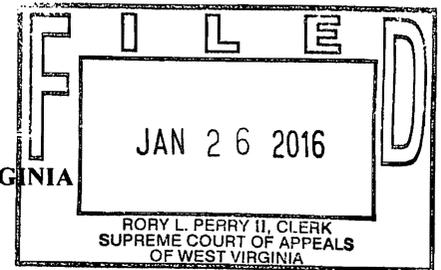


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 15-1035



**ANN KENDALL MORRIS,
JOSEPH GREENE,
CAROLYN BESTE &
MICHAEL BESTE**
Petitioners (Plaintiffs Below)

(Appeal from Final Order Granting
Respondents Motion Dismiss in Case No: 14-
C-2197 before the Circuit Court of Kanawha
County; Judge Charles E. King presiding)

vs.)

**THE ESTATE OF ROBERT LEE
MORRIS, EUGENIE MATYAS,
Individually and in her capacity as the
Executrix of and for the ESTATE OF
ROBERT LEE MORRIS,
EDWARD M. MATYS and JULIA
MATYAS**

Respondents (Defendants Below)

Petitioners' Brief

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TABLE OF CONTENTS

Table of Authorities	Page	3
Assignments of Error	Page	5
Statement of the Case	Page	5
Procedural History	Page	5
Factual History	Page	7
Summary of Argument	Page	12
Statement Regarding Oral Argument and Decision	Page	12
Argument	Page	13
Error 1	Page	13
Error 2	Page	16
Error 3	Page	19
Conclusion	Page	22
Certificate of Service	Page	23

TABLE OF AUTHORITES

- Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)
- Alpine Prop. Owners Assn. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 365 S.E.2d 52 (1987)
- Chapman v. Kane Transfer*, 160 W.Va. 530, 236 S.E.2d 207 (1977)
- Collia v McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (1987)
- Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996)
- Dunn v. Consolidation*, 180 W.Va. 681, 376 S.E.2d 485 (1989)
- Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008)
- Hager v. Marshall*, 202 W.Va. 577, 505 S.E.2d 640 (1998)
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- Horsley v. Feldt*, 302 F.3d 1125 (11th Cir. 2002)
- In the Matter of Marguerite Seyse*, 803 A. 2d 694 (N.J. Super.Ct. App. Div. 2002)
- John W. Lodge Distributing v. Texaco*, 161 W.Va. 603, 245 S.E.2d 157 (1978)
- Masinter v. Webco Co.*, 164 W.Va. 241, 262 S.E.2d 433 (1980)
- Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130 (4th Cir.1993)
- Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)
- Par Mar v. City of Parkersburg*, 183 W.Va. 706, 398 S.E.2d 352 (1990)
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- Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir.1989)
- Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148 (1981)
- Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995)
- Rule 12(b)(6) of the West Virginia Rules of Civil Procedure

Rule 56 of the West Virginia Rules of Civil Procedure

Franklin Cleckley in Litigation Handbook on West Virginia Rules of Civil Procedure - Fourth Edition.

5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §§ 1356 and 1357 (1990 and 1998 Supplement).

ASSIGNMENTS OF ERROR

- 1. THE COURT BELOW ERRED IN GRANTING RESPONDENTS' RULE 12(B)(6) MOTION IN THAT THE COURT CONVERTED RESPONDENTS' MOTION INTO A MOTION FOR SUMMARY JUDGMENT WITHOUT NOTICE TO PETITIONER**

- 2. THE COURT BELOW ERRED IN GRANTING RESPONDENTS' RULE 12(B)(6) MOTION IN THAT THE COURT ACTUALLY DETERMINED FACTS OF THE CASE INSTEAD OF EVALUATING THE SUFFICIENCY OF PETITIONER' COMPLAINT**

- 3. THE COURT BELOW ERRED IN GRANTING RESPONDENTS' RULE 12(B)(6) MOTION IN THAT THE COURT FAILED TO FOLLOW THE STANDARD OF REVIEW FOR SUCH A MOTION AND ADDITIONALLY FAILED TO FOLLOW THE APPROPRIATE STANDARD OF REVIEW FOR A RULE 56 MOTION AS WELL**

STATEMENT OF THE CASE

I. Procedural History

Petitioners, Ann Kendall, Joseph Greene, Carolyn Beste and Michael Beste, filed their verified cause of action on December 17, 2014 wherein they sought equitable and legal remedies stemming from the manner in which Defendants below, Respondents herein, (more specifically Respondent Eugenie Matyas) abused and mismanaged the estate of the decedent Robert Lee Morris ("Mr. Morris") both prior to and after Mr. Morris' death. (A.R. 20-42, 625). In addition, the Petitioners sought declaratory judgment so that the deceased was found to be a domiciliary of West Virginia at the time of his death in October 2014 and that his estate was a matter to be opened and processed under the estate laws of West Virginia. (A.R. 11-13, 20-42, 625).

