IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RICHARD JEFFRIES, and COLOURS BEAUTY SALON, LLC, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

Civil Action No. 17-C-765
Honorable Carrie L. Webster

WEST VIRGINIA-AMERICAN WATER COMPANY,

Defendant.

ORDER DENYING DEFENDANT WEST VIRGINIA AMERICAN WATER COMPANY'S MOTION TO DISMISS

This matter is before the Court on Defendant West Virginia American Water Company's Motion to Dismiss and for Application of the Primary Jurisdiction Doctrine to Plaintiffs' Class Action Complaint. The instant civil action arises from a massive main break that occurred on or about June 23, 2015, in the Kanawha Valley tap water distribution system operated by West Virginia American Water Company ("West Virginia American"), which allegedly left 25,000 or so customers located in the western portion of the water utility's system without tap water, or with insufficient water pressure, for multiple days.

BACKGROUND AND FINDINGS OF FACT

The instant motion to dismiss was brought under Rule 12(b) of the West Virginia Rules of Civil Procedure. Therefore, "the plaintiff's allegations must be accepted as true and construed most favorably to him." *Garrison v. Herbert J. Thomas Memorial Hosp. Ass'n*, 190 W. Va. 214, 219, 438 S.E.2d 6, 11 (1993). Accordingly, with respect to West Virginia American's motion to dismiss, in place of findings of fact, Plaintiff's allegations must be accepted as true.

Plaintiffs allege that the main break occurred on a section of pipe and type of pipe known by West Virginia American and to the water industry generally to be faulty, poorly designed, poorly constructed, and highly prone to catastrophic failures like the one at issue. Plaintiffs further allege that West Virginia American knew for years that industry standards required it to do something to reinforce the western portion of its Kanawha Valley system to reduce the impact of such a failure, such as increasing the volume of available treated water storage by building water tanks, by building additional large-diameter water mains to supply water in that direction, or by developing an interconnection with a neighboring water system for use in the event of such a break. Plaintiffs further allege that West Virginia American deliberately declined to take any of these actions because it was willfully starving the system infrastructure budget in the hope that more outages, coupled with its refusal to address their root cause, would force utility regulators to give it more favorable rate treatment for capital expenditures. Plaintiffs claim that these alleged actions and omissions on the part of West Virginia American give rise to both breach of contract and tort actions for damages resulting from the loss of the tap water service brought on behalf of Plaintiffs and a class of similarly situated individuals and businesses who owned or leased property situated in the area impacted by the service outage at the time of the outage.

In its motion to dismiss, West Virginia American argues that the tort claims stated in Plaintiffs' Complaint are barred by the gist of the action doctrine, and, alternatively, by the economic loss rule. Plaintiffs respond that West Virginia Code section 24-4-7 clearly creates—and two West Virginia Supreme Court cases interpreting that provision, *Carter v. Willis*, 145 W. Va. 779, 783–84, 117 S.E.2d 594, 596–97 (1960), and *Hedrick v. Grant County Pub. Serv. Dist.*, 209 W. Va. 591, 550 S.E.2d 381 (2001), clearly recognize—a non-contractual (i.e., tort) private right of action by those who own or lease property situated within a utility's exclusive territorial

service area against a utility for failure to fulfill its obligations to "the public" under West Virginia Code section 24-3-1.

A hearing was held on these issues on May 30, 2018, which all Parties appeared by counsel. This Court, having fully considered the briefs and oral arguments of counsel, finds that the statutes and cases cited by Plaintiffs are dispositive of West Virginia American's motion to dismiss Plaintiffs' tort claims. Accordingly, the Court hereby **DENIES** West Virginia American's motion to dismiss those claims.

