

FILE COPY

**DO NOT REMOVE
FROM FILE**

JUN 28 2019

DOCKET NO. 19-0055

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 19-0055

**ROBERT LEE MATTINGLY,
Petitioner Below,
Petitioner,**

v

**Appeal from the Circuit Court of
Pleasants County, West Virginia 18-C-2**

**ROBERT MOSS,
Respondent Below,
Respondent.**

RESPONDENT'S SUMMARY RESPONSE TO PETITIONER'S BRIEF

Counsel for the Respondent, Robert Moss

**John M. Butler, WWSB No. 568
Counsel of Record
109 Clay Street
P. O. Box 700
St. Marys, WV 26170-0700
Telephone: (304) 684-9258
Facsimile: (304) 684-9259
E-mail: Butlerlaw1984@gmail.com**

Counsel for the Petitioner, Robert Mattingly

**Jospeh H. Kozlowski, WWSB No.13215
Jennifer N. Taylor, WWSB No. 4612
922 Quarrier Street, 4th Floor
Charleston, WV 25301
Telephone: (304) 343-3013 ext. 3913, 2131
Email: jkozlowski@lawv.net
jtaylor@lawv.net**

Comes now the Respondent by counsel and files a Summary Response under Revised Rule 10(e) due to this case being presented upon undisputed facts with no significant issues of law being presented by the Petitioner.

STATEMENT OF THE CASE

No facts are in dispute under the Summary Judgment being appealed. The facts as presented by the Petitioner are disputed as to their embellishment. In 2015 Robert Mattingly (Robert Lee Mattingly, Jr. is alternatively used throughout the record) was arrested for violating home confinement for a alcohol-related criminal conviction. He claims he was surprised about his trip to jail because he was on home confinement and was arrested for violation. He had no one to care for his property and money during the ensuing eighteen months of incarceration and recruited Robert Moss the well tender for the gas well on his property, who knew him casually, for help. Robert Moss agreed.

From July 2015 until January 2017 Robert Moss (Bob Moss is used alternatively throughout the record) handled money on behalf of Robert Mattingly as his attorney in fact while Mattingly was in jail. [Appendix pages 147-152 Answer to Complaint Case No 1] Robert Moss was to pay bills, collect mail and bring it to jail, to care for Mattingly's dog, house, apartment, vehicle and manage any issues with a tenant which included filing a civil eviction and obtaining judgment for damages to the rental property. [Appendix pages 120-122, Magistrate Court eviction and judgment] The money was handled by Robert Moss through checks signed by Mattingly. The checks support that Robert Moss spent approximately \$23,000 for the total care of Robert Mattingly's assets and debts for the eighteen months

Mattingly was jailed. Robert Moss turned over all remaining funds and supporting documents to Mattingly upon his release from jail in January 2017 . Mattingly then began drinking heavily and accusing Moss of not accounting for, misspending or converting to his own use those funds handled and failing to care for Mattingly's property.

Two civil cases were then filed in Pleasants County Magistrate Court by Robert Mattingly, pro se. In case number 17-M37C-32, (hereinafter Case No. 1) Robert Lee Mattingly sued for \$16,400.00 which he claims was drawn out of his Williamstown Bank account with his signed checks and the funds were allegedly misused. Mattingly also sued for damages for failure to care for the dog, the house, the apartment and the tenant damaging his house.

In Case No 1 Mattingly claims [Appendix pages 136-144 Summons, Complaint and attachments]:

1. "He(Robert Moss) did very little, and still let my home and apartment go into ruin" ..he even cash(ed) two checks 1368 & 1369 the same day for \$9,000.00 surly(sp) not for my selfe(sp) dog, house or apartment, in any way" Mattingly attached a handwritten Power of Attorney document dated October 21, 2015. [Appendix pages 39, 77, 139 and 156. Power of Attorney to Robert Moss]

2. Mattingly attached to his Complaint check No. 1363 for \$800.00, No. 1365 for \$600.00, No. 1368 for \$5,000.00 and No. 1369 for \$4,000.00 totaling \$10,400.00.

