IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-0074

JUSTINA GABBERT,

Plaintiff/Petitioner,

v.

On Appeal from Circuit Court
of Berkeley County
Civil Action No. 21-C-137

RICHARD T. COYNE, ESQ.,
TRUSTEE OF GERALD COYNE TRUST

Defendant/Respondent.

PETITIONER'S BRIEF

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II. INTRODUCTION[1]

For more than fifteen years, and deep into their elder ages, Gerald Coyne and Petitioner Justina Gabbert lived together as *de facto* spouses at property owned by Gerald. Having amassed substantial wealth through his business ventures, Gerald created a trust to govern the handling and disposition of his assets, and by way of a handwritten amendment he not only directed that upon his death Justina and other specifically-identified beneficiaries be given various items of personal property, but that Justina be given title to a house in Martinsburg so that she could live out the remainder of her life there.

At age 81 Gerald died, leaving Justina behind at age 78. Gerald's intentions were thwarted, however, when his nephew, Respondent Richard T. Coyne, Esquire, refused to give Justina the house. His refusal was not based on a contention that Gerald did not intend Justina to get the property. Much to the contrary, he conceded that Gerald wanted her to have the house. Rather, he contended that Gerald made a technical mistake in the use of the handwritten directive and as a consequence that gift failed. As for the personal property, while he agreed that the handwritten instrument was valid and effective, and while he even gave others (including himself) their gifts under the force of that document, he failed to provide Justina what was hers.

Petitioner was forced to bring suit for her property. Her Complaint presents a lengthy recitation of particularized facts, multiple causes of action sounding both in contract and in tort,

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[1] Although for ease of reading this Introduction omits citations to the appendix, later in this Brief the same facts are provided with such citation.

and an expressly-pled count for declaratory judgment, which prays for the Court to recognize and effectuate Gerald's clear intent. However, contrary to decades of precedent and strong recent appellate admonitions, the lower court ignored the well-pleaded factual allegations of the Complaint and granted Respondent's Rule 12(b)(6) motion to dismiss. The lower court's ruling should be reversed.

III. STATEMENT OF THE CASE

A. Procedural History

On May 13, 2021, Justina Gabbert filed her Complaint, (JAR[2] 07-30), which sets forth detailed allegations of fact upon which her request for declaratory judgment and other causes of action are grounded. The parties then submitted a Stipulation Extending Responsive Pleading Deadline, (JAR 31-32), with Respondent signing the stipulation *pro se*. As implied by the Notice Of Mediation that was filed on August 12, 2021, (JAR 33-35), the reason for the stipulated extension was to allow the parties to attempt a settlement prior to further litigation. As the September 7, 2021, letter, (JAR 37), of mediator Samuel Byrer, Esquire, to the lower court attests, two in-person mediation sessions failed to resolve the dispute. A scheduling order then followed. (JAR 38-41).

Respondent then filed, on September 10, 2021, a Motion To Dismiss based solely upon Rule of Civil Procedure 12(b)(6). (JAR 45-81). The motion was stand-alone, that is to say, it was not accompanied by an answer particularly admitting to or denying any of the factual allegations laid forth by the sixty enumerated paragraphs of the Complaint. Petitioner timely filed her Response To Richard T. Coyne's Motion To Dismiss, (JAR 83-133), on September 23, 2021, and

[2] Joint Appendix Record.

this was in turn followed by Respondent's September 30, 2021, Reply In Support Of Motion To Dismiss. (JAR 134-152).

In light of material contentions of fact sprung by Respondent's briefings, Petitioner served a comprehensive and case-tailored set of interrogatories and requests for production, denominated Plaintiff's Discovery Requests To Defendant (1st Set), (JAR 153-167), on October 21, 2021, along with a Notice Of Deposition Of Richard T. Coyne, Esquire (JAR 168-170), setting the deposition to occur subsequent to when the answers and responses to the interrogatories and requests would be due. On November 19, 2021, Respondent filed a Motion For Protective Order, (JAR 207-362), seeking to block Petitioner's discovery. Less than three hours later that same day, without Petitioner being given any opportunity to respond, the lower court granted the defense motion. (See Order, JAR 363).

Without permitting any oral argument, on November 30, 2021, the lower court granted the Motion To Dismiss. (See Order Granting Defendant's Motion to Dismiss Complaint, JAR 364-377). Because the court's order completely omitted addressing some critical issues raised by the Complaint and Petitioner's Response brief, Petitioner filed, on November 29, 2021, her Motion Pursuant To West Virginia Rule Of Civil Procedure 59(e) To Alter Or Amend 11/24/2021 "Order Granting Defendant's Motion To Dismiss Complaint." (JAR 378-381). Respondent filed his response, (JAR 387-410), to this motion on December 13, 2021, to which Petitioner filed her reply, (JAR 411-413), on December 14, 2021. During the pendency of the Rule 59(e) motion, and out of caution, Petitioner filed with This Honorable Court a Motion For An Extension Of Time Period For Filing A Notice Of Appeal, which was granted on December 20, 2021. On January 6, 2022, the lower court denied Petitioner's Rule 59(e) motion. (See Order Denying Plaintiff's

Motion, JAR 449-451). Petitioner's Notice Of Appeal was then timely filed January 24, 2022. (JAR 452-486).

During the pendency of her Rule 59(e) motion, on December 9, 2021, in order to protect against the inadvertent disclosure of some confidential information set forth in one of the exhibits to Plaintiff's Response To Motion To Dismiss—"Exhibit B" to be exact—Petitioner filed a Motion To Substitute Exhibit, (JAR 383-385), attaching a proposed substitute "Exhibit B" bearing various areas of redaction.[3] Respondent filed his Response To Plaintiff's Motion To Substitute Exhibit, (JAR 414-436), submitting to the court his own version of "Exhibit B," which bore greater redactions than that proposed by Petitioner. In his Response, Respondent related the parties' communications concerning the exhibit, providing the court with emails and a draft "Agreed Order," which Respondent previously tendered to Petitioner's counsel for consideration, with electronic signatures filled in upon the draft, which would actually strike the exhibit wholly from the court file. As the Response sets forth, Petitioner's counsel rejected that draft order proposal. (JAR 415; 423). Consequently, Respondent's Response culminated not with a request for the whole exhibit to be stricken but with the submittal of his own redacted "Exhibit B." (JAR 418). The Response was filed December 20, 2021, at 3:32 PM. (JAR 414). Sixty-three minutes later that same day, the lower court entered into the court file the "Agreed Order," which was discussed within but never submitted for entry by the Respondent through his Response. (JAR 437-448). While that document on its face strikes the whole exhibit, the Court affixed to it the very "Exhibit B" version that Respondent tendered. That version is provided with the Joint Appendix.

[3] Because the version of "Exhibit B" that the lower court ordered to be substituted into the record is that tendered by Respondent, by agreement and for sake of privacy Petitioner does not hereby attach her own version, which contains substantially fewer areas of redaction.

B. Statement of Facts

The Complaint in this matter is far beyond a minimal "notice pleading." It is rich in facts upon which Petitioner's causes of action for Declaratory Judgment (Count I), Breach of Fiduciary Duty (Count II), Tort of Outrage (Count III), and Conversion (Count IV) are founded. It first sets forth the relationship between Gerald Coyne and Petitioner Justina Gabbert, averring that as of the date the Complaint was filed Petitioner was 78 years old, (JAR 07 ¶3), that Gerald died at age 81 on September 27, 2019, (JAR 07 ¶4), that he had never been married and had no children, (JAR 07 ¶5), and that,

> 6. For approximately fifteen continuous years leading up to Gerald Coyne's death Justina and Gerald Coyne resided together as de facto spouses and, while they were engaged to be married, as of Gerald's death they had not legally married.

(JAR 07 ¶6).

Then it turns to the trust that is directly at issue.

Paragraphs 7 and 8 of the Complaint specify that Gerald Coyne originally created the Gerald Coyne Trust (hereinafter "The Trust") on August 17, 2006, and made himself "Trustee," with Respondent being designated "Successor Trustee." (JAR 08). Paragraph 15 alleges that "Gerald Coyne amended The Trust on August 27, 2006, through a handwritten document." (JAR 09). On November 18, 2016, another trust document was created bearing language that it was the "Gerald Coyne Trust" with its "Original Effective Date August 17, 2006" as "Amended And Restated Effective November 18, 2016." (JAR 07 ¶7). Both the August 27, 2006, handwritten amendment and the November 18, 2016, typed amendment are incorporated into and exhibited to the Complaint. (JAR 09 ¶17; 18-30). As explained to the lower court in Plaintiff's Response To Defendant Richard T. Coyne's Motion To Dismiss, at Page 5, Footnote 4, (JAR 87), the reason

the original 2006 Trust document was not itself appended to the Complaint was because Petitioner did not have it and Respondent only first supplied it with his motion to dismiss.

Given that it was by virtue of an amendment that Petitioner obtained the rights to the real and personal property at issue, the Complaint sets forth with particularity Gerald's expressed mandate on how The Trust might ever be altered in any way.

> 9. Article I of The Trust bears the title "Administration Of Trust During My Lifetime," and at Section 1.2, which is titled "Amendment And Revocation," it sets forth:
>
> > This is a revocable trust and I reserve the right to withdraw any part or all of the assets in this trust. I also reserve the right to amend or revoke this trust during my lifetime by a writing, other than a will or codicil to a will, signed by me and delivered to my Co-Trustee, or all trustees then acting, if more than one. At my death, the trust will become irrevocable. (underline added.)

(JAR 08).

Paragraph 16 then alleges the validity of the handwritten amendment.

> 16. The August 27, 2006, document (at times referenced herein as "The Trust Amendment"), is a valid amendment of The Trust, for in accordance with Section 1.2 of The Trust it is a writing, other than a will or codicil to a will, signed by Gerald during his lifetime, when he was the sole Trustee of The Trust.

(JAR 09).

As for the effect of the amendment, the Complaint alleges that Gerald gave Petitioner the Waverly Drive, Martinsburg, West Virginia, house "free and clear" after living for one year at "1239," (JAR 09 ¶18), which is a different house he owned where they both lived up to his death. The Complaint also alleges he gave her all of the household belongings except for particular items that the same handwritten amendment gave to others. (JAR 10 ¶24). As Complaint Paragraphs 18 and 24 aver:

> 18. The Trust Amendment plainly expresses: "Gerald Coyne wishes to be carried out...155 Waverly Dr brick house go to Justina Gabbert free & clear, after the one year at 1239 to live in or whatever".

. . . .

24. The Trust Amendment sets forth:

> Geo & Tim can split the Bose system whoever wants it.
>
> Justina Gabbert get all household belongings except those that came from Elnor's house & were promised. And the Lexus LS430.

(JAR 9-10).

While just these allegations may be deemed sufficient to serve as a complaint's foundation, in light of the lower court's rulings, it is particularly important to recognize that the Complaint moreover expressly alleges that Respondent has admitted to the validity and effectiveness of the handwriting at least insofar as dictating the distribution of personal property, that he has even distributed personal property to himself and others under the sole force of that handwriting, that he has admitted to Gerald's intent to give the Waverly Drive house to Petitioner, and that Respondent's contended justification for refusing to transfer ownership is because Gerald did not properly convey the real property gift by the handwriting.

> 26. Defendant has expressly acknowledged that Gerald Coyne intended to write, and did write, the August 27, 2006, document referenced herein as The Trust Amendment.
>
> 27. Defendant has distributed, or permitted the distribution of, various items of property in accordance with the August 27, 2006, writing, including the distribution of a Rolex watch and a Lincoln Navigator motor vehicle to Defendant himself.
>
> 28. Although the August 27, 2006, writing constitutes a valid amendment to The Trust, Defendant refuses to distribute and transfer ownership of The Waverly Drive Premises to Plaintiff.
>
> 29. By a letter to Plaintiff dated August 24, 2020, Defendant informed Plaintiff of his refusal to distribute and transfer ownership of The Waverly Drive Premises to Plaintiff, and attempted to justify the refusal with the observation that Gerald's directive to give the real property to Plaintiff is set forth in the same document as other gifts which are, categorically, items of tangible personal property.

30. Defendant's August 24, 2020, letter to Plaintiff expressly states:

> While Jerry's writing is plain that the 155 Waverly house was to pass to you free and clear after one year for you to live in, unfortunately the terms of the Trust only permit tangible personal property, not real estate, to pass under the external memorandum. And, I'm sure Jerry did not realize this when he wrote the memo.

31. Plaintiff is entitled to legal ownership "free and clear" of The Waverly Drive Premises under the plain terms and provisions of The Trust as amended by the August 27, 2006 writing identified herein as The Trust Amendment, and Defendant's refusal to transfer the legal ownership to Plaintiff is in clear contravention of The Trust terms and provisions.

(JAR 10-11).

