Docket No. 22-586

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LEWIS SPRINGER & KAREN SPRINGER,
Plaintiffs Below, Petitioners,

- v. -

BIG BEND MOUNTAIN RETREAT WATER UTILITY SYSTEM ASSOCIATION, EARL GILLIS & KAREN GILLIS, WES RUNYAN & TAMMY RUNYAN, AND TRACY WILSON & DAVID WILSON,
Defendants-Below, Respondents.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT OF SUMMERS, COUNTY, WEST VIRGINIA
CIVIL ACTION NO. CC-45-2021-C-39

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & RULES

ASSIGNMENTS OF ERROR

I. The lower Court erred in considering documents and other materials not contained in the complaint and not previously made exhibits in a related action by failing to convert Respondent Runyans' (Wilson's) Motion to Dismiss to a Motion for Summary Judgment, in its decision to dismiss Petitioners' complaint, under this Court's previous decision of *Forshey v. Jackson*, 671 S.E.2d 748.

II. The lower Court erred by failing to convert Respondents Wes Runyan and Tamy Runyan's (Wilson's) Motion to Dismiss to a Motion for Summary Judgment, since the lower Court chose to consider a list of expenses attached to Respondents Wes Runyan and Tamy Runyons' (Wilson's) Motion to Dismiss.

III. The lower Court erred by applying the Doctrine of Laches to Petitioners' claims as the lower court erroronously considered the list of expenses and Petitioners attempted repeatedly attempted to obtain contributions from Respondents but were refused.

STATEMENT OF THE CASE

Petitioners filed their Complaint against Big Bend Mountain Retreat Water Utility System Association ("Water Association") and residents and/or participants in the Association on March 31, 2022. JA 000071. Petitioners alleged that each of the Respondents, through their action and inaction have unjustly enriched themselves through the utilization of the water available to them from the Well property, which well provides water to the members of the Water Association. JA 000071–76. Further that each of the Respondents were and have been unjustly enriched through

the utilization of water from the Well property, all the while having knowledge, constructive or actual, of Petitioners' continued payments to upkeep and maintain the water system. *Id.*

In 2011, the Circuit Court of Summers County previously Ordered the formation of an entity to accept ownership of the well property to the Water Association, which Order was memorialized in a Deed conveying ownership of the well property to the Water Association, (Civil Action No. 10-C-35). The Deed itself, added as an exhibit and taken judicial notice of in the lower court's order (JA 000116-117 and JA 000224), provides in pertinent part:

> 2) The members of the Big Bend Mountain Retreat Water Utility Association will be comprised of those landowners using the water system. . . .
>
> 3) Each lot owner in the Big Bend Mountain Retreat will have the right to join and participate in this entity. There are ten (10) lots; therefore there will be ten (10) potential taps for water service.
>
> 4) The Association will establish conditions and responsibilities for use of water which will run with the land.
>
> 5) Possession of the existing water system will be turned over to the Association without initial cost to the members.
>
> 6) The Association will establish reasonable rates for the users of its water, which are consistent with the rates of water systems of this nature, and which fully cover the costs of operation and maintenance. The Association will fully account to its members for expenses and capital expenditures.
>
> 7) Owners of the ten (10) lots in Big Bend Mountain Retreat will have an absolute right to use the water system upon payment of the rates established by the Association, provided the system has sufficient capacity to supply any new users. If the system does not have sufficient capacity to supply a new user with water, the new user will be responsible for paying the costs to upgrade the water system.
>
> 8) The users of the water system will pay their pro-rata share of the costs of operating the water system.

JA 000117. Petitioners herein were parties to that civil action 10-C-35 which initially dealt with the issues surrounding the Well property located in the Big Bend Mountain Retreat. JA 000221. This Deed, by its terms, requires all residents of BBMR who make the affirmative choice to hook up to the water system (e.g. Respondents) to pay for the cost of the water system, both in terms of usage and maintenance (including "expenses and capital expenditures").

