IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CLAY MUSIC CORP.,

Plaintiff Below, Petitioner,

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

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

Defendant Below, Respondent.

RESPONDENT'S BRIEF

Carrie Goodwin Fenwick (WV Bar No. 7164)
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
T: 304-346-7000
cgf@goodwingoodwin.om

Eric R. Passeggio (WV Bar No. 14740)
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
260 Franklin Street, 14th Floor
Boston, MA 02110-3112
Eric.passeggio@wilsonelser.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

The Statement of the Case is intended to be a "concise account of the procedural history of the case and a statement of the facts of the case that are relevant to the assignments of error." W. Va. R.A.P., Rule 10(c)(4). Clay Music's recitation exceeds this standard and Mountaineer Gas Company ("MGC") requests that this Court disregard those portions of Petitioner's Brief.

The second paragraph of the "Procedural History" begins with an argumentative characterization of the Circuit Court's order, suggesting that the Circuit Court erred in deciding the motion to dismiss without a hearing and entering an order consistent with MGC's prepared order. First, pursuant to Rule 6(d)(1) of the West Virginia Rules of Civil Procedure, the Circuit Court is not required to conduct a hearing and may decide a motion based upon the materials submitted. It should also be noted that Clay Music did not request a hearing, so the Circuit Court did not ignore Clay Music's wishes. Second, it is common for the prevailing party to prepare an order, which the Circuit Court then adopts. *See* W.Va. T.C.R. 24.01.

The "Statement of Facts" is a near-verbatim recitation of ¶¶ 1-19 of Clay Music's Complaint. To the extent that it contains arguments and legal conclusions, MGC requests that this Court disregard those portions.

SUMMARY OF ARGUMENT

MGC recognizes that resolving disputes related to the application of the statute of limitations often depends on resolving facts; however, that general presumption is not an impediment in this case because Clay Music has failed to exercise reasonable diligence to protect its interests. As explained below, attempting to decipher Clay Music's position requires a certain amount of cognitive dissonance. It argues simultaneously (1) that it could not determine that it had

a claim against MGC because of stolen evidence *but*, (2) it nonetheless was and is able to conclude that MGC was negligent in the absence of that same evidence. Both cannot be true.

There are two overarching issues before this Court: (i) the Circuit Court's analysis of the statute of limitations in the context of this case, with an emphasis on the concept of fraudulent concealment; and (ii) the Circuit Court's determination that Clay Music failed to state a claim for the tort of intentional spoliation.

This Court reviews the assignments of error regarding the application of the rule concerning the statute of limitations *de novo.*

The Circuit Court properly applied the Rule 12(b)(6) standard. Nothing in the order suggests otherwise. Clay Music's brief does not cite a single example from the order where the Circuit Court erred in applying the Rule 12(b)(6) standard, nor could it. Much like its Complaint, its Brief is instead riddled with bald assertions that it claims this Court must accept simply because West Virginia is a notice pleading state. "Notice pleading" does not mean that a party simply gets to allege anything and that those allegation(s) automatically withstand scrutiny. There are times when a motion to dismiss is proper, and this is exactly one of those instances.

The Circuit Court did not err in its analysis of when the time for Clay Music's negligence claim accrued, nor when in the exercise of reasonable diligence, Clay Music should have known about its potential cause of action. Some accidents and allegedly negligent acts are so obvious that any reasonable person has access to facts upon which a claim can be pursued. MGC denies that it was negligent, but for purposes of the motion acknowledges that an odor of gas, an explosion, and the discovery of a gas leak near the Patty's/Judy's property,[1] at least invites a controversy as to its alleged negligence.

[1] Shop-A-Minit owned the property at 103 Beaver Plaza. A separate entity, Patty's, Inc. d/b/a Judy's, operated the commercial gambling parlor, and Clay Music owned two of the video lottery terminals inside the gambling parlor.

The Circuit Court did not commit any error as to Clay Music's third assignment of error. Whether Clay Music satisfied the pleading standards for a substantive claim of negligence was not the basis of MGC's motion to dismiss. Every time a court determines that a plaintiff missed a statute of limitations deadline, it necessarily disregards the merits of that plaintiff's claim. That is what happened here. MGC does not dispute that, in theory, it owes a duty of reasonable care under the circumstances. Its point, however, is that the existence and contours of that duty is not material to this appeal.

Finally, Clay Music waived its ability to appeal the Circuit Court's order dismissing Count II of the Complaint because Clay Music did not assert any argument concerning the tort of intentional spoliation in its opposition to the motion to dismiss. Even if it had, Clay Music cannot overcome the fact that it does not and cannot explain how the *sewer pipe* would prevent it from proving MGC's alleged negligence in connection with MGC's gas distribution main (which has been preserved and inspected). Clay Music appears to believe that the mere absence of *any* piece of evidence amounts to intentional spoliation. This belief is wrong. Clay Music cannot establish the elements of the tort of intentional spoliation and the Circuit Court rightly dismissed Count II.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

MGC does not request oral argument as oral argument would be unnecessary under Rule 18(a)(4) of the *West Virginia Rules of Appellate Procedure*. MGC instead requests entry of a memorandum decision on the merits as presented in the parties' individual briefs.

ARGUMENT

See Complaint at ¶ 5 [Clay Music-Appx. pg. 18] Counsel for Clay Music also represents Shop-A-Minit; both entities are owned by the same individual.

1. **The Circuit Court applied the correct standard for a motion to dismiss pursuant to Rule 12(b)(6) and there is no basis for asserting that it failed to do so.**

"Appellate 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, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

> The term *"de novo"* means "Anew; a fresh; a second time." We have often used the term *"de novo"* in connection with the term *"plenary"* … Perhaps more instructive for our present purposes is the definition of the term "plenary," which means "[f]ull, entire, complete, absolute, perfect, unqualified." We therefore give a new, complete and unqualified review to the parties' arguments and the record before the circuit court.

Gastar Exploration, Inc. v. Rine, 239 W. Va. 792, 798, 806 S.E.2d 448, 454 (2017).

As to the matter before this Court, *de novo* review affords it the opportunity to engage in its own review of the underlying motion papers. Considering the nature of review conducted by this Court, the Circuit Court's omission of a recitation of Rule 12(b)(6) standard is, at best, harmless error. *See e.g., Stephens v. Rakes*, 235 W. Va. 555, 573, 775 S.E.2d 107, 125 (2015). There is no indication in the Circuit Court's order that it applied anything other than the principles stated in *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 520-521, 854 S.E.2d 870, 882-883 (2020).

As to the substance, Clay Music's first assignment of error and argument – that the failure to restate the Rule 12(b)(6) standard "is a sufficient ground to reverse the Circuit Court's decision [Petitioner's Brief, p. 11] – is not supported by citation to any legal authority. Like allegations in the Complaint, it is a bald statement of error and conclusory argument.

Clay Music does not explain how it believes the Circuit Court weighed the facts, the very essence of this assignment of error. "Bald statements or carelessly drafted pleadings will not survive a Rule 12(b)(6) motion to dismiss." *Highmark v. W. Virginia, Inc. v. Jamie*, 221 W. Va.

487, 491, 655 S.E.2d 509, 513 (2007) (*Fass v. Nowsco Well Services,* 177 W. Va. 50, 52, 350 S.E.2d 562, 564 (1986)); *See also Blackburn v. City of Smithers*, 2023 W. Va. App. LEXIS 121, (W.Va. ICA, 2023).

The recitation of facts set forth in MGC's motion to dismiss consists of direct quotes from Clay Music's Complaint. [Clay Music-Appx. pg. 27-28] That does not mean that the conclusion that Clay Music attempts to infer from those facts is *also a fact*, which is what Clay Music's assignment of error attempts to do. Its Brief states, "Clay Music alleged that it has no idea that Mountaineers' gas escaped from its line, got trapped in a sewer line, and it blew up the business where it had two (2) machines." [*Id.*] In other words, Clay Music appears to think that its allegation that it lacked *actual knowledge* is enough to state a basis for tolling the statute of limitations. This is wrong.