If not explicit, then obviously implicit in this pleading is the contention that as of the filing of the Complaint, and still, Respondent has had the ability and power, which he simply refuses to exercise, to transfer the real property to Petitioner. The Declaratory Judgment prayer itself can lead to no other conclusion. In order to effectuate Gerald's intent, which the Complaint alleges to be conceded, it states:

44. Plaintiff is entitled to a declaratory judgment providing the following relief:

a. Upon construction of The Trust, inclusive of The Trust Amendment, an order compelling Defendant:

   i. to transfer ownership of The Waverly Drive Premises to Plaintiff; and,

   ii. to transfer to Plaintiff ownership and sole possession of all "household belongings", other than for the excepted items;

b. An order compelling Defendant to submit to the Court and to Plaintiff a full and complete accounting of all household belongings held by and/or encompassed by The Trust from the date of Gerald Coyne's death to the present;

c. An order compelling Defendant to restore the value of The Waverly Drive Premises and all of the

household belongings to what they would have been had the breaches not occurred, or to pay to Plaintiff all profits Defendant made by virtue of the breaches, whichever is greater;

d. An order compelling Defendant to pay Plaintiff attorneys' fees in accordance with applicable law; and,

e. An order providing any other appropriate relief in consideration of determined facts under applicable law.

(JAR 13).

Subsection "e." above was included for a reason. For instance, were the lower court to become satisfied that Gerald's intent was for Justina to have the house—either by agreeing with Petitioner that the issue of intent is conceded or because his intent becomes established through evidence adduced by discovery—then even with a determination that The Trust by its unambiguous terms does not give it to her, then The Trust might be reformed pursuant to West Virginia Code §44D-4-415 to conform the terms to Gerald's intention, as further discussed below.[4] Unfortunately, the lower court inappropriately pre-empted this.

Respondent's Motion To Dismiss set forth three bases that demonstrate a stark mis-grasp of Petitioner's claims. Turning the actual chronology on its head, Respondent predicated his first argument with the mis-characterization that Petitioner claims the 2006 handwriting amends the later created 2016 "Amended And Restated" trust document. (See JAR 53-55). His second argument posited that the handwriting, even if just considered to be a memorandum disposing of personal property, was wholly nullified by the 2016 document. (See JAR 56). With its third basis

[4] **§44D-4-415. Reformation to correct mistakes.**

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the grantor's intention if it is proved by preponderance of the evidence that both the grantor's intent and the terms of the trust instrument were affected by a mistake of fact or law, whether in expression or inducement.

for dismissal, Respondent presented something completely distinct from the reason Respondent wrote in 2020, which the Complaint quotes at Complaint Paragraph 35 above. Attaching to his responsive pleading two deeds that Respondent maintains to be proper for court consideration as "public records," he contended that because in 2008 Gerald Coyne sold the Waverly Drive house to his own LLC, "Coyne Properties, LLC," for five dollars ($5.00), the property was "adeemed" and no longer under The Trust for disposition to Petitioner. (JAR 57-58; 77-81).

Petitioner's Response to the Motion to Dismiss commenced with emphasizing the pled facts and evidence, including through Respondent's own admissions, of Gerald Coyne's clear intent that Petitioner be given the Waverly Drive house. (JAR 83-85). It then emphasized what the Complaint alleges, especially that the August 27, 2006, handwriting which Petitioner submits to be a valid amendment, serves to amend the already-existing original August 17, 2006, Trust, not the later-created 2016 "Amended And Restated" version. (JAR 86-93). Petitioner explained that the reason why the original Trust document was not itself appended to the Complaint was simple: Petitioner did not have it and obtained it only when Respondent himself produced it as an exhibit to his Motion to Dismiss. (JAR 87).

Petitioner carefully explicated how The Trust expressly permits changes only through two ways: amendment or revocation. (JAR 89-90). By omission, "restatement" is not an option. (JAR 90). She described how the handwriting plainly constituted an amendment giving the house to Petitioner, how the 2016 document could only serve to further amend the original Trust, that the 2016 document said nothing directed against the handwriting to further amend The Trust concerning it, and how the handwritten amendment and the 2016 amendment are in harmony with each other. (JAR 90-93).

Moreover, on the issue of whether the 2016 document constituted a "restatement" that nullified all that preceded it, Petitioner highlighted the elephant in the room—that as the Complaint clearly alleges, Respondent himself acknowledged the validity, effectiveness, and force of the 2006 handwriting through the disposition of personal items per its terms, including by giving a Rolex watch and a Lincoln Navigator to himself. (JAR 94-96). Arguing this pled conduct is irreconcilable with Respondent's "restatement" argument, Petitioner included contentions that issues of waiver and/or estoppel are in play. (Id.).

As to Respondent's ademption contention, Petitioner emphasized that the Complaint alleges Respondent has the control, power, and duty to convey the house to Petitioner. (JAR 97). She also presented the court with the February 1, 2020, letter from Respondent to The Trust's residual beneficiaries (from which the Complaint quotes), which itemized the numerous assets Respondent was handling in his Trustee capacity, including assets of Coyne Properties, LLC, and which raises serious questions concerning the status of the Waverly Drive house and whether it is an asset under, and controlled by, The Trust for disposition purposes. (JAR 97-98). After again emphasizing that the reason offered by Respondent in writing, in 2020, for not giving Petitioner the house was because Gerald failed to effectively document the gift, with nothing at all being said about selling the house (to himself) in 2008, (JAR 98), Petitioner entreated the lower court to allow discovery to proceed. As she argued:

> What are not yet in the Court record, but what are nevertheless material toward a judicial resolution of defendant's argument, are things that plaintiff does not yet possess and which can only come through discovery. These include the "operating agreement" that in accordance with W.Va. Code '31B-1-103 would "regulate the affairs of the company and the conduct of its business, and [would] govern relations among the members, managers and company," and any amendments to that agreement. They include the articles of incorporation and all other documents associated with the LLC's creation, perpetuation, and interconnection with Gerald Coyne personally, with his trust, and with any of his businesses, and all meeting minutes and other documents which would prove the

> company's legitimacy or illegitimacy. They include evidence of who actually owned the assets of the LLC and where those assets were to pass upon Gerald's demise.

(JAR 99).

Respondent filed a Reply In Support Of Motion To Dismiss, (JAR 134-152), that attempted to counter Petitioner's arguments, but among other failings, he could not even muster an explanation of how he, as alleged by the Complaint, acted under the force of the handwriting if it were completely nullified by the 2016 document. Instead, ignoring this actual and pled history whereby he distributed property in accordance with the handwriting, he maintains "the 2016 restated trust replaces all of [Gerald's] prior trust documents, represents a complete statement of his intent, and provides all of the terms of his trust." (JAR 139). The Reply makes only a passing, footnote reference to the ademption argument, (JAR 141-142), and says nothing of Petitioner's request for discovery.

