

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**BRAXTON LUMBER CO., INC.,**

**Petitioner,**

**v.**

**No. 15-0993**

**LLOYD'S INC.,**

**Respondent.**

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**PETITIONER'S BRIEF  
IN SUPPORT OF APPEAL**

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## ASSIGNMENTS OF ERROR

1. The circuit court erred in finding that Petitioner's claim is barred by the statute of limitations, because the statute was tolled pursuant to W.Va. Code §§'s 55-2-21 and/or 55-2-8.
2. The circuit court erred in finding that Petitioner's claim is barred by *res judicata*, because Petitioner's assignment of the Note is not at issue in this action, and Respondent's liability on the Note was actually conceded in the First Action.
3. The circuit court erred in finding that Petitioner's claim is barred by collateral estoppel, because Petitioner's assignment of the Note is not at issue in this action, and Respondent's liability on the Note was actually conceded in the First Action.

## STATEMENT OF THE CASE

### PROCEDURAL HISTORY

Petitioner Braxton Lumber Co., Inc. (hereinafter "Petitioner" or "Braxton Lumber") filed suit in the Circuit Court of Braxton County on December 26, 2007, to collect on a Promissory Note (the "Note") dated January 1, 1998, executed by Lloyd's, Inc. (hereinafter "Respondent" or "Lloyd's"), in the original principal amount of \$564,000.00 bearing interest at the rate of 5.00% per annum (Appendix p.3). As such, the Note is a negotiable instrument governed by Article 3 of the Uniform Commercial Code (W.Va. Code §§ 46-3-101, *et. seq.*). In its Complaint, Braxton Lumber seeks judgment for the principal amount of the Note plus accrued interest. Respondent filed a *Motion to Dismiss* on January 25, 2008. On May 22, 2009, Braxton Lumber filed a *Motion for Summary Judgment of Plaintiff Braxton Lumber Co., Inc.* ("Motion for Summary Judgment"). A hearing was held on the aforesaid motions on July 12, 2013.

On September 9, 2015, the Circuit Court of Braxton County (the "circuit court") entered two substantially identical orders: (i) *Order Denying Motion for Summary Judgment of Plaintiff Braxton Lumber Co. Inc. and Granting Cross-Motion for Summary Judgment of Defendant Lloyd's, Inc.* and (ii) *Order Granting Motion to Dismiss of Defendant Lloyd's Inc.* In its orders,

the circuit court concluded that Braxton Lumber's claim is barred as a matter of law by the statute of limitations in W.Va. Code § 46-3-118(a), and by the doctrine of *res judicata* and the doctrine of collateral estoppel, based on the outcome of an earlier action styled *William G. Lloyd, Plaintiff, v. Braxton Lumber Co., Inc., Defendant/Third-Party Plaintiff, Charles R. Lloyd, Defendant, and Charles R. Lloyd, II, Defendant/Third-Party Plaintiff v. Lloyd's Inc., Third-Party Defendant*, Civil Action No. 04-C-39 (the "First Action").<sup>1</sup> Braxton Lumber filed a timely Notice of Appeal on October 9, 2015.

### **STATEMENT OF FACTS**

Braxton Lumber, incorporated in 1984, operates a saw mill in Braxton County, West Virginia. Initially, Braxton Lumber was wholly owned by Charles R. Lloyd, II ("Chuck"). In January, 1986, Chuck gave 32% of the stock of Braxton Lumber to his younger brother, William G. Lloyd ("Greg"), who had come to work at the saw mill. (Appendix p. 0126.) From January 4, 1986 through and after 2004 (when the First Action was filed by Greg against his father and Chuck), the board of directors of Braxton Lumber consisted of Chuck, Greg and Charles R. Lloyd, Sr. ("Mr. Lloyd")<sup>2</sup> (Appendix p. 0125). Greg was designated as the corporate Secretary of Braxton Lumber until January 4, 1997. As a matter of practice, Mr. Lloyd prepared all of the corporate minutes for Braxton Lumber during the entire time that Greg served as corporate Secretary. (Appendix p. 0124.) After January 4, 1997, Mr. Lloyd became the corporate Secretary for Braxton Lumber, as Greg was not actually performing the duties of that office. (Appendix p. 0123).

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<sup>1</sup> Petitioner had also previously filed a motion requesting leave to file an amended complaint to assert an equitable claim for unjust enrichment against Respondent and the sole shareholder of Respondent, William G. Lloyd. That motion was also denied by order entered by the circuit court on September 9, 2015.

<sup>2</sup> Charles R. Lloyd, now age 94, is the father of Chuck Lloyd and Greg Lloyd.

Until the First Action was filed, the shareholders and board of directors of Braxton Lumber did not hold formal meetings to discuss corporate issues. (Appendix p. 0125). Instead, Chuck, Greg and Mr. Lloyd saw each other on a daily basis, and they discussed corporate matters and made decisions for Braxton Lumber. Periodically, Mr. Lloyd prepared minutes of meetings of shareholders and directors to reflect decisions that had been made, and gave them to Greg to sign as Secretary. (Appendix p. 0125).

In 1995, Chuck and Greg approached their father with the idea of building a hardware store, to complement the saw mill business. Mr. Lloyd allowed Chuck and Greg to build a hardware store ("Lloyd's Ace Hardware") on a five-acre lot that he owns on Sutton Lane near the Flatwoods interchange of Interstate 79 in Braxton County. Greg asked that this hardware store be put in his name alone, and Chuck agreed to this. Greg incorporated Respondent Lloyd's Inc., to operate the hardware store, and he owns 100 percent of Respondent's issued and outstanding stock. (Appendix pps. 042, 072).