On December 18, 2014, the Petitioners filed and properly recorded their Notice of Lis Pendens insuring that any potential buyer of the decedent's West Virginia real estate would be on notice of the Petitioners' claims. (A.R. 43-69, 625). On December 26, 2014 the Petitioners

also filed their Verified Motion for Injunction and/or for Temporary Restraining Order to Freeze or Prevent the Dissipation of Assets. (A.R. 70-87, 625).

On or about February 2, 2015 Respondents filed their Motion to Dismiss with supporting memorandum and exhibits (A.R. 88 – 377, 625) claiming among other things, improper and/or lack of jurisdiction (A.R. 97-100) and comity. (A.R. 100-101). By February 12, 2014 the decedent's real property, located at 205 Shawnee Circle, Charleston, West Virginia (more particularly Kanawha City) was sold via stipulation as reflected in the Court's Order of that same date. (A.R. 607-611 [title commitment schedules], 612-616 [Order], 625). At that time the proceeds from the sale of the decedent's real property was placed in the Registry of the Kanawha County Circuit Court where they remain to this day. (A.R. 613).

Petitioners initially responded to Defendants' Motion to Dismiss on May 14, 2014 (A.R. 378-590, 625) and supplemented their position on August 31, 2015 with the filing of an additional exhibit designated "Exhibit S". (A. R. 626-641, 625). On June 8, 2015 Petitioners filed their Motion to Distribute Registry Funds (A.R. 591-594, 625) which Respondents responded to on June 22, 2015. (A.R. 595-598, 625).

On July 31, 2015 Petitioners filed their reply to Respondents' response in regard to Petitioners' request to divide the registry funds. (A.R. 599-602, 325). Petitioners also filed their Motion to Produce or Identify All Estate Assets on August 14, 2015 (A.R.603-606, 625) as there was great concern Respondent Matyas was secreting away certain editorial cartoons drawn by Kendall Vintroux, grandfather of Petitioners Ann Kendall Morris and Carolyn Beste as well as Respondent Eugenie Matyas. (A.R. 603)

On August 31, 2015 Respondents' Motion to Dismiss was presented and heard before the Honorable Charles E. King. (A.R. 1-19, 625). On September 22, 2015 and after the Court was

presented with competing finding of facts and conclusions of law, Respondents' Motion to Dismiss was granted by the Circuit Court. (A.R.617-624-625). Petitioners' Complaint therefore was dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Id.

On October 22, 2015 Petitioners timely filed their Notice of Appeal (A.R. 642-656) and it is from the Circuit Court's September 22, 2015 Order that Petitioners now seek redress from this Honorable Court.

II. Factual History

As found in Petitioner's Complaint and pleadings, this matter presents the issue of whether the decedent, Robert Lee Morris ("Mr. Morris"), was domiciled in the state of West Virginia at the time of his death while in a New Jersey health care facility in October 2014. (A.R. 29, 385, 467-468). Further, a secondary issue raised in the complaint states that if in fact Mr. Morris was a domiciliary of West Virginia at his death then his will rightly should be probated in the State of West Virginia and not the State of New Jersey. (A.R. 28-29). And in addition, the Petitioners sought redress against Respondent Eugenie Matyas for the waste and destruction she committed against Mr. Morris' estate which clearly has impacted and continues to cause detriment to Petitioners. (A.R. 30-32).

As background, Mr. Morris was the father to Petitioners Ann Kendall Morris and Carolyn Beste as well as to Respondent Eugenie Matyas. (A.R. 22). Petitioners Ann Kendall Morris and her husband Joseph Greene are life long residents of West Virginia. (A.R. 21). Petitioner Carolyn Beste and her husband Michael Beste, are residents of New Mexico. (A.R. 21). Respondents Eugenie Matyas and her 24-year-old daughter, Respondent Julia Matyas, are residents of New Jersey. (A.R. 21-22). Respondent Edward Matyas, who is Respondent Eugenie Matyas' son, is a resident of Pennsylvania. (A.R. 21)

On October 5, 2012, over two years before his eventual passing, Mr. Morris was removed from the state of West Virginia by his New Jersey daughter, Respondent Matyas. (A.R. 25, 385-386, 471). Respondent Matyas personally and physically took her father (allegedly against his will) from his West Virginia home, transported him in her car across the West Virginia state line into New Jersey all under the guise that he was too mentally feeble to care for himself. (A.R. 25, 385-386, 471).

On April 7, 2011 and obviously prior to her physical collection of Mr. Morris, Respondent Matyas, allegedly secured a valid power of attorney over her father's financial estate. (A.R. 23) At that same time, Morris purportedly executed a "new" will (in Charleston, West Virginia), which, along with the power of attorney, was drafted and witnessed by his West Virginia lawyer, Harry P. Henshaw. (A.R. 23-24, 240-274, 307). Interestingly, Mr. Henshaw noted that he had concerns about Mr. Morris' mental condition when he executed his new will and power of attorney. (A.R. 24, 387, 576).

Upon being taken from the state Mr. Morris then resided (also allegedly against his will and with the unabated intent to return to his West Virginia home) with Respondent Eugenie Matyas in Gloucester County, New Jersey. (A.R. 23, 29). Mr. Morris remained in New Jersey up until his death in October 2014, with the last few months of his life spent in a nursing facility after being placed there by Respondent Matyas. (A.R. 22-23, 25, 29, 379, 388). Even though at the time of his admission to the nursing facility, Ms. Matyas had no guardianship over Mr. Morris and in fact was specifically denied being his guardian by the Gloucester County Superior Court, Chancery Division (New Jersey), ("Chancery Court") Respondent Matyas admitted him anyway without any judicial oversight or order. (A.R. 421, 442).

In addition to the domiciliary issues concerning Mr. Morris, Petitioners more specifically stated in their Complaint that Respondent Matyas, intentionally engaged in a pattern of tortious behavior – including taking Mr. Morris from West Virginia to New Jersey against his will as described above. (A.R. 25, 385-386). Respondent Matyas also, over a period of more than two years, significantly diminished the value of Morris’ financial estate, while he was still living, for her own self-centered purposes. (A.R. 24-25, 30-32). Respondent acted in this manner both knowing that Mr. Morris was mentally infirmed and contrary to Mr. Morris’ testamentary intent (even the one expressed in his “new” 2011 will). (A.R. 240-247, 482-489).

As a result of her actions, large amounts of money went missing from Mr. Morris’ estate without meaningful and substantive explanation as to the manner in which the monies were utilized or spent. (A.R. 31-33). Or funds simply were unaccounted for in any “explanations” of expenditures provided by Respondent Matyas (A.R. 31-33). And Petitioners reasonably believe that Respondent Matyas continues to drain the Morris estate for purposes that are rooted in her own self-interests and for the interests of her children, Co-Respondents Julia and Edward Matyas.

Therefore, by her actions Respondent insured that Mr. Morris’ two other daughters would not be treated equally with her in regard to the full distribution of Mr. Morris’ estate, (both prior and post death) all despite his expressed intent to the contrary. (A.R. 31-33, 240-247, 482-489) Additionally, the Petitioners claimed that Matyas also destroyed a pattern of gift-giving to Petitioners despite the written and well established desire of Mr. Morris as expressed by him long prior to his being removed from West Virginia in 2012. (25, 30, 385-386).

From essentially October 2012 through today Petitioners have sought and continue to seek redress for the behavior of Respondent Matyas and in so doing filed an earlier claim before

the Kanawha County Circuit Court seeking to prevent Respondent Matyas from wasting Mr. Morris' estate.

Underling Actions and Orders of 2014 Prior to the Filing of Civil Action No: 14-C-2197

By April 2014 Petitioners had good faith reasons to believe that Mr. Morris was overwhelmingly being taken advantage of both financially and physically by Respondent Matyas. (A.R. 26, 379, 506-507). Petitioners' concern for their father steadily grew resulting in the filing of Petitioner Ann Kendall Morris' initial cause of action before the Kanawha County Circuit Court, styled *Morris v. Matyas*, Civil Action No: 14-C-749 ("14-C-749 Action"). (A.R. 26, 379) As noted, Petitioners claimed in that matter that Mr. Morris should be returned to his domicile in West Virginia to live out his remaining days and that Respondent Matyas should be held accountable for unlawfully and deliberately wasting the then living Mr. Morris' estate. (A.R. 26, 379).