In her effort to develop the case toward its proper resolution, on October 21, 2021, Petitioner served Plaintiff's Discovery Requests To Defendant (1st Set), (JAR 153-167), comprised of interrogatories and requests homing in on all disputed issues, including with respect to Coyne Properties, LLC. This discovery was accompanied by a notice for Respondent's deposition, (JAR 168-171), set to take place after the deadline for the provision of answers and responses to the interrogatories and requests. On the cusp of his deadline to provide answers and responses, Respondent served objections, (JAR 172-206), to the discovery coupled with a Motion For Protective Order. (JAR 207-362). This occurred November 19, 2021, and on that same date, without allowing Petitioner any opportunity to be heard, the lower court entered an order stating, in its totality:

Motion for Protective Order filed by Joseph Caltrider is hereby GRANTED.

/s/ Michael Lorenson
Circuit Court Judge
23rd Judicial Circuit

(JAR 363).

The Order thereafter entered by the lower court dismissing the Complaint basically adopted Respondent's arguments wholesale, including the incorrect analytic set up that Petitioner was contending the 2006 handwriting to amend the later 2016 document instead of the 2006 original Trust document. (JAR 364-377). Like Respondent, the court stated that the 2016 document completely nullified all documents that preceded it, (see, for instance, JAR 370), in particular the handwriting, and like Respondent the court completely avoided any discussion of the pled fact that Respondent acted in conformity with the handwriting and how that behavior could ever be reconciled with that document's nullification. The court likewise did not directly address Petitioner's argument that the original 2006 Trust strictly limited changes to either amending or revoking, it wholly ignored Petitioner's waiver and estoppel arguments and, relying upon the extrinsic deeds proffered by Respondent, it echoed Respondent's argument on ademption, adding that as a distinct basis for the dismissal without even referencing Petitioner's plea for discovery. (JAR 373-374).

Petitioner subsequently filed a Rule 59(e) Motion To Reconsider, (JAR 378-381), the issues as relating to the handwritten amendment. Even though the Complaint, as well as the Response to the Motion to Dismiss, laid Petitioner's contentions out in a straightforward manner, given the language of the court's order there seemed a possibility that the lower court misunderstood the claims or perhaps believed that the Complaint does not read as Petitioner submits. As the motion to reconsider recited:

2. Plaintiff does not allege, and has never argued, that the 2006 handwriting served to amend the future, 2016, document. The fact that the *Complaint* is based upon an amendment of the trust as it pre-existed is elaborated upon throughout plaintiff's response, including by the following statements:

> The Complaint does of course allege that by his handwriting of August 27, 2006, (which is appended to plaintiff's Complaint but which defendant also appended to his August 24, 2020, letter to plaintiff along with the 2016 amendment (Exhibit C)), Gerald effectively amended his 2006 trust to give the Waverly house to the plaintiff.

(Resp. P. 4).

> As a strawman argument, defendant submits that the handwritten document cannot theoretically be an amendment because it pre-dates the 2016 amendment. However, as is clear, what plaintiff claims is that the amendment is to the 2006 trust *as it already existed.* In other words, and of course, the August 27, 2006, handwriting amended the August 24[sic], 2006, original trust writing. It is absurd for defendant to contend plaintiff's Complaint alleges that by the 2006 amendment Gerald changed a prospective iteration of the trust.

(Resp. P. 10).

3. In an abundance of caution concerning defendant's strawman argument, plaintiff further stated:

> If somehow the Court finds defendant's reading of the Complaint at all colorable, then now that plaintiff finally has the original 2006 original trust document in hand, plaintiff would seek leave to amend her Complaint for sake of clarification.

(Resp. P. 10).

4. The 11/24/2021 *Order Granting Defendant's Motion to Dismiss Complaint*, however, suggests the incorrect belief on the part of the Court that plaintiff alleges the 2006 handwriting to be an amendment to the 2016 trust document. For example, the Court states, at *Order* page 5:

> There is no set of facts consistent with Plaintiff's allegations which will allow Mr. Coyne's 2006 handwritten note to amend or alter the plain terms of his 2016 restated and amended trust.

At page 7, the *Order* states:

> Although Plaintiff refers to the 2006 handwritten note as "The Trust Amendment," this note cannot be an amendment to the 2016 restated trust because it was created long before the 2016 restated trust.

The motion culminated with this prayer:

> 5. In the event that the Court believes that the *Complaint* does not allege the August 27, 2006, handwriting to have amended the pre-existing August 17, 2006, original trust document, then plaintiff prays that the Court vacate its *Order* of 11/24/2021 and grant plaintiff 20 days to file an amended complaint attaching and incorporating the original August 17, 2006, trust document and adjusting her allegations in clarification, consistent with her arguments as set forth in her *Response to Defendant Richard T. Coyne's Motion to Dismiss*.

The lower court denied the motion to reconsider without oral argument, (see Order, JAR 449-451), expressing that Petitioner's particular contentions do not matter, for "this Court's Order dismissing her Complaint clearly found that the 2016 restated trust replaced the original 2006 trust and any amendments to the original 2006 trust." (JAR 450). Consequently, the court determined there to be no need for Petitioner to amend the Complaint and denied the motion to reconsider. This appeal thereby fully ripened.

IV. SUMMARY OF ARGUMENT

As has been consistently stated by this Court, motions under Rule 12(b)(6) are viewed with disfavor and should rarely be granted. *Gable v. Gable*, --W.Va.--, 858 S.E.2d 838, 846 (2021); *Brown v. City of Montgomery*, 233 W.Va. 119, 755 S.E.2d 653 (2014). The lower court is not permitted to grant the motion unless it is clear beyond doubt that Petitioner could prove no set of facts in support of her claim that would entitle her to relief. Syl. pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (referencing *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Moreover, at Syllabus Points 4-5, *Gable* offers:

> 4. "The general rule is that matters of defense should not be anticipated by the plaintiff, but that all such matters should be shown by the opposite party in his pleadings." Syl. pt. 7, in part, *Rhodes v. J.B.B. Coal Co.*, 79 W. Va. 71, 90 S.E. 796 (1916).

> 5. Under Rule 8(a) of the West Virginia Rules of Civil Procedure, a plaintiff's complaint need not anticipate or attempt to plead around potential defenses that may be raised by the defendant. A complaint is not required to contain any information about defenses and may not be dismissed, under the guise of Rule 12(b)(6), for that omission.

--W.Va.--, 858 S.E.2d 838, 842.

The lower court committed reversible error by finding that the Complaint fails to state a claim upon which relief may be granted. A plain reading of the document reveals that our minimum pleading standards are clearly met. Moreover, a correct analysis of The Trust documents which are incorporated into the Complaint, particularly respecting the manner that The Trust prescribes that any amendments can be made, supports Petitioner's allegations that Grantor Gerald Coyne gifted a Martinsburg house and household belongings to his long-time fiancé Justina Gabbert, your Petitioner.