The discovery rule, as set forth Syllabus Points 3-4 of *Gaither v. City Hosp.*, 199 W. Va. 706, 487 S.E.2d 901 (1997), clearly states that this is an *objective test*. The discovery rule "focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action." *Syl. Pt. 5 State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799 (2020) (quoting *Syl. Pt. 4, Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009)). The standard to establish a claim for intentional spoliation focuses on the defendant's intent, not the plaintiff's claimed knowledge (or lack thereof). *See Hannah v. Heeter,* 213 W. Va. 704, 717, 584 S.E.2d 560 (2003).

The premise of Clay Music's argument is patently flawed. The Circuit Court applied the correct standard.

2. The Circuit Court correctly applied *Dunn's* five-step analysis, committing no error.

"[A] right of action does not 'accrue' for purposes of the statute of limitations until the plaintiffs knew or should have known by the exercise of reasonable diligence of the nature of their claims." *Stemple v. Dotson*, 184 W. Va. 317, 400 S.E.2d 561 (1990) (citing *Syl. Pt., Sewell v. Gregory,* 179 W. Va. 585, 371 S.E.2d 82 (1988)). The relevant question before this Court for the second assignment of error is: Does Clay Music's Complaint state sufficient facts to support its claim that its cause of action accrued on a date *other than* July 18, 2021? The Circuit Court agreed with Respondent; Clay Music should have known by the exercise of reasonable diligence of a possible claim against MGC on the day of the explosion, July 18, 2021, or certainly within two years.

The critical facts (which are not in dispute) for this inquiry are:

- Patty's (doing business as Judy's) did not have natural gas service;
- MGC and only MGC provides natural gas distribution service in Beaver, West Virginia and owned/operated a gas distribution main adjacent to the property;
- MGC found a hole in the main after the explosion, within hours of it occurring; and
- It was a natural gas explosion.

There is no case law to support the proposition that a plaintiff must know every detail of its cause of action before the statute of limitations begins to run. This is the lesson of *Roberts v. W. Va. Am. Water Co.*, 221 W. Va. 373, 655 S.E.2d 119 (2007), which arose from the installation of water lines parallel to a gravel road on the plaintiff's property. In *Roberts*, the plaintiff attempted to argue that the statute of limitations did not begin to run until it hired an engineering consultant to inspect its property and offer an opinion as to the cause of the property damage. *See id.* at 376-379. *Roberts* rejected that argument. Similarly, here, the notion that Clay Music's cause of action did not become

complete until late-August 2021, when it received an opinion from an investigator, is not consistent with West Virginia law.

To be clear, MGC is relying on *Roberts* for the proposition that the facts surrounding the incident were so obvious that no one could conceal the prospect of a potential claim against MGC. *Metz v. E. Associated Coal, LLC*, 239 W. Va. 157, 165, 799 S.E.2d 707 (2017), supports the same proposition. Clay Music had complete access to the facts underlying its claim, it just failed to act on them in a timely manner.

Despite the litany of cases that Clay Music cites in support of its position, it only states part of the test to determine whether an action is time-barred – even in the presence of allegations of fraud. *See Syl. Pts. 3-6, State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799 (2020). *Dunn's* five-step analysis explicitly includes consideration of fraudulent concealment: (i) identify the applicable statute of limitations; (ii) identify when the requisite elements of the cause of action occurred; (iii) apply the discovery rule; (iv) if the discovery rule does not apply, then determine whether 'the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the potential cause of action; and (v) determine if some other tolling doctrine applies. *Syl. Pt. 5, Dunn,* 225 W. Va. 43. In short, contrary to Clay Music's argument, *Stemple*, *Wooten v. Roberts,* 205 W. Va. 404, 518 S.E.2d 645 (1999), and *Perrine v. E.T. Dupont De Nemours*, 225 W. Va. 482, 694 S.E.2d 815 (2010), do not create a categorical prohibition against granting a motion to dismiss in the context of allegations of fraud.

Among the *Dunn* factors, only step four is at issue in this case. Addressing each factor:

a. <u>The applicable statute of limitations</u>: Clay Music is asserting a claim for negligence. Clay Music's claim is subject to the 2-year statute of limitations established by W.Va. Code § 55-1-12.

b. Date that requisite elements of the cause of action occurred: The explosion occurred on July 18, 2021.

c. Is the discovery rule applicable: As noted, this case is analogous to *Roberts*, which renders the discovery rule inapplicable. *Gaither* states the discovery rule as follows:

> In 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.

