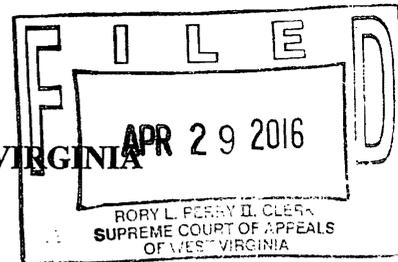


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 16-0346



STATE OF WEST VIRGINIA EX REL. JOHN VEARD,
VEARD-MASONTOWN LIMITED PARTNERSHIP, AND
UNITED PROPERTY MANAGEMENT COMPANY,

Petitioners

vs.

THE HONORABLE LAWRANCE S. MILLER,
JUDGE OF THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA,
AND ARTHUR J. SUMMERS,

Respondents.

**RESPONDENT ARTHUR J. SUMMERS' VERIFIED BRIEF IN RESPONSE TO
PETITIONERS' VERIFIED PETITION FOR WRIT OF PROHIBITION**

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Respondent Arthur J. Summers (“Respondent Summers”) files this brief, by and through counsel, in response to the Verified Petition for Writ of Prohibition (“Petition”) filed with this Court on April 7, 2016 by Jon Veard, Veard-Masontown Limited Partnership (“VMLP”), and United Property Management Company (“UPMC”) (collectively “Petitioners”) against Respondent Summers and the Honorable Lawrance S. Miller, Jr. (“Respondents”). Respondent Summers requests that this Honorable Court deny the Petitioners’ prayer for relief for the reasons contained herein.

I. STATEMENT OF THE CASE

This case is about an employee, Respondent Summers, who was terminated by one or more Ohio entities who do business in this State without going through the usual formalities of registering with the office of our Secretary of State. Respondent Summers’ employment with these entities included compensation in the form of housing at Plum Hill Terrace Apartments. When Respondent Summers’ employment was terminated, he was at the same time sued in the Preston County Magistrate Court by Plum Hill Terrace Apartments for eviction. He filed a counterclaim for a portion of his unpaid wages, as suing for all of his wages would have exceeded the \$5,000 jurisdictional limit of Magistrate Court. The presiding Magistrate found against him, without explanation. Mr. Summers appealed that ruling and — after retaining counsel and with permission from the Judge presiding over his Magistrate Court appeal — filed a new Civil Action in the Circuit Court of Preston County against proper legal parties, alleging categories of damages which could not have been properly presented in Magistrate Court. The central issue is whether Respondent Summers will be deprived of full justice simply because he “took the bait” by countersuing the non-entity that was presented to him in the Magistrate Court case caption; to the benefit of his savvy former employers (and the individual officer thereof) who were not parties to the underlying Magistrate Court case.

Aside from the above, the Respondent Summers generally agrees with the Petitioners' Statement of the Case subject to the exceptions noted in the following paragraphs.

The Petitioners state that on January 29, 2016, they filed their Motion to Dismiss "arguing that Plaintiff Summers' claims in the Circuit Court Action were barred as a matter of law by the doctrines of collateral estoppel, *res judicata*, and the precedent set by this Court in *Monongahela Power Company v. Starcher*, 174 W.Va. 593, 328 S.E.2d 200 (1985)." [Petition 5]. This is inaccurate and an overstatement of the arguments contained Petitioners' original Motion to Dismiss. The *only* basis relied on by the Petitioners in their Motion to Dismiss was the doctrine of collateral estoppel. In fact, the Petitioners went to great lengths to distinguish between the doctrines of collateral estoppel and *res judicata* in their Motion to Dismiss. ("Collateral estoppel varies slightly from the broader doctrine of *res judicata* [sic], which bars the re-litigation of *claims* previously decided . . . in an earlier action. Instead, collateral estoppel bars re-litigation of identical *issues*."; "As discussed in detail above, the doctrine of collateral estoppel is *issue preclusion*, as opposed to *claim preclusion*.) (Emphasis in original). [Quotes at App. 0020 and 0023. See generally App. 0015-0036]. It was only after Plaintiff Summers offered a response to their original Motion to Dismiss that the Petitioners cursorily, and arguably in contravention of the *West Virginia Rules of Civil Procedure*, first raised the doctrine of *res judicata* in support of their Motion to Dismiss. [App. 0067-0071]. The Petitioners now assert *res judicata* as a basis for this Court to enter a writ of prohibition, despite the fact that *res judicata* was not raised in their original Motion to Dismiss.

Petitioners represent to this Court that Plum Hill Terrace Apartments is the trade name for Veard-Masontown Limited Partnership ("VMLP"). There is no record of Plum Hill Terrace Apartments as a trade name registered with the Secretary of State for the State of West Virginia.

[App. 0045-0046]. Furthermore, VMLP is, effectively, a non-entity as it is not registered and is not in good standing with the Secretary of State for the State of West Virginia. [App. 0060-0062]. There is no record that it owns property in West Virginia. Likewise, United Property Management Company (“UPMC”) is not registered or in good standing with the Secretary of State for the State of West Virginia.