Legislative enactments and Supreme Court pronouncements equally grant paramount deference on allegations and evidence of grantor intent. The Complaint strongly pleads Gerald Coyne's intention that Petitioner be given the house and belongings, and it even sets forth a direct quote from Respondent acknowledging that same intent. While Petitioner rightly claims that a correct reading of The Trust documents results in her getting the real and personal property, even if the unambiguous language of those documents does not support Petitioner, then the action should still proceed, for Petitioner might prevail in showing that The Trust should be reformed to conform to Gerald's intent, per W.Va. Code §44D-4-415, titled "Reformation to correct mistakes," which expresses:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the grantor's intention if it is proved by preponderance of the evidence that both the grantor's intent and the terms of the trust instrument were affected by a mistake of fact or law, whether in expression or inducement.

Even further, principles of waiver and/or estoppel clearly may apply under the Complaint's contentions, especially upon the allegation that Respondent, presumably with the consent of The

Trust's residual beneficiaries, acted under the force of Gerald's 2006 handwriting to distribute items of personal property to various others, leaving Petitioner out, and Respondent himself took property under the force of the handwriting.

Finally, and as a distinct assignment of error, the lower court abused its discretion to Petitioner's unfair detriment by granting Respondent's Motion For A Protective Order within mere hours of that motion's filing, without affording Petitioner her rightful opportunity to be heard and to make a record on why the discovery at issue in the motion is proper and warranted.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In dismissing Petitioner's Complaint, the lower court violated long-settled and often repeated standards regarding complaint sufficiency and Rule 12(b)(6) motions to dismiss. The dismissal and the court's reasoning for it constitute an unsustainable exercise of the lower court's discretion, where the boundaries of that discretion, which the court clearly exceeded, are clear. Petitioner therefore submits that oral argument under Rule of Appellate Procedure 19 is appropriate and that, likewise, a memorandum opinion is appropriate.

VI. ARGUMENT

A. Standard Of Review

Because this appeal arises from the lower court's grant of a motion to dismiss under W.Va. R. Civ. P. 12(b)(6) for failure to state a claim, the standard of review for all assignments of error is *de novo*. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995), Syllabus Point 2.

As recently re-expressed by this Honorable Court at Syllabus Points 3-5 of *Gable v. Gable*,

> 3. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d

80 (1957)." Syl. pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977).

4. "The general rule is that matters of defense should not be anticipated by the plaintiff, but that all such matters should be shown by the opposite party in his pleadings." Syl. pt. 7, in part, *Rhodes v. J.B.B. Coal Co.*, 79 W. Va. 71, 90 S.E. 796 (1916).

5. Under Rule 8(a) of the West Virginia Rules of Civil Procedure, a plaintiff's complaint need not anticipate or attempt to plead around potential defenses that may be raised by the defendant. A complaint is not required to contain any information about defenses and may not be dismissed, under the guise of Rule 12(b)(6), for that omission.

--W.Va.--, 858 S.E.2d 838, 842.

A circuit court weighing the sufficiency of a complaint should view the motion to dismiss with disfavor, should presume that all of the plaintiff's factual allegations are true, and should construe those facts and the inferences arising from those facts in the light most favorable to the plaintiff.

Id., 858 S.E.2d 838, 846, 2021 W. Va. LEXIS 271, *15, 2021 WL 2201292.

B. The Lower Court Erred As A Matter Of Law In Determining Upon A Rule 12(b)(6) Motion That Dismissal Of Petitioner's Complaint Was Proper

i. A Plain Reading Of The Complaint Reflects Its Sufficiency

Under the standards that this Honorable Court established decades ago, standards to which this Court has continually recommitted, it is manifest that the lower court committed reversible error in dismissing the Complaint because, without question, Petitioner's initiating pleading sufficiently sets forth allegations which could found a judgment in her favor.

As recounted above in the Statement Of Facts, the Complaint, (JAR 07-30), sets forth that Gerald Coyne amended his 2006 original Trust by a subsequent handwritten amendment, gifting at his death his Waverly Drive house in Martinsburg to his long-time, and equally elderly, fiancée—your Petitioner—along with all household belongings excepting particularly-identified items that he gifted to some specified other persons, including to Respondent himself. The Complaint sets forth the precise and exclusive manner expressed by Gerald in his Trust by which

any alterations—confined to amendment or revocation—of the Trust could be made, and how the handwriting clearly fulfilled all requisites for being a valid amendment. The Complaint factually alleges the paramount fact that is critical to any proper resolution of a trust dispute—that Gerald intended Petitioner to receive the house and the household belongings.[5] It alleges that now, even after the creation of the 2016 document referenced as the "Gerald Coyne Trust" with an "Original Effective Date August 17, 2006" as "Amended And Restated Effective November 18, 2016," the handwritten amendment retains its power. With actual quotation to Respondent from 2020, stated subsequent to Gerald's death, the Complaint alleges that Respondent has conceded that Gerald intended Petitioner to have the real and personal property which she claims. It moreover alleges that, based solely on the strength of the handwritten amendment and subsequent to the creation of the 2016 amendment, Respondent gifted items of personal property to others, including to himself. It alleges distinct causes of action against Respondent expressly grounded both in contract and tort. Moreover, with the first presented cause of action being one for declaratory judgment, the Complaint prays that the court judicially compel the fulfillment of Gerald's intention that Petitioner be given the Waverly Drive house and personal property, and this is not just upon construction of The Trust, (JAR 13 ¶44.a.), but through an "order providing any other appropriate relief in consideration of determined facts under applicable law." (JAR 13 ¶44.e.).

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[5] As to this fact, this Court has emphasized:

> This Court has stated that "the paramount principle in construing or giving effect to a trust is that the intention of the settlor prevails, unless it is contrary to some positive rule of law or principle of public policy." Syllabus Point 1, *Hemphill v. Aukamp*, 164 W.Va. 368, 264 S.E.2d 163 (1980).

Proudfoot v. Proudfoot, 214 W. Va. 841, 846, 591 S.E.2d 767, 772 (2003).