Syl. Pt. 4, Gaither, 199 W. Va. 706. This is an objective test, which "focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action." *Syl. Pt. 5 State ex rel. 3M Co.,* 244 W. Va. 299 (quoting *Syl. Pt. 4, Dunn*, 225 W. Va. 43).

Clay Music knew that an explosion occurred at Judy's and knew that Shop-A-Minit ("SAM")/Judy's was not a natural gas customer. It also knew that MGC was the only entity that supplied natural gas to the area, and was on site, responding to the explosion on July 18, 2021. The Supreme Court provided an example of when and why the discovery rule applies in *Metz*. The court stated:

> In marked contrast to those tort cases such as *Gaither* where **a plaintiff has no basis to know of his injury** (surgical sponge left in body cavity), an employee or prospective employee knows of his injury immediately upon finding out that he or she was not hired or was terminated or otherwise discriminated against. Consequently, there is no need to apply the discovery rule, whose purpose is to avoid barring a plaintiff from bringing suit who had no access to the facts underlying his claim—not the legal theories—upon which the claim will be pursued.

Metz, 239 W.Va. at 165. (declining to apply the discovery rule to toll the statute of limitations until the individual learns of the alleged discriminatory motive underlying the adverse employment

decision) (citations omitted) (emphasis added). Clay Music's suggestion that it did not have reason to know that a possible cause of action existed *and* that MGC was a potential defendant is astonishing and defies common sense.

What more would Clay Music or any other potential plaintiff have needed to know? Nothing. That is one of the points of *Roberts* and *Metz*. Some accidents and allegedly negligent acts are so obvious that any reasonable person has access to facts upon which a claim will be pursued. As Clay Music notes repeatedly, West Virginia is a notice pleading state; nothing prevented it from asserting a negligence claim immediately. The other matters that are consolidated with Clay Music's Complaint are apt examples; Janet Danberry and Patty's timely filed their claims and thus did not have to resort to asserting an intentional spoliation claim into their factual allegations. It was enough that a natural gas fueled explosion occurred to support a negligence claim. Clay Music knew what was going on, it simply missed the deadline.

d. Fraudulent concealment: There are two components to the analysis of fraudulent concealment: (i) "fraudulent concealment" and (ii) that the plaintiff was prevented from discovering the potential cause of action. Clay Music's position fails on both components.[2]

First, *Dunn* defined fraudulent concealment as follows: "Fraudulent concealment involves the concealment of facts by one with knowledge or the means of knowledge, and a duty to disclose, coupled with an intention to mislead or defraud," i.e., knowledge, intent, and duty to disclose. *Dunn*, 225 W.Va. at 52 (quoting *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W.Va. 578, 584, 567 S.E.2d 294, 300 (2002). Paragraph 12 of the Complaint is a muddled mess of allegations;[3]

[2] There are few cases that analyze and apply *Dunn's* step 4. None of those cases involved the type of physical and obvious accidents or damage that occurred at Judy's in this case, which makes them unhelpful in resolving the issue before the court. *See Dunn*, 225 W.Va. 43 (claims against law firms in connection with a real estate transaction); *State ex rel. 3M*, 244 W.Va. 299 (alleged violations of the West Virginia Consumer Credit and Protection Act concerning product that defendants allegedly knew did not do what they were supposed to do).

[3] Paragraph 12 is eight sentences long and, as best MGC can tell, conflates events that occurred on different days.

however, the most reasonable reading of it is that Clay Music alleges that MGC "stole" a portion of the sewer line on the evening/night of the explosion. In fact, ¶ 12 of the Complaint is so vague and imprecise that it is difficult for anyone to follow what it is talking about.

Essentially, Clay Music alleges a legal conclusion of intentional spoliation, not facts. *See* Clay Music Opposition at 12-13 (citing Complaint ¶ 33) [Clay Music-Appx. pg. 24].[4] Clay Music's Complaint never refers to a witness,[5] photograph, document, or any shred of evidence that supports the allegation or legal conclusion concerning spoliation. Not a single factual allegation in its Complaint can be construed to support an allegation of knowledge or intent.