3. Mattingly claims that "he (Robert Moss) had plenty of time to with draw \$16,400.00 from my bank account 48763-5" which may be in addition to the two checks stated in Paragraph No. 1.

4. "I (Mattingly) waive my rights to anything over 10,000.00."

In 17-M37C-33 (hereinafter Case No 2), filed the same day pro se against Robert Moss, Mattingly claims [Appendix pages 154 - 159, Summons, Complaint and attachments]:

1. "This civil matter is like case 1 in this case Mr. Moss with draw \$7,200.00 under the same circumstances, I feel this is extorson(sp) I am asking for \$7,200.00 in this suit plus cost this is out of checking acct Community Bank"

2. He attached check No. 731 for \$150.00, check No. 732 for \$4,100.00 and check No. 733 for \$3,000.00 totaling \$7,250.00.

3. He attached the same Power of Attorney document as Case No. 1.

In Case No. 2, Robert Mattingly admits that his second Complaint is a continuation of the first but seeks an additional \$7,200.00 for money handled during that same eighteen months for dealings under the same Power of Attorney, just from a different bank, "Community Bank". [Appendix, page 155]

Both Case No. 1 and Case No.2 were heard together and then adjudicated on the merits of Mattingly's evidence and Moss's defenses. [Appendix pages 187-189, Affidavit in Support of Summary Judgment] No recording of the trial was preserved. Mattingly was unable to show any damage to his rental property in excess of the judgment obtained against the tenant. Mattingly failed to prove by a preponderance of the evidence that any money was improperly kept, mishandled, converted or otherwise misused by Robert Moss. He failed to prove damages or a failure to care for his dog. He failed to prove any damage or mishandling of the house, the apartment, rent or tenant issues or repairs as would be

reasonably raised by his Complaints.

The Magistrate ruled for Robert Moss on Case No. 1 finding that Robert Mattingly failed to provide proof by a preponderance of the evidence. [Appendix, page 153 Ruling on Case No. 1] The Magistrate ruled on Case No 2 that it was dismissed “without prejudice”. [Appendix page 165 Ruling on Case No. 2] The dismissal appears to be based upon the Motion to Dismiss filed in Case No. 2 by Robert Moss claiming Case No. 2 was a continuation of Case No 1 and an effort to exceed jurisdictional limits of Magistrate Court under the same series of transactions. [Appendix pages 162 -164] Neither case was appealed.

Robert Mattingly then resorted to self-help by harassing Robert Moss. A series of letters were exchanged. [Appendix, pages 166 to 172] After the exchange of threatening lawyer letters, it was apparent to both sides that a resolution would not be reached.

On January 26, 2018 Robert Mattingly filed through Legal Aid the underlying Civil Action No. 18-C-2 in the Circuit Court of Ritchie County West Virginia against Robert Moss. [Appendix, pages 5-21 Complaint of Robert Lee Mattingly, Jr against Robert Moss] The Complaint relies upon the exact same financial circumstances between the parties from July 2015 until January 2017 with multiple expanded legal theories but relies upon the same facts from the Magistrate Court cases. Robert Moss defended the Circuit Court case by written Answer denying the Complaint and asserting multiple defenses including res judicata. [Appendix, pages 24-123, Answer and Counterclaim of Robert Moss with attachments] Robert Moss later filed his Motion for Summary Judgment. [Appendix, pages 140-189, Motion for Summary Judgment with attachments]

The Motion for Summary Judgment was heard before the Circuit Court of Ritchie County. Judge Timothy Sweeney reviewed the pleadings, the motion, attachments and response, held oral argument and allowed the parties to supplement their Briefs with any additional authority. [Appendix, pages 218-236, Transcript of hearing] No dispute of facts was alleged or argued.

Judge Sweeney later by order dated August 27, 2018 granted the Motion for Summary Judgment. [Appendix page 1-4, Order Granting Summary Judgment] Judge Sweeney ruled that the Circuit Court action by Mattingly was an attempt to retry and relitigate the fundamental claims between the parties. The Court found that the fact that the claims were more exhaustive in their presentation in the pleadings including new or more detailed causes of action on the same facts in the Circuit Court was of no consequence. The Court ruled that Robert Mattingly chose to file his claim in Magistrate Court which limited his damages and precluded any filing on alternative or additional theories in Circuit Court citing the case of Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 803 S.E.2d 519 (W. Va., 2017). From that granting of Summary Judgment to the Respondent this appeal was filed.

SUMMARY OF ARGUMENT

Res judicata bars the Petitioner from relitigating claims in Circuit Court when he filed two separate Magistrate Court cases which were heard on the merits and ruled on behalf of the Respondent. The Petitioner's additional legal theories based upon the same transactions from Magistrate Court are not sufficient to give him additional opportunity to file a Circuit Court civil action.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Waived by Respondent due to Summary Response. Petitioner stated in their Brief no such oral argument was necessary.

A. Standard of Review

This Court reviews a Circuit Court's orders granting Summary Judgment de novo. This Court has held that "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Id. at 190, 451 at 756, Syl. Pt. 3. *Sanson v. Recovery* (W. Va., 2016) Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

B. Res judicata bars the Petitioner's Complaint

The two Magistrate cases, Case No. 1 and Case No. 2 were scheduled together and heard on May 17, 2017 before Magistrate Lisa Taylor as a bench trial noticed properly and attended by both parties. A ruling was issued on both cases for Robert Moss without subsequent appeal.

Comparing those two Magistrate cases to the Circuit Court case shows each has the same parties, the same facts and the same claimed damages.

Why did Mattingly file two suits in Magistrate Court? Because he was fairly sophisticated and knew a Magistrate Court claim must be under \$10,000.00 in damages per case to avoid Circuit Court. Mattingly chose to be his own lawyer. He thought he could file

two suits, one for each bank account making them two separate cases. Mattingly knew that the checks in Case No. 1 exceeded the jurisdictional limits and tried to waive anything over that amount. Mattingly thought he could recover up to \$10,000.00 in Case No. 1 from showing a breach of duty which caused loss of the money from the checks of \$16,400.00 and subsequent misuse, or active or passive damages to the house, dog or rental property, but waive anything over \$10,000.00¹.

Mattingly thought he could file Case No. 2 based upon checks from a different bank and account but from the same eighteen months of financial transactions but relying upon the different bank account to allow a second suit for \$7,200.00.

After the Magistrate Court ruled against him, Robert Mattingly began harassing Robert Moss as described in the stated facts. [Appendix pages 62-63, Letter to Robert Mattingly] Lawyers exchanged letters. In January 2018 the Ritchie County Circuit Court action was filed. The new civil action was based upon all the financial documents contained in the two Magistrate Court cases.

In *Beahm v. 7 Eleven, Inc.*, 672 S.E.2d 598 (W.Va., 2008), SP3 this Court states that "(b)efore 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

¹W Va Code 50-2-1: Except as limited herein and in addition to jurisdiction granted elsewhere to magistrate courts, such courts shall have jurisdiction of all civil actions wherein the value or amount in controversy or the value of property sought, exclusive of interest and cost, is not more than \$10,000.

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."

The first requirement for res judicata has been met by the Magistrate ruling in favor of the Respondent Robert Moss in Case No. 1 and Case No. 2 after an evidentiary hearing. Robert Mattingly represented himself and presented all evidence he had available to him to support all those claims. Robert Mattingly had the opportunity to present all his evidence on both cases and failed to meet the burden of proof and failed to show Case No. 2 was anything more than an attempt to avoid the jurisdictional limits of Magistrate Court because the issues of Case No. 1 and Case No. 2 are based upon the same identical series of transactions between the parties. Case No. 2 was dismissed after the bench trial. [Appendix pages 187-189, Affidavit of Robert Moss] The Motion to Dismiss should have been treated as a Motion for Summary Judgment and as a clear final ruling on the merits. Judge Sweeney found that the Magistrate's characterization as without prejudice was an erroneous statement [Appendix pages 1-4 Order Granting Summary Judgment].

The Magistrate dismissed Case No. 2 "without prejudice" after hearing both cases. Yet both cases were heard by the Magistrate. Under these facts, Magistrate Court has no authority to determine whether it was with, or without prejudice when hearing the evidence

and ruling on the merits². Robert Mattingly waived any rights to recover any amount over \$10,000.00 as a strategic decision to keep the matter in Magistrate Court. For this Court to agree with the Petitioner and allow a lawsuit based upon the dismissal of Case No. 2 without prejudice would be to allow people to file cases in Magistrate Court under the \$10,000.00 jurisdictional limit and subsequently file a second lawsuit for the damages beyond the jurisdictional limit in Circuit Court. This is the relief that is being requested by the Petitioner.

The second requirement of res judicata has been met because the named parties were exactly the same in the two Magistrate Court cases and as in the case before this Court. There is no claim, nor evidence to support, that the plaintiff in each Magistrate Court case is not the Petitioner. No one is contending that Bob Moss in the Magistrate Court cases is someone different than Robert Moss a/k/a Bob Moss the Respondent in the case before this Court.

²§50-4-12. Dismissal of actions for failure to appear, testify, etc.

A magistrate may render judgment against the plaintiff dismissing his action with prejudice to a new action and awarding costs to the defendant when (a) the plaintiff fails to appear and prosecute his action at the proper time for appearance; (b) the plaintiff fails or refuses to testify when properly required to do so; or (c) the plaintiff fails to give security for costs when properly required to do so. In cases (a) and (b) if the plaintiff shows cause why his action should not have been dismissed, the magistrate may set aside such judgment and continue the matter before him or may dismiss the action without prejudice.

A magistrate shall dismiss a claim without prejudice if the summons is defective or erroneous and cannot properly be amended.

A magistrate shall dismiss a claim without prejudice if the plaintiff requests such dismissal before trial.

The dismissal of a claim shall not affect the right of any party to proceed to trial upon a counterclaim. (West Virginia Code (2018 Edition))

The third requirement for res judicata to apply is that the cause of action in the subsequent proceeding must be identical to the cause of action in the prior actions or must be such that it could have been resolved had it been presented in the prior action. There is no requirement of identical legal theories, just identical facts or series of transactions.

Both Magistrate cases and Case No. 18-C-2 in Circuit Court are claims arising from money and duties claimed against Robert Moss by Robert Mattingly for dealings from July 2015 to January 2017. In his Answers in Magistrate Court and Circuit Court, Robert Moss denied all these allegations in the Complaints. All claims in the Circuit Court case are reasonably interpreted as arising from the facts and time period heard in the Magistrate Court cases. The causes of action in the Circuit Court Complaint, financial exploitation breach of fiduciary duty, fraud, fraud in the inducement and breach of contract are all claims that the facts supported by the financial transactions heard in Magistrate Court cases.

Mattingly chose Magistrate Court with the jurisdictional limitations and such choice, pro se or with counsel, is binding and conclusive. This Court has barred a similar attempt to relitigate a case on the same facts and case between Federal and State courts which would appear to be directly on point to bar retrying this case between the Magistrate Court and Circuit Court actions. *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 803 S.E.2d 519 (W.Va., 2017).

The principles of res judicata and of clear waiver in excess of \$10,000.00 by Robert Mattingly should decide this case. Mr. Mattingly may not be a lawyer, but he is certainly sophisticated enough to prepare a Power of Attorney and file Complaints. He was intelligent

enough to be able to file two law suits in Magistrate Court to avoid its jurisdictional limits.

C. The second point in Petitioners brief alleging there was not an adjudication on the merits of the Petitioner's pro se complaint for extortion does not make any sense.

The petitioner's brief [pages 9-14] argue that Case No. 2 was only a complaint for extortion not on the second bank transaction which is contrary to a reasonable interpretation of the complaint and the Magistrate Court ruling. Judge Sweeney, ruling upon the Motion for Summary Judgment, certainly did not interpret the judgment of the Magistrate Court as being only a ruling upon an issue of extortion. The Petitioner's brief cites correctly that there is no civil action for extortion under West Virginia law.