With all of this, clearly the Complaint is sufficiently pled so as to meet minimal pleadings standards and be beyond Rule 12(b)(6) vulnerability. Indeed, mindful of the standards at play, that if there is any chance of Petitioner's prevailing, upon a judicial analysis in the light most favorable to Petitioner, then the motion must be denied. As Justice Hutchison wrote for the Court in *Gable v. Gable*:

> A circuit court weighing the sufficiency of a complaint should view the motion to dismiss with disfavor, should presume that all of the plaintiff's factual allegations are true, and should construe those facts and the inferences arising from those facts in the light most favorable to the plaintiff. *Chapman*, 160 W. Va. at 538, 236 S.E.2d at 212. "The task of a court in ruling on a Rule 12(b)(6) motion is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Mountaineer Fire & Rescue Equip.*, --W. Va. at--, 854 S.E.2d at 882 (citation omitted).
>
> "Taken as a whole, the West Virginia Rules of Civil Procedure establish the principle that a plaintiff pleading a claim for relief need only give general notice as to the nature of his or her claim." *Id*, --W.Va. at --, 854 S.E.2d at 883. Stated simply, the West Virginia Rules of Civil Procedure reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and manifest a preference for the resolution of disputes on the merits, not on technicalities of pleading.
>
> A motion to dismiss tests the legal sufficiency of a complaint. Therefore, the issue for the circuit court is *not* whether the plaintiff can later prove the case as pleaded, but whether the complaint is legally sufficient to state a claim upon which relief can be granted.

--W.Va.--, 858 S.E.2d 838, 846.

ii. The Ademption Basis For Dismissal

Prior to further addressing The Trust documents, it is appropriate to state, again, what *Gable* also emphasizes, at its Syllabus Point 5:

> 5. Under Rule 8(a) of the West Virginia Rules of Civil Procedure, a plaintiff's complaint need not anticipate or attempt to plead around potential defenses that may be raised by the defendant. A complaint is not required to contain any information about defenses and may not be dismissed, under the guise of Rule 12(b)(6), for that omission.

--W.Va.--, 858 S.E.2d 838, 842.

No better example exists of a violation of this standard than the lower court's dismissal of the Complaint partly on the grounds that Gerald adeemed the Waverly Drive property by selling it to his own LLC subsequent the creation of the handwritten amendment. The Complaint says nothing of this purported sale which Respondent contends to have occurred in 2008, but it does plainly allege that Respondent now, still, has the power and duty to convey the house to Petitioner. Dismissing the Complaint on the basis of the ademption defense was unquestionable error. While this defense cannot support a 12(b)(6) motion, it does cry out for discovery, and Petitioner's arguments to the lower court as to why discovery is important were not only ignored but stifled, as further discussed below.

iii. More As To The Trust Documents

Were this Court to believe more than what has already been set forth respecting The Trust documents is necessary to warrant a reversal of the dismissal order, more does exist. There are multiple ways, in the light most favorable to Petitioner, that the pled claims may be proven to entitle Petitioner to relief.

The first way is per the plain language of The Trust documents. The lower court clearly analyzed the documents with an eye toward dismissing the claims, but a fair and proper analysis of what the Complaint specifically lays forth and what the response to the motion to dismiss emphasizes actually supports Petitioner.

The original 2006 Gerald Coyne Trust sets forth the following terms at its first page:

> **1.2 AMENDMENT AND REVOCATION.** This is a revocable trust and I reserve the right to withdraw any part or all of the assets in this trust. I also reserve the right to amend or revoke this trust during my lifetime by a writing, other than a will or codicil to a will, signed by me and delivered to my Co-Trustee, or all trustees then acting, if more than one. At my death, the trust will become irrevocable. I direct that any attorney-in-fact named by me will not have the power or authority to amend or revoke this trust, or to act on my behalf as regards this trust, it being my intent that such rights are personal only to me.

(JAR 64).

These terms allow changes to the trust in two ways only: Gerald could either amend it or he could revoke it, exclusively. Notably, the 2016 amendment echoed these terms word for word, and Respondent does not submit that by some other amendment these "amendment and revocation" terms themselves were ever changed. As of Gerald's death there remained only two forms of potential change: amendment or revocation.

This provision is completely devoid of any language authorizing the making of any changes through a "restatement" and, in fact, nowhere in the trust is there any hint that through the creation of a restatement all original trust provisions and all prior amendments would be automatically nullified were they omitted by a "restated" document. Belying the suggestion that the 2016 document is really anything more than an amendment itself are the identifying statements at its Page 1 heading, to wit:

ORIGINAL EFFECTIVE DATE **AUGUST 17, 2006**

AMENDED AND RESTATED EFFECTIVE **NOVEMBER 18, 2016**

(JAR 18).

Moreover, and very consistent with Plaintiff's contention that the 2006 amendment remains in full force, nowhere in the 2016 amendment is there any "merger provision" which would serve to nullify any prior amendments to the trust which are not expressly acknowledged within it.

> This Court has explained that "[a] 'merger clause' is '[a] provision in a contract to the effect that the written terms may not be varied by prior or oral agreements because all such agreements have been merged into the written document.'" *Frederick Bus. Properties Co. v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 240 n.2, 445 S.E.2d 176, 181 n.2 (1994) (quoting Black's Law Dictionary 989 (6th ed. 1990)).

TD Auto Fin. LLC v. Reynolds, 243 W. Va. 230, 234-235, 842 S.E.2d 783, 787-788 (2020).

A merger clause is common, and its purpose is to accomplish the very end Respondent seeks despite its absence. Considering the many provisions that are set forth by the 2016 document, the absence of a merger clause is very telling.

What this so far distills to is that Gerald created a trust in 2006 which is the very same trust that exists still today. By that trust's plain terms, any changes could be made only through amendment or revocation. He clearly did not revoke the original trust, but rather it was amended. The 2016 document calls itself, and by fact and law is, an amendment. What this leaves is the critical question of whether, subsequent to the August 17, 2006, original creation of the trust, Gerald effectively amended it to gift the Waverly house to plaintiff. Unquestionably pled by Petitioner, by his August 27, 2006, handwriting, Gerald did just that.

As the Complaint alleges with particularized reference to Section 1.2 above, all Gerald needed to do to effectively amend The Trust was (1) to create a writing; (2) the writing must not be a will nor a codicil; (3) the writing must be signed by him; and (4) the writing must be delivered to any co-trustee or all trustees then acting, if more than one. These are all of the requirements, and each and every one of them is satisfied by the August 27, 2006, document which Gerald wrote and signed (and dated) and, as the lone trustee, he possessed. The writing was neither a will nor a codicil.

Had the 2016 document made any direct reference to the Waverly Drive house which would contradict the handwritten gift to Petitioner, then an argument could be made by Respondent that through the 2016 amendment Gerald changed his intention and negated the gift to Petitioner; but this he did not do. Instead, he actually made the 2016 amendment perfectly and harmoniously lock in with the amendment of 2006.

As the Complaint alleges at Paragraph 11, Gerald provided Petitioner continued use of the premises located at 1239 Showers Lane, where the two had been living, for one year following his death.

> 11. Section 2.5A [of the 2016 amendment] is titled "Use Of Residence" and sets forth:
>
> > I direct that my close friend, Justina Gabbert, be permitted to occupy the residence which is owned by me or this trust at the time of my death, **for a period of one year from the time of my death**, provided that we are living together in that residence at the time of my death. (bold added.)