Beginning in or about 1996 and continuing through August, 1998, Braxton Lumber made a series of loans to Respondent to build Lloyd's Ace Hardware in Flatwoods, WV. During discovery in the First Action, Braxton Lumber and Chuck submitted Request for Admission Number 14 requesting that Lloyd's and Greg admit or deny the following:

Do you admit that beginning in or about 1996, Braxton Lumber made a series of loans to Lloyd's, Inc. totaling approximately \$600,000.00, which allowed for the capitalization of Lloyds' Ace Hardware and that by August 15, 1998, the books of Braxton Lumber and Lloyd's, Inc. each reflected that Lloyd's, Inc. owed Braxton Lumber not less than \$600,000.00.

Greg's and Lloyd's response thereto was:

Admitted in so far as the fact that loans were made. Greg Lloyd, after reasonable investigation, does not possess knowledge or information sufficient to admit or deny facts about the amount of any such loans.

Greg, on behalf of Lloyd's, signed a verification on August 12, 2002, verifying under oath the answers and responses to the discovery, including the response to Request for Admission Number 14, to be true and accurate. (Supplemental Appendix at pps. 4-5) In fact, Respondent's own expert noted that Lloyd's accounting records reflect the amount of the loans made by Braxton Lumber to Lloyd's was \$600,000 as of August, 1998. (Appendix p. 038).

To evidence funds loaned to Respondent to build Lloyd's Ace Hardware, Greg signed the Note on behalf of Respondent on January 1, 1998, promising to pay Five Hundred Sixty Four Thousand Dollars (\$564,000.00) to the order of Braxton Lumber. Under the Note, Respondent Lloyd's agreed to pay Braxton Lumber the total principal sum due on or before January 1, 1999, including interest at a rate of 5.00% per annum. (Appendix p. 003). Under the terms of the Note, Lloyd's waived presentment for payment, notice of non-payment, protest, and notice of protest. Respondent defaulted on the Note by failing to make payment on or before January 1, 1999. However, Braxton Lumber took no action to enforce the Note until after Greg filed the First Action.

In or about August, 1998, Charles Lloyd prepared minutes of a special meeting of the board of directors of Braxton Lumber, dated August 15, 1998, purporting to approve a distribution by Braxton Lumber to its shareholders, Chuck and Greg, of the debt owed it by Respondent Lloyd's, which included the Note. Although Charles Lloyd had become the corporate Secretary of Braxton Lumber by August 15, 1998, he mistakenly listed Greg as the corporate Secretary. Charles Lloyd presented the minutes of the August 15, 1998 meeting to Greg, who signed them as Secretary. Later, after realizing that Greg was no longer the Secretary,

Charles Lloyd erased Greg's name with a course eraser and signed his own name. (Appendix p. 028).<sup>3</sup>

To give effect to this corporate action, Chuck, as President of Braxton Lumber, signed an *Assignment of Promissory Note and Accounts Receivable* dated September 1, 1998 (the "Assignment") (Appendix p. 039). The Assignment purported to assign Lloyd's debt, including the Note, to Chuck and Greg. (Appendix p. 040). By the Assignment, 68% of Lloyd's debt and of the Note, or \$408,000, was purportedly assigned to Chuck, with the remaining 32% of the Lloyd's debt and of the Note, or \$192,000, purportedly being assigned to Greg. (Appendix p. 038 ). The above distribution percentages were proportionate to Chuck's and Greg's stock ownership in Braxton Lumber on the date of the Assignment. (Appendix p. 046 ). Thereafter, the accounting records of Lloyd's were adjusted to show that Lloyd's owed Chuck and Greg instead of Braxton Lumber for the \$600,000.00 debt. (Appendix p. 038). However, the Note was not endorsed to Chuck and Greg, and no new Promissory Notes were executed by Respondent to Chuck and Greg. Thus, Braxton Lumber legally retained title to the Note. W.Va. Code § 46-3-203(d).

The First Action involved both claims at law, which were tried to the jury, and claims in equity which were tried to the court. The claims at law included:

- Greg's claims against (i) his father for forgery and fraud, (ii) his father and Chuck for civil conspiracy, and (iii) Chuck and Braxton Lumber for self-dealing and waste.

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<sup>3</sup> At the trial of the First Action, all witnesses testified that no actual meeting of Braxton Lumber's board of directors took place on August 15, 1998. Charles testified that he made this decision on his own, without consulting either Chuck or Greg, after receiving tax advice from the accountants for Braxton Lumber. Greg testified that he never agreed to the distribution of Lloyd's Note to Braxton Lumber, which formed the basis for his claim against his father for forgery and fraud.

- Chuck’s claims (i) for a declaratory judgment as to ownership of property known as the “Rose Farm,” and (ii) third party claim against Respondent to collect 68% of Lloyd’s debt owed to Braxton Lumber for capitalizing Lloyd’s Ace Hardware, including 68% of the balance due on the Note.
- Mr. Lloyd’s claim against Respondent on another promissory note in the amount of \$132,000 for capitalizing Lloyd’s Ace Hardware.

At the trial of the First Action Greg testified that (i) Braxton Lumber provided labor and materials in helping Respondent set up Lloyd’s Ace Hardware , and (ii) his signature appeared to be on the Note (Appendix p. 029) The books of Braxton Lumber and Respondent each reflected that Lloyd’s owed Braxton Lumber \$600,000.00. (Appendix p. 038). Robert Morris, an accounting expert retained by Greg and Respondent in the First Action, reviewed the inter-company transfers between Braxton Lumber and Respondent, and compiled a report of his findings. A partial copy of Mr. Morris’s expert report was admitted in the First Action as Respondent’s and Greg’s Exhibit 191. Page 4 of Exhibit 191 shows Lloyd’s inter-company accounts, which specifically reflects the Note as a note payable due to Braxton Lumber on December 31, 1997, at \$566,400.00 (including interest). (Appendix p. 044). Further, the report includes three (3) pages of handwritten notes, beginning at p. 9 of Exhibit 191, entitled Observations/Notes – Review of Accounts”. (Appendix p. 045). The fourth observation on the handwritten notes relates to the Note and provides: “Conclusion: Entries on Braxton & Lloyd’s Inc. probably correspond and are ok.” (Appendix p. 046) (Lloyd’s and Greg Lloyd Exhibit 191 from the First Action). Thus, there is no dispute that the debt owed by Respondent to Braxton Lumber for capitalizing Lloyd’s Ace Hardware is legitimate.

