

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO. 35593

**FAROUK ABADIR, HOSNY GABRIEL
RICARDO RAMOS, ALFREDO RIVAS,
MICHAEL VEGA and HUNTINGTON
ANESTHESIOLOGY GROUP, INC.,**

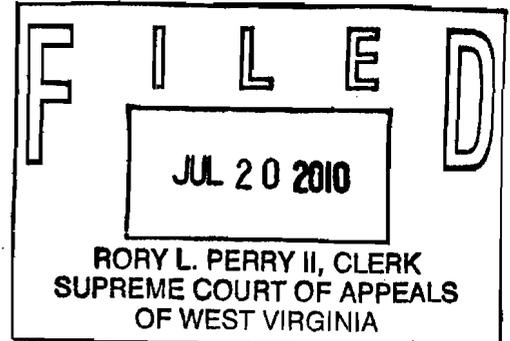
Appellants,

v.

**MARK H. DELLINGER and
BOWLES RICE McDAVID
GRAFF & LOVE LLP,**

Appellees.

BRIEF OF APPELLEES



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FAROUK ABADIR, HOSNY GABRIEL,
RICARDO RAMOS, ALFREDO RIVAS,
MICHAEL VEGA and HUNTINGTON
ANESTHESIOLOGY GROUP, INC.,

Plaintiffs/Appellants,

v.
MARK H. DELLINGER and
BOWLES RICE MCDAVID
GRAFF & LOVE LLP,

Appeal No. 35593

Defendants/Appellees.

BRIEF OF APPELLEES

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA:

Pursuant to Rule 10(b) of the West Virginia Rules of Appellate Procedure, appellees Mark H. Dellinger (“Mr. Dellinger”) and Bowles Rice McDavid Graff & Love LLP (“Bowles Rice”, or the “firm”), by their counsel, David D. Johnson, III and the law firm of Winter Johnson & Hill PLLC, respectfully tender to the Court their Brief in opposition to the opening Brief of appellants Huntington Anesthesiology Group, Inc. (“HAGI”), and Farouk Abadir, Hosny Gabriel, Ricardo Ramos, Alfredo Rivas, and Michael Vega (sometimes referred to here collectively as “the HAGI doctors”). In this appeal, appellants attempt to divert this Court’s focus from its prior findings and conclusions in *Messer v. Huntington Anesthesia Group, Inc.*, 222 W.Va. 410, 664 S.E.2d 751 (2008) (subsequently, “*Messer*”), which require affirmance of the trial court’s Order in this case dismissing appellants’ Complaint on grounds of collateral estoppel.

**OMISSIONS FROM, AND INACCURACIES IN,
APPELLANTS' STATEMENT OF THE CASE¹**

Appellants' Introductory Statement

Appellants alleged in their Complaint that Mr. Dellinger, the attorney who defended them against an employment-related claim asserted against HAGI and its doctors by Teresa Messer, a nurse-anesthetist previously employed by HAGI, improperly bound them to a mediated settlement with Ms. Messer without having been authorized by his clients to do so. Appellants now appeal from an Order entered in this case by the Circuit Court of Cabell County (the Hon. F. Jane Hustead) on November 18, 2009, in which the trial court granted appellees' Motion to Dismiss. The trial court's Order was based on the conclusion that appellants were estopped from pursuing their claim against Mr. Dellinger and his firm by this Court's decision in *Messer*, in which this Court concluded that Mr. Dellinger reasonably relied on statements by appellant Dr. Ramos, speaking on behalf of HAGI and the other HAGI doctors, to the effect that appellants had all approved the settlement agreement with Ms. Messer.

Appellants assert that the Circuit Court's dismissal of their Complaint was based on that Court's conclusion "that since it had been determined by this Court that Mr. Dellinger had the apparent authority to settle, the doctrine of collateral estoppel precluded the Appellants from challenging what he had done." Appellants' Brief, page 1. Appellants assert specifically that "the Circuit Court failed to perceive the difference between the actual authority of an attorney, which pertains to the relationship between the attorney and the client, and the apparent authority of an attorney to act for the client, which relates to the dealings between the attorney and a third party."

¹See the "Introductory Statement" at page 1 of Appellants' Brief, as well as appellants' discussion of the facts, beginning at page 1 and continuing to page 4 of their Brief.

Id. Appellants' description of this Court's opinion in *Messer* is inaccurate and woefully incomplete. Moreover, appellants misstate the Circuit Court's ruling in its Order of November 18, 2009, in this case. *See* the Order, pages 14-16.

In *Messer*, this Court's discussion of the doctrine of *apparent authority* was necessitated by appellants' denial that Mr. Dellinger acted with *actual authority* in binding them to a settlement with Ms. Messer. *See* the *Messer* opinion, 222 W.Va. at 418, 664 S.E.2d at 759 (noting that appellants had asserted that "Mr. Dellinger had never been authorized to make the representation that all of the doctors had approved the settlement agreement"). Because appellants denied that Mr. Dellinger had *actual authority*, it was necessary for this Court to invoke the doctrine of apparent authority and examine the record in order to determine whether appellants had met "their burden of clearly showing a want of authority in this case." *Messer*, 222 W.Va. at 419, 664 S.E.2d at 760.

Over the space of more than four pages of its opinion, this Court proceeded to carefully scrutinize the trial court record in *Messer*, and at the end concluded that appellants had failed to satisfy that burden. *Id.* However, this Court's factual analysis was not limited to the dealings between Mr. Dellinger and counsel for Ms. Messer - the relationship which, as appellants correctly note, is of primary interest in an apparent authority analysis. Rather, this Court devoted far more attention in *Messer* to the communications and the relationship between Mr. Dellinger and appellants, his clients. As appellants correctly observe at page 1 of their Brief, it is the relationship and communications between an attorney and his clients that is germane to a determination of the attorney's *actual authority*.

As part of its factual analysis, this Court made certain key findings and conclusions in *Messer*, all of which - not surprisingly - are ignored in appellants' Brief. First, this Court

concluded that the record evidence in *Messer* supported the conclusion that it was reasonable under all of the circumstances for Mr. Dellinger to rely on Dr. Ramos's representation to him that HAGI and all of its doctors had approved the settlement with Ms. Messer. *Messer*, 222 W.Va. at 419, 664 S.E.2d at 760. In that regard, although this Court took note of the conflicting testimony of Mr. Dellinger and Dr. Ramos concerning what Dr. Ramos told Mr. Dellinger during a telephone call on June 5, 2006, the Court concluded that "Mr. Dellinger's account of the content of that phone call is corroborated by the e-mail Dr. Gabriel sent to Dr. Ramos on June 4, the day before Dr. Ramos called Mr. Dellinger to inform him about the June 3 meeting of the doctors" *Id.*² Last, but certainly not least, this Court found and concluded that appellants had attempted to rescind a valid and enforceable settlement agreement with Ms. Messer and should therefore be required to pay her legal fees incurred in enforcing the agreement. *Messer*, 222 W.Va. at 420, 664 S.E.2d at 761 (internal citation and quotation marks omitted).³

In the present case, the Circuit Court of Cabell County correctly held that the foregoing findings and conclusions by this Court in *Messer* collaterally estopped appellants from attempting to relitigate the very same factual issues which this Court resolved in *Messer*, including issues such as whether Dr. Ramos did, or did not, tell Mr. Dellinger that HAGI and all of the HAGI doctors had approved the settlement, and whether it was, or was not, reasonable for Mr. Dellinger

²This Court further noted that "[t]he credibility of Dr. Ramos' testimony must also be weighed against the doctor's admission that his memory was not clear regarding the specifics of what actually was said during the June 5 phone call because of his subsequent cardiac surgery." 222 W.Va. at 420, 664 S.E.2d at 761.

³This Court's award of fees and costs in favor of Ms. Messer and against appellants was grounded upon the Court's equitable power to make such an award against a party who "has acted in bad faith, vexatiously, wantonly or for oppressive reasons." 222 W.Va. at 420, 664 S.E.2d at 761.

to rely on Dr. Ramos to serve “as the conduit of information if not the spokesperson between the [other HAGI doctors] and Mr. Dellinger.” *Messer*, 222 W.Va. at 419, 664 S.E.2d at 760. This ruling by the Circuit Court was correct and should be affirmed.

Appellants’ Statement Of Facts

Because appellants appeal from the trial court’s decision that their claim against appellees was subject to dismissal pursuant to Rule 12(b)(6), W.Va. R. Civ. P., on collateral estoppel grounds arising from this Court’s decision in *Messer*, the facts relevant to the present appeal are those which were identified by this Court in *Messer* as probative of the existence of a binding and enforceable settlement agreement between appellants and Ms. Messer. Appellants’ statement of the facts is inadequate. Accordingly, appellees’ statement of the facts will include the critical findings and conclusions by this Court in *Messer* which were omitted by appellants, as well as certain factual averments contained in appellants’ Complaint which must be taken as true. Many of the following facts also appear in the Circuit Court’s Order, beginning at page 5.

HAGI is a West Virginia corporation, the physician-employees of which, at times material to the Complaint, practiced the specialty of anesthesiology. Complaint, ¶ 1. Appellants Abadir, Gabriel, Ramos, Rivas and Vega, along with non-parties, doctors Mark Newfeld, Grant Shy and Stanislas Striz, were employed by HAGI. *Id.*, ¶¶ 2 and 4. In 2002, HAGI and its physician-employees were sued by Ms. Messer, and they retained Mr. Dellinger to defend them against her claims. *Id.*, ¶¶ 3 - 4.⁴

⁴Drs. Newfeld, Shy and Striz left HAGI in 2004, as a result of differences and disputes which had arisen between them and the other HAGI doctors. *See* the Complaint, ¶ 5. *Also see*, *Messer*, 222 W.Va. at 413, 664 S.E.2d at 754. They entered into a separation agreement with HAGI pursuant to which, they believed, they would have no responsibility to make any payment to Ms. Messer in connection with her lawsuit. *Id.*, 222 W.Va. at 413 and 419, 664 S.E.2d at 754 and 760.

The Complaint alleges that “[i]n May 2006, Mr. Dellinger agreed with Counsel for Ms. Messer to mediate the existing controversy.” Complaint, ¶ 6. However, as appellants and their counsel well know, the decision to try to settle the case did not originate with Mr. Dellinger, or with Ms. Messer’s counsel. Although not alleged in the Complaint, it was undisputed in *Messer* that the original impetus for settlement discussions came from the HAGI doctors, themselves, in the form of an e/mail message sent by Dr. Ramos to Mr. Dellinger in February or March of 2006 “indicating that the doctors wanted to initiate settlement of the case and stating a figure for an initial settlement offer.” *Messer*, 222 W.Va. at 413, 664 S.E.2d at 754, and n. 4. Only thereafter, at a status conference convened on April 13, 2006, did counsel for the parties agree to participate in mediation. *Id.* The mediation took place on May 18, 2006. *Id.*

Although the details of what actually transpired surrounding the mediation have been disputed (*Messer*, 222 W.Va. at 413, 664 S.E.2d at 754), it is not disputed that Dr. Gabriel, then the president of HAGI, participated in mediation, and that when he was required to go to the hospital during the mediation, Dr. Ramos filled in for him. *Id.*, 222 W.Va. at 413, 664 S.E.2d at 754, and n. 5. *Also see* the Complaint, page 2, ¶ 9. All of the HAGI doctors had been notified in a letter from Mr. Dellinger of the time and place of mediation, and of their right to attend if they wished to do so. *Id.*, 222 W.Va. at 413, 664 S.E.2d at 754, and n. 6.⁵

Appellants assert that “mediation was attempted but no settlement agreement was reached” *See* appellants’ Brief, page 2. This is only partially accurate. As alleged in the

⁵Drs. Newfeld, Shy and Striz, who had retained separate counsel to advise them with respect to their dispute with the remaining HAGI doctors, notified Mr. Dellinger through their counsel that they did not object to any settlement, but that they would not attend the mediation and, relying on the separation agreement they had reached with the remaining HAGI doctors, that they would pay nothing towards any settlement. 222 W.Va. at 413, 664 S.E.2d at 754, n. 6.

