 3 of *Miller v. Monongalia County Board of Education*, the West Virginia Supreme Court of Appeals held that "*any act or omission tending to suppress the truth is enough" to toll the running of the statute of limitations*." *Id*. The *Miller* Court went on to explain that fraudulent concealment is an equitable doctrine that operates to estop a defendant from asserting the statute of limitations as a bar to a claim because that defendant in some way prevented a plaintiff from getting the information needed to pursue a claim. In *Miller*, the West Virginia Supreme Court of Appeals noted "[*f*]*raudulent concealment requires that the Defendant commit some positive act tending to conceal the cause of action from the Plaintiff, although any act or omission tending to suppress the truth is enough*" (emphasis added). *Id*. at Syl. Pt. 3.

In *Supermarket of Marlington v. Meadow Gold Dairs*, the Fourth Circuit Court of Appeals explained that the purpose of the fraudulent concealment doctrine is to prevent a

defendant from concealing a fraud or committing a fraud in a manner that it concealed itself until the defendants could plead a statute of limitations argument. *Id*., 71 F.3d 119, 122 (4th Cir. 1995). Under the doctrine of equitable estoppel, a party who has fraudulently prevented the other party from seeking redress within the statute of limitations period cannot benefit from the statute of limitations. *Id*., *see also Boehme v. Fairway Stores, Inc.*, 762 N.W.2d 142, 145-8 (Iowa 2009); *Egerer v. Woodland Realty, Inc.*, 556 F.3d 415, 421-5 (6th Cir. 2009). It should not matter what particular fact is concealed so long as the defendant's conducts prevents the timely filing of the claim. *See Christy v. Miulli*, 692 N.W.2d 694, 700-704 (Iowa 2005).

At this stage, Clay Music clearly and sufficiently alleged enough facts to trigger the discovery rule to prevent application of the statute of limitations. As such, based upon the above referenced averments and law, Mountaineer's Motion to dismiss should have been denied on this basis. The Circuit Court should have entered Clay Music's proposed Order denying the Motion which properly addressed the averments and law because the discovery rule applied in this case. However, the Circuit Court ignored these averments in the Complaint and West Virginia law on the discovery rule when granted Mountaineer's Motion to dismiss and entered Mountaineer's proposed Order. That decision was reversible error and this Court should reverse the Circuit Court on this issue.

3. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss when it erred on the law regarding negligence and its application when sufficient facts were alleged in the Complaint.

"In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken." Syl. Pt. 1, *Parsley v. Gen.*

Motors Acceptance Corp., 167 W.Va. 866, 280 S.E.2d 703 (1981); Syl. Pt. 4, *Jack v. Fritts*, 193 W.Va. 494, 457 S.E.2d 431 (1995); Syl. Pt. 3, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000); Syl. Pt. 5, *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W.Va. 609, 567 S.E.2d 619 (2002).

"The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law." *Aikens* at Syl. Pt. 5; *Lockhart* at Syl. Pt. 3; Syl. Pt. 3, *Jackson v. Putnam Cty. Bd. of Educ.*, 221 W.Va. 170, 653 S.E.2d 632 (2007). "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" Syl. Pt. 3, *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

In Syllabus Points 1 and 2 of *Foster v. City of Keyser*, the West Virginia Supreme Court of Appeals set forth the following duties of gas companies, like Mountaineer:

> 1. It is the duty of a company transporting and supplying natural gas, to so construct and maintain its pipe lines to prevent the escape of gas in a manner that will injure the person or property of another. Syllabus Point 1, *Dowler v. Citizens' Gas & Oil Co.*, 71 W.Va. 417, 76 S.E. 845 (1912).
>
> 2. Natural gas is a dangerous substance and a distributor of natural gas is required to exercise a high degree of care and diligence to prevent injury and damage to the public from the escape of gas. A distributor of natural gas is required to exercise a degree of care commensurate to the danger involved in the transaction of its business. The duty to use due care which a distributor of natural gas owes to the public is a continuing one and one which ***cannot be delegated to another*** (emphasis added).