CONCLUSIONS OF LAW

A. The Gist of the Action Doctrine

The "gist of the action" doctrine, a common-law doctrine, basically prohibits plaintiffs from re-casting purely contract claims as tort claims. It does not mean that tort claims cannot co-exist with contract claims in the same action no matter the circumstances or source of the tort claims. "In sum, 'whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract.'" *Tri-State Petroleum Corp. v. Coyne*, Case No. 17-0009, 2018 W. Va. LEXIS 286 (W. Va. April 12, 2018) (quoting *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013)). The West Virginia Supreme Court has also held: "An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract." Syl. pt. 9, *Lockhart v. Airco Heating & Cooling*, 211 W. Va. 609, 567 S.E.2d 619 (2002).

In *Gaddy*, an engineering firm (Gaddy) alleged that it had reached an oral fee-sharing agreement with a law firm (Bowles Rice) in a line of cases involving potential underpayment of royalties by a gas company. For reasons relating to changes in the nature of the litigation—

1. The Court notes that it requested the plaintiff to amend proposed order to incorporate discussion of Gaddy. CW

which was pursued as a class action by a different attorney who was appointed lead class counsel—the law firm was unable to keep its promise to share the contingency fees that would have been available in individual lawsuits. Gaddy brought suit for breach of contract and fraud, among other things. The trial court dismissed the fraud claim on the grounds that the only "fraud" alleged was the *promise* of a portion of any future contingency fee, which ultimately was not performed. *Gaddy*, 231 W. Va. at 585, 746 S.E.2d at 576. The trial court reasoned that a proper fraud claim requires the false assertion of an *existing* fact, and explained that "[f]raud cannot be predicated on a promise not performed." *Id.*

The Supreme Court affirmed the trial court's dismissal of Gaddy's fraud claim on the same grounds—that it failed to meet one of the required elements of fraud, a misrepresentation about existing or past facts. *Id.* The Supreme Court then went on to discuss the "gist of the action" as another way of thinking about the same flaw:

> Rather than citing to intentional misrepresentations that the respondents made about existing or past facts to prove its fraud case, the petitioner simply redoubled its efforts in trying to prove the existence of the alleged oral fee-sharing agreement. And, by taking this tack, the petitioner has demonstrated what the respondents argued: that the fraud claims asserted by petitioner were simply breach of contract claims masquerading as fraud claims. In seeking to prevent the recasting of a contract claim as a tort claim, courts often apply the "gist of the action" doctrine.

Id., 231 W. Va. at 586, 746 S.E.2d at 577. The Supreme Court in *Gaddy* did not hold that fraud claims and breach of contract claims cannot co-exist. Rather, the Court summarized its discussion of the gist of the action doctrine by explaining: "Succinctly stated, whether a tort claim can coexist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract." *Id.*

Unlike the plaintiff in *Gaddy*, Plaintiffs in the instant case are not doubling down on their contract claim by alleging that a contractual promise not performed constitutes a fraud. Here,

Plaintiffs allege that the duty that West Virginia American allegedly breached is defined by statute and regulations in the first instance, and only then incorporated into the contract. Thus, those duties exist independent of their inclusion in contract or any promise West Virginia American made to its customers. The duties at issue in the instant case have an independent source in the statutes and regulations of the State of West Virginia.

More recently, in *Tri-State Petroleum Corp. v. Coyne*, Case No. 17-0009, 2018 W. Va. LEXIS 286 (W. Va. April 12, 2018), the Supreme Court focused on *Gaddy*'s "summation" language—i.e., the sentence quoted above in *Gaddy* that begins, "Succinctly stated . . ."— in finding that a plaintiff's breach of fiduciary duty claim was not barred simply because the plaintiff also alleged breach of contract against the same board members. Because the defendants' fiduciary "duty exists independently of the 2002 Partnership and 2008 Stockholders Agreements," the gist of the action doctrine did not bar those claims. 2018 W. Va. LEXIS 286, *29–30. In this case, Plaintiffs primarily rely on two statutory provisions in support of their tort claims. West Virginia Code section 24-4-7 reads in relevant part:

> Any person, firm or corporation claiming to be damaged by any violation of this chapter by any public utility subject to the provisions of this chapter, may make complaint to the commission, as provided herein, and bring suit in his own behalf for the recovery of the damages for which such public utility may be liable under this chapter in any circuit court having jurisdiction.

