

18-0927

In the Circuit Court of Berkeley County, West Virginia

ESTATE OF WAYNE A. JONES BY)
 ROBERT L. JONES,)
 Plaintiff,)
 vs.))
 THE CITY OF MARTINSBURG WV)
 C/O MARK BALDWIN,)
 ERIK HERB,)
 DANIEL NORTH,)
 WILLIAM STAUBS,)
 PAUL LEHMAN ET AL,)
 Defendants)

Case No. CC-02-2016-C-490

ORDER GRANTING MOTION TO DISMISS

ON A PREVIOUS DAY came the Defendants, THE CITY OF MARTINSBURG, WEST VIRGINIA, PFC. ERIK HERB, PFT. DANIEL NORTH, PTLM. WILLIAM STAUBS, PTLM. PAUL LEHMAN, and PFT. ERIC NEELY, by counsel, and moved the Court to dismiss the Plaintiffs' First Amended Complaint with prejudice pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure because it duplicates their lawsuit currently pending in the United States Court of Appeals for the Fourth Circuit after it was dismissed on summary judgment by the United States District Court for the Northern District of West Virginia (Martinsburg Division).

UPON MATURE CONSIDERATION of the Defendants' Motion, the Plaintiffs' Response, and the Defendants' Reply, the Court hereby GRANTS the Defendants' Motion and makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

I. FINDINGS OF FACT

1. On March 13, 2013, Plaintiffs' Decedent, Wayne A. Jones, died as a result of the shooting incident alleged in Plaintiffs' Complaint. Plaintiffs' First Amended Complaint, ¶ 7;

Motion to Dismiss, **Exhibit F**.

2. On **June 13, 2013**, Plaintiffs filed a Complaint for Damages, Injunctive and Declaratory Relief against the Defendants in the United States District Court for the Northern District of West Virginia (Martinsburg Division) based upon the March 13, 2013 shooting incident. Motion to Dismiss, **Exhibit A**.

3. On **October 15, 2014**, the District Court granted all Defendants summary judgment, finding, *inter alia*, that the Defendant police officers shot Wayne A. Jones while he was resisting arrest, after he struck one officer in the head, and after he stabbed another officer with a knife. Motion to Dismiss, **Exhibit C**.

4. On **September 15, 2016**, Plaintiffs filed a Complaint in this Court based upon the same March 13, 2013 shooting incident. Motion to Dismiss, **Exhibit D**. Plaintiffs did not serve any Defendants with this Complaint.

5. On **July 20, 2017**, Plaintiffs filed a First Amended Complaint in this Court based upon the same March 13, 2013 shooting incident. Motion to Dismiss, **Exhibit F**. The Plaintiffs served each of the Defendants with their First Amended Complaint between July 21 and July 25, 2017.

6. On **March 5, 2018**, the United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part the District Court's summary judgment finding, *inter alia*, that "genuine issues of material fact remain which underlie the determination of whether the force the [Defendants] used was excessive" and, therefore, "summary judgment was improper on the [Plaintiffs'] § 1983 claim against the [Defendant] officers for use of excessive force in violation of the [Plaintiffs' Decedent's] Fourth Amendment rights, as well as on the related § 1983 claim brought against the [Defendant City of Martinsburg]." *See* Opinion, **Exhibit M**, pp.

13-14.

7. On March 27, 2018, this Court inquired about how Plaintiffs intend to proceed in their parallel Circuit Court case now that their separate District Court case has been remanded for trial. Plaintiffs acknowledged some "overlap" between their Circuit Court case and their District Court case, and this Court directed Plaintiffs to file a statement which fully identifies the claims they intend to prosecute in the District Court and the claims they intend to prosecute in the Circuit Court. *See* Status Hearing Order, Exhibit N.

8. On April 10, 2018, the District Court entered a Scheduling Order and set the Plaintiffs' case for a jury trial on October 23, 2018. *See* Scheduling Order, Exhibit O.

