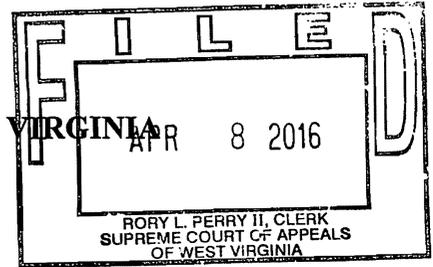


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 16-0346



STATE OF WEST VIRGINIA, ex rel.
JON VEARD, VEARD-MASONTOWN LIMITED PARTNERSHIP,
and UNITED PROPERTY MANAGEMENT COMPANY

Petitioners

v.

HONORABLE LAWRENCE S. MILLER, JR., CIRCUIT JUDGE
FOR THE EIGHTEENTH JUDICIAL CIRCUIT
and ARTHUR J. SUMMERS

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

Counsel for Petitioners

Richard M. Wallace, Esquire (WVSB #9980)
J. Todd Bergstrom, Esquire (WVSB #11385)
Littler Mendelson, P.C.
1085 Van Voorhis Road, Suite 200
Morgantown, WV 26505
(304) 599-4626
rwallace@littler.com
tbergstrom@littler.com

Counsel for Respondents

Jacques R. Williams, Esquire
Brianna W. McCardle, Esquire
Hamstead, Williams & Shook, PLLC
315 High Street
Morgantown, WV 26505
(304) 296-3636
Jacques@wvalaw.com
Brianna@wval.com.com

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This is a verified petition for writ of prohibition by the Petitioners, Jon Veard, Veard-Masontown Limited Partnership, and United Property Management Company (collectively “Petitioners”), by and through counsel, against the Honorable Lawrance S. Miller, Jr., Circuit Judge for the Eighteenth Judicial Circuit, and Arthur J. Summers (“Plaintiff Summers”) (collectively “Respondents”), seeking interlocutory appellate review of orders entered on December 22, 2015 [App. 0001-0002] and March 8, 2016 [App. 0003-0005] which, respectively, consolidated a magistrate court appeal with a circuit court action (“Consolidation Order”), and denied the Petitioners’ *Motion to Dismiss Counts I, II, and IV of Plaintiffs’ Complaint Filed by Plaintiff Summers* (“Motion to Dismiss”). [App. 0015-0036]

I. QUESTIONS PRESENTED

Did the Respondent Judge err by consolidating, “for all purposes and all events,” an appeal from a judgment entered in the Magistrate Court of Preston County, West Virginia with a separate civil cause of action filed in the Circuit Court of Preston County, West Virginia thereby providing for, *inter alia*, a trial by jury and full discovery in the appeal from magistrate court? Further, did the Respondent Judge err by denying Petitioners’ Motion to Dismiss, thereby allowing Plaintiff Summers to pursue claims for unpaid wages in a newly filed civil action in the Circuit Court of Preston County, despite the fact that Plaintiff Summers previously litigated those very same claims in the Magistrate Court of Preston County to a final order on the merits, and is currently appealing that ruling?

II. STATEMENT OF THE CASE

On August 31, 2015, Plum Hill Terrace Apartments¹ (“Plum Hill”) filed an original *Petition for Summary Relief: Wrongful Occupation of Residential Rental Property* against Plaintiff Summers and Rebecca M. White (“Plaintiff White”) in the Magistrate Court of Preston County (“Magistrate Court”), Case No. 15-M39C-00515. On September 8, 2015, Plaintiff Summers filed a “cross-claim” (technically, a permissive counterclaim) against Plum Hill in Magistrate Court, seeking unpaid wages for work that he allegedly performed from November 1, 2014 to May 19, 2015. [App. 0028-0029] He sought damages equaling the Magistrate Court’s jurisdictional limit of \$5,000, as set forth in W.Va. Code § 50-2-1, though he claims he was owed \$8,125. [App. 0028-0029] After a full adversarial hearing was held in Magistrate Court on October 19, 2015, where all parties appeared and participated in the hearing, Magistrate Judge Janice Snider entered an order later that day finding against Plaintiff Summers with regard to his counterclaim seeking unpaid wages. [App. 0031] On October 28, 2015, Plaintiff Summers then timely appealed that order to the Circuit Court of Preston County, West Virginia (“Circuit Court”), with the appeal being assigned Civil Action # 15-C-AP-2 (referred to herein as the “Magistrate Court Appeal”). [App. 0033]

Thereafter, on December 9, 2015, Plaintiff Summers, through counsel, filed a Rule 41 motion to dismiss his Magistrate Court Appeal, without prejudice, arguing that

¹ Plum Hill Terrace Apartments is the trade name for Veard-Masontown Limited Partnership (“VMLP”), a named Defendant in the civil action filed in the Circuit Court of Preston County. United Property Management Company provides administrative and management support and services to VMLP in areas such as financial, accounting, payroll, management information systems, human resources, insurance, and other related support services. The last named Defendant in the Circuit Court action is Jon Veard, who is a general partner of Veard-Masontown Limited Partnership.