West Virginia American is plainly a "public utility subject to the provisions of this chapter" within the meaning of section 24-4-7. With respect to West Virginia American's alleged "violation of this chapter," Plaintiffs point to West Virginia Code section 24-3-1, which reads in relevant part:

> Every public utility subject to this chapter shall establish and maintain adequate and suitable facilities, safety appliances or other suitable devices, and shall perform such service in respect thereto as shall be reasonable,

> safe and sufficient for the security and convenience of the public, and the safety and comfort of its employees, and in all respects just and fair, and without any unjust discrimination or preference.

A simple analysis and application of the Supreme Court's holding in *Coyne* shows that West Virginia American's gist of the action doctrine must fail. Just as the fiduciary duty obligations allegedly breached in *Coyne* arise independent of the partnership and shareholder contracts, the duties owed by West Virginia American to "the public" and persons and businesses located within its exclusive service area are derived from statute, and do not require a contract between the utility and any particular person to be formed in order for the duties to apply, although it may often be the case, as it was in *Coyne*, that a contract does exist and the independent duties and the contractual duties overlap.

Two earlier West Virginia Supreme Court cases interpreting West Virginia Code section 24-4-7 add significant weight and support to this conclusion. *See Hedrick v. Grant County Pub. Serv. Dist.*, 209 W. Va. 591, 550 S.E.2d 381 (2001) (holding that applicant could maintain an action in circuit court under W. Va. Code § 24-4-7 against water utility for its refusal to accept application and extend water service to applicant's premises); *Carter v. Willis*, 145 W. Va. 779, 783–84, 117 S.E.2d 594, 596–97 (1960) (holding under W. Va. Code § 24-4-7 that the plaintiff, a utility customer, could proceed with an action in tort for damages against a water utility for failure to provide him with an adequate supply of water). In *Hedrick*, the West Virginia Supreme Court held that plaintiff, an applicant but not a customer—he never formed a contract, because his application for utility water service was rejected—could maintain an action for damages for lost anticipated profits due to lack of tap water under West Virginia Code section 24-4-7, where plaintiff's application for service was allegedly refused on improper grounds. Thus, clearly, the duties to the public and persons situated within a service area imposed by

statute (such as West Virginia Code section 24-3-1) arise independently of contract and do not require a contract in order to give rise to an action under West Virginia Code section 24-4-7.

In *Carter v. Willis*, on the other hand, the Supreme Court clearly held that the plaintiff, in that case a customer of a water utility, could maintain an action in tort or contract—although he might have to choose a remedy at a later date—under West Virginia Code section 24-4-7 for all damages, including mere inconvenience and economic losses from having to take time and spend money obtaining alternate sources of water, arising from the utility's failure to provide a sufficient and adequate supply of water and water pressure to meet his ordinary needs. Thus, tort claims under West Virginia Code § 24-4-7 plainly can coexist with contract claims by customers.

West Virginia American argues that these cases were decided prior to the gist of the action doctrine taking off in West Virginia as a common-law doctrine. While that may be, this Court would be extremely reluctant to issue a ruling that is directly contrary to the result reached by the Supreme Court itself considering the precise statute at hand and issue at hand on the basis of a projection about how the Court might decide the issue under this statute were it to consider it now, armed only with a doctrine that plainly does not command a different result by itself. In fact, as noted above, it appears that the most recent trend in gist of the action cases has been to strip the doctrine down to its core or "summation," *Coyne*, 2018 W. Va. LEXIS 286, *29–30, which is whether any independent basis for the duty and claim exists. In this case, an independent basis plainly exists for the tort liability Plaintiffs seek to impose—namely, West Virginia American's statutory obligations to "the public" under West Virginia Code section 24-3-1 and the right to damages of any person injured by a breach of those obligations under West Virginia Code section 24-4-7.