9. On June 13, 2018, the Plaintiffs filed a Statement of Claims pursuant to the Court's March 27, 2018 Status Hearing Order (Exhibit N). This Statement of Claims confirms that Plaintiffs are making various claims related to the March 13, 2013 shooting incident in both the Circuit Court and the District Court and demonstrates the "overlap" in Plaintiffs' claims.

| CIRCUIT COURT | DISTRICT COURT |
|--|--|
| ESTATE OF WAYNE A. JONES, by Robert L. Jones and Bruce A. Jones, Administrators of the Estate of Wayne A. Jones, <i>Plaintiffs,</i> | ESTATE OF WAYNE A. JONES, by Robert L. Jones and Bruce A. Jones, Administrators of the Estate of Wayne A. Jones, <i>Plaintiffs,</i> |
| v. | v. |
| THE CITY OF MARTINSBURG, WEST VIRGINIA, PFC. ERIK HERB, PFT. DANIEL NORTH, PTLM. WILLIAM STAUBS, PTLM. PAUL LEHMAN, PFT. ERIC NEELY, and STATE BOARD OF RISK AND INSURANCE MANAGEMENT, <i>Defendants.</i> | THE CITY OF MARTINSBURG, WEST VIRGINIA, PFC. ERIK HERB, PFT. DANIEL NORTH, PTLM. WILLIAM STAUBS, PTLM. PAUL LEHMAN and PFT. ERIC NEELY, <i>Defendants.</i> |
| Berkeley Co. Civil Action No. 16-C-490 | U.S. District Court for the Northern District of W.Va. Civil Action No. 3:13-CV-68 |
| NEGLIGENCE | NEGLIGENCE |
| Violation of Special Duty | Negligence and Wrongful Death by Individual Officers |
| Negligent Management, Non-feasance, Misfeasance | |
| Negligence of Mayor and City Council | |
| Violations of Statute | |
| WRONGFUL DEATH | WRONGFUL DEATH |
| W.Va. Code §55-7-5, <i>et seq.</i> | W.Va. Code §55-7-5, <i>et seq.</i> |

| CONSTITUTIONAL VIOLATIONS | CONSTITUTIONAL VIOLATIONS |
|--|---|
| Violation of W.Va. Code § 61-6-21(b) by Individual Officers (State Constitution) | Violation of W.Va. Code § 61-6-21(b) by Individual Officers (State Constitution) |
| | Violation of Decedent Jones' Civil Rights by Individual Officers – 42 U.S.C. § 1983 |
| | Violation of Civil Rights of Jones Family by Individual Officers – 42 U.S.C. § 1983 |
| | Violation of Civil Rights by City of Martinsburg – 42 U.S.C. § 1983 |
| EQUITABLE RELIEF | |
| Injunction against City's Insurer | |
| Appointment of Commissioner | |
| Appointment of Special Prosecutor | |
| Appointment of Grand Jury Advocate | |

See Plaintiff's Statement of Claims, Exhibit P.

II. CONCLUSIONS OF LAW

A. Rule 56 Summary Judgment Standard

1. Plaintiffs assert that Defendants' Motion to Dismiss attaches "numerous exhibits which are not pleadings" and, therefore, must be treated as a motion for summary judgment. See Plaintiffs' Response, pg.4. Plaintiffs also argue that "numerous genuine issues of material fact precluding summary judgment exist," and that "summary judgment is only appropriate after the opposing party has adequate time for discovery." See Plaintiffs' Response, pp. 7-9. Plaintiffs also filed a separate motion under Rule 56(f) "for additional discovery necessary to respond to Defendants' motion to dismiss/for summary judgment." See Plaintiffs' Response, pg. 9. See also Plaintiffs' Motion for Additional Discovery filed September 18, 2017.

2. The Court rejects Plaintiffs' arguments with regard to Rule 56 and finds Defendants' Motion is properