IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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RONALD J. HOPKINS, II,
RACHEL L. ABRAMS HOPKINS,
SARAH A. ABRAMS, and
LANGHORNE ABRAMS,

Respondents Below, Petitioners,

v.

MARY C. SUTPHIN,

Petitioner Below, Respondent.

APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY,
WEST VIRGINIA – CIVIL ACTION NO. 17-C-591 AND
THE INTERMEDIATE COURT OF APPEALS OF
WEST VIRGINIA – NO. 22-ICA-201

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

I. INTRODUCTION

This is a shareholder oppression, breach of fiduciary duty, and corporate waste case. On February 3, 2022, the Respondent/Plaintiff, Mary Charles Sutphin ("Ms. Sutphin"), filed a Second Amended Complaint against the Petitioners/Defendants, A. David Abrams, Jr., Langhorne Abrams, Ronald J. Hopkins, Jr., Rachel L. Abrams Hopkins, and Sarah A. Abrams (collectively "the Petitioners"). [0160-0249] Her Second Amended Complaint asserted, *inter alia*, statutory claims for Violations of the Uniform Trust Code (Count I) and associated breaches of fiduciary duty (Count II) and Violations of the West Virginia Business Corporation Act (Count V) and associated breaches of fiduciary duty (Count VI), along with common law claims for Conversion (Count VII), Negligence (Count VIII), Tortious Interference with Inheritance (Count X), Fraud/Constructive Fraud (Count XI), Civil Conspiracy (XII), Unjust Enrichment (Count XIII), Constructive Trust (Count XIV), Punitive Damages (Count XV), and Attorney Fees and Litigation Costs (Count XVI). The Circuit Court of Raleigh County, West Virginia granted Mrs. Abrams', Mr. Hopkins', Mrs. Hopkins', and Ms. Abrams' Motion to Partially Dismiss Plaintiff's Second Amended Complaint on September 28, 2022 after a hearing on July 29, 2022. [0336-0460, 0462-0478] Ms. Sutphin appealed this decision to the Intermediate Court of Appeals on October 28, 2022. [0010-0049]

II. THE RESPONDENT'S SECOND AMENDED COMPLAINT

The following facts – which are taken as true for purposes of the motions to dismiss and this appeal – are based upon the allegations contained in Ms. Sutphin's verified Second Amended Complaint. [0160-0249]

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] [0165] Under her Will, Ms. Lewis Smith's three daughters – the Respondent Mary C. Sutphin, the Petitioner 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 the Defendant, A. David Abrams, Jr., Esq., and equal shares of the remainder of her estate. [0165, 0170-0172] Accordingly, Mr. Abrams controlled Ms. Sutphin's, Mrs. Abrams' (his wife's), 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. [0170-0172]

Mr. Abrams is the Petitioner Langhorne Abrams' husband and Nancy Pat Lewis Smith's son-in-law. [0165-0166] He is also an attorney. In October 1990, he prepared Ms. Lewis Smith's Will ("the Will"). [0167] 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"). [0167] At the time he prepared the Will, Mr. Abrams also served as General Counsel to Lewis Chevrolet, a Member of the Lewis Chevrolet Board of Directors, and both the Executive Vice President and the Assistant Secretary of Lewis Chevrolet. [0166-0167]

After Ms. Lewis-Smith died on November 23, 2009, the Petitioners exercised total control over Lewis Chevrolet. [0166-0167, 0170] Mr. Abrams' and the Petitioner Langhorne Abrams' daughter, Respondent Rachel L. Abrams Hopkins, served as the second Member of the Lewis Chevrolet Board of Directors, the President of Lewis Chevrolet, and full-time employee/principal of Lewis Chevrolet. Ms. Hopkins also owned 60 shares of stock in Lewis Chevrolet.[3] [0166, 0169]

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[1] Lewis Chevrolet now operates the Nissan Dealership in Beckley and touts itself as the "#1 Volume Dealer in the State." [0166]

[2] Nancy Lewis Haley died, and her interests were inherited by her two daughters: Notice Defendant Kate Hatfield and Notice Defendant Ann Haley. [0165]

[3] The only other stockholder was Nancy R. Smith, who owned 92 shares of Lewis Chevrolet. Thus, Mr. Abrams and his daughter, Petitioner Rachel L. Abrams Hopkins, controlled 302 of the 394 shares of Lewis Chevrolet stock. [0162]

Mr. and Mrs. Abrams' other daughter, the Petitioner Sarah A. Abrams, served as the third and final Member of the Lewis Chevrolet Board of Directors, both the Secretary and the Treasurer of Lewis Chevrolet, and a full-time employee of Lewis Chevrolet. [0166] Mr. and Mrs. Abrams' son-in-law and Ms. Hopkins' husband, the Petitioner Ronald J. Hopkins, II, also served as a full-time employee of Lewis Chevrolet in the role of General Manager. [0167] Since their mother died, and the Petitioners 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. [0173] During the same time that Mr. and Mrs. Abrams' family has controlled Lewis Chevrolet as the only Directors 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. [0161, 0183-0185]

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. [0174-0177] After several unsuccessful attempts to obtain information from the Petitioners, 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. [0174-0177] After four years of litigation, Ms. Sutphin was finally able to obtain an Order from the Circuit Court which compelled the Defendant A. David Abrams, Jr., to provide some specific, detailed financial information about Lewis Chevrolet. [0164]

In 2021, Ms. Sutphin learned, *inter alia*, that Mr. Abrams and the Petitioners, acting in multiple conflicting roles, had forgiven approximately $410,000 in debt owed by Lewis Chevrolet to her mother's Estate [0173]; 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 [0181]; and had continued to operate Lewis Chevrolet with negative and/or declining net income [0181]. During this extended period of severe financial underperformance, Mr. Abrams and the Petitioners kept themselves in highly paid management positions; approved significant salaries, bonuses, and fringe benefits for themselves; and made themselves the beneficiaries of certain Nissan "incentive programs" which allowed them to significantly supplement their income through Lewis Chevrolet. [0181-0183]

Based upon this new information, Ms. Sutphin filed her Second Amended Complaint on February 3, 2022, alleging that Mr. Abrams, Mrs. Hopkins, and Ms. Abrams, with the encouragement and assistance of Mrs. Abrams and Mr. Hopkins, 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, Directors, Officers, and General Counsel to Lewis Chevrolet. [0160-0249]

III. THE PETITIONERS' MOTIONS TO DISMISS

On March 31, 2022, the Petitioners filed motions to dismiss Ms. Sutphin's Second Amended Complaint. [0251-0262, 0264-0277] On July 29, 2022, the Circuit Court held a hearing on these motions, incorrectly applied the Rule 12(b)(6) standards to Ms. Sutphin's detailed, 279-paragraph Complaint, and improperly dismissed multiple counts of Ms. Sutphin's Complaint, including all claims against Mr. Hopkins. [0336-0460, 0469-0477]

During the July 29, 2022 motions hearing, the Circuit Court made the following observations and rulings with regard to the Petitioner Ronald J. Hopkins, II's motion to dismiss:

THE COURT: So what decision have you pled that he has made or what action has he taken that has resulted in [unjust enrichment, civil conspiracy, and tortious interference with inheritance]?

[MS. SUTPHIN'S COUNSEL]: Your honor, at this point, we don't have those types of specifics because we haven't been able to get into discovery. We're able to say that Chad Hopkins is the general manager and we can reasonably infer from that position that he makes decisions about how much is paid, how they handle sales, how they show profit, what they – where he works presumably with his wife to decide whether the company shows a bottom line on the profit or whether they spend more money on advertising or they spend more money on this or not.

THE COURT: What authority do you rely upon to tell me that I can infer those things?

[MS. SUTPHIN'S COUNSEL]: Well, I think your Honor, that Rule 12 tells us that the Court can not only consider the facts that are pled, but the reasonable inferences from those facts.

[0393-0394] (emphasis added)

THE COURT: See, the problem that I have is anytime that a lawsuit is filed, yes, we are a notice pleadings, but **the notice should at least give the Defendants the opportunity to address the specific allegations against them and not just broad general terms.** I don't believe it's proper, even under Rule 12(b) motion that you could come in and say, "Defendants A, B, and C have committed civil conspiracy because they had a job." […] **Your complaint doesn't put them on notice as to what the improper things they have done** other than pay themselves and keep jobs without paying dividends. That's a business operational decision and I don't see anything that says that's wrong that they made a decision the way they did. [...] **But then you also ignore the Bylaws, which evidence shows, says that that's discretionary of the directors and officers.**

[0400-0401] (emphasis added)

THE COURT: With regards to the complaint against Mr. Hopkins, the Court is prepared to issue an order today that will direct that Mr. Hopkins be dismissed entirely from the lawsuit. **The Court does not believe there's been any sufficient factual basis or allegation that would lead the Court to believe that further development of the evidence can show that Mr. Hopkins has, in fact, engaged in any activity which would justify him remaining in this.** […] With regard to the remaining allegation of the civil conspiracy, **the Court does not believe that there's been any allegations that have been substantial or sufficient enough to allow further development of any actions by Mr. Hopkins.**

[0410-0411] (emphasis added)

The Circuit Court also made the following observations and rulings with regard to the Petitioner Rachel L. Abrams Hopkins' and the Respondent Sarah A. Abrams' motion to dismiss:

> THE COURT: [T]he Court would note that I do believe the counts that are specifically alleged violations of the directors would entitle you to at least seek the relief that you're seeking with regard to trying to claim unjust enrichment and some of those other factors which are relief and not stand-alone grounds as the court's previously addressed. […] The Court does believe that in this case that Rachel Hopkins and Sarah Abrams should be dismissed in their individual capacities, but there are no allegations against them specifically which would survive or be addressed through further discovery that would hold them individually liable outside of their capacities as directors and officers of the corporation.

[0419-0420]

Immediately following these rulings, during the same motions hearing on July 29, 2022, the Court considered Ms. Sutphin's Rule 12(b)(6) Motion to Dismiss a Counterclaim filed by Mr. Abrams for malicious prosecution, libel, and slander related to the filing of her Second Amended Complaint. [0069-0070, 0445-0458] Mr. Abrams' Counterclaim contains only twelve paragraphs of boilerplate language:

> COUNTERCLAIM
>
> 1. The Counterclaimant, A. David Abrams, (hereinafter "Counterclaimant") is a resident of Raleigh County, West Virginia.
>
> 2. The Plaintiff, Mary Sutphin, is a resident of North Carolina.
>
> COUNT ONE - MALICIOUS PROSECUTION
>
> 3. Counterclaimant hereby incorporates each and every allegation contained in the preceding paragraphs as though fully restated here.
>
> 4. Upon information and belief, the Plaintiff instituted with malice, the above-styled civil complaint against Counterclaimant.
>
> 5. Further, upon information and belief, the Plaintiff acted without a full and proper investigation prior to the institution of the civil complaint against Counterclaimant.
>
> 6. As a direct and proximate result of the malicious prosecution of Counterclaimant, Counterclaimant has been caused to suffer embarrassment, annoyance, inconvenience, emotional distress, and otherwise has endured the specter of a civil suit, cost of legal defense, and other court costs.
>
> 7. But for the malicious actions of the Plaintiff as detailed herein, the damages as detailed above would not have been suffered by Counterclaimant.

COUNT TWO – LIBEL/SLANDER

8. Counterclaimant hereby incorporates each and every allegation contained in the preceding paragraphs as though fully restated herein.

9. Plaintiff has libeled Counterclaimant Abrams by printing and disseminating to third parties and the public in general untruths about his moral character, professional reputation, and actions relating to the operations of Lewis Chevrolet Company.

10. Plaintiff made these written false statements with actual malice with the intent to ruin the business reputation of Counterclaimant Abrams.

11. By communication to third person(s), Plaintiff has slandered Counterclaimant Abrams by accusing him of being a thief, untruthful, negligent, and guilty of malfeasance, breaching fiduciary duties, legal malpractice, and other various misdeeds. Plaintiff has slandered the Counterclaimant Abrams and said slander is per se as it goes to the professional reputation of Counterclaimant Abrams and accuses him of crimes.

12. As a direct and proximate result of the libel/slander of Counterclaimant Abrams, by Plaintiff, Counterclaimant Abrams has suffered actual and presumed damages.

[0069-0070] Ms. Sutphin argued this is insufficient under the Rule 12(b)(6) standard as applied by the Circuit Court just minutes earlier to her Second Amended Complaint (e.g. "[W]e are a notice pleadings [state], but the notice should at least give the Defendants the opportunity to address the specific allegations against them and not just broad general terms …. Your complaint doesn't put them on notice as to what the improper things they have done."). [0400-0401, 0470] In stark contrast to the Rule 12(b)(6) standard the Court applied to Ms. Sutphin's Second Amended Complaint, the Court deemed this sufficient notice pleading, specifically querying:

> THE COURT: […] [W]ould you not agree that the Defendant [Mr. Abrams] should be allowed to at least have discovery as to whether or not your client thinks they can prove those statements were made to third parties?
>
> [MS. SUTPHIN'S COUNSEL]: No, Your Honor. They've got to identify them first because we have to have an ability to appreciate what's alleged against us and assert the appropriate affirmative defenses. [. . .]

[0448] The Court also specifically stated that Ms. Sutphin must conduct discovery to learn any basic facts which support Mr. Abrams' malicious prosecution, libel, and slander claims, in part, because she must already know the basis for those claims:

> THE COURT: Is that not an issue that you can address with discovery saying, "Please provide to me what it is your relating to specific Paragraph 8?"
>
> [MS. SUTPHIN'S COUNSEL]: Your Honor, the point is Mrs. Sutphin shouldn't have to guess. Bald statements will not survive a motion to dismiss for failure to state a claim. […]
>
> THE COURT: Well, let's just assume for argument purposes that she did that. And I'm not saying she did. Do you not think that she would have knowledge that maybe she knows what is being referenced in that?
>
> [MS. SUTPHIN'S COUNSEL]: No. I don't think she knows what []he's referring to when he alleges this. That's the point. He's supposed to tell us. [. . .]

[0450-0451] Ultimately, the Court ruled "there is sufficient notice pleading as to the allegations of what form of libel and slander the Defendant, Mr. Abrams, has alleged to have been taken or occurred based upon the actions of Plaintiff. The Court does not believe that the counterclaim would be required to go into great detail with regard to the specific items. And even though [counsel] will disagree with me, I don't believe I've held [Ms. Sutphin] to that standard in their complaint." [0457]

IV. THE CIRCUIT COURT'S PARTIAL DISMISSAL ORDER

On September 28, 2022, the Circuit Court entered its Order on Motions to Dismiss and dismissed multiple claims from Ms. Sutphin's Second Amended Complaint "with prejudice" even though the Petitioners never sought a dismissal with prejudice; there was no discussion of a dismissal with prejudice during the July 29, 2022 hearing; and Ms. Sutphin demonstrated the need for discovery to meet the Court's erroneous pleading standard and amend her Complaint to support her allegations. [0462-0478]

In its Order, the Court made several erroneous findings which demonstrated its misapplication of the Rule 12(b)(6) standard. These include: 1) "The Court does not believe there are sufficient factual allegations that would lead the Court to believe that further development of evidence can show that Mr. Hopkins has, in fact, engaged in any activity which would justify him

remaining in this lawsuit." [0471]; 2) "With regard to the remaining allegation of civil conspiracy, the Court does not believe that there has been any allegation of any action by Mr. Hopkins that is substantial or sufficient enough to allow further development through discovery." [0471]; and 3) "The Court believes that Rachel Hopkins and Sarah Abrams should be dismissed in their individual capacities, because there are no allegations in those counts [common law counts for conversion, negligence, unjust enrichment, and constructive trust (Counts VII-VIII and XIII-XIV)] against them specifically that would survive or could be addressed through further discovery that would hold them individually liable outside of their capacities as directors and officers of the corporation." [0474]

The Circuit Court dismissed with prejudice Ms. Sutphin's claims against the Petitioner Langhorne Abrams for Tortious Interference with Inheritance (Count X), Unjust Enrichment (Count XIII), Constructive Trust (Count XIV), Punitive Damages (Count XV), and Attorney Fees and Litigation Costs (Count XVI). [0465-0468] The Court dismissed with prejudice Ms. Sutphin's claims against the Petitioner Ronald J. Hopkins, II for Tortious Interference with Inheritance (Count X), Civil Conspiracy (XII), Unjust Enrichment (Count XIII), Constructive Trust (Count XIV), Punitive Damages (Count XV), and Attorney Fees and Litigation Costs (Count XVI) and specifically noted that "this dismissal is intended to be a final ruling by the Court on all matters asserted against Mr. Hopkins." [0469-0472] And, the Court dismissed with prejudice Ms. Sutphin's claims against the Petitioner Rachel L. Abrams Hopkins and the Petitioner Sarah A. Abrams for Conversion (Count VII), Negligence (Count VIII), Tortious Interference with Inheritance (Count X), Unjust Enrichment (Count XIII), and Constructive Trust (Count XIV). [0472-0475]

On December 9, 2022, the Circuit Court entered its Order Denying Plaintiff's Motion to Dismiss. [0073] In stark contrast to its rulings on the Petitioners' motions to dismiss, the Court found "there is sufficient notice pleading as to the allegations of what form of libel and slander Defendant Abrams has alleged to have been taken or occurred based upon the actions of the Plaintiff." [0073, 0457] The Court reasoned that "the counterclaim would [not] be required to go into great detail with regard to the specific items" because the "Plaintiff has general notice of what form of libel and slander she is being accused of and Plaintiff can address the specifics of the allegations in discovery and file another motion if she believes the evidence is insufficient to renew her Motion to Dismiss." [0073, 0457] The Court also found "Defendant Abrams should be allowed discovery regarding his malicious prosecution claim to determine whether Plaintiff can prove her statements allegedly made to third parties . . . and to allow Defendant Abrams to further develop his Counterclaim." [0073, 0457]

V. THE INTERMEDIATE COURT OF APPEALS' MEMORANDUM DECISION

On October 28, 2022, Ms. Sutphin timely appealed the Circuit Court's dismissal of multiple counts of her Second Amended Complaint to the Intermediate Court of Appeals because the Circuit Court erroneously applied the Rule 12(b)(6) standards to dismiss her claims with prejudice and erroneously made its ruling a "Final Order" before allowing Ms. Sutphin an opportunity to conduct discovery. [0010-0049] After considering the parties' briefs, the Intermediate Court of Appeals reversed the Circuit Court's erroneous dismissal of Ms. Sutphin's civil conspiracy claim against the Petitioner Ronald J. Hopkins, II; reversed the Circuit Court's erroneous dismissal of Ms. Sutphin's claims for conversion, negligence, unjust enrichment, and constructive trust against the Petitioners Rachel L. Abrams Hopkins and Sarah A. Abrams; and reversed the Circuit Court's erroneous dismissal of each of these claims with prejudice. [0001-

0007] The Petitioners have now appealed the Intermediate Court of Appeals' March 25, 2024 Memorandum Decision to this Honorable Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The legal issues in this case may be resolved by an application of the correct Rule 12(b)(6) standard to the basic facts pled in Respondent's Second Amended Complaint which, when taken as true, demonstrate she is entitled to develop her various claims against Petitioners through discovery and have a jury determine the merits of these claims at trial. All legal issues have already been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and record on appeal. This Honorable Court's decisional process would not be significantly aided by oral argument. It need only apply the pled facts to existing Rule 12(b)(6) standards and West Virginia law, then issue a memorandum decision which affirms the Intermediate Court of Appeals' March 25, 2024 decision to reverse the Circuit Court of Raleigh County's erroneous September 28, 2022 Order on Motions to Dismiss. Unless this Court determines other issues arising upon the record should be addressed, oral argument is not necessary under the Rule 18(a) criteria. W. Va. R. App. P. 18(a). Should this Court determine oral argument is necessary, this case is appropriate for Rule 19 argument and disposition by a memorandum decision. W. Va. R. App. P. 19(a) ("cases involving assignments of error in the application of settled law").

STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syllabus Point #1, *Gable v. Gable*, 245 W. Va. 213, 858 S.E.2d 838 (2021).

SUMMARY OF ARGUMENT

The Intermediate Court of Appeals correctly reversed the Circuit Court's erroneous dismissal of Ms. Sutphin's civil conspiracy, conversion, negligence, unjust enrichment, and constructive trust claims by properly and consistently applying the Rule 12(b)(6) standards.

Contrary to the Petitioners' arguments, and the Circuit Court's rulings, "a plaintiff pleading a claim for relief need only give general notice as to the nature of his or her claim" because, "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia*, 244 W. Va. 508, 521, 854 S.E.2d 870, 883 (2020) (internal citations omitted). Ms. Sutphin's detailed, 279-paragraph Second Amended Complaint clearly meets this standard. Thus, the Intermediate Court of Appeals properly recognized that Ms. Sutphin should be permitted an opportunity to conduct full discovery on her claims.

As to Ms. Sutphin's civil conspiracy claims, the Petitioners' arguments concerning legal duty fail as a matter of established West Virginia law. Under Syllabus Point #9 of *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009), "liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s)." It is not necessary for a defendant-conspirator to owe a direct legal duty to the plaintiff to be liable for a civil conspiracy. Even if this were the law in West Virginia, the Petitioner Ronald J. Hopkins, II owed fiduciary duties to Ms. Sutphin as the general manager of Lewis Chevrolet and one of four immediate family members with total control over the company. The Petitioners' acts as individuals for their individual advantage in violation of their official obligations and fiduciary duties as officers, directors, and managers of Lewis Chevrolet create individual liability for each, as well as overarching liability for civil conspiracy.

As to Ms. Sutphin's common law claims for conversion, negligence, unjust enrichment, and constructive trust claims, the Petitioners' arguments concerning duplicate claims also fail as a matter of established West Virginia law. Rule 8(e)(2) of the West Virginia Rules of Civil Procedure specifically allows a party to "state as many separate claims … as the party has"

regardless of the basis for those claims. Meanwhile, the doctrine of *res judicata* requires a plaintiff to assert in one action "any legal theory, cause of action, or defense which could have been asserted in that action." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 560, 803 S.E.2d 519, 530 (2017). In keeping with these basic rules, several West Virginia cases recognize that an individual shareholder like Ms. Sutphin may assert multiple causes of action for oppressive conduct, breach of fiduciary duties, and corporate waste against individual corporate officers and directors like the Petitioners under circumstances very similar to those stated in Ms. Sutphin's Second Amended Complaint.

Finally, the Petitioners' suggestion that the Intermediate Court of Appeals lacked jurisdiction to reverse the Circuit Court's erroneous rulings because the Circuit Court's September 28, 2022 Order was not a "final" order fails upon inspection of the extraordinary language used by the Circuit Court. "The key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature and effect." Syllabus Point #1, in part, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995). Here, the Circuit Court created "a final order in its nature and effect" by dismissing Ms. Sutphin's claims "with prejudice" when this was unnecessary at the outset of the case and by specifically stating that that "this dismissal is intended to be a final ruling by the Court on all matters asserted against Mr. Hopkins." [0477]

ARGUMENT

I. THE INTERMEDIATE COURT OF APPEALS CORRECTLY REVERSED THE CIRCUIT COURT'S ERRONEOUS RULE 12(b)(6) DISMISSAL OF THE RESPONDENT'S CIVIL CONSPIRACY CLAIM AGAINST THE PETITIONER TO ALLOW DEVELOPMENT OF THE RECORD THROUGH DISCOVERY.

The Petitioner, Ronald J. Hopkins, II, disputes the Intermediate Court of Appeals' decision to reverse the Circuit Court's Rule 12(b)(6) dismissal of the Respondent, Mary Charles Sutphin's, civil conspiracy claim because he believes a defendant "must be alleged to have conspired to violate some duty that he owes to the plaintiff" and he believes the allegations in Ms. Sutphin's Second Amended Complaint are not sufficient. Both arguments fail as a matter of well-established West Virginia law and proper application of the Rule 12(b)(6) standard.

A. The Petitioner Can Be Guilty Of Civil Conspiracy Under West Virginia Law Even If He Did Not Owe A Direct Legal Duty To The Respondent.

As early as 1979, this Honorable Court recognized a cause of action for civil conspiracy in *Dixon v. American Industrial Leasing Co.*, 162 W. Va. 832, 253 S.E.2d 150 (1979). The *Dixon* Court acknowledged the definition of civil conspiracy set forth in 15A C.J.S. *Conspiracy* § 1(1):

> [A] civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.

Id at 834, 152. And, the *Dixon* Court held in Syllabus Point #1, in part, that:

> In order for civil conspiracy to be actionable it must be proved that the defendants have committed some wrongful act or have committed a lawful act in an unlawful manner to the injury of the plaintiff[.]

Id at 832, 151. If there were any question about civil conspiracy as a cause of action, in 1998, this Honorable Court decided *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998). The *Kessel* Court stated unequivocally that:

> The law of this State recognizes a cause of action sounding in civil conspiracy. At its most fundamental level, a "civil conspiracy" is "a combination to commit a tort." *State ex rel. Myers v. Wood,* 154 W. Va. 431, 442, 175 S.E.2d 637, 645 (1970) (citing 15A C.J.S. *Conspiracy* § 1 (1967)).

Id at 128, 753. Neither *Dixon,* nor *Kessel,* required a defendant-conspirator to owe a direct legal duty to the plaintiff in order to be liable for civil conspiracy. The defendant-conspirator need only commit "some wrongful act or [commit] a lawful act in an unlawful manner to the injury of the plaintiff." *Id* at 129, 754.

In 2009, this Honorable Court revisited civil conspiracy when it decided *Dunn v. Rockwell*, 225 W. Va. 43, 689 S.E.2d 255 (2009). In Syllabus Point #9, the *Dunn* Court held:

> A civil conspiracy is not a *per se,* stand-alone cause of action; it is instead a legal doctrine under which **liability for a tort may be imposed on people who did not actually commit a tort themselves** but who shared a common plan for its commission with the actual perpetrator(s).

Id at 47, 259 (emphasis added). Thus, the *Dunn* Court confirmed that a defendant-conspirator, like the Petitioner, can be liable for a tort, like breach of fiduciary duty, even if he did not commit the tort, or owe the legal duty, himself, so long as he "shared a common plan for its commission with the actual perpetrator(s)." The Intermediate Court of Appeals correctly recognized this, properly concluding that, "given the specific allegation against [the Petitioner Ronald J. Hopkins, II], his close relationship with other alleged tortfeasors, and his position in management of Lewis Chevrolet, it was error for the circuit court to dismiss the civil conspiracy claim against [him]" because "the preference is to decide cases on their merits." [0005]

The Petitioner repeatedly argues that "civil conspiracy is not a stand-alone claim" under West Virginia law and, therefore, the Circuit Court was correct to dismiss Ms. Sutphin's civil conspiracy claim against him under Rule 12(b)(6). He trumpets this bare assertion throughout his Brief without acknowledging the complete *Dunn* holding and without citing any West Virginia

legal authority. *See* Petitioner's Brief, pgs. 13, 15, 16, 17, 18, 19, 30. Instead, he cites a single California intermediate court of appeals case decided in 1996 – *Weinbaum v. Goldfarb, Whitman & Cohen*, 54 Cal. Rptr. 462, 466 (Cal. App. June 27, 1996) – for the overstated proposition that "other courts have recognized [that] a conspiracy claim 'allows tort recovery only against a party who already owes the duty.'" *See* Petitioner's Brief, pg. 19. *Weinbaum* is not a proper substitute for *Dunn*.