Complaint, “[a]t the conclusion of that mediation a written document was prepared which provided that contingent upon the approval of all defendants the matter would be settled by the payment to Ms. Messer of \$225,000. The document further provided that if the unanimous approval of all defendants was not given within 21 days, there would be no settlement.” See the Complaint, page 3, ¶ 10. Also see *Messer*, 222 W.Va. at 413-14, 664 S.E.2d at 754-55, reciting the same facts, and noting that the handwritten agreement specified that it would be replaced by a typewritten document, to be prepared by Mr. Dellinger, which would include a full and complete release, and that the handwritten agreement was signed at mediation by Ms. Messer and her counsel, by Dr. Gabriel, as president of HAGI, and by Mr. Dellinger. *Id.*

Although appellants are well aware that the uncontroverted record evidence contradicts them, they nonetheless allege in their Complaint that “Mr. Dellinger never communicated with Michael Vega, Farouk Abadir, or Alfredo Rivas after the mediation had concluded but prior to him advising Ms. Messer’s counsel that the matter had been settled.” Complaint, page 3, ¶ 12. However, the trial court was not required to accept this false allegation at face value, as would normally be required by Rule 12(b)(6) (*see, e.g., Coberly v. Coberly*, 213 W.Va. 236, 580 S.E.2d 515 (2003), Syl. Pt. 1), because this Court had previously found in *Messer* that “[i]t was established at the August 21 hearing [the hearing on Ms. Messer’s motion to enforce her settlement with appellants] that Mr. Dellinger sent a letter to Dr. Abadir, Dr. Vega and Dr. Rivas on June 2, 2006” *Messer*, 222 W.Va. at 414, 664 S.E.2d at 755. (The letter also went to Drs. Ramos and Gabriel.) In that letter, Mr. Dellinger “outlined the issues facing HAGI and the doctors, and the need to communicate with [Ms. Messer] about whether or not settlement was acceptable.” *Id.*

The Complaint alleges - in essence - that the individual HAGI physicians had differing views of the tentative settlement with Ms. Messer, with some flatly opposed to settling, and others

conditionally willing to approve a settlement. *See* the Complaint, page 3, ¶ 13. The Complaint further alleges that “Mr. Dellinger had no *conversations* with any of his clients about the proposed settlement other than with Dr. Ramos.” *Id.*, ¶ 15 (emphasis added). Although this allegation, taken literally, may be true, it is incomplete and therefore highly misleading. As this Court found in *Messer*, Mr. Dellinger’s initial post-mediation communication with the HAGI doctors concerning the tentative mediation settlement agreement was via his letter of June 2, 2006, referred to above. *Messer*, 222 W.Va. at 414, 664 S.E.2d at 755.

Appellants allege in their Complaint that “Ricardo Ramos advised Mr. Dellinger that the proposed settlement had not been approved by all defendants to the Messer litigation. Dr. Ramos, however, advised Mr. Dellinger that he thought all parties might be able to reach an agreement if more time was available.” Complaint, page 3, ¶ 14. *Also see* appellants’ Brief, page 2. However, juxtaposed against that bare allegation is the recognition by this Court in *Messer* that Mr. Dellinger had testified during the Circuit Court hearing on August 21, 2006, that Dr. Ramos had informed him by telephone on June 5, 2006, that his letter of June 2nd to all HAGI physicians had been discussed by the doctors during a sometimes heated meeting on June 3rd, and that “ultimately all of the individuals agreed to the settlement and that [Mr. Dellinger] was authorized to communicate that to the other side.” *Messer*, 222 W.Va. at 414, 664 S.E.2d at 755. And, as noted, *infra*, pages 3-4, and n. 2, this Court in *Messer* also credited Mr. Dellinger’s testimony over the conflicting testimony of Dr. Ramos on this point because Mr. Dellinger’s testimony was corroborated by other record evidence, and because Dr. Ramos admitted that his memory of this time period had been adversely affected by cardiac surgery. *Id.*

It is undisputed that when the HAGI doctors received Mr. Dellinger’s letter of June 2, 2006, telling them that mediation had resulted in a tentative settlement agreement pursuant to which

they would be called on to pay Ms. Messer the sum of \$225,000.00, not one of the doctors contacted Mr. Dellinger to complain or to say that the tentative agreement was unacceptable. This telling fact was explicitly noted by the Court in *Messer*. *Id.* 222 W.Va. at 419, 664 S.E.2d at 760. After Mr. Dellinger received Dr. Ramos' telephone call on June 5, he wrote to Ms. Messer's counsel and the mediator on June 6, 2006, to say that HAGI and the doctors had agreed to the mediated settlement. Copies of that letter went to HAGI and each of the HAGI doctors. *Messer*, 222 W.Va. at 415, 664 S.E.2d at 756. On June 9, 2006, Mr. Dellinger wrote a letter to Ms. Messer's counsel enclosing a proposed settlement agreement and release, and a dismissal order, and copies of that letter also went to HAGI and each of the HAGI doctors. *Id.* It is undisputed that upon receiving Mr. Dellinger's letters of June 6 and June 9, 2006, not one of the HAGI doctors promptly contacted him to repudiate the settlement agreement, or even to question it. *Id.*