Rather, at the trial of the First Action, Respondent Lloyd's and Greg defended Chuck's third-party claim against Respondent exclusively by disputing the validity of Braxton Lumber's corporate action in distributing Respondent Lloyd's debt, including the Note, to Chuck and Greg, by the Assignment. At the trial, no evidence whatsoever was offered by Respondent or Greg to attack the validity of the Note or the amount of the debt owed.

At the conclusion of the trial in the First Action, the circuit court directed a verdict against Greg on his claims against his father for forgery and fraud, and his claims against his father and Chuck for civil conspiracy. The circuit court likewise directed a verdict in favor of Mr. Lloyd on the \$132,000 promissory note. The jury rejected (i) Greg's claims against Chuck and Braxton Lumber for waste, and (ii) Chuck's third-party claim against Lloyd's. (Appendix pps. 0181-0184.) After the verdict was returned, Braxton Lumber adjusted its accounting records to reflect the Note as an asset.

Greg, Chuck and Braxton Lumber all filed timely notices of appeal from the trial of the first action. While the appeal from the first action was still pending, Greg filed a second action against Braxton Lumber asserting claims for equipment rental, unjust enrichment and conversion (Case No. 07-C-75).<sup>4</sup> In response, Braxton Lumber filed this action, seeking judgment on the Note. Thus, this action was filed while the First Action was still pending.

### **SUMMARY OF ARGUMENT**

- I. The circuit erred in finding that Petitioner's claim was barred by statute of limitations, because the statute was tolled pursuant to W.Va. Code §§'s 55-2-21 and/or 55-2-8.**

The Note is a negotiable instrument governed by the West Virginia's Uniform Commercial Code. W.Va. Code § 46-3-118(a) provides, in pertinent part, as follows:

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<sup>4</sup> Braxton Lumber filed a motion to dismiss this action, but the circuit court has never ruled on this motion.

an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.”

W. Va. Code Ann. § 46-3-118 (West). Therefore, a cause of action to enforce the Note had to be brought no later than January 1, 2005, unless the limitations period was arrested by a tolling doctrine. W.Va. Code § 55-2-21 provides that:

After a civil action is commenced, the running of any statute of limitation shall be tolled for, and only for, the pendency of that civil action as to any claim which has been or may be asserted therein by counterclaim, whether compulsory or permissive, cross-claim ***or third-party complaint***: Provided, that if any such permissive counterclaim would be barred but for the provisions of this section, such permissive counterclaim may be asserted only in the action tolling the statute of limitations under this section.

The limitations period on the claim asserted by Braxton Lumber in this action was tolled pursuant to West Virginia Code § 55-2-21, pending the resolution of the First Action, because it could have been asserted as a third-party claim in that action. The First Action was filed in 2004, prior to the January 1, 2005 statute of limitations prescribed by W.Va. Code §46-3-118(a). This action was filed prior to resolution of the appeal in the First Action. Accordingly, this action was filed by Braxton Lumber before the expiration of the applicable statute of limitations as tolled under Section 55-2-21 and thus, the claim is not time-barred as matter of law.

Moreover, Section 55-2-8 of the West Virginia Code provides that:

If any person against whom the right shall have so accrued on ... any such contract, shall by writing signed by him ***or his agent*** promise payment of money on such ... contract, the person to whom the right shall have so accrued may maintain an action or suit for the moneys so promised within such number of years after such promise as it might originally have been maintained within upon the award or contract, and the plaintiff may either sue on such a promise, or on the original cause of action, and in the latter case, in answer to a plea under the sixth section, may, by way of replication, state such promise, and that such action was brought within such

number of years thereafter; but no promise, except by writing as aforesaid, shall take any case out of the operation of the said sixth section, or deprive any party of the benefit thereof. An acknowledgment in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this section.

The testimony, evidence, and exhibits offered during the trial of the First Action establish genuine issues of material fact with respect to whether there was an acknowledgment by Lloyd's of the Note sufficient to satisfy the requirement of W.Va. Code §55-2-8. Accordingly, the statute of limitations on Braxton Lumber's claim to collect on the Note was tolled by W. Va. Code § 55-2-21 and/or W. Va. Code § 55-2-8, and thus the circuit court erred in finding that Braxton Lumber's claim is barred by statute of limitations.

**II. The circuit court erred in finding that Petitioner's claim is barred by the doctrine of *res judicata*, because the validity of Petitioner's assignment of the Note is not at issue in this action, and Respondent's liability on the Note was actually conceded in the First Action.**

All of the following elements must be met for a claim to be barred by the doctrine of *res judicata*:

Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either 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.

Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 476, 498 S.E.2d 41, 48 (1997); see also Beahm v. 7 Eleven, Inc., 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008) (per curiam) (citing Conley v. Spillers, 171 W. Va. 584, 301 S.E.2d 216 (1983)).

The issue decided in the First Action bears no relation to the issue presented in this action. In the First Action, Chuck sued Lloyd's to recover on 68% of the total debt (\$600,000)

owed to Braxton Lumber, including 68% of the Note and the balance of the account payable by Respondent to Braxton Lumber. Respondent actually acknowledged this obligation through testimony and its trial exhibits in the First Action (Appendix pps. 038-047) (Respondent's Trial Exhibits 171 and 191 from the First Action). Rather, the issue presented to the jury in the First Action was whether Braxton Lumber's Assignment of the Note to Chuck and Greg was invalid. In this action, the issue regarding the Assignment is completely irrelevant.

Further, Braxton Lumber was not in privity with Chuck in connection with the third party claim, because Braxton Lumber was presumed to not hold legal title to the Note or debt that Chuck sought to recover. Respondent defended the third party claim exclusively by attacking the validity of the Assignment, on the basis that Greg never agreed to it. Lloyd's did not, in any way, attack the validity of the Note. In fact, Lloyd's own evidence admitted during the trial of the First Action directly acknowledged the validity of the Note. Thus, the jury's verdict in the First Action was based upon the validity of the Assignment and adequacy of the corporate actions in distributing the Note and other Lloyd's debt to Chuck and Greg. As the validity of the Note was not contested in the First Action, *res judicata* does not preclude Braxton Lumber from maintaining a claim against Lloyd's in this action to collect on the Note. Accordingly, the circuit court erroneously applied the doctrine of *res judicata* in finding that Petitioner's claim is barred.

**III. The circuit court erred in finding that Petitioner's claim is barred by the doctrine of collateral estoppel, because the validity of Petitioner's assignment of the Note is not at issue in this action, and Respondent's liability on the Note was actually conceded in the First Action.**

All four of the following elements must be met for the doctrine of collateral estoppel to apply: (a) the issue previously decided is identical to the one presented in the action in question; (b) there is a final adjudication on the merits of the prior action; (c) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (d) the party

against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. State of West Virginia v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995).

The first three elements which must be satisfied to invoke collateral estoppel are substantially identical to the three elements pertinent to a defense of *res judicata*. As set forth above, those three elements are not satisfied in this action and thus collateral estoppel does not apply to Petitioner's claim in this action. Moreover, Petitioner did not have a full and fair opportunity to litigate its claim in the First Action. Respondent in fact admitted the validity of the debt represented by the Note in the First Action, both by the testimony of Greg and its own expert witness. Thus, collateral estoppel does not operate as a defense to Petitioner's claim in this action.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner hereby requests pursuant to the W. Va. Rules of Appellate Procedure Rule 19 that oral argument be scheduled. The issues presented by Petitioner: (i) involve assignments of error in the application of settled law; or (ii) claim an unsustainable exercise of discretion where the law governing that discretion is settled.

### **ARGUMENT**

#### **I. STANDARD OF REVIEW**

In reviewing the circuit court's orders granting Respondent's motion to dismiss and Respondent's motion for summary judgment, this Court must draw any permissible inference from the underlying facts in the light most favorable to Braxton Lumber, the non-moving party. Painter v. Peavy, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994)(citations omitted). Conclusions of law are subject to *de novo* review.

**II. THE CIRCUIT COURT ERRED IN FINDING THAT THE PETITIONER'S CLAIM IS BARRED BY STATUTE OF LIMITATIONS BECAUSE THE STATUTE WAS TOLLED PURSUANT TO W.VA. CODE §§'S 55-2-21 AND/OR 55-2-8 .**

In Dunn v. Rockwell, 225 W. Va. 43, 689 S. E.2d 255 (2009) this Court set forth the following factors that must be analyzed in determining whether a claim is time-barred:

A five-step analysis should be applied to determine whether a cause of action is time-barred. First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of Gaither v. City Hosp., Inc., 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. *And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine.*

(Emphasis added.) See Syl. Pt. 5, Dunn v. Rockwell, 225 W. Va. 43, 689 S. E.2d 255 (2009); see also J.A. St. & Associates, Inc. v. Thundering Herd Dev., LLC, 228 W. Va. 695, 724 S.E.2d 299, 309-10 (2011). “‘Only the first step’ in the *Dunn* analysis ‘is a pure question of law.’” Hanshaw v. Wells Fargo Bank, N.A., No. 2:14-CV-28042, 2015 WL 5345439, at \*6 (S.D.W. Va. Sept. 11, 2015) (quoting Robinson v. Quicken Loans Inc., 988 F.Supp.2d 615, 625 (S.D.W.Va.2013) (citing Dunn, 689 S.E.2d at 265)). “[M]any of the steps in assessing tolling involve questions of fact, and therefore are within the province of the jury[.]” HSBC Bank USA, Nat. Ass'n v. Resh,

No. 3:12-CV-00668, 2013 WL 312871, at \*6 (S.D.W. Va. Jan. 25, 2013)(citing to *Dunn*, 689 S.E.2d at 265).

Pursuant to Article 3 of the West Virginia Uniform Commercial Code (“UCC”) a promissory note is a “negotiable instrument” if it meets the following requirements:

- (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) Is payable on demand or at a definite time; and
- (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

W. Va. Code Ann. § 46-3-104. The Note satisfies the above requirements and is a negotiable instrument.

W.Va. Code § 46-3-118(a) provides, in pertinent part, as follows:

an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date.”

The Note was due and payable on or before January 1, 1999. Accordingly a cause of action to enforce the Note had to be brought no later than January 1, 2005, pursuant to W.Va. Code §46-3-118(a), unless the limitations period was arrested by a tolling doctrine. The UCC provides that “[u]nless displaced by the particular provisions of this chapter, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating or invalidating cause supplement its provisions.” See W. Va. Code Ann. § 46-1-103(b).

W.Va. Code § 55-2-21 provides as follows:

After a civil action is commenced, the running of any statute of limitation shall be tolled for, and only for, the pendency of that civil action as to any claim which has been or may be asserted therein by counterclaim, whether compulsory or permissive, cross-claim or third-party complaint. Provided, that if any such permissive counterclaim would be barred but for the provisions of this section, such permissive counterclaim may be asserted only in the action tolling the statute of limitations under this section. This section shall be deemed to toll the running of any statute of limitation with respect to any claim for which the statute of limitation has not expired on the effective date of this section, but only for so long as the action tolling the statute of limitations is pending.

(Emphasis added). There is no provision within the UCC or elsewhere that abrogates the application of W.Va. Code § 55-2-21 to the claim asserted by the Petitioner in this action. Accordingly, W. Va. Code §46-1-103(b) mandates that W. Va. Code §55-2-21 supplement the limitations period set forth in W. Va. Code §46-3-118(a).

This Court has long recognized a rebuttable presumption that a corporate officer has the authority to act on behalf of a corporation in the signing of contracts and instruments on behalf of the corporation. Gallagher v. Washington Cnty. Sav., Loan & Bldg. Co., 125 W. Va. 791, 25 S.E.2d 914, 919 (1943). Accordingly, when the Assignment was signed by Chuck as President of Braxton Lumber, there arose a rebuttable presumption that the Assignment was valid. An effective assignment of a negotiable promissory note divests the assignor of legal title to the note and vests in the assignee such legal title to the note as the assignor held. Maryland Trust Co. v. Gregory, 129 W. Va. 35, 39, 38 S.E.2d 359, 361 (1946). Thus, until the jury's verdict at the conclusion of the trial of the First Action, legal title to the Note was presumed to be held by Chuck and Greg. Until the rebuttable presumption was overcome by the jury's verdict in the First Action, Braxton Lumber presumptively did not hold any interest in the Note sufficient to grant it standing to bring a claim to enforce the Note. Thus, Braxton Lumber could not have

asserted a claim on the Note as a third party claim against Lloyd's in the First Action based on the presumption that the Note was owned by Chuck and Greg by virtue of the Assignment.

The First Action was filed in 2004 and well within the statute of limitations period prescribed by West Virginia Code § 46-3-118(a). A claim was asserted by Chuck to collect on 68% of the Note in the First Action. Respondent Lloyd's defended Chuck's third-party claim exclusively by attacking the validity of the Assignment. Respondent did not assert a claim or defense challenging the validity of the Note during the First Action. In fact, Respondent's own expert opined that its debt to Braxton Lumber was valid.

Furthermore, Braxton Lumber could have, and would have, asserted a third-party claim to enforce the Note but for the rebuttable presumption that legal title to the Note was held by Chuck and Greg. Post-trial motions and appeals extended the pendency of the First Action past the filing date of this action. Accordingly, the statute of limitation relating to the enforcement of Note was tolled pursuant to W. Va. Code §55-2-21 at the time the Complaint was filed to initiate this action. As this action was filed before the expiration of the applicable statute of limitations, Braxton Lumber's claim on the Note is not time barred.

In addition to the above, there are genuine issues of material fact as to whether the statute of limitations to enforce the Note was tolled by Respondent's and Greg's acknowledgment of the Note at the trial of the First Action. This Court has long recognized that an acknowledgement of a debt can remove the bar of statute of limitations. See Abrahams v. Swann, 18 W. Va. 274 (1881); State ex rel. Battle v. Demkovich, 148 W. Va. 618, 136 S.E.2d 895 (1964); Weirton Ice & Coal Co., Div. of Starvaggi Indus., Inc. v. Weirton Shopping Plaza, Inc., et al. 175 W. Va. 473, 474, 334 S.E.2d 611, 612 (1985). The decisions issued by this Court on the

acknowledgement issue, for the most part, have been decided under W. Va. Code § 55-2-8 which provides that:

If any person against whom the right shall have so accrued on an award, or on any such contract, shall by writing signed by him or his agent promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action or suit for the moneys so promised within such number of years after such promise as it might originally have been maintained within upon the award or contract, and the plaintiff may either sue on such a promise, or on the original cause of action, and in the latter case, in answer to a plea under the sixth section, may, by way of replication, state such promise, and that such action was brought within such number of years thereafter; but no promise, except by writing as aforesaid, shall take any case out of the operation of the said sixth section, or deprive any party of the benefit thereof. *An acknowledgment in writing as aforesaid, from which a promise of payment may be implied, shall be deemed to be such promise within the meaning of this section.*

(Emphasis added). This Court has not specifically applied W. Va. Code § 55-2-8 to the statute of limitations period provided for under W. Va. Code § 46-3-118(a). Other jurisdictions, however, have recognized that an acknowledgment of a debt can toll a limitations period under statute of limitations provisions comparable to W.Va. Code §46-3-118. For example, the Court of Appeals of Maryland, in Jenkins v. Karlton, recognized and reaffirmed the long held legal principle in Maryland that:

The statute of limitations does not extinguish the debt; it bars the remedy only.... Thus, Maryland law has long recognized that acknowledgement of a debt barred by limitations removes the bar to pursuing the remedy.... An acknowledgement, sufficient to remove the bar of limitations, need not expressly admit the debt, it need only be consistent with the existence of the debt.... Nor must it be an express promise to pay a debt; just as an express promise to pay a debt barred by limitations revives the remedy, “a mere acknowledgement of such a debt will remove the bar of the statute, because if the debtor acknowledges the debt it is implied that he promises to pay.” ... An acknowledgement can occur prior to the running of limitations, ... in which event, **rather than removing the bar of limitations, it both tolls the running of limitations**

**and establishes the date of the acknowledgement as the date from which the statute will now run....**

Jenkins v. Karlton, 329 Md. 510, 531, 620 A.2d 894 (1993) (emphasis added)(citations omitted); see also Cadle Co. v. Errato, 71 Conn. App. 447, 461, 802 A.2d 887, 897 (2002). The Connecticut Appeals Court in Cadle Co. v. Errato, recognized that “a general acknowledgment may be inferred from acquiescence as well as from silence, as where the existence of the debt has been asserted in the debtor's presence and he did not contradict the assertion.” Cadle, 71 Conn. App. at 465, 802 A.2d at 899 (citations omitted).

This Court has held that an acknowledgment of a debt must be in writing in order to toll a statute of limitations under W. Va. Code § 55-2-8. An often disputed issue is what type of writing is sufficient to satisfy the statutory requirement. In Weirton Ice & Coal Co. v. Weirton Shopping Plaza, Inc., this Court found that “[a] notation on a debtor's check acknowledging the existence of the debt can constitute a sufficient writing to extend the statute of limitations under W. Va. Code 55-2-8.” Weirton Ice & Coal Co. v. Weirton Shopping Plaza, Inc., 175 W.Va. 473, 334 S.E.2d 611 (1985); see also Greer Limestone Co. v. Nestor, 175 W. Va. 289, 294, 332 S.E.2d 589, 595 (1985).

