

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CLAY MUSIC CORP.,

Plaintiff Below, Petitioner,

v.

MOUNTAINEER GAS COMPANY,

Defendant Below, Respondent.

**ICA EFiled: Mar 07 2025
03:15PM EST
Transaction ID 75797334**

Court No. No. 24-ICA-457

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

PETITIONER'S REPLY BRIEF

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III. 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.

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.

As was done in the Order granting the Motion to dismiss submitted to the Circuit Court, Mountaineer Gas Company's ("Mountaineer") response brief blatantly ignores and omits any discussion of the Rule 12(b) standard and Clay Music's averments in the Complaint and its arguments regarding the Motion to dismiss.

Under the Rule 12(b) standard, 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. *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008) (citing *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978)). Based upon Mountaineer's response brief, there is no dispute that the Circuit Court failed to do so in the Order granting the Motion to dismiss and that is reversible error. Had the Circuit Court conducted a proper analysis, it would have established clearly that Clay Music's Complaint sets forth claims for which relief can be granted to it. In fact, in *Mountaineer Fire & Rescue Equipment, LLC, et al. v. City National Bank of WV, et al.*, the West Virginia Supreme Court of Appeals reversed a circuit court for granting a Motion to dismiss in a similar situation. *Id.*, 854 S.E.2d 870 (W.Va. 2020).

Moreover, assuming *arguendo*, that Clay Music erred in the articulation of its theory of the case, as Mountaineer suggests, that is not a basis for dismissing the case. *Mountaineer*, 854 S.E.2d at 883-884. All that is required to defeat a Rule 12(b) Motion to dismiss is that if it

appears from Clay Music's Complaint that it may be entitled to any form of relief, even though the particular relief it has demanded and the theory on which it seems to rely are not appropriate. *Id.* Fair Notice is all that is required because West Virginia remains a notice-pleading state. *Id.*, at Ft. Nt. 4. Clay Music met this standard and the Motion to dismiss should have been denied by the Circuit Court.

Mountaineer completely misrepresents Clay Music's averments in the Complaint and arguments regarding the Motion to dismiss. Clay Music never argued that it lacked actual knowledge about the incident. Instead, Clay Music alleged that on July 18, 2021, a gas Explosion and fire (the "Explosion") occurred at the Premises, which was not a Mountaineer customer, 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). In pertinent part, contrary to Mountaineer's assertions, Clay Music specifically further alleged in the Complaint that:

Not until the end of August of 2021, did Plaintiff know or, by the exercise of reasonable diligence, should have known what caused the explosion and who caused the explosion. Plaintiff was not a natural Gas customer of Mountaineer at the 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 the Plaintiff 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 Defendant 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 Plaintiff 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 a Defendant 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. Defendant Mountaineer did not have permission from the owner of the premises to take the key section of the sewer line being tested. Defendant Mountaineer took the sewer line in an effort to conceal and cover up its actions and liability. To this day, Defendant Mountaineer still denies that its gas line was the cause of the explosion and blames the sewer line.

Clay Music-Appx. pg. 19-20 (Complaint at ¶ 12) (emphasis added); *see also* Clay Music-Appx. pgs. 17-24 (Complaint at ¶s 12, 13, 26(j), 20-31 & 33). These issues then were articulated in Clay Music's response brief to the Motion to dismiss and in its proposed Order. Clay Music-Appx. pgs. 9, 41-67. All of these averments and arguments were ignored improperly when the Circuit Court granted the Motion to dismiss.

As Mountaineer admitted, 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)). Based upon the liberal Rule 12(b) standard and notice pleading, Clay Music's Complaint met this standard, but the Circuit Court failed to liberally construe the complaint so as to do substantial justice. *Cantley v. Lincoln Cty. Comm'n*, 221 W.Va. 468, 470, 655 S.E.2d 490, 492 (2007). Clay Music, in its timely August 2, 2023, Complaint, put Mountaineer on notice of its claims and sufficiently set forth those claims for which relief could be granted to it and the Court erred in granting the Motion to dismiss. 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.

While Mountaineer's response brief sets out the five-part test articulated in Syllabus Point 5 of *Dunn v. Rockwell*, it completely ignores Clay Music's pertinent averments in the Complaint and its arguments regarding the Motion to dismiss. Syl. Pt. 5, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009). In addition, Mountaineer completely ignores case law indicating the *Dunn* analysis is a question of fact for the jury. Mountaineer's failures are fatal to its argument.

Mountaineer, like the Circuit Court's Order granting Mountaineer's Motion, alludes to pictures and otherwise argues the weight of the evidence. Mountaineer, while ignoring Clay Music's averments in the Complaint and its arguments regarding the Motion to dismiss, merely argues about when Plaintiff knew or, by the exercise of reasonable diligence, should have known what caused the explosion and who caused the explosion and compares Clay Music to other parties. As such, Mountaineer attempts to gloss over the fact that 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 improperly weighed the averments in the Complaint and, based upon the weighing of facts, held that Clay Music failed to plead properly the discovery rule, despite what was alleged in the Complaint. *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.

