NO. 24-0343

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

v.

THE HON. DARL W. POLING, CIRCUIT COURT JUDGE,
A. DAVID ABRAMS, JR., RACHEL L. ABRAMS HOPKINS, SARAH A. ABRAMS,
LANGHORNE ABRAMS, THE ESTATE OF NANCY R. SMITH,
KATE M. HATFIELD, and ANN DONEGAN (HALEY),
Respondents

RESPONSE TO PETITION FOR WRIT OF PROHIBITION BY RESPONDENTS A. DAVID ABRAMS, JR., RACHEL L. ABRAMS HOPKINS, SARAH A. ABRAMS, and LANGHORNE ABRAMS

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QUESTION PRESENTED

The question presented by Petitioner Mary C. Sutphin ("Petitioner" or "Ms. Sutphin") focuses on timing issues relating to the circuit court's order compelling her counsel's fact deposition: (1) Whether the deposition should be ordered at this time "where discovery in the case is ongoing;" and (2) Whether the circuit court incorrectly "refus[ed] to consider Ms. Sutphin's Motion to Stay its May 24, 2024 Order until several weeks after the deadlines were imposed." (Pet. at 1–2). The second timing issue is moot since this Court issued a stay. Petitioner's focus on the first timing issue obscures that the circuit court ordered the deposition only as to facts behind her complaints, particularly her operative Second Amended Complaint, in the exceptional circumstances of Ms. Sutphin testifying that her attorney is the only source of those facts. The circuit court's order recognizes these exceptional circumstances in ordering a fact deposition while preserving the attorney-client privilege. (*See* A.R. 2059–61). Accordingly, Respondents A. David Abrams, Jr. ("Mr. Abrams"), Rachel L. Abrams Hopkins ("Ms. Hopkins"), Sarah A. Abrams ("Ms. S. Abrams"), and Langhorne Abrams ("Ms. L. Abrams") respectfully suggest that the following more clearly states the question presented by the petition:

> Whether defendants may depose plaintiff's counsel solely as to the facts behind her complaint, with the attorney-client privilege remaining intact, when plaintiff has established that her counsel developed those facts and is the only individual able to testify about her factual allegations.

SUMMARY OF ARGUMENT

Ms. Sutphin, who inherited approximately one-fifth of the shares of Lewis Chevrolet Company ("Lewis Chevrolet"), has been pursing individual damages relating to her minority position for seven years. In February 2022, Ms. Sutphin filed her Second Amended Complaint, adding defendants and claims. In that operative complaint, Ms. Sutphin claims that her family members who run Lewis Chevrolet have violated their fiduciary duties to the corporation and owe her individual damages as a result.[1] For more than two years, Respondents have asked Ms. Sutphin in written discovery and in depositions to tell them the facts behind her claims that she says should require them to pay her millions of dollars in individual damages. Despite

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[1] The four Respondents submitting this brief are the only defendants below from whom Ms. Sutphin seeks relief. Mr. Abrams, Ms. Hopkins, and Ms. S. Abrams are the directors and officers of Lewis Chevrolet. (*See* 2nd Am. Compl. ¶ 28, A.R. 0030–31). Ms. Sutphin's primary claims are that they have breached their fiduciary duties to the corporation in their roles as directors and officers, although she seeks damages only for herself and not on behalf of the corporation. (*See id.* ¶¶ 167–195, Prayer for Relief, A.R. 0057–63, 0079–80). Ms. Sutphin claims that "[a]s a direct, proximate, and foreseeable result of the Directors' and Officers' breaches of their fiduciary duties [to the corporation], ***Ms. Sutphin*** has suffered damages." (*Id.* ¶195, A.R. 0063 (emphasis added)). Ms. L. Abrams, a shareholder as well, is alleged to have conspired with her husband, Mr. Abrams, and daughters, Ms. Hopkins and Ms. S. Abrams, to harm her sister Ms. Sutphin's interest in the family business. (*See id.* ¶¶ 245–249, A.R. 0072–73). The other respondents—the Estate of Nancy R. Smith, Kate Hatfield, and Ann Donegan Haley—are shareholders and so-called notice defendants (a designation created by Ms. Sutphin) from whom Ms. Sutphin seeks no relief.

being deposed twice and being ordered to supplement certain interrogatory answers, Ms. Sutphin made it clear that she cannot personally provide those facts. Instead, she has been consistently clear that her counsel is the only individual who is able to testify about her facts. That left Respondents with no choice but to seek her counsel's deposition, which the circuit court permitted after considering the exceptional circumstances of this case.

To reach the conclusions in its Order Modifying Discovery Commissioner's Sixth Recommended Decision, entered on May 24, 2024 (the "May 24 Order"), the circuit court analyzed in detail Ms. Sutphin's deposition transcripts and written discovery responses across six pages of the order. (*See* A.R. 2054–59). The circuit court acknowledged that it is "standard practice for an attorney to take the facts presented by a client and craft those facts into a complaint or other pleading," (A.R. 2055), but that is not what happened here.

Ms. Sutphin was unable to testify about the facts in her Second Amended Complaint, and she "repeatedly responded that she relied upon her attorney or words to that effect in regard to the pleadings." (A.R. 2055). Also, her counsel was given repeated opportunities to draft sufficient answers to contention interrogatories, but he failed to do so. (A.R. 2055–59). Ms. Sutphin "has exhibited a pattern of failing to provide specific facts in response to discovery throughout this case and has failed to respond [to certain interrogatories] as ordered by the Court." (A.R. 2059). Ms. Sutphin "has

prevented Defendants from being able to adequately prepare a defense to the broad, general allegations and assertions contained in [her] Second Amended Complaint." (*Id.*).

The circuit court thus concluded that "Plaintiff's counsel is subject to being deposed, only as to the facts communicated to him by the Plaintiff or third parties, which he used in the preparation of the Complaint, Amended Complaint, and Second Amended Complaint." (A.R. 2060–61 (cleaned up)). The circuit court specifically dispelled the notion that its order required Ms. Sutphin's counsel to reveal protected mental impressions. (*See* A.R. 2060). The circuit court carefully tailored its order to give Respondents, defendants below, a final opportunity to learn the facts supporting Ms. Sutphin's claims, while she retains the ability to keep privileged communications and information privileged.

Ms. Sutphin's petition claims that the "bell" of having her counsel testify as to facts "cannot be unrung." (Pet. at 28). She claims she "will be unfairly prejudiced through the remainder of the case" if her counsel has to testify. (*Id.* at 29). Yet Ms. Sutphin does not say ***how*** she will be unfairly prejudiced by her counsel giving a fact deposition other than to say she will not be able to challenge the circuit court's order on appeal. (*Id.*). Instead, Ms. Sutphin claims that the circuit court's May 24 Order is clearly erroneous as a matter of law largely because of earlier rulings that Ms. Sutphin never challenged.

Ms. Sutphin claims that the circuit court committed three clear legal errors:

> (1) The circuit court last year ordered Ms. Sutphin to supplement answers to contention interrogatories "at the outset of discovery." (Pet. at 29–31).
>
> (2) The circuit court found that Ms. Sutphin had not properly supplemented her interrogatory answers before Ms. Sutphin was able to conduct third-party discovery and disclose any additional experts. (*Id.* at 31–35).
>
> (3) The circuit court ignored the law governing work-product protections that says opposing attorney depositions are "highly disfavored," "infrequently proper," and should be permitted "only in limited circumstances." (*Id.* at 35–39).

In sum, Ms. Sutphin says, "[i]n several of its discovery rulings, culminating in its May 24, 2024 Order, the Circuit Court 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." (*Id.* at 39).

Nowhere, however, does Ms. Sutphin say ***why*** the circuit court committed clear legal error by ordering her counsel to testify as to facts that she admits he developed. Nowhere does Ms. Sutphin acknowledge that she and her counsel created the exceptional circumstances that led to the circuit court's well-reasoned and narrowly tailored May 24 Order. Accordingly, this Court

should decline to issue a rule to show cause in response to her petition for a writ of prohibition.[2]

STATEMENT REGARDING ORAL ARGUMENT & DECISION

Oral argument is unnecessary because Ms. Sutphin's petition objectively fails to establish that a writ of prohibition is warranted. This Court may, therefore, summarily deny the petition.

ARGUMENT

If Ms. Sutphin had testified that one of her family members developed the facts behind her Second Amended Complaint, Respondents would have requested that fact witness's deposition, and Ms. Sutphin would have no basis to resist it. Instead, Ms. Sutphin repeatedly testified that not only did her counsel draft her Second Amended Complaint, which, admittedly, is not unusual, but also that she could not provide testimony about her 123

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[2] On July 31, 2024, the circuit court held a hearing on Ms. Sutphin's motion for a stay of the May 24 Order pending the resolution of her petition to this Court. The circuit court ruled from the bench that it was denying the stay motion, but it said that it would extend the deadlines in its earlier order. On August 5, 2024, the circuit court entered its Order Denying Plaintiff's Motion to Stay Court's May 24 Order Modifying Discovery Commissioner's Sixth Recommended Decision, which also repeated various findings and conclusions of the May 24 Order and set extended deadlines. On August 12, 2024, this Court stayed the effect of both orders pending resolution of the petition for writ of prohibition. Accordingly, this Court has mooted Petitioner's timing arguments about the deadlines in the orders, but the issue of the propriety of deposing Petitioner's counsel, albeit only as to facts, remains.

paragraphs of factual allegations ***because*** her counsel had developed and drafted them, which is unusual.[3] (*See* Defs.' Mot. to Compel Depo. of Joseph Caltrider at 3–7 (Sept. 19, 2023), A.R. 1033–1036 (quoting deposition testimony, including Ms. Sutphin agreeing that she was unable to explain what is meant by the words used in her Second Amended Complaint because her counsel created them); Resp. to Mot. for Protective O. & Reply in Support of Mot. to Compel at 7–16, A.R. 1228–1237 (further quoting testimony)). Respondents assert that Ms. Sutphin's testimony put her counsel's advice in issue and thus sought to depose him based on the argument that Ms. Sutphin has waived the attorney-client privilege. *See* Syl. Pt. 8, *State ex rel. U.S. Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995) ("A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue."); *W.W. McDonald Land Co. v. EQT Production Co*, Civil Action No. 2:11-cv-00418, 2013 WL 1310243, at *3 (S.D. W. Va. March 27, 2013) ("The idea behind [the advice-of-counsel] exception is that parties cannot be allowed to use the attorney-client privilege as both a shield and a sword, on the one hand stating that the information is

[3] Ms. Sutphin's inability to testify about the facts she alleged in her Second Amended Complaint is particularly perplexing because she verified that the "facts set forth in the foregoing SECOND AMENDED COMPLAINT are true and correct to the best of her knowledge, information, and belief." (2nd Am. Compl., Verification, A.R. 0082).

protected from discovery because it is a communication from an attorney while on the other hand asserting a claim … based on the same information communicated by an attorney.").[4]

Defendants' September 2023 motion to compel ultimately resulted in the May 24 Order that permits the deposition of Ms. Sutphin's counsel but only as to facts behind her Second Amended Complaint and with the attorney-client privilege intact. The May 24 Order confirms Defendants' assertion that Ms. Sutphin's counsel not only drafted her Second Amended Complaint but also developed the facts: "It is abundantly clear to this Court that the Plaintiff, during her deposition, was unable to provide specific facts in response to the Defendants' questions seeking factual support for the allegations, statements and conclusions within her *Second Amended Complaint*." (A.R. 2055). Defendants "were repeatedly told by Plaintiff, that Plaintiff's counsel was responsible for language used in her pleadings and/or she relied upon her counsel and the Plaintiff was unable to provide any information related to the allegations." (A.R. 2056).

Although these findings arguably confirm that Ms. Sutphin put her counsel's advice "in issue" and waived the attorney-client privilege, the circuit

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[4] (*See also* Defs.' Mot. to Compel Depo. of Joseph Caltrider at 7-8, A.R. 1037–1038; Resp. to Mot. for Protective O. & Reply in Support of Mot. to Compel at 2-6, A.R. 1223–1227).

court narrowly tailored its order to reach only unprotected facts. The circuit court quoted this Court's 2003 statement in *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht* that "the attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." (A.R. 2053–54 (quoting *State ex rel. Med'l Assur. of W. Va., Inc. v. Recht*, 583 S.E.2d 80, 93 (2003))). The circuit court accordingly limited the deposition of counsel to the unprotected "facts communicated to him by the Plaintiff or third parties which he used in the preparation of the . . . Second Amended Complaint." (A.R. 2060–61 (cleaned up)). The circuit court left the attorney-client privilege intact and specifically dispelled the notion that it was requiring counsel to disclose his mental impressions. (A.R. 2060).

Nothing in Ms. Sutphin's petition for writ of prohibition explains why it is clear legal error to order her counsel's deposition only as to unprotected facts communicated to him by Ms. Sutphin or another third party. Instead, Ms. Sutphin sets up and attempts to knock down the straw-man argument that discovery has not progressed sufficiently to require her counsel's fact deposition. That argument is, however, beside the point. The compelled deposition is limited to facts behind Ms. Sutphin's Second Amended Complaint, not facts that Ms. Sutphin may have subsequently learned in discovery. Ms. Sutphin also argues, with citations to work-product case law,

that a deposition of opposing counsel is a very disfavored and rare occurrence. She does not argue, however, that there is a blanket prohibition on depositions of counsel, as there is none, nor does she acknowledge the exceptional circumstances of this case that the circuit court found warrant her counsel's deposition. Accordingly, and as the following further explains, this Court should decline to issue a rule to show cause in response to Ms. Sutphin's petition.

1. Because counsel's deposition is limited to facts behind the Second Amended Complaint, the status of discovery is irrelevant.

The bulk of Ms. Sutphin's petition is devoted to describing the status of discovery and arguing that her counsel's fact deposition is premature when she has been compelled to respond to contention interrogatories but has not completed her own discovery.[5] Ms. Sutphin's argument, however, fundamentally ignores the scope of relief ordered by the circuit court and its reasons for ordering that relief. The circuit court has not ordered Ms. Sutphin's

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[5] Ultimately, Ms. Sutphin asserts that "the Circuit Court 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." (Pet. at 39.) Ms. Sutphin, however, did not include in the appendix the transcript of the January 23, 2024, hearing that led to the May 24 Order that she now challenges, despite requests from Respondents that she do so. Ms. Sutphin thus has not provided a complete record for this Court to evaluate the accuracy of her assertion that the circuit court has ignored legal standards.

counsel to disclose what he thinks Ms. Sutphin has learned in discovery since filing her Second Amended Complaint and his strategy for trial. Nor are Respondents seeking to obtain any privileged information or work product through the deposition that the circuit court has ordered.[6]

Instead, the circuit court ordered counsel's deposition "only as to the facts communicated to him by the Plaintiff or third parties which he used in the preparation of the . . . Second Amended Complaint." Ms. Sutphin demonstrated time and time again that she cannot testify about the factual allegations in the Second Amended Complaint and that it was her counsel who developed those facts. Ms. Sutphin pleaded in her Second Amended Complaint that she identified "Defendants' malfeasance and [her] damages" from "documents and complete information regarding the Dealership previously concealed from [her]" until their production in 2021. (2nd Am. Compl. ¶ 22, A.R. 0028). Ms. Sutphin, however, then testified repeatedly that her counsel actually developed the facts, and she confirms that in her petition:

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[6] Respondents still assert that Ms. Sutphin has waived the attorney-client privilege and work product protections in this case, particularly because she has now asserted the advice-of-counsel defense in a related malicious prosecution action (*see* A.R. 2125–50), but that issue is not before the Court due to the limited nature of the relief granted by the circuit court. Respondents have not sought review of the circuit court's determination to leave the attorney-client privilege intact and are prepared to go forward with the deposition as ordered by the circuit court.

