RECORD NO. 24-343

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA *ex. rel.* MARY C. SUTPHIN,

Petitioner,

v.

HONORABLE DARL W. POLING, Judge of the Circuit Court of Raleigh County, West Virginia, A. DAVID ABRAMS, JR., RACHEL L. ABRAMS HOPKINS, SARAH A. ABRAMS, LANGHORNE ABRAMS, ESTATE OF NANCY R. SMITH, NANCY R. SMITH REVOCABLE TRUST, KATE M. HATFIELD, and ANN DONEGAN (HALEY),

Respondents.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY,
WEST VIRGINIA – CIVIL ACTION NO. 17-C-591

PETITION FOR WRIT OF PROHIBITION

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Petitioner, Mary C. Sutphin ("Plaintiff" or "Ms. Sutphin"), by counsel, petitions this Honorable Court, under West Virginia Code § 53-1-1, *et seq.*, to issue a writ of prohibition against the Honorable Darl W. Poling, in his capacity as Judge of the Circuit Court of Raleigh County, West Virginia ("the Circuit Court"), and A. David Abrams, Jr., Rachel L. Abrams Hopkins, Sarah A. Abrams, Langhorne Abrams, Estate of Nancy R. Smith, Nancy R. Smith Revocable Trust, Kate M. Hatfield, and Ann Donegan (Haley) (collectively "Defendants" or "Respondents"), prohibiting enforcement of the Circuit Court's May 24, 2024 *Order Modifying Discovery Commissioner's Sixth Recommended Decision* which rejects the Discovery Commissioner's recommendations and orders Ms. Sutphin to "either submit a proposed Stipulation [that she has no knowledge of any specific facts related to the allegations in her Second Amended Complaint] … *or* schedule [her] counsel's deposition as to facts related to the drafting of the Complaint, Amended Complaint, and Second Amended Complaint [ten (10) days from the entry of its May 24, 2024]" and further orders Ms. Sutphin's counsel to "make himself available for deposition [if Ms. Sutphin does not so stipulate] within thirty (30) days of the entry of [the Court's May 24, 2024] Order."

QUESTION PRESENTED

Did the Circuit Court abuse its discretion and commit clear legal error by ordering Ms. Sutphin to schedule her counsel's deposition by June 24, 2024 in order to supplement her responses to Respondents' contention interrogatories with "facts communicated to him by [Ms. Sutphin] or third parties which he used in the preparation of the Complaint, Amended Complaint, and Second Amended Complaint," where discovery in the case is ongoing, Ms. Sutphin has requested, but not completed, key fact witness depositions, and the parties have not completed expert witness disclosure or begun expert witness depositions, *unless* Ms. Sutphin is willing to stipulate by

June 10, 2024, that she "has no knowledge of any specific facts related to the allegations [in her Complaint, Amended Complaint, and Second Amended Complaint] and that neither [Ms. Sutphin] nor any other potential witness has disclosed to [her] counsel any specific facts in support of the allegations…" *and* by refusing to consider Ms. Sutphin's Motion to Stay its May 24, 2024 Order until several weeks after the deadlines it imposed?

STATEMENT OF THE CASE

I. INTRODUCTION

> **"Deposing an opponent's attorney is a drastic measure and is infrequently proper."**
>
> Hughes v. Sears, Roebuck & Co., No. 2:09-CV-93, 2011 WL 2671230, at *4 (N.D. W. Va. July 7, 2011); Am. Heartland Port, Inc. v. Am. Port Holdings, Inc., No. 5:11-CV-50, 2014 WL 12605549, at *2 (N.D. W. Va. Apr. 7, 2014).
>
> **"[M]ost courts agree that '[d]ue to the nature of contention interrogatories, they are more appropriately used after a substantial amount of discovery has been conducted—typically at the end of the discovery period' [because of] 'the unfairness of requiring a party to prematurely articulate theories which have not yet been fully developed.'"**
>
> Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1 (S.D. W. Va. July 17, 2019) (internal citations omitted).

The Circuit Court has ignored this well-established precedent – and the recommendations of its own Discovery Commissioner – and presented Ms. Sutphin with a patently unfair choice before fact and expert witness discovery in this case has been completed: Either stipulate that neither she, nor any other potential witness, has disclosed to her attorney any specific facts in support of the allegations in her Second Amended Complaint by June 10, 2024 *or* make her attorney available to be deposed by June 24, 2024. The Circuit Court has presented this unfair "choice" to Ms. Sutphin upon the faulty premise that she provided inadequate answers to Respondents' contention interrogatories at the outset of discovery before the completion of fact witness depositions, expert witness disclosures, and expert witness depositions. The Circuit

Court's adoption of this "drastic measure" and imposition of this unfair "choice" demonstrate clear legal error and a substantial abuse of its discretion in discovery which warrant the extraordinary remedy of a writ of prohibition.

II. NATURE OF THE CASE

This is a breach of fiduciary duty and corporate waste case related to the Lewis Chevrolet Company (Lewis Nissan) in Beckley, West Virginia. After several years of requesting information from Respondents about Lewis Chevrolet, and ultimately obtaining orders compelling production of corporate documents, Ms. Sutphin filed a Second Amended Complaint against Respondents, A. David Abrams, Jr., Langhorne Abrams, Ronald J. Hopkins, Jr., Rachel L. Abrams Hopkins, and Sarah A. Abrams on February 3, 2022. [0023] Her Second Amended Complaint includes claims for Violations of the Uniform Trust Code (Count I), Breach of Fiduciary Duties as Trustee (Count II), Waste to Estate (Count III), Breach of Fiduciary Duties as Executor (Count IV), Violations of West Virginia Business Corporation Act (Count V), Breach of Fiduciary Duties as Directors and Officers (Count VI), Conversion (Count VII), Negligence (Count VIII), Tortious Interference with Inheritance (Count X), Fraud/Constructive Fraud (Count XI), Civil Conspiracy (Count XII), Unjust Enrichment (Count XIII), Constructive Trust (Count XIV), Punitive Damages (Count XV), and Attorney Fees and Litigation Costs (Count XVI). [0049-0080]

III. HISTORY OF LEWIS CHEVROLET COMPANY AND THIS DISPUTE

Nancy Pat Lewis Smith owned 242 of 394 outstanding shares of stock in the Lewis Chevrolet Company ("Lewis Chevrolet" or "the Dealership") in Beckley, West Virginia when she died on November 23, 2009.[1] [0029, 0034] According to her Will, Ms. Lewis Smith's three

[1] Lewis Chevrolet now operates the Nissan Dealership in Beckley and touts itself as the "#1 Volume Dealer in the State." [0030]

daughters – Petitioner Mary C. Sutphin, Respondent Langhorne Abrams , and Nancy Lewis Haley[2] – were to receive equal shares of this stock after it was held in trust for ten years by Respondent, A. David Abrams, Jr., and equal shares of the remainder of her estate. [0029, 0034-0036] Mr. Abrams thus controlled Ms. Sutphin's, Mrs. Abrams', Kate Hatfield's, and Ann (Donegan) Haley's 242 shares of Lewis Chevrolet stock as Trustee of the Nancy Pat H. Lewis Smith Heirs Trust from November 23, 2009 to November 23, 2019. [0034-0036, 0047]

Mr. Abrams is Respondent Langhorne Abrams' husband and Nancy Pat Lewis Smith's son-in-law. [0036] He is also an attorney. In October 1990, he prepared Ms. Lewis Smith's Will ("the Will"). [0031] In this Will, Mr. Abrams named himself as both the Executor of Ms. Lewis Smith's Estate and the Trustee of the Nancy Pat H. Lewis Smith Heirs Trust ("the Trust"). [0031] At the time he prepared the Will, Mr. Abrams also served as General Counsel, a Member of the Board of Directors, and an Officer of Lewis Chevrolet. [0030-0031, 0065]

After Ms. Lewis-Smith died on November 23, 2009, Respondents exercised total control over Lewis Chevrolet. [0065] Mr. Abrams' and Respondent Langhorne Abrams' daughter, Respondent Rachel Abrams Hopkins, served as a second Member of the Board, President of Lewis Chevrolet, and full-time employee/principal of Lewis Chevrolet. [0030] Ms. Hopkins also owned 60 shares of stock in Lewis Chevrolet.[3] [0030, 0033] Mr. and Mrs. Abrams' other daughter, Respondent Sarah Abrams, served as the third and final Member of the Board, an Officer of Lewis Chevrolet, and a full-time employee of Lewis Chevrolet. [0030] Mr. and Mrs. Abrams' son-in-

[2] Nancy Lewis Haley died, and her interests were inherited by her two daughters: Notice Defendant Kate Hatfield and Notice Defendant Ann Haley. [0029]

[3] The only other stockholder was Nancy R. Smith, who owned 92 shares of Lewis Chevrolet. Thus, Mr. Abrams and his daughter, Respondent Rachel Abrams Hopkins, controlled 302 of the 394 shares of stock. [0026]

law and Ms. Hopkins' husband, Ronald J. Hopkins, Jr., also served as a full-time employee of Lewis Chevrolet in the role of General Manager. [0031]

Since their mother died, and Respondents took control, Lewis Chevrolet has not held regular shareholder meetings or regular Board of Directors meetings and has not kept consistent records of Board of Directors decisions. [0037] During the same time that Mr. and Mrs. Abrams' immediate family has controlled Lewis Chevrolet as the only Board members and officers, Ms. Sutphin has not received any benefit whatsoever from her ownership interest in Lewis Chevrolet; none while Mr. Abrams and his family were controlling her stock as Trustee and none after the Trust terminated by its terms in November 2019. [0025]

Ms. Sutphin began planning for her retirement in 2016 and, thus, began asking Mr. Abrams and Lewis Chevrolet for information about her mother's Estate and Trust and her ownership interest in Lewis Chevrolet. [0038-0041] After several unsuccessful attempts to obtain information from the Respondents, Ms. Sutphin filed her original Complaint in 2017 to obtain information about Mr. Abrams' administration of her mother's Estate, administration of the Trust, and management of Lewis Chevrolet and also to determine why she had received no benefit from her shares of Lewis Chevrolet stock since 2009. [0027-0028, 0038-0041] After four years of litigation, Ms. Sutphin was finally able to obtain an Order from the Circuit Court which forced Respondents to share some specific, detailed financial information about Lewis Chevrolet. [0028, 0344] In 2021, Ms. Sutphin learned, *inter alia*, that Respondents, acting in multiple conflicting roles, had forgiven approximately $410,000 in debt owed by Lewis Chevrolet to her mother's Estate [0037]; had allowed the book value of Lewis Chevrolet stock to decline from $8,399 per share in 2010 to negative $1,156 per share in 2019 [0028, 0045]; and, during this same time, had approved significant salaries, bonuses, and fringe benefits from Lewis Chevrolet for themselves.

[0045-0047] Ms. Sutphin also learned that Mrs. Hopkins and Ms. Abrams are the beneficiaries of certain Nissan "incentive programs" which allow them to significantly supplement their income through Lewis Chevrolet. [0046-0047]

Based upon this new information, Ms. Sutphin filed a Second Amended Complaint on February 3, 2022, alleging that Respondents violated multiple provisions of the West Virginia Code (i.e., Uniform Trust Code, Administration of Estates, and the West Virginia Business Corporations Act) and multiple fiduciary duties in their conflicting roles as Trustee, Executor, Board Members, Corporate Officers, and General Counsel to Lewis Chevrolet. [0023] Ms. Sutphin's Second Amended Complaint contains detailed allegations in 279 paragraphs. In his Answer to Ms. Sutphin's Second Amended Complaint, Mr. Abrams *admitted* most of the 100 specific Background Facts (Paragraph Nos. 23 to 123) including:

> 37. Under Article II of the Will, Ms. Lewis-Smith gave, devised and bequeathed, "in Trust to [her] Trustee as hereinafter nominated, for the purposes specified in this Will, all of [her] stock and other corporate holdings in Lewis Chevrolet Company, a West Virginia corporation …."
>
> 40. The Will directed David Abrams to "hold, invest and reinvest the proceeds, corpus and otherwise … in the Trust … for the beneficiaries …."
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> 41. The Will suggested "that during such time as the Trust herein created is in effect, [David Abrams] shall consult with and give consideration to the opinions of said children concerning the management of the said assets and funds committed to the Trustee's care hereunder …."
>
> 44. The Will authorized David Abrams "to make distribution of the principle of the Trust Estate in kind and to cause any share to be composed of cash, property or undivided fractional shares in property different in kind from any other share."
>
> 45. The Will further "authorized, empowered and directed [David Abrams] to pay or apply to the use and benefit, of each of [Ms. Lewis-Smith's] said children, equally, such sum or sums, from the income of this Trust, as may be in the absolute discretion of my said Trustee, necessary to provide for the health, education, support and maintenance of said child."
>
> 46. The Will directed David Abrams to "be guided by [Ms. Lewis-Smith's] primary interest which [was] to assure that [her] present and future holdings of stock in Lewis Chevrolet Company … shall maintain their maximum worth, shall not be diluted, divided or otherwise treated in a manner which would tend to reduce the market value of such stock holdings . . . ."

47. The Will further directed David Abrams to "maintain as many shares of the corporate stock which is the subject of this Trust as he deems advisable giving due regard for my intention that my stock not be divided and the market value and voting power of same not be diluted by any such division, and that the control of this stock not pass from family ownership without having received therefore its proper value."

49. The Will limited the Trust to a ten (10) year period and required David Abrams to distribute the Trust's assets including, but not limited to, the corporate shares of the Dealership, to the beneficiaries on the date of termination – November 23, 2019.

50. The Will also provided that "in the event [David Abrams] shall determine it is in the best interests of [Ms. Lewis-Smith's] children and in accordance with [Ms. Lewis-Smith's] intentions . . . to sell the entirety of the Trust Estate holdings of Lewis Chevrolet Company … stock, or any substantial part thereof, [David Abrams] may, at that time, determine, upon his own discretion to terminate the Trust …."

52. From December 11, 2009 through July 9, 2018, there are no meeting minutes for any annual shareholders meeting of the Dealership or any regular Board of Directors meetings for the Dealership; nor is there any document that would describe any authorized actions taken by David Abrams, Rachel Hopkins, and/or Sarah Abrams as Directors and/or Officers of the Dealership during this time.

53. On December 31, 2012, David Abrams, as Executor of the Estate, wrote two nearly identical letters, on his law firm's letterhead, to his daughter, Rachel Hopkins, stating that "as a result of [their] negotiations, [David Abrams] reduced the prevailing interest rate on the [Notes Payable]."

55. At the time of this interest reduction, David Abrams was the Executor of the Estate, a Director of the Dealership, an Officer of the Dealership, employed as in-house counsel for the Dealership, and Trustee of the Trust which was the majority shareholder of the Dealership.

56. The Dealership's consolidated financial statement for years 2012 and 2013 states that on December 31, 2013 "an agreement was reached with the Estate of Nancy Pat Lewis-Smith to forgive $410,000 of [the Notes Payable] made to the corporation."

57. At the time of this forgiveness, David Abrams was the Executor of the Estate, a Director of the Dealership, an Officer of the Dealership, employed as in-house counsel for the Dealership, and Trustee of the Trust which was the majority shareholder of the Dealership.

58. Upon information and belief, the Notes Payable have not been paid by the Dealership to the Estate.

100. The Dealership's financial statements are consolidated, consisting of Lewis Chevrolet and [its subsidiary] Lewis One Plaza Center Corporation.

101. The 2018/2019 consolidated CPA-prepared financial statement of the Dealership shows that the book value per share of common stock has consistently declined from $8,399/share in 2010, to (negative) $1,156/share in 2019 – in violation of the Trust's terms written by David Abrams.

103. For the past decade, the Dealership has not paid any dividends to its shareholders, including Ms. Sutphin, Langhorne Abrams, Kate Hatfield, and Ann Haley.

104. For the past decade, despite the Dealership's negative and/or consistently declining net income, Rachel Hopkins, David Abrams, Sarah Abrams, and Chad Hopkins, have all remained employed in key management positions and received increasing and/or significant salaries.

105. In addition to the above salaries, Rachel Hopkins, Sarah Abrams, and Chad Hopkins all receive the following benefits from the Dealership: a) a "demo" automobile; b) gas for the "demo" automobile; c) a Sam's Club membership; d) health insurance; and e) other travel and training expenses.

110. During the entire existence of the Trust (November 23, 2009 to November 23, 2019), the Dealership never paid any dividends to the shareholders.

111. During the entire existence of the Trust (November 23, 2009 to November 23, 2019), David Abrams never made one distribution of income or principal to any Trust beneficiary, including Ms. Sutphin.

115. On April 10, 2020, the Dealership received $262,400.00 in Paycheck Protection Program ("PPP") loans under Lewis Chevrolet; this $264,895.00 loan was later forgiven.

116. On April 10, 2020, the Dealership received $332,500.00 in PPP loans under Lewis One Plaza Center Corporation; this $335,570.00 loan was later forgiven.

117. Collectively, in 2020, the Dealership received $594,900.00 in PPP loans that were forgiven.

118. In 2020, the Dealership did not pay a single dividend to the shareholders.

119. In 2020, the Dealership's net income was negative.

120. On January 22, 2021, the Dealership received $262,495.00 in PPP loans under Lewis Chevrolet; this $262,495.00 loan was later forgiven.

121. On February 1, 2021, the Dealership received $332,540.00 in PPP loans under Lewis One Plaza Center Corporation; this $332,540.00 loan was later forgiven.

122. Collectively, in 2021, the Dealership received $595,035.00 in PPP loans that were forgiven.

123. In 2021, the Dealership did not pay a single dividend to the shareholders.

[0028-0049, 0122-0140]

IV. HISTORY OF DISCOVERY IN THIS CASE

On July 1, 2022 – five months after Ms. Sutphin filed her Second Amended Complaint and long before Ms. Sutphin was able to take any depositions in this case[4] – Respondents Rachel Hopkins and Sarah Abrams served their First Set of Interrogatories, Requests for Production, and Requests for Admission to Plaintiff. These discovery requests included five contention interrogatories (Interrogatory Nos. 3, 4, 5, 6 and 7). [0243, 0246-0247]

On August 2, 2022, Ms. Sutphin filed her Responses to Respondent's discovery requests. These Responses included the following Preliminary Statement regarding Respondents' contention interrogatories:

> Plaintiff's answers to Defendants' contention Interrogatories are based upon the information currently available to Plaintiff. Plaintiff reserves the right to supplement her answers to Defendants' contention Interrogatories where necessary. Plaintiff's answers to Defendants' contention Interrogatories are not intended to, and shall not, limit Plaintiff's proof at trial. See e.g., TexPar Energy, Inc. v. Murphy Oil USA, Inc., 45 F.3d 1111, 1115 (7th Cir. 1995) (actual loss amount in response to interrogatory does not limit responding party to actual loss damages).

[0264] These Responses then provided the following answer to each of Respondents' contention interrogatories:

> ANSWER: Please see Plaintiff's Second Amended Complaint. Plaintiff objects to this contention interrogatory as premature at the outset of this case before discovery has been completed. Plaintiff's investigation is ongoing. Plaintiff also objects to this Interrogatory on the basis of expert discovery. Plaintiff has not identified expert witnesses yet. Plaintiff will identify expert witnesses in accordance with the Court's Scheduling Order and Rule 26(b)(4) of the West Virginia Rules of Civil Procedure.
>
> Without waiving these objections, see the attached Last Will and Testament of Nancy Pat H. Lewis-Smith ("I direct that my said Trustee be guided by my primary interest which is to assure that my present and future holdings of stock in Lewis Chevrolet Company and Lewis Realty and Insurance Company shall maintain their maximum worth, shall not be diluted, divided or otherwise treated in a manner which would tend to reduce the market value of such stock holdings [].")

[4] Respondents forced Ms. Sutphin to file two separate motions to compel their depositions because they refused to provide available dates. [0294 and 0321] Ms. Sutphin began her attempts to take Respondents' depositions on or before February 22, 2023, but was not able to take any depositions until September 11, 2023.

> Plaintiff reserves the right to supplement and moves the Court to defer any further answers to Defendants' contention interrogatories until investigation through discovery is completed.

[0271] Along with these discovery responses, and her detailed Second Amended Complaint, Ms. Sutphin produced nearly 10,000 pages of documents (BR00001-BR09869), most of which were previously produced by Respondents in response to her First and Second Motions to Compel and from which Ms. Sutphin, through her counsel and expert forensic accountant, gleaned most of the information which supports her Second Amended Complaint. [0276, 0344]

On October 21, 2022, Respondents filed an Amended Motion to Compel Plaintiff's Participation in Discovery claiming that Ms. Sutphin had refused "to participate in discovery about her claims" because she could not identify every fact to support every one of her claims at the outset of discovery before she had taken any depositions or even received complete document production from Respondents and Lewis Chevrolet. [0358]

On November 2, 2022, Ms. Sutphin filed her Response to Respondents' Amended Motion to Compel. [0455] As to Respondents' contention interrogatories, Ms. Sutphin cited Shreve v. Warren Assoc., Inc., 177 W. Va. 600, 355 S.E.2d 389 (1987), for the proposition that additional answers should be deferred until she had an opportunity to conduct further discovery including Respondents' depositions. Ms. Sutphin also cited Taggart v. Damon Motor Coach, No. 5:05-CV-00191, 2007 WL 152101, at *8 (N.D. W. Va. Jan. 17, 2007), for the proposition that, "[a]lthough contention interrogatories represent a valid discovery device, they should not be served until near the end of the discovery period" and "[w]here significant discovery has not occurred, a motion to compel contention interrogatories should be denied without prejudice." Finally, Ms. Sutphin cited Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1 (S.D. W. Va. July 17, 2019), to confirm that "most courts agree that '[d]ue to the nature

of contention interrogatories, they are more appropriately used after a substantial amount of discovery has been conducted—typically at the end of the discovery period.'"

On January 24, 2023, Ms. Sutphin voluntarily supplemented her answers to Respondents' contention Interrogatory Nos. 3, 4, 5, 6 and 7 by producing an October 21, 2022 report prepared by her expert forensic accountant as follows:

> ANSWER: Please see Plaintiff's Second Amended Complaint. Plaintiff objects to this contention interrogatory as premature at the outset of this case before discovery has been completed. Plaintiff's investigation is ongoing. Plaintiff reserves the right to supplement and moves the Court to defer any further answers to Defendants' contention interrogatories until investigation through discovery is completed.
>
> SUPPLEMENTAL ANSWER: Please see the October 21, 2022 Report prepared by Jay A. Goldman, CPA and produced to Defendants' counsel on December 19, 2022 as BR10048-BR10068. Please also see the most recent financial statements produced by counsel for Lewis Chevrolet on December 14, 2022.
>
> "[I]n cases where the parties anticipate the production of 'an expert report which will touch on the very contentions at issue, the Court should normally delay contention discovery until after the expert reports have been served, which may then render moot any further contention discovery.'" Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1 (S.D. W. Va. July 17, 2019) (*citing* BB & T Corp. v. United States, 233 F.R.D. 447, 450–51 (M.D. N.C. 2006).
>
> Plaintiff anticipates producing additional expert report(s) to address Defendant's contention interrogatories in accordance with the deadlines set by the Court for expert discovery.

[0506, 0515, 0714]

On January 26, 2023, Ms. Sutphin gave deposition testimony for nearly seven (7) hours (9:00 a.m. to 5:00 p.m. less time for lunch). During this deposition, Respondents' counsel asked several improper questions, pressing Ms. Sutphin to identify every single fact which supports every one of her legal theories in her case. Over multiple objections, Ms. Sutphin explained that she relied upon her counsel to prepare her Second Amended Complaint; that much of the information in her Second Amended Complaint comes from the Lewis Chevrolet documents the Circuit Court compelled Respondents to produce; and that she does not have first-hand knowledge of many of

the facts gleaned from Lewis Chevrolet documents (because, as alleged in her Second Amended Complaint, Respondents refused to share information about Lewis Chevrolet with her). [0553]

On February 2, 2023, the Circuit Court referred Respondents' Amended Motion to Compel to G. Nicolas Casey, Jr., Esq. as Discovery Commissioner ("the Discovery Commissioner"). [0500, 0503]

On February 22, 2023, the Discovery Commissioner held a hearing on Respondents' Amended Motion to Compel. Following this hearing, on March 9, 2023, the Discovery Commissioner issued his Second Recommended Decision which determined that "substantial" discovery had been undertaken to date and, therefore, Ms. Sutphin should provide "specific responses" to Respondents' contention Interrogatory Nos. 3, 4, 5, 6 and 7 "instead of an overly broad response referencing 'Please see Plaintiff's Second Amended Complaint.'" [0736]

On March 14, 2023, Ms. Sutphin filed Objections and Exceptions to Second Recommended Decision of the Discovery Commissioner. [0744] These objections noted Ms. Sutphin's supplemental responses served on January 24, 2023 and reiterated the applicable case law concerning the proper timing of contention interrogatory responses. The Circuit Court held a hearing on Ms. Sutphin's Objections on May 5, 2023.

On May 19, 2023, the Circuit Court entered its Order Adopting Discovery Commissioner's First and Second Recommended Decisions with Additions. [0770] This Order directed Ms. Sutphin to supplement her responses to Respondents' contention interrogatories as follows:

> 2. The *Second Recommended Decision of the Discovery Commissioner* is adopted in its entirety. The Court further directs the Plaintiff to specifically reference any applicable paragraph of her *Amended Complaint* and specific items of discovery or opinions expressed by her expert(s) upon which she bases her responses at this time, with the ongoing obligation to supplement her responses as discovery continues.

[0771]

On June 8, 2023, Ms. Sutphin supplemented her answers to Respondents' contention Interrogatory Nos. 3, 4, 5, 6 and 7 by specifically identifying the factual allegations in her Second Amended Complaint which support her claims and also identifying specific documents produced by Respondents which support her claims as follows:

> ANSWER: Please see Plaintiff's Second Amended Complaint. Plaintiff objects to this contention interrogatory as premature at the outset of this case before discovery has been completed. Plaintiff's investigation is ongoing. Plaintiff also objects to this Interrogatory on the basis of expert discovery. Plaintiff has not identified expert witnesses yet. Plaintiff will identify expert witnesses in accordance with the Court's Scheduling Order and Rule 26(b)(4) of the West Virginia Rules of Civil Procedure.
>
> Without waiving these objections, see the attached Last Will and Testament of Nancy Pat H. Lewis-Smith ("I direct that my said Trustee be guided by my primary interest which is to assure that my present and future holdings of stock in Lewis Chevrolet Company and Lewis Realty and Insurance Company shall maintain their maximum worth, shall not be diluted, divided or otherwise treated in a manner which would tend to reduce the market value of such stock holdings []."). Plaintiff reserves the right to supplement and moves the Court to defer any further answers to Defendants' contention interrogatories until investigation through discovery is completed.
>
> SUPPLEMENTAL ANSWER: Please see the October 21, 2022 Report prepared by Jay A. Goldman, CPA and produced to Defendants' counsel on December 19, 2022 as BR10048-BR10068. Please also see the most recent financial statements produced by counsel for Lewis Chevrolet on December 14, 2022.
>
> "[I]n cases where the parties anticipate the production of 'an expert report which will touch on the very contentions at issue, the Court should normally delay contention discovery until after the expert reports have been served, which may then render moot any further contention discovery.'" Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1 (S.D. W. Va. July 17, 2019) (*citing* BB & T Corp. v. United States, 233 F.R.D. 447, 450–51 (M.D. N.C. 2006).
>
> Plaintiff anticipates producing additional expert report(s) to address Defendant's contention interrogatories in accordance with the deadlines set by the Court for expert discovery.
>
> SECOND SUPPLEMENTAL ANSWER: Please see the Second Amended Complaint ¶ 46 ("The Will directed Defendant David Abrams to "be guided by [Ms. Lewis-Smith's] primary interest which [was] to assure that [her] present and future holdings of stock in Lewis Chevrolet Company and Lewis Realty and Insurance Company shall maintain their maximum worth, shall not be diluted, divided or otherwise treated in a manner which would tend to reduce the market value of such stock holdings ...."). Please see the Second Amended Complaint ¶¶

28, 30-32, 52, 53, 56, 58, 99, 101-108, 130-132, 114-123, 167-211, 231-255. Please see RAH 3-23, 78-116. Please see SAA 15-23.

Please also see the Financial Statements of Lewis Chevrolet Company, Years Ended December 31, 2016 and 2015, BR 746-788 (listing the book value per share of common stock outstanding in 2010 as $8,399). Plaintiff reserves the right to supplement as discovery is ongoing.

[0783]

On July 14, 2023, Ms. Sutphin answered Respondents' Second Set of Interrogatories and Requests for Production and supplemented her answers to Defendants' contention interrogatories by providing additional information regarding the factual basis for her claims and the reports prepared by her expert forensic accountant as follows:

> INTERROGATORY NO. 1: State all legal and factual bases for your assertion that you have been damaged in the amount of and should be paid your proportional amount of shareholder equity in Lewis Chevrolet Company, as of December 31, 2019, as stated in the report of your expert Jay A. Goldman.
>
> ANSWER: Plaintiff objects to this Interrogatory to the extent it misinterprets the February 22, 2023 Expert Report of Jay A. Goldman, CPA previously produced in discovery. Plaintiff will defer to Mr. Goldman's report and his expert testimony to explain his assessment of her damages.
>
> As Plaintiff understands Mr. Goldman's report, the value of her 80 2/3 shares of stock in Lewis Chevrolet is $1,478,319 if Lewis Chevrolet were sold on an open market. Defendant David Abrams' conflict-of-interest decisions and Defendants' mismanagement of Lewis Chevrolet and its subsidiaries and corresponding breaches of fiduciary duty have severely undermined the value of Plaintiff's 80 2/3 shares of stock in Lewis Chevrolet.
>
> Further, as Plaintiff understands Mr. Goldman's report, Defendants' mismanagement of Lewis Chevrolet and corresponding breaches of fiduciary duties have caused it to underperform by regional standards and lose $9,065,209 in profits from January 1, 2010 through December 31, 2021. These lost profits could have been distributed to Lewis Chevrolet's shareholders, including Plaintiff, as dividends. Along with Defendants' mismanagement, and corresponding breaches of fiduciary duties, Defendant David Abrams' conflict-of-interest decisions and breach of fiduciary duties as Trustee of the Nancy Pat Lewis Smith Trust and Officer and Director of Lewis Chevrolet and failure to make the Nancy Pat Lewis Smith Heirs Trust income-producing have cost Plaintiff her 20.47% share of these lost profits ($1,855,990) which could have been distributed as dividends to all shareholders.
>
> Finally, as Plaintiff understands Mr. Goldman's report, Defendant David Abrams' conflict-of -interest decisions as Executor of the Estate of Nancy Pat Lewis Smith and Officer and Director of Lewis Chevrolet to forgive promissory

> notes owed by Lewis Chevrolet to the Estate of Nancy Pat Lewis Smith caused her $91,573 in damages when portions of the notes were forgiven in 2013. Plaintiff is also owed an additional $86,165 because Defendant David Abrams has never required payment of the remaining balances of these promissory notes to the Estate. Therefore, Defendant David Abrams' corresponding breaches of fiduciary duty have caused Plaintiff $177,738 in damages ($86,165 + $91,573) for her share of the improperly forgiven and/or uncollected promissory notes.