Since the entry of the 2011 Order, Petitioners utilized their home at the Big Bend Mountain Retreat ("BBMR") as a temporary home—staying for a short while and then returning to New Jersey for medical treatments for Mr. Springer, who had suffered tremendous injuries as a result of a car accident. The Springer's home at BBMR was dependent on the functioning well in order to have water at their home. Decidedly, as repairs and expenses for the well rose, it necessitated someone paying for them. The Springers, who were dependent upon the well water for their home, were caught in a position where if it was not paid for, the Springers would not have water. Being an elderly couple in ill-health, being without water was not an option.

Over time the Springers expended considerable sums for the maintenance and operation of the Well property and the water system itself to ensure regular access to clean, drinkable water. JA 000071–76. Since 2011, Mr. Springer frequently requested the financial assistance of the other users of the water system largely without any contributions or reciprocations. JA 000076.

On or about March 11, 2021, Respondents Wes Runyan and Tammy Runyan, purchased their lot on the Big Bend Mountain Retreat. JA 000002. After the purchase of their lot, Respondent Runyans, linked up their mobile home to the well property water access port. JA 000003, **which linkage, per the terms of the 2001 Deed, required Respondent Runyans to pay for the cost of the water system and their usage of the water.** Mr. Springer informed the Respondents Runyans of the requirement to pay for the water per the Summers County Circuit Court's previous Order and specifically the Deed conveying the well property and water system to the Water Association. JA 000003. Respondent Runyans refused to pay for the use of the water **and the maintenance and upkeep of the water system** despite their knowledge of the Deed and its requirements. JA 000076. Petitioner and Respondent engaged in a verbal argument on the well property and

following this, Respondent Runyans initiated an action in the lower court seeking injunctive relief against both the Springers and Water Association (Civil Action No. 21-P-14). JA 000003–4.

As the Respondent Runyans chose to sue an entity that could not represent itself, Petitioner Springers sought legal representation for that entity, himself and his wife, as he was acting on behalf of the Water Association when he requested payments for water usage from Appellee Runyans in 2021. To date, Respondent Runyans have not paid for their water usage, having paid nothing toward the maintenance of the water system, and have paid nothing toward what should have been properly capitalized costs.

Petitioners initially filed their Complaint on December 15, 2021, and filed their Amended Complaint on March 31, 2022, against Water Association, and residents and/or participants in the Association. JA 000071 & 000221. Petitioners' complaint outlined that each of the Respondents have unjustly enriched themselves through the utilization of the water available to them from the Well property, without, for the most part, paying for the utilization of the water from the Well property, all having knowledge, either constructive or actual, of the monies expended by the Petitioners to upkeep and maintain the water system, and knowledge of their obligations under the Court's Order entered in Civil Action No. 10-C-35. JA 000071–000076. Respondents Runyans failed to make any payments for their use of the Well property water since March 2021. In addition to their non-payment for their water usage, Respondent Runyans previously sued the water system thereby necessitating its hiring of an attorney to represents it in that court action. JA 000114-115.

On or about April 29, 2022, Respondents Wes and Tamy Runyan filed a motion to dismiss pursuant to West Virginia Rules of Civil Procedure Rule 12(b)(6). JA 000112-113. This motion was joined on or about June 6, 2022 by Respondents Tracey and David Wilson. JA 000171. In

their motion to dismiss, Respondents attached as exhibits the Deed transferring the Well Property to the Water Association as well as a preliminary list of expenses. JA 000114-117.