he has “more significant interests at stake than what is represented in this appeal.”² [App. 0072-0073] Plaintiff Summers attached a copy of a new and original complaint which he and Plaintiff White (collectively “Plaintiffs”) filed in Circuit Court on or around December 7, 2015, which was assigned Civil Action # 15-C-190 (referred to herein as the “Circuit Court Action”). [App. 0075-0083] With regard to Plaintiff Summers, the Complaint in the Circuit Court Action purports to assert three causes of action against Petitioners: (Count I) Plaintiff Summers’ claim for unpaid wages pursuant to the doctrine of *quantum meruit*; (Count II) Plaintiff Summers’ claim for unpaid wages and statutory liquidated damages pursuant to the West Virginia Wage Payment and Collection Act (“WPCA”); and (Count IV) Plaintiff Summers’ claim for wrongful termination pursuant to *Harless v. First National Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978), and its progeny. [App. 0006-0014]

In the Circuit Court Action, Plaintiff Summers alleges he was hired by the Petitioners as a manager on or about November 1, 2014. [App. 0007] Plaintiff Summers alleges he was “suffered or permitted to work in that capacity by all the Defendants until May 19, 2015.” [App. 0007] In that regard, he alleges he performed a number of duties for Petitioners, including general maintenance work, collecting rent, ensuring tenants were compliant with the obligations under their lease, and handling paperwork and communications with federal agencies. [App. 0007-0008] Plaintiff Summers alleges that he was “subject to the control, management and direction of the Plum Hill Defendants.” [App. 0008] Lastly, Plaintiff Summers alleges that he was “never paid any sum of money

² Notably, Plaintiff Summers admitted in this filing that “[t]he Magistrate ruled against Mr. [Summers] [sic] on the issue of unpaid wages.” [App. 0073]

by the Plum Hill Defendants,” but that he “benefitted from the ‘free’ use of a single-bedroom apartment which he shared with Ms. White.” [App. 0008]

In Count I of his Complaint in the Circuit Court Action, Plaintiff Summers alleges that he was an employee of Petitioners and was not paid for the value of services he performed on behalf of the Defendants. He claims he is entitled to unpaid wages totaling \$6,700.00 pursuant to the doctrine of *quantum meruit*. [App. 0078] In Count II, Plaintiff Summers alleges that he was not paid his wages within four business days following the date that he was discharged in violation of the WPCA, W.Va. Code § 21-5-4, thereby entitling him to damages totaling \$20,100.00. [App. 0009-0011] Lastly, Plaintiff Summers alleges in Count IV that he was terminated by Petitioners in retaliation for inquiring to management about alleged rent increases for several tenants at Plum Hill Terrace. [App. 0012-0013]

Before the Petitioners ever filed any responsive pleading in Plaintiff Summers’ new Circuit Court Action, or otherwise entered an appearance in the Circuit Court Action, the Circuit Court entered a Consolidation Order on December 22, 2015, consolidating Plaintiff Summers’ Magistrate Court Appeal with the new Circuit Court Action. [App. 0001-0002] This order purported to consolidate the Circuit Court Action and the Magistrate Court Appeal “for all purposes and all events including pre-trial discovery, motions and hearings, and trial.” [App. 0001] Additionally, that order stated “the Court will allow Mr. Summers and Ms. White to renew their motion for dismissal without prejudice [of the Magistrate Court Appeal] at a later date if they so choose.” [App. 0001-0002]

On January 29, 2016, Petitioners filed their Motion to Dismiss, arguing that Plaintiff Summers' claims in the Circuit Court Action were barred as a matter of law by the doctrines of collateral estoppel, *res judicata*, and the precedent set by this Court in *Monongahela Power Company v. Starcher*, 174 W. Va. 593, 328 S.E.2d 200 (1985). [App. 0015-0026] In his response brief, Plaintiff Summers argued that his Circuit Court Action should not be dismissed because: (1) there was no final adjudication on the merits in Magistrate Court, and (2) there is no privity between the party to the magistrate court action (Plum Hill Terrace Apartments) and the defendants in the Circuit Court Action. [App. 0040-0043] Petitioners filed a reply brief on February 22, 2016, repudiating both of those arguments. [App. 0067-0071] After a hearing on February 23, 2016, the Circuit Court entered an order denying the Motion to Dismiss, concluding that Plaintiff Summers' claims, in both his Magistrate Court Appeal and his new Circuit Court Action, could proceed in Circuit Court as part of a consolidated action. [App. 0003-0005] In denying the Motion to Dismiss and concluding that the Circuit Court Action stated a claim for which relief may be granted, the Circuit Court reasoned that it was asked to consider matters outside the pleadings, and that the parties are not the same in the Magistrate Court Appeal and the Circuit Court Action. [App. 0004] It is from this erroneous order that Petitioners timely petition for a writ of prohibition.

III. SUMMARY OF ARGUMENT

The rulings of the Circuit Court, as first expressed in its Consolidation Order and later reinforced in its order denying Petitioners' Motion to Dismiss, exceed the Circuit Court's proper power and jurisdiction. The Circuit Court's decision to allow the Circuit Court Action and the Magistrate Court Appeal, both of which involve claims and issues that were previously litigated to a final order by Plaintiff Summers in Magistrate Court,

to proceed simultaneously in a consolidated action is contrary to the great weight of the law of West Virginia and beyond the jurisdiction of the Circuit Court.

Because Plaintiff Summers chose to avail himself of the magistrate court system to litigate his claim(s) for unpaid wages, and because such claims were litigated to a final judgment in Magistrate Court, Plaintiff Summers is barred by the doctrines of *res judicata* and collateral estoppel from re-litigating his wage claim(s) as part of the Circuit Court Action. As the Supreme Court of West Virginia has previously stated, “[f]ew if any circumstances . . . justify allowing a litigant to haul his opponent into one court and then decide he ought to have proceeded elsewhere – *dies enceptus pro complete habetur*. A trial, like a day, ought to be completed.” *Truglio v. Julio*, 174 W. Va. 66, 69, 322 S.E.2d 698, 701 (1984). To allow otherwise would turn the fundamental underpinnings of our judicial system – providing that a final judgment is, indeed, final (subject to appellate proceedings) – on its head.

Plaintiff Summers is certainly entitled to pursue the appellate avenues available to him, but he cannot simply file a brand new civil action in Circuit Court because he was unhappy with the ruling against him on his wage claim(s) in Magistrate Court. Plaintiff Summers’ *only* avenue of redress for his exceptions to the ruling of the Magistrate Court is the Magistrate Court Appeal (which is subject to the jurisdictional limits of magistrate courts in West Virginia), and *not* a new civil complaint which seeks to re-litigate wage claims which have already been fully adjudicated.

A writ of prohibition is appropriate to prevent the extreme prejudice to the Petitioners that would occur if Plaintiff Summers were permitted to take a second bite at the proverbial apple and pursue claims that have already been litigated to a final decision

on the merits in a new civil cause of action. A writ is the only available remedy for the Petitioners in this matter. Accordingly, the Petitioners respectfully request that this Court issue a rule to show cause as to why a writ of prohibition should not be granted arising from the Circuit Court's order and opinion entered on March 8, 2016, denying Petitioner's Motion to Dismiss, as well as the Circuit Court's order purporting to consolidate the Magistrate Court Appeal with a newly filed civil cause of action which was entered on December 22, 2015.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided by this Court's prior precedent, under Rule 18(a) of the *West Virginia Rules of Appellate Procedure*, oral argument is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for Rule 19 argument because it involves an assignment of error in the application of settled law.

V. ARGUMENT

A. THE RESPONDENT JUDGE'S ORDERS BELOW ARE PROPERLY THE SUBJECT OF INTERLOCUTORY APPELLATE REVIEW BY WRIT OF PROHIBITION

This petition for writ of prohibition is filed pursuant to Article 8, § 3 of the West Virginia Constitution, granting the Supreme Court of Appeals original jurisdiction in prohibition, and W.Va. Code § 53-1-1. This petition is also filed with this Honorable Court pursuant to Rule 16 of the *West Virginia Rules of Appellate Procedure*. Pursuant to the original jurisdiction of this Court, the Petitioner seeks relief in the form of a writ of

prohibition on the basis that the Circuit Court's Consolidation Order and its denial of Petitioners' Motion to Dismiss were clearly erroneous as a matter of law.

West Virginia Code § 53-1-1 provides the general standard for a writ of prohibition: "the writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1; *see also State ex rel. Medical Assurance of West Virginia v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003). Furthermore, "the writ should in all proper cases be upheld and encouraged and applied without hesitation." 15 MICHIE'S JURISPRUDENCE OF VIRGINIA AND WEST VIRGINIA § 2 (1998). A writ of prohibition will lie where the abuse of power is so flagrant and violative of a party's rights so as to make the remedy of appeal inadequate. *See State ex rel. UMWA Internat'l Union v. Maynard*, 176 W. Va. 131, 342 S.E.2d 96 (1985). The Court's " 'modern practice is to allow the use of prohibition, based on the particular facts of the case, where a remedy by appeal is unavailable or inadequate, or where irremediable prejudice may result from a lack of an adequate interlocutory review.' " *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 257, 470 S.E.2d 205, 211 (1996) (quoting *McFoy v. Amerigas, Inc.*, 170 W. Va. 256, 532, 295 S.E.2d 16, 22 (1982)).

In determining whether a rule to show cause will issue in prohibition, the inadequacy of other remedies, such as appeal, and the overall economy of effort and money among litigants, lawyers and the Court will be considered. *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). Accordingly a writ of prohibition will issue where substantial, clear-cut legal errors are committed which may be resolved independent of

any disputed facts and resolution of the errors as critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources. *State ex rel. State Auto Mut. Ins. Co. v. Steptoe*, 190 W. Va. 262, 438 S.E.2d 54 (1993); *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va. 176, 437 S.E.2d 749 (1993).

This Court has identified five factors that will be examined by the Court in determining whether to grant a writ of prohibition:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). Although all five factors need not be satisfied, "it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *State ex rel. Packard v. Perry*, 221 W. Va. 526, 532, 655 S.E.2d 548, 554 (2007).

For the reasons stated herein, the Circuit Court's rulings are clearly erroneous as a matter of law, exceed its legitimate powers, and disregard the substantive law of the State of West Virginia. Further, the Petitioners would be severely prejudiced if Plaintiff Summers were allowed to simultaneously litigate his claims in two different civil actions (the Circuit Court Action and the Magistrate Court Appeal), with different procedural rules and different remedies available. Because the Petitioners have no other adequate

means, such as direct appeal, to obtain the desired relief, the Petitioner's only means of relief is through the issuance of a writ of prohibition from this Court. It would be wholly inequitable to require Petitioners to expend the time and cost required to re-litigate claims in the Circuit Court Action that have already been ruled upon, on the merits, by the Magistrate Court.

B. THE RESPONDENT JUDGE ERRED BY CONSOLIDATING THE MAGISTRATE COURT APPEAL AND THE CIRCUIT COURT ACTION

The Circuit Court entered its Consolidation Order on December 22, 2015, consolidating Plaintiff Summers' Magistrate Court Appeal with the new Circuit Court Action. [App. 0001-0002] This order was entered even before the Petitioners filed their answer to Plaintiff's Complaint in the new Circuit Court Action or otherwise entered an appearance in the Circuit Court Action,³ yet it purported to consolidate the Circuit Court Action and the Magistrate Court Appeal "for all purposes and all events including pre-trial discovery, motions and hearings, and trial." [App. 0001]

A party to a final judgment in magistrate court may, as a matter of right, appeal that judgment to circuit court. W. Va. R. Civ. P. Mag. Ct. 18(a); W.Va. Code § 50-5-12. Such appeals are governed by Rule 18 of the Rules of Civil Procedure for Magistrate Courts. That rule states that "[a]n appeal of a civil action tried before a magistrate without a jury shall be a trial de novo in circuit court without a jury." W. Va. R. Civ. P. Mag. Ct. 18(d). Once perfected, a magistrate court appeal remains governed by the rules and procedures for magistrate courts and by West Virginia Code § 50-5-12. For example, under W.Va. Code § 50-5-12, additional discovery is not permitted prior to the de novo

³ Petitioners had separate counsel to represent it in the Magistrate Court Appeal, but an appearance had not yet been entered in the Circuit Court Action.

trial in circuit court. Rather, “[t]he exhibits, together with all papers and requests filed in the proceeding [in magistrate court below], constitute the exclusive record for appeal and shall be made available to the parties.” W.Va. Code § 50-5-12(d)(1). On the other hand, civil actions in circuit court are obviously governed by the West Virginia Rules of Civil Procedure, and trial will be before a jury and based on the evidence established through discovery.

The Circuit Court’s Consolidation Order, which consolidated the Magistrate Court Appeal with the Circuit Court Action “for all purposes and all events including pre-trial discovery, motions and hearings, and trial,” is facially erroneous. On its face, the Consolidation Order purports to allow for a jury trial and full discovery on the Magistrate Court Appeal, which is directly contrary to both Rule 18 of the Rules of Civil Procedure for Magistrate Courts and West Virginia Code § 50-5-12. For this reason alone, the Respondent Judge’s Consolidation Order is clearly erroneous as a matter of law and a writ of prohibition should be issued.

C. THE RESPONDENT JUDGE ERRED BY DENYING PETITIONERS’ MOTION TO DISMISS AND ALLOWING PLAINTIFF TO PURSUE CLAIMS AND RE-LITIGATE ISSUES IN CIRCUIT COURT WHICH WERE PREVIOUSLY LITIGATED TO A FINAL ORDER IN MAGISTRATE COURT, AND WHILE SUCH CLAIMS ARE STILL PENDING AS AN APPEAL FROM MAGISTRATE COURT

The Circuit Court’s decision to deny the Petitioner’s Motion to Dismiss constitutes clear legal error for three independent, but interrelated reasons: (1) this Court has previously held that a circuit court acts beyond its jurisdiction in allowing a plaintiff who previously filed a magistrate court complaint to later file an original complaint in circuit court for damages beyond the magistrate court’s jurisdictional limit; (2) the claims asserted by Plaintiff Summers in Counts I and II of his Complaint in the Circuit Court

Action were previously decided in Magistrate Court, and thus he is barred from re-litigating that issue in Circuit Court pursuant to the doctrines of *res judicata* and collateral estoppel; and (3) the two reasons underlying the Circuit Court's order denying the Motion to Dismiss are misplaced and misinterpret the applicable law.

1. Allowing Plaintiff Summers to pursue his claims for unpaid wages found in Counts I and II of his Complaint in Circuit Court is in clear violation of this Court's holding in *Monongahela Power Company v. Starcher*.

Plaintiff Summers' counter-claim in the Magistrate Court of Preston County was, undisputedly, a claim for unpaid wages. After a hearing in Magistrate Court resulted in an adverse decision for Plaintiff Summers, he then obtained counsel and, not only appealed the Magistrate Court decision, but also filed the new Circuit Court Action. The claims asserted in Counts I and II of Plaintiff Summers' new Complaint, like the claims he is appealing in his Magistrate Court Appeal, are claims -- in the alternative -- for unpaid wages (Count I seeks unpaid wages pursuant to *quantum meruit* and Count II seeks unpaid wages and additional damages under the West Virginia Wage Payment and Collection Act). This Court has previously held, in a case with facts that are virtually identical to those presented to the Court in this case, that such a practice clearly violates established West Virginia law.

In *Monongahela Power Company v. Starcher*, 174 W. Va. 593, 328 S.E.2d 200 (1985), the plaintiffs, Mr. and Ms. Guminey, proceeding pro se in the Magistrate Court of Monongalia County, sued Mon Power for allegedly trespassing on their land and destroying trees and vegetation on the property, seeking \$1,500 in damages. *Id.* at 594. A hearing was held in magistrate court, which resulted in a judgment of \$650 in favor of the plaintiffs. *Id.* Unsatisfied with the amount of the judgment, the plaintiffs then obtained

counsel and appealed the magistrate court judgment to the Circuit Court of Monongalia County. *Id.* Mon Power then offered plaintiffs the maximum amount of damages recoverable in magistrate court, \$1,500, and moved to dismiss the appeal on that ground. *Id.* The circuit court dismissed the magistrate court appeal without prejudice, but granted plaintiffs leave to re-file their complaint and seek recovery for any amount of damages without regard to the monetary jurisdictional limit of the magistrate court. *Id.*

In reviewing these facts on appeal, this Court held that the circuit court “acted beyond its jurisdiction in dismissing the plaintiffs’ de novo appeal and permitting them to file an original complaint against Monongahela increasing the damages beyond the \$1,500 magistrate jurisdictional level.” *Id.* at 595. The Court reasoned that “magistrate court appeals are derivative jurisdictionally,” and therefore “on a de novo appeal from a magistrate court judgment, the amount demanded cannot be increased beyond the jurisdictional limit of the magistrate court.” *Id.* The Court concluded that “plaintiffs are limited upon their complaint in the circuit court to the \$1,500 damage limitation since they are in effect proceeding on a de novo appeal from the magistrate court.” *Id.* Having reached those conclusions, the Court issued a moulded writ allowing plaintiffs to “pursue their de novo appeal” for an amount not exceeding the \$1,500 damage limit. *Id.*

Under the clear mandate of the *Starcher* case, Plaintiff Summers’ claims for unpaid wages must be litigated in Circuit Court only as a de novo appeal from the adverse ruling in Magistrate Court. In other words, the Magistrate Court Appeal is the *only* avenue available to Plaintiff Summers to pursue his claims for unpaid wages. Likewise, Plaintiff Summers’ damages with regard to his wage claims are limited to the Magistrate Court’s jurisdictional limit of \$5,000. By allowing Plaintiff Summers to

simultaneously pursue, in a consolidated fashion, both his Magistrate Court Appeal and his new Circuit Court Action (which have overlapping claims), the Circuit Court clearly acted beyond its jurisdiction, as discussed in *Starcher*.

2. The claims asserted by Plaintiff Summers in Counts I and II of his Complaint in the Circuit Court Action are barred by the doctrines of res judicata and collateral estoppel

Counts I and II of Plaintiff Summers' Complaint in the Circuit Court Action are claims for unpaid wages and are the identical claims and issues that were litigated to a final order in Magistrate Court. As such, these claims are barred by the doctrines of *res judicata* and collateral estoppel, and Plaintiff should be prevented from now re-litigating those claims and issues in a new venue in hopes of a better result.

a). The doctrine of res judicata bars Plaintiff Summers from re-litigating claims which have already been fully adjudicated in the Magistrate Court of Preston County, West Virginia.

Broadly phrased, *res judicata* refers to "claim preclusion." *Blake v. Charleston Area Medical Center*, 201 W. Va. 469, 476, 498 S.E.2d 41, 48 (1997) (citations omitted). "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) (quotations omitted). The rationale underlying the preclusive effect of *res judicata* is to avoid "the expense and vexation attending relitigation of causes of action which have been fully and fairly decided." *Sattler v. Bailey*, 184 W. Va. 212, 217, 400 S.E.2d 220, 225 (1990). With specific respect to the identity of the two causes of action, this Court has held 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*.

White v. SWCC, 164 W. Va. 284, 290, 262 S.E.2d 752, 756 (1980) (citations omitted); *see also* Syl. Pt. 1, *In re Estate of McIntosh*, 144 W. Va. 583, 109 S.E.2d 153 (1959) (“An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*.”) (quotations omitted). As enunciated by this Court in *Blake*, “*res judicata* may operate to bar a subsequent proceeding even if the precise cause of action involved was not actually litigated in the former proceeding so long as the claim could have been raised and determined.” *Blake*, 201 W. Va. at 477.

Thus, pursuant to the principles identified above, in outlining the elements of the doctrine of *res judicata*, this Court has held:

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, 201 W. Va. at Syl. Pt. 4.

Clearly, as argued to the Circuit Court below, the doctrine of *res judicata* bars Counts I and II of Plaintiff Summers' Complaint filed in the Circuit Court Action. There was a final adjudication on the merits in the prior action, which was tried at a hearing in Magistrate Court on October 19, 2015 and reflected in an Order of that date. *See Truglio*, 174 W. Va. at 68 (“[A magistrate court’s] final judgment is binding *unless overturned on appeal.*”) (emphasis added). Both actions involve Plaintiff Summers bringing a claim for unpaid wages against his alleged employer, Plum Hill Terrace Apartments (which is the trade name for Veard-Masontown Limited Partnership).

Lastly, Plaintiff Summers' causes of action for unpaid wages found in Counts I and II of his Complaint in the Circuit Court Action are identical to those that were decided on the merits in Magistrate Court, or at the very least were claims that “could have been resolved, had [they] been presented, in the prior action.” As discussed in *White*, the test to determine if the claims involved in the two suits are identical is to inquire whether the same evidence would support both claims. *White*, 164 W. Va. at 290. Here, undoubtedly, the same evidence would support both Plaintiff Summers' wage claims in Magistrate Court, and his wage claims in the Circuit Court Action, including his claims for liquidated damages pursuant to the WVWPCA. Thus, Plaintiffs' wage claims asserted in the Circuit Court Action are clearly barred from re-litigation pursuant to the doctrine of *res judicata*. The Respondent Judge erred in ignoring this argument and denying the Motion to Dismiss.

b). Plaintiff is barred by the doctrine of collateral estoppel from re-litigating the very same issues that have been previously adjudicated by the Magistrate Court of Preston County, West Virginia.

Even assuming, *arguendo*, that Plaintiff Summers' claim(s) in the Circuit Court Action are not identical, for the purposes of a *res judicata* analysis, to the claims which were previously decided by the Magistrate Court (and they clearly are), they are nonetheless barred by the doctrine of collateral estoppel because the underlying issues are identical and have been fully adjudicated. Collateral estoppel "stands for an extremely important principle in our adversary system of justice." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). In essence, the doctrine forecloses the re-litigation of issues that have been previously decided. "Collateral estoppel will bar a claim if four conditions are met: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Collateral estoppel varies slightly from the doctrine of *res judicata*, which bars the re-litigation of *claims* previously decided (or which could have been decided) in an earlier action. Instead, collateral estoppel bars the re-litigation of identical *issues*. *Id.* at 9. "The central inquiry on collateral estoppel is whether a given issue has been actually litigated by the parties in the earlier suit." *Mellon-Stuart Co. v. Hall*, 178 W. Va. 291, 299, 359 S.E.2d 124, 132 (1987). "Collateral estoppel is designed to foreclose litigation of issues in a second suit which have actually been litigated in the earlier suit even though

there may be a difference in the cause of action between the parties of the first and second suit.” Syl. Pt. 2, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216 (1983).

The Supreme Court of Appeals of West Virginia has on several occasions examined the application of the doctrine of collateral estoppel to magistrate court judgments. For example, in *Truglio v. Julio*, 174 W. Va. 66, 322 S.E.2d 698 (1984), one of the plaintiffs, Ms. Finnegan, was bitten by the defendant’s dog while reading meters for the power company, and received a proper adversarial hearing in magistrate court. *Id.* at 67. At the conclusion of the hearing, but before the magistrate announced his verdict, Ms. Finnegan decided to consult a lawyer, who then promptly voluntarily dismissed her magistrate complaint. *Id.* The magistrate thereafter awarded judgment to Ms. Finnegan. *Id.* Ignoring the judgment, Ms. Finnegan then filed a civil lawsuit in the Circuit Court of Cabell County, where there is no jurisdictional limit on the amount of recovery. *Id.* In upholding the circuit court’s dismissal of the action, the West Virginia Supreme Court emphasized the binding nature of magistrate court proceedings. In that regard, the Court held that “[a]lthough the magistrate court is not a court of record, its final judgment is binding unless overturned on appeal.” *Id.* at 68. With regard to Ms. Finnegan’s attempt to “annul a proper trial and to relitigate her case at a different time and in another place,” the Court reasoned that:

If we do not strictly enforce rules of finality with regard to magistrate court judgments the judicial system becomes overburdened with the juggling of crowded dockets; lawyers are inconvenienced by rescheduled trial dates; and litigants are set to great expense by a forum shift and reappearance in court on another date. . . . Few if any circumstances . . . justify allowing a litigant to haul his opponent into one court and then decide he ought to have proceeded elsewhere – *dies enceptus pro complete habetur*. A trial, like a day, ought to be completed.

Id. at 68-69. Following that reasoning, the Court held that the magistrate court decision barred the re-litigation of Ms. Finnegan's claims in circuit court. *Id.* at 70.

Like the plaintiffs in *Starcher* and *Truglio*, Plaintiff Summers brought a valid complaint in Magistrate Court, was ultimately displeased with the result, and, despite the fact that he is pursuing an appeal of that result, seeks to re-litigate the same issue in his new Complaint in Circuit Court. All of the elements of the doctrine of collateral estoppel are met. The issue decided in Magistrate Court – namely, whether plaintiff was entitled to alleged unpaid wages – is identical to the issue underlying the claims asserted in Counts I and II of his Complaint in the Circuit Court Action. As discussed above, there was a final adjudication on the merits in Magistrate Court which determined, conclusively, that Plaintiff Summers was **not** entitled to any unpaid wages for the work he alleges to have performed at Plum Hill Terrace Apartments. [App. 0031] *See Truglio*, 174 W. Va. at 68 (“[A magistrate court’s] final judgment is binding *unless overturned on appeal.*”) (emphasis added). The party against whom the doctrine is being invoked (Plaintiff Summers) is identical in both actions. And finally, Plaintiff Summers had a full and fair opportunity to litigate the issue at an adversarial hearing in Magistrate Court. For all of those reasons, and based on the precedent set by the West Virginia Supreme Court of Appeals in *Starcher* and *Truglio*, Plaintiff Summers’ claims, as set forth in Counts I and II in his new Complaint, are barred as a matter of law because the dispositive underlying issue has already been fully adjudicated on the merits.

Despite his own admission that that “[t]he Magistrate ruled against Mr. [Summers] [sic] on the issue of unpaid wages,” [App. 0073] Plaintiff Summers argued below that there was no final adjudication on the merits in the Magistrate Court action

because it was appealed. Plaintiff Summers argues that he should be permitted to pursue his wage claims in the new Circuit Court Action as a result. This argument is seriously wide of the mark. In support of this argument, Plaintiff Summers cited *Starcher*, which Petitioners also cited in their Motion to Dismiss. While the Court in *Starcher* did conclude that the magistrate court's findings in that case were not yet final because they were appealed, the Court clearly held that the plaintiff's claims could only be adjudicated in circuit court as a de novo appeal from the magistrate court. This Court has held that a magistrate court's "final judgment is binding *unless overturned on appeal.*" *Truglio*, 174 W. Va. at 68 (emphasis added). Petitioners are not arguing that Plaintiff Summers cannot pursue his Magistrate Court Appeal. Rather, Petitioners are simply arguing that Plaintiff Summers cannot be permitted to re-litigate in Circuit Court the issues that have already been brought under the jurisdiction of the Magistrate Court. The Magistrate Court's decision that Plaintiff Summers was not entitled to any alleged unpaid wages is a final judgment "*unless overturned on appeal.*" To date, such judgment has not been overturned on appeal, and the doctrine of collateral estoppel therefore bars Plaintiff Summers from re-litigating the issue. Moreover, even if that judgment were to be overturned through the Magistrate Court Appeal, Plaintiff Summers is still only limited to the remedies available to him through that appellate avenue and can never bring a new civil cause of action for the same claims. As such, the Respondent Judge erred in denying the Petitioners' Motion to Dismiss.

3. The only findings made by the Circuit Court are clearly erroneous under West Virginia law

As the basis of its order denying the Petitioners' Motion to Dismiss, the Circuit Court made two findings, added as a short handwritten notation (without further

reasoning), which are both insufficient to support its ruling and are erroneous under West Virginia law. First, the Circuit Court stated that it “is asked to consider matters outside the pleadings under this Rule 12(b)(6) motion.” Importantly, however, Petitioners did **not** present the Court with any matters outside the pleadings other than the public records related to Plaintiff Summers’ Magistrate Court proceeding. This Court has previously determined that matters of public record will not convert a motion to dismiss into one for summary judgment. For example, in *Sturm v. Bd. of Educ. of Kanawha Cnty.*, 223 W. Va. 277, 283, 672 S.E.2d 606, 612 n.8 (2008), the Supreme Court of Appeals of West Virginia held that “a trial court can take notice of a prior case without having to convert the motion to dismiss into one for summary judgment. *See e.g., Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000) (“[A] court may look to matters of public record in deciding a Rule 12(b)(6) motion without converting the motion into one for summary judgment. And a court ordinarily may treat documents from prior state court adjudications as public records” (citations omitted)).”

Secondly, the Circuit Court found that “the parties are not the same in these 2 consolidated cases. New additional parties are in Case # 15-C-190.” While it is true that additional parties were added to Plaintiff Summers’ Circuit Court Action, that fact is irrelevant to the critical issues that were before the Circuit Court. As discussed above, the doctrine of collateral estoppel only requires that “the party *against whom the doctrine is invoked*” be a party or in privity with a party to the prior action. *See* Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3 (1995). So for the purposes of the collateral estoppel analysis, the **only** fact that matters is that Plaintiff Summers was a party to both actions – a fact that is undisputed. This requirement exists so that the doctrine of collateral estoppel cannot be

used against a party who did not have an opportunity to actually litigate the issue in the earlier proceeding.

Likewise, *res judicata* requires that the two actions must involve either the same parties or persons in privity with those same parties. *Blake*, 201 W. Va. at Syl. Pt. 4. In this case, there is no dispute that Plaintiff Summers and Plum Hill Terrace Apartments (which is simply the trade name for Veard-Masontown Limited Partnership) are *the same* parties in both proceedings. Moreover, the Petitioners that were added only in the Circuit Court Appeal are in privity with the party to the Magistrate Court action, thereby meeting the elements of both doctrines. “The term ‘privity’ is a somewhat fluid concept.” *Conley v. Spillers*, 171 W. Va. 584, 589, 301 S.E.2d 216, 221 (1983). “Privity, in a legal sense, ordinarily denotes ‘mutual or successive relationship to the same rights of property.’ ” Syl. Pt., *Cater v. Taylor*, 120 W. Va. 93, 196 S.E. 558 (1938). With specific respect to the doctrine of *res judica*, this Court has stated that privity stems from “a common interest in the outcome” of the former litigation. Syl. Pt. 1, *Gentry v. Farruggia*, 132 W. Va. 809, 53 S.E.2d 741 (1949); *see also West Virginia Human Rights Comm’n v. The Esquire Group, Inc.*, 217 W. Va. 454, 460-61, 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.”). The Petitioners are all, at various levels and in different roles, involved in the operation of Plum Hill Terrace Apartment. Clearly there is a “common interest in the outcome” among Petitioners as to the former action.