Petitioners also assert that Respondent Summers was afforded “a full adversarial hearing” in Magistrate Court with regard to his counterclaim for unpaid wages. Although it is true that a hearing was held on this issue, the extent and thoroughness of the hearing is unclear as Magistrate Snider’s Order simply indicates in regard to Respondent Summers’ crossclaim [sic] against Plum Hill Terrace that judgment was rendered in favor of Plum Hill Terrace. [App. 0053]. It is worth mentioning that there is no recording of this hearing or any other hearing on matters related to this issue. The exact nature of the hearings conducted, the facts considered and evidence presented therein, and procedures followed by Magistrate Snider in regard to Respondent Summers’ claim for unpaid wages are unknown. To assert that Respondent Summers was afforded “a full adversarial hearing” on this issue is simply speculation.

Petitioners also state in their Petition that the Circuit Court entered a Consolidation Order “[b]efore the Petitioners ever filed any responsive pleading in Plaintiff Summers’ new Circuit Court Action, or otherwise entered an appearance in the Circuit Court Action . . .” [Petition 4]. At the time the cases were consolidated, the Petitioners were represented by Ashley Williams of Sal Sellaro Thorn Culpepper Legal Group, PLLC. Ms. Williams represented and appeared on behalf of Plum Hill Terrace Apartments and the Defendants named in the new Circuit Court Action at the hearing on the consolidation matter. As evidence of this fact, counsel for Respondent Summers represents

to this Court that Judge Miller entered a Scheduling Conference Order on December 18, 2015, which noted Ashley Williams as Counsel for the Defendants named in the new Civil Action. Again, Petitioners' claim that the Circuit Court entered the Consolidation Order before the Defendants in the Circuit Court Action filed a responsive pleading or entered an appearance misstates the status of the Petitioners' legal representation at the time of the consolidation hearing.

II. SUMMARY OF ARGUMENT

The Petitioners assert that the entry of the Consolidation Order and Order Denying Petitioners' Motion to Dismiss are errors committed by the Circuit Court in this matter which warrant this Court's exercise of original jurisdiction to issue a writ of prohibition. The extraordinary nature of the relief requested by the Petitioners is not warranted, and a writ of prohibition should not issue for the reasons discussed herein.

This Court has stated “[p]rohibition . . . is an extraordinary remedy, the issuance of which is usually ‘reserved for really extraordinary causes.’” *State ex rel. Davidson v. Hoke*, 207 W.Va. 332, 335; 532 S.E.2d 50, 53 (W.Va. 2000). Furthermore, “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where a trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1.” Syl. pt. 1, *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. 776, 760 S.E.2d 590 (W.Va. 2014), citing Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (W.Va. 1977). As early as 1873, this Court has stated that “a mere error in the proceeding may be ground of appeal or review, but not of prohibition.” *State ex rel. W.Va. Nat’l Auto Ins. v. Bedell*, 223 W.Va. 222, 227, 672 S.E.2d 358, 363 (W.Va. 2008), (quoting Syl. pt. 3, in part, *Buskirk v. Judge of Circuit Court*, 7 W.Va. 91 (W.Va. 1873)).

The Petitioners argue that the Circuit Court’s decision to consolidate the Magistrate Court appeal and Civil Action filed in Circuit Court was “contrary to the great weight of the law of West Virginia and beyond the jurisdiction of the Circuit Court.” [Petition 6]. This is the first time that Petitioners have raised issue with the consolidation of these cases, and the Petition filed by the Petitioners was the first notice that Respondent Summers has received of this contention. In any event, Rule 42(b) of the *West Virginia Rules of Civil Procedure* provides that actions in different courts may be consolidated. Furthermore, Rule 81(a)(1) of the *West Virginia Rules of Civil Procedure* allows the *West Virginia Rules of Civil Procedure* to be applied to Magistrate Court appeals.¹ This Court has granted wide discretionary power to consolidate civil actions, and has stated that unless there is a clear showing of prejudice or abuse of discretion, the trial court’s decision to consolidate will not be reversed. *Holland v. Joyce*, 155 W. Va. 535, 185 S.E.2d 505 (W.Va. 1971).

This Court has stated, “The application of the doctrine of collateral estoppel is discretionary with the trial court and rests upon a number of factual predicates, therefore, a writ of prohibition will not issue on the basis that the trial court abused its discretion in failing to enforce collateral estoppel.” Syl. pt. 7, *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (W.Va. 1983). Additionally, this Court has stated that “even though the requirements of *res judicata* may be satisfied, we do not ‘rigidly enforce [this doctrine] where to do so would plainly defeat the ends of Justice.’” *Blake v. Charleston Area Med. Ctr.*, 201 W.Va. 469, 498 S.E.2d 41 (W.Va. 1997), (quoting *Gentry v. Farruggia*, 132 W.Va. 809, 811, 53 S.E. 2d 741,742 (W.Va. 1949)). The conditions of collateral estoppel, as set forth in *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (W.Va. 1995), have not been

¹ “When the appeal of a case has been granted or perfected, these rules apply . . .” Rule 81(a)(1) of the *West Virginia Rules of Civil Procedure*.

satisfied in this case. Even if this Court finds that the conditions of collateral estoppel have been established, compelling reasons exist to preclude its application in this case. Similarly, even if the requirements of *res judicata*, as set forth in *Blake*, have been met here (which they have not), invoking the doctrine to preclude Respondent Summers from proceeding in Circuit Court would plainly defeat the ends of justice and would lead to an unfair result. Furthermore, a writ of prohibition should not issue as there has only been, at most, an abuse of discretion by the Circuit Court Judge in this matter, and a writ of prohibition is not appropriate based on this Court's previous rulings.

Consolidation of the Magistrate Court appeal and Civil Action were appropriate under West Virginia law and were within the sound discretion of the Circuit Court. Furthermore, Judge Miller was presented with evidence and facts regarding Petitioners' assertion of collateral estoppel, and exercising his discretion, refused to grant the Petitioners' Motion to Dismiss. Even if the Circuit Court abused its discretion (which it did not), a writ of prohibition is not an appropriate remedy for this error. Even though the Petitioners did not raise *res judicata* as a basis for dismissal in their Motion to Dismiss, if the elements of the doctrine are satisfied (which they are not), the doctrine should not be invoked to prevent Respondent Summers from proceeding in Circuit Court. For reasons stated herein, the Circuit Court's decisions were not in error, and a writ of prohibition should not issue in this case.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent requests that the Court permit oral argument on these issues under Rule 19 of the *West Virginia Rules of Appellate Procedure* as the Petitioners assert that this case involves assignments of error in the application of settled law. Unless the Court determines that this case not

appropriate for oral argument under Rule 18(a) of the *West Virginia Rules of Appellate Procedure*, the Respondent welcomes the opportunity to argue these matters pursuant to Rule 19 of the *West Virginia Rules of Appellate Procedure*.

IV. ARGUMENT

A. **JUDGE MILLER’S ORDERS BELOW SHOULD STAND AND SHOULD NOT BE SUBJECT TO INTERLOCUTORY APPELLATE REVIEW BY WRIT OF PROHIBITION**

Judge Miller exercised appropriate jurisdiction and authority in consolidating the Magistrate Court appeal and new Civil Action filed by Respondent Summers in Circuit Court. Additionally, Judge Miller acted within the bounds of West Virginia law by exercising discretion in denying Petitioners’ Motion to Dismiss.

This Court has stated that “[p]rohibition . . . may not be used as a substitute for [a petition for appeal] or certiorari.” Syl. pt. 3, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (W.Va. 1996). Furthermore, this Court has stated that “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by the trial court.” Syl. pt. 1, *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. 776, 760 S.E.2d 590 (W.Va. 2014). Additionally, this Court has stated that it “will use prohibition in this discretionary way to correct **only** substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.” (Emphasis added). Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (W.Va. 1979).

If error exists at all in Judge Miller’s decisions, his consolidation of the Magistrate Court appeal and new Civil Action and decision to deny the Petitioners’ Motion to Dismiss involve nothing

more than simple abuses of discretion. Additionally, it is not clear that Judge Miller committed error in consolidating the Magistrate Court appeal and Civil Action, and denying the Petitioners' Motion to Dismiss. He was presented with evidence regarding the circumstances of this case, and exercising his discretion, consolidated the actions and later denied the Petitioners' Motion to Dismiss. The Petitioners can show no compelling reason as to why the errors asserted cannot be raised on appeal. The extraordinary nature of the remedy sought should not apply to the ordinary circumstances of this case. Therefore, Judge Miller's Orders should be allowed to stand, and a writ of prohibition should not issue.

B. THE MAGISTRATE COURT APPEAL AND THE CIRCUIT COURT ACTION WERE PROPERLY CONSOLIDATED

The Petitioners assert that Judge Miller's decision to consolidate the Magistrate Court appeal with the new Civil Action was erroneous and in contravention of West Virginia law. However, the *West Virginia Rules of Civil Procedure* and West Virginia case law clearly indicate that these matters could properly be consolidated.

Rule 42(b) of the *West Virginia Rules of Civil Procedure* provides in pertinent part:

When two or more actions arising out of the same transaction or occurrence are pending before different courts or before a court and a magistrate, the court in which the first such action was commenced shall order all the actions transferred to it or any other court in which any such action is pending. The court to which the actions are transferred may order a joint hearing or trial of any or all of the matters in issue in any of the actions; it may order all the actions consolidated; and it may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

This Court has interpreted Rule 42(b) of the *West Virginia Rules of Civil Procedure*, and has stated that “[a] trial court, pursuant to the provisions of R.C.P. 42, has a wide discretionary power to consolidate civil actions for joint hearing or trial and the action of a trial court in consolidating

civil actions for a joint hearing or trial will not be reversed in the absence of a clear showing of abuse of such discretion and in the absence of a clear showing of prejudice to any one or more of the parties to the civil actions which have been so consolidated.” Syl. pt. 1, *Holland v. Joyce*, 155 W. Va. 535, 185 S.E.2d 505 (W.Va. 1971).

It is worth noting that this is the first time Petitioners have raised issue with Judge Miller’s consolidation of these cases. Regardless, Petitioners have failed to show that Judge Miller abused his discretion in consolidating these two cases, or that the Petitioners would be substantially prejudiced by the consolidation of these matters. Even if Petitioners could show that Judge Miller abused his discretion or that substantial prejudice would result from the consolidation, according to this Court’s ruling in *State ex rel. Owners Ins. Co. v. McGraw*, 233 W.Va. 776, 760 S.E.2d 590 (W.Va. 2014), a writ of prohibition is not the proper remedy in this instance.

C. THE RESPONDENT JUDGE DID NOT ERR BY DENYING PETITIONERS’ MOTION TO DISMISS AND ALLOWING RESPONDENT SUMMERS TO FILE A NEW CIVIL ACTION IN CIRCUIT COURT FOR UNPAID WAGES, LIQUIDATED DAMAGES, AND WRONGFUL TERMINATION

The Circuit Court’s decision to deny the Petitioners’ Motion to Dismiss does not constitute a clear legal error for several reasons: (1) the Respondent Judge was well within his discretion in denying the Petitioners’ Motion to Dismiss, and his ruling was not in violation of this Court’s holding in *Monongahela Power Company v. Starcher*, 174 W.Va. 593, 328 S.E.2d 200 (1985); (2) the claims asserted by Respondent Summers in Counts I and II of his Complaint in the Circuit Court action are not barred by the doctrines of *res judicata* and collateral estoppel as the requirements for each are not met, and assuming *arguendo*, that they are met, application of the doctrines would be in contravention of the notions of justice and compelling reasons exist to preclude their application

in this case; and (3) the findings made by the Circuit Court are not clearly erroneous under West Virginia law.

1. Allowing Respondent Summers to pursue claims for unpaid wages in Counts I and II of his Complaint in the Circuit Court is not in violation of this Court's holding in *Monongahela Power Company v. Starcher*

The Petitioners have asserted that the Circuit Court's Order denying their Motion to Dismiss is in clear contravention of this Court's ruling in *Monongahela Power Company v. Starcher*, 174 W.Va. 593, 328 S.E.2d 200 (1985). The Petitioners assert that this Court should be bound by the same reasoning found in *Monongahela Power*; however, they fail to recognize the significant factual and legal differences between the instant case and *Monongahela Power*.

Factually, *Monongahela Power* seems similar to the instant case; however, upon closer examination, it is clear that the two are substantially different. One of the most notable differences between *Monongahela Power* and the instant case is that the Magistrate Court action brought by the Plaintiffs in *Monongahela Power* was brought against Monongahela Power—a proper party and legal entity, which was presumably registered and in good standing with the Secretary of State for the State of West Virginia at the time of the Magistrate Court action. *Id.* Additionally, the Plaintiffs in *Monongahela Power* filed a new complaint naming the same parties, making the same allegations, and demanding the same relief. *Id.*

In the instant case, after first giving the Court notice of his intention to do so at a scheduling conference on the Magistrate Court appeal, Respondent Summers was permitted by Judge Miller to file a new Complaint in Circuit Court. In the new Complaint, Respondent Summers not only sought compensation for unpaid wages, but also liquidated damages pursuant to the *West Virginia Wage Payment and Collection Act* (“WPCA”), W.Va. Code § 21-5-1, *et seq.* Respondent Summers also

made a claim for wrongful termination in the *Harless v. First Nat'l Bank*, 162 W.Va. 116, 246 S.E.2d 270 (W.Va. 1978) line of cases in the new Circuit Court Complaint. Not only were the claims contained in the new Complaint different, the parties were different as well. Additionally, Respondent Summers named Jon Veard, an officer the named Defendants, as a Defendant in the new Complaint pursuant to the provisions of the *WPCA*, for knowingly permitting the other named Defendants to violate provisions of the *WPCA*. [App. 0012]. None of the Defendants in the new Complaint, including Jon Veard, were identified and named in Respondent Summers' Magistrate Court counterclaim. Furthermore, Respondent Summers did not make a claim for liquidated damages under the *WPCA* in his Magistrate Court counterclaim, nor did he make a claim for wrongful termination under the *Harless* line of cases in his Magistrate Court counterclaim.

As stated above, and preserved in the record, Plum Hill Terrace Apartments is not a legal entity, nor is it a registered trade name for any legal entity. Presumably, even if Respondent Summers was successful in his counterclaim at the Magistrate Court level, the enforceability and collectability of any favorable judgment against a non-entity, without property interests, is tenuous at best. Furthermore, the \$5,000 jurisdictional limit of Magistrate Court would not fully compensate Respondent Summers for the unpaid wages he is owed. Additionally, even if Respondent Summers, then acting *pro se*, had thought to brought the claims for liquidated damages and wrongful termination in Magistrate Court, he would not have been able to receive full and fair compensation for the damages alleged based on the Magistrate Court's jurisdictional limit. His liquidated damage claim alone is nearly four times the jurisdictional limit in Magistrate Court. The Respondent Judge, taking these factors into consideration and acting within his sound discretion, decided to allow Respondent Summers to file a new claim in Circuit Court containing claims for unpaid wages,

liquidated damages pursuant to the *WPCA*, and wrongful termination. Judge Miller, noting the significant differences between Plum Hill Terrace Apartments and the entities named in the new Complaint, allowed Respondent Summers to file a new Complaint in Circuit Court naming Jon Veard, an individual officer; Veard-Masontown Limited Partnership; and, United Property Management Company as Defendants in the new Civil Action.

Furthermore, if Respondent Summers is allowed to proceed only with his Magistrate Court appeal, the Petitioners will reap the continued benefit of what amounts to a corporate shell game. The Petitioners have continuously asserted that Plum Hill Terrace Apartments is the trade name for Veard-Masontown Limited Partnership. They have also stated that United Property Management Company provides management and support to Plum Hill Terrace Apartments. However, none of these entities are registered with the Office of the Secretary of State for the State of West Virginia, and none of these entities are currently in good standing with that Office. By trying to force Respondent Summers to proceed only with his Magistrate Court appeal against Plum Hill Terrace Apartments, a non-entity, without property interests, they hope to reap the benefit of their continued shell game, and prevent Respondent Summers from recovering any compensation from them.

As such, because there are significant factual and legal differences in the instant case, and because Judge Miller properly exercised his discretion in considering this matter, the Circuit Court's decision to deny the Petitioners' Motion to Dismiss was not in violation of this Court's holding in *Monongahela Power*.

2. **The requirements of *res judicata* and collateral estoppel are not met in this case, and even if the Court finds that the conditions of each are met, compelling reasons exist to preclude the application of these doctrines to Counts I and II of Respondent Summers' Complaint**

The requirements of *res judicata* and collateral estoppel are not met in this case, and as such, claims in Counts I and II of Respondent Summers' Complaint in the Circuit Court action are not barred. However, even if the conditions of *res judicata* and collateral estoppel are satisfied, compelling reasons exist to preclude the application of these doctrines in the instant case.

- a). ***Res judicata* does not apply to the claims asserted by Respondent Summers in Counts I and II of his Complaint in the Circuit Court Action, and even if the Court finds that the conditions of *res judicata* are met, the doctrine should not be enforced because doing so would plainly defeat the ends of Justice**

The Petitioners rightly assert that three elements must be satisfied before the doctrine *res judicata* may be invoked: 1) there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings; 2) the two actions must involve either the same parties or persons in privity with those same parties; 3) the cause of action must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented in the prior action. See Syl. pt. 4, *Blake v. Charleston Area Med. Ctr.*, 201 W.Va. 469, 498 S.E.2d 41 (W.Va. 1997). This Court has declined to apply *res judicata* where doing so would "plainly defeat the ends of Justice." *Id.* at 478, 23. The requirements of *res judicata* are not met here, and even if they are, applying the doctrine in this instance would plainly defeat the ends of Justice, and would allow the Petitioners the continued benefit of their corporate shell game.

First, as argued at the Circuit Court, there has been no final decision on Respondent Summers' Magistrate Court claim. Even though this Court in *Monongahela Power* ruled that the Plaintiffs were limited to the jurisdictional amount of the Magistrate Court, it also held that no final judgment had been reached because the Magistrate Court decision was timely appealed. *Monongahela Power Company v. Starcher*, 174 W.Va. 593, 595, 328 S.E.2d 200, 202 (1985). As

discussed above, this case is legally and factually different than *Monongahela Power*; however, the underlying rationale for the decision reached by this Court - that the Magistrate judgment was not final because it was timely appealed - applies in this instance. Accordingly, because Respondent Summers timely appealed the decision of the Magistrate Court, no final judgment has been rendered, and the first element of *res judicata* is not satisfied.

The parties to the Circuit Court Action and those to the Magistrate Court action are different, and no privity can exist between a non-legal entity (Plum Hill Terrace Apartments) and the parties named in the new Civil Action. As previously stated, Plum Hill Terrace Apartments was the original Plaintiff in the Magistrate Court eviction proceeding. Petitioners assert that Plum Hill Terrace is the trade name for Veard-Masontown Limited Partnership; however, there is no record of Plum Hill Terrace Apartments as a registered trade name with the Secretary of State for the State of West Virginia. Furthermore, Plum Hill Terrace Apartments owns no property or other assets. In effect, Plum Hill Terrace Apartments is a non-legal entity.

Petitioners assert that privity, the second element of *res judicata*, is met in this case; however, according to this Court's elaboration on the issue of privity, no privity exists between the parties to the Magistrate Court Action and those to the Civil Action filed in Circuit Court. This Court has held that "[p]rivity, in a legal sense, ordinarily denotes 'mutual or successive relationship to the *same rights of property*.'" (Emphasis added). *Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558 (W.Va. 1938) (quoting *Gerber v. Thompson*, 84 W. Va. 721, 727, 100 S.E. 733 (W.Va. 1919)). Plum Hill Terrace Apartments is effectively a non-entity, with no property rights and no ownership interests. [See App. 0055-0056]. In contrast, the Defendants named in the new Civil Action own property, and have separate, distinct, and actual legal and property interests. [See App. 0057-0059]. For this reason

alone, privity does not exist between the parties to the Magistrate Court action and those named in the new Civil Action.

Finally, the claims asserted by Respondent Summers in Counts I and II of his Complaint could not have been resolved at the Magistrate Court level as the jurisdictional limit of that tribunal would prevent Respondent Summers from bringing, and fully litigating, his claims for unpaid wages, liquidated damages under the *Wage Payment and Collection Act*, and wrongful termination.

Even assuming, *arguendo*, that the requirements of *res judicata* are met in this case, the Court should not apply the doctrine to bar Respondent Summers from litigating these claims in Circuit Court. Allowing the Petitioners to use this device to prevent Respondent Summers from proceeding in his Circuit Court claim would offend the notions of justice, and would result in an unfair result. If this Court holds that Respondent Summers is barred by *res judicata*, he will be forced to proceed on appeal against a non-entity, for sums owed which are substantially less than what is just in this matter.

For the reasons stated above, the conditions of *res judicata* are not satisfied in this case. Even if this Court finds that the conditions of *res judicata* are met, it should refuse to apply the doctrine in the interests of Justice.

b). Collateral estoppel does not apply the Respondent Summers' claims in Counts I and II of his Complaint in the Circuit Court Action

The Petitioners further argue that Respondent Summers' claims in Counts I and II of his Complaint are barred on the basis of collateral estoppel. The doctrine of collateral estoppel does not apply to Mr. Summers' claims in Counts I and II of his Complaint because the elements of collateral estoppel are not satisfied in this instance. If the Court determines that the elements of collateral

estoppel are met, compelling reasons exist to preclude the application of collateral estoppel in this instance.

As Petitioners stated in their Petition, this Court has determined that the doctrine of collateral estoppel “will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” Syl. pt. 1, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (W.Va. 1995). As stated above, this Court has held that the application of collateral estoppel is “discretionary with the trial court and rests upon a number of factual predicates . . .” and that “a writ of prohibition will not issue on the basis that the trial court abused its discretion in failing to enforce collateral estoppel.” Syl. pt. 7, *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (W.Va. 1983).

As already indicated in the Petition, the original Magistrate Court action was an eviction proceeding brought against Respondent Summers by Plum Hill Terrace Apartments. Respondent Summers then made a counterclaim for unpaid wages owed to him as a manager of Plum Hill Terrace Apartments. Respondent Summers’ claim for unpaid wages was the only claim brought by him in Magistrate Court. He did not bring a claim for liquidated damages pursuant to the *Wage Payment and Collection Act* and did not make a claim for wrongful termination. Magistrate Snider ruled against Respondent Summers on his unpaid wage claim; however, there is no record to indicate what facts and evidence supported the Magistrate’s ruling. In any event, the claims brought by Respondent Summers in the new Civil Action are different than the unpaid wage counterclaim brought by him in Magistrate Court.

As stated in the Petition, Respondent Summers timely appealed the Magistrate Court's decision on his unpaid wage claim. Although the facts in the instant case differ significantly from those in *Monongahela Power*, this Court's reasoning with regard to the finality of the Magistrate Court decision is undisputed. In *Monongahela Power*, this Court held that the Magistrate Court decision was not final because it was timely appealed. It is undisputed that Respondent Summers, like the petitioners in *Monongahela Power*, timely appealed the Magistrate Court decision. Respondent Summers' appeal is still pending in the Circuit Court of Preston County. No final adjudication has been rendered on Respondent Summers' unpaid wage claim; therefore, the second element of collateral estoppel is not satisfied.

The Petitioners argue that Respondent Summers had a full and fair opportunity to litigate his unpaid wage claim in Magistrate Court; however, no record of the hearings, facts considered, or evidence presented during Magistrate Court proceedings on this issue exist. The extensiveness of the procedures followed and evidence presented at the Magistrate Court level on this issue is unknown. As such, it is unclear whether Respondent Summers was afforded the opportunity to fully litigate his unpaid wage claim in Magistrate Court.

It is undisputed that Respondent Summers was a party to the prior Magistrate Court action; however, as discussed above, the other conditions of collateral estoppel are not met in this case. This Court's list of conditions in *Miller* is inclusive - if one element is not met, the doctrine does not apply. Furthermore, Judge Miller was presented with facts and arguments on this issue, and exercising his sound discretion, determined that the application of collateral estoppel was not appropriate in this case. The conditions of collateral estoppel are not present in this case, and accordingly, the doctrine should not be applied.

c). Even if the Court finds that the conditions of collateral estoppel are met, compelling reasons exist to preclude its application

Even if this Court determines that the elements of collateral estoppel are satisfied in this instance, significant differences in the quality and extensiveness of the Magistrate Court procedures constitute compelling reasons to preclude the application of collateral estoppel.

In *Miller*, this Court, citing the *Restatement (Second) of Judgments (1980)*, stated that relitigation of an issue is not precluded when a “new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts[.]” *State v. Miller*, 194 W.Va. 3, 15, 459 S.E.2d 114, 121 (W.Va. 1995) (quoting Section 283(3) of *Restatement (Second) of Judgments* at 273). Further, this Court, quoting Comment d to Section 28 of the *Restatement (Second) of Judgments*, stated “‘where the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims,’ a compelling reason exists not to apply collateral estoppel.” *Id.* (quoting, *Restatement (Second) of Judgments* at 279). Elaborating even further on this point, and again quoting the *Restatement (Second) of Judgments*, this Court stated that “the simple procedure of the first forum ‘may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim.’” *Id.* (quoting *Restatement (Second) of Judgments* at 279), (citing *Salida School District R-32-J v. Morrison*, 732 P.2d 1160, 1165 (Colo. 1987). After this analysis, this Court stated that “for the purposes of issue preclusion, issues and procedures are not identical or similar if the second action involves application of . . . substantially different procedural rules, even though the factual settings of both suits may be the same.” *Id.* at 15-16, (citing *Parklane Hosiery Co., Inv. v. Shore*, 439 U.S. 322, 331 n.15, 99 S.Ct. 645, 651 N.15, 58 L.Ed.2d 552, 562 n.15 (U.S. 1979)).