On June 10, 2022, the lower court held a hearing on Respondents Runyans (and Wilsons) motion to dismiss (JA 000188–219) wherein it found that it was "appropriate to handle this matter under. . . Rule 12 as a motion to dismiss." that "laches is an appropriate defense." and granted "the motion to dismiss based on the doctrine of laches . . . ." JA 000217. The lower court summarily issued an order (JA 000220–229) first determining under *Forshey v.Jackson*, 671 S.E.2d 748, 754 (W. Va. 2008) that the exhibits to Respondents' motion to dismiss were properly considered stating "The Deed is not in dispute and, as a recorded instrument, is likewise susceptible to judicial notice" and the list of expenses because " The expenses listed in this document, prepared by the Plaintiffs, are consistent with those discussed, in general terms, in the Plaintiffs' Complaint. Furthermore, as the same were made part of the record in the related injunctive proceeding before this Court, the same is susceptible to judicial notice." JA 000224. Further, and based on its review of the exhibit listing expenses of Mr. Springer, the lower court ruled that the Petitioners' claim was barred by the doctrine of laches. JA 000226-228.

STANDARD OF REVIEW

This Court has provided 'Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo.' Syllabus point 2, *State ex rel. McGraw v. Scott Runyan Pontiac—Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).'" Syl. Pt. 1, *Longwell v. Bd. Of Educ. of the Cnty. of Marshall*, 213 W.Va. 486, 583 S.E.2d 109 (2003). Syl. pt. 1, *Evans v. United Bank, Inc.*, 235 W. Va. 619, 620, 775 S.E.2d 500, 501 (2015). This Court's review of a lower tribunal's decision "whether or not to review a document outside of the pleadings, which is attached to a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, will be

reviewed for an abuse of discretion. Syl. pt. 7, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 515, 854 S.E.2d 870, 877 (2020)

STATEMENT REGARDING ORAL ARGUMENT

Petitioners submit that this case is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because this case involves a complicated set/series of facts, and the facts and legal arguments would be significantly aided by oral argument. Further, clarification on the appropriate application of *Forshey* analysis vis-à-vis what is appropriately considered and taken judicial notice of is of utmost importance to the clear the otherwise murky waters of *Forshey's* ever growing interpretation.

ARGUMENT

A. Under This Court's Decision in *Forshey* and *Mountaineer Fire*, the Lower Tribunal Incorrectly Considered a List of Expenses Attached to Respondents' Motion to Dismiss

As previously stated in Petitioners' brief, the lower tribunal improperly considered a list of expenses in its decision to dismiss Petitioners' claim under *Forshey v. Jackson*, 222 W. Va. 748 (W. Va. 2008). JA 000224. The lower tribunal in its order further failed to analyze whether it should have considered the list of expenses under this Court's decision in *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va*, 244 W. Va. 508, 854 S.E.2d 870 (2020). Plainly, had the lower tribunal undertaken this analysis it would have seen that the list of expenses should not have been considered because (1) the pleading did not implicitly or explicitly refer to the document and (2) even if this Court finds that the pleading did implicitly or explicitly reference the document, it nevertheless was not integral to the pleadings allegations.

Respondents correctly state the test laid down by this Court in *Forshey*: to wit, that a court may properly consider documents not attached or incorporated by reference to a complaint

where the complaint "relies heavily upon its terms and effects." *Forshey v. Jackson*, 222 W. Va. at 748, 671 S.E.2d at 753 Key here is that the complaint does not rely on any "terms and effects" Further, this Court in Syllabus Point 6 of its decision *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va*. refined the analysis adopted in *Forshey* stating in pertinent part:

> When a movant makes a motion to dismiss a pleading pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and attaches to the motion a document that is outside of the pleading, a court may consider the document only if:
>
> (1) the pleading implicitly or explicitly refers to the document;
>
> (2) the document is integral to the pleading's allegations; and
>
> (3) no party questions the authenticity of the document. If a document does not meet these requirements, the circuit court must either expressly disregard the document or treat the motion as one for summary judgment as required by Rule 12(b)(7).

Syl. pt. 6, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 854 S.E.2d 870 (2020).

As to the first prong of the *Mountaineer Fire* test, Petitioners' pleading does not implicitly or explicit refer to the document itself. Importantly the document is an estimation of expenses, not a full accounting of all costs and expenditures of the well property. Petitioners could not rely on this document alone to prove out damages in their case in chief and instead would provide receipts, bills, bank statements and other documents from third-parties evincing payments. The Document has no effect or value vis-à-vis Petitioners cause of action, it does not contain terms and conditions which would govern the relationship of the parties as a contract would—a document which would be implicitly or explicitly referred to in a complaint.

Petitioners' in their complaint do list various categories of costs associated with the list reviewed by the lower tribunal, but do not list any dates or amounts. J.A. 000039–40. Rather Petitioners discuss direct and indirect costs and benefits conferred. Id. Specifically, the list provided to Respondent Runyan's Counsel was an estimate of costs with approximate dates

meant to engage the other party in discussions regarding the appropriate capital account funding—which the parties discussed as a facet of the Petitioners' claim (first discussing the capital costs associated with the well property in the injunction action (J.A. at 000054–55).

As to the Second prong of *Mountaineer Fire*, Respondents' argument fails because the document is not "integral to the pleading's allegations." By way example, the Deed (considered by the lower tribunal in its Order granting Respondents' motion to dismiss (JA 000224)) which was attached to Respondents' motion to dismiss would necessarily be integral to the claims and allegations of the Petitioners as it specifically grants to the party landowners the right to access the water system contingent upon their payment of appropriate fees into a water system management association.

Respondents wholly fail to address this requirement of *Mountaineer Fire*. But Mountaineer Fire requires a lower tribunal find that an attached document satisfy all three prongs. Flatly Respondents' arguments fail in this regard. Petitioners' claims do not rise and fall based upon the terms or conditions of this document, it does not tend to prove or disprove Petitioners' claims. Accordingly, this honorable Court should reverse the lower tribunal's ruling in this matter.

b. The Lower Court Erred by Applying the Doctrine of Laches to Bar Petitioners' Claims

Petitioners asserted a claim of unjust enrichment against several Defendants below over a several years. JA 000036–42. Seven defendants were named in the initial complaint and represented the various users (beneficiaries) of the water system over the years. Respondent Runyans had purchased their tract of land on or about March 11, 2021. JA 000119. During their ownership of this land, Respondent Runyans linked up to the water system and paid nothing toward its upkeep or maintenance, further they paid nothing for the water they used. JA 000041.

Respondents Wilsons purchased their property in 2014. JA 000203. Respondent Wilsons for their part have contributed at least $2,000 over the years for the maintenance of the water system. JA 00040. Petitioners' claims of unjust enrichment admittedly span payments over several years, but importantly, the expenses of the water system are capitalized and on-going. JA 00040. If this Court finds that the inclusion of the list of expenses was proper, the application of Laches as a defense by the lower tribunal was still improper because several of the expenses and bad acts by Respondents continue to this present day. As the Complaint alleges, Respondents have failed to make any payments for the water system whatsoever over the past two years. JA 000040. Further, Respondent Runyans never paid for any maintenance to the system or for any water used during their ownership of their parcel of land since March of 2021. Respondents' bad acts are continuous and on-going.

Laches is an equitable defense, and its application depends upon the particular facts of each case. *State ex rel. Webb v. W. Va. Bd. of Med*., 203 W. Va. 234, 237, 506 S.E.2d 830, 833 (1998). "mere delay will not bar relief in equity on the ground of laches. 'Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right.'" *State ex rel. West Virginia Dept. of Health and Human Resources, Child Advocate Office, on Behalf of Jason Gavin S. by Diann E.S. v. Carl Lee H.*, 196 W. Va. 369, 374, 472 S.E.2d 815, 820 (1996). This Court in *State ex rel. Smith v. Abbot*, 187 W. Va. 261, 418 S.E.2d 575 (1992), stated that laches is an equitable, affirmative defense that is "sustainable only on proof of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." 187 W. Va. at 264, 418 S.E.2d at 578 (citing *Mogavero v. McLucas*, 543 F.2d 1081 (4th Cir. 1976)).