Case No. 2 in the Magistrate Court was properly dismissed for two reasons. First, Case No. 2 was dismissed because it was an attempt to file a second lawsuit on the same series of transactions and exceed the \$10,000.00 jurisdictional limit of Magistrate Court. Second, the Magistrate did not rule on the Motion to Dismiss before trial and heard evidence on both complaints, incorrectly stating the ruling on Case No. 2 as a dismissal "without prejudice" which should have been granted as a Summary Judgment, a dismissal on the merits. See Syl. Pt. 4, U.S. Fed & Guar. Co. v. Eades, 150 W.Va. 238, 144 S.E.2d 703 (1965) (providing "if matters outside the pleadings are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith").

D. Equity does not demand that the Petitioner be given his day in Court because he had his day and reversal for a trial would be a useless act.

The pleadings clearly show Robert Mattingly is sophisticated enough to prepare a Power of Attorney and analyze multiple financial transactions on the basis of written documents from two bank accounts dividing them into two separate civil actions in Magistrate Court in an attempt to avoid the jurisdictional limits of Magistrate Court. Robert Mattingly was able to file each suit, include all documents necessary to show his claims attached as exhibits to the Complaints and have the Complaints served by the Sheriff. Mattingly was able to appear at the time of the bench trial and present evidence and documents in support of his claims. Given the laws which support that civil proceedings should be finalized and not easily relitigated, what sense of equity would be the source of the petitioner's belief that Robert Mattingly should have a second trial on all the issues in the first two Magistrate Court Cases which he lost and failed to appeal? The person who is being forced to litigate a second time and defend himself is Robert Moss.

The final issue to consider is that even if res judicata is not applied here, can the Petitioner still prevail on the underlying complaint in Circuit Court? The clear answer is no. The doctrine of collateral estoppel or issue preclusion between the Magistrate Court cases and the Circuit Court case is applicable. In *Christian v. Sizemore*, 407 S.E.2d 715, 185 W.Va. 409 (W.Va., 1991) this Court said:

“ Collateral estoppel, conversely, is applicable to matters which have "actually been litigated in the earlier suit" even if it was on a separate cause of action.

The primary distinction between the doctrines of res judicata and collateral estoppel, as relevant to the present case, is the requirement in collateral estoppel that the issue in question was (1) decided on its merits, (2) actually litigated, and (3) that the entity against whom collateral estoppel is asserted had a prior opportunity to litigate his claim. Res judicata does not require the concurrence of those three elements; consequently, a default judgment may in certain circumstances preclude a second suit based upon the same cause of action under res judicata. That scenario, however, does not exist in the present case. Collateral estoppel is essentially a doctrine which precludes the relitigation of an issue, while res judicata precludes relitigation of the same cause of action.....

In syllabus point 2 of *Conley(v. Spillers)*, 171 W.Va. at 586, 301 S.E.2d at 217, we explained the following:

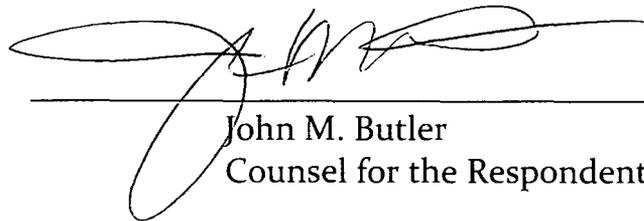
"Collateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit. We have made this summary of the doctrine of collateral estoppel: 'But where the causes of action are not the same, the parties being identical or in privity, the bar extends to only those matters which were actually litigated in the former proceeding, as distinguished from those matters that might or could have been litigated therein, and arises by way of estoppel rather than by way of strict res judicata.' *Lane v. Williams*, 150 W.Va. 96, 100, 144 S.E.2d 234, 236 (1965)."

CERTIFICATE OF SERVICE

I, John M. Butler, counsel for the Respondent, Robert Moss, hereby certify that the foregoing **Respondent's Summary Response to Petitioner's Brief** was duly served upon the following parties of interest by depositing a true copy with the United States Mail Service postage prepaid addressed as follows on this the 27th day of June, 2019:

**West Virginia Supreme Court
Edythe Nash Gaiser, Clerk of Court
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305**

**Jospeh H. Kozlowski, WWSB No.13215
Jennifer N. Taylor, WWSB No. 4612
922 Quarrier Street, 4th Floor
Charleston, WV 25301**



John M. Butler
Counsel for the Respondent