[0794]

On July 18, 2023, Ms. Sutphin supplemented her answers to Respondents' contention interrogatories by producing a February 22, 2023 report prepared by her expert forensic accountant which had previously been provided to Respondent's counsel informally. [0805, 0941]

On July 21, 2023, Ms. Sutphin gave additional deposition testimony for nearly eight (8) more hours (9:00 a.m. to 6:00 p.m. less time for lunch). During this second deposition, Respondents' counsel asked more improper questions, still insisting that Ms. Sutphin must be able to identify every single fact which supports every one of her legal theories in her case. At the conclusion of this deposition, Respondents' counsel specifically asked Ms. Sutphin the following improper questions:

> Q: […] You appreciate that as we sit here today. Knowing that there are standards that you must meet as the plaintiff, how do you intend to prove that Mr. Abrams failed to meet those standards of fiduciary duties either as executor or trustee?
>
> MR. CALTRIDER: Object to the form of the question.
>
> Q: Are you authorizing your attorney to take the witness stand and be deposed by the attorneys in this room to answer that question?
>
> A: I do not –
>
> MR. CALTRIDER: Object to the form of the question.

[0873]

On September 11, 13, and 14, 2023, Ms. Sutphin took the depositions of Respondent Sarah Abrams (September 11, 2023), Respondent Rachel Abrams Hopkins (September 13, 2023), and

Respondent David Abrams (September 14, 2023). She was forced to suspend Mr. Abrams' deposition before its completion because he refused to answer several relevant questions.

On September 19, 2023, Respondents filed their Motion to Compel Deposition of Joseph L. Caltrider [Ms. Sutphin's counsel]. In this Motion, Respondents argued "[m]ore than 17 months have passed since [Ms. Sutphin] filed her Second Amended Complaint, and [Respondents] … still have no explanation as to what are [Ms. Sutphin's] specific reasons for asserting that they are legally liable to her nor any explanation for why [Ms. Sutphin] thinks she deserves her claimed damages from them." Respondents did not, however, identify or discuss the uniformly applied legal standard for taking the deposition of opposing counsel in pending litigation. [1031]

On October 13, 2023, Respondents filed a Notice of Video Recorded Zoom Deposition of Joseph L. Caltrider. [1088] In response, on October 24, 2024, Ms. Sutphin filed a Motion for Protective Order to prevent Respondents from taking her counsel's deposition. [1093]

On October 24, 2023, Ms. Sutphin supplemented her answers to Respondents' contention Interrogatory Nos. 3, 4, 5, 6 and 7 by producing nearly 900 pages of documents reviewed by her expert forensic accountant to prepare his October 21, 2022 and February 22, 2023 reports. [1191]

On October 27, 2023, Ms. Sutphin filed her Response to Respondents' Motion to Compel Deposition of Plaintiff's Counsel and explained the strong policy in the law against depositions of opposing counsel in pending litigation. [1196]

On November 3, 2023, Respondents filed their Response to Ms. Sutphin's Motion for Protective Order and their Reply in Support of Motion to Compel Deposition of Joseph L. Caltrider. [1222] This Response cited selected portions of Ms. Sutphin's deposition, but also failed to meet the uniformly applied legal standard for taking the deposition of opposing counsel in pending litigation.

On November 9, 2023, the Discovery Commissioner held a hearing on Respondents' Motion to Compel Deposition of Plaintiff's Counsel and Ms. Sutphin's Motion for Protective Order. Following this hearing, on December 4, 2023, the Discovery Commissioner issued his Sixth Recommended Decision and correctly determined that: 1) Ms. Sutphin did not waive her attorney-client privilege by acknowledging that she relied upon her counsel to draft her Second Amended Complaint; and 2) Respondents cannot satisfy two of the three prongs of the Shelton test for taking a deposition of opposing counsel in pending litigation because there "are other means of obtaining information, such as depositions of persons other than Plaintiff's Counsel."[5] [1375. 1377]

V. THE CIRCUIT COURT'S MAY 24, 2024 ORDER MODIFYING DISCOVERY COMMISSIONER'S SIXTH RECOMMENDED DECISION

On December 11, 2023, Respondents filed Objections and Exceptions to the Sixth Recommended Decision of the Discovery Commissioner. These Objections raised no new facts or law; failed to address the uniformly applied standard for taking a deposition of opposing counsel except to argue it should not apply; and failed to explain why Ms. Sutphin should be denied the opportunity to complete fact and expert discovery before being required to provide additional supplemental responses to their contention interrogatories. [1385]

[5] On November 10, 2023 – despite the Discovery Commissioner's Decision issued the previous day – Respondent's counsel sent Ms. Sutphin's counsel a letter claiming that the Court's May 19, 2023 Order required Ms. Sutphin to further supplement her responses to Respondents' contention Interrogatories Nos. 3, 4, 5, 6 and 7 before the completion of fact and expert witness discovery. [1615]

On November 21, 2023, Ms. Sutphin's counsel sent Respondents' counsel an email reiterating his multiple prior requests for specific fact witness depositions including: 1) Chad Hopkins; 2) Langhorne Abrams; 3) David Abrams; 4) David Tifft; 5) Lewis Chevrolet's CPA; and 6) Lewis Chevrolet Corporate Designee Ms. Sutphin has since completed Langhorne Abrams' deposition and postponed Chad Hopkins' deposition; however, Respondents' counsel still have not provided available dates for Mr. Abrams', Mr. Tifft's, Lewis Chevrolet's CPA's, and Lewis Chevrolet's Corporate Designee's depositions. Once she is able to complete these fact witness depositions, Ms. Sutphin expects that she will be in a position to supplement her contention interrogatory answers again and disclose additional expert witness opinions. [1781, 1883]

On January 5, 2024, Respondents filed a Motion for Rule 37(b) Sanctions for Plaintiff's Failure to Obey Discovery Order arguing Ms. Sutphin's claims against Respondent Rachel Abrams Hopkins and Respondent Sarah Abrams should be dismissed as a sanction for her alleged failure to supplement her answers to their contention interrogatories. [1489]

On January 16, 2024, Ms. Sutphin filed her Response to Respondents' Objections to Discovery Commissioner's Sixth Recommended Decision demonstrating why the Discovery Commissioner's recommended Decision is correct. [1644]

On January 23, 2024, the Circuit Court held a hearing on Respondents' Objections and Exceptions to the Sixth Recommended Decision of the Discovery Commissioner, but took no action. [Transcript Pending]

On April 9, 2024, Ms. Sutphin filed her Response to Defendants' Motion for Rule 37(b) Sanctions specifically detailing her efforts to complete fact and expert discovery and her good faith efforts to supplement her answers to Respondents' contention interrogatories before the completion discovery. [1778]

On April 16, 2024, the Circuit Court held a hearing on, *inter alia*, Respondents' Motion for Rule 37(b) Sanctions for Plaintiff's Failure to Obey Discovery Order, but took no action. [1921]

On May 24, 2024, following consideration of Respondents' Objections and Respondents' Motion for Sanctions, the Circuit Court entered its Order Modifying Discovery Commissioner's Sixth Recommended Decision. This Order rejected the Discovery Commissioner's findings; ignored the uniformly applied standard for taking a deposition of opposing counsel; and, instead, ordered Ms. Sutphin to "schedule [her] counsel's deposition as to facts related to the drafting of the Complaint, Amended Complaint, and Second Amended Complaint [ten (10) days from the

entry of its May 24, 2024 Order]" and ordered Ms. Sutphin's counsel to "make himself available for deposition [as to the facts communicated to him by [Ms. Sutphin] or third parties which he used in the preparation of the Complaint, the Amended Complaint, and Second Amended Complaint] within thirty (30) days of the entry of [the Court's May 24, 2024] Order" *unless* Ms. Sutphin will stipulate that she "has no knowledge of any specific facts related to the allegations [in her Complaint, Amended Complaint, and Second Amended Complaint] and that neither [she] nor any other potential witness has disclosed to [her] counsel any specific facts in support of the allegations related to (1) oppression of minority shareholder (Interrogatory No. 3); (2) the manner in which [Respondents] have damaged Plaintiff (Interrogatory No. 5); (3) claim that the dealership should have paid dividends (Interrogatory No. 6); and (4) the claim that the value of the dealership stock should have increased over time (Interrogatory No. 7)." [2051, 2060]

On May 31, 2024, Ms. Sutphin filed a Motion to Stay Order Modifying Discovery Commissioner's Sixth Recommended Decision to allow her an opportunity to seek proper review of the Circuit Court's decision by the Supreme Court of Appeals under West Virginia Code § 53-1-1, *et seq*. [2064] She filed this Motion because, as a practical matter, the Circuit Court's 10-day and 30-day deadlines to stipulate, schedule, and conduct her counsel's deposition would expire before she could prepare, present, and obtain a ruling on this Petition for Writ of Prohibition.[6] The Circuit Court has not yet granted Ms. Sutphin's Motion to Stay. Therefore, Ms. Sutphin's counsel contacted the Circuit Court to schedule a hearing. The Circuit Court advised that it is available for a hearing on Ms. Sutphin's Motion to Stay on the following dates: July 16 @ 1:30 p.m., July 17 @ 1:30 p.m., July 22 @ 1:30 p.m., July 23 @ 9:00 a.m. or 1:30 p.m., or July 24 @ 9:00 a.m. or

[6] Under Rule 6(a) of the West Virginia Rules of Civil Procedure, the ten (10) day deadline from Friday, May 4, 2024 was Monday, June 10, 2024 after intervening weekends and Memorial Day are excluded and the thirty (30) day deadline from Friday, May 24, 2024 was Monday, June 24, 2024 because the last day of the period fell on a Sunday. W. Va. R. Civ. P. 6(a).

1:30 p.m. The Circuit Court further advised that Ms. Sutphin's counsel must travel from Martinsburg to Beckley to attend this hearing in person. The Circuit Court did not offer any hearing dates before the deadlines in its May 24, 2024 Order expired on June 10 and June 24, 2024. Therefore, Ms. Sutphin also filed a Motion to Stay Circuit Court's Order Compelling Deposition of Petitioner's Counsel in Pending Case with this Honorable Court on June 13, 2024. Ms. Sutphin now appeals the Circuit Court's May 24, 2024 Order and associated deadlines.