It was hardly foreseeable that when Respondent Runyans purchased their property in March of 2021 that they would refuse to pay anything toward the water system, despite demanding the

absolute and unfettered right to water. JA 000003 ("an absolute right to use the water system"). Respondent Wilsons further, in the past two years, have failed to make any payments whatsoever to the maintenance of or their usage of the water system. Decidedly, Respondents make considerable arguments that expenses incurred by Petitioner span ten years (JA 000196) and use this as a convenient way to excuse their recent decisions of non-payment. This especially includes Respondent Runyans, who were made aware of their duties under the Well Deed to contribute to the costs of the water system but affirmatively chose not to pay for any maintenance or use.

Here, as it pertains to Respondent Runyans, Petitioner took immediate action to impress the duty they had to pay for maintenance and use of the water system. JA 000004. Decidedly, the lower tribunal could have determined that expenses incurred ten years ago were properly barred by the doctrine of laches, but the more recent actions taken by Respondent Runyans and the benefits inured to them through their taking of water from the system with no payment whatsoever for that water and not contributing to its maintenance during their time as owners of a parcel in the subdivision were proper for purposes of the issue of unjust enrichment.

Claims against Respondent Runyans were proper as there was no lack of diligence by the Petitioners in the face of Respondent Runyans demands for free water and Respondent Runyans cannot claim prejudice as almost immediately after they purchased their parcel, they began instituting legal actions related to their use and right of use of the water system. The application of Laches depends upon the particular facts of each case. *State ex rel. Webb v. W. Va. Bd. of Med.*, 203 W. Va. 234, 237, 506 S.E.2d 830, 833 (1998). Here, Respondent Runyans have not been surprised by this action, were not unaware of their need to pay for expenses related to the water system, but unilaterally decided they should have the absolute right not to just water, but free water.

If this Court finds laches is appropriate in this matter, it should limit the application of the doctrine to those expenses either prior to the Respondents purchase of the land in March of 2021

or a reasonable period before the purchase to account for capital expenses which would have been capitalized across the life of the well water system and under normal circumstances would be paid for by anyone who used the system. Liability in this case is clear when individuals seek to obtain a benefit from a system on the back of another individual without contributing to the maintenance and costs attendant in the same. The question of what damages should be properly assessed against the individual defendants in the matter should have been further litigated and apportioned according to their culpability. Each cost represents a specific head of damage against which the analysis of laches should be applied in its own right, and not on a broad basis. Again the application of Laches depends upon the particular facts of each case. *State ex rel. Webb v. W. Va. Bd. of Med*., 203 W. Va. 234, 237, 506 S.E.2d 830, 833 (1998). Here, the lower tribunal at the least should have allowed discovery to be conducted to determine the precise amounts and timing of payments by Petitioner and then, based on the facts presented to it, apply the doctrine of laches, especially in the face of continued harm. The lower tribunal's decision to bar any recovery from Respondents amounts to essentially providing Respondents carte blanch to continue utilizing the water system without paying for either usage or maintenance thereby propagating a fundamental injustice. Accordingly, the lower tribunal's decision must be reversed and remanded.

CONCLUSION

Based on the foregoing grounds, supported by the above facts and cited law, Petitioners respectfully request that this Honorable Court reverse the Circuit Court's decision and remand the case to the Circuit court for trial and for any further relief the Court deems appropriate.

Respectfully submitted,

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EARL GILLIS & KAREN GILLIS,
WES RUNYAN & TAMMY RUNYAN, AND
TRACY WILSON & DAVID WILSON,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, Ronald N. Walters Jr., counsel for Petitioner, do hereby certify that service of the foregoing *Petitioner's Brief* in the above-styled matter have been made counsel of record in the e-filing system and upon the following:

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this 28th day of December, 2022, via United States mail in a sealed envelope, postage prepaid.

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