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' BRIEF

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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)

SUMMARY OF ARGUMENT

This case involves the inappropriate review of documents under Rule 12(b)(6) not attached to Petitioners complaint and then the use of those documents by the lower court to provide a basis for a laches defense. Further, the lower tribunal's consideration of and reliance upon documents outside of the pleadings, without converting the motion to dismiss to a motion for summary judgment, represents an abuse of discretion. Petitioners, in their response to the motion to dismiss, requested that "If this Court decides to treat Defendants' motion as a motion to dismiss, it should not consider the documents attached to Defendants' motion. If, however, this Court decides to consider these documents, the Defendants' motion should be properly treated as a motion for summary judgment and Plaintiffs should be afforded reasonable time to respond." JA 000153.

The Petitioners' unjust enrichment claim was incorrectly dismissed due to the lower tribunal's erroneous interpretation of Rule 12(b)(6), its erroneous interpretation of this Court's decision in *Forshey v. Jackson*, 671 S.E.2d 748 and its progeny, because first, the list of expenses document was not implicitly or explicitly referred to in the Petitioners' complaint, second, the document is not integral to the allegations contained in Petitioners' complaint; and finally, the respondents themselves questioned the authenticity of the document. Under this Court's holding in *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, if any one of the above three are true, then a 244 W. Va. 508, 515, 854 S.E.2d 870, 877 (2020), 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).

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. The lower court erred in considering documents and other materials not contained in the complaint and not previously made exhibits in a related action, in its decision to dismiss Petitioners' complaint, under this Court's previous decision of *Forshey v. Jackson* and the lower Court erred by failing to convert Respondents Wes Runyan and Tamy Runyan'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' Motion to Dismiss.

The lower court abused its discretion when it considered a "list of expenses" in its determination of whether Petitioners had stated a claim upon which relief may be granted. Specifically, as to whether the doctrine of laches—argued below—would attach to deny petitioners relief.

This Court has made clear that generally a complaint forms the sole basis for review for purposes of a motion to dismiss "[o]nly matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith. . . ." Syl. pt. 4, *.8 Fid. & Guar. Co. v. Eades,* 150 W.Va. 238, 144 S.E.2d 703 (1965), *overruled on other grounds by Sprouse v. Clay Communication, Inc.,* 158 W.Va. 427, 211 S.E.2d

674 (1975). *Accord* Syl. pt. 1, *Poling v. Belington Bank, Inc.,* 207 W.Va. 145, 529 S.E.2d 856 (1999). *See also* FRANKLIN D.. CLECKLEY, ET AL., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 12(B)(6)[3], at 354 (3d ed. 2008) ("Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6). However, if matters outside the pleading are presented to the court and are not excluded by it, the motion must be treated as one for summary judgement and disposed of under Rule 56.")

Further, this Court in *Dimon v. Mansy* stated that "the singular purpose of a Rule 12(b)(6) motion is to seek a determination whether the plaintiff is entitled to offer evidence to support the claims made in the complaint." *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996). Justice Cleckley discussing this standard has stated that "[a]ll that is required to state a cause of action is a short and plain statement of a claim that will give the defendant fair notice of what plaintiff's claim is and the grounds upon which it rests." FRANKLIN D. CLECKLEY, ET AL., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 12(b)(6), at 1303 (2012) (citing broad support for this contention: *Harris v. Davis*, 197 W. Va. 651, 448 S.E.2d 104 (1996); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1638 (1974); *Chaveriat v. Williams Pipe Line Co*., 11 F.3d 1420 (7th Cir. 1993). This Court has recognized "a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failure to state a claim should be viewed with disfavor and rarely granted." *Sauer, Inc. v. American Bituminous Power Partners, L.P.*, 192 W. Va. 150, 154, 451 S.E.2d 451, 455 (1994). In fact, this Court has made clear:

> 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 he would entitle him to relief." Syl., *Flowers v. City of Morgantown, W. Va.,* 166 W. Va. 92, 272 S.E.2d 663 (1980) Syllabus point 2, *Stricklen v. Kittle,* 168 W. Va. 147, 287 S.E.2d 148 (1981).

Syl. Pt., *Sauer, Inc. v. American Bituminous Power Partners, L.P.*, 192 W. Va. 150, 451 S.E.2d 451 (1994). Flatly, "[a] Complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conrad v. ARA Szabo*, 198 W.Va. 362, 369-70, 480 S.E.2d 801, 808-09 (1996).

Although entitlement to relief must be shown in the complaint, "a plaintiff is not required to set out facts upon which the claim is based"; all that is required is a "short and plain" statement of a claim. *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516, 522 (1995). A Plaintiff's complaint is be construed liberally and in such a way as to favor disposition of a case on its merits:

> "In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b) motion is a liberal standard, and few complaints fail to meet it."

John W. Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W.Va. 603, 606, 245 S.E.2d 157, 159 (1978). *See also State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 227, 488 S.E.2d 901, 907 (1997) ("Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." quoting *Scott Runyan*, 194 W.Va. at 776, 461 S.E.2d at 522).

Rule 201(b) of the West Virginia Rules of Evidence provides the "Kinds of Facts That May Be Judicially Noticed," specifically providing in pertinent part:

> (b) The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

W. Va. R. Evid. 201(b). Courts will routinely take judicial notice of records in other matters. *See e.g. Arnold Agency v. W. Va. Lottery Comm'n*, 206 W. Va. 583, 596, 526 S.E.2d 814, 827 (1999) (specifically discussing judicial notice of adjudicative facts in other orders); *Mounts v. Troutman Pepper Hamilton Sanders LLP*, No. 21-0687, 2022 W. Va. LEXIS 616, at *4 (Oct. 17, 2022) (finding a lower court appropriately took notice of a federal court docket sheet). However, the list of expenses is in dispute and the accuracy of the expenses has been questioned by the Respondents.

Under this Court's decision in *Forshey v. Jackson*: "[a] circuit court ruling on a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure may properly consider exhibits attached to the complaint without converting the motion to a Rule 56 motion for summary judgment." Syl. pt. 1, *Forshey v. Jackson*, 222 W. Va. 743, 671 S.E.2d 748 (2008). However, this Court has stated that:

> Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith.

Syl. pt. 4, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 854 S.E.2d 870 (2020). This seemingly contradictory stance has been clarified by this Court stating in *Mountaineer Fire*:

> 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) (formatted by counsel for clarity) (emphasis added)

> Here, in its June 23, 2022 Order, the lower court stated and found:
>
> While the Court recognizes that the Defendants rely upon two (2) documents [attached as exhibits 1 and 2 of Defendant's Motion to Dismiss JA 000114–117] not attached to Plaintiffs' Complaint, namely a list of expenses provided by and made an exhibits in a related injunction proceeding and the Deed for the subject well property, the Court is of the opinion that disposition of this case is proper under Rule 12 of the West Virginia Rules of Civil Procedure and not Rule 56.

JA 000223–224 (emphasis added). The lower court further stated and found:

> This Court finds that the list of expenses attached to the Defendants' Motion to Dismiss is proper for consideration by this Court pursuant to *Forshey v. Jackson*, 671 S.E.2d 748, 754 (W. Va. 2008). 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.
>
> This Court further finds that the Deed attached to Defendants' Motion to Dismiss is Dismiss is proper for consideration by this Court pursuant to *Forshey v.Jackson*, 671 S.E.2d 748 (W. Va. 2008). The Deed is not in dispute and, as a recorded instrument, is likewise susceptible to judicial notice.
>
> Thus, this Court finds that these two (2) exhibits are proper for use and consideration by this Court under *Forshey v. Jackson*, 671 S.E.2d 748 (W. Va. 2008) and do [sic] not require conversion of Defendants' Motion to Dismiss to Motions for Summary Judgment.