On June 13, 2006, after Mr. Dellinger had received the settlement agreement signed by Ms. Messer, he wrote to the HAGI doctors and addressed the need to arrange for checks in payment of the settlement sum. *Messer*, 222 W.Va. at 415, 664 S.E.2d at 756. Only then, after appellants had received three separate mailings from Mr. Dellinger concerning the settlement with Ms. Messer, did he first receive any word that the HAGI doctors were not going to go through with the settlement agreement, when he received an e/mail message to that effect from Dr. Gabriel at midnight on June 14, 2006. *See* the Complaint, page 4, ¶ 18, and *Messer*, 222 W.Va. at 415-16, 664 S.E.2d at 756-57.⁶

Ms. Messer's counsel thereafter moved in the Circuit Court to enforce the settlement agreement; HAGI and the doctors opposed the motion; and - as was previously noted - a hearing on

⁶Mr. Dellinger then withdrew as counsel of record for HAGI and the doctors. *See Messer*, 222 W.Va. at 416, 664 S.E.2d at 757. Attorney Thomas E. Scarr undertook the representation of doctors Newfeld, Shy and Striz, while HAGI and the remaining doctors were represented by their present counsel, William D. Levine.

the motion was convened on August 21, 2006. *See Messer*, 222 W.Va. at 416, 664 S.E.2d at 757. Following the hearing, the Circuit Court denied the motion to enforce the settlement, finding that Mr. Dellinger had not been authorized by HAGI and the doctors to settle with Ms. Messer. *See* the Complaint, page 4, ¶ 19, and *Messer*, 222 W.Va. at 416, 664 S.E.2d at 757. HAGI and the doctors later moved to dismiss or, in the alternative, for summary judgment, and their motions, treated as ones for summary judgment, were granted. Ms. Messer then petitioned for leave to appeal. 222 W.Va. at 416-17, 664 S.E.2d at 757-58.

Appellants' Complaint avers that on appeal, "[t]he Supreme Court reversed the Circuit Court decision on the settlement[,] ruling that an attorney who had appeared in court representing all defendants[] was presumed to have had the authority to settle a case." Complaint, page 4, ¶ 19. *Also see* appellants' Brief, page 3. This statement, as far as it goes, is certainly correct, but appellants omit the better part of the findings and conclusions made by this Court in *Messer*, including the factual findings and the central conclusion that are fatal to appellants' present claim against Mr. Dellinger.

In the *Messer* opinion, this Court's recognition of "the strong presumption of authority raised by Mr. Dellinger being the recognized attorney for all named defendants . . ." (*Messer*, 222 W.Va. at 419, 664 S.E.2d at 760) was only the point of beginning for the Court in reaching a decision to reverse the Circuit Court's denial of Ms. Messer's motion to enforce the settlement. In order to evaluate whether HAGI and the doctors, having denied that Mr. Dellinger had actual authority to bind them to a settlement, had successfully rebutted the strong presumption of his authority, this Court undertook, step-by-step, a meticulous examination of the facts which were of record and available to the trial court, including the considerable evidence adduced at the hearing of August 21, 2006, on Ms. Messer's motion to enforce the settlement. After devoting in excess of four full pages of its opinion to that factual analysis, this Court made the following findings:

The record also supports the conclusion that Dr. Ramos served as the conduit of information if not the spokesperson between the doctors who retained affiliation with HAGI and Mr. Dellinger. Before the case was ordered to mediation, Dr. Ramos had sent an e-mail to Mr. Dellinger saying that the doctors wanted to initiate settlement and he proposed an initial settlement offer. He attended the mediation, organized a meeting with the doctors about the terms of the handwritten mediation agreement, kept Dr. Gabriel apprised of settlement developments even while Dr. Gabriel was traveling abroad, routinely communicated information regarding the settlement to Mr. Dellinger by phone and e-mail, and fielded questions from the HAGI doctors. In like fashion, the HAGI doctors recognized him as their spokesperson by contacting him directly when they had concerns with the settlement agreement. An example of this recognition is Dr. Abadir's testimony that while he understood that Mr. Dellinger was the attorney in the case, he called Dr. Ramos with the concerns he had about the division of responsibility for payment of the figure stated in the settlement agreement. Actually, the only other individual who directly contacted Mr. Dellinger was Dr. Gabriel, who represented HAGI as its president. Moreover, none of the HAGI affiliated doctors contacted Mr. Dellinger immediately upon receipt of the June 6 letter announcing the doctors' acceptance of the settlement to, at the very least, question Mr. Dellinger's authority to make such a move on their behalf. It was not until near midnight on June 14 that Dr. Gabriel sent an e-mail to Mr. Dellinger telling him that the HAGI doctors were opposing the settlement. *Viewed as a whole, the statements and conduct of the doctors form clear supportive evidence that Mr. Dellinger's reliance on Dr. Ramos' representations was reasonable under the circumstances.*⁷

Messer, 222 W.Va. at 419, 664 S.E.2d at 760 (emphasis added).⁸

⁷Again, as noted, *infra*, page 3, this Court's focus in *Messer* upon "the statements and conduct of the doctors" (222 W.Va. at 419, 664 S.E.2d at 760) in their dealings with Mr. Dellinger is critically important, because it is the dealings between clients and their counsel which is germane to a determination of the lawyer's *actual authority*. See appellants' brief, page 1 (noting that "the actual authority of an attorney . . . pertains to the relationship between the attorney and the client . . .", while "the apparent authority of an attorney to act for the client . . . relates to the dealings between the attorney and a third party").

⁸As noted, *infra*, at pages 3-4 and n. 2, this Court recognized the dispute between Dr. Ramos and Mr. Dellinger concerning what Dr. Ramos had reported to Mr. Dellinger by telephone on June 5, 2006, concerning the position of the HAGI doctors with respect to the settlement. 222 W.Va. at 419, 664 S.E.2d at 760. However, the Court credited Mr. Dellinger's testimony on this point, finding

The gravamen of appellants' Complaint in the present case is the averment that Mr. Dellinger lacked authority from HAGI and the doctors to bind them to a settlement with Ms. Messer. See the Complaint, page 4, ¶¶ 16, 17 and 22. The same issue was at the heart of their opposition to the motion to enforce the settlement in the underlying action and their subsequent appeal in *Messer*: "Appellees maintain that . . . Mr. Dellinger never had been authorized to make the representation that all of the doctors had approved the settlement agreement." *Messer*, 222 W.Va. at 418, 664 S.E.2d at 759. This Court rejected that averment in *Messer*, and plaintiffs are therefore collaterally estopped from relitigating the issue in the present civil action.

APPELLANTS' ASSIGNMENT OF ERROR

Appellants have assigned only one error with respect to the Circuit Court's Order of November 18, 2009. See appellants' Brief, page 4. Specifically, appellants assert that this Court, in *Messer*, decided only that Ms. Messer's settlement agreement with HAGI and the doctors was enforceable because Mr. Dellinger acted with *apparent authority* in binding them to that agreement, and that the Circuit Court in the present case incorrectly ruled that appellants are now collaterally estopped by *Messer* from pursuing a claim against Mr. Dellinger and his firm for having bound them to a settlement without *actual authority* to do so. *Id.* However, in *Messer*, in the process of concluding that appellants had failed to rebut the presumption that Mr. Dellinger acted with authority in agreeing with Ms. Messer's counsel on the terms of a binding settlement, this Court made findings and conclusions that are directly at odds with the claim now asserted by appellants against Mr.

that his testimony was corroborated by other record evidence. *Id.*, 222 W.Va. at 419-20, 664 S.E.2d at 760-61. The Court also noted Dr. Ramos's own admission that his memory of the relevant period was impaired by cardiac surgery which he underwent at the time. *Id.*, 222 W.Va. at 415, 420, 664 S.E.2d at 756, 761.

Dellinger and his firm in the present case.⁹ The doctrine of collateral estoppel therefore bars appellants' claim, and the Circuit Court's Order of November 18, 2009, should be affirmed.

ARGUMENT¹⁰

A. The Circuit Court Applied The Proper Legal Standard In Evaluating Appellees' Motion To Dismiss¹¹

It is settled law that “[w]hen considering a Motion to Dismiss under Rule 12(b)(6), the factual allegations of the complaint must be taken as true and all reasonable inferences must be viewed in favor of the plaintiff.” *Battles v. Anne Arundel County Board of Education*, 904 F.Supp. 471, 474 (D.Md. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996) (Table Opinion), citing *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992).¹² *Also see, Coberly v. Coberly*, 213 W.Va. 236, 238, 580 S.E.2d 515, 517 (2003), and Syl. Pt. 1. Further, “[a] complaint

⁹That is to say, this Court, in deciding that appellants had failed to rebut the presumption of Mr. Dellinger's authority to bind them to a settlement, made factual findings from the record which, in addition to weighing against appellants' effort to rebut the presumption, were also necessarily probative of this Court's ultimate conclusions, namely, that “the statements and conduct of the doctors form clear supportive evidence that Mr. Dellinger's reliance on Dr. Ramos' representations was reasonable under the circumstances”, and, that appellants had attempted to rescind a valid and enforceable settlement agreement. *Messer*, 222 W.Va. at 419-20, 664 S.E.2d at 760-61.

¹⁰This Court's review of a circuit court's order dismissing a complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), W.Va. R. Civ. P., is plenary, the trial court's ruling receives *de novo* review by this Court. *Hill v. Stowers*, 224 W.Va. 51, 680 S.E.2d 66, 70 (2009); *Coberly v. Coberly*, 213 W.Va. 236, 580 S.E.2d 515 (2003), Syl. Pt. 1.

¹¹Appellants' treatment of the standard applicable to consideration of a Rule 12(b)(6) motion is inadequate. *See* the first sentence of the first paragraph of the “Argument” section of appellants' Brief, page 4.

¹²Because the West Virginia Rules of Civil Procedure are virtually identical to the federal rules, this Court and the circuit courts have given considerable weight to federal cases such as these in determining the meaning and proper application of our rules. *Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758, n.6 (1994).

should not be dismissed unless it appears that the plaintiff can prove no set of facts in support of the claims which would entitle the plaintiff to relief.” *Battles*, 904 F. Supp. at 474 (internal citation omitted). *Also see*, *Chapman v. Kane Transf. Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). Nonetheless, a court “is not bound to accept conclusory allegations concerning the legal effect of events set out in the complaint if the conclusions do not reasonably follow from the plaintiff’s description of what happened.” *Battles*, 904 F. Supp. at 474 (internal citation omitted).

Although motions to dismiss for failure to state a claim are disfavored by the courts due to the strong policy in favor of resolving disputes on their merits, Rule 12(b)(6) exists for a very good reason: “The purpose of the rule is to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.” *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993). *Also see*, *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996), and *Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242, *cert. denied*, 484 U.S. 944, 108 S.Ct. 330, 98 L.Ed.2d 357 (1987).

In considering a motion under Rule 12(b)(6), a court normally confines its analysis to the four corners of the complaint. However, inasmuch as appellees’ Motion in the present case asserted that appellants are collaterally estopped from pursuing their claims due to the holdings by this Court in *Messer*, both the trial court’s and this Court’s consideration of appellees’ Motion necessarily also includes an analysis of the *Messer* opinion in order to identify those issues which were litigated and decided in *Messer*, which plaintiffs improperly sought to relitigate in this action. *See, e.g.*, *Wittich v. Wittich*, 2006 WL 3437407, *2, n.2 (E.D.N.Y., Nov. 29, 2006); and Syl. Pt. 2, *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983). *Also see* the Circuit Court’s Order in this

case, beginning at page 2.

Moreover, the Circuit Court's consideration of the *Messer* opinion did not require that appellees' Motion to Dismiss pursuant to Rule 12(b)(6) be converted to one for summary judgment in accordance with Rule 12(b). This is so because the appeal in which the *Messer* decision was rendered is expressly referred to in paragraphs 19 and 20 of the Complaint, and *Messer* is therefore integral to the Complaint. *Phillips v. LCI International, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999).¹³

B. The Doctrine Of Collateral Estoppel

The doctrine of collateral estoppel is firmly established as an integral part of the law of West Virginia. This Court has explained that “[c]ollateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit.” *State ex rel. Leach v. Schlaegel*, 191 W.Va. 538, 540, 447 S.E.2d 1, 3 (1994), quoting from *Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983), Syl. Pt. 2. Similarly, in *McCord v. Bailey*, the United States Court of Appeals for the D.C. Circuit explained:

Collateral estoppel ‘prohibits parties who have litigated one cause of action from relitigating in a second and different cause of action matters of fact which were, or necessarily must have been, determined in the first litigation.’ (Internal citations omitted.) Like *res judicata*, collateral estoppel promotes judicial efficiency.

636 F.2d 606, 608 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981).

¹³Also see, *Forshey v. Jackson*, 222 W.Va. 743, 747-48, 671 S.E.2d 748, 752-53 (2009); *Phifer v. The City of New York*, No. 99 Civ. 4422, 2003 WL 1878418, *2 (S.D.N.Y., April 15, 2003); and *The Late Charles Alan Wright and Arthur R. Miller*, 5C Fed. Prac. & Proc. Civ.3d § 1366, all of which stand for the proposition that in considering a motion to dismiss pursuant to Rule 12(b)(6), a court may properly consider, in addition to the allegations of the complaint, other matters of which the court may take judicial notice.

Moreover, the doctrine of collateral estoppel has routinely been applied to foreclose legal malpractice actions where the allegations relied on to support the malpractice claim have already been resolved against the malpractice plaintiff in prior litigation. *See, e.g., Walden v. Hoke*, 189 W.Va. 222, 429 S.E.2d 504 (1993). Courts from numerous other jurisdictions have reached the same result when applying the doctrine of collateral estoppel in legal malpractice cases. *See, e.g., Gray v. Weinstein*, 2004 WL 3130552 (Conn. Super. Ct., December 22, 2004), *aff'd*, 955 A.2d 1246 (Conn. App. 2008); *Purdy v. Zeldes*, 337 F.3d 253 (2nd Cir. 2003) (applying the federal doctrine of collateral estoppel); *Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989); *Knoblauch v. Kenyon*, 163 Mich. App. 712, 415 N.W.2d 286 (1987); *Johnson v. Raban*, 702 S.W.2d 134 (Mo. Ct. App. 1985); *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498 (Mo. Ct. App. 1985); and *McCord v. Bailey*, *supra*, quoted from with approval and relied on by this Court in *Walden v. Hoke*, 189 W.Va. at 226-27, 429 S.E.2d at 508-09.¹⁴

The criteria which must be satisfied in order for collateral estoppel to apply have been expressed in different terms by various courts. However, the practical effect remains the same. In *State ex rel. O'Blennis v. Adolf*, the Missouri Court of Appeals stated the following test for determining whether collateral estoppel would apply: “(1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral

¹⁴The cases cited here from other jurisdictions all involved allegations of legal malpractice by the defendant-lawyer in representing the malpractice plaintiff in a previous criminal proceeding. Nonetheless, application of the doctrine of collateral estoppel to foreclose a malpractice claim in that setting is no different from the doctrine's application in a malpractice action such as the present one, which arises from a previous civil action. This fact is clearly illustrated by the reliance of this Court in *Walden v. Hoke* - a malpractice case arising from a prior civil case - upon *McCord v. Bailey* - a malpractice case which arose from a prior criminal case.

estoppel is asserted was a party or in privity with a party to the prior adjudication; [and] (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.” 691 S.W.2d at 501. Similarly, in *Purdy v. Zeldes*, involving federal collateral estoppel law, the Second Circuit stated that “collateral estoppel applies when ‘(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.’” 337 F.3d at 258 (internal citation omitted).

Arguably the most important of the criteria for determining whether the doctrine of collateral estoppel may properly be applied is the criterion which focuses on whether the factual issues decided in an earlier action are identical to those which a party in that action seeks to relitigate in a subsequent case. *See, e.g., Holloman v. Nationwide Mutual Insurance Co.*, 217 W.Va. 269, 274 and 276, 617 S.E.2d 816, 821 and 823 (2005). However, this Court has noted that it is important for a court to look to the actual substance of the issue decided in the earlier case, as well as the actual substance of the issue subsequently raised by a party in a later case, rather than simply taking at face value the party’s own characterization of those issues. *See, Walden v. Hoke*, 189 W.Va. at 226-27, 429 S.E.2d at 508-09, noting that although the plaintiff’s claim in her later malpractice action, as worded by her counsel, appeared to be a new claim, “[a] litigant cannot relitigate, in a different jurisdiction, an issue previously ruled upon by another court merely by describing the same facts in a different way.”

C. Application Of The Doctrine Of Collateral Estoppel To This Case

Appellants aver that “[t]he sole issue in this appeal is whether this Court’s prior

decision that the Appellants failed to rebut the presumption that Mr. Dellinger had the authority to settle the case, collaterally estops them from maintaining an action against Mr. Dellinger for obligating them to a settlement to which they had never agreed.” Appellants’ Brief, page 5. This is incorrect. The sole issue in this appeal is whether this Court in *Messer*, in the process of examining the trial court record to determine whether appellants had rebutted the presumption of Mr. Dellinger’s authority, found (a) that Mr. Dellinger reasonably relied on Dr. Ramos, as a conduit of information from the other HAGI doctors, to make representations to him as to the doctors’ position on the mediated settlement, and (b) that Mr. Dellinger’s account of what was said by Dr. Ramos in this regard was corroborated by the record. If this Court *did* make those determinations in *Messer*, then appellants are estopped from pursuing their malpractice claim against Mr. Dellinger, and the Circuit Court’s Order should be affirmed.

In the underlying employment action, Ms. Messer moved the Circuit Court to enforce her settlement agreement with HAGI and the doctors. HAGI and the five doctors who are appellants in the present action vigorously opposed that motion, arguing specifically that Mr. Dellinger had bound them to the mediated settlement agreement with no authority from his clients to do so. The issues of whether Mr. Dellinger could properly rely on Dr. Ramos to serve as spokesman for HAGI and the other doctors, and whether Dr. Ramos did, or did not, tell Mr. Dellinger that HAGI and the doctors had approved the settlement, were fully briefed on behalf of the parties. Thereafter, the Circuit Court convened a day-long evidentiary hearing in order to receive sworn testimony from Mr. Dellinger and from any of the HAGI doctors who cared to testify. Their testimony dealt almost exclusively with facts surrounding the mediation and, more important, the communications by Mr. Dellinger with the doctors, both by letters and by telephone, concerning the mediation settlement

agreement. At the hearing, the Circuit Court also heard extensive oral argument from counsel on these issues.

On September 21, 2006, the Circuit Court entered an Order denying Ms. Messer's motion to enforce her settlement. The Circuit Court's Order was sharply critical of Mr. Dellinger due to the Court's conclusion that he had agreed to the settlement without obtaining authorization from his clients, and the Circuit Court even ordered Mr. Dellinger, personally, to pay Ms. Messer's legal fees incurred in trying to enforce the settlement. In so holding, the Circuit Court credited the testimony of Dr. Ramos over the testimony of Mr. Dellinger.

Ms. Messer then appealed from the Order of September 21, 2006. On appeal, HAGI and the doctors were represented by their current counsel, who fully briefed the issue of Mr. Dellinger's alleged lack of authority to settle with Ms. Messer. This Court carefully considered the record from the Circuit Court, including the testimony and exhibits from the August 21, 2006, evidentiary hearing, and reversed the holding by the Circuit Court. In so ruling, this Court found and concluded that Mr. Dellinger's reliance on settlement authorization from Dr. Ramos on behalf of HAGI and the doctors "was reasonable under the circumstances." 222 W.Va. at 419, 664 S.E.2d at 760. Moreover, although the Court noted the conflicting testimony of Dr. Ramos and Mr. Dellinger with respect to the issue of settlement authority, the Court found that Mr. Dellinger's testimony was corroborated by independent evidence in the form of e/mail correspondence generated by one of the appellants. *Id.*, 222 W.Va. at 419-20, 664 S.E.2d at 760-61.

This Court remanded the case to the Circuit Court "for entry of an order enforcing the settlement agreement and awarding appropriate attorney's fees with respect to [Ms. Messer's] efforts to enforce the settlement agreement" 222 W.Va. at 420, 664 S.E.2d at 761. However,

having considered all of the evidence adduced in the trial court, this Court imposed the award of attorney's fees - not against Mr. Dellinger, as the Circuit Court had done - but against HAGI and the doctors, themselves, based on their "attempt to rescind a valid and enforceable settlement agreement." *Id.* (Internal citation omitted.) In reversing the trial court's award of fees and costs against Mr. Dellinger, this Court relied expressly on its "authority in equity to award to the prevailing litigant his or her reasonable attorney's fees . . . when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." 222 W.Va. at 420, 664 S.E.2d at 761 (internal quotation marks and citation omitted, and emphasis added). This Court would certainly not have concluded that appellants were equitably obligated to pay Ms. Messer's attorney's fees, had it not also concluded that appellants, in reneging on their settlement agreement, did, in fact, act in bad faith, vexatiously, wantonly, or for oppressive reasons. Obviously, such a conclusion by this Court is consistent only with the Court's findings (1) that it was reasonable for Mr. Dellinger to rely on Dr. Ramos as a spokesman for his colleagues, and (2) that Mr. Dellinger's account of what Dr. Ramos told him on June 5, 2006, was supported by the record.¹⁵

Now, in the present civil action, HAGI and the doctors once again assert that "[n]one of the Plaintiffs hereto authorized Mr. Dellinger to settle on their behalf nor had any of them authorized Dr. Ramos to be their spokesman." Complaint, page 4, ¶ 16. These allegations are the cornerstone of the Complaint. See the Complaint, page 5, ¶ 23. However, the issue of Mr.

¹⁵At page 3 of appellants' Brief, in footnote 7, they complain that Mr. Dellinger refused to pay Ms. Messer's fees and costs incurred in moving to enforce her settlement agreement after the Circuit Court in *Messer* ordered him to do so. However, after the Circuit Court ordered Mr. Dellinger to pay those fees and costs, Ms. Messer and her counsel never presented Mr. Dellinger or his firm with any statement of fees and costs, and the trial court's Order was then reversed by this Court in *Messer*.

Dellinger's authorization to settle, and the subsidiary issue of his entitlement to rely on Dr. Ramos as spokesman for HAGI and the other doctors, were fully litigated in the underlying action, both at the trial court level and in this Court. It could not seriously be contended that HAGI and the doctors did not have a "full and fair opportunity to litigate" these issues in *Messer. Holloman*, Syl. Pt. 3.

Nor can it reasonably be argued that these issues were not determined on their merits by this Court. Appellants seek to create a false dichotomy by asserting that the issue in this case is one of actual authority, while all that was at issue in the appeal in *Messer* was Mr. Dellinger's apparent authority. But this Court must look behind the bare words of appellants' argument and focus on the actual substance of the factual issues that were decided in *Messer*. See, *Walden v. Hoke*, 189 W.Va. at 226-27, 429 S.E.2d at 508-09, and the discussion, *infra*, at page 17.¹⁶ This Court in *Messer* carefully weighed the evidence, credited the testimony of Mr. Dellinger which was corroborated by independent evidence, and concluded that "[v]iewed as a whole, the statements and conduct of the doctors form clear supportive evidence that Mr. Dellinger's reliance on Dr. Ramos' representations was reasonable under the circumstances." *Messer*, 222 W.Va. at 419, 664 S.E.2d at 760. The criteria for applying the doctrine of collateral estoppel are therefore satisfied, and appellants' claims against appellees were properly dismissed by the trial court. The Order of the Circuit Court should therefore be affirmed.

It would be strange, indeed, if this Court, having already explicitly decided in *Messer* that Mr. Dellinger's reliance on representations made to him by Dr. Ramos concerning the agreement

¹⁶Appellants, themselves, necessarily concede that the question of Mr. Dellinger's actual authority was fully litigated in the trial court prior to the final appeal in *Messer*. See Appellants' Brief, pages 1 and 7, noting that the trial court in that case determined that Mr. Dellinger lacked actual authority to settle.

of his colleagues to settle was reasonable under all of the circumstances, were to now allow these same issues to be relitigated in this legal malpractice action. All the more so because, as this Court correctly noted in *Messer*, it is undisputed that when appellants learned that Mr. Dellinger had told Ms. Messer's lawyer that the HAGI doctors had all approved the mediation settlement agreement, not one of the doctors took any action to repudiate the agreement. *See Messer*, 222 W.Va. at 419, 664 S.E.2d at 760, noting that "none of the HAGI . . . doctors contacted Mr. Dellinger immediately upon receipt of the June 6 letter announcing the doctors' acceptance of the settlement to, at the very least, question Mr. Dellinger's authority" *Also see Miranosky v. Parson*, 152 W.Va. 241, 245, 161 S.E.2d 665, 667 (1968), holding that when a client denies that his counsel had authority to compromise a case on his behalf, he must repudiate the settlement immediately upon learning of it. *Accord, Dwight v. Hazlett*, 107 W.Va. 192, 147 S.E. 877, 879 (1929).

Appellants' argument based on *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), at page 8 of their Brief, is strained, at best, and was no doubt prompted by their inability to circumvent this Court's findings in *Messer*. In *Miller*, this Court held that the fact that the criminal case defendant had been found - during an administrative employment grievance proceeding - not to have physically abused a patient in a state hospital, did not collaterally estop the state from prosecuting her for criminal battery. 194 W.Va. at 12, 459 S.E.2d at 123. In particular, this Court held that for purposes of applying the collateral estoppel doctrine, "issues . . . are not identical or similar if the second action involves application of a different legal standard or substantially different procedural rules, even though the factual settings in both suits may be the same." 194 W.Va. at 10, 459 S.E.2d at 121. Because the legal and procedural standards that were applied in the administrative proceeding differed from those to be applied in the criminal case, collateral estoppel could not be raised as a defense in the criminal action. 194 W.Va. at 12, 459 S.E.2d at 123.

Relying on *State v. Miller*, appellants observe that this Court held in *Messer* that appellants failed to rebut the presumption of Mr. Dellinger's authority by making "a 'clear showing' of evidence". See Appellants' Brief, page 9. Appellants contend that this Court in *Messer* was *actually* imposing on appellants the burden of overcoming that presumption by clear and convincing evidence. Appellants assert that such a burden is clearly different from the preponderance of the evidence burden applicable to this case, and that collateral estoppel is therefore inapplicable to this action. *Id.* Nowhere in *Messer* did this Court ever even refer to clear and convincing evidence, much less hold that such is the burden of proof applicable to a client's rebuttal of the presumption of authority on the part of his counsel. Nor are appellees and their counsel aware of any holding to that effect by this Court in any prior or subsequent case.¹⁷

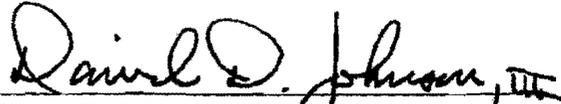
CONCLUSION

It makes no difference, for purposes of applying the doctrine of collateral estoppel, that this Court held in *Messer* that appellants failed to overcome the presumption of Mr. Dellinger's authority to bind them to a settlement, while in the present case, appellants assert that Mr. Dellinger lacked actual authority to do so. What is important is that the operative facts in *Messer* and those in the case at bar are identical; and that, in *Messer*, this Court meticulously scrutinized those facts, credited Mr. Dellinger's testimony as to what he had been told by Dr. Ramos, and found that it was entirely reasonable for Mr. Dellinger to rely on what Dr. Ramos told him. To now allow appellants

¹⁷More important, even if this Court had previously held that the burden for overcoming the presumption of an attorney's authority to act and speak for his client is one of clear and convincing evidence, this would not alter the factual findings actually made by this Court in *Messer*. Any burden of proof, whether a preponderance of the evidence, or clear and convincing evidence, speaks to the cumulative weight of the evidence offered by a party, not to the actual nature of any particular item of evidence.

to relitigate those very issues in the present case would stand the collateral estoppel doctrine on its head. In short, appellants' Brief raises a very obvious question: If this Court previously found in *Messer* "that Mr. Dellinger's reliance on Dr. Ramos' representations was reasonable under the circumstances" (*Messer*, 222 W.Va. at 419, 664 S.E.2d at 760), how can a jury possibly be allowed to consider that issue again in the present case? The Circuit Court's Order granting appellees' Motion to Dismiss should be affirmed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAROUK ABADIR, HOSNY GABRIEL,
RICARDO RAMOS, ALFREDO RIVAS,
MICHAEL VEGA and HUNTINGTON
ANESTHESIOLOGY GROUP, INC.,

Plaintiffs/Petitioners,

v.

Appeal No. 35593

MARK H. DELLINGER and
BOWLES RICE MCDAVID
GRAFF & LOVE LLP,

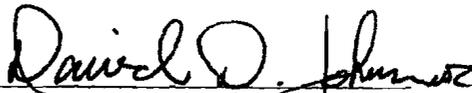
Defendants/Respondents.

CERTIFICATE OF SERVICE

I, David D. Johnson, III, do hereby certify that I have served the **BRIEF OF APPELLEES** upon counsel of record by placing a true and exact copy thereof in a properly stamped and addressed envelope, first class postage prepaid, addressed to:

William D. Levine, Esquire
717 6th Avenue
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on this 20th day of July, 2010.



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