Id., 202 W.Va. 1, 501 S.E.2d 165 (1997). In *Foster*, the facts were that city employees damaged a gas line, and the gas company delayed in its response to the leak. *Id*., 202 W.Va. at 13, 501 S.E.2d at 177. The *Foster* Court went on to hold:

> As is noted in *Groff v. Charleston-Dunbar Natural Gas Co.*, 110 W.Va. 54, 156 S.E. 881 (1931), quoting from *Siebrecht v. Gas Co.*, 21 A.D. 110, 47 N.Y.S. 262, 263:
>
> > "Care and prudence required of the defendant watchfulness and vigilance commensurate with the dangerous character of the substance it was distributing, and this involves not only the careful laying of sound pipes, but also requires an efficient system of inspection, oversight and superintendence." 110 W.Va. at 58.
>
> *Long*, 158 W.Va. at 754, 214 S.E.2d at 844.
>
> In *Canfield v. West Virginia Central Gas Co.*, 80 W.Va. 731, 736, 93 S.E. 815, 816 (1917), we said that:
>
> > A gas company is bound to inspect for discovery of leaks due to defects in materials, deterioration of pipes and valves, displacement or dislocation by accident, the weather and the like, because it knows these things often occur.
>
> We have also said that "When a gas company has the exclusive use of a pipe line not its own to conduct gas to a consumer, the company assumes the duty of reasonable inspection and maintenance of the line while it is so used." Syllabus Point 1, *Groff v. Charleston-Dunbar Natural Gas Co.*, 110 W.Va. 54, 156 S.E. 881 (1931). In *Groff*, we also said that:
>
> > the question of the [gas company's] liability is not dependent upon their knowledge of the pipe's defective condition or the escaping gas, but upon the observance or neglect of care by them. . . . If the evidence warrants the view that the service line was broken by a slip of the 3-inch line, then the question is the same, whether the slip resulted from the work done on the regulator or from the looseness of the soil. That question is: What care was exercised by defendant to anticipate and

> prevent the slip? Did it make reasonable inspection of the line? If so, would the slip or the tendency to slip with its consequent menace to the service pipe have been discovered? If the defendant had notice of, or by the exercise of reasonable care it should have noticed, the instability of the hillside soil, it became its duty to support the 3-inch line properly against that danger. It has been held that "every precaution which is within the bounds of reason" should be taken to guard against a misplacement of gas pipes. Other authorities have said "every reasonable precaution suggested by experience and the known danger of the escape of gas ought to be taken" (citations omitted).
>
> 110 W.Va. at 59, in part quoting from *Dow v. Winnipesaukee Gas & Electric Co.*, 69 N.H. 312, 315, 41 A. 288, 289 (1898).

Id. Clay Music made the same allegations against Mountaineer in this case. Clay Music-Appx. pgs. 21-24. The Circuit Court sidestepped the issue by holding Clay Music did specify who damaged the pipes or when the pipes were damages, but the *Foster* decision makes clear those are erroneous conclusions because the issues are questions of fact for the jury. Mountaineer had a clear duty to protect Clay Music, as stated in *Foster*, regardless of who damaged the pipe and when the pipe damage occurred. To hold otherwise, as the Circuit Court did, was clear reversible error.

Clay Music's Complaint repeatedly cites Mountaineer's continuing obligation to keep its gas in its pipe, especially since Clay Music did not have gas service. Clay Music-Appx. pgs. 17-24 (Complaint at ¶s 12, 13, 26(j), 20-31 & 33). Mountaineer's gas escaped its pipes, entered into the subject structure and caused the Explosion. *Id*. Mountaineer also stole two (2) sections of pipe on two (2) occasions which hindered Clay Music. *Id*. Clay Music also alleged injuries that affect it, such as the exclusive use and enjoyment of its property, lowering the value of its

property, and otherwise causing it annoyance, inconvenience, and aggravation in the use of their properties. Clay Music-Appx. pgs. 20-21 (Complaint at ¶s 15-19).

At this stage, Clay Music sufficiently alleged enough facts to state a claim for negligence upon which relief could be granted to it. As such, based upon the above referenced averments and law, Mountaineer's Motion to dismiss should have been denied on this basis. The Circuit Court should have entered Clay Music's proposed Order denying the Motion which properly addressed the averments and law. However, the Circuit Court ignored these averments in the Complaint and West Virginia law on negligence when granted Mountaineer's Motion to dismiss and entered Mountaineer's proposed Order. That decision was reversible error and this Court should reverse the Circuit Court on this issue.

4. The Circuit Court committed reversible error when it erroneously granted Mountaineer Gas Company's Motion to dismiss when it erred on the law regarding intentional spoliation and its application when sufficient facts were alleged in the Complaint.

The tort of intentional spoliation is designed to preclude a party from destroying evidence with the intent to harm another party's ability to bring or defend a legal claim. *Williams v. Werner Enters., Inc.*, 235 W.Va. 32, 42, 770 S.E.2d 532, 542 (2015). "Intentional spoliation of evidence is defined as the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." Syllabus Point 10, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003); *Williams*, 235 W.Va. at 38, 770 S.E.2d at 538. "The gravamen of the tort of intentional spoliation is the intent to defeat a person's ability to prevail in a civil action. Therefore, it must be shown that the evidence was destroyed with the specific intent to defeat a pending or potential lawsuit." *Id.*, 213 W.Va. at 717,

584 S.E.2d at 573. "West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party." Syllabus Point 9, *Hannah*, 213 W.Va. at 708, 584 S.E.2d at 564.

In *Hannah*, the West Virginia Supreme Court of Appeals answered another certified question which held that West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party. *Id*., 213 W.Va. 704, 716, 584 S.E.2d 560, 572 (2003). In order to establish this intentional spoliation claim, a plaintiff must prove that: (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. *Hannah*, 213 W.Va. at 715, 584 S.E.2d at 573. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. *See Id*. The spoliator must overcome the rebuttable presumption or else be liable for damages. *See Id*.

Clay Music satisfied its liberal notice-pleading burden under *Hannah* to establish a claim for intentional spoliation which was to be interpreted in light most favorable to it and accepted as true. First, Clay Music alleged that there was a pending or potential civil action. Clay Music-Appx. pgs. 17-24 (Complaint at ¶s 12, 13, 26(j), 20-31 & 33); *Mace v. Ford Motor Co.*, 221 W.Va. 198, 203, 653 S.E.2d 660, 665 (2007) (*per curiam*) (a "pending or potential civil action" exists where the plaintiff has actually filed a claim, or where there is evidence objectively demonstrating the possibility that the plaintiff was likely to pursue a claim in the future). There

was an Explosion in the Premises from Mountaineer's gas which did not have gas service. Second, Clay Music alleged knowledge of Mountaineer of the pending or potential civil action. *Id*; *Williams*, 235 W.Va. at 40, 770 S.E.2d at 540 ("Our scrutiny of the seven-factor test in Syllabus Point 11 of *Hannah v. Heeter*, as well as the text of *Hannah*, reveals ***no*** requirement of 'actual' knowledge. The tort of intentional spoliation requires only proof of '***knowledge of the spoliator of the pending or potential civil action***.' Syllabus Point 11, *Hannah*."). When the Explosion occurred under these circumstances, Mountaineer knew or should have known of a potential civil action. Third, Clay Music alleged willful destruction of evidence. *Id*. Mountaineer's employees came to the scene after the Explosion and took a critical piece of pipe which hindered a cause determination. Later, at site examination by causation experts, one of Mountaineer's employees, after being asked not to interfere, intentionally prevented a video scoping of the pipe by cutting and taking another section of pipe. Fourth, Clay Music alleged the spoliated evidence was vital to Clay Music's ability to prevail in the pending or potential civil action. *Id*. Clay Music was hindered in its ability to determine the exact cause of the Explosion by Mountaineer's actions in taking critical sections of pipe. Fifth, Clay Music alleged the intent of Mountaineer to defeat a party's ability to prevail in the pending or potential civil action. *Id*. Mountaineer intentionally took key pieces of pipe that were vital to the case and knew that in doing so a causation determination would be hindered and difficult by other parties. *Id*. Sixth, Clay Music alleged its inability to prevail in the civil action and Clay Music alleged damages. *Id*.; Clay Music-Appx. pgs. 20-21 (Complaint at ¶s 15-19).

Here, the Circuit Court merely did a cursory review of West Virginia law on the intentional spoliation. Clay Music-Appx. pgs. 84-90. Then, the Circuit Court weighed the averments in the Complaint and, based upon the weighing of facts, held that Clay Music failed to

plead properly a claim for intentional spoliation. *Id*. The Circuit Court did not construe the averments in the Complaint in the light most favorable to Clay Music, take the allegations as true or do a liberal notice pleading analysis. In fact, the Circuit Court ignored the averments which demonstrated the discovery rule was applicable to this case. That is reversible error.

At this stage, Clay Music clearly and sufficiently alleged enough facts to state a claim for intentional spoliation upon which relief could be granted to it. As such, based upon the above referenced averments and law, Mountaineer's Motion to dismiss should have been denied on this basis. The Circuit Court should have entered Clay Music's proposed Order denying the Motion which properly addressed the averments and law. However, the Circuit Court ignored these averments in the Complaint and West Virginia law on intentional spoliation when granted Mountaineer's Motion to dismiss and entered Mountaineer's proposed Order. That decision was reversible error and this Court should reverse the Circuit Court on this issue.

IX. CONCLUSION

In this case, the facts in Clay Music's Complaint are to be construed in the light most favorable to it, the allegations are to be taken as true and given a liberal notice pleading analysis. The Circuit Court failed to do so and that is reversible error. Clay Music alleged that Mountaineers' gas escaped from its line, got trapped in a sewer line, and blew it up the business where it had two (2) machines. The business did not have gas service, so there was no expectation that there would be any gas in the structure. Clay Music had no reason to know that because the gas and sewer lines are deep underground, off the property and could not be observed or viewed without excavation. Experts are needed to test and examine of all pipes involved which takes a significant amount of time and expertise before determining causation. Thus, the discovery rule would be applicable because Clay Music would not have the requisite

knowledge because the nature of the incident and due to the fraudulent concealment of Mountaineer.

The Complaint also alleges fraudulent concealment, removing, theft, cover-up and spoliation and all the elements necessary to toll the statute of limitations on the tort causes of action because on two (2) separate occasions Mountaineer intentionally interfered with experts trying to determine the cause of the Explosion by removing and leaving the scene with critical sections of pipe which thwarted efforts to determine causation. More importantly, Clay Music's Complaint alleges that it was defrauded by Mountaineer in connection with investigating the subject Explosion. Therefore, Clay Music set forth claims for which relief can be granted under any theory and it is clearly a question of fact as whether, when and how the statute of limitations applies to Clay Music's claims. Counts I (negligence) and II (intentional spoliation) of Clay Music's Complaint (Clay Music-Appx. pgs. 16-25) allege specific fraudulent concealment, removing, theft, cover-up and spoliation by Mountaineer, which were done in a fraudulent and deceptive manner. These are the types of allegations that specifically need to be addressed by the jury as to when the statute of limitations began to run, and whether or not Mountaineer's conduct tolled the statute of limitations.

WHEREFORE, Petitioner Clay Music Corp. respectfully request this Honorable Court grant its appeal regarding the granting of Respondent Mountaineer Gas Company's Motion dismiss, reverse the Circuit Court's October 21, 2024, Order, remand this case to allow discovery and trial on all claims in its Complaint and for all other relief this Court deems just and proper.

Dated: January 21, 2025

PETITIONER CLAY MUSIC CORP.,
By counsel:

/s/ David R. Barney, Jr.
David R. Barney, Jr., Esquire (W.Va. Bar No. 7958)
Thompson Barney

2030 Kanawha Boulevard, East
Charleston, West Virginia 25311
Telephone: (304) 343-4401
Facsimile: (304) 343-4405
drbarneywv@gmail.com

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CLAY MUSIC CORP.,

Plaintiff Below, Petitioner,

v. **Court No. No. 24-ICA-457**

MOUNTAINEER GAS COMPANY, **Kanawha Co. Civil Action No. 22-C-385 (Consolidated with CAN 22-C-694 & CAN 23-C-657)**

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner Clay Music Corp. hereby certifies that on **January 21**, **2025**, the foregoing "*Petitioner's Brief*" was served on the following counsel through the electronic filing system:

Carrie Goodwin Fenwick, Esquire
Goodwin & Goodwin, LLP
300 Summers Street; Suite 1500
Charleston, West Virginia 25301
Counsel for Mountaineer Gas Co.

Eric R. Passeggio (admitted *pro hac vice*)
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
260 Franklin Street, 14th Floor
Boston, Massachusetts 02110-3112
Counsel for Mountaineer Gas Co.

PETITIONER CLAY MUSIC CORP.,
By counsel,

/s/ David R. Barney, Jr.
David R. Barney, Jr., Esquire (W.Va. Bar No. 7958)
Thompson Barney
2030 Kanawha Boulevard, East
Charleston, West Virginia 25311
Telephone: (304) 343-4401
Facsimile: (304) 343-4405
drbarneywv@gmail.com