"Ms. Sutphin, through her counsel and expert forensic accountant, gleaned most of the information which supports her Second Amended Complaint" from documents produced in 2021.[7] (Pet. at 10.) Ms. Sutphin admits that "she does not have first-hand knowledge of many of the facts gleaned from Lewis Chevrolet documents."[8] Ms. Sutphin thus has established that her counsel is the only witness available to testify about the facts behind her Second Amended Complaint, and that is all the circuit court's May 24 Order addresses.

Ms. Sutphin attempts to identify error in the circuit court's May 24 Order because the circuit court earlier compelled her to respond to contention interrogatories with a May 2023 order that she never challenged. She claims this is clear error because she has not completed discovery. This entire argument is beside the point. The circuit court has not ordered Ms. Sutphin's counsel to testify as to all facts *learned through discovery* since filing her Second Amended Complaint that Ms. Sutphin intends to rely on at trial. The circuit court ordered Ms. Sutphin's counsel to testify as to the facts that formed

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[7] Although Ms. Sutphin refers to both her counsel and her accounting expert, her accounting expert offers no liability opinions, (*see* A.R. 0944), so he cannot provide any testimony about facts that may support Ms. Sutphin's liability claims.

[8] Again, this admission is particularly perplexing when Ms. Sutphin verified the truthfulness and correctness of the factual allegations in her Second Amended Complaint.

the basis for the Second Amended Complaint. Those facts necessarily must have been known at the time of filing on February 3, 2022. Nothing that has occurred since then is to be the subject of the compelled deposition, so nothing that Ms. Sutphin may have learned since that February 2022 filing or purportedly still needs to learn is relevant to the propriety of the May 24 Order.

For seven years, Ms. Sutphin has pursued individual damages based on her minority share position in Lewis Chevrolet, originally from only Mr. Abrams. In pursuit of those individual damages, she greatly expanded her claims and roster of defendants with her Second Amended Complaint. Having defended those expanded claims for more than two years, Respondents are entitled to know the facts on which Ms. Sutphin relied to make her allegations in the first place. If she had none, the circuit court has afforded her the opportunity to state as much in lieu of making her counsel available for deposition. Absent that election, Ms. Sutphin must make her counsel available to testify about the source or sources of her factual allegations.

2. In any event, substantial discovery has occurred, and thus Ms. Sutphin cannot complain that significant discovery remains to be completed.

In addition to being wrong about the relevance of the status of her own discovery, Ms. Sutphin also is wrong about the status of discovery itself. Ms. Sutphin claims that the circuit court prematurely ordered her to supplement contention interrogatory answers but "refus[ed] to allow [her] an

opportunity to complete fact and expert witness discovery." (Pet. at 34-35; *see also id.* at 21 (same).) This is a faulty assertion for several reasons.

First, the circuit court's May 2023 order compelling answers to contention interrogatories adopted, *inter alia*, the Discovery Commissioner's findings that Defendants have "demonstrate[ed] substantial discovery has occurred" and "[d]iscovery has been substantial." (A.R. 0770–71, 0775–80). Second the May 2023 compulsion order did not "refus[e] to allow" Ms. Sutphin any additional discovery and instead emphasized Ms. Sutphin's "ongoing obligation to supplement her responses as discovery continues." (A.R. 0071). Third, by the time May 24 Order was entered, it had been more than eight months since Ms. Sutphin deposed the key defendants Mr. Abrams, Ms. Hopkins, and Ms. S. Abrams, Lewis Chevrolet's officers and directors, in mid-September 2023. (*See* Defs.' Mot. for Sanctions at 11 (Jan. 5, 2024), A.R. 1499). Fourth, the fact witnesses that Ms. Sutphin contends she still needs to depose are third parties, (Pet. at 38), and she never has said what "key" evidence they have. Fifth and finally, Ms. Sutphin's accounting expert "offer[s] no opinions on liability in [his] report," (Expert Report of Jay A. Goldman at 4 n.4 (Feb. 22, 2023) A.R. 0944), and Ms. Sutphin has no other expert, such as a corporate governance expert, to offer opinions on liability issues, (*see* Sutphin 7/21/2023 Tr. at 43:4–14; A.R. 0820).

3. Petitioner's reliance on the *Shelton* test as the source of clear legal error is misplaced, but in any event, this case presents exceptional circumstances warranting counsel's deposition.

Ms. Sutphin asserts that the circuit court clearly erred because it did not follow the Eighth Circuit's *Shelton* test and conclude that "other means exist for Respondents to obtain information about Ms. Sutphin's case." (Pet. at 36 (discussing *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986)). But that was no error.

Even if *Shelton* were persuasive, it simply is not West Virginia law. Indeed, Ms. Sutphin's petition asserts that this Court "has not directly addressed the issue of taking a deposition of opposing counsel in pending litigation or formally adopted the *Shelton* test." (Pet. at 39). Thus, the circuit court could not have committed a ***clear legal error*** if it did, in fact, decide not to rely on *Shelton*.

In any event, the May 24 Order effectively followed *Shelton*. A deposition of opposing counsel may be a "drastic measure," "highly disfavored," and "infrequently proper," (Pet. at 20), but this case presents the exceptional circumstances justifying opposing counsel's deposition.

Shelton concerned protections for attorney work product – that is, an attorney's preparation of a case for trail. 805 F.2d at 1328. The federal appellate court in *Shelton* worried about forcing counsel to reveal legal

opinions and theories. *Id.* The court, however, "[did] not hold that opposing trial counsel is absolutely immune from being deposed." 805 F.2d at 1327.

> We recognize that circumstances may arise in which the court should order the taking of opposing counsel's deposition. But those circumstances should be limited to where the party seeking to take the deposition has shown that (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.

Id. (citation omitted); *see also, e.g.*, *Borden Inc v. Valdez*, 773 S.W.2d 718, 720–21 (Tex. Ct. App. 1989) (upholding attorney fact deposition and stating that "the attorney-client privilege was never intended to foreclose any opportunity to depose an attorney, but rather only precludes those questions which may somehow invade upon the attorney-client confidences" (cleaned up)).

Here, the circuit court acknowledged that what happened in this case is not the "standard practice [of] an attorney [taking] the facts presented by a client and craft[ing] those facts into a complaint or other pleading." (A.R. 2055). The circuit court found that: (1) after two years of discovery, Ms. Sutphin has not provided facts supporting her claims; (2) her counsel developed the facts in her Second Amended Complaint, and (3) her counsel thus is subject to deposition about those non-privileged facts. (*See* A.R. 2055–61). "The Plaintiff cannot rely upon the skills of her attorney to draft her allegations and then argue that she does not have to somehow disclose the facts upon which her

counsel crafted her pleadings as being protected by the attorney-client privilege." (A.R. 2059). In short, the circuit court concluded that this case presents rare circumstances that warrant the limited deposition of opposing counsel to allow Respondents to adequately prepare a defense.

CONCLUSION

The circuit court committed no clear legal error in ordering the deposition of Ms. Sutphin's counsel "only as to the facts communicated to him by the Plaintiff or third parties which he used in the preparation of the . . . Second Amended Complaint." Ms. Sutphin has established that she can provide no factual support for her claims, but if anyone can, it is her counsel. Accordingly, this Court should deny Ms. Sutphin's petition for a writ that seeks to prohibit what is nothing more than a well-reasoned discovery order.

Respectfully submitted this 19th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19th, 2024, I served the foregoing by electronically filing the same through the West Virginia E-Filing System, which will send notice and a copy to all counsel of record.

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