Petitioners properly served Respondent Matyas the 14-C-749 Action shortly after filing and instead of replying to the 14-C-749 Complaint, Respondent Matyas moved to seek lawful guardianship of Mr. Morris by filing an action before the Chancery Court styled *In Re the Matter of Robert Lee Morris*, Docket No: 14-682. (A.R. 26, 28, 380, 416-419). Though it was known to Respondent Matyas that she had been served with pleadings, she never informed that Chancery Court when she filed for guardianship that she was a Defendant in a West Virginia action that called into question her behavior as the manager of her father's money and body.¹ (A.R. 381, 439).

Petitioner Ann Kendall Morris was never served with Respondent Matyas' guardianship pleadings. Petitioner Carolyn Beste however was served and she and her husband, Michael

¹ It was not until Petitioners' counsel contacted the Chancery Court directly that the Chancery Court learned, for the first time, that Respondent Matyas had already been served with West Virginia pleadings. (A.R. 381, 439).

Beste, filed a counter petition in the Chancery Court seeking to be declared Mr. Morris' co-guardians. (A.R. 311-350). It was the Beste's plan to move Mr. Morris back to his home in West Virginia; the place where Mr. Morris desperately wanted to return. (A.R. 311-350).

On July 30, 2014 the Chancery Court held a preliminary hearing concerning guardianship and in its ruling denied Respondent Matyas' guardianship request and placed severe restrictions on her ability to spend money from her father's estate. (A.R.442-443). The Chancery Court's July 30, 2014 Order noted clearly that Mr. Morris' domicile was in question (A.R. 442-443), it also appointed a Guardian ad Litem for him and it further temporarily froze Mr. Morris' assets while it sorted out issues. (A.R.442-443).

By August 2014 the Chancery Court and Kanawha County Circuit Court matters were progressing. (A.R. 26). Given the Chancery Court's July 30, 2014 findings, Petitioner Ann Morris Kendall agreed to permit the issue of guardianship to be determined before the Chancery Court. (A.R. 26). Petitioner's position was simply that guardianship is a matter of residency while the probate of an estate is a matter of domicile. (A.R. 11-13). Given her position on the matter, Petitioner Ann Kendall Morris dismissed the 14-C-749 Action. (A.R. 26).

And as the guardianship matter was progressing, inclusive of the review as to whether the Chancery Court even had jurisdiction over Mr. Morris, Mr. Morris died. (A.R. 9-11, 27, 442-443). Upon his death the guardianship matter was rendered moot and eventually dismissed by the Chancery Court. (A.R. 27). Mr. Morris was finally reunited with West Virginia being buried in the mountain state in early November 2014. (AR. 386). Shortly after his death, the Petitioners reached out to Respondent Matyas in good faith in the hopes of resolving all issues. (A.R. 27). Instead of discussion, Respondent Matyas moved to probate Mr. Morris' will in New Jersey. (A.R. 239-248).

As a result, the Petitioners filed Circuit Court Civil Action No. 14-C-2197 and proclaimed, among other things, that Mr. Morris had never established a domicile in New Jersey but remained domiciled instead in West Virginia up to and including the day of his death in October 2014. (A.R. 20-42). For those reasons, Petitioners claimed that the administration of Mr. Morris' estate should be accomplished in and through the State of West Virginia and further that the actions and behavior of Respondent Matyas rightly deserved judicial scrutiny in the state of West Virginia.

SUMMARY OF ARGUMENT

The Court below improperly dismissed Petitioners' complaint by first, failing to place the Petitioners' on notice that the Respondents' Rule 12(b)(6) motion to dismiss was actually being reviewed by the court as a Rule 56 motion for summary Judgment instead. In addition, the trial court improperly determined and came to conclusions regarding facts by examining evidence well beyond the scope of determining the sufficiency of the Petitioners' pleadings. And, regardless of whether the the trial court was reviewing Respondents' motion as a motion to dismiss or a motion for summary judgment, it failed to apply the appropriate standard of review for either one.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case involves assignment(s) of error in the application of settled law and is therefore suitable for oral argument pursuant to Rev. R.A.P. 19(a)(1) and disposition by memorandum decision is likewise appropriate.