The Petitioner fails to recognize the limiting context of *Weinbaum*. *Weinbaum* was an employment case. The question was whether a defendant who did not employ the plaintiff could be sued for damages for conspiracy to wrongfully terminate the plaintiff's employment in violation of public policy. The *Weinbaum* Court held that, "[b]ecause tort liability arising from conspiracy presupposes that the coconspirator *is legally capable of committing the tort* (because he owes a duty to the plaintiff recognized by law and is thus potentially subject to liability for a breach of that duty), we hold that a third party who is *not* (and never was) the plaintiff's employer cannot be liable for conspiracy to wrongfully terminate the plaintiff's employment in violation of public policy." *Id* at 1314–15, 464 (emphasis in original). This context is markedly different than the present case.

More importantly, the Petitioner fails to acknowledge that the California Supreme Court in 1994, like the *Dunn* Court in 2009, specifically held that civil "[c]onspiracy is not a cause of action, but **a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration**." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.,* 7 Cal. 4th 503, 510–11 (1994) (emphasis added). Thus, California law is actually consonant with West Virginia law on this critical point.

The Petitioner's misplaced reliance on *Weinbaum* over *Dunn* and *Applied Equip. Corp.*, invites this Honorable Court to ignore the development of civil conspiracy as a cause of action in West Virginia and this Honorable Court's specific 2009 holding in *Dunn* – "liability for a tort may be imposed on **people who did not actually commit a tort themselves** but who shared a common plan for its commission with the actual perpetrator(s)." *Dunn* supra (emphasis added). By relying upon the 1996 *Weinbaum* case from a California intermediate appellate court, instead of the 2009 *Dunn* case from the Supreme Court of Appeals of West Virginia, the Petitioner substitutes inapposite, non-binding authority for well-settled, mandatory authority. He offers no good reason for this Honorable Court to ignore *stare decisis* and graft another state's context-specific case into West Virginia's well-settled general law on civil conspiracy. This Honorable Court should not accept the Petitioner's faulty argument, especially since he never once cited *Weinbaum* before the Circuit Court or the Intermediate Court of Appeals.[4]

B. The Petitioner Owes Fiduciary Duties To The Respondent As The General Manager Of Her Car Dealership Given His Close Familial Relationship With The Officers And Directors Of The Dealership.

The Petitioner continues to argue, without any legal authority, that as a mere employee of Lewis Chevrolet he does not owe any fiduciary duties to Ms. Sutphin or the corporation's other owners/shareholders. This argument ignores applicable West Virginia law. It also ignores the fact

[4] "Ordinarily, a defendant who has not proffered a particular claim or defense in the trial court may not unveil it on appeal. Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal. [The Supreme Court of Appeals has] invoked this principle with a near religious fervor. This variant of the 'raise or waive' rule cannot be dismissed lightly as a mere technicality. The rule is founded upon important considerations of fairness, judicial economy, and practical wisdom." *State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996). This "raise or waive" rule applies equally in civil cases. See *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.").

that the Petitioner's wife (Petitioner Rachel L. Abrams Hopkins), his father-in-law (Defendant A. David Abrams, Jr.), and his sister-in-law (Petitioner Sarah A. Abrams) owe strict fiduciary duties to Ms. Sutphin, and the corporation's other shareholders, as officers and directors of the corporation.

In *Pomeroy, Inc. v. Four Jaks, Inc.*, the corporate defendant and its employee defendant, Gene Beard, similarly claimed that Mr. Beard owed no fiduciary duties to shareholders because "he was not a corporate officer or director of [the corporation][.]" *Pomeroy, Inc. v. Four Jaks, Inc.*, 11 F. App'x 275, 277 (4th Cir. 2001) (appeal from the United States District Court for the Southern District of West Virginia, at Beckley). Mr. Beard argued that the title of "vice president" was placed on his "business cards for appearances[,]" but he was "not appoint[ed] [] to be a true vice president." *Id*. Significantly for the court, Mr. Beard "admitted that he 'was the general manager and that [he] had the right to do whatever he felt was proper.'" *Id*. The court looked to the definition of a corporate officer in Black's Law Dictionary, which included:

> Those persons who fill the offices which are provided for in the corporate charter such as president, treasurer, etc., *though in a broader sense the term includes vice presidents, general manager and other officials of the corporation.*

Id (quoting Black's Law Dictionary 340 (6th ed. 1990) (emphasis added)). Based on this definition, and Mr. Beard's testimony, the Fourth Circuit held that Mr. Beard was a corporate officer regardless of title because of the extent of his authority over the corporation, which "comes with a fiduciary duty to use it for the benefit of the company." *Pomeroy*, 11 F. App'x at 277-78.

The same is true of the Petitioner in this case. The facts of his employment, as pled in Ms. Sutphin's Second Amended Complaint, are strikingly analogous to *Pomeroy*. He is employed full-time by Lewis Chevrolet as the "general manager." Although not a formal officer or director of the Dealership, he has significant authority in the Dealership, specifically: "[a]ll department

managers report to him[;]" he is "responsible for the entire sales force as well as fixed plant operations [;]" he handles all aspect[s] of advertising and does all new car orders[;] and "he maintains daily contact with Nissan." *See* Response of Defendant A. David Abrams, Jr. to Plaintiff's First Motion to Compel.[5] Just like the employee in *Pomeroy*, the Petitioner cannot hide behind the lack of official labels. He has significant authority as "general manager" of the Lewis Chevrolet which "comes with a fiduciary duty to use it for the benefit of the company." *Pomeroy*, 11 F. App'x at 278. He also has a significant relationship with the officers and directors of Lewis Chevrolet which allows him the opportunity for significant influence.

The facts, and reasonable inferences from those facts, pled in Ms. Sutphin's Second Amended Complaint demonstrate that the Petitioner owes fiduciary duties to Lewis Chevrolet and its owners/shareholders, including Ms. Sutphin, just like his wife, father-in-law, and sister-in-law. Therefore, he cannot prevail under the Rule 12(b)(6) standard and escape responsibility by erroneously claiming, without any legal authority, that employees of a corporation can never owe fiduciary duties to the corporation's owners/shareholders. The Intermediate Court of Appeals was entirely correct in determining that this issue should be fully developed through discovery so this case may be decided on its merits at trial.

C. The Petitioner Can Certainly Be Guilty Of Conspiring With His Immediate Family Members To Deprive The Respondent Of Any Benefit From Her Car Dealership In Violation Of Their Fiduciary Duties.

[5] Although not appropriate for consideration under the Rule 12(b)(6) standard, discovery in this case has already revealed that the Petitioner has an employment contract with the Dealership. This contract will likely demonstrate additional authority and, thus, an even greater basis for his fiduciary duties to the owners/shareholders of the Dealership, including Ms. Sutphin. *See* Plaintiff's First Motion to Compel; *see also* Plaintiff's Reply to Defendant [A. David Abrams, Jr.]'s Preliminary Response to Plaintiff's First Motion to Compel."

The Petitioner argues that he cannot be guilty of civil conspiracy because, as a mere employee of Lewis Chevrolet, he cannot conspire with his employers or principals. Petitioners' Brief, pg. 23. In support of this clever argument, the Petitioner cites *Cook v. Heck's Inc.*, 176 W. Va. 368, 375, 342 S.E.2d 453, 460 (1986), for the general proposition that "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." *Id*. Understandably, he focuses on the first part of this citation – "[a]gents and employees of a corporation cannot conspire with their corporate principal or employer" – and simply ignores the critical qualification which follows – "**where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage**." *Id* (emphasis added); *see also* 15A C.J.S. *Conspiracy* § 19 ("An agent can be liable for conspiracy with the principal if the agent acts out of a self-interest that goes beyond the agency relationship as where the interests of a separately incorporated agent diverge from the interests of the corporate principal, and the agent at the time of the conspiracy is acting beyond the scope of its authority or for its own benefit rather than that of the principal.").[6]

[6] The Petitioner also ignores the peculiar facts of the *Cook* case. In *Cook*, the plaintiff alleged that two corporations, Heck's and M & W, conspired with three employees, Isaacs, Darnall, and Harrick, to wrongfully terminate her employment under a unilateral contract created by her employee handbook. The *Cook* Court upheld a directed verdict on civil conspiracy in favor of the defendants finding there "clearly was sufficient evidence that Isaacs, Harrick and Darnall engaged in concerted action in deciding to fire Ms. Cook"; however, the only wrongful act alleged to be the purpose of the conspiracy was a breach of the alleged unilateral employment contract and there was "no evidence presented which showed that any of the defendants in deciding to terminate [Ms. Cook] acted in any capacity other than an official one." *Id* at 375, 460. These are not the alleged facts in the present case. Ms. Sutphin alleges each of the Petitioners was acting in his/her own individual capacity for his/her own individual advantage, not solely in his/her official capacity for Lewis Chevrolet, when each breached his/her fiduciary duties. Moreover, even in *Cook*, the plaintiff was properly afforded an opportunity to develop the facts through discovery and trial before the circuit court determined the merits of her civil conspiracy claim.

This is precisely what Ms. Sutphin has alleged against the Petitioner, Ronald J. Hopkins, II, and the other Petitioners: Each stopped acting in his/her official capacity for Lewis Chevrolet and started acting in his/her individual capacity for his/her individual advantage when Nancy Pat Lewis Smith died; when their father/father-in-law, Defendant A. David Abrams, Jr., gained complete control of the Dealership as Trustee of the Nancy Pat Lewis Smith Heirs Trust; and when they subsequently decided to ignore corporate formalities and ignore the actual owners/ shareholders of Lewis Chevrolet in favor of paying themselves increasing salaries, bonuses, and benefits while paying the owners/shareholders nothing.

The Petitioner glosses over his close familial connections to officers and directors of Lewis Chevrolet by making his clever argument and ignoring half the *Cook* holding. He is clearly more than a mere employee of Lewis Chevrolet with limited decision-making authority. He is the general manager of Lewis Chevrolet and also one of four immediate family members – along with his wife, father-in-law, and sister-in-law – who control the company. Regardless of whether an employee can conspire with his/her employer, the Petitioner can certainly conspire with his wife, father-in-law, and sister-in-law to keep all the benefits of owning Lewis Chevrolet away from the actual owners and for themselves. These are necessarily actions in his individual capacity, not his official capacity, taken to advance his individual interests, not those of Lewis Chevrolet or its owners/shareholders. Thus, even under *Cook*, they are actionable as part of a civil conspiracy under West Virginia law. Again, the Intermediate Court of Appeals was entirely correct in determining that this issue should be fully developed through discovery so this case may be decided on its merits at trial.

D. The Respondent's Second Amended Complaint States A Claim For Civil Conspiracy Against The Petitioner Under Proper Application Of The Rule 12(b)(6) Standard.

Setting aside the Petitioner's failed technical arguments about legal duty and agency, the crux of the Petitioner's argument is his mistaken view that Ms. Sutphin has not pled *sufficient* facts to establish that he conspired with his wife, father-in-law, and sister-in-law to keep all benefits from Lewis Chevrolet for themselves. Petitioner's Brief, pg. 21. This argument is entirely self-serving because the Petitioner well knows Ms. Sutphin has not been able to develop facts through appropriate discovery. More to the point, this self-serving argument ignores the actual Rule 12(b)(6) standard. Ms. Sutphin is required to provide the Petitioner general notice of her claims, not meet some subjective standard for the sufficiency of evidence at the outset of the case.

"[T]he West Virginia Rules of Civil Procedure establish the principle that a plaintiff pleading a claim for relief need only give general notice as to the nature of his or her claim." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia*, 244 W. Va. 508, 521, 854 S.E.2d 870, 883 (2020). Thus, "when Rule 12(b)(6) is viewed in the context of [other parts of the West Virginia Rules of Civil Procedure] [t]he intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the [common law] codes permitted that served either to delay trial on the merits or prevent a party from having a trial because of mistakes in statement." *Id* (quoting Advisory Committee Report, October, 1955, Note to Rule 8(a)(2), 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1201 (3rd Ed. 2020)).

This is all the Petitioner really offers to dispute the Intermediate Court of Appeals' reversal of the Circuit Court's dismissal of Ms. Sutphin's civil conspiracy claim – "needless controversy"

over "mere form of statement" intended to "delay trial on the merits." The Intermediate Court of Appeals correctly and succinctly summarized the basis for Ms. Sutphin's claims in its Memorandum Decision as follows:

> Regarding [Petitioner Ronald J. Hopkins, II] the Complaint alleges that he remained employed at Lewis Chevrolet despite the company's negative or declining income, received benefits from his employment such as health insurance and travel expenses, and otherwise conspired with the other Respondents to retain all benefit from Lewis Chevrolet.

[0003] There is no genuine dispute about whether the Petitioner understands the general nature of Ms. Sutphin's claims. His own arguments demonstrate he fully understands her claims and the issues to be developed through discovery.

"When a Rule 12(b)(6) motion is made, the pleading party has no burden of proof. Rather, the burden is upon the moving party to prove that no legally cognizable claim for relief exists." *Gable v. Gable*, 245 W. Va. 213, 221, 858 S.E.2d 838, 846 (2021) (quoting *Mountaineer Fire*, 244 W. Va. at 520, 854 S.E.2d at 882.) "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co. Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). Contrary to this well-established standard, the Petitioner – much like the Circuit Court – insists Ms. Sutphin must bear the burden of articulating all the facts which support her claims before she has even been afforded an opportunity to conduct depositions in this case.[7] This reverses the burden at the motion

[7] At several points in their arguments, the Petitioners have suggested Ms. Sutphin should be able to provide more detail to support the allegations in her Second Amended Complaint because this case has been pending since 2017 or because she verified the allegations in her Second Amended Complaint "to the best of her knowledge information and belief" or because the Circuit Court granted her leave to amend her civil conspiracy claim. *See e.g.*, Resp. Brief, pg. 29, pg. 16 fn. 17 [0126, 0113]. The Petitioners even go so far as to suggest Ms. Sutphin "already stated that she has conducted sufficient discovery to identify her claims" and "[n]o additional discovery will uncover evidence that does not exist to resurrect her dismissed claims." *See* Resp. Brief, pg. 29 and pg. 3 [0126, 0100]. Of course, these self-serving arguments are beside

to dismiss stage. The Petitioner cannot meet *his* burden of demonstrating that "no legally cognizable claim for relief exists" simply by refusing to recognize, or pretending he does not understand, the plain facts and obvious inferences from those facts pled in Ms. Sutphin's Second Amended Complaint and recognized by the Intermediate Court of Appeals. Because the Petitioner cannot meet *his* burden, the Intermediate Court of Appeals was entirely correct in its application of the Rule 12(b)(6) standard and its decision to reverse the Circuit Court's erroneous dismissal of Ms. Sutphin's civil conspiracy claim against the Petitioner.

II. THE INTERMEDIATE COURT OF APPEALS CORRECTLY REVERSED THE CIRCUIT COURT'S ERRONEOUS RULE 12(b)(6) DISMISSAL OF THE RESPONDENT'S COMMON LAW CLAIMS AGAINST THE PETITIONERS TO ALLOW DEVELOPMENT OF THE RECORD THROUGH DISCOVERY.

The Petitioners, Rachel L. Abrams Hopkins and Sarah A. Abrams, dispute the Intermediate Court of Appeals' decision to reverse the Circuit Court's Rule 12(b)(6) dismissal of the Respondent, Mary Charles Sutphin's, common law claims for conversion, negligence, unjust enrichment, and constructive trust because they believe these common law, "individual capacity" claims duplicate Ms. Sutphin's statutory, "official capacity" claims and they believe the allegations in Ms. Sutphin's Second Amended Complaint are not sufficient for either type of claims. Both arguments fail as a matter of well-established West Virginia law and proper application of the Rule 12(b)(6) standard.

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the point. The West Virginia Rules of Civil Procedure do not hold Ms. Sutphin to a heightened pleading standard at the motion to dismiss stage just because she has obtained some document production from the Petitioners/Defendants. While making these arguments, the Petitioners are well aware that it took Ms. Sutphin five years of litigation just to obtain the basic document production which allowed her to file her Second Amended Complaint. The Petitioners are also well aware that they filed a Motion to Stay Discovery in July 2022 to prevent Ms. Sutphin from taking depositions before the Circuit Court ruled on their motions to dismiss. And, thus, even after nearly six years of litigation, Ms. Sutphin was not able to depose any of the Petitioners/Defendants before the Circuit Court ruled on their motions to dismiss; this in a case which will turn largely on the Petitioners'/Defendants' justifications for their actions in managing Lewis Chevrolet because they admittedly failed to keep appropriate corporate records and failed to share information with shareholders.

A. West Virginia Law Not Only Permits, But Actually Requires, The Respondent To Assert Her Claims For Conversion, Negligence, Unjust Enrichment, And Constructive Trust Along With Her Claims For Violation of Statute, Oppressive Conduct, Breach of Fiduciary Duties, And Corporate Waste As Part Of Her Second Amended Complaint Against The Petitioners.

Rule 8(e)(2) of the West Virginia Rules of Civil Procedure states:

> A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. **A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.** All statements shall be made subject to the obligations set forth in Rule 11.

W. Va. R. Civ. P. 8(e)(2) (emphasis added). "This rule gives parties considerable latitude in framing their pleadings, and expressly permits claims or defenses to be pled alternatively or hypothetically regardless of consistency." *Arnold Agency v. W. Virginia Lottery Comm'n*, 206 W. Va. 583, 595, 526 S.E.2d 814, 826 (1999). Such "considerable latitude" is entirely consistent with the stated purpose of the West Virginia Rules of Civil Procedure generally and Rule 8 specifically. *See* W. Va. R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); s*ee also* W. Va. R. Civ. P. 18(a) ("A party asserting a claim to relief as an original claim, counterclaim, crossclaim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as the party has against an opposing party."). More importantly, this rule specifically allows a party to "state as many separate claims … as the party has" regardless of the basis for those claims.

In light of Rule 8(e)(2), and its underlying policy, there is nothing novel or improper about a plaintiff asserting multiple causes of action arising from the same set of facts and injuries. Indeed, a plaintiff may be barred by the doctrine of *res judicata* or claim preclusion from asserting

viable causes of action if she fails to assert them all in one proceeding. "Res judicata or claim preclusion bars a party from suing on a claim that has already been litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 560, 803 S.E.2d 519, 530 (2017) citing *State ex rel. Small v. Clawges*, 231 W. Va. at 311, 745 S.E.2d at 202 (*quoting Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 210 (4th Cir. 2009)). If a plaintiff were not permitted to assert multiple causes of action arising from the same set of facts and injuries, she would be required to determine from the outset of her case, before any discovery was available, which causes of action are likely to be the most successful. This is certainly not required by the West Virginia Rules of Civil Procedure or West Virginia law, both of which allow a plaintiff "considerable latitude" to ensure "substantial justice" and a resolution of cases on their merits.

As recently as April 2024, this Honorable Court considered, and upheld, a case in which the plaintiff asserted multiple causes of action arising from the same set of facts and injuries. In *Council for Educ. Travel United States of Am., Inc. v. M.S.*, No. 22-928, 2024 WL 1577448, at *2 (W. Va. Apr. 11, 2024), this Court considered a lawsuit filed by a foreign exchange student against a member of her host family who had been secretly recording her and the company that coordinated her exchange program. In her complaint, she asserted causes of action for negligence and intentional infliction of emotional distress, along with violation of the West Virginia Wiretapping and Electronic Surveillance Act (W. Va. Code §§ 62-1D-1 to 16), based upon the defendants' allegedly wrongful conduct. This Court affirmed the circuit court's decision that an arbitration provision was unenforceable and allowed each of the plaintiff's multiple causes of action to proceed to trial.

Ms. Sutphin's case is no different. She has asserted statutory claims for violations of the West Virginia Business Corporation Act (W. Va. Code §31D-1-101, *et seq*.), along with common law claims for breach of fiduciary duty, conversion, negligence, unjust enrichment, and constructive trust, based upon the Petitioners' exclusionary control of Lewis Chevrolet and illegal decisions to ignore corporate formalities and ignore the actual owners/shareholders of Lewis Chevrolet in favor of paying themselves increasing salaries, bonuses, and benefits while paying the owners/shareholders nothing. There is no reason Ms. Sutphin should be precluded from asserting each of these causes of action in her Second Amended Complaint or presenting each of these causes of action at trial.[8] Rule 8(e)(2) allows her to assert "as many separate claims or defenses as [she] has regardless of consistency and whether based on legal or on equitable grounds or on both" while the doctrine of *res judicata* requires her to assert these claims in the pending action or risk waiving them.

In an effort to avoid these pleading requirements, and artificially narrow Ms. Sutphin's claims, the Petitioners conjure a distinction between Ms. Sutphin's "official-capacity" claims and her "individual-capacity" claims. This is really a distinction without a difference.[9] The Petitioners correctly recognize that "[a]ll Ms. Sutphin's claims against [them] are based on allegations that

[8] If there were any question about the propriety of a plaintiff asserting multiple causes of action arising from the same set of facts and injuries, this Honorable Court may reference *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 491, 457 S.E.2d 152, 168 (1995), holding modified by *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 491 S.E.2d 1 (1996), where it discussed three expansions to the general rule that special verdicts and/or special interrogatories are within the discretion of the circuit court, the second expansion being "cases involving multiple causes of action where at least one of the causes of action is not supported by sufficient evidence to make it a legitimate jury issue." *Id*. The *Barefoot* case demonstrates that it is not only proper for a plaintiff to plead multiple causes of action based upon the same set of facts and injuries, but it is also proper for a jury to consider those multiple causes of action as part of a special verdict or special interrogatory.

[9] Under Rule 9(a) of the West Virginia Rules of Civil Procedure, it is not even necessary for Ms. Sutphin to "aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party." W. Va. R. Civ. P. 9(a).

they used their director and officer roles in the family business to their own benefit, violating fiduciary duties imposed by statute and common law on directors and officers." Petitioners' Brief, pg. 16. These wrongful actions give rise to multiple statutory and common law claims under West Virginia law regardless of whether they arise from the Petitioners' actions as officers, directors, general managers, employees, or simply as individuals. Ultimately, the Petitioners are liable to Ms. Sutphin for acting in their individual capacities for their own individual advantage instead of faithfully adhering to the fiduciary duties imposed by their official capacities as officers and directors of Lewis Chevrolet.

The Petitioners also attempt to avoid West Virginia's pleading requirements by citing inapposite cases from foreign jurisdictions for the overgeneralized proposition that a court must dismiss "duplicative" claims. Petitioners' Brief, pp. 25-26. For instance, the Petitioners cite *Hall v. Fiat Chrysler Am. US LLC*, No. SACV2100762CJCDFMX, 2022 WL 17885693, at *3 (C.D. Cal. Oct. 24, 2022), where a California court found a plaintiff's claim for breach of warranty was duplicative of his claim for breach of contract because both claims arose solely from the defendant's failure to perform its obligation to provide repairs under a service contract. Ms. Sutphin's various statutory and common law claims cannot be equated with an overlapping breach of contract/warranty claim. The Petitioners also pluck language from a District of Columbia case, *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 81 (D.D.C. 2010), to suggest that "[a]s a matter of judicial economy, courts should dismiss claims that are duplicative of other claims." However, the Petitioners fail to acknowledge the remainder of the Court's statement: When "two claims are not sufficiently identical, they are not duplicative." *Id*. The *Wultz* Court explained that, to be sufficiently identical, duplicative claims "stem from identical allegations, that are decided under identical legal standards, and for which identical relief is available." *Id*. Try as they might,

the Petitioners cannot establish that Ms. Sutphin's statutory claims for violations of the West Virginia Business Corporation Act (W. Va. Code §31D-1-101, et seq.) will be decided under the same legal standards as common law claims for breach of fiduciary duty, conversion, negligence, unjust enrichment, and constructive trust. Each is a distinctive legal claim with its own legal standard. Moreover, the relief for violations of these various claims can be different and ranges from removal of directors to dissolution of the corporation to monetary damages. The Petitioners' strained attempt to distinguish between "alternative" and "duplicative" claims fails for each of these reasons.

Given that Rule 8(e)(2) allows a party to "state as many separate claims … as the party has" regardless of the basis for those claims and affords a party "considerable latitude in framing [her] pleadings," there is no question that the Intermediate Court of Appeals properly allowed Ms. Sutphin to assert multiple claims against the Petitioners by reversing the Circuit Court and reinstating her common law claims for conversion, negligence, unjust enrichment, and constructive trust.

B. Multiple West Virginia Cases Recognize That An Individual Shareholder May Assert Multiple Causes Of Action To Recover Damages Directly From Individual Corporate Officers And Directors Under Both Statutory And Common Law Theories.

The Petitioners correctly recognize that "[a]ll Ms. Sutphin's claims against [them] are based on allegations that they used their director and officer roles in the family business to their own benefit, violating fiduciary duties imposed by statute and common law on directors and officers." Petitioners' Brief, pg. 16. However, they incorrectly argue that Ms. Sutphin cannot assert both common law and statutory claims against them. These arguments ignore at least three similar West Virginia cases which have allowed a plaintiff to assert common law tort claims along

with statutory corporate law claims against individual defendants who have breached various fiduciary duties in comparable corporate disputes.

In *Masinter v. WEBCO Co.*, 164 W. Va. 241, 262 S.E.2d 433 (1980), the Supreme Court of Appeals held that, in a suit by a minority shareholder against majority shareholders for oppressive conduct, "**a dissolution statute does not provide the exclusive remedy for injured shareholders** and that the courts have equitable powers to fashion appropriate remedies where the majority shareholders have breached their fiduciary duty to the minority by engaging in oppressive conduct." *Id* at 250, 439–40 (emphasis added). Much like the Petitioners' conduct toward Ms. Sutphin in the present case, the oppressive conduct alleged in *Masinter* consisted of the majority shareholders depriving the minority shareholder, "without any legitimate business purpose, of any benefit from his ownership and investment in a corporation." *Id* at 251, 440-41. The *Masinter* Court recognized that "[f]iduciary duties increasingly can be enforced as direct suits brought by individual shareholders, particularly in closely held firms" and "[j]udicial authority exists in half of the states authorizing such direct suits and is sometimes provided by statute …." *Id.*[10] The *Masinter* Court further recognized that there are various forms of relief for oppressive conduct, other than dissolution, in a direct action brought by a shareholder for oppressive conduct. *Id* at 441-42. Specifically, the *Masinter* Court held that the minority shareholder's relief was not limited to dissolution of the company, but also included damages from the individual majority

[10] Indeed, West Virginia Code § 31D-8-831 (standards for liability for directors) recognizes a direct claim by an individual shareholder against her corporation's directors as follows: "A director is not liable to the corporation **or its shareholders** for any decision to take or not to take action, or any failure to take any action, as a director, **unless the party asserting liability** in a proceeding establishes that: …." W. Va. Code § 31D-8-831(a) (emphasis added).

shareholders for breaching their fiduciary duties. *Id* at 245-247, 437-438.[11] Ms. Sutphin makes essentially the same claims in this case.

In *Avon Hill Farms, Inc. v. Keesecker*, No. 13-0977, 2014 WL 2682036 (W. Va. June 13, 2014), minority shareholders in a closely held corporation sued the corporation and the majority shareholder "alleging fraud, conversion, and breach of fiduciary duty by [the majority shareholder]." *Id*. The circuit court reviewed various transactions undertaken by the majority shareholder and concluded those transactions were not:

> authorized, agreed to, or were otherwise in the best interests of [the corporation] or the minority shareholders[;]" that "[the majority shareholder] used the [the corporation] assets as his own to the great detriment of the minority shareholders [;]" and that "[the majority shareholder]'s fraud and conversion [were] carried out in a willful, wanton[,] and reckless manner which also breached his fiduciary obligations to the minority shareholders and constitute[d] an improper conversion of property.

Id at 2. Additionally, the circuit court found that "the fraud perpetrated upon the minority shareholders of [the corporation] significantly devalued th[e] shares[.]" *Id*. Based upon these findings, the minority shareholders were "entitled to damages, including attorney's fees, pursuant to West Virginia Code § 31D-16-1604." *Id*. The Supreme Court of Appeals affirmed the circuit court's ruling. *Id* at 5. Ms. Sutphin makes similar claims in this case.

Finally, in *Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 814 S.E.2d 205 (2018), a minority shareholder sued the corporation and the majority shareholders for breach of contract, breach of fiduciary duties, and fraud against a shareholder. *Id* (distinguished on other grounds in

[11] Since at least 1942, the Supreme Court of Appeals has clearly stated that "[t]he officers and directors of a corporation who appropriate to themselves, **their families** and business associates the assets thereof are guilty of 'fraud' in law and are jointly and severally liable to the corporation and its stockholders for the profits derived by them, **their families** and associates from such appropriation." Syllabus, *Chounis v. Laing*, 125 W. Va. 275, 275, 23 S.E.2d 628, 628 (1942).

Dan's Car World, LLC v. Delaney, 2022 WL 1055447 at 7 (W. Va. 2022)). After a jury verdict in favor of the minority shareholder on his claims for breach of contract and breach of fiduciary duty, the majority shareholders appealed. On appeal, the majority shareholders argued that the minority shareholder lacked standing to assert statutory and common law claims. The *Tri-State* Court recognized that no authority exists to support the majority shareholders' argument that "a plaintiff may use a factual allegation to support only one theory of liability." *Id* at 219, 556. It underscored this point by acknowledging that *Masinter*, supra, recognized "that a minority shareholder may pursue a breach of fiduciary duty claim against majority shareholders directly, that the minority shareholder [is] not confined to a derivative suit, and that, '[i]n a given case, it is possible that both causes of action may be utilized.'" *Id* at 556, 219 citing *Masinter* at 255, 442. Again, Ms. Sutphin makes essentially the same claims in this case.[12]

In light of the common law and statutory claims against individual defendants approved in Masinter, Avon Hill, and *Tri-State*, the Petitioners cannot credibly argue – without any supporting legal authority – that there is no set of facts upon which Ms. Sutphin's common law tort claims

[12] Throughout their Brief, and indeed throughout most of their pleadings, Petitioners make much of the fact that Ms. Sutphin has brought claims solely for herself instead of bringing a derivative action on behalf of Lewis Chevrolet. *See e.g.*, Petitioners' Brief, pp. 1-2. These impertinent arguments ignore the *Tri-State* Court's explicit statement **only six years ago** that it agrees with the observation of the Supreme Court of Ohio which stated:

> [I]f we require a minority shareholder in a close corporation, who alleges that the majority shareholders breached their fiduciary duty to him, to institute [a derivative action], then any recovery would accrue to the corporation and remain under the control of the very parties who are defendants in the litigation. Thus, a derivative remedy is not an effective remedy because the wrongdoers would be the principal beneficiaries of the recovery.

Id citing *Crosby v. Beam*, 47 Ohio St.3d 105, 548 N.E.2d 217, 221 (Oh. 1989); *see also Dowling v. Narragansett Cap. Corp.*, 735 F.Supp. 1105, 1113–14 (D.R.I. 1990) (minority shareholder could bring direct action; to require him to bring suit on behalf of corporation would benefit controlling shareholders, which is "an absurd result"). The *Tri-State* Court continued by observing that "[a] regularly cited treatise has similarly commented that the 'derivative/direct distinction makes little sense when the only interested parties are two individuals or sets of shareholders, one who is in control and the other who is not.'" *Id* (citations omitted).

could entitle her to relief. Ms. Sutphin's common law tort claims have clear support in her Second Amended Complaint and in West Virginia law. Therefore, the Intermediate Court of Appeals was entirely correct in determining that Ms. Sutphin's common law tort claims should be fully developed through discovery so this case may be decided on its merits at trial.

C. The Respondent's Second Amended Complaint States Common Law Claims Against the Petitioners Under Proper Application Of The Rule 12(B)(6) Standard.

Setting aside the Petitioners' strawman argument regarding "individual capacity" versus "official capacity" claims and the Petitioners' semantics regarding "alternative" versus "duplicative" claims, the crux of the Petitioners' argument is again their mistaken view that Ms. Sutphin has not pled *sufficient* facts to establish they were guilty of conversion, negligence, and unjust enrichment when they conspired with their immediate family members to keep all benefits from Lewis Chevrolet for themselves. Petitioner's Brief, pg. 28. This self-serving argument ignores the actual Rule 12(b)(6) standard. As discussed above, Ms. Sutphin is required to provide the Petitioners general notice of her claims, not meet some subjective standard for the sufficiency of evidence at the outset of the case.

As with Ms. Sutphin's civil conspiracy claim, all the Petitioners really offer to dispute the Intermediate Court of Appeals' reversal of the Circuit Court's dismissal of Ms. Sutphin's conversion, negligence, unjust enrichment, and constructive trust claims is "needless controversy" over "mere form of statement" intended to "delay trial on the merits." The Intermediate Court of Appeals correctly and succinctly summarized the basis for Ms. Sutphin's conversion, negligence, unjust enrichment, and constructive trust claims in its Memorandum Decision as follows:

> In regard to Rachel, the Complaint alleges that she signed for the adoption of corporate bylaws as the corporate secretary when she was not the secretary, failed to keep corporate minutes or any documentation authorizing her corporate actions, borrowed money from the Estate [of Nancy Pat Lewis Smith], executed a loan on

> behalf of Lewis Chevrolet, received salary and benefits from Lewis Chevrolet, entered Lewis Chevrolet into a Management Fee Administration Agreement whereby she received 100% of the fee generated, purchased property from the Estate, and otherwise conspired with the other [Petitioners] to retain all benefit from Lewis Chevrolet. Regarding Sarah, the Complaint alleges that she certified corporate bylaws that are not valid, failed to keep corporate minutes or any documentation that authorized her corporate actions, received benefits from her employment and otherwise conspired with the other [Petitioners] to retain all benefit from Lewis Chevrolet.

[0003] There is no genuine dispute about whether the Petitioners understand the general nature of Ms. Sutphin's claims. Their recognition that "[a]ll Ms. Sutphin's claims against [them] are based on allegations that they used their director and officer roles in the family business to their own benefit, violating fiduciary duties imposed by statute and common law on directors and officers" demonstrates they fully understand her claims and the issues to be developed through discovery. Petitioners' Brief, pg. 16.

Contrary to well-established Rule 12(b)(6) standards, the Petitioners – much like the Circuit Court – insist Ms. Sutphin must bear the burden of articulating all the facts which support her claims before she has even been afforded an opportunity to conduct depositions in this case. Again, this reverses the burden at the motion to dismiss stage. The Petitioners cannot meet *their* burden of demonstrating that "no legally cognizable claim for relief exists" simply by refusing to recognize, or pretending they do not understand, the plain facts and obvious inferences from those facts pled in Ms. Sutphin's Second Amended Complaint and recognized by the Intermediate Court of Appeals. Because the Petitioners cannot meet *their* burden, the Intermediate Court of Appeals was entirely correct in its application of the Rule 12(b)(6) standard and its decision to reverse the Circuit Court's erroneous dismissal of Ms. Sutphin's Ms. Sutphin's conversion, negligence, unjust enrichment, and constructive trust claims against the Petitioners.

III. THE INTERMEDIATE COURT OF APPEALS PROPERLY CONSIDERED THE RESPONDENT'S APPEAL BECAUSE THE CIRCUIT COURT'S DISMISSAL ORDER APPROXIMATED A FINAL ORDER IN ITS NATURE AND EFFECT.

In footnote #7 and footnote #11 of their Brief, the Petitioners suggest the Intermediate Court of Appeals lacked jurisdiction to reverse the Circuit Court's erroneous dismissal of Ms. Sutphin's claims because the Circuit Court did not dismiss all of her claims, did not direct a final judgment, and did not include "no just reason for delay" Rule 54(b) language in its dismissal order; thus, its September 28, 2022 Order was interlocutory, not final. Petitioners' Brief, pp. 10-11 and pp. 24-25. To the extent this Honorable Court may consider the Petitioners' footnotes to be another assignment of error, even though the Petitioners never raised this issue before the Intermediate Court of Appeals, Ms. Sutphin will address it here.

First, the Petitioners' new argument ignores the plain language of the Circuit Court's dismissal order. In its September 28, 2022 Order, the Circuit Court dismissed Ms. Sutphin's claims against the Petitioner Ronald J. Hopkins, II "with prejudice" and specifically noted that "this dismissal is intended to be a final ruling by the Court on all matters asserted against Mr. Hopkins." [0477] The Circuit Court likewise dismissed Ms. Sutphin's common law claims against the Petitioners Rachel L. Abrams Hopkins and Sarah A. Abrams "with prejudice." [0477]

Second, the Petitioners' new argument also ignores the circumstances of the Circuit Court's dismissal order. The Circuit Court entered its September 28, 2022 Order and dismissed multiple claims "with prejudice" even though the Petitioners never sought a dismissal with prejudice; there was no discussion of a dismissal with prejudice during the July 29, 2022 hearing; and Ms. Sutphin demonstrated the need for discovery to meet the Court's erroneous pleading standard and amend her Complaint to support her allegations.

Finally, the Petitioners' new argument ignores basic West Virginia law concerning the finality of orders. "The key to determining if an order is final is not whether the language from

Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature and effect." Syllabus Point #1, in part, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995). This rule extends to dismissal orders under Rule 12(b)(6). *Id.*

In this case, the Circuit Court took the extraordinary step of dismissing Ms. Sutphin's claims "with prejudice" before discovery was completed, even though this was not necessary or appropriate. See *Belcher v. Greer*, 181 W. Va. 196, 198, 382 S.E.2d 33, 35 (1989) ("Nothing in Rule 41, W. Va. R. Civ. P., implies, however, that a judge *must* dismiss an action with prejudice if justice and the nature of the cause do not so require.") And, it took the extraordinary step of specifically noting that "this dismissal is intended to be a final ruling by the Court on all matters asserted against Mr. Hopkins." [0477] Given these extraordinary rulings, the Circuit Court's dismissal order "approximate[d] a final order in its nature and effect" as to Ms. Sutphin's civil conspiracy and other common law claims. Therefore, it was entirely appropriate for the Intermediate Court of Appeals to consider Ms. Sutphin's appeal and entirely correct for the Intermediate Court of Appeals to reverse the Circuit Court's erroneous decisions.

CONCLUSION

"A circuit court weighing the sufficiency of a complaint should view the motion to dismiss with disfavor, should presume that all of the plaintiff's factual allegations are true, and should construe those facts and the inferences arising from those facts in the light most favorable to the plaintiff." *Gable*, 245 W. Va. at 221, 858 S.E.2d at 846; see also *Collia v. McJunkin*, 178 W. Va. 158, 160, 358 S.E.2d 242, 244 (1987) ("Motions to Dismiss are generally viewed with disfavor because the complaint is to be construed in the light most favorable to the plaintiff and its allegations are to be taken as true."). "[T]o survive a motion under Rule 12(b)(6), a pleading need only outline the alleged occurrence which (if later proven to be a recognized legal or equitable

claim), would justify some form of relief." *Mountaineer Fire*, 244 W. Va. at 521, 854 S.E.2d at 883. Stated differently, "a complaint need only provide the who, what, where, and when of a problem, so that the responding party can formulate a response and the court can begin to decide how to remedy that problem." *Id* at fn 5.

There is no genuine dispute that Ms. Sutphin's Second Amended Complaint provides the "who, what, where, and when" of the problem (i.e. the Petitioners' violations of the West Virginia Business Corporation Act, breach of fiduciary duties, corporate waste, conversion, negligence, unjust enrichment, and civil conspiracy claims). Rather than acknowledge this, the Petitioners pretend they do not understand Ms. Sutphin's claims because she cannot provide all the details yet. They insist Ms. Sutphin should be denied any opportunity to learn those details though discovery. This insistence stands contrary to basic pleading and Rule 12(b)(6) standards. It also flies in the face of the well-established purpose of discovery.[13]

A motion to dismiss should be granted *only* where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). In fact, this Honorable Court recently recognized that:

> **dismissal under Rule 12(b)(6) is not warranted merely because the pleading fails to state all of the elements of the particular legal theory advanced**; instead, the circuit court should examine the allegations as a whole to determine whether they call for relief on any possible theory. Moreover, **a party is not required to establish a *prima facie* case at the pleading stage.**

[13] "[A] party is not required to establish a *prima facie* case at the pleading stage. 'Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case. Given that the *prima facie* case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard[.]'" *Mountaineer Fire*, 244 W. Va. at 522, 854 S.E.2d at 884 (citing *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)). "Accordingly, [the West Virginia Rules of Civil Procedure], like the Federal Rules of Civil Procedure, 'do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.'" *Id* (citing *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11, 135 S.Ct. 346, 190 L.Ed.2d 309 (2014)).

Mountaineer Fire, 244 W. Va. at 522, 854 S.E.2d at 884 (emphasis added). Throughout their Briefs, the Petitioners insist Ms. Sutphin must meet some heightened pleading standard which provides them specific details to avoid Rule 12(b)(6) dismissal (e.g. "facts that, if proven, would support validly stated legal claims"). This is clearly not the pleading standard or the Rule 12(b)(6) standard under West Virginia law.[14] In fact, Ms. Sutphin provided significant detail in her 279-paragraph Second Amended Complaint – more than enough to demonstrate relief could be granted to her under multiple sets of facts that could be proved consistent with her allegations – before she was even permitted to depose any of the Petitioners. This is particularly true when considering that Ms. Sutphin is not even required to establish a *prima facie* case at the preliminary pleading stage of the proceedings.

During the July 29, 2022 hearing on motions to dismiss in this case, the Circuit Court recognized the need for discovery on basic, general allegations in a complaint as follows:

> THE COURT: […] [W]ould you not agree that the Defendant [Mr. Abrams] should be allowed to at least have discovery as to whether or not your client thinks they can prove those statements were made to third parties? [0448]

The Circuit Court then recognized that, under notice-pleading standards, a pleader is not required to state all of the details before she is afforded an opportunity to conduct discovery to survive a Rule 12(b)(6) motion to dismiss: "[T]here is sufficient notice pleading as to the allegations of what form of libel and slander the Defendant, Mr. Abrams, has alleged to have been taken or occurred based upon the actions of Plaintiff. The Court does not believe that the counterclaim would be required to go into great detail with regard to the specific items." [0457] The same must also be true of Ms. Sutphin's Second Amended Complaint; it is not "required to go into great detail with

[14] It is telling that the Petitioners do not address this Honorable Court's recent explanations of the Rule 12(b)(6) standards in *Mountaineer Fire* or *Gable* at any point in their Briefs.

regard to the specific items" under this Honorable Court's most recent interpretations of Rule 12(b)(6) and the Circuit Court's own application of those standards. The Intermediate Court of Appeals correctly applied the Rule 12(b)(6) standard; appropriately recognized that Ms. Sutphin is entitled to the same opportunity to conduct discovery and advance her claims as Mr. Abrams; and correctly reversed the Circuit Court's dismissal of Ms. Sutphin's claims.

WHEREFORE the Respondent, Mary C. Sutphin, by counsel, respectfully requests this Honorable Court to affirm all rulings contained in the Intermediate Court of Appeals' March 25, 2024 Memorandum Decision; remand this case to the Circuit Court with instructions to allow her full discovery on all claims set forth in her Second Amended Complaint; remand this case to the Circuit Court with instructions to allow her to amend her Second Amended Complaint as necessary to present the merits of all claims which become apparent through discovery; and grant her such other relief as the Court shall deem just and proper.

DATED the 28th day of October 2024.

RESPONDENT
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CERTIFICATE OF SERVICE

I certify that I served the foregoing RESPONDENT'S BRIEF upon on the below-named individuals on the **28th day of October 2024** by e-filing the same through the File & Serve*Xpress* electronic filing system for appeals:

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