SUMMARY OF ARGUMENT

There is a strong policy in the law *against* deposing an opponent's attorney during pending litigation. It is a "drastic measure" which is "highly disfavored" and "infrequently proper." It should be permitted "only in limited circumstances." *See* Hughes v. Sears, Roebuck & Co., No. 2:09-CV-93, 2011 WL 2671230, at *4 (N.D. W. Va. July 7, 2011) *citing* M & R Amusements Corp. v. Blair, 142 F.R.D. 304, 305 (N.D. Ill. 1992) ("Deposing an opponent's attorney is a drastic measure and is infrequently proper.") and Shelton v. American Motors Co., 805 F.2d 1323, 1327 (8th Cir. 1987) ("[D]eposing an opposing counsel is a negative development in the area of litigation and should be permitted only in limited circumstances."); Am. Heartland Port, Inc. v. Am. Port Holdings, Inc., No. 5:11-CV-50, 2014 WL 12605549, at *2 (N.D. W. Va. Apr. 7, 2014) *citing* M & R Amusements Corp. v. Blair, 142 F.R.D. 304, 305 (N.D. IL 1992) ("[D]eposing an opposing party's attorney is a 'drastic measure,' which is highly disfavored in Federal courts and is 'infrequently proper.'").[7] Those circumstances certainly do not exist in the present case.

[7] The Supreme Court of Appeals has not directly addressed depositions of opposing counsel during pending litigation under Rule 26 and Rule 30 of the West Virginia Rules of Civil Procedure. Therefore, Federal case law is most instructive on the issue. *See* Painter v. Peavy, 192 W. Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994) ("Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases ... in determining the meaning and scope of our rules."); Cattrell Companies, Inc. v. Carlton, Inc., 217 W. Va. 1, 8, n. 21, 614 S.E.2d 1, 8 n. 21 (2005); Keplinger v. Virginia Elec. & Power Co., 208 W. Va. 11, 20 n. 13, 537 S.E.2d 632, 641 n. 13 (2000); State ex rel. Surnaik Holdings of WV, LLC v. Bedell, 244 W. Va. 248, 269, 852 S.E.2d 748, 769 (2020) (Workman dissenting) ("I agree with the majority that review of federal cases can

Respondents clearly have other methods of obtaining information about Ms. Sutphin's case. Nevertheless, the Circuit Court imposed this "drastic measure" upon Ms. Sutphin by its May 24, 2024 Order and its immediate deadlines.

The Circuit Court first erred by ordering Ms. Sutphin to provide responses to Respondent's contention interrogatories at the outset of discovery. It is well established under West Virginia law that answers to contention interrogatories should be deferred until the opposing party has an opportunity to complete designated discovery. *See* W.Va. R. Civ. P 33(c) ("the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time"); Shreve v. Warren Assoc., Inc., 177 W. Va. 600, 605-606, 355 S.E.2d 389, 394 (1987) ("This deferral of answering is permitted in recognition of the fact that often in a complicated suit, the plaintiff is unable to pinpoint initially all of the relevant facts that will support the various theories of liability.") Here, the Circuit Court ordered Ms. Sutphin to provide more detailed responses to Respondent's contention interrogatories on May 19, 2023 – four (4) months *before* she was able to take a deposition of any Respondent.

The Circuit Court then compounded its original error by finding that Ms. Sutphin did not adequately answer Respondents' contention interrogatories *before* the parties completed key fact-witness depositions, expert witness disclosure, and expert witness depositions. Abundant case law holds that, "in cases where the parties anticipate the production of 'an expert report which will touch on the very contentions at issue, the Court should normally delay contention discovery until after the expert reports have been served, which may then render moot any further contention discovery.'" Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1

be beneficial in analyzing issues that arise under the West Virginia Rules of Civil Procedure, since our rules are largely consonant with (although not identical to, as the majority intimates) their federal counterparts.")

(S.D. W. Va. July 17, 2019) (internal citations omitted).[8] Here, the Circuit Court reached its erroneous conclusion on the adequacy of Ms. Sutphin's responses to Respondent's contention interrogatories by ignoring supplemental information Ms. Sutphin produced in discovery; by refusing to allow Ms. Sutphin an opportunity to complete fact and expert witness discovery; and by refusing to allow Ms. Sutphin an opportunity to produce expert witness reports which should moot any further contention discovery.[9]

On the basis of these faulty premises, the Circuit Court committed clear legal error and a substantial abuse of its discretion by determining that any "deficiencies" in Ms. Sutphin's answers to Respondent's contention interrogatories could only be addressed by either forcing Ms. Sutphin to stipulate that she "has no knowledge of any specific facts related to the allegations" in her Second Amended Complaint in the next ten (10) days or forcing her to make her counsel available to for a deposition in the next thirty (30) days before the completion fact and expert witness discovery. "The prevailing test for determining whether it is appropriate to allow opposing counsel to be deposed was first set out in Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986). Under this three-pronged test, the party seeking to depose opposing counsel must show all of the

[8] The Supreme Court of Appeals considers Federal cases interpreting similar Federal Rules of Civil Procedure as persuasive when interpreting the West Virginia Rules of Civil Procedure. *See* Painter v. Peavy, 192 W. Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994) ("Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases ... in determining the meaning and scope of our rules."); *see also* Cattrell Companies, Inc. v. Carlton, Inc., 217 W. Va. 1, 8, 614 S.E.2d 1, 8 (2005) ("Because the pertinent language of Rule 37(d) of the Federal Rules of Civil Procedure is identical to our own rule, we look to how the 'failure to appear' facet of Rule 37(d) has been applied in federal courts when a deponent has canceled a scheduled deposition.").

[9] In its May 24, 2024 Order, the Circuit Court specifically noted that it *only* considered "the Defendants' Exhibit 3 attached to Defendants' Motion to Compel Deposition of Joseph L. Caltrider" containing *only* Ms. Sutphin's Third Supplemental Responses served on June 8, 2023 to evaluate the adequacy of Ms. Sutphin's overall responses to Respondent's contention interrogatories. [2055] This error is consistent with the Circuit Court's statement during the April 16, 2024 hearing: "Are you telling me I've got to go through all discovery responses which aren't provided to me in order to rule on this issue – the issue of 3, 4, 5, 6 and 7?" [2007] The Circuit Court made this statement even though Ms. Sutphin provided a complete history of her responses and supplemental responses to Respondents' contention interrogatories in response to Respondents' Motion for Rule 37(b) Sanctions. [1778]

following: '(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.'" Am. Heartland Port, Inc. v. Am. Port Holdings, Inc., No. 5:11-CV-50, 2014 WL 12605549, at *3 (N.D. W. Va. Apr. 7, 2014) *citing* Shelton, 805 F.2d at 1327 (internal citations omitted); Hughes v. Sears, Roebuck & Co., No. 2:09-CV-93, 2011 WL 2671230, at *5 (N.D. W. Va. July 7, 2011) *citing* Shelton, 805 F.2d at 1327. Here, the Circuit Court recognized the Shelton test, and even recognized that Respondents cannot not satisfy all three elements, but nevertheless ordered Ms. Sutphin to make her counsel available for a deposition by June 24, 2024, *before* the completion of fact and expert discovery which will likely address the issues raised by Respondents' contention interrogatories.

Typically, the Supreme Court of Appeals is reluctant to address a circuit court's discretionary discovery rulings through a writ of prohibition. It will only do so when there is clear legal error, a "substantial" abuse of discretion, and some "irremediable prejudice." *See* Syl. Pt. 2, State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 583 S.E.2d 80 (2003); Syl. Pt. 4, Policarpio v. Kaufman, 183 W. Va. 258, 395 S.E.2d 502 (1990). Although this is a high standard, Ms. Sutphin can satisfy each of these criteria. Here, the Circuit Court's May 24, 2024 Order presents her with a patently unfair decision: Either stipulate that she and other witnesses have no knowledge of any specific facts related to the allegations in her Second Amended Complaint within ten (10) days or allow her counsel to be deposed within thirty (30) days. And, the Circuit Court's Order ignores the actual information Ms. Sutphin has been able to disclose in discovery to date, even without the benefit of complete fact and expert witness discovery. Meanwhile, the Circuit Court's Order certainly presents Ms. Sutphin with irremediable prejudice. Because the Circuit Court has refused to grant her Motion to Stay before a July 2024 hearing –

approximately one month *after* the deadlines imposed by its May 24, 2024 Order – Ms. Sutphin is faced with another patently unfair decision: Either comply with the Court's deadlines and forego her due process right to a proper review of the Court's erroneous decisions or risk a finding of contempt while she seeks a writ of prohibition from this Honorable Court. The cumulative effect of the Circuit Court's erroneous discovery rulings, drastic decision to order a deposition of Ms. Sutphin's counsel to supplement contention interrogatory answers before completion of fact and expert discovery, and imposition of deadlines intended to deny her due process right to a proper appellate review certainly constitutes clear legal error and a substantial abuse of discretion which warrant the extraordinary remedy of a writ of prohibition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case. The Circuit Court's clear legal error and substantial abuse of discretion in discovery are apparent in the record before this Honorable Court. Therefore, Ms. Sutphin respectfully requests that the Court dispense with oral argument and issue a writ of prohibition which prohibits the Circuit Court from enforcing its May 24, 2024 Order and directs the Circuit Court to allow Ms. Sutphin to complete discovery before any further supplementation of her responses to Respondents' contention interrogatories. Should the Court determine that oral argument is necessary, Ms. Sutphin respectfully requests an opportunity to appear and present argument to the Court under either Rule 19 or Rule 20 of the West Virginia Rules of Appellate Procedure as the Court deems appropriate.

ARGUMENT

I. ORIGINAL JURISDICTION IN THE SUPREME COURT OF APPEALS IS PROPER.

A writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having

such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. In the present case, Ms. Sutphin can demonstrate that the Circuit Court has abused and exceeded its legitimate powers by ignoring well-established precedent and taking a "drastic measure" which is "highly disfavored" and "infrequently proper" (i.e., ordering the deposition of Ms. Sutphin's counsel to supplement her contention interrogatory answers before fact and expert witness discovery has been completed).

"A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders." Syl. Pt. 2, State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 461, 583 S.E.2d 80, 84 (2003). But, "[i]n the absence of compelling evidence of irremediable prejudice, a writ of prohibition will not lie to bar trial based upon the judge's pretrial ruling on a matter of evidentiary admissibility [or pretrial discovery]." Syl. Pt. 4, Policarpio v. Kaufman, 183 W. Va. 258, 259, 395 S.E.2d 502, 503 (1990). In the present case, Ms. Sutphin can demonstrate that the Circuit Court's May 24, 2024 discovery Order involves clear cut legal error, obvious abuse of discretion, inadequate alternate remedies, and other irremediable prejudice (i.e., expiration of the Court's deadlines before consideration of her Motion to Stay which prevents proper appellate review).

"When a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate." Syl. Pt. 3, State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 461, 583 S.E.2d 80, 84 (2003). This Honorable Court has not addressed the use of a writ of prohibition to prohibit the deposition of opposing counsel in pending litigation; however, this issue is similar to a discovery order which involves the probable invasion of confidential materials because the issue will be moot, and Ms.

Sutphin will have no adequate remedy at law, if her counsel's deposition is required to go forward before any meaningful appellate review.

II. THE CIRCUIT COURT'S MAY 24, 2024 ORDER IS SUBJECT TO *DE NOVO* REVIEW.

"Generally, this Court reviews findings of fact for clear error and conclusions of law *de novo*. Ostensible findings of fact, which entail application of law or constitute legal judgments that transcend ordinary factual findings, must be reviewed *de novo*." State ex rel. Ford Motor Co. v. McGraw, 237 W. Va. 573, 580, 788 S.E.2d 319, 326 (2016); *see also* Syl. Pt. 2, Northeast Natural Energy LLC v. Pachira Energy LLC, 243 W. Va. 362, 844 S.E.2d 133 (2020) (questions of law are reviewed *de novo* with underlying factual findings reviewed for clear error).

"A circuit court's ruling on discovery requests is reviewed for an abuse of discretion standard; but, where a circuit court's ruling turns on a misinterpretation of the West Virginia Rules of Civil Procedure, our review is plenary. The discretion that is normally given to a trial court's procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard." Syl. Pt. 5, State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 461, 583 S.E.2d 80, 84 (2003).

By finding that Ms. Sutphin's contention interrogatory responses are inadequate and ordering her to make her counsel available for a deposition to address these alleged inadequacies before the completion of fact and expert witness discovery, the Circuit Court has made erroneous findings of fact which constitute legal judgments and has also incorrectly applied the West Virginia Rules of Civil Procedure and associated West Virginia law. Therefore, this Honorable Court should review the Circuit Court's May 24, 2023 Order under a *de novo* standard.

III. THE SUPREME COURT OF APPEALS SHOULD ISSUE A WRIT OF PROHIBITION WHICH PROHIBITS ENFORCEMENT OF THE CIRCUIT COURT'S MAY 24, 2024 ORDER BECAUSE THE CIRCUIT COURT SUBSTANTIALLY ABUSED ITS DISCRETION AND COMMITTED CLEAR LEGAL ERROR BY ORDERING THE DEPOSITION OF PETITIONER'S COUNSEL IN AN ONGOING CASE AS A SUPPLEMENT TO CONTENTION INTERROGATORY ANSWERS BEFORE THE COMPLETION OF DISCOVERY.

In cases where the circuit court has jurisdiction, but exceeds its legitimate powers by abusing its discretion or committing clear legal error, the Supreme Court of Appeals examines five factors to determine whether to issue a writ of prohibition: "(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression." Syl. Pt. 1, State ex rel. Med. Assurance of W. Virginia, Inc. v. Recht, 213 W. Va. 457, 460–61, 583 S.E.2d 80, 83–84 (2003). These five factors provide "general guidelines" for the issuance of a discretionary writ of prohibition. Id. It is not necessary for a party to satisfy all five; however, the third factor – the existence of clear error as a matter of law – should be given "substantial weight." Id. As demonstrated below, Ms. Sutphin can satisfy each of these five factors, particularly the third factor, given the Circuit Court's clear legal errors.

A. Ms. Sutphin Has No Other Adequate Means, Such As Direct Appeal, To Obtain Relief From The Circuit Court's May 24, 2024 Order And Corresponding Deadlines.

The Circuit Court's May 24, 2024 Order requires Ms. Sutphin to "submit a proposed Stipulation" or "schedule [her] counsel's deposition as to facts related to the drafting of the Complaint, Amended Complaint, and Second Amended Complaint" by June 10, 2024 (i.e., "within ten (10) days from the entry of this Order"). Meanwhile, the Circuit Court's May 24, 2024 Order

requires Ms. Sutphin's counsel to "make himself available for deposition [as to the facts communicated to him by [Ms. Sutphin] or third parties which he used in the preparation of the Complaint, the Amended Complaint, and Second Amended Complaint] by June 24, 2024 (i.e., "within thirty (30) days of the entry") *if* Ms. Sutphin is not willing to stipulate that she "has no knowledge of any specific facts related to the allegations [in her Complaint, Amended Complaint, and Second Amended Complaint] and that neither [she] nor any other potential witness has disclosed to [her] counsel any specific facts in support of the allegations…." [2060] On May 31, 2024, Ms. Sutphin moved the Circuit Court to stay its May 24, 2024 Order so she could exercise her due process right to proper appellate review before the Circuit Court's deadlines expired. Instead of granting this Motion immediately, and preserving Ms. Sutphin's due process right to appellate review, the Circuit Court required Ms. Sutphin to set her Motion to Stay for an in-person hearing and provided dates for this hearing in July 2024 – nearly a month *after* its June 24, 2024 deadline for her counsel's deposition. Obviously, Ms. Sutphin's Petition will be moot, and her due process right to proper appellate review of the Court's Order will be denied, if she and her counsel comply with the Circuit Court's July 10 and July 24, 2024 deadlines. The Circuit Court has thus presented Ms. Sutphin and her counsel with an unfair "choice": Either comply with its May 24, 2024 Order and forfeit the due process right to appellate review or risk being found in contempt of its Order. Under these circumstances, the Circuit Court has clearly left Ms. Sutphin no means to obtain relief from its May 24, 2024 Order and corresponding deadlines, other than seeking a writ of prohibition from this Honorable Court.

B. Ms. Sutphin Will Be Prejudiced In A Way That Is Not Correctable On Appeal If The Circuit Court's May 24, 2024 Order And Corresponding Deadlines Are Enforced.

The bell cannot be unrung. The stipulation cannot be withdrawn. And, the deposition cannot be untaken. If Ms. Sutphin is forced to accept the Circuit Court's mandatory stipulation or

if she is forced to present her counsel for a deposition, these actions cannot be undone by a direct appeal after a trial. Ms. Sutphin will be unfairly prejudiced through the remainder of the case. At the least, requiring Ms. Sutphin to correct the Circuit Court's clear legal error *after* having her counsel deposed, completing all of the remaining discovery in the case, and presenting her case at trial would be an enormous waste of resources for the Circuit Court and all parties. Given the unfair "choices" the Circuit Court has forced upon Ms. Sutphin with its May 24, 2024 Order and corresponding deadlines, it is clear that Ms. Sutphin will be prejudiced in a way that is not correctable with a direct appeal once the Order is enforced.

C. The Circuit Court's May 24, 2024 Order Is Clearly Erroneous As A Matter Of Law Because It Ignores Well-Established Precedent.

1. The Circuit Court erred by ordering Ms. Sutphin to provide responses to Respondent's contention interrogatories at the outset of discovery.

Shreve v. Warren Assoc., Inc., 177 W. Va. 600, 355 S.E.2d 389 (1987), is the seminal West Virginia case on contention interrogatories. It recognizes that contention interrogatories are "not *per se* objectionable" under Rule 33(b) (now Rule 33(c)) of the West Virginia Rules of Civil Procedure. Id at 605, 394. It also recognizes a "mechanism for a court to defer the [answers to contention interrogatories] until the opposing party [has] an opportunity to complete designated discovery." Id. This deferral mechanism is necessary because "often in a complicated suit, the plaintiff is unable to pinpoint initially all of the relevant facts that will support the various theories of liability." Id at 606, 394 *citing* 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2167 at 497–515 (1970). The Shreve Court observed that "courts ought to be more sympathetic with a party's stated unwillingness or inability to give his opinions at the outset of a case than after there has been substantial discovery." Id *citing* K. Sinclair, Federal Civil Practice 709 (2d ed. 1986). This is precisely the situation Ms. Sutphin faced with Respondent's contention interrogatories served at the outset of discovery. She filed a detailed Second Amended Complaint

and fairly summarized the information available to her after four years of pressing Respondents for information. She even provided her expert forensic accountant's preliminary reports. However, she had not been afforded any opportunity to take testimony from any Respondent or complete expert evaluation of Respondents' decision-making. This deposition testimony and expert review will allow her to provide much of the information Respondents demanded with their premature contention interrogatories. Despite clear West Virginia law on contention interrogatories, and the direct application of its underlying rationale, the Circuit Court erroneously ordered Ms. Sutphin to provide more detailed responses to Respondent's contention interrogatories on May 19, 2023 – four (4) months *before* she was able to take a deposition of any Respondent.

West Virginia District Courts have further developed the Shreve approach to contention interrogatories under Rule 33(b) of the Federal Rules of Civil Procedure. In Taggart v. Damon Motor Coach, No. 5:05-CV-00191, 2007 WL 152101, at *8 (N.D. W. Va. Jan. 17, 2007), the District Court observed:

> Although contention interrogatories represent a valid discovery device, they should not be served until near the end of the discovery period. Nestle Foods Corp. v. Aetna Cas. & Sur. *Co.*, 135 F.R.D. 101, 110-11 (D. N.J. 1990). **One reason for this is "the unfairness of requiring a party to prematurely articulate theories which have not yet been fully developed.** Cornell Research Found., Inc. v. Hewlett Packard Co., 223 F.R.D. 55, 66 (N.D. N.Y. 2003). Another reason is that a lawyer's unwillingness to commit to a position without an adequately developed record will likely lead to vague, ambiguous responses. In re Convergent Technologies Sec. Litig., 108 F.R.D. 328, 338 (N.D. Cal. 1985). These answers serve little use. Id. Thus, a party serving contention interrogatories before substantial discovery has occurred bears the burden of showing why they should be answered. Fischer & Porter Co. v. Tolson, 143 F.R.D. 93, 96 (E.D. Pa. 1992). This burden may be satisfied by demonstrating "good reason to believe that answers ... will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussions, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56." In re Convergent Technologies Sec. Litig., 108 F.R.D. at 338-39. **Where significant discovery has not occurred, a motion to compel contention interrogatories should be denied without prejudice.** Fischer & Porter Co., 143 F.R.D. at 96.

(emphasis added). More recently, in Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1 (S.D. W. Va. July 17, 2019), the District Court observed:

> **[M]ost courts agree that "[d]ue to the nature of contention interrogatories, they are more appropriately used after a substantial amount of discovery has been conducted—typically at the end of the discovery period."** Capacchione v. Charlotte–Mecklenburg Board of Education, 182 F.R.D. 486, 489 (W.D. N.C. 1998). Premature contention interrogatories are discouraged for several reasons. First, there is "the unfairness of requiring a party to prematurely articulate theories which have not yet been fully developed." Cornell Research Found., Inc. v. Hewlett Packard Co., 223 F.R.D. 55, 66 (N.D.N.Y. 2003). In addition, "a lawyer's unwillingness to commit to a position without an adequately developed record will likely lead to vague, ambiguous responses," which are effectively useless. Taggert, 2007 WL 152101, at *8 (*citing* In re Convergent Technologies Sec. Litig., 108 F.R.D. 328, 338 (N.D. Cal. 1985)).

(emphasis added). The Circuit Court also ignored this applicable law on contention interrogatories, and the logical reasons for deferring responses to the end of discovery. Instead, it erroneously ordered Ms. Sutphin to provide more detailed responses to Respondent's contention interrogatories on May 19, 2023 – four (4) months *before* she was able to take a deposition of any Respondent.

2. The Circuit Court compounded its original error by finding that Ms. Sutphin did not adequately supplement her responses to Respondents' contention interrogatories *before* the parties completed key fact witness depositions, expert witness disclosure, and expert witness depositions.

In Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1 (S.D. W. Va. July 17, 2019), the District Court also observed:

> **[I]n cases where the parties anticipate the production of "an expert report which will touch on the very contentions at issue, the Court should normally delay contention discovery until after the expert reports have been served, which may then render moot any further contention discovery."** BB & T Corp. v. United States, 233 F.R.D. 447, 450–51 (M.D. N.C. 2006) (*citing* United Situations v. Duke Energy Corp., 208 F.R.D. 553, 558 (M.D. N.C. 2002)).

(emphasis added). The Circuit Court's May 19, 2023 Order directed Ms. Sutphin to supplement her responses to Respondent's contention interrogatories by "specifically referenc[ing] any applicable paragraph of her Amended Complaint and specific items of discovery or opinions

expressed by her expert(s) upon which she bases her responses at this time ….” [0770] At this point, Ms. Sutphin had already supplemented her contention interrogatory answers with a report prepared by her expert forensic accountant. Specifically, on January 24, 2023, Ms. Sutphin supplemented her answers to Defendants’ contention Interrogatory Nos. 3, 4, 5, 6 and 7 by producing an October 21, 2022 report prepared by her expert forensic accountant as follows:

> INTERROGATORY NO. 3: Describe with specificity and without reference to your Second Amended Complaint each separate theory by which you contend that either or both Propounding Defendants have oppressed you as a minority shareholder of the Dealership.
>
> ANSWER: Please see Plaintiff’s Second Amended Complaint. Plaintiff objects to this contention interrogatory as premature at the outset of this case before discovery has been completed. Plaintiff’s investigation is ongoing. Plaintiff reserves the right to supplement and moves the Court to defer any further answers to Defendants’ contention interrogatories until investigation through discovery is completed.
>
> SUPPLEMENTAL ANSWER: Please see the October 21, 2022 Report prepared by Jay A. Goldman, CPA and produced to Defendants’ counsel on December 19, 2022 as BR10048-BR10068. Please also see the most recent financial statements produced by counsel for Lewis Chevrolet on December 14, 2022.
>
> “[I]n cases where the parties anticipate the production of ‘an expert report which will touch on the very contentions at issue, the Court should normally delay contention discovery until after the expert reports have been served, which may then render moot any further contention discovery.’” Pauley v. CNE Poured Walls, Inc., No. 3:18-CV-01508, 2019 WL 3226996, at *1 (S.D. W. Va. July 17, 2019) (*citing* BB & T Corp. v. United States, 233 F.R.D. 447, 450–51 (M.D. N.C. 2006).
>
> Plaintiff anticipates producing additional expert report(s) to address Defendant’s contention interrogatories in accordance with the deadlines set by the Court for expert discovery.

[0515]

On June 8, 2023, in response to the Circuit Court’s May 19, 2023 Order, Ms. Sutphin further supplemented her answers to Defendants’ contention Interrogatory Nos. 3, 4, 5, 6 and 7 by specifically identifying the factual allegations in her Second Amended Complaint which support her claims and also identifying specific documents produced by Respondents which support her claims as follows:

> SECOND SUPPLEMENTAL ANSWER: Please see the Second Amended Complaint ¶¶ 28, 30-32, 52, 53, 56, 58, 99, 101-108, 130-132, 114-123, 167-211, 231-255. Please see the Second Amended Complaint ¶¶ 131-132 ("For over ten years, Defendant David Abrams and his family have remained employed by the Dealership and have received increasing and/or significant salaries and/or other benefits from the Dealership, while the Trust paid no income or dividends to the beneficiaries/owners and conferred no other benefits on the beneficiaries/owners . . . and despite the net income of the Dealership consistently being negative and/or decreasing.").
>
> Please see RAH 3-23, 78-116. Please see SAA 15-23. Plaintiff reserves the right to supplement as discovery is ongoing.

[0785]

Ms. Sutphin subsequently provided additional supplemental information responsive to Respondent's contention interrogatories with her responses to additional discovery requests propounded by Respondents. Specifically, on July 14, 2023, Ms. Sutphin answered Respondents' Second Set of Interrogatories and Requests for Production and supplemented her answers to Defendants' contention Interrogatory Nos. 3, 4, 5, 6 and 7 by providing additional information regarding the factual basis for her claims and her expert forensic accountant's report as follows:

> INTERROGATORY NO. 1: State all legal and factual bases for your assertion that you have been damaged in the amount of and should be paid your proportional amount of shareholder equity in Lewis Chevrolet Company, as of December 31, 2019, as stated in the report of your expert Jay A. Goldman.
>
> ANSWER: Plaintiff objects to this Interrogatory to the extent it misinterprets the February 22, 2023 Expert Report of Jay A. Goldman, CPA previously produced in discovery. Plaintiff will defer to Mr. Goldman's report and his expert testimony to explain his assessment of her damages.
>
> As Plaintiff understands Mr. Goldman's report, the value of her 80 2/3 shares of stock in Lewis Chevrolet is $1,478,319 if Lewis Chevrolet were sold on an open market. Defendant David Abrams' conflict-of-interest decisions and Defendants' mismanagement of Lewis Chevrolet and its subsidiaries and corresponding breaches of fiduciary duty have severely undermined the value of Plaintiff's 80 2/3 shares of stock in Lewis Chevrolet.
>
> Further, as Plaintiff understands Mr. Goldman's report, Defendants' mismanagement of Lewis Chevrolet and corresponding breaches of fiduciary duties have caused it to underperform by regional standards and lose $9,065,209 in profits from January 1, 2010 through December 31, 2021. These lost profits could have been distributed to Lewis Chevrolet's shareholders, including Plaintiff, as dividends. Along with Defendants' mismanagement, and corresponding breaches

> of fiduciary duties, Defendant David Abrams' conflict-of-interest decisions and breach of fiduciary duties as Trustee of the Nancy Pat Lewis Smith Trust and Officer and Director of Lewis Chevrolet and failure to make the Nancy Pat Lewis Smith Heirs Trust income-producing have cost Plaintiff her 20.47% share of these lost profits ($1,855,990) which could have been distributed as dividends to all shareholders.
>
> Finally, as Plaintiff understands Mr. Goldman's report, Defendant David Abrams' conflict-of -interest decisions as Executor of the Estate of Nancy Pat Lewis Smith and Officer and Director of Lewis Chevrolet to forgive promissory notes owed by Lewis Chevrolet to the Estate of Nancy Pat Lewis Smith caused her $91,573 in damages when portions of the notes were forgiven in 2013. Plaintiff is also owed an additional $86,165 because Defendant David Abrams has never required payment of the remaining balances of these promissory notes to the Estate. Therefore, Defendant David Abrams' corresponding breaches of fiduciary duty have caused Plaintiff $177,738 in damages ($86,165 + $91,573) for her share of the improperly forgiven and/or uncollected promissory notes.

[0797]

Ms. Sutphin provided all of this information responsive to Respondents' contention interrogatories by July 14, 2023 – two (2) months *before* she was able to take any Respondent's deposition. Nevertheless, in its May 24, 2024 Order, the Circuit Court erroneously determined that a "lack of specific, factual responses by [Ms. Sutphin] during her deposition" and her "counsel's failure to craft written, supplemental responses containing the facts upon which pleadings were drafted" justify Ms. Sutphin's "counsel … being deposed…." [2060] Not only is the Circuit Court's finding factually incorrect – Ms. Sutphin clearly provided an abundance of detailed information in response to Respondent's contention interrogatories early in the discovery process before she was able to depose any Respondent – but it continues to ignore well-established West Virginia and District Court precedent which appropriately defers such detailed contention responses to the end of the discovery process after all expert reports have been completed and disclosed. Thus, the Circuit Court reached its erroneous conclusion on the adequacy of Ms. Sutphin's responses to Respondent's contention interrogatories by ignoring supplemental information Ms. Sutphin produced in discovery; by refusing to allow Ms. Sutphin an opportunity

to complete fact and expert witness discovery; and by refusing to allow Ms. Sutphin an opportunity to produce expert witness reports which should moot any further contention discovery.

3. The Circuit Court committed clear legal error and a substantial abuse of its discretion by determining that any "deficiencies" in Ms. Sutphin's answers to Respondent's contention interrogatories could only be addressed by ordering Ms. Sutphin to make her counsel available for a deposition before the completion of fact and expert witness discovery.

Taking the deposition of an opponent's attorney during pending litigation is a "drastic measure" which is "highly disfavored" and "infrequently proper." It should be permitted "only in limited circumstances." Hughes, *supra*. Because deposing an opponent's attorney is "highly disfavored" and "infrequently proper," the party seeking to take the opposing attorney's deposition must prove the deposition's necessity. The "cards are stacked against the requesting party," who must demonstrate a "legitimate basis" for the request and must also demonstrate the deposition "will not otherwise prove overly disruptive or burdensome." Am. Heartland Port, Inc. *supra*, *citing* Guantanamera Cigar Co. v. Corporacion Habanos, S.A., 263 F.R.D. 1, 9 (D.D.C. 2009); *see also* N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987) ("It is appropriate to require the party seeking to depose an attorney to establish a legitimate basis for requesting the deposition and demonstrate that the deposition will not otherwise prove overly disruptive or burdensome."). The Circuit Court ignored this strong policy in the law against deposing an opponent's attorney during pending litigation, and the associated burdens it places on Respondents, in its May 24, 2024 Order.

The drastic measure of deposing an opponent's attorney has given rise to a three-prong test. It was first established in Shelton v. Am. Motors Corp., 805 F.2d 1323 (8th Cir. 1986). "Under this three-pronged test, the party seeking to depose opposing counsel must show all of the following: '(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the

preparation of the case.'" Am. Heartland Port, Inc., *supra*, *citing* Shelton, 805 F.2d at 1327 (internal citations omitted); Hughes, *supra*, *citing* Shelton, 805 F.2d at 1327. Although the Supreme Court of Appeals has not yet explicitly adopted the Shelton test, it "has been adopted by the First, Fifth, Sixth, and Tenth Circuits" and it has been "uniformly applied" by all of the District Courts in the Fourth Circuit. Am. Heartland Port, Inc., *supra* at *3. Accordingly, the Circuit Court's Discovery Commissioner correctly applied the Shelton test to determine that it was not appropriate or necessary for Ms. Sutphin to make her counsel available for a deposition to supplement her contention interrogatory responses.

The Circuit Court compounded its previous errors by rejecting its Discovery Commissioner's recommendation and failing to follow the "uniformly applied" Shelton test. In its May 24, 2024 Order, the Circuit Court recognized that "[t]he only Shelton factor the Discovery Commissioner found the [Respondents] prevailed on was that the information was crucial to the preparation of the case." It then analyzed the "Discovery Commissioner's decision that the information sought by [Respondents] through the deposition of [Ms. Sutphin's counsel] is privileged" and ultimately concluded that the attorney-client privilege does not apply to facts provided by Ms. Sutphin to her counsel. [2053, 2060] Through this convoluted analysis – which the Circuit Court used to justify its erroneous conclusion that Ms. Sutphin must make her counsel available for a deposition to supplement her contention interrogatory responses – the Circuit Court abandoned the Shelton test and, like the Respondents, never addressed the first Shelton factor: "no other means exist to obtain the information other than to depose counsel." This blatant omission highlights the Court's clear legal error and substantial abuse of discretion. Clearly, other means exist for Respondents to obtain information about Ms. Sutphin's case.[10]

[10] Respondents based their request for Ms. Sutphin's counsel's deposition upon the false premise that Ms. Sutphin should know every fact which supports her Second Amended Complaint and should be able to identify those

The Respondents' request for counsel's deposition, and the Circuit Court's May 24, 2024 Order directing counsel's deposition, simply ignore the fact that Respondents have plenty of other options to obtain information about Ms. Sutphin's case (i.e., fact witness depositions, expert witness disclosures, and expert witness depositions) and that these other options are preferred by West Virginia law governing contention interrogatories. Ms. Sutphin has already filed a detailed Second Amended Complaint. It is noteworthy that Respondents have admitted many of the operative facts in this Second Amended Complaint. Ms. Sutphin has already submitted to two days of questioning by Respondents' counsel in her deposition. Many of Defendants' counsel's deposition questions were irrelevant, argumentative, harassing, and improper. Nevertheless, Ms. Sutphin provided information to the best of her knowledge, information, and belief. This is all she is required to do. Ms. Sutphin has already answered Defendants' contention interrogatories and supplemented her responses several times. She has done so despite clear law which holds that contention interrogatories are premature and unfair at the outset of a case before substantial discovery has been completed. *See* Pauley, *supra* ("[M]ost courts agree that '[d]ue to the nature of contention interrogatories, they are more appropriately used after a substantial amount of discovery has been conducted—typically at the end of the discovery period' [because of] 'the unfairness of requiring a party to prematurely articulate theories which have not yet been fully developed.'") Finally, Ms. Sutphin has already produced two reports from her expert forensic accountant, even though the Court has not set a deadline for expert witness disclosure. Thus, the

facts during her deposition. This premise is directly contradicted by West Virginia law. *See e.g.*, Gable v. Gable, 245 W. Va. 213, 224, 858 S.E.2d 838, 849 (2021) ("[A] plaintiff might sometimes have a right to relief without knowing every factual detail supporting [her] right; requiring the plaintiff to plead those unknown details before discovery would improperly deny the plaintiff the opportunity to prove [her] claim."). Nevertheless, the Circuit Court adopted this false premise as part of its justification for ordering Ms. Sutphin to make her counsel available for a deposition. *See* May 24, 2024 Order ("The Court finds that based upon the lack of specific, factual responses by Plaintiff during her deposition … [Ms. Sutphin's] counsel is subject to being deposed….") [2060].

Respondents' bald assertion that they cannot determine the facts which support Ms. Sutphin's claims without a deposition of her counsel, and the Circuit Court's apparent adoption of this assertion, are clearly wrong.

Furthermore, Ms. Sutphin still needs to take depositions of several fact witnesses. These include: 1) David Abrams (regarding questions he improperly refused to answer during his recent deposition); 2) David Tifft (a dealership consultant from Mooresville, NC first identified during Rachel Hopkins' recent deposition); 3) Lewis Chevrolet's CPA; and 4) Lewis Chevrolet Corporate Designee. She has repeatedly notified the Circuit Court of her requests for these depositions. [1781, 1883] Once Ms. Sutphin has completed these fact witness depositions, she will be in a position to disclose additional expert witness opinions which should address Respondents' contention interrogatories as contemplated by well-established West Virginia precedent. *See* Pauley, *supra* at *1 ("[I]n cases where the parties anticipate the production of 'an expert report which will touch on the very contentions at issue, the Court should normally delay contention discovery until after the expert reports have been served, which may then render moot any further contention discovery.'"). This will certainly provide Respondents the clarity they seek. If it still does not provide them clarity, they will be free to depose Ms. Sutphin's expert witnesses.

Respondents cannot simply feign ignorance of the facts Ms. Sutphin has already uncovered, and disclosed, in her detailed Second Amended Complaint, her numerous discovery responses, and her two-day deposition to justify a deposition of her counsel. Likewise, the Circuit Court cannot simply ignore Ms. Sutphin's good faith efforts to answer Respondents' contention interrogatories at the outset of discovery before she has an opportunity to complete fact witness depositions, expert disclosures, and expert depositions; ignore well-established West Virginia law on the appropriate timing of contention discovery (i.e., after substantial discovery and expert

disclosure has been completed); and ignore well-established law on depositions of opposing counsel (i.e., the Shelton test and its first requirement that "no other means exist to obtain the information other than to depose counsel"). By doing so, the Circuit Court has substantially abused its discretion and committed clear legal error.

D. The Circuit Court's May 24, 2024 Order Demonstrates Persistent Disregard For Both Procedural And Substantive Law.

In several of its discovery rulings, culminating in its May 24, 2024 Order, the Circuit Court's has frequently and persistently chosen to ignore basic legal standards applicable to contention interrogatories and uniformly applied legal standards applicable to depositions of opposing counsel in pending litigation. This series of errors has culminated in the "drastic measure" of directing Ms. Sutphin to make her counsel available for a deposition before the completion of fact and expert witness discovery. As described above, the Circuit Court's series of errors demonstrates a persistent disregard for both procedural and substantive law and warrants intervention by this Honorable Court through a writ of prohibition.

E. The Circuit Court's May 24, 2024 Order Raises An Issue That Has Not Been Directly Addressed By The Supreme Court Of Appeals.

This Honorable Court has not directly addressed the issue of taking a deposition of opposing counsel in pending litigation or formally adopted the Shelton test. Therefore, this case provides an excellent opportunity for the Court to confirm application of the Shelton test in West Virginia state courts, as already applied in West Virginia federal courts, and provide the circuit courts with more guidance on how address this highly disfavored, drastic measure.

CONCLUSION

Ms. Sutphin has demonstrated the clear legal error, "substantial" abuse of discretion, and "irremediable prejudice" necessary for the issuance of a discretionary writ of prohibition. Simply stated, the Circuit Court should not have imposed the highly disfavored, drastic measure of forcing

Ms. Sutphin to make her counsel available for a deposition in this case when fact and expert witness discovery has yet to be completed and will likely address any perceived "deficiencies" in her responses to Respondent's contention interrogatories. And, the Circuit Court should not have imposed deadlines in its May 24, 2024 Order which would prevent Ms. Sutphin from exercising her due process right to a proper appellate review of its erroneous decisions without the risk of a contempt finding.

WHEREFORE, the Petitioner, Mary C. Sutphin, by counsel, respectfully requests this Honorable Court to 1) issue a writ of prohibition which prohibits the Circuit Court from enforcing its May 24, 2024 Order; 2) direct the Circuit Court to allow her to complete fact and expert witness discovery before any further supplementation of her responses to Respondents' contention interrogatories; and 3) grant her such other relief as the Court shall deem proper.

DATED the 25th day of June 2024.

PETITIONER
MARY C. SUTPHIN
By Counsel

/s/ Joseph L. Caltrider

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VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF BERKELEY, to-wit:

Pursuant to West Virginia Code § 53-1-3, I verify that I have reviewed this PETITION FOR WRIT OF PROHIBITION; that the facts set forth in the Petition are true and correct, unless stated to be upon information and belief; and that, as to any facts set forth in the Petition upon information and belief, I believe those representations to be true.

Joseph L. Caltrider WVSB #6870

Taken, subscribed, and sworn to before me this 25th day of June 2024.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
VIRGINIA M CULVER
BOWLES RICE LLP
101 S QUEEN STREET
MARTINSBURG WV 25401
My Commission Expires April 11, 2029

Virginia M. Culver
Notary Public

My commission expires: 4·11·2029

CERTIFICATE OF SERVICE

I certify that I served the foregoing PETITION FOR WRIT OF PROHIBITION upon the below-named counsel on the **25th day of June 2024** by efiling the same through the File & Serve*Xpress* electronic filing system for appeals:

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I further certify that I served a true and accurate copy of the foregoing PETITION FOR WRIT OF PROHIBITION upon the below named *pro se* parties by United States Mail, first class, postage prepaid in an envelope addressed as follows on the **25th day of June 2024**:

Ann Donegan
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Kate M. Hatfield
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Honorable Darl W. Poling
Judge of the Circuit Court of
Raleigh County, West Virginia
Raleigh County Judicial Center
222 Main Street
Beckley, West Virginia 25801

/s/ Joseph L. Caltrider

Joseph L. Caltrider WVSB #6870