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DOCKET NO. 19-0055

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**Robert Lee Mattingly, Jr.,
Plaintiff Below, Petitioner**

vs.

No. 19-0055

**Robert Moss
Defendant Below, Respondent**

**(On Appeal from the Circuit Court of
Ritchie County, West Virginia Case No. 18-C-2)**

PETITIONER'S BRIEF

MAY 15 2019

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

The Petitioner, Robert Lee Mattingly, Jr., respectfully prays that this Honorable Court grant his Petition for Appeal and REVERSE the Order Granting Summary Judgement entered by the Circuit Court of Ritchie County, West Virginia, and REMAND this matter back to the Circuit Court for further development and trial on the merits. In support of his appeal, the Petitioner states as follows:

ASSIGNMENT OF ERRORS

The Circuit Court of Ritchie County was clearly wrong in granting the Respondent's Motion for Summary Judgement by misapplying the doctrine of *res judicata* and by failing to recognize that equity demands that the Petitioner be given his day in court

STATEMENT OF THE CASE

This appeal arises from the Order Granting Summary Judgement entered by the Circuit Court of Ritchie County, in the civil matter styled *Mattingly v. Moss*, Case No. 18-C-2 [Order Granting Summary Judgement, Appendix p. 1.]

The Petitioner, Robert Mattingly, was a sixty-six (66) year old disabled Vietnam veteran who lived in the country in Pleasants County, West Virginia, with his beloved German Shepherd service dog. He lived quietly, maintained some rental property, and had accumulated a small savings that he used for his own support and to maintain his property. The Respondent, Robert Moss, was a well-tender who often maintained the gas wells that were located on the Petitioner's property and on adjacent parcels. The two men became acquaintances and often visited when the Respondent passed through.

In July 2015, Petitioner Mattingly was visited by the local constabulary, who advised him that he was under arrest for driving on a suspended license. It just so happened that the

Respondent Moss was visiting Mr. Mattingly that day. Believing his stay in jail would be brief, and to ensure his rental property and beloved German Shepherd service dog were adequately cared for, Petitioner Mattingly asked Respondent Moss to care for his property and dog until the Petitioner was released from jail. The Respondent obliged.

Unfortunately, the Petitioner's initial estimate of his jail stay proved to be misguided as he was confined at the North Central Regional Jail, West Virginia, for eighteen (18) months. In or about August 2015, a month after Petitioner Mattingly was taken to jail, the Respondent visited Mr. Mattingly at the North Central Regional Jail and agreed that he would continue to take care of the Petitioner's German Shepard and rental property but advised the Petitioner that he needed money to do so. Consequently, the Petitioner told the Respondent where to find two (2) check books at his home. The Respondent obtained the check books and took them to the Petitioner at the jail and requested that the Petitioner sign approximately eight (8) blank checks from his two bank accounts. Relying upon the representations of the Respondent, Mr. Mattingly signed the checks and gave them to the Respondent.

Beginning on August 28, 2015, Moss began writing checks from Mattingly's checking account to himself. The funds were not used for the benefit of Mattingly, his real or personal property, or his dog.

Moss later convinced the Petitioner that for him to continue to care for and maintain his real and personal property, his dog, and his business affairs, Mattingly needed to appoint Moss as his attorney-in-fact under a durable power of attorney. Based upon the promises, inducements, and representations of the Respondent on October 21, 2015, the Petitioner appointed Moss as his true and lawful attorney-in-fact and agent through a Power of Attorney that was specific and

limited for the period of the Petitioner's incarceration. [Appendix, p. 76, Complaint Exhibit No. 2.]

Subsequently, the Respondent engaged in a pattern and practice of misusing and misappropriating the property of the Petitioner. He further failed to care for and maintain the Petitioner's real and personal property and his German Shepard. He first wrote checks to himself for amounts ranging from \$150.00 to \$600.00. Later, he wrote checks to himself for greater amounts, ranging from \$4,100.00 to \$6,000.00. At all times after October 21, 2015, when Moss wrote checks from the Petitioner's account, he was acting in a fiduciary capacity pursuant to the Power of Attorney appointment. None of the funds withdrawn from the Petitioner's accounts by Moss were used for the benefit of Mattingly, his dog, or his property.