ARGUMENT

THE COURT BELOW ERRED IN GRANTING RESPONDENTS' RULE 12(B)(6) MOTION IN THAT THE COURT CONVERTED RESPONDENTS' MOTION INTO A MOTION FOR SUMMARY JUDGMENT WITHOUT NOTICE TO PETITIONER

As the September 22, 2015 Order reflects, the trial court dismissed the Petitioners' complaint via Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. It did so knowing that when evaluating the sufficiency of a complaint on a Rule 12(b)(6) motion, it should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. Syl. Pt. 3, *Chapman v. Kane Transfer*, 160 W.Va. 530, 236 S.E. 2d 207 (1977). And knowing that the complaint is to be construed in the light most favorably to the plaintiff. *Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987), and *Chapman*. Id. at 538. Also see *Highmark West Virginia v. Jamie*, 221 W. Va. 487 at 491, 655 S.E.2d 509 (2007), (*Where*, "All the pleader is required to do is set forth sufficient information to outline the elements of her claim or to prevent inference to draw that these elements exist.").

As to a motion to dismiss, the trial court should not dismiss a claim merely because it doubts that the plaintiff will prevail in the action and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on pleadings. *John W. Lodge Distributing v. Texaco*, 161 W.Va. 603, 605 245 S. E. 2 157 (1978), *Highmark v. Jamie*, Id. at 491, and *Dunn v. Consolidation*, 180 W.Va. at 694, 376 S.E.2d 485 (1989).

As stated succinctly by Professor Cleckley in Litigation Handbook on West Virginia Rules of Civil Procedure - Fourth Edition, pgs. 385-386: "If the complaint alleges sufficient facts, it must survive a Rule 12(b)(6) motion to dismiss even if it appears that recovery is very remote and unlikely. And it has long been held that "whether a complaint states a claim upon which relief may be granted is to be determined solely from the provisions of the complaint".

Par Mar v. City of Parkersburg, 183 W.Va. 706, 398 S.E. 2d 352 (1990). Franklin Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure – Fourth Edition, p. 387. And further that “[o]nly matters contained in the pleading can be considered on a motion to dismiss”. *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977); see also, Franklin Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure – Fourth Edition, Id.

As to the Complaint, the facts as plead are to be accepted as true. See *Sticklen v. Kittle*, 168 W. Va. 147, 163, 287 S.E.2d 148, 157 (1981) (citing *John W. Lodge Distributing Co. v. Texaco*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978), (where the facts as alleged for purposes of a Rule 12 (b) (6) motion, are to be taken as true)). The requirement that the facts as plead are to be accepted as true makes clear that the purpose of a 12(b)(6) motion is not to try facts or test defenses but instead to test the sufficiency of the Complaint. See *Collia v McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (W.Va. 1987). And it is for that reason that a motion to dismiss for failure to state a claim under Rule 12(b)(6) should be viewed with disfavor and should be rarely granted. See *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir.1989) (reaffirmed in *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 n. 4 (4th Cir.1993)). See generally, 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §§ 1356 and 1357 (1990 and 1998 Supplement).

And further, upon a conversion from a motion to dismiss to a motion for summary judgment the Court is obligated to give the parties notice that it is now treating the moving party’s motion to dismiss as a Rule 56 motion. *Riffle v. C. J. Hughes Construction*, 226 W. Va. 581, 703 S.E. 2d 552 (2010). It is important also to recall that even though affidavits and the like may be attached to a moving party’s motion to dismiss (or even the plaintiff’s complaint or

response motion), the Court is not necessarily obligated to convert the motion to dismiss into a motion for summary judgment. *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

Yet, should the Court elect not to convert a motion to dismiss into a motion for summary judgment while also taking into review affidavits and other supporting documents to that motion to dismiss, then it may do so if (1) the document is central to the plaintiff's claim, and (2) undisputed. Franklin Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure – Fourth Edition, p. 394, see also, *Horsley v. Feldt*, 302 F.3d 1125 (11th Cir. 2002).

In the matter below the trial Court never placed the parties' on notice that it had converted Respondents' motion to dismiss into a motion for summary judgment. That is presuming that the Court treated the Respondents' motion to dismiss more akin to a summary judgment even though in actuality it failed to apply the appropriate standard of review for either such motion. Yet, to the degree that the Court was assessing the validity of facts or determining whether there was a genuine issue of material fact in dispute, it never notified Petitioner that it had converted Respondents' motion.