A troubling aspect of Mountaineer's argument is that it mocks Clay Music's claims in this matter. To Mountaineer, Clay Music's claims do not make sense. However, nothing could be further from the truth. As aforementioned, Clay Music's claims make clear that from the outset, Mountaineer did whatever it could to prevent Clay Music from investigating the cause of

the explosion which took about a month because of Mountaineer's actions. The allegations in the Complaint are quite serious. There was an explosion at premises which was not a natural gas customer and then, on two separate occasions, Mountaineer employees stole pieces of pipe during the causation investigation and those sections of pipe have not been seen since.¹ Now, not surprisingly, Mountaineer claims there is a lack of evidence against it in this case. Mountaineer's claims are wrong factually and legally.

Clay Music specifically alleged that not until the end of August of 2021, did it know or, by the exercise of reasonable diligence, should have known what caused the explosion and who caused the explosion and alleged fraudulent concealment, removing, theft, cover-up and spoliation 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). Then, Clay Music timely filed its Complaint within two (2) years of this knowledge on August 2, 2023. The aforementioned averments in the Complaint clearly demonstrated the discovery rule was applicable to this case. As previously outlined, 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, these averments were sufficient to satisfy the *Dunn* test and

¹ During the year that this case was pending, deposition testimony has confirmed Clay Music's allegations, including testimony from Mountaineer employees.

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.

Furthermore, despite Mountaineer's claims to the contrary, there is no dispute that the question as to when Clay Music became aware of this fraudulent concealment, removing, theft, cover-up and spoliation is a question of fact, not a basis for a Motion to dismiss. *Stemple v. Dotson*, Syl. Pt. 3, 184 W.Va. 317, 400 S.E.2d 561 (1990); *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 714-15, 487 S.E.2d 901, 909-10 (1997); *Wooten v. Roberts*, Syl. Pt. 4, 205 W.Va. 404, 518 S.E.2d 645 (1999); *Miller v. Monongalia County Board of Education*, Syl. Pt. 4, 210 W.Va. 147, 556 S.E.2d 427 (2001); *Dunn* at Syl. Pt. 5; *Perrine v. E.T. Dupont De Nemours*, 225 W.Va. 482, 516-520, 694 S.E. 2d 815, 849-853 (2010); *Lemon v. Stilwell*, Case No. 12-0990 (W.Va. Supreme Court Memorandum Opinion 2013). Mountaineer simply argues questions of fact which are for jury consideration, not a basis for the Motion to dismiss. The Circuit Court's Order is inconsistent with West Virginia law on this issue and should be reversed by this Court.

At the Rule 12(b) stage, Clay Music clearly and sufficiently alleged enough facts to trigger the discovery rule to prevent application of the statute of limitations. As such, Clay Music timely filed its August 2, 2023, Complaint. 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.

Mountaineer does not dispute the fact that Clay Music established a claim for negligence. Instead, Mountaineer relies on its faulty argument that the claim was time barred. Clay Music timely filed its Complaint. As aforementioned, Clay Music clearly and sufficiently alleged enough facts to trigger the discovery rule to prevent application of the statute of limitations. Clay Music-Appx. pgs. 17-24 (Complaint at ¶s 12, 13, 26(j), 20-31 & 33) and Clay Music-Appx. pgs. 41-67. 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.

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.

Mountaineer's waiver argument exemplifies the issues with the Circuit Court's Order dismissing the case. Despite clear factual averments and arguments to the contrary, Mountaineer submitted an Order to the Circuit Court which, in dismissing the case, held that Clay Music failed to respond to the spoliation aspect of the Motion to dismiss. This holding simply is not accurate.

As aforementioned, the record is replete, in the averments in the Complaint and in the response to the Motion to dismiss, that Clay Music addressed the factual and legal aspects of the spoliation argument in the Motion to dismiss. Clay Music-Appx. pgs. 17-24 (Complaint at ¶s 12, 13, 26(j), 20-31 & 33) and Clay Music-Appx. pgs. 41-67. Clay Music satisfied its liberal notice-pleading burden under *Hannah v. Heeter* to establish a claim for intentional spoliation which was to be interpreted in light most favorable to it and accepted as true. *Id.*, 213 W.Va. 704, 716, 584 S.E.2d 560, 572 (2003). Clay Music timely filed its Complaint and alleged that there was a pending or potential civil action; Clay Music alleged knowledge of Mountaineer of the pending or potential civil action; Clay Music alleged willful destruction of evidence; Clay Music alleged the spoliated evidence was vital to Clay Music's ability to prevail in the pending or potential civil action; Clay Music alleged the intent of Mountaineer to defeat a party's ability to prevail in the pending or potential civil action; and Clay Music alleged its inability to prevail in the civil action and Clay Music alleged damages. Clay Music-Appx. pgs. 20-21 (Complaint at ¶s 15-19) and Clay Music-Appx. pgs. 41-67.

Mountaineer relies on the Circuit Court's flawed Order for its waiver argument. Again, 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 improperly 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 and did not address the spoliation argument. *Id.* The Circuit Court ignored the specific averments and arguments which demonstrated the spoliation claim. Likewise, 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. 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. Clay Music timely filed its Complaint on August 2, 2023.

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: March 7, 2025

**PETITIONER CLAY MUSIC CORP.,
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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner Clay Music Corp. hereby certifies that on **March 7, 2025**, the foregoing “*Petitioner’s Reply Brief*” was served on the following counsel through the electronic filing system:

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