In January 2017, upon returning to his home and rental property after his release from jail, the Petitioner, to his dismay, discovered that the Respondent not only failed to maintain the Petitioner's rental property, but also neglected his beloved four-legged companion. The Petitioner later discovered that Moss had withdrawn over twenty-three thousand dollars (\$23,000) from Mattingly's two bank accounts: fifteen thousand six hundred dollars (\$15,600) from the Petitioner's account with the Williamstown Bank and another seven thousand four hundred fifty dollars (\$7,450.00) from the Petitioner's account with the Community Bank of Parkersburg/Vienna.

While confined in his jail cell, the Petitioner was not aware of the Respondent's self-dealing and had no way of monitoring the Respondent's actions. Conversely, Moss was attentively aware of the Petitioner's incarceration and isolation and took advantage of the Petitioner's trust and circumstances to swindle thousands of dollars from the Petitioner. Moss purposely kept the Petitioner unaware of the Respondent's true intent by providing the Petitioner

false information about his finances and the conditions of both his rental property and German Shepherd service dog. Not until his release eighteen (18) months later did the Petitioner ultimately discover the Respondent's nefarious deeds.

Unaware of the consequences of acting pro se and without understanding the requirements of civil procedure, Mattingly hastily filed two complaints in the Pleasants County Magistrate Court (Case Nos. 17-M37C-32 and 17-M37C-33) with the intent of righting a wrong he genuinely believed occurred.

In his first complaint, the Petitioner alleged a breach of contract action against Moss, claiming that the Respondent failed to take care of Mr. Mattingly's real property and dog, even though the Respondent withdrew more than enough funds from the Petitioner's bank accounts. Moss appeared by and through his attorney, but the Petitioner proceeded on his own without counsel. The Magistrate Court ultimately ruled in favor for the Respondent. [Appendix, p. 53, Complaint Exhibit No. 3, Magistrate Order #1.] Unaware of the time requirement to appeal, the Petitioner did not timely appeal nor file a Motion to vacate the judgement due to his lack of understanding and expertise of the law.

In his second Magistrate Court complaint, the Petitioner alleged extortion, a criminal action that fell outside the Magistrate Court's jurisdiction and claimed damages in excess of \$10,000. The Respondent Moss, again through his attorney, moved to dismiss the matter because the claims exceeded the jurisdictional amount of the court. [Appendix, pp. 58-60, Complaint Exhibit No. 5.]. The Magistrate Court dismissed the second lower court action *without prejudice* for lack of jurisdiction. [Appendix, p. 61, Complaint Exhibit No. 6, Magistrate Order #2.]. This permitted the Petitioner to re-file his complaint in Circuit Court, which he then decided to do.

Upon realizing he was beyond his knowledge and expertise of the law, the Petitioner sought legal counsel and filed the Complaint in the present case on January 26, 2018, alleging a breach of fiduciary duty, fraud, fraudulent inducement, intentional infliction of emotional distress, and breach of contract on the part of the Respondent, Robert Moss. The causes of action arose out of the actions and omissions of Moss while he was acting under the authority of a durable power of appointment made by the Petitioner. [Circuit Court Complaint, Appendix pp. 5-21.].

Prior to conducting any discovery whatsoever, Respondent Moss filed a Motion for Summary Judgment on April 5, 2018, asserting that the principles of *res judicata* precluded further development of this action. [Motion for Summary Judgment, Appendix pp. 130-172.] The motion was based upon the fact that the Petitioner, acting pro se, previously filed two different claims against the Respondent in the Magistrate Court of Pleasants County, West Virginia. The first claim for breach of contract for failure to care for the Petitioner's dog and rental property resulted in judgement for the Respondent [Magistrate Court Complaint #1, Appendix pp. 36-46.]. The second claim for extortion was dismissed *without prejudice* because it exceeded the \$10,000 monetary jurisdictional limits of the Magistrate Court. [Magistrate Court Complaint #2, Appendix pp. 154-161.].

The Circuit Court conducted a hearing upon the Motion for Summary Judgment on August 17, 2018. The Court deferred ruling on the Motion for Summary Judgment and allowed the parties to submit further arguments and documents for consideration. [Transcript, August 17, 2018, Appendix p. 217.] The Petitioner filed a Second Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment on August 27, 2018. [Plaintiff's Memo #2, Appendix p. 203.] The Respondent did not file any further pleadings.