As pointed out above, the Court's September 22, 2015 Order clearly states that it was dismissing Petitioners' complaint by way of Rule 12(b)(6). (A.R. 623). Therefore, the Court had the duty to or to a) maintain the appropriate standard of review for a 12(b)(6) motion to dismiss with the recognition that any documents it evaluated outside of the complaint had to be central to Plaintiff's claim and undisputed; or b) inform the parties that it had converted Respondents' motion in to a Rule 56 motion and then apply the appropriate standard of review. In this case though the Court did neither. The trial Court actually determined facts after evaluating credibility, validity and "truthfulness" all through the use of extensive external documents well beyond the scope of the Petitioners' complaint.

Stated bluntly, it was not the Court's prerogative to move past the evaluation of the Petitioner's complaint to the point of factual determination or even assessing whether Petitioners could ultimately prevail. Again, "If the complaint alleges sufficient facts, it must survive a Rule 12(b)(6) motion to dismiss even if it appears that recovery is very remote and unlikely". Franklin Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure - Fourth Edition, pgs. 385-386. And Petitioners' Complaint clearly set forth sufficient factual allegations which made clear to Respondents the nature of their claims.

THE COURT BELOW ERRED IN GRANTING RESPONDENTS' RULE 12(B)(6) MOTION IN THAT THE COURT ACTUALLY DETERMINED FACTS OF THE CASE INSTEAD OF EVALUATING THE SUFFICIENCY OF PETITIONER' COMPLAINT

Again, the purpose of a 12(b)(6) motion is not to try facts or test defenses but instead to test the sufficiency of the complaint. See *Collia v McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (W.Va. 1987). Or as this Court has stated succinctly, "[t]he singular purpose of a Rule 12(b)(6) motion is to seek a determination of whether the plaintiff is entitled to offer evidence to support the claims made in the complaint". *Dimon v. Mansy*, 198 W. Va. 40, 48, 479 S.E.2d 339, 347 fn5 (1996). Again, instead of reviewing the sufficiency of the Petitioners' complaint the trial court determined "facts" even to the point where it concluded that the Petitioners' facts were not true or that Respondents' facts were more credible and therefore true.

By example, the trial court concluded that Respondent Matyas had *insufficient* ties to the State of West Virginia to be held accountable in West Virginia for alleged actions in deliberately harming Mr. Morris' (West Virginia) estate. (A.R. 620). The trial court determined that her contacts with West Virginia were "incidental" and not personal in nature (A.R. 6320-621). Yet, at the time Petitioners' filed their initial (14-C-749) and subsequent (14-C-2197) actions Respondent Matyas held a specific interest in her father's West Virginia real property (A.R. 20-

42) which was then converted, by substitution, into the funds held in registry by the Kanawha County Circuit Court. (A.R. 621-616).

Yet, Petitioners alleged and made clear through ample documents in support, that Respondent Matyas contacts with West Virginia were far more than telephone calls with large and impersonal conglomerate financial institutions, as the trial court determined. (A.R. 382, 339, 449-450, 452-464, 621). These documents, offered by Petitioners, reflected the significant amount of times Respondent Matyas had conducted substantive business in West Virginia by routinely and physically coming to West Virginia and to hire lawyers, accountants and maintenance help, or to physically work on her father's house, among other things. (A.R. 449-450, 451-464).

The trial court also determined, as a fact, that Mr. Morris suffered from Alzheimer's Disease. (A.R. 617). However, at no time was there a medical diagnosis or medical evidence presented to the Court, by either party, to substantiate such a finding. The trial court's declaration of this fact represented only Respondents' opinion and nothing more.

The trial court also established, as fact, that Respondent Matyas was appointed by the Chancery Court in May 2014 as the guardian of her father. (A.R. 618). However, the trial court then utterly ignored the July 30, 2014 Chancery Court Order that clearly and specifically stated that Respondent's Matyas' request to be her father's guardian was denied. (A.R. 442-443). Therefore, Respondent Matyas was not the lawful guardian to her father at the time of his death in October 2014.