B. The Economic Loss Rule

The statutes and cases relied upon by Plaintiffs also require rejection of the economic loss rule as a bar to Plaintiffs' tort claims. *Hedrick*, in particular, stands as an insurmountable obstacle to the application of the economic loss rule to tort claims arising under West Virginia Code sections 24-3-1 and 24-4-7. In that case, a non-customer, who had no contract claim because no contract was ever formed, was permitted to pursue a claim under West Virginia Code sections 24-3-1 and 24-4-7 for purely economic losses—lost profits from the plaintiff's inability to develop his property as a mobile home park due to the refusal by the utility to extend water service to the development. It is impossible to square the result in *Hedrick* with the application of the economic loss rule to claims brought under sections 24-3-1 and 24-4-7 by persons who own or lease property within a utility's exclusive territorial service area.

At the hearing, West Virginia American repeatedly referred this Court to language cited by Judge Copenhaver in ruling on a West Virginia American economic loss argument in a superficially similar case arising from the chemical spill into West Virginia American's source water in January 2014, which resulted in an even larger number of customers being without water for a similar number of days. However, Judge Copenhaver was not, in that order, applying the economic loss rule to bar claims for economic loss and other damages (such as annoyance and inconvenience) from not being supplied tap water brought by persons who owned or leased real property within the exclusive service area impacted by the outage. Rather, Judge Copenhaver was applying the economic loss rule to bar claims brought by persons outside the service area, whose claims were clearly more tenuous than the claims of persons who reside or otherwise own or lease property that is within the utility's exclusive service area, and therefore must be serviced by that utility, or not at all. In fact, Plaintiffs' counsel, who was also counsel for plaintiffs in the case pending before Judge Copenhaver, represented that West Virginia

American did not even advance the economic loss rule in that case as an argument for the dismissal of tort claims brought by persons residing, or otherwise owning or leasing property, within the impacted service area and supplied by the utility. West Virginia American did not refute this proposition.

Lastly, while the holding in *Hedrick* leaves no room for question or doubt as to whether the statutory right of action under West Virginia Code section 24-4-7 permits recovery of economic losses even in the absence of a contractual right to such recovery, there is good reason to doubt that the common-law economic loss rule would bar these claims even in the absence of a clear statutory right to recover economic losses. The Supreme Court's holding in *Aikens v. Debow*, 208 W. Va. 486, 493, 541 S.E.2d 576, 583 (2000), bars recovery of "economic loss from an interruption in commerce in the absence of damage to a plaintiff's person or property" unless there exists contract or a "special relationship." While the Parties focused on the interplay of Code section 24-4-7 with the common-law doctrine, rather than focusing on the common-law doctrine itself, the relationship between a regulated utility with an exclusive service area and persons who reside in or otherwise own or lease property supplied by tap water in that exclusive service area appear to have a classic special relationship. In other contexts the hallmark of a "special relationship" is the "assumption . . . through promises or actions, of an affirmative duty to act on behalf of the party who was injured." Syl. pt. 6, Barbina v. Curry, 221 W. Va. 41, 650 S.E.2d 140 (2007). Here, through its affirmative act of applying for and obtaining the exclusive right to supply tap water, an essential service, to persons residing and owning property in the exclusive service area, West Virginia American plainly formed a special relationship with the persons in the area. They cannot get tap water from any other source. This Court does not need to dwell any longer on whether this application for an exclusive territorial franchise creates a

"special relationship" under the common law however, because the actual obligations and rights of recovery for breaches of those obligations have been spelled out in statutes. *See* W. Va. Code § 24-3-1; W. Va. Code § 24-4-7. Accordingly, West Virginia American's motion to dismiss Plaintiffs' tort claims is hereby **DENIED**. The objections and exceptions of the defendant noted and preserved. EWJ

Entered this 21 day of Feb, 2019.

Honorable Carrie L. Webster, Circuit Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 22
DAY OF February 2019
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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