After considering further arguments and exhibits from both parties, the Circuit Court concluded that the Motion for Summary Judgement should be granted on the grounds of *res judicata*, and entered the Order Granting Summary Judgement on December 6, 2018. The Circuit Clerk subsequently filed the Order on December 17, 2018. [Order Granting Summary Judgement, Appendix p. 1.]

On January 16, 2019, the Petitioner filed his Notice of Intent to Appeal.

SUMMARY OF ARGUMENT

The Circuit Court of Ritchie County was clearly wrong in granting the Respondent's Motion for Summary Judgement. First, two of the three required elements of the doctrine of *res judicata* were not satisfied. Second, equity and justice demand that the Petitioner's cause should not be defeated solely by his unfamiliarity with procedural or evidentiary rules while acting pro se.

For the doctrine of *res judicata* to apply, three elements must be satisfied: identical parties; final adjudication on the merits; and identical causes of action, burdens of proof, and evidence presented. In the present matter, only one of these elements was satisfied, that of having identical parties. The other two elements, final adjudication on the merits and identical causes of actions, burdens of proof, and evidence presented, were not satisfied. There was no final adjudication on the merits of the Petitioner's second complaint due to the Magistrate Court lacking jurisdiction and dismissing the complaint *without prejudice*. Moreover, the causes of action, burdens of proof, and evidence presented amongst all complaints filed by the Petitioner were completely different.

Finally, the Petitioner's misguided attempt at pursuing justice as a pro se litigant, with limited resources, legal training, and experience, should not bar him from being fully and fairly

heard. Justice and equity demand that the Petitioner be given his day in court and be allowed to present new causes of actions, facts, and evidence. This Court has long recognized that pro se litigants are allowed leniency when traversing through the intricacies of litigation to preserve equity and justice. This matter is a prime example as to why that principle should now apply.

For all the foregoing reasons, this Honorable Court should REVERSE the Order Granting Summary Judgement entered by the Circuit Court of Ritchie County, West Virginia, and REMAND this matter to the Circuit Court for further development and trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the provisions of Rules 18 and 19 of the *West Virginia Rules of Appellate Procedure*, oral argument may not be necessary since the dispositive issue has been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal. This is a matter that could be appropriate for a memorandum decision.

ARGUMENT

A. Standard of Review

The standard of review for challenges to findings and conclusions of the circuit court is a two-prong deferential standard. Final orders and ultimate dispositions are reviewed under an abuse of discretion standard, and a circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review. *Phillips v. Fox*, 193 W. Va. 657 at 661, 428 S.E.2d 327 at 331 (1995).

B. Res Judicata Does Not Bar the Petitioner's Complaint.

The Circuit Court abused its discretion by granting the Respondent's Motion for Summary Judgment on the grounds of *res judicata*. The Circuit Court determined that the doctrine of *res judicata* applied because *both* actions were litigated fully in Magistrate Court,

despite the Magistrate Court's dismissal of Petitioner's second action *without prejudice*. The Circuit Court arbitrarily concluded that the Magistrate Court's dismissal without prejudice was "erroneous," and that the Magistrate was required to rule against the Petitioner because the matters were fully litigated in the Petitioner's first action.

The Circuit Court's conclusion that *both* actions were litigated fully because the first action *alone* was litigated fully is clearly erroneous. The Petitioner fully litigated only one action, not both, and was not afforded the opportunity to litigate the second action due to the Magistrate Court's dismissal without prejudice.

Generally, *res judicata* means precluding re-litigation of the same cause of action. Under this doctrine, 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:

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.

Syllabus Point 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

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

Syllabus Point 4, *Slider v. State Farm Mut. Auto. Ins. Co.*, 210 W.Va. 476 (2001).

The Petitioner filed two complaints against the Respondent (Civil Action Numbers 17-M37C-32 and 33) in the Pleasants County Magistrate Court. While there is no doubt that the

lower court actions did indeed include the identical parties, the Petitioner and the Respondent, the remaining elements for *res judicata* are not present. Specifically, there was no final adjudication on the merits of the second Magistrate Court action, and the causes of action, burdens of proof, and evidence used in the two prior complaints and those required in the Circuit Court Complaint were completely different.

1. The second element for *res judicata* was not satisfied because there was no final adjudication on the merits of the Petitioner’s pro se complaint for extortion.

The record is clear that the Petitioner’s second Magistrate Court action was not adjudicated on the merits, but rather was dismissed *without prejudice* for lack of jurisdiction. Such a dismissal does not constitute a “final adjudication on the merits by a court having jurisdiction of the proceedings” as required by *Blake and Slider, supra*.

In Civil Action Number 17-M37C-33, the Petitioner listed only one cause of action, namely, extortion.¹ The Petitioner attached a copy of his Power of Attorney naming the Respondent as the Petitioner’s agent, ten (10) checks amounting to approximately seven thousand two hundred dollars (\$7,200), and copies of bank records that were used to show the extortion of money by the Respondent. The damages in claim ultimately would have exceeded \$10,000.

In response, the Respondent, again acting through his attorney, filed a Motion to Dismiss requesting that the Petitioner’s Complaint be dismissed “as being inappropriate and beyond the jurisdictional limits of the Court.” The Magistrate agreed and dismissed the action *without prejudice* for lack of jurisdiction. Thus, there was no final adjudication on the merits by a court having jurisdiction.

¹ The pro se Petitioner obviously did not realize that a civil complaint for the criminal act of extortion does not exist. See, *Machinery Hauling, Inc. v. Steel of West Virginia*, 384 S.E.2d 139, 181 W.Va. 694 (1989).

The Circuit Court in its Order Granting Summary Judgment arbitrarily concluded that the Magistrate Court's dismissal without prejudice was "erroneous" because "the matters had been factually and legally argued before the Magistrate in the companion case number (1)." The Circuit Court then further ruled that the Petitioner's second action was conclusive because the Petitioner "fully tried . . . case number (2) in Magistrate Court and received an adverse ruling, which he did not appeal," despite the Petitioner not being afforded the opportunity to litigate the second action due to the Magistrate Court's dismissal without prejudice. [Order Granting Summary Judgement, Appendix p. 2.]

The Circuit Court was clearly wrong in its determination. The Magistrate clearly indicated, *in bold lettering*, that the judgement order was "Dismissed without prejudiced." The Magistrate's intent is clear, and it was not within the province of the Circuit Court Judge to later revise history to better suit his conclusion. Thus, the Circuit Court's ruling that Petitioner's second action was conclusive is wrong, and therefore, there was no final adjudication on the merits by a court having jurisdiction.

Because the lower court found it lacked jurisdiction over the complaint in Case No. 17-M37C-33, all facts, evidence, and causes of actions contained in the pleadings are not barred by the doctrine of *res judicata*. Instead, the Petitioner was free to file the complaint in Circuit Court, along with the new causes of actions, facts and evidence.

Thus, the second element of *res judicata* is not satisfied, the doctrine of does not apply, and the Petitioner is entitled to a jury trial and adjudication of his Circuit Court complaint on the merits.

2. The third element of *res judicata* has not been satisfied because the evidence, causes of action, and burdens of proof in the Petitioner's various complaints are not identical.

The West Virginia Supreme Court has consistently held that “[a] cause of action between persons who were parties to a former adjudication, set up in a subsequent action between them, is not *res judicata* by the former decision, unless it is identical with the one actually or constructively heard and determined in the former suit.” *Lutz v. Williams* 84 W. Va. 216, 99 S.E.2d 440 (1919). Moreover, “the application of *res judicata* is very much dependent upon the distinctive characteristics of a particular case.” *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

The causes of action, evidence, and burdens of proof amongst the Petitioner's complaints are not identical.

In his first Magistrate Court Complaint, Civil Action Number 17-M37C-32, the Petitioner alleged a breach of verbal contract. He complained that the Respondent failed to properly care for both the Petitioner's beloved German Shephard service dog, including not obtaining the necessary medical attention his dog needed, and his rental property. To prove his allegations, the Petitioner attached copies of his power of attorney naming the Respondent as the Petitioner's agent and copies of cashed checks that showed the Respondent withdrew substantial sums of money from the Petitioner's bank account to cover the costs of any needed care or maintenance but failed to actually perform any of those duties. [Appendix, pp. 40-44, Complaint Exhibits, Check Nos. 1363, 1365, 1366, 1368, and 1369].