JA 000224 (emphasis added). Here the lower court erroneously stated, with no reference to where in the record it appeared, that the Petitioners' prepared list of expenses, tendered to Respondent Runyans' counsel in settlement discussions was made "part of the record" in a related injunctive action (Case No. CC-45-2021-P-14). *Id.* This was never the case as the "list of expenses" was never attached to any filings or introduced into evidence in the injunctive action. The lower court made no reference to specific filings, exhibits, or transcripts in the related injunctive action, but rather made the bald allegation that first that the list of expenses were consistent with expenses discussed in Petitioners' complaint only in general terms and that the same was "made part of the

record in the related injunctive proceeding before the" lower court. In fact, a review of the filings and transcript from the injunctive action shows that the "list of expenses attached to the Defendants' Motion to Dismiss" as exhibit 1 (JA 000114-115) was nowhere attached to any filing, nor introduced into evidence in any proceeding before the lower court. JA 000001–11 - Respondents' Emergency Verified Petition for Temporary Restraining Order and Preliminary Injunction; JA 000012–15 - Order Granting Temporary Restraining Order and Setting Hearing for Friday, June 4, 2021 at 2:30PM; JA 000023–26 - Order Granting Preliminary Injunction; JA 000043–64 - Bench Trial on Petition for Permanent Injunction – Transcript [1]). Further, Respondents' Runyans themselves in their Reply to Petitioner's Response to their motion to dismiss admit that the list of expenses was not part of the record in the injunctive matter. JA 000178 at footnote 1 & 2. The record is clear that this is a clearly erroneous statement and the lower courts reliance on this document was ill-placed and inappropriate. Flatly, judicial notice of this document was inappropriate because, as Petitioners' counsel stated in the hearing on this matter, this was an incomplete list of expenses and not necessarily forming the basis for the claim as it pertained to Respondent Runyans. JA 000205–207.

This Court provided in *Mountaineer Fire*:

> 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).

[1] Counsel notes there was never a final order entered in CC-45-2021-P-14.

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) (formatted by counsel for clarity) (emphasis added).

Under *Mountaineer Fire*, it is clear that the expense list relied upon here by the lower Court did not meet the elements outlined therein. First, Petitioners' complaint did not implicitly or explicitly refer to the expense list; second the document if not integral to the pleadings' allegations; and third Respondent Runyans disputed the authenticity of the data contained on the list of expenses by requesting additional expense information and refused to make any payments to the Petitioners. Per this Court's holding in *Mountaineer Fire*, the lower court's consideration and reliance upon the list of expenses as a basis for its dismissal of the Petitioners' complaint is erroneous and an abuse of discretion. The expense list does not meet the requirements under *Mountaineer Fire* and should not have been disregarded by the lower court or the lower court should have treated the Runyan's motion to dismiss as a one for summary judgment as required by Rule 12(b)(7).

Respondents made bald statements and argued that the list of expenses was "integral to the Complaint and should be considered without converting the instant Motion to one for summary judgment" based on *Forshey* analysis. JA 000177–178 at fn. 1 & 2. As stated above, the list of expenses, attached to Respondent Runyans' motion to dismiss is not the entire basis for Petitioner's claims. Respondent Runyans, during the time of their ownership of the property, failed to make on-going monthly usage payments nor did they make any payments for the maintenance of the water system. Petitioners have made significant contributions to the water system and have sought like and kind contributions from all Respondents on multiple occasions including Respondent Runyans since their purchase of their property in 2021. JA 000144. It is of importance to note that shortly after the Respondent Runyans took possession of their property at BBMR, Petitioners

immediately requested payments from the Respondent Runyans for their use of the water and payments for maintenance costs. Thus, the Respondent Runyans were on notice of their duties and obligations to make payments for their water usage and their pro rata share of maintenance costs.

In the lower Court's Order, paragraphs 12 and 13, the court found, as a matter of law, that the list of expenses was made "an exhibits (sic) in a related injunction proceeding…" JA 000223-224. The lower Court also found as a matter law that "the list of expenses…is proper for consideration…" and "…as the same were made part of the record in the related injunctive proceeding before this Court, the same is susceptible to judicial notice." *Id*.

> "A court is permitted to take judicial notice of adjudicative facts that cannot reasonably be questioned in light of information provided by a party litigant."

Arnold Agency v. W.Va. Lottery Comm'n, 206 W.Va. 583, 596, 526 S.E.2d 814, 827 (1999).

Courts may take judicial notice of matters in the public record, but not those which may be subject to reasonable dispute. The list of expenses considered by the lower court as a basis for its dismissal, was utilized only during informal negotiations, was not used as evidence during the injunction proceeding, and is not a matter in the public record. Further the list of expenses was disputed by Respondent Runyans during those negotiations. The lower court's finding that the list of expenses was made a part of the record in the injunction proceeding is plain error and the lower court's ruling based on this conclusion must be overturned.

Further, in its Order dismissing the Petitioners' complaint, the lower Court found in paragraph 15, as a matter of law, that "these two (2) exhibits are proper for use and consideration by this Court under *Forshey v. Jackson*, 671 S.E.2d 748 (W.Va. 2008) and do not require conversion of Defendants' Motion to Dismiss to Motions for Summary Judgment." JA 000224.

A list of general types of expenses incurred by Mr. Springer was laid out in the complaint, but several other expenses that were raised were not included on that list. The list of expenses considered by the lower court were not integral to Petitioners' pleading. It did not, in and of itself, provide a basis for the claims asserted by the Petitioners. Additional expenses were incurred, including but not limited to, expenses related to the on-going use of the water system without paying a monthly usage fee that were not included on the preliminary list expenses utilized by Petitioners and Respondent Runyans during settlement negotiations.

The list of expenses should not have been considered; or if they had been considered, the lower court should have converted the motion to a motion for summary judgment under West Virginia Rules of Civil Procedure Rule 56 according to Rule 12(b)(7). The lower court abused its discretion in considering this document and therefore, this matter should be remanded to the lower tribunal with instructions reflecting the need to not consider these expenses for purposes of a motion to dismiss or convert the motion to a motion for summary judgment under Rule 56 and permit time for the parties to adequately undertake discovery in this matter.

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

The lower Court erred by applying the Doctrine of Laches to Petitioners' claims as all Respondents have been on notice of monies owed, and have refused, despite multiple attempts to obtain payment for the maintenance, upkeep, or usage of the water from the water system have failed to pay monies owed to the Petitioners. Further, the lower court erroneously based its decision to grant Respondents' motion to dismiss, and to dismiss Petitioners' claim on the doctrine of laches on the attached list of expense exhibit as argued above.

Respondent Runyans' memorandum in support of their motion to dismiss argued that dismissal under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure was proper due to the application of the Doctrine of Laches. JA 000122–127; *See also* JA 000178–183 replying to Petitioners' arguments. Respondent Runyans attached as an exhibit a list of expenses as evidence to prove the arguments outlined in their motion to dismiss. JA 000114–115.

In setting out the analysis for reaching its decision to grant respondents' motion to dismiss, the lower court found:

> If taken as true, Plaintiffs allege that the "association" was created when the deed was filed in February 2012. Thus, this Court finds that the Plaintiffs knew their rights or were cognizant of their interest in seeking reimbursement of any funds expended to operate the well. Despite that and despite the Plaintiffs expending money for the past ten (10) years, the Court finds that the Plaintiffs have never asserted claim for unjust enrichment or otherwise apparently sought reimbursement for many, if not all, of the costs for which they now seek the same. Plaintiffs have not demonstrated that, aside from the instant litigation, that they have sought to seek reimbursement through any legal actions, such as a lien or a civil action, against any current or former property owner. This, at its very core, suggest that the Plaintiff has known of his alleged rights for the past ten (10) years and has failed year after year to exercise any actual or perceived right to reimbursement of any funds he may have expended. . .
>
> Plaintiffs, despite knowing who these Defendants were engaged in a series of unilateral transaction for the furtherance of their personal gain in this matter. Plaintiffs, had they been acting in good faith and in a diligent effort to avoid being in this position now, could have easily contacted these Defendants and discussed the nature of, the need for, and the cost of the more recent line items above. Finally, for the past ten or so years, Plaintiffs have enjoyed the access to and use of the water without enforcing any right of any party to assist in the costs of the same.

JA 000226–227. The lower court continued its analysis, stating:

> Plaintiffs are seeking recovery of monies allegedly expended over the course of more than ten (10) year. Most of these expenditures happened during a period of during which these Defendants did not know nor did they have any way of knowing whether the same were either necessary or reasonable.

JA 000227.

These findings are erroneous in that, in addition to their claims for unjust enrichment, Petitioners also sought from all Respondents within their Complaint, participation in the water system in the form of non-monetary cooperation in forming a formal water-system structure, and the establishment of a long-term, prospective solution designed to stop each Respondents' unjust enrichment. The list of costs expended, upon which the lower Court considered and based its dismissal per the Doctrine of Laches, is not the entire story nor does the list outline all of the evidence which would be adduced in discovery. As such, while costs may be a piece of the evidence, Respondent Runyans misrepresent the extent of the tortious behavior they have undertaken and misrepresent the Petitioners' claims.

Laches, as an affirmative defense, may be the proper subject of a motion to dismiss where: "[i]n an appropriate case, an affirmative defense may be adjudicated on a motion to dismiss for failure to state a claim. Two conditions must be met for such a dismissal. First, the facts that establish the defense must be definitively ascertainable from the allegations of the complaint, the documents (if any) incorporated therein, matters of public record, and other matters of which the court may take judicial notice. Second, the facts so gleaned must conclusively establish the affirmative defense." *Forshey v. Jackson*, 222 W. Va. 743, 746 fn. 8, 671 S.E.2d 748, 751 (2008) (emphasis added).

In *Absure, Inc. v. Huffman*, 584 S.E.2d 507, 511 (W.Va. 2003), the West Virginia Supreme Court held that the claim for unjust enrichment "was equitable in nature, and thus principles of laches rather than the Statute of Limitations govern the bringing of it." Unlike a statute of limitations defense, "the controlling element of the equitable defense of laches is prejudice, rather than the amount of time which has elapsed without asserting a known right or claim." *Maynard v. Bd. of Educ.*, 357 S.E.2d 236 (W.Va. 1987). Further the *Maynard* Court provided that "[t]his

Court has consistently emphasized the necessity of a showing that there has been a detrimental change of position in order to prove laches[.]" *Id.*

In *State ex rel. Smith v. Abbot*, 187 W.Va. 261, 418 S.E.2d 575, 578 (W.Va. 1992), this Court held that "laches 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." Also, "[t]he burden of proving unreasonable delay and prejudice is upon the litigant seeking relief." *Province v. Province*, 473 s.E.2d 894, 905 (W.Va. 1996). Mere delay will not bar relief in equity on the grounds of laches. *See Condry v. Pope*, 152 W. Va. 714, 166 S.E.2d 167 (1969); *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 57 S.E.2d 725 (1950). The federal district court for the Southern District of West Virginia, interpreting and applying West Virginia law has opined:

> Laches is inexcusable delay in asserting a right, and is an equitable defense, controlled by equitable considerations. To be a bar, the lapse of time must be so great, and the relation to the defendant to the right such that it would be inequitable to permit the plaintiff to assert it, where he had had, a **considerable period**, knowledge of the existence, or might have acquainted himself with it, by the use of reasonable diligence.

Cumis, Ins. Soc'y, Inc. v. Raines, 3:12-6277, 6 n.7 (S.D.W.Va.Feb.11, 2013) This Court refined the test for recovery under unjust enrichment when it stated,

> [t]he Court has also indicated that if benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment thereof, the law requires the party receiving…the benefits to pay their reasonable value.

Realmark Devs., Inc., v. Ranson 542 S.E.2d 880, 884-85 (W.Va. 2000).

In the years prior to the filing of their Complaint, Mr. Springer made repeated attempts to obtain payment from other members of the association for the operation and maintenance of the system. In fact, an association was set up for a time, but the members of the association failed to

maintain it.[2] At times payments were made by some participants. Further, at times, it was represented to Mr. Springer that certain amounts were due in excess of actual costs due—i.e. a regular payment for electric utilities were requested by another Respondent and it was later discovered that the amount exceeded the electric bills.

Decidedly, within the discussions contained in their preliminary injunction complaint against Mr. Springer and the Water Association itself, the Respondent Runyans outline previous attempts by Mr. Springer to obtain contributions for Petitioners' operation and maintenance of the water system. JA 000180 ("By admitting in their brief that Plaintiffs have previously made efforts to collect these expenses, this makes it clear that Plaintiffs knew, or were aware, they had the right to seek contribution for past expenses made to operate and maintain the system.") However, the Respondent Runyans' argued in their motion to dismiss that Mr. Springer's demand of them, merely a year after their purchase of the property, is a delay in the assertion of the Petitioners' known rights. Decidedly, Respondents Runyans argue that the lack of legal action on the part of the Petitioners alone, despite numerous overtures over the years outside of the court involvement were not enough to protect them from the imposition of laches. JA 000181.

Additionally, Respondent Wilsons were often involved in discussions with Petitioners about the status of the well property, and had even, at one point in time contributed to the same. (JA 000040–41). The Respondent Wilsons' themselves wrote a letter in the related injunctive action discussing their involvement with Mr. Springer and his demands for payment for the water system—which they categorized as harassing. JA 000029–30.

[2] As explained later, Mr. Springer is a part-time resident of Big Bend Mountain Retreat and as such has not been able to manage the on-goings of the water system continually aside from making needed repairs when he is present.

As further evidence that the Respondent Runyan's have not been prejudiced by the filing of Petitioners' Complaint, during the pendency of the Injunction proceeding filed by the Respondent Runyans, which injunction was filed by Respondent Runyans' on May 27, 2021 JA 00001-00011, Mr. Springer made numerous attempts to negotiate with Respondent Runyons and their counsel to obtain a minimum monthly payment for water. These interactions between the parties put the Respondent Runyans on notice that Petitioners of their obligations to pay for their water use and that they were required to pay Petitioners for Petitioners' operation and maintenance of the water system.

During the Injunction proceeding, Respondent Runyons and Petitioners could not come to an agreement, and instead Respondent Runyons disputed the amount of the requested costs—despite being provided information on the private water systems and their operational costs—and refused to pay any monies to the Petitioners; a fact reflected in their reply filed in opposition to Petitioners' response. JA 000176.

Respondent Runyans have been aware of the requirement to pay for their use of the water, the operational needs and maintenance demands related to the operation of the water system almost from the beginning of their tenure at the BBMR. Despite the lower courts finding that Petitioners had "not demonstrated . . . ., that they have sought to seek reimbursement through any legal actions, such as a lien or a civil action, against any current or former property owner. This, at its very core, suggest that the Plaintiff has known of his alleged rights for the past ten (10) years and has failed year after year to exercise any actual or perceived right to reimbursement of any funds he may have expended. . ." the fact is, Petitioners repeatedly attempted to work with Respondents to have the costs related to on-going expenses covered. In fact, Respondents admit this. In a confusing line of argument Respondents Runyans' counsel in almost the same breath argues in his reply to

Petitioner's brief that the Springers have failed to communicate with the Respondent Runyans, but that Petitioners and their counsel "spoke with the undersigned [Respondent Runyans' Counsel] countless times and attempted to negotiate a monetary sum to cover any potential liabilities during the injunctive process." JA 000176. Respondents' arguments proceed further to argue that their water usage should be entirely without charge (despite the Deed being clear) "While it is true that no payment has been made, the Runyan Defendants maintain that the payment demanded is improper, that arguably no funds are required for the water used, and that there is no party to which payment could be made." *Id.*

In order for the Doctrine of Laches to be applicable, the Runyans must show "lack of diligence by the party against who the defense is asserted, and (2) prejudice to the party asserting the defense." *Dep't of Health & Human Res. Child Advocate Office ex rel. Robert Michael B. v. Robert Morris N.*, 195 W.Va. 759, 762 (1995).

It is clear that the Respondent Runyans have not been prejudiced in any manner and that the Petitioners were diligent in their efforts to obtain monies from the Runyans (as well as other Respondents) for their pro rata share of the maintenance and operational costs of the water system, and payments for their use of the water. In fact, the Petitioners' claims as set forth in their complaint have been subject to litigation in some form since Defendant Runyans first moved to the BBMR. Petitioners' complaint not only sought claims not only for unjust enrichment for expenses for multiple years, but also sought expenses up to and including the current day and specifically asked for a pro rata share, meaning a share against each Defendant named respecting the temporal nature of their exposure and benefits. JA 000167. The same argument runs against Respondent Wilsons, who decidedly have been fighting and refusing to pay for costs of the water system for years.

The lower court ruled that "Plaintiffs knew their rights or were cognizant of their interest in seeking reimbursement of any fund expended to operate the well. Despite that and despite the Plaintiffs expending money for the past ten (10) years, the Court finds that the Plaintiffs have **never** (emphasis supplied) asserted claims for unjust enrichment or otherwise apparently sought reimbursement for many, if not all, of the costs for which they now seek the same." JA000226. This finding by the lower court is erroneous. Within Petitioners' complaint they stated: "Plaintiffs have not received reimbursement for their costs absent a $2,000 payment from Defendant Wilson." JA 000075. It is an impossibility that Petitioners never sought reimbursement for any costs from Respondents given the fact that the Wilsons made a $2,000 payment to the Petitioners. The lower court failed to consider this fact as outlined in the Petitioners' complaint. Respondent Wilsons did not deny the payment of the $2,000 to the lower court, nor did the lower court take this fact into consideration prior to dismissing Petitioners' Complaint.

Each of the Respondents owe their pro rata share of the costs for the maintenance and operation of the water system, and their water usage. Petitioners have repeatedly sought contributions from Respondents in this matter, who largely, have refused to pay. The complaint, on its face shows that, and if the facts from the complaint are to be taken as true, together with Respondents' counsel's own statements, Petitioners have sought reimbursement, and further attempted—while admittedly not successfully—the cooperation of their neighbors in the water association. The lower court, inappropriately accepted facts from Respondents, which they themselves, by their own admissions countered, to inappropriately apply laches and further did so based on a list of expenses attached to Respondents Runyans' motion to dismiss.

Taken together, the errors of the lower tribunal amount to an inappropriate application of law and an abuse of discretion. The lower court's decision should be reversed, and this matter

should be remanded with further instruction to the lower court regarding the appropriate application of *Forshey* and the finding that, given the facts pled in Petitioners' complaint, laches, at least without further discovery is inapplicable as a bar to Petitioners' claim.

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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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LEWIS SPRINGER & KAREN SPRINGER,
Plaintiffs Below, Petitioners,

v. DOCKET NO: 22-586

BIG BEND MOUNTAIN RETREAT
WATER UTILITY SYSTEM ASSOCIATION,
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 24th day of October, 2021, via United States mail in a sealed envelope, postage prepaid.

Lewis Springer, et al.
By Counsel

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