The trial court also declared and accepted as a fact, the "opinion" of the New Jersey Guardian Ad Litem ("GAL") in the then dismissed New Jersey guardianship matter. (A.R. 119-157, 618). At no time was this foreign GAL subjected to cross examination before the Chancery

Court much less before the trial court. Nor was the GAL's opinion submitted by way of affidavit or given under oath in the Court below. Moreover, the New Jersey GAL's opinion, if of any evidentiary value at all, was only "relevant" in the New Jersey guardianship matter which was rendered moot upon the death of Mr. Morris in October 2014.² (A.R. 27). As a result, it was an incredible overreach by the trial court for it to adopt the untested, highly controverted opinion of the foreign GAL, as "fact" – especially for the purpose of finding that the GAL's opinion "refuted" all of Petitioners' claims of Respondent Matyas' financial wrongdoings upon the estate. (A.R. 618). Stated bluntly, if the Court was going to accept, at face value, the opinion of the New Jersey GAL then it owed the Petitioners' the duty to permit them to challenge those opinions; this the trial court did not offer. *Riffle v. C. J. Hughes Construction*, 226 W. Va. 581, 703 S.E. 2d 552 (2010).

The trial court additionally concluded, as fact, that tax payments made to the state of New Jersey by the Respondents meant that the Chancery Court had assumed jurisdiction over Mr. Morris' estate and/or that Mr. Morris' was domiciled in New Jersey at the time of his death. (A.R. 618). Yet, New Jersey tax payments were made only, and well after, Respondent Matyas had paid Federal and State (West Virginia) taxes for Mr. Morris in tax years 2012 and 2013 declaring Mr. Morris as domiciled and a resident of West Virginia. (A.R. 504, 505, 568-571, 637-641).³

² The Petitioners' complaint alleged that Mr. Morris' domicile was West Virginia – in other words, Mr. Morris always called West Virginia home. (A.R. 29). Yet, a guardianship action is based upon residency (i.e. where the physical body is at that particular time). Therefore, the GAL's letters and opinions attached to Respondents' motion to dismiss were of no value in the issue of determining domicile. (A.R. 119-157). A determination of that fact was beyond the scope of the GAL's duty.

³ As an aside, the trial court found the Respondents' "comity" argument persuasive only because it found that the New Jersey Court had already determined that it had jurisdiction over the probate of Mr. Morris' will. (A.R. 618). However, the trial court was in error in that the Chancery Court knew that jurisdiction of the probate of the will was in dispute. (A.R. 550-553). Therefore, the application of comity is inappropriate until such time as one of the conflicting courts determines / determined jurisdiction.

As to the Chancery Court, the trial court determined as fact that the Gloucester County Chancery Court had asserted its jurisdiction over the issue of domicile regarding probating Mr. Morris' will. (A.R. 618). However, there was no order presented to the Court by Respondents which specifically stated that the Chancery Court had affirmatively declared that it had personal and subject matter jurisdiction over the probate of Mr. Morris' will. (A. R. 384, 466-480, 550 - 553).⁴ And as made clear to the trial court, the Chancery Court, to the extent that it was furthering any probate process was doing so with the absolute knowledge that a lack of jurisdiction due to lack of domicile would void the entire probate process. (A.R. 550-553[Order to Show Cause]); See also, *In the Matter of Marguerite Seyse* 803 A. 2d 694 (N.J. Super.Ct. App. Div. 2002).⁵

Whether the factual determinations by the trial court were minor (the disease that caused Mr. Morris dementia) or significant (that the New Jersey Court had fully accepted probate of Mr. Morris will or that the opinion of the New Jersey GAL was gospel) it does not diminish from the trial court's error in determining facts as if it were the jury; or its determination that a jury was not needed given no genuine issue of material fact may have been in dispute. Such findings by the trial seemed to treat Respondents' motion more akin to a motion for summary judgment.

THE COURT BELOW ERRED IN GRANTING RESPONDENTS' RULE 12(B)(6) MOTION IN THAT THE COURT FAILED TO FOLLOW THE STANDARD OF REVIEW FOR SUCH A MOTION AND ADDITINALLY FAILED TO FOLLOW THE APPROPRIATE STANDARD OF REVIEW FOR A RULE 56 MOTION AS WELL

⁴ Attorney Harry Henshaw attending the August 31, 2015 hearing and without being sworn in a witness or being identified by the Court blurted out that the Chancery Court was in discovery over a motion to dismiss and the general furtherance of probating Mr. Morris' will. (A. R. 8). However, such "testimony", if that was what he offered, was neither accurate or judicial notice that the Chancery Court had determined the domicile of Mr. Morris. In reality the Chancery Court, at the time of August 31, 2015 hearing, planned to engage in discovery over the issue of jurisdiction. (A.R. 11).