The burden of proof for breach of contract is simply showing the existence of a contract, a breach of the same, and damages. The Petitioner relied upon the representations of the Respondent, the power of attorney that established the duty of the Respondent, and his own

testimony as to the damages to his property and dog. The checks were tendered to show that the Respondent had sufficient funds to carry out his obligation under the contract but failed to do so. Ultimately, the Magistrate Court did not find this evidence compelling, and ruled in favor of the Respondent.

In his second Magistrate Court complaint, Civil Action Number 17-M37C-33, the Petitioner simply alleged extortion, and complained that the Respondent extorted seven thousand two hundred dollars (\$7,200.00) from him. To prove the allegations of his second complaint, the Petitioner attached copies of ten (10) *different* checks showing the Respondent had withdrawn large sums of money at different times and different amounts from the Petitioner's bank account [Appendix, pp. 157-159, Complaint Exhibits, Check Nos. 726, 727, 729, 730, 731, 732, 733, 741, 742, and one miscellaneous check]. These were not the same checks used in the first complaint.

Moreover, since the cause of action in the second complaint was not identical to the cause of action in the first complaint, the burdens of proof would not have been the same. As previously indicated, the pro se Petitioner had no idea that one could not file a civil complaint for a criminal action. Moreover, his request for relief further exceeded the monetary jurisdiction of the lower court. Thus, the second action, dismissed for lack of jurisdiction and without prejudice, differs substantially from the first Magistrate Court action.

Both prior actions are also actually and constructively different from the Circuit Court Complaint in terms of causes of action, evidence, and burdens of proof. The Petitioner submitted a laundry list of new causes of actions against the Respondent: breach of fiduciary duty, fraud, fraud in the inducement, and infliction of emotional distress. Other than breach of contract for failure to care for his dog and rental property, the Petitioner's allegations in his Circuit Court

complaint were different from the prior actions. Even if the Petitioner is precluded from asserting his breach of contract claim, the Petitioner should be afforded the opportunity to substantiate the rest of his claims because they are actually and constructively different.

The evidence that supported the Petitioner's Circuit Court Complaint included the previously-noted power of attorney and some, *but not all*, of the bank records and checks used in the previous Magistrate Court Complaints: Check Nos. 1365, 1366, 1368, and 1369 were used in Case No. 17-M37C-32; and Check Nos. 727, 731, 733 were used in Case No. 17-M37C-33. The additional checks were not the same.

In his Circuit Court action, the Petitioner would need additional evidence not used in the prior two Magistrate Court Complaints to substantiate his claims for breach of fiduciary duty, fraud, fraud in the inducement, and infliction of emotional distress. The intent of both parties is highly relevant, as well as their understanding of what fiduciary duties were given and accepted. The Petitioner would have the burden of showing that the funds used by the Respondent were used for the Respondent's own benefit, and not for the benefit of the Petitioner, his dog, or his rental property. That would require obtaining records, receipts, and accounts not used in either of the two prior Magistrate Court cases.

The fraud claims are based upon intent: whether the Respondent intentionally misrepresented material facts to the Petitioner, whether the Petitioner relied upon those facts and was damaged, and whether the Respondent fraudulently induced the Petitioner into trusting him. The claims for emotional distress will depend upon not only testimony from the Petitioner, but also evidence from physicians, counselors, friends, or other witnesses who can support the claim. The Petitioner will also include bills, statements, photographs and other supporting evidence to further support all his claims.

Taken altogether, all the Petitioner's complaints, causes of action, and evidence are distinct and different from each other. The Petitioner's current claims will include evidence used in the prior cases but will not be limited to just that evidence. Additional evidence will be required for each new claim asserted in the Petitioner's Complaint. And although the Circuit Court Complaint included cashed checks that were previously submitted with the second dismissed Magistrate Court complaint, those checks are proper because the second complaint was dismissed *without prejudice* for lack of jurisdiction.

Thus, the third element of *res judicata* is not satisfied, and the doctrine of *res judicata* does not apply.

C. Equity demands that the Petitioner be given his day in court.

Principles of equity and justice require that the Petitioner, previously acting pro se against a defendant who had benefit of counsel, should be provided the opportunity to have his significant claims of fraud, exploitation, and breach of fiduciary duty fully developed and tried before a jury. As this Court has repeatedly stated, "the trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. . . Courts possess a discretionary range of control over parties and proceedings which will allow reasonable accommodations to pro se litigants without resultant prejudice to adverse parties. Pro se parties, like other litigants should be provided the opportunity to have their cases fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party." *Washington v. Washington*, 221 W. Va. 224, 654 S.E.2d 110 (2007), overruled on other grounds, *Crea v. Crea*, 222 W. Va. 388, 664 S.E.2d 729 (2008) (emphasis added.)

The Court further recognized this equitable principle when applying the doctrine of *res judicata*, and specifically emphasized that the circuit court should take great care in applying the doctrine to preclude the plaintiff's day in court:

It is imperative the party bringing the subsequent lawsuit was, during the prior action, able to foresee the consequences of his/her failure to raise the subsequently raised issue in the prior action. Thus, where a plaintiff bringing a subsequent lawsuit was not able to discover or otherwise ascertain his/her claim until after the final adjudication of the prior action his/her subsequent suit may not automatically be precluded on the basis of *res judicata*. . . Accordingly, the circuit court should very carefully evaluate the claims raised by the plaintiff in the subsequent proceeding and scrutinize the plaintiff's reasons as to why he/she was unable to earlier discover the nature of his/her claim during the course of the prior action when determining whether *res judicata* operates to bar the subsequent lawsuit. . . even though the requirements of *res judicata* may be satisfied, we do not "rigidly enforce[this doctrine] where to do so would plainly defeat the ends of Justice.

Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 477, 498 S.E.2d 41, 49 (1997) (emphasis added.)

At the time of his arrest, Petitioner Mattingly had to take drastic and immediate action to ensure his rental property and German Shepherd service dog were adequately cared for. Mattingly desperately pleaded with the Respondent to care for the Petitioner's dog and property while the Petitioner was confined at the North Central Regional Jail, West Virginia. Respondent Moss obliged to the Petitioner's plea. Throughout his entire stay in jail, Mattingly had the understanding that Moss would act in the Petitioner's best interests and relied on Moss's assurances and verbal agreement during his entire eighteen (18) month stay.

Petitioner Mattingly depended on Moss to properly care for his property, dog, and anything else occurring outside the walls of his jail cell. While in jail and having no other alternatives, Mattingly appointed Moss as his Power of Attorney and established a fiduciary relationship that imposed Moss "a duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. It is the highest standard of duty implied."

Elmore v. State Farm Mut. Auto. Ins Co., 202 W. Va. 430, 435, 504, S.E.2d 893, 898 (1993).

Moreover, Mattingly provided Moss with multiple signed blank checks from his two (2) bank accounts to better fulfill the Petitioner's needs.

Unfortunately, upon returning to his rental property after his release, Mattingly, to his dismay, discovered that Moss failed to maintain and purposely abandoned the Petitioner's rental property as promised and, arguably more egregious, failed to care for the Petitioner's beloved German Shephard. As added salt to an already serious wound, Mattingly later discovered that Moss selfishly withdrew fifteen thousand six hundred dollars (\$15,600) from the Petitioner's account at the Williamstown Bank and another seven thousand four hundred fifty dollars (\$7,450.00) from the Petitioner's account at the Community Bank of Parkersburg/Vienna.

Moss saw Mattingly's circumstances as an opportunity to take advantage of the Petitioner and did so by willfully, knowingly, and intentionally acting with malice and bad faith. Moss intentionally left Mattingly unaware of Moss's nefarious actions by falsifying information to Mattingly while the Petitioner sat in his jail cell. Moss neglected to care for the Mattingly's rental property and German Shepherd as promised and engaged in a pattern of misuse and misappropriation to swindle over twenty-three thousand dollars (\$23,000) of the Mattingly's funds. Moss had no concern for the Mattingly's needs and saw the Petitioner merely as a vault of free money to financially exploit and take advantage of. Consequently, Moss benefitted lucratively from having free rein of Mattingly's funds at the expense of the unsuspecting Petitioner.

At the time of his sudden and abrupt arrest, the Petitioner's needs were critical, and he had minimal time to make all the necessary accommodations to ensure both his rental property and German Shepherd service dog were adequately cared for. Had the Petitioner not found

immediate assistance, his rental property would have deteriorated due to neglect and his German Shepherd would have been forced to run wild, confused, and alone. Moreover, Mattingly was confined in jail for eighteen (18) months and had minimal control over anything occurring outside the walls of the North Central Regional Jail, including his own finances.

Comparatively, Moss was not obligated to assist the Petitioner in any way and auspiciously happened to be present and available while the Petitioner frantically searched for assistance. At most, the parties were mere acquaintances with the scope of their relationship centered primarily around Moss tending the oil and gas wells on the Mattingly's property. Only while under duress did Mattingly make a desperate plea towards Moss to care for his rental property and German Shepherd. Mattingly went to jail with the genuine belief that Moss was a sincere and honest person who was willing to help a fellow man in need and maintained that belief after assigning the Respondent as his Power of Attorney and providing him eight (8) signed blank checks. Unfortunately, Mattingly was proven incredibly wrong after his release from jail when he discovered that Moss failed to maintain and care for the Petitioner's rental property and beloved German Shephard and swindled twenty-three thousand dollars (\$23,000) of Mattingly's funds.

Taken altogether, the needs of the Petitioner, the condition of his circumstances, and the Respondent's conduct while acting as the Petitioner's Power of Attorney and fiduciary created a situation *incredibly* one-sided in favor for Moss.

The Respondent should not be safeguarded by obscure legal technicalities that a pro se litigant would have difficulty comprehending and dismissing the Petitioner's Circuit Court Complaint would indeed plainly defeat the ends of justice. Mattingly is a sixty-six (66) year old disabled Vietnam veteran who has never had legal training, has never attended law school, nor

has informally studied law. He is not familiar with the Rules of Civil Procedure or the application of legal principals like *res judicata*. He did not know what causes of action were available to him at the time he filed his Magistrate Court complaints and was guided solely by his firm and genuine belief that he was wronged by the Respondent. Mattingly attempted to rectify his situation by filing his Magistrate Court Complaints but was stymied by his misunderstanding of the legal process and the requirements. There are no logical gymnastics that one can attempt that would conclude that the Petitioner knew the consequences of hastily filing his two Magistrate Court complaints.

Allowing the Petitioner's case to continue would not result in any prejudice to the Respondent, but would, instead, result in great harm and prejudice to the Petitioner. The Respondent has suffered no substantial loss or injury. Instead, at this point, the Respondent has been slightly inconvenienced by the Petitioner's two Magistrate Court complaints. Alternatively, if this case was to be dismissed, the Petitioner would suffer the potential loss of thousands of dollars because of the Respondent's actions. Thus, it is the Petitioner, and not the Respondent, who would be substantially harmed if the Circuit Court's dismissal stands.

CONCLUSION

The doctrine of *res judicata* should not bar the Petitioner's present Complaint. The only element of that doctrine that has been met is similarity of parties. The remaining two elements have not been satisfied. Petitioner has alleged many new facts, distinct and different causes of action that require different burdens of proof and claims that will require further discovery to uncover even more evidence. Moreover, the Petitioner contends that the new facts and causes of actions could not have been foreseen at the time of the filing of his previous complaints, mainly

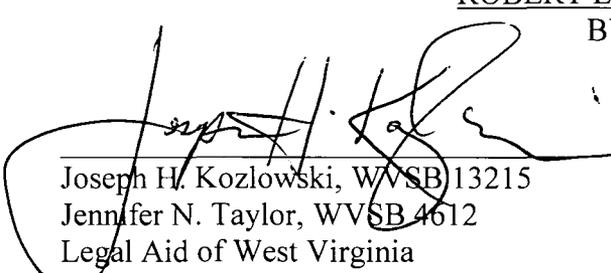
because the Plaintiff was acting pro se and had no knowledge of the law or his possible causes of action.

Finally, principles of equity and justice demand that the formerly pro se Petitioner be given an opportunity to fairly and fully litigate his claim. Disposing of the Petitioner's Complaint on the basis of *res judicata* would plainly defeat the ends of Justice.

Therefore, the Petitioner respectfully requests that this Honorable Court REVERSE the Order Granting Summary Judgement entered by the Circuit Court of Ritchie County, West Virginia, and REMAND this matter for trial.

Respectfully submitted:

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