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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRAXTON LUMBER CO., INC.,

Petitioner,

v. **No. 15-0993**

LLOYD'S INC.,

Respondent.

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

Petitioner Braxton Lumber Co., Inc. ("Petitioner" or "Braxton Lumber") submits this Reply Brief in support of its Petition for Appeal from two orders entered by the Circuit Court of Braxton County (the "circuit court"). In both orders, the circuit court found that Petitioner's claim to enforce a Note executed by William G. Lloyd ("Greg" or "Greg Lloyd"), on behalf of Respondent Lloyd's Inc. ("Respondent" or "Lloyds"), dated January 1, 1999 (the "Note") is barred as a matter of law by the (i) statute of limitations in W.Va. Code § 46-3-118(a), (ii) doctrine of *res judicata* and (iii) doctrine of collateral estoppel. In support of its reply, Petitioner reasserts and incorporates herein the Statement of the Facts set forth in *Petitioner's Brief in Support of Appeal* ("Petitioner's Brief"). In addition to the facts set forth in the Statement of the Facts in Petitioner's Brief, Petitioner asserts the following additional facts that are relevant to this reply, and makes reference to the entire set of instructions[1] given by the circuit court to the jury in the "First Action."[2]

The portions of the circuit court's orders finding that Petitioner's claims are barred by *res judicata* and collateral estoppel are based on the outcome of the First Action, in which Greg sued his father ("Charles Lloyd" or "Charles") and brother ("Chuck Lloyd" or "Chuck"). At the conclusion of the trial in the First Action, the circuit court delivered the following instructions to the jury applicable to the third-party claim asserted by Chuck Lloyd in his third-party complaint:

Instruction No. 4-A

> If you find by a preponderance of the evidence that Lloyd's Inc. has made no payments to Chuck Lloyd on the debt in the amount of $408,000.00 transferred to Chuck Lloyd and payable by Lloyd's Inc. on August 16, 1998, which represented Chuck Lloyd's contribution to the capitalization of Lloyd's Inc., then you may find judgment for Chuck Lloyd against Lloyds' Inc. in the amount of $408,000 plus pre-judgment interest from August 15, 1998.

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[1] See Supplemental Appendix, filed herewith.

[2] As referenced in Petitioner's Brief, *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.

Instruction No. 13

> Rules relating to notice of special corporate board meetings might be overcome by proof of contrary custom or usage on the part of the directors. If you find by a preponderance of the evidence that formal notices of meetings were not ever issued by Braxton Lumber Co., Inc., you may consider this fact when determining whether Braxton Lumber Co. was required to provide notice of special meetings.

Plaintiff's and Third Party Defendant's Request No. 8

> Greg Lloyd has alleged that Charles Lloyd and Chuck Lloyd, as directors of Braxton Lumber Co., failed to give him notice of most or all special board of director meetings as required in the by-laws of Braxton Lumber Co., Inc. and by the West Virginia Corporation statutes. Article Two, Section 4 of the Bylaws of Braxton Lumber Co., Inc. requires, amongst other things, that directors be given written notice of any special meeting of corporate directors at least three (3) days in advance of the meeting. A special board of directors meeting held without notice to any of the directors and in their absence, unless otherwise waived, is illegal, and any action taken at such meeting is invalid.

The Jury's Verdict Form required the jury to make the following finding with respect the claim asserted by Chuck Lloyd in his third-party complaint:

> 4. Do you find by a preponderance of the evidence that Chuck Lloyd is entitled to judgment against Lloyd's Inc. in the amount of $408,000.00, plus prejudgment interest from September 1, 1998?

In response to the above-question, the jury found that Chuck Lloyd had not established, by a preponderance of evidence, that he was entitled to judgment against Lloyd's on his third-party complaint.

Respondent attempts to argue that Braxton Lumber did not join in the convoluted, multi-part instruction suggested by Greg Lloyd and Respondent. This characterization is incorrect. The circuit court instructed the jury on all conceivable bases on which they could find for and against the parties. Thus, the circuit court instructed the jury that they could find the assignment was invalid based on lack of notice to Greg Lloyd. The jury was not instructed on nor did the Verdict Form require the jury to consider and determine the issue as to whether the debt owed by Respondent (including the Note and other debt purportedly distributed to Greg Lloyd and Chuck

Lloyd) was unenforceable, ***because there was no evidence in the record to support any such instructions.*** *See* Supplemental Appendix. Accordingly, based upon the record in the First Action and the limited instructions given to the jury, it is clear that the jury's verdict denying Chuck Lloyd relief on the third party claim could have only been based upon a finding that the corporate action in assigning the Lloyd's account (including the Note) to Chuck and Greg was invalid.

Further, Greg Lloyd was and is the 100% owner of Lloyd's, which is a Subchapter S corporation. As such, Lloyd's is a so-called "disregarded entity" under the Internal Revenue Code (meaning Respondent is separate from Greg Lloyd for liability purposes, but its income flows directly to Greg Lloyd for tax purposes). In the First Action, Greg accused Chuck of waste, conversion, self-dealing and insider lending, in his dealings on behalf of Braxton Lumber. Given this claim filed by Greg Lloyd, it was entirely appropriate for Chuck Lloyd to file a third-party complaint against Respondent, which was capitalized entirely from insider loans made by Braxton Lumber, and 100% of whose profits flowed directly to Greg Lloyd.

II. ARGUMENT

A. THE CIRCUIT COURT ERRED IN NOT FINDING THAT THE STATUTE OF LIMITATIONS ON PETITIONER'S CLAIM ON THE NOTE WAS TOLLED BY WEST VIRGINIA CODE § 55-2-21.

West Virginia 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.

This Court has previously held that the above statutory provision is clear and unambiguous and, thusly, not in need of judicial interpretation. *J.A. St. & Associates, Inc. v. Thundering Herd Dev., LLC*, 228 W. Va. 695, 724 S.E.2d 299, 307 (2011).

With respect to third-party claims, Rule 14(a) of the West Virginia Rules of Civil Procedure provides, in pertinent part as follows:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer.

This Court has previously recognized that "one of the primary goals of any system of justice [is] to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts." *Bd. Of Ed. Of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). In so doing, this Court has repeatedly recognized that "[t]he purpose of Rule 14(a), West Virginia Rules of Civil Procedure, permitting impleader of a third party defendant by the original defendant, is to eliminate circuity of actions when the rights of all three parties center upon a common factual situation." *Cava v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 232 W. Va. 503, 507, 753 S.E.2d 1, 5 (2013)(quoting Syllabus Point 1, *Bluefield Sash & Door Co., Inc. v. Corte Const. Co.,* 158 W.Va. 802, 216 S.E.2d 216 (1975), overruled on other grounds, *Haynes v. City of Nitro,* 161 W.Va. 230, 240 S.E.2d 544 (1977)).

In *Cava v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* this Court stated following:

> This Court discussed the type of "claim" that meets the requirements of Rule 14(a) in *Magnet Bank, F.S.B. v. Barnette,* 187 W.Va. 435, 436–37, 419 S.E.2d 696, 697–98 (1992), stating:
>
> We have not had occasion to discuss in any detail the type of claim which the defendant must assert to meet the requirement of Rule 14(a) that the third-party defendant "is or may be liable to him for all or part of the plaintiff's claim[.]" The federal courts have considered this question and in 3 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 14.07(1) at 14–45–46 (1991), this summary is given:
>
>> "Thus, 'claim' is defined transactionally, and has nothing to do with the legal theory upon which a party relies. The fact that the third-party complaint may be based upon a different legal theory from the underlying case is irrelevant; the question is whether the assertion of liability against the third-party defendant is derivative of the same transaction, occurrence or nucleus of operative fact as the underlying claim by the plaintiff. If the transactional relatedness is present, impleader is proper even if the third-party complaint will be tried to the court while the underlying action will be tried to a jury. In sum, it is clear that the remedial purpose of

> Rule 14 requires that it be interpreted liberally to promote its underlying purposes."

Cava, 753 S.E.2d at 5-6. Respondent argues that West Virginia Code § 55-2-21 is not applicable, because the claim asserted by Petitioner in the underlying civil action could not properly have been brought as a third-party claim in the First Action, as it would not have sought recovery from the Respondent for an amount asserted by Greg Lloyd on his claims against Petitioner. First, Respondent is judicially estopped to raise this argument now, as Chuck Lloyd brought this claim as a third-party complaint in the First Action. Moreover, Respondent's argument is inconsistent with the transactional relatedness test previously set forth by this Court in *Cava* and is further contrary to the principle, that the "remedial purpose of Rule 14 requires that it be interpreted liberally to promote its underlying purposes." *Id.*

In the First Action Greg Lloyd asserted claims against Chuck Lloyd for waste, conversion, self-dealing or insider lending. Furthermore, Greg Lloyd asserted claims against Chuck Lloyd and his father, Charles Lloyd, for civil conspiracy and a claim against his father for fraud and forgery. The $564,000.00 Note, representing amounts loaned by Braxton Lumber to Respondent, was executed by Greg Lloyd while he was an insider of Braxton Lumber, by virtue of his stock ownership and his status as a director and officer of the company. Thus, these were insider loans. The Assignment was also executed while Greg Lloyd was an insider of Petitioner by virtue of his status as a director. Thus, the Note and Assignment were directly at issue in the First Action in connection with Greg Lloyd's waste, self-dealing, and insider lending claims against Chuck Lloyd, his civil conspiracy claim against Chuck and Charles Lloyd, and his fraud and forgery claim against Charles. Accordingly, the Note and Assignment were related and derivative of the same transaction, occurrence and nucleus of operative fact as the underlying claims asserted by Greg Lloyd in the First Action. Therefore, the provisions of Rule 14 would not have barred Petitioner from asserting a third-party claim on the Note in the First Action.

Furthermore, the Note was clearly brought directly into issue by virtue of the claim asserted by Chuck Lloyd in the third-party complaint. In the third-party complaint, Chuck sought

to recover from Respondent 68% of the loans, totaling $600,000 (including the $564,000 Note), made by Petitioner to capitalize Respondent. Neither Respondent nor Greg Lloyd challenged the propriety of the third-party claim asserted in third-party complaint in the First Action. The third-party claim was also thoroughly litigated in the First Action.[3] Therefore, Respondent clearly accepted and acquiesced in Chuck Lloyd's third-party claim in the First Action and thus has waived its right to challenge the propriety of the third-party complaint and is judicially estopped to raise this argument at this juncture. Accordingly, this Court should disregard any argument proffered by Respondent that is grounded upon a determination as to whether the claim asserted in the Third-Party Complaint was proper under Rule 14 of the West Virginia Rules of Civil Procedure.

For the reasons stated above, Rule 14 of the West Virginia Rules of Civil Procedure would not have barred Petitioner from asserting a third-party claim in the First Action to collect on the Note. The clear and unambiguous language of West Virginia Code § 55-2-21 provides that the statute of limitations on any claim that Petitioner had or may have asserted as a third-party claim was tolled. Accordingly, the circuit court erred in finding that West Virginia Code § 55-2-21 did not toll the running of the statute of limitations applicable to the claim asserted by Petitioner in the underlying civil action and the circuit court's decision must be reversed.

B. THE CIRCUIT COURT ERRED IN NOT FINDING THAT THE STATUTE OF LIMITATIONS APPLICABLE TO PETITIONER'S CLAIM WAS TOLLED BY WEST VIRGINIA CODE § 55-2-8 BY VIRTUE OF RESPONDENT'S ACKNOWLEDGEMENT OF THE NOTE

Respondent argues that there was not an acknowledgment of the Note sufficient to toll the running of the applicable statute of limitations under W.Va. Code § 55-2-8. In so doing, the Respondent proffers a narrow and hyper-technical interpretation of W.Va. Code § 55-2-8 that does not comport with applicable law and the purpose of the statute, which provides as follows:

[3] The issue of the enforcement of the 600,000.00 in loans, including the Note, was thoroughly discussed in Petitioner's and Chuck Lloyd's pretrial disclosures. The loans were also the subject of extensive testimony at trial. In that connection, there was testimony regarding the factual circumstances of certain minutes that were executed approving the distribution of the Note to Chuck Lloyd and Greg Lloyd pursuant to the Complaint. There was also testimony and exhibits entered into evidence specifically related to the Note.

> 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***.

W. Va. Code § 55-2-8. This Court has long recognized that "[i]t is important to note that our statute [West Virginia Code § 55-2-8] does not require any special language. The only condition expressly imposed by the statute is the requirement that the new promise or acknowledgment shall be in writing and signed by the debtor or his agent." *Weirton Ice & Coal Co., Div. of Starvaggi Indus. v. Weirton Shopping Plaza, Inc.*, 175 W. Va. 473, 477, 334 S.E.2d 611, 614 (1985)(citing *Hill v. Ringgold,* 112 W.Va. 374, 375, 164 S.E. 412, 413 (1932)). This Court has further stated that "[s]uch writing need not contain an express promise to pay, or even an affirmative statement of willingness or intent to pay, ***because a willingness to pay can be inferred from an unqualified admission of indebtedness,*** as we said in *Stansbury v. Stansbury's Adm'rs,* 20 W.Va. 23, 29 (1882):

> 'The current of modern authority establishes, that the burden of removing the statutory bar rests upon the plaintiff, and that the acknowledgement or admission must not only be unqualified in itself, ***but that there must be nothing in the attendant acts or declarations of the defendant to modify it, or rebut the inference of willingness to pay, which naturally and prima facie arises from an unqualified admission.***'

(Emphasis added). *Weirton Ice & Coal Co.*, 334 S.E.2d at 614 (citing *First Nat'l Bank in Canyon v. Gamble,* 134 Tex. 112, 132 S.W.2d 100 (1939); *Ford v. Sweet,* 224 Va. 374, 297 S.E.2d 657 (1982); 54 C.J.S. *Limitations of Actions* § 317 at 399 (1948); 1A A. Corbin, Corbin on Contracts § 216 at 297 (1963); 1 S. Williston, A Treatise on the Law of Contracts § 166 at 669 (3d ed. 1957));

Accord *Miller v. Thomas*, 226 S.W.2d 149, 152 (Tex. Civ. App. 1949), *writ refused* (Recognizing that the rule is well established that a subsequent unqualified acknowledgment in writing of an existing debt implies a promise to pay it, and such is sufficient to toll the statute of limitations unless the acknowledgment be accompanied by some expressions indicative of an unwillingness to pay); *Faulkner v. Arista Records LLC*, 602 F. Supp. 2d 470, 478 (S.D.N.Y. 2009)(To toll the running of the statute of limitations an acknowledgment or promise must be in writing, be signed by the debtor party, "recognize an existing debt and contain nothing inconsistent with an intention on the part of the debtor to pay it."). Further, in 4 Williston on Contracts § 8:28 it is stated that:

> In short, in all of these similar settings, merely acknowledging or admitting the existence of the obligation will generally not remove the bar; ***but as far as the statute of limitations is concerned, in most jurisdictions any unqualified acknowledgment, so long as it is voluntarily made and is not accompanied with any evidence showing an intention to refuse payment, is the equivalent of a new promise.***

4 Williston on Contracts § 8:28 (4th ed.)(Emphasis added)(citing *Weirton Ice & Coal Co.* in a footnote in support).

In West Virginia, a new promise which will revive a stale demand need not specify a fixed sum, provided the "the sum to be paid 'admits of ready and certain ascertainment.'" *Hill v. Ringgold*, 112 W. Va. 374, 164 S.E. 412, 412 (1932). "The effect of a new promise to pay, ***or a written acknowledgment from which a promise to pay may be implied***, is to revive the period of limitation of the original obligation, and the new period of limitation begins to run from the date of the subsequent promise or acknowledgment." *State ex rel. Battle v. Demkovich*, 148 W. Va. 618, 623, 136 S.E.2d 895, 898-99 (1964) (citing *Ingram v. Harris*, 174 Va. 1, 5 S.E.2d 624 (Va. 1939))(emphasis added.). Likewise, in Syllabus 2 of *Bank of Union v. Nickell*, this Court held that:

> Where a debt is barred by the statute of limitations, and a new promise or acknowledgment is relied upon to remove the bar, there must be an express promise to pay, ***or an acknowledgment of the debt, unaccompanied by reservations or conditions, from which an implied promise will arise***, and the writing ought to be such a one as, if declared upon, would support the action.

Bank of Union v. Nickell, 57 W. Va. 57, 49 S.E. 1003 (1905). For the reasons discussed in Petitioner's Brief, some of which are restated hereinafter, there was an acknowledgement of the Note during the pendency of the First Action sufficient to toll the running of statute of limitations under West Virginia Code § 55-2-8.

At the trial of the First Action, Greg Lloyd admitted that: (i) Braxton Lumber provided labor and materials to Respondent in helping set up its business (Appendix p. 29); (ii) that he signed the Note (Appendix p. 29); (iii) that he was the President of Respondent Lloyd's; and (iv) as President, if the Respondent 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 Lloyd and Greg Lloyd. (Appendix p. 38). Additionally, Respondent's expert and agent, 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. 46). In addition to the above testimony and Exhibits, during discovery in the First Action, Petitioner and Chuck Lloyd submitted Request for Admission Number 14 requesting that Lloyd's and Greg Lloyd 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 Lloyd and Respondent responded as follows:

> 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 Lloyd, on behalf of Respondent 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 pp. 4-5). The verified response to Request for Admission Number 14 above coupled with Greg Lloyd's sworn testimony at trial of the First Action, the exhibits and other evidence offered at the trial in the First Action, is an unqualified acknowledgment of the Note. The evidence was voluntarily given, at a time when there was no issue as to whether any statute of limitations applied to bar a claim on the Note, and neither Greg Lloyd nor Respondent disputed that the debt was justly owed. Greg Lloyd and/or Respondent did question the exact amount due on the loans and the Note, but this is irrelevant; an acknowledgement of the exact amount due is not required to satisfy West Virginia Code § 55-2-8 provided the amount due on the Note could be reasonably ascertained. *Hill,* 164 S.E. at 412. Calculating the balance due on the Note is a simple exercise of calculating accrued interest, and in fact Respondent's own CPA/expert verified the amount owed. Furthermore, neither Greg Lloyd nor Respondent disputed the obligation to pay the Note. What they did challenge was the payment of 68% of the Note to Chuck Lloyd pursuant to the Assignment. Accordingly, there is ample evidence of an implied promise on behalf of Respondent to pay the balance due on the loans and Note. Based upon the above, the circuit court clearly erred in finding that there was not an acknowledgement sufficient to toll the statute of limitation pursuant to W. Va. Code § 55-2-8. Therefore, the circuit court clearly erred in not finding that statute of limitations on Petitioner's claim on the Note was tolled by W.Va. Code § 55-2-8.

C. THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER'S CLAIM ON THE NOTE IS BARRED BY THE DOCTRINE OF *RES JUDICATA*

In *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 476, 498 S.E.2d 41, 48 (1997) 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). As has already been established in Petitioner's Brief and for the reasons discussed in more detail below, Petitioner's claim on the Note is not barred by the doctrine of *res judicata* because all of the *Blake* factors have not been satisfied.

(i) There was no final adjudication on the merits on Petitioner's claim in the First Action.

In the Third-Party Complaint, Chuck Lloyd sought to recover 68% of $600,000.00 in loans made by Braxton Lumber to capitalize Respondent (including the 68% of the liquidated sum due on the $564,000.00 Note), that were purportedly transferred to him by virtue of the Assignment. The validity of the loans and the Note was not disputed. In fact, the record establishes that Respondent conceded and acknowledged that the loans and the Note were valid obligations of Respondent. Furthermore, Petitioner's right to collect on the loans and Note also was not litigated in the First Action. These facts are clear from the jury instructions and the verdict from the First Action. At the conclusion of the trial in the First Action, the circuit court gave the following three instructions to the jury applicable to Chuck's third-party claim:

THIRD PARTY CLAIMS FOR PAYMENT OF NOTE OR ACCOUNT (HARDWARE STORE)

Instruction No. 4-A

> If you find by a preponderance of the evidence that Lloyd's Inc. has made no payments to Chuck Lloyd on the debt in the amount of $408,000.00 transferred to Chuck Lloyd and payable by Lloyd's Inc. on August 16, 1998, which represented Chuck Lloyd's contribution to the capitalization of Lloyd's Inc., then you may find judgment for Chuck Lloyd against Lloyds' Inc. in the amount of $408,000.00 plus pre-judgment interest from August 15, 1998.

Supplemental Appendix, p. 4.

CONTRARY CUSTOM OR USAGE

Instruction No. 13

> Rules relating to notice of special corporate board meetings might be overcome by proof of contrary custom or usage on the part of the directors. If you find by a preponderance of the evident that formal notices of meetings were not ever issued by Braxton Lumber Co., Inc., you may consider this fact when determining whether Braxton Lumber Co. was required to provide notice of special meetings.

Supplemental Appendix, p. 5.

PLAINTIFF'S AND THIRD PARTY DEFENDANT'S REQUEST NO. 8

> Greg Lloyd has alleged that Charles Lloyd and Chuck Lloyd, as directors of Braxton Lumber Co., failed to give him notice of most or all special board of director meetings as required in the by-laws of Braxton Lumber Co., Inc. and by the West Virginia Corporation statutes. Article Two, Section 4 of the Bylaws of Braxton Lumber Co., Inc. requires, amongst other things, that directors be given written notice of any special meeting of corporate directors at least three (3) days in advance of the meeting. A special board of directors meeting held without notice to any of the directors and in their absence, unless otherwise waived, is illegal, and any action taken at such meeting is invalid.

Supplemental Appendix, p. 6. The circuit court gave no instructions relating to the enforceability of the loans made by Braxton Lumber to Respondent. In the context of these instructions, the Verdict Form required the jury to make only the following finding with respect to Chuck Lloyd's third-party claim:

> 4. Do you find by a preponderance of the evidence that Chuck Lloyd is entitled to judgment against Lloyd's Inc. in the amount of $408,000.00, plus prejudgment interest from September 1, 1998?

Contrary to Respondent's contentions, based upon the above instructions and the verdict form, the only thing that can reasonably be concluded is that Petitioner's right to collect on the Note was not litigated in the First Action. What was litigated in the First Action was Chuck Lloyd's right to collect on the loans and the Note by virtue of the Assignment. The record clearly reflects that Respondent defended against Chuck Lloyd's third-party claim solely based upon the validity of the corporate actions surrounding the Assignment. The circuit court gave no instructions to the jury as to whether the Note was unenforceable, because Respondent did not contend that the Note was

unenforceable. Therefore, the only issue decided by the jury in the First Action was the validity of the corporate action with respect to the Assignment based on Greg Lloyd's protests that he was not given notice of the directors' meeting at which the Assignment was approved.

In this civil action, the Petitioner seeks to enforce the Note. Petitioner's claim is completely different from the issue decided by the jury in the First Action to resolve Chuck Lloyd's third-party claim. Accordingly, as the jury was not asked to determine if the Note was enforceable, there could not have been a final adjudication on Petitioner's claim in the First Action. Therefore, the first prong of the *Blake* test has not been met.

(ii) The parties to the Third-Party Complaint are not the same parties or persons in privity with those parties to Petitioner's claim in the underlying civil action.

The *Blake* test requires that the parties to the third-party complaint and Petitioner's claim in the underlying action be the same parties or persons in privity with those parties. Chuck and Respondent were the parties to the claim asserted in third-party complaint in the First Action. Petitioner and Respondent are the parties to the claim asserted in the underlying action. Accordingly, the parties to the Third-Party Complaint and the parties to the claim asserted by Petitioner in the underlying action are not the same parties. The question then centers on whether there is privity among the parties. "This Court has recognized that '[p]rivity, in a legal sense, ordinarily denotes 'mutual or successive relationship to the same rights of property'.'" *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008) (*per curiam*)(quoting *West Virginia Human Rights Comm'n v. The Esquire Group, Inc.,* 217 W.Va. 454, 460, 618 S.E.2d 463, 469 (2005)). "[T]he concept of privity with regard to the issue of claim preclusion is difficult to define precisely but the key consideration for its existence is the sharing of the same legal right by parties allegedly in privity, so as to ensure that the interests of the party against whom preclusion is asserted have been adequately represented." *Beahm* 672 S.E.2d at 602. It has previously been recognized by this Court that "[p]rivity ... 'is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within

the *res judicata.*'" *Id.* (citing *Rowe v. Grapevine Corp.,* 206 W.Va. 703, 715, 527 S.E.2d 814 (1999)).

In the First Action, Greg challenged Chuck Lloyd's legal rights with respect to 68% of the account owed by Respondent to Braxton Lumber, by virtue of the Assignment. Conversely, Petitioner's claim is grounded in the Note itself. As Chuck Lloyd's claim depended on the validity of the Assignment of the debt owed by Respondent to Braxton Lumber (including the Note and all other amounts owed), Chuck did not adequately represent Braxton Lumber's interests in the Note itself. Accordingly, Chuck was not in privity with Petitioner so as to satisfy the second prong of the *Blake res judicata* test.

(iii) The claim in this action is not identical to the cause of action set forth in the third-party complaint determined in the First Action.

The third prong of the *Blake* test requires that the cause of action asserted by the Petitioner in this action be the same as the third-party claim asserted by Chuck Lloyd in the First Action. This Court has established that:

> [f]or 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 ... 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.*

Beahm, 672 S.E.2d at 604 (2008)(quoting *Blake,* 201 W.Va. at 476, 498 S.E.2d at 48 (internal citation omitted)). Further,

> 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)(citing *Restatement (Second) of Judgments* § 24(a) (1982) (taking the position that judgment in an action extinguishes 'all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose'). Rather, in *White v. SWCC,* 164 W.Va. 284, 290, 262 S.E.2d 752, 756 (1980), we embraced the 'same-evidence' approach for determining whether two

> claims should be deemed to be the same for purposes of claim preclusion....

Slider, 557 S.E.2d at 888 (citations omitted). The United States District Court for the Southern District of West Virginia has also recognized that this Court has utilized the doctrine of "virtual representation" whereby "'relitigation of any issue that [has] once been adequately tried by a person sharing a substantial identity of interests with a nonparty'" is precluded. *Richardson v. Church of God Int'l*, No. CIV.A. 1:13-21821, 2014 WL 4202619, at *3 (S.D.W. Va. Aug. 22, 2014)(quoting *Beahm,* 672 S.E.2d at 602 (quoting *Galanos v. Nat'l Steel Corp.,* 358 S.E.2d 452, 454 (W.Va.1987)). The United States District for the Southern District of West Virginia has further recognized with respect to the third prong of the *Blake* test that "...the question is whether the interests of the parties are aligned with respect to the litigation." *Harrison v. Burford*, No. 2:11-CV-00700, 2012 WL 2064499, at *5 (S.D.W. Va. June 7, 2012)(citing *West Virginia Human Rights Comm'n v. Esquire Grp., Inc.,* 217 W.Va. 454, 460, 618 S.E.2d 463 (2005) (quoting *Gribben v. Kirk,* 195 W.Va. 488, 498 n. 21, 466 S.E.2d 147 (1995))).

Again, the third-party claim was a claim asserted by Chuck Lloyd, by virtue of the Assignment, to collect on 68% of all amounts owed by Respondent, including the Note and other loans made by Petitioner. The claim asserted by Braxton Lumber in this action relates to Petitioner's right to enforce the Note. Chuck Lloyd's third-party claim required proof of the validity of the Assignment. At the trial of the First Action, neither Respondent nor Greg Lloyd introduced any evidence attacking the validity of the Note and other amounts owed. And, significantly, the circuit court gave no instructions to the jury relating to whether or not the Note was enforceable. As Petitioner did not assert a third-party claim to enforce the Note in the First Action, the evidence, testimony and exhibits introduced in the First Action focused on the validity of the Assignment and Chuck right to collect on the loans and Note pursuant thereto. Petitioner's claim in this civil action requires nothing more than proof of the enforceability of the Note. Thus, Chuck Lloyd's third party claim in the First Action was not aligned with Petitioner's claim here. Accordingly, based upon the above, the third-prong of the *Blake* test was not satisfied.

D. THE CIRCUIT COURT ERRED IN FINDING THAT PETITIONER'S CLAIM IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

This Court has established the following four part test for the doctrine of collateral estoppel to apply to bar a claim:

> (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. Pt. 1, *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995). The elements necessary to invoke collateral estoppel as an affirmative defense are substantially identical to the elements that must be met to successfully assert the affirmative defense of *res judicata.* The difference is that collateral estoppel focuses on whether an issue was decided as opposed as to whether a claim was decided.

In this case, the elements necessary to sustain the affirmative defense of collateral estoppel have not been met for the very same or similar reasons that the affirmative defense of *res judicata* has not been satisfied. The issue involved in this case is Petitioner's legal right to enforce the Note. The issue decided in the First Action was Chuck Lloyd's right to collect 68% of Respondent's debt owed to Braxton Lumber (including 68% of the Note), by virtue of the Assignment. Clearly, those issues are not identical. There was no final adjudication on the merits in the First Action with respect to Petitioner's right to collect on the Note. Furthermore, as Chuck Lloyd's and Petitioner's legal rights with respect to the Note were conflicting, Chuck could not have been in privity with Petitioner.

The parties agree that the Note is a negotiable promissory note. As such, W. Va. Code § 46-3-203(b) provides that:

> Transfer of an instrument, ***whether or not the transfer is a negotiation***, vests in the transferee ***any right of the transferor to enforce the instrument***, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

W. Va. Code § 46-3-203. (Emphasis added.) The official comments to this section precisely illustrate the situation here:

> 2. Subsection (b) states that transfer vests in the transferee any right of the transferor to enforce the instrument "including any right as a holder in due course." ***If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3-301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder.*** Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3-308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unendorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder. At that point the transferee is entitled to the presumption under Section 3-308.

(Emphasis added.) Applying the law to these facts, because Braxton Lumber did not endorse the Note, Chuck Lloyd had to prove his rights in the Note, *i.e.*, the validity of the Assignment. Presuming the validity of the Assignment, Petitioner did not have standing, prior to the trial of the First Action, to assert a claim on the Note.

As Braxton Lumber was the assignor, it would have been inconsistent for Braxton Lumber to attempt to enforce the Note in the First Action. However, once the jury found that the Assignment was ineffective, Braxton Lumber was entitled to bring the present action to enforce the Note.

Contrary to the plain language of W. Va. Code §46-3-203 and the explanation in the official comments, Respondent suggests that Petitioner had standing to bring a cause of action on the Note in the First Action because Petitioner retained legal title to the Note after the Assignment. This is plainly wrong. "It is a *sine qua non* of negotiability that the ***legal title, as well as the equitable title, of the instrument shall pass to a transferee thereof either by indorsement and delivery, or by delivery only***, so that the transferee thereof can sue thereon in his own name independent of any statute upon the subject." (Emphasis added.) *Stegal v. Union Bank & Fed. Trust Co.*, 163 Va. 417, 442, 176 S.E. 438, 448 (1934)(citing *Clerke v. Martin* (1805) 2 Ld.Raym.

757, 1 Salk. 129, 1 Chitty, Jr., 219; *Buller v. Crips* (1704) 6 Mod. 29, 1 Salk. 130, 2 Ld.Raym. 757, 1 Chitty, Jr., 222; 1 Daniels on Neg. Inst. (6th Ed.) section 1). This Court has long recognized that: "By the endorsement or transfer by delivery, when payable to bearer, of a negotiable note, though after it is due, the legal title passes without notice to the maker[.]" *Smith v. Lawson*, 18 W. Va. 212, 213 (1881).

It is well-settled that an assignor of a ***non-negotiable*** promissory note retains legal title to a Note while the assignee receives equitable title. Respondent's misplaced argument is based on this rule, which is contrary to the well-recognized legal principles relating to negotiable instruments recited above. In support of its argument, Respondent relies on this Court's decisions in *Curl v. Ingram,* 121 W. Va. 763 (1939), and *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770 (1995). This Court's decisions in *Curl* and *Scott Runyan* are clearly distinguishable and provide no support to Respondent's argument.

The *Curl* case was decided in 1939 and involved a limited assignment of four ***non negotiable*** promissory notes by an out-of-state personal representative of a decedent's estate that was being administered out-of-state. The only right that was assigned by the out-of-state personal representative was the right to collect. This was a legal formality at the time of the *Curl* decision because applicable law prohibited an out-of-state personal representative from asserting a right in West Virginia to collect on promissory notes. Clearly, the personal representative in *Curl* retained rights to the promissory notes after their assignment. Therefore, the holding in *Curl* is simply not applicable to this case and provides no guidance as to whether Petitioner had standing to assert a claim on the Note in the First Action.

The *Scott Runyan* case is also clearly distinguishable. The *Scott Runyan* case involved a "consumer" transaction relating to a note that was issued for the purchase of a used car. The note was sold and assigned to One Valley Bank ("OVB"). The borrower ceased making payments on the grounds that the car was defective and that the sale of the car and the accompanying note were obtained by fraud. The Court applied W. Va. Code § 46A-2-102 and held that OVB (the assignee

of the note) took the note subject to the claims and defenses of the maker. The Court did not address whether the assignor retained standing to sue the maker of the note. Thus, the *Scott Runyan* case provides no meaningful guidance as to whether Petitioner had standing to assert a claim to enforce the Note in the First Action.

The case, *Nat'l Fin. Co. v. Uh,* from The Supreme Court, Appellate Division, First Department, New York, is directly relevant to the issue of an assignor's standing to enforce a negotiable promissory note. The *Uh* Court found that, upon the assignment of a negotiable promissory note, the assignor's claim against defendant passed to its assignee. *Nat'l Fin. Co. v. Uh*, 279 A.D.2d 374, 375, 720 N.Y.S.2d 17, 18 (2001). In so finding, the *Uh* Court further found that, upon the assignment of a negotiable promissory note, the assignor was no longer the real party in interest with respect to an action upon the note and retained no right to pursue a claim against defendant. *Id.* (citing *James McKinney & Son v. Lake Placid 1980 Olympic Games,* 61 N.Y.2d 836, 473 N.Y.S.2d 960, 462 N.E.2d 137 (N.Y. 1984). The holding in *Uh*, applying New York's version of UCC Article 3, is consistent with West Virginia Code § 46-3-203, long established case law from this Court, and the applicable legal authorities from other jurisdictions.

In addition, the Respondent appears to argue that the Petitioner had standing to sue on the Note in the First Action because Petitioner should have known that the Assignment was invalid as it impermissibly split the Note into two shares: 68% to Chuck and 32% to Greg Lloyd. This issue was not litigated in the First Action nor has the issue been presented to and ruled upon by circuit court in the underlying civil action. Thus, Respondent's argument in that regard is not ripe for determination by this Court. Moreover, even if Respondent is correct, this actually demonstrates that Petitioner did not have a full and fair opportunity to litigate the claim on the Note in the First Action. And because this action was filed before the conclusion of the First Action, the applicable statute of limitations does not operate to bar Braxton Lumber's claim here.

Based upon the above, Petitioner's claim is not barred by collateral estoppel because all four elements of the test necessary to establish the affirmative defense have not been met.

Accordingly, the circuit court's decision finding Petitioner's claim barred by the doctrine of collateral estoppel was erroneous and must be reversed.

III. CONCLUSION

For the reasons set forth in Petitioner's Brief and 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.

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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 21st day of March, 2016, ***Reply Brief of Petitioner*** was served by First Class U.S. Mail upon counsel of record for Respondent, as follows:

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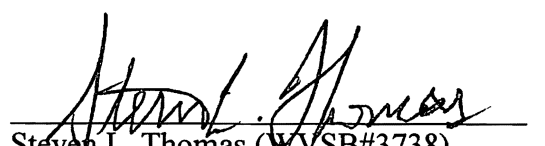

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