Ultimately, Clay Music's allegation is nonsensical – why would the absence of the *sewer line* conceal a potential cause of action against MGC due to a hole in the *gas main*? For purposes of the motion to dismiss, MGC did not attempt to dispute Clay Music's allegations of negligence.

This feeds directly into the second component of *Dunn's* step 4. A potential cause of action against MGC was obvious the moment that it excavated the gas main to locate the apparent leak. The building that blew up did not have gas service, there was a hole in the gas main, and the building was the site of an explosion. How much more would Clay Music need to know to consider that it might have a claim against MGC? The other parties knew immediately and timely filed their actions. There is no case law that supports the proposition that a plaintiff must know every last detail of its cause of action before the statute of limitations begins to run.

e. Other tolling doctrines: Clay Music has not identified any other tolling doctrine that may apply to this case.

---

[4] "Plaintiff assert [*sic*] that Defendant Mountaineer intentionally and knowingly spoliated certain pieces of the subject sewer line and has otherwise tried to conceal evidence in this matter."

[5] In ¶ 14 of the Complaint, Clay Music alleges, "Defendant Mountaineers [*sic*] theft and removal of the section of sewar [*sic*] line was seen by an eyewitness at the premises." This is an extremely serious allegation and the fact that Clay Music does not name the "eyewitness" is notable. This is especially true where Clay Music's counsel has been present at every deposition in this case and no "eyewitness" has ever been identified.

The Circuit Court did not err in its analysis. Objectively, any other person or entity in Clay Music's position would have reasonably known that a potential cause of action existed, and the potential defendant was MGC. In fact, the other parties in the consolidated cases knew just that and timely asserted their claims.

3. Clay Music's third assignment of error is inapposite, as the Circuit Court's order addressed the timeliness of the Complaint, not the substance of its negligence claim.

Clay Music's third assignment of error is an issue that was not raised or briefed below and does not relate to the statute of limitations or allegations of intentional spoliation. MGC did not argue that it had no duty to Clay Music (or other similarly situated individuals). Again, MGC's motion to dismiss focused on two issues: (i) that Clay Music's claim was barred by the statute of limitations; and (2) that it failed to state a claim for intentional spoliation.

That Clay Music can state a claim for negligence that could have survived a motion to dismiss substantively *does not* cure Clay Music's failure to file this lawsuit within two years of the accrual of its cause of action.

Foster v. City of Keyser, 202 W.Va. 1, 501 S.E.2d 165 (1997), stands for the simple proposition that natural gas distribution companies are subject to a negligence standard – *not strict liability* – and that those companies cannot delegate their duties as distributors of natural gas to other entities. MGC anticipates that there will be some disputes about the contours of its duties with respect to the claims asserted by Patty's and SAM, but those disputes are not before this Court or germane to MGC's motion to dismiss Clay Music's Complaint.

The Circuit Court did not commit any error as to Clay Music's third assignment of error. Whether Clay Music satisfied the pleading standards for a substantive claim of negligence was not the basis of MGC's motion to dismiss. No plaintiff can bring a claim after the expiration of the

relevant statute of limitations, regardless of the merits of their allegations; that is the effect of a statute of limitations.

4. The Circuit Court analyzed Count II, Intentional Spoliation, pursuant to Rule 12(b)(6) and Clay Music failed to raise an objection to Respondent's argument below.

The Supreme Court has "continually held that issues not raised in the trial court and first raised on appeal are considered waived." *Builders' Serv. & Supply Co. v. Dempsey*, 224 W. Va. 80, 680 S.E.2d 95, n. 9 (2009) (citations omitted). Clay Music dedicated three (3) pages to intentional spoliation in its appellate brief. It did not, however, reference the leading case on intentional spoliation, *Hannah,* 213 W. Va. 704, or include a single sentence discussing intentional spoliation in its opposition to MGC's motion to dismiss. [Clay Music-Appx. pg. 41-56] Clay Music waived any argument on this assignment of error due to its failure to raise the argument below. This Court's analysis of this section should stop here.

Notwithstanding the defect in Clay Music's appeal of this issue, MGC will address the substance of Clay Music's argument with respect to the *sewer pipe.*

Syllabus Point 11 of *Hannah* established the elements of the tort of intentional spoliation.