Complaint Paragraph 18 then alleges, with explicit citation to the 2006 handwritten amendment:

> 18. The Trust [2006] Amendment plainly expresses: "Gerald Coyne wishes to be carried out...155 Waverly Dr brick house go to Justina Gabbert free & clear, **after the one year at 1239** to live in or whatever". (bold added)

Beyond all else, the fact that the 2016 amendment was written with such a temporal connection to the amendment that preceded it smothers any hope for dismissal. As Gerald plainly designed, both amendments fit together perfectly so as to end Petitioner's use of the Showers Lane house precisely at the date she is to be given the Waverly house. The interrelation of the two is manifest.

Adding, in Petitioner's favor, to all the other contractual principles at play, is Syllabus Point 1 of *Antero Res. Corp. v. Directional One Servs. Inc. USA*, just filed on April 8, 2022.

> 1. "Separate written instruments will be construed together and considered to constitute one transaction where the parties and the subject matter are the same, and where there is clearly a relationship between the documents." Syllabus point 3, *McCartney v. Coberly*, 250 S.E.2d 777 (W. Va. 1978), *overruled on other grounds by Overfield v. Collins*, 199 W. Va. 27, 483 S.E.2d 27 (1996).

--W.Va.--, --S.E.2d--, 2022 W. Va. LEXIS 224, *1.

The goal of course is to divine the intention of the creator(s) of the legal device.

> 3. "The primary consideration in the construction of a contract is the intention of the parties. This intention must be gathered from an examination of the whole instrument, which should be so construed, if possible, as to give meaning to every word, phrase and clause and also render all its provisions consistent and

harmonious." Syllabus, *Henderson Dev. Co. v. United Fuel*, 121 W.Va. 284, 3 S.E.2d 217 (1939).

Id., at Syllabus Point 3.

Under an analytic lens where the Complaint is viewed in the light most favorable to Petitioner, perhaps it is improper to ask this Honorable Court to rule in Petitioner's favor in a dispositive manner on the plain terms of The Trust documents, but were the Court to determine it proper to now apply and enforce the documents according to Gerald's unambiguous intent, then the outcome should not only be the reversal of the lower court's decision to dismiss the Complaint, but also the mandate that judgment be entered in Petitioner's favor on her claims for ownership of the Waverly Drive house and the household belongings.

iv. More As To The Issue Of Intent

The second manner by which Petitioner may obtain a judgment in her favor is by proving Gerald's intention to gift her the house and personalty, even if the unambiguous terms of The Trust documents would dictate otherwise. As Petitioner argued in her response to the Motion to Dismiss, in the *Uniform Trust Code*, W.Va. Code Chapter 44D, our Legislature found it important to set forth:

> §44D-6-602. Revocation or amendment of revocable trust.
>
> (c) The grantor may revoke or amend a revocable trust:
>
> (1) By substantially complying with a method provided in the terms of the trust instrument; or
>
> (2) If the terms of the trust instrument do not provide a method, by any other method manifesting clear and convincing evidence of the grantor's intent.

The underlying purpose of this statute is obvious, to exalt substance over form, to honor a grantor's intent even if he did not technically convey it fully or properly. Even more supportive of this purpose is §44D-4-415, titled "Reformation to correct mistakes," which expresses:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the grantor's intention if it is proved by preponderance of the evidence that both the grantor's intent and the terms of the trust instrument were affected by a mistake of fact or law, whether in expression or inducement.

Obviously, and somewhat remarkably, by these statutes the Legislature can be said to hold the very same sentiment our Supreme Court has expressed in *Proudfoot v. Proudfoot*, that "the paramount principle in construing or giving effect to a trust is that the intention of the settlor prevails,..." 214 W. Va. 841, 846, 591 S.E.2d 767, 772 (2003).

In light of these statutes, even if this Court should determine that The Trust documents unambiguously yield a result against Petitioner's interests, then the potentiality of these statutes becomes huge upon the pled contentions of Gerald's intent, particularly as expressed by Respondent himself. Again, it was after Gerald's death that he wrote:

> While Jerry's writing is plain that the 155 Waverly house was to pass to you free and clear after one year for you to live in, unfortunately the terms of the Trust only permit tangible personal property, not real estate, to pass under the external memorandum. And, I'm sure Jerry did not realize this when he wrote the memo.

(JAR 11 ¶30).

With nothing more, a jury might find this statement enough to determine Petitioner has met her burden of proof toward reformation should it be found for some reason that the handwriting fail to be a valid amendment with current potency. The point now, however, is that upon her Complaint Petitioner might conceivably prevail based on a claim that Gerald's intention so clearly was that she get the house and belongings.

v. Waiver And Estoppel

Yet another manner by which Petitioner might obtain relief based upon her Complaint are through principles of waiver and/or estoppel. The lower court completely disregarded the implications of these principles which Petitioner advanced. On the one hand, the lower court bluntly found "[T]he 2016 restated trust replaces all of [Gerald's] prior trust documents, represents

a complete statement of his intent, and provides all the terms of his trust." (JAR 450-451). On the other hand the Complaint at Paragraph 27 states:

> 27. Defendant has distributed, or permitted the distribution of, various items of property in accordance with the August 27, 2006, writing, including the distribution of a Rolex watch and a Lincoln Navigator motor vehicle to Defendant himself.

(JAR 10).

If, as the lower court found, the 2006 handwriting had been fully nullified by the 2016 document, then clearly the underpinnings of waiver and/or estoppel can be said to exist. As stated at Syllabus Point 1 of *Potesta v. United States Fid. & Guar. Co.*,

> 1. "Although the doctrines of waiver and estoppel are both grounded in equity, they differ significantly in application. To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right. Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syllabus point 2, *Ara v. Erie Ins. Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

202 W. Va. 308, 310, 504 S.E.2d 135, 137 (1998).

Here, Respondent acted under the sole force of the 2006 handwriting in order to distribute property to himself and others, and in so doing he arguably waived any argument that the handwriting was legally impotent. Upon examination of "Exhibit B" to Petitioner's response to the motion to dismiss, (JAR 104-112), which is a letter of February 1, 2020, to The Trust's residual beneficiaries, it appears that all of them consented to that distribution.[6] Respondent and those beneficiaries therefore lost any ability to argue the impotence of the handwriting in its fullness, including vis-à-vis Petitioner. Thus, the clear potential for Petitioner's relief through the portal of waiver exists.

[6] The first two paragraphs at Page 2 of the letter discuss the handwriting, referring to it as the "memo," and reports that items of personal property are to "pass as Jerry established" in the memo. (JAR 105). The handwriting is also discussed elsewhere in the same letter.