Finally, the fact that additional related entities were added as named defendants in his new Circuit Court Action does not affect the fact that Plaintiff Summers is barred from pursuing his causes of action in Circuit Court for damages exceeding the jurisdictional limit of the Magistrate Court, as decided in *Starcher*.

4. Count IV of Plaintiff's Complaint in the Circuit Court Action should be stayed pending the resolution of the Magistrate Court Appeal

Count IV of Plaintiff Summers' Complaint asserts a claim for wrongful termination pursuant to *Harless v. First National Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978), and its progeny. This claim is obviously dependent upon the fundamental determination that Plaintiff Summers was an employee of Veard-Masontown Limited Partnership, which does business under the trade name Plum Hill Terrace Apartments. That determination is the essence of the Magistrate Court Appeal. If the Circuit Court affirms the Magistrate Court's final order below after a de novo trial and concludes that Plaintiff Summers was not an employee (and thus not entitled to unpaid wages), Plaintiff Summers' wrongful termination claim would clearly be barred by the doctrine of collateral estoppel. Petitioners assert herein, as was argued orally to the Circuit Court below, that considerations related to the economy of time, effort, expense, and judicial resources weigh in favor of granting a stay as to the wrongful termination claim, pending the outcome of the Magistrate Court Appeal. The Circuit Court erred in failing to grant a stay as to this claim, and Petitioners request this Court to grant a writ of prohibition, directing the Circuit Court to stay Plaintiff Summers' wrongful termination claim pending the outcome of the Magistrate Court Appeal.

VI. CONCLUSION AND PRAYER FOR RELIEF

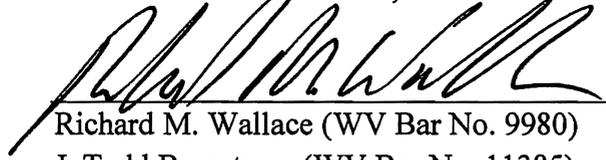
For the reasons stated above, the Circuit Court of Preston County's rulings below were clearly erroneous as a matter of law and exceeded the legitimate powers of that court, making a writ of prohibition proper in this case. The clear, undisputed facts and law governing this case demonstrate that Plaintiff Summers should be prohibited from proceeding to litigate the claims set forth in Counts I and II of the Complaint in the Circuit Court Action. The Circuit Court of Preston County's ruling clearly strays from well-settled West Virginia law. Therefore, the Petitioners pray as follows:

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

Dated: April 7, 2016.

Respectfully submitted,

LITTLER MENDELSON, P.C.

A handwritten signature in black ink, appearing to read "Richard M. Wallace", is written over a horizontal line.

Richard M. Wallace (WV Bar No. 9980)

J. Todd Bergstrom (WV Bar No. 11385)

1085 Van Voorhis Road, Suite 200

Morgantown, WV 26505

304.599.4600

304.599.4650 (fax)

Counsel for Petitioners

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. _____

STATE OF WEST VIRGINIA, ex rel.
JON VEARD, VEARD-MASONTOWN LIMITED PARTNERSHIP,
and UNITED PROPERTY MANAGEMENT COMPANY

Petitioners

v.

HONORABLE LAWRENCE S. MILLER, JR., CIRCUIT JUDGE
FOR THE EIGHTEENTH JUDICIAL CIRCUIT
and ARTHUR J. SUMMERS

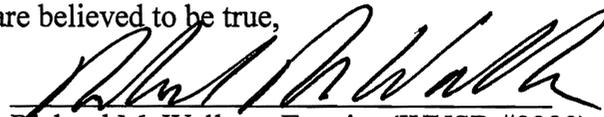
Respondents.

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF MONONGALIA, TO-WIT

Pursuant to W.Va. Code § 53-1-3 and Rule 16(d)(9) of the West Virginia Rules of Appellate Procedure, I, Richard M. Wallace, being first duly sworn, state that the facts and allegations contained in the foregoing *Verified Petition for Writ of Prohibition* are true, or to the extent they are stated to be on information, are believed to be true,


Richard M. Wallace, Esquire (WVSB #9980)

Taken, subscribed, and sworn to before me on this 7th day of April, 2016.

My Commission expires on: March 2, 2020.


Notary Public



CERTIFICATE OF SERVICE

I, Richard M. Wallace, counsel for the Petitioners, hereby certify that service of the foregoing *Verified Petition for Writ of Prohibition* was made upon counsel of record this 7th day of April, 2016, by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

Honorable Lawrance Miller, Jr.
101 West Main Street, Room 303
Kingwood, WV 26537

Jacques R. Williams, Esquire
Brianna W. McCardle, Esquire
Hamstead, Williams & Shook, PLLC
315 High Street
Morgantown, WV 26505


Richard M. Wallace, Esq.