At the trial of the First Action, Greg admitted that: (i) Braxton Lumber provided labor and materials in helping set up Lloyd's (Appendix p.029); (ii) that he signed the Note (Appendix p.029); (iii) that he was the President of Lloyd's; and (iv) as President, if the company borrowed money or signed a contract that he would be the one to sign. Furthermore, Respondent Lloyd's Exhibit 171, admitted into evidence at trial of the First Action, is an accounting journal entry showing that Respondent's own books reflected a \$600,000 debt to Braxton Lumber, before it was distributed to Chuck and Greg. (Appendix p.038) Additionally, Respondent's expert, Robert Morris, rendered a report, a partial copy of which was admitted at trial as Exhibit 191.

Page 4 of this Exhibit is Mr. Morris' work paper showing Lloyd's inter-company accounts, which plainly reflect the existence of the Note to Braxton Lumber on December 31, 1997, with a then existing balance of \$566,400.00. The fourth observation in the handwritten notes to Mr. Morris' report provides as follows: "Conclusion: Entries on Braxton & Lloyd's Inc. probably correspond and are ok." (Appendix p.046).

In addition to the above, during discovery in the First Action, Braxton Lumber and Chuck submitted Request for Admission Number 14 requesting that Lloyd's and Greg admit or deny the following:

Do you admit that beginning in or about 1996, Braxton Lumber made a series of loans to Lloyd's, Inc. totaling approximately \$600,000.00, which allowed for the capitalization of Lloyds' Ace Hardware and that by August 15, 1998, the books of Braxton Lumber and Lloyd's, Inc. each reflected that Lloyd's, Inc. owed Braxton Lumber not less than \$600,000.00.

Greg's and Lloyd's response thereto was:

Admitted in so far as the fact that loans were made. Greg Lloyd, after reasonable investigation, does not possess knowledge or information sufficient to admit or deny facts about the amount of any such loans.

Greg, on behalf of Lloyd's, signed a verification on August 12, 2002, verifying under oath the answers and responses to the discovery, including the response to Request for Admission Number 14 above, to be true and accurate. (Supplemental Appendix at pps. 4-5) The verified response to Request for Admission Number 14 above, Greg's sworn testimony at trial of the First Action, and the exhibits and other evidence offered by Respondent's counsel in the First Action, at the very least establish a genuine issue of material fact that there was an acknowledgment by Respondent of the validity of the Note sufficient to toll the statute of limitation pursuant to W. Va. Code § 55-2-8.

The First Action was filed in 2004. The validity of the Note was never disputed by the Respondent in the First Action. The issue that was disputed was the validity of the Assignment, based on Greg's testimony that he never agreed to it. The validity of the Assignment was not determined until the conclusion of the trial in 2007 and the exhaustion of the appeals. At the conclusion of the First Action, the jury returned a verdict finding that the assignment of the Note to Chuck and Greg was invalid. Following this verdict, Braxton Lumber reinstated the Note as an asset on its books, and filed the instant action to collect on the Note prior to the conclusion of the appeals process in the First Action. Therefore, the Complaint in this action was filed well within the renewed statute of limitations.

The circuit court's order, which permits Respondent to avoid its clear legal obligations based upon a statute of limitations defense, perpetrates a grave miscarriage of justice. Accordingly, the circuit court's finding that Braxton Lumber's claim to enforce the Note is barred by statute of limitations defense is erroneous and must be reversed.<sup>5</sup>

**III. THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER'S CLAIM IS BARRED BY THE DOCTRINE OF *RES JUDICATA*, BECAUSE THE VALIDITY OF PETITIONER'S ASSIGNMENT OF THE NOTE IS NOT AT ISSUE IN THIS ACTION, AND RESPONDENT'S LIABILITY ON THE NOTE WAS ACTUALLY CONCEDED IN THE FIRST ACTION.**

"Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Porter v. McPherson, 198 W.Va. 158, 166, 479 S.E.2d 668, 676 (1996) (citations omitted). In Blake v.

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<sup>5</sup> Other jurisdictions have recognized that, in certain circumstances, the doctrine of equitable tolling applies to statute of limitations applicable to promissory notes. See Kaisha v. Dodson, 423 B.R. 888, 906 (N.D. Cal. 2010); Barash v. Siler, 69 F. App'x 506, 508 (2d Cir. 2003). This Court, in Copier World Processing Supply v. Wesbanco Bank, Inc., 640 S.E.2d 102 (W. Va. 2006), held that the equitable tolling theory of continuing torts applied to conversion does not apply to claims under West Virginia § 46-3-118(g). The facts and claims of *Copier World* are easily distinguishable from the facts and claims in this case. Furthermore, this Court's holding in *Copier World* is narrow and did not address whether equitable tolling is applicable to the limitations applicable to promissory notes under West Virginia Code §§ 46-3-118(a) & (b). Accordingly, the holding in *Copier World* is not dispositive as to whether equitable tolling can be applied in this case.

Charleston Area Med. Ctr., Inc., this Court stated that the following elements must be met for a claim to be barred by the doctrine of *res judicata*:

Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either 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.

Blake v. Charleston Area Med. Ctr., Inc., 201 W. Va. 469, 476, 498 S.E.2d 41, 48 (1997); see also Beahm v. 7 Eleven, Inc., 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008) (per curiam) (citing Conley v. Spillers, 171 W. Va. 584, 301 S.E.2d 216 (1983)). The third prong of this test is most often the focal point, since “the central inquiry on a plea of *res judicata* is whether the cause of action in the second suit is the same as the first suit.” Id. In this case, none of the Blake elements are satisfied, and thus the circuit court erred in finding that Petitioner’s claim is barred by *res judicata*.

With respect to the first prong of the *Blake* test, the issue decided in First Action bears no relation to the issue presented by the claim asserted by Braxton Lumber in this action. In the First Action, the issue presented was the validity of the Assignment and Chuck’s legal right to collect 68% of the Note pursuant thereto. In this case, the simple issue is Braxton Lumber’s legal right to collect the Note, which indisputably represents Respondent’s debt for the capitalization of Lloyd’s Ace Hardware. A grave injustice will be perpetrated if Respondent is not required to pay this debt, which literally brought Lloyd’s Ace Hardware into existence.

In fact, pursuant to W. Va. Code §46-3-203(d), Braxton Lumber’s cause of action on the Note could not be split. Official Comment 5 to W. Va. Code §46-3-203 provides as follows:

Subsection (d) restates former Section 3-202(3). The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation. This is true of either “Pay A one-half,” or “Pay A two-thirds and B one-third.” Neither A nor B becomes a holder. On the other hand an indorsement reading merely “Pay A and B” is effective, since it transfers the entire cause of action to A and B as tenants in common. An indorsement purporting to convey less than the entire instrument does, however, operate as a partial assignment of the cause of action. Subsection (d) makes no attempt to state the legal effect of such an assignment, which is left to other law. A partial assignee of an instrument has rights only to the extent the applicable law gives rights, either at law or in equity, to a partial assignee.

Here, there was no endorsement of the Note; rather, Braxton Lumber executed the Assignment, which was not affixed to the instrument itself. As the holder of the Note, a negotiable instrument, only Braxton Lumber could bring a cause of action on the Note as a matter of law.

In the First Action the final adjudication was that the Assignment was invalid, and thus Chuck could not maintain an action on the Note. Although the issue was not put to the jury in the language of W. Va. Code §46-3-203(d), the result was consistent with that statute. For present purposes, there was no final adjudication regarding the validity of the Note. In fact, Respondent’s own expert in the First Action opined that the Note represented a valid debt. Accordingly, there was no final adjudication on the merits in the First Action on the claim asserted by Braxton Lumber in this action.

As to the second prong of the Blake test, Braxton Lumber was not in privity with Chuck in connection with his third-party claim. “This Court defined the word “privity” in the syllabus of Cater v. Taylor, 120 W.Va. 93, 196 S.E. 558 (1938), by saying: “Privity, in a legal sense, ordinarily denotes ‘mutual or successive relationship to the same rights of property.’” W. Virginia Human Rights Comm'n v. Esquire Grp., Inc., 217 W. Va. 454, 460, 618 S.E.2d 463, 469 (2005) Braxton Lumber was not a party to Chuck’s third-party claim against Lloyd’s in First Action.

During the pendency of the First Action, Braxton Lumber's Assignment of the Note to Chuck and Greg created a rebuttable presumption of validity until the jury returned its verdict (*see supra*, p. 14), finding that Chuck could not recover on the Note. As Braxton Lumber presumptively held no legal right to the Note until the jury verdict, it was not in privity with Chuck with respect to the third-party claim against Respondent. Thus, the second prong of the *Blake* test is not satisfied in this case.

Furthermore, with respect to the third prong of the *res judicata* test, the cause of action identified for resolution in this action is not identical to Chuck's third-party claim in the First Action and Braxton Lumber's claim could not have been brought in the prior action. This Court "has not adopted a transaction-focused test for determining whether successive proceedings involve the same claim or cause of action." Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 481, 557 S.E.2d 883, 888 (2001). This Court has recognized that:

For purposes of *res judicata*, "a cause of action" is the fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief... The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues... If the two cases require substantially different evidence to sustain them, the second cannot be said to be the same cause of action and barred by *res judicata*.

Slider v. State Farm Mut. Auto. Ins. Co., 210 W. Va. 476, 481, 557 S.E.2d 883, 888 (2001)(citing White v. SWCC, 164 W. Va. 284, 290, 262 S.E.2d 752, 756 (1980); Blake, 201 W.Va. at 476, 498 S.E.2d at 48). The issue in the First Action regarding the validity of the Assignment is completely irrelevant in this action. Similarly, the issue regarding Respondent's liability on the Note was neither litigated nor contested in the First Action. Chuck's third-party claim was grounded upon Braxton Lumber's Assignment of Lloyd's debt and Note to Chuck and Greg on August 15, 1998, according to their respective stock interests. The only defense

presented by Lloyd's was that the Assignment was invalid because Greg never agreed to it (even though he initially signed the August 15, 1998 minutes). In the First Action, the jury's verdict was that Chuck could not recover on the Lloyd's debt which included the Note. Respondent's own expert in the First Action unequivocally opined that its liability on this instrument was valid. Thus, the jury's verdict could have only been based upon a determination that the Assignment was invalid.

Furthermore, it is important to note that in the First Action Greg Lloyd never asserted that the Note was unenforceable. To the contrary, the evidence and testimony presented by Greg and Respondent during the trial of the First Action supports a finding that the Note was valid. In that regard, the following evidence and testimony supports a finding that the Note was valid:

- Greg testified that Braxton Lumber provided labor and materials in helping set up Respondent Lloyd's (Appendix p.029).
- By August 15, 1998, the books of Braxton Lumber and Respondent Lloyd's each reflected that Lloyd's owed Braxton Lumber \$600,000.00. (Appendix p.038).
- The accounting records of Lloyd's showed that the debt was owed which included the Note. (Appendix p.044).
- By offering Exhibits 171 and 191 into evidence, and by the direct examination testimony of Lloyd's expert, Robert Morris, Respondent established that there was (i) a Note Payable to Braxton Lumber in the amount of \$566,400 as of December 31, 1997, and (ii) an account payable by Lloyd's to Braxton Lumber as of August, 1998. (Appendix p.044)
- Respondent's own expert opined that Lloyd's debt, including the Note, to Braxton Lumber is valid. (Appendix No. p.046 ).
- During discovery in the First Action, Greg and Respondent admitted in their response to Request of Admission No. 14 that Braxton Lumber made loans to Respondent.
- Greg acknowledged in the First Action that he signed the Note and that as the President of Lloyd's he would be the signatory for the Company as to any contract for money owed (Appendix p.029).

- Although Greg accused his father of forgery and fraud with respect to the Braxton Lumber minutes approving distribution of the Note, he never accused anyone of forgery with respect to his signature on the Note.

Respondent never contended, asserted or even hinted that the debt to Braxton Lumber underlying the Note was invalid during the pendency of the First Action. Thus, the issue tried in the First Action is not identical to the one presented in this action. Furthermore, during the pendency of the First Action and until the jury returned its verdict it had to be presumed that the Assignment was valid and that Braxton Lumber did not hold legal title to the Note. Based upon that presumption, Braxton Lumber lacked standing to assert a claim to enforce the Note in the First Action. Thus, the third prong of the Blake test is not satisfied.

For *res judicata* to bar Petitioner's claim, all three prongs of the test set forth above must be satisfied. For the reasons discussed above, none of the prongs of the *res judicata* test have been met. Therefore, the circuit court clearly erred in finding that *res judicata* precludes Braxton Lumber from maintaining its claim against Lloyd's on the Note in this action.

**IV. THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER'S CLAIM IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL, BECAUSE THE VALIDITY OF PETITIONER'S ASSIGNMENT OF THE NOTE IS NOT AT ISSUE IN THIS ACTION, AND RESPONDENT'S LIABILITY ON THE NOTE WAS ACTUALLY CONCEDED IN THE FIRST ACTION.**

All four of the following conditions must be met for the doctrine of Collateral estoppel to apply:

- (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. Point 1, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The first three elements which must be satisfied to invoke collateral estoppel are substantially identical to the three elements pertinent to a defense of *res judicata*. As those three elements are not satisfied in this action, collateral estoppel does not apply to Petitioner's claim in this action. Moreover, Petitioner did not have a full and fair opportunity to litigate its claim in the First Action.

Respondent Lloyd's Exhibit 171, admitted into evidence at trial of the First Action, is an accounting journal entry showing that Respondent's own books reflected a \$600,000 debt to Braxton Lumber, before it was distributed to Chuck and Greg. (Appendix p.038) Additionally, Respondent's expert, Robert Morris, rendered a report, a partial copy of which was admitted at trial as Exhibit 191. Page 4 of this Exhibit is Mr. Morris' work paper showing Lloyd's inter-company accounts, which plainly reflect the existence of the Note to Braxton Lumber on December 31, 1997, with a then existing balance of \$566,400.00. The fourth observation in the handwritten notes to Mr. Morris' report provides as follows: "Conclusion: Entries on Braxton & Lloyd's Inc. probably correspond and are ok." (Appendix p.046).

In addition to the above, during discovery in the First Action, Braxton Lumber and Chuck submitted Request for Admission Number 14 requesting that Lloyd's and Greg admit or deny the following:

Do you admit that beginning in or about 1996, Braxton Lumber made a series of loans to Lloyd's, Inc. totaling approximately \$600,000.00, which allowed for the capitalization of Lloyds' Ace Hardware and that by August 15, 1998, the books of Braxton Lumber and Lloyd's, Inc. each reflected that Lloyd's, Inc. owed Braxton Lumber not less than \$600,000.00.

Greg's and Lloyd's response thereto was:

Admitted in so far as the fact that loans were made. Greg Lloyd, after reasonable investigation, does not possess knowledge or information sufficient to admit or deny facts about the amount of any such loans.

Greg, on behalf of Lloyd's, signed a verification on August 12, 2002, verifying under oath the answers and responses to the discovery, including the response to Request for Admission Number 14 above, to be true and accurate. (Supplemental Appendix at pps. 4-5) The verified response to Request for Admission Number 14 above, Greg's sworn testimony at trial of the First Action, and the Exhibits and other evidence offered by Respondent's counsel in the First Action, at the very least establish a genuine issue of material fact that there was an acknowledgment by Respondent of the validity of the Note sufficient to toll the statute of limitation pursuant to W. Va. Code § 55-2-8.

Respondent in fact admitted the validity of the debt represented by the Note in the First Action, both by the testimony of Greg and its own expert witness. Thus, collateral estoppel does not operate as a defense to Petitioner's claim in this action.

## CONCLUSION

For the reasons set forth herein, the circuit erred in finding that Petitioner's claim in this civil action is barred by the statute of limitations and/or the doctrines of res judicata and collateral estoppel. Accordingly, the Petitioner requests this Court to reverse the (i) *Order Denying Motion for Summary Judgment of Plaintiff Braxton Lumber Co. Inc. and Granting Cross-Motion for Summary Judgment of Defendant Lloyd's, Inc.* and (ii) *Order Granting Motion to Dismiss of Defendant Lloyd's Inc.* entered by the circuit court in this civil action.

Respectfully submitted,

BRAXTON LUMBER CO., INC.

By counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRAXTON LUMBER CO., INC.,

Petitioner,

v.

No. 15-0993

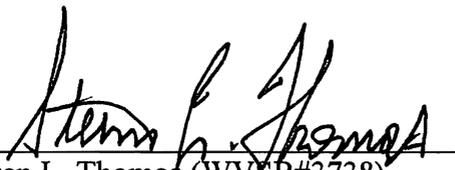
LLOYD'S INC.,

Respondent.

**CERTIFICATE OF SERVICE**

The undersigned counsel for Braxton Lumber Co., Inc., a West Virginia corporation, hereby certifies that on this this 11<sup>th</sup> day of January, 2016, *Petitioner's Brief In Support of Appeal* was served by First Class U.S. Mail upon Respondent, as follows:

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