> The tort of intentional spoliation of evidence consists of the following elements: (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. 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. The spoliator must overcome the rebuttable presumption or else be liable for damages

Id. Clay Music had/has the burden of pleading elements 1-6. It attempted to do so for the first time in its brief to this Court. [Petitioner's Brief, at 27-28] It must make specific allegations, more than

mere conclusory allegations with no factual support. *Hannah*, 213 W. Va. at 717. The Supreme Court stated:

> We caution that the party injured by spoliation must show more than the fact that potential evidence was intentionally destroyed. 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. "The intent with which tort liability is concerned. . . .is an intent to bring about a result which will invade the interests of another in a way that the law forbids."

Id.

As a preliminary issue, the segment of sewer line at issue was not MGC's property. This situation is unlike *Hannah*, in which the plaintiff's mother destroyed an original audiotape of a conversation with the defendant. In *Hannah*, there was a clear trail from the plaintiff to the destruction of the evidence. In contrast, Clay Music advances the conclusory allegation that MGC "stole" the line but does not set forth any specific facts to that effect. Rule 12 requires more than conclusory allegations.

MGC did not steal the sewer line. However, in recognition of the fact that the Court will assume that the facts alleged in the Complaint are true, MGC's argument focuses on the *alleged effect* of the missing section of sewer line on Clay Music's claim.

Clay Music has not set forth any factual allegations that the missing section of sewer line "was vital to [its] ability to prevail in the pending or potential civil action." Giving Clay Music the benefit of the doubt, the Complaint alleges that gas leaked from MGC's gas main and migrated into the building via the sewer customer service line. *See* Complaint at ¶ 27 [Clay Music-Appx. pg. 23]. It is not at all apparent from the Complaint how the sewer line is vital to proving any negligence by MGC with respect to the gas main. The sewer line was a conduit for natural gas into

the building. MGC's alleged negligence concerned the gas main and its operations, not the sewer line.[6]

Similarly, the Complaint does not assert any facts that support the existence of "intent" to defeat Clay Music's claim by "stealing" a piece of sewer line. Again, the claim against MGC will rise and fall on evidence concerning the gas main and MGC's operations, not the sewer line. In this context, it is impossible to infer intent as required by *Hannah*.[7]

CONCLUSION

For the reasons stated herein, MGC requests that this Court affirm the Circuit Court's October 21, 2024, Order in its entirety.

Dated: February 20, 2025

RESPONDENT MOUNTAINEER GAS COMPANY

By Counsel

/s/ Carrie Goodwin Fenwick
Carrie Goodwin Fenwick (WV Bar No. 7164)
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
T: 304-346-7000
cgf@goodwingoodwin.com

/s/ Eric R. Passeggio
Eric R. Passeggio (WV Bar No. 14740)
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
260 Franklin Street, 14th Floor
Boston, MA 02110-3112

[6] Paragraph 11 of the Complaint alleges that gas migrated through the Patty's/Judy's sewer service line. This allegation is unremarkable – every party to the *Danberry* and *Patty's* lawsuits have made similar allegations (including MGC). Notably, Clay Music has not alleged a *different* path of gas migration.

[7] Lost in the absurdity of Clay Music's argument, is the fact that MGC has a crossclaim against SAM in the *Danberry* action. What possible advantage would MGC obtain by "stealing" and hiding evidence that might support its claims against SAM?

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CLAY MUSIC CORP.,

Plaintiff Below, Petitioner,

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

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

Defendant Below, Respondent.

CERTIFICATET OF SERVICE

The undersigned counsel for Respondent Mountaineer Gas Company hereby certifies that on February 20, 2025, the foregoing "Respondent's Brief" was served on the following counsel through the electronic filing system:

David R. Barney, Jr., Esquire
Thompson Barney
2030 Kanawha Boulevard, East
Charleston, WV 25311

Respondent Mountaineer Gas Company

By Counsel,

/s/ Carrie Goodwin Fenwick
Carrie Goodwin Fenwick (WV Bar No. 7164)
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
T: 304-346-7000
cgf@goodwingoodwin.com