⁵ *In Re Seyse* simply makes clear that the determination of domicile is absolutely necessary before a court can take jurisdiction of the probate of a will.

Though a motion to dismiss and a motion for summary judgment may have similar consequences for a victorious moving party, the two come with greatly varying standards for that same movant. As noted above, given the standard of review for a motion to dismiss, the burden is extremely high for a movant to be successful. This is ever more true in that the Court should restrict its examination of the motion to dismiss to only “matters contained in the pleadings”. Franklin Cleckley, Litigation Handbook on West Virginia Rules of Civil Procedure – Fourth Edition, p. 393. And as Professor Cleckley additionally points out, “if matters outside the pleading are presented to the Court . . . the motion [to dismiss] must be treated as one for summary judgment and disposed of under Rule 56. Id. And again, a conversion from a motion to dismiss to a motion for summary judgment requires the trial court to give the parties notice that it is now treating the moving party’s motion to dismiss as a Rule 56 motion. *Riffle v. C. J. Hughes Construction*, 226 W. Va. 581, 703 S.E. 2d 552 (2010).

To that end, the standard of review for a motion for summary judgment is extremely well established, such that:

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment may be granted when the record shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See Syllabus Point 2 of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995) (Where the court held that in considering a motion for summary judgment, the circuit court must determine whether there are any issues for trial and that Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove). see also *Hager v. Marshall*, 202 W.Va. 577, 505 S.E.2d 640 (1998).

It is also additionally well established that:

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syllabus Point 3, *Aetna Casualty*

& Surety Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963); also Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). In syllabus point four of *Aetna Casualty*, this Court explained: "If there is no genuine issue as to any material fact summary judgment should be granted but such judgment must be denied if there is a genuine issue as to a material fact."

and further that:

The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syllabus Point 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Per Curiam:

In determining whether a genuine issue of material fact exists, this Court construes the facts in the light most favorable to the party against whom summary judgment was granted.

Masinter v. Webco Co., 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980); *Alpine Prop. Owners Assn. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17, 365 S.E.2d 57, 62 (1987). Syllabus point six of *Aetna Casualty* also explains: "A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such issue is resolved against the movant for such judgment."(fn8).

As clearly set out above the trial court below determined facts and in so doing determined that there was no genuine issue of material fact in dispute. However, every genuine issue of material fact was in dispute and remains in dispute. For example, whether the New Jersey Chancery Court had determined jurisdiction over the probate of Mr. Morris' will was clearly in dispute. (A.R. 550-553).

The declaration that the "opinion" of the New Jersey GAL as "fact" concerning Respondent's financial wrongdoing to her father's estate was clearly in dispute as well. Granted, whether Mr. Morris suffered from a specific ailment that caused dementia may not have been relevant to the matter over all. However, facts as to Respondents' multiple ties to the state of

West Virginia (for purposes of personal jurisdiction), Respondents' behavior and actions concerning her father's body and money (i.e. placing Mr. Morris in a nursing home without court oversight and attempting to sell her father's house even though the July 30, 2014 Chancery Court Order prohibited the same) were absolutely relevant and absolutely in dispute. And clearly whether Mr. Morris was a domiciliary of West Virginia was the most significant fact that remained in dispute both in West Virginia and New Jersey. Yet, the trial court acted in a manner that it became the trier of facts and resolved the matter.

It was the trial court's duty to evaluate Petitioners' facts most favorably to the Petitioners, this if it had actually converted the Respondents' motion to dismiss into a motion for summary judgment. See, *Masinter v. Webco Co.*, 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980); *Alpine Prop. Owners Assn. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17, 365 S.E.2d 57, 62 (1987). Yet, the Court utterly rejected this standard of review. Again, as it did under the standard of review for a 12(b)(6) motion the court determined facts, evaluated them, weighed their credibility and ignored its duty to test either the sufficiency of the Petitioners' complaint or the fact that those genuine issues of material fact were utterly and completely in dispute.

CONCLUSION

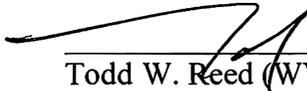
For the reasons articulated above, the trial courts order dismissing Petitioners complaint under Rule 12(b)(6) should be reversed, and this matter should be remanded for further proceedings.


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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January 2016 true and accurate copies of the foregoing Petitioners' Brief were hand delivered and/or deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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