Rule 1 of the *West Virginia Rules of Civil Procedure for Magistrate Courts* explicitly and unequivocally states that the procedure of Magistrate Court is specifically suited to the quick and inexpensive resolution of claims. See Rule 1 *West Virginia Rules of Civil Procedure for Magistrate Courts* (“The purpose of the rules is to help resolve cases in a just, speedy, and inexpensive manner.”). Furthermore, the extensiveness of discovery devices available varies significantly in the different tribunals. Production of documents and entry upon land and physical examination are the only methods of discovery provided for in the *West Virginia Rules of Civil Procedure for Magistrate Courts*. See Rule 13 *West Virginia Rules of Civil Procedure for Magistrate Courts*. In contrast, there are a variety of discovery methods available in Circuit Court including interrogatories, requests for production of documents, entry upon land for inspection and other purposes, requests for admissions, and depositions. See Rules 26-36 *West Virginia Rules of Civil Procedure*. It is undeniable that significant differences exist in the quality and extensiveness of the procedures followed in Magistrate Court and Circuit Court.

Here, the only record that exists regarding the Magistrate Court’s decision against Respondent Summers’ on his unpaid wage claim is Magistrate Snider’s Order entering judgment for Plum Hill Terrace on Respondent Summers’ counterclaim. [App. 0031]. There is no record indicating what evidence, if any, was presented, and there is no record regarding the arguments of the parties. Furthermore, based on the Court file, it does not appear as if any discovery was conducted at the Magistrate Court level on this issue. Regardless, because of the very nature of Magistrate Court proceedings and the limited discovery devices available in that tribunal, Respondent Summers would not have been able to fully litigate his unpaid wage claim in that tribunal. Even if the Court finds that the conditions of collateral estoppel are met in this instance,

because there are significant differences in the extensiveness of the procedural rules followed in Magistrate Court and Circuit Court, and because no record exists regarding the Magistrate's decision on Respondent Summers' unpaid wage claim, compelling reasons exist to preclude the application of collateral estoppel.

3. The findings made by the Circuit Court are not insufficient and are not clearly erroneous under West Virginia law

Petitioners have asserted that the findings of the Circuit Court in denying their Motion to Dismiss "are both insufficient and are erroneous under West Virginia law"; however, in making this argument, Petitioners fail to specify exactly how these findings are insufficient and erroneous. Regardless, the findings made by the Circuit Court in its Order Denying the Petitioners' Motion to Dismiss were made within the Court's discretion based on facts and evidence presented to it. Furthermore, the Court's findings go directly to the issue of collateral estoppel, which was the only doctrine asserted by the Petitioners in their original Motion to Dismiss.

This Court has stated that "[a] finding is clearly erroneous when, although there is evidence to support it, the appellate court upon review of the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. pt. 1, in part, *In the Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (W. Va. 1996).

The handwritten notations in the Circuit Court's Order Denying Petitioners' Motion to Dismiss state "The Court finds the Court is asked to consider matters outside the pleadings under this Rule 12(b)(6) motion" and "[t]he parties are not the same in these 2 (sic) consolidated cases new

additional parties are in Case # 15-C-190.” [App. 0004]. The second handwritten notation alone is sufficient to deny the Petitioners’ Motion to Dismiss as privity of parties is an essential element in both collateral estoppel and *res judicata*. The Court, in its discretion, and in consideration of the facts and evidence presented to it, determined that the parties in the consolidated cases were different. Simply because another tribunal may have decided the matter differently does not mean that the Circuit Court’s finding was clearly erroneous as the Petitioners suggest.

Additionally, the Petitioners assert that the Circuit Court was not asked to consider matters outside of the pleadings on their Motion to Dismiss. This is another misstatement. The Petitioners clearly mentioned in footnote 4 of their Motion to Dismiss, and discussed at the hearing on this Motion, a Complaint that was previously filed by Respondent Summers with the United States Department of Labor, Wage and Hour Division. [App. 0022]. To state that the Circuit Court did not consider matters outside the pleadings on the Petitioners’ Motion to Dismiss is simply inaccurate.

Based on the reasons discussed previously, the Circuit Court’s decision denying the Petitioners’ Motion to Dismiss was sufficient, was not clearly erroneous, and in light of West Virginia law should be allowed to stand.

4. Count IV of Respondent Summers’ Complaint in the Circuit Court Action should be allowed to proceed as part of the Consolidated Magistrate Court Appeal and Circuit Court Action

The Petitioners have continuously asserted that Respondent Summers was never an employee of any of the entities involved in these consolidated cases. They content that Count IV of Plaintiff Summers’ Complaint should be stayed pending the outcome of the Magistrate Court appeal, and assert that “[t]his claim is obviously dependent upon the fundamental determination that Plaintiff Summers was an employee of Veard-Masontown Limited Partnership . . .” [Petition 23]. Judge

Miller considered this in consolidating these cases, and exercising his discretion, determined (properly) that the cases should be consolidated. Based on the contents of the original eviction proceeding Petition, there is evidence to show that Respondent Summers was an employee of at least one of the named Defendants.

Even though the Petitioners are adamant that Respondent Summers was never an employee of any of the Petitioners, the record provided to this Court and considered by Judge Miller, contains evidence to the contrary. In an handwritten attachment to the original eviction Petition filed in Magistrate Court by Plum Hill Terrace Apartments, it states, “On 5/19/15 Art Summers [sic]. . . employment with United Property was terminated from [sic] the property owner of Plum Hill Terrace.” [App. 0049]. This clearly indicates that Respondent Summers was an employee of at least one of the entities named in the new Civil Action. Judge Miller had this information available to him, and exercising his discretion, decided to consolidate the Magistrate Court appeal and new Civil Action pursuant to Rule 42(b) of the *West Virginia Rules of Civil Procedure*.

For the reasons stated above, the Circuit Court acted soundly within its discretion in consolidating the Magistrate Court Appeal and Circuit Court Action. Because the cases were properly consolidated, Count IV of Respondent Summers’ Complaint in the Circuit Court Action should be permitted to proceed as part of the Consolidated Magistrate Court Appeal and Circuit Court Action.

V. CONCLUSION

For the reasons stated above, Judge Miller’s rulings in the Circuit Court of Preston County were proper, were not clearly erroneous in light of West Virginia law, and as such, a writ of prohibition should not issue in this instance. Furthermore, the conditions of collateral estoppel and

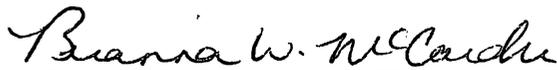
res judicata are not met in this case. Even if this Court determines that the conditions of these doctrines have been met, the interests of Justice and other compelling reasons exist to preclude the application of these doctrines in this case. Therefore, the Respondent Arthur J. Summers prays as follows:

- a. That this Court deny Petitioners' prayer to issue a rule to show cause against the Respondents directing them to show cause as to why a writ of prohibition should not be issued;
- b. That all proceedings in the Circuit Court of Preston County regarding this case be permitted to continue;
- c. That this Court deny Petitioners' prayer to award a writ of prohibition against the Respondents, directing that the Petitioners' Motion to Dismiss Counts I, II, and IV of the Plaintiff's Complaint Filed by Plaintiff Summers be granted, in part;
- d. That this Court deny Petitioners' prayer to award a writ of prohibition against the Respondents' directing that the Consolidation Order be annulled;
- e. That this Court deny Petitioners' prayer for this Court to award a writ of prohibition against the Respondents directing that Count IV of the Plaintiffs' Complaint in the Circuit Court Action be stayed pending the resolution of the Magistrate Court Appeal; and
- f. Such other and further relief as the Court may deem proper.

Dated: April 28, 2016

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 16-0346

STATE OF WEST VIRGINIA EX REL. JOHN VEARD,
VEARD-MASONTOWN LIMITED PARTNERSHIP, AND
UNITED PROPERTY MANAGEMENT COMPANY,

Petitioners

vs.

THE HONORABLE LAWRENCE S. MILLER,
JUDGE OF THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA,
AND ARTHUR J. SUMMERS,

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF MONONGALIA, TO-WIT

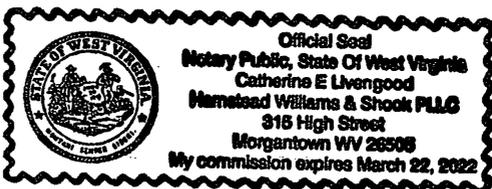
Pursuant to Rule 16(g) of the West Virginia Rules of Appellate Procedure, I, Brianna W. McCardle, Esq., being first duly sworn, state that the facts and allegations contained in the foregoing *Respondent Arthur J. Summers' Verified Brief in Response to Petitioners' Verified Petition for Writ of Prohibition* are true, or to the extent they are stated to be on information, are believed to be true.

Brianna W. McCardle
Brianna W. McCardle, Esq. (WVSB #12836)

Taken, subscribed, and sworn to before me on this 28th day of April, 2016.

My Commission expires on: March 22, 2022

Catherine E. Livengood
Notary Public

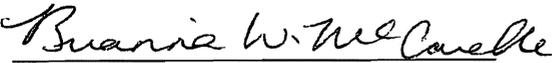


CERTIFICATE OF SERVICE

I, Brianna W. McCardle, Esq., counsel for Respondent Arthur J. Summers, hereby certify that service of the foregoing *Respondent Arthur J. Summers' Brief in Response to Petitioners' Verified Petition for Writ of Prohibition* was made upon counsel of record this 28th day of April, 2016, by mailing a true and exact copy thereof *via* first class United States Mail, postage prepaid, in an envelope addressed as follows:

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