As for estoppel, the handwritten amendment was created in 2006, and for more than a decade thereafter Petitioner and Gerald lived with the belief, as the Complaint pleads, that upon Gerald's death the house and personalty would be given to Petitioner under the force of the handwriting. For years then, the opportunity existed for Gerald and/or Petitioner to take action to cure the deficiencies that Respondent claims to exist in the handwritten gift, and more generally, the opportunity existed to ensure Gerald's intentions stayed legally potent and valid up to the point of his death. In the same February 1, 2020, letter from Respondent which is quoted in the Complaint, Respondent expressed that "I had several conversations with Jerry over the years about his estate plan." Conceivably, evidence may be presented that upon reliance of Respondent's advice Gerald and/or Petitioner failed to act so as to protect the legal viability of Gerald's intent. Discovery would bear all of this out.

C. The Lower Court Abused Its Discretion In Granting Respondent's Motion For Protective Order Without Allowing Petitioner Any Opportunity To Respond

After mediation failed, and having received Respondent's Motion To Dismiss which sets forth the factual contentions upon which Respondent has built a defense, by facsimile transmission Petitioner served upon Respondent, on October 21, 2021, a carefully crafted set of interrogatories and requests for production, (JAR 153-167), accompanied by a notice of Respondent's deposition, (JAR 168-170), to take place after the date the discovery answers and document production would be served. The interrogatories include probings into Respondent's conduct with respect to handwriting Petitioner contends to be an amendment. For instance:

> **INTERROGATORY NO. 6**: Respecting the August 27, 2006, handwriting that is attached hereto as Exhibit A, state the following:
>
> (a) Identify all persons who have had possession of the item referenced as "My Rolex", when the possession commenced and ended, the basis/justification of the possession, and where it has been kept;

(b) Identify all persons who have had possession of the item referenced as "John Deere" "tractor", when the possession commenced and ended, the basis/justification of the possession, and where it has been kept;

(c) Identify all persons who have had possession of the item referenced as "trailer 6 X 10", when the possession commenced and ended, the basis/justification of the possession, and where it has been kept;

(d) Identify all persons who have had possession of the item referenced as "Bose system", when the possession commenced and ended, the basis/justification of the possession, and where it has been kept;

(e) Identify all persons who have had possession of the item referenced as "the Lincoln Navigator", when the possession commenced and ended, the basis/justification of the possession, and where it has been kept.

They include probings into the LLC which may be essential to challenging the defense contention that the Waverly Drive house was, in fact and law, taken out of The Trust by the five dollar 2008 sale.

INTERROGATORY NO. 7: With respect to Coyne Properties, LLC, state:

(a) Any role you played in the formation and legal effectuation of the entity;

(b) Each official capacity you have ever held as a member, officer and/or manager, stating the inclusive dates of each capacity;

(c) Any financial interest you have ever had in the entity, and the basis of that interest.

INTERROGATORY NO. 8: Without time limitation, set forth an itemization of any and all contributions, as described and/or encompassed by W.Va. Code §31B-4-401, to Coyne Properties, LLC, by each and every of its members, including a date of each contribution and the nature and/or value of the contribution.

INTERROGATORY NO. 9: Without time limitation, itemize any and all payments, reimbursements, advances made to any manager or member of Coyne Properties, LLC, of the kind described, governed and/or encompassed by W.Va. Code §31B-4-403 (a), (b), (c) and/or (d).

INTERROGATORY NO. 10: Without time limitation, itemize by date and value each and every distribution made by Coyne Properties, LLC, to any of its members.

INTERROGATORY NO. 11: Without time limitation, itemize by date, transferor, transferee and transferred amount of each and every transfer of any/all members' distributional interest in Coyne Properties, LLC.

INTERROGATORY NO. 12: Without time limitation, identify all persons responsible for the supervision and management of Coyne Properties, LLC, and describe each person's respective responsibilities.

The requests for production too delve into these same material factual matters, but moreover home in on documentation respecting Gerald's intentions with regard to Petitioner.

REQUEST FOR PRODUCTION NO. 1: Produce all written communications between you and the following persons relating in any way to the Trust, relating to its administration, and/or relating to Justina Gabbert's rights and her contended rights under the Trust:

(a) Gerald Coyne;...

Twenty-nine days after the faxed service of these interrogatories and requests, Respondent served his Objections To Plaintiff's Discovery Requests To Defendant along with a Motion For Protective Order, for the first time asking the court to stay discovery pending the outcome of the Motion To Dismiss. (JAR 207-362). Petitioner would have opposed the motion, but never got the chance, for just slightly more than two hours later that same day the lower court entered a one line order stating "Motion for Protective Order filed by Joseph Caltrider is hereby GRANTED." (JAR 363). To so deprive Petitioner the opportunity to respond to the motion is to commit an abuse of discretion which compels an appeal.

It is clearly understood that the lower court believes that Petitioner's claims cannot survive even a 12(b)(6) analysis. Petitioner respectfully disagrees with that sentiment and has presented her arguments why the court is wrong. The grievance here however is over the court's failure to afford Petitioner even her fundamental right to due process, the right to be heard on the record as the Rules of Civil Procedure and Trial Court Rule 22 dictate, on a motion which is closely tied to the matters encompassed by the Rule 12(b)(6) motion. An order which required an expedited

written response from Petitioner, or which set an immediate hearing by telephone, or which provided some other opportunity for Petitioner to state her opposition upon the record, would have been proper. Granting the motion in the manner which the lower court did was not. It was an abuse of discretion committed in the course of the errant dismissal of the action, which itself deserves appellate consideration and redress.

VII. CONCLUSION

The lower court erred in dismissing all of Justina Gabbert's claims pursuant to W.Va. R. Civ. P. 12(b)(6). The dismissal violated the applicable standard under the Rule and constituted substantive error in the application of the law, most notably the strong precedent of This Court, to the claims. Petitioner's Complaint properly sets forth claims recognized by the law, and the claims are appropriately supported by factual allegations. The lower court's decision should be reversed, and the case remanded with directives to the lower court consistent with the facts and law.

Respectfully submitted, Petitioner

Justina Gabbert

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 22-0074

JUSTINA GABBERT,

Plaintiff/Petitioner,

v.

On Appeal from Circuit Court
of Berkeley County
Civil Action No. 21-C-137

RICHARD T. COYNE, ESQ.,
TRUSTEE OF GERALD COYNE TRUST

Defendant/Respondent.

CERTIFICATE OF SERVICE

Service of the foregoing **Petitioner's Brief** and **Joint Appendix** were made upon the following by mailing a true copy thereof, by United States Mail, postage prepaid, on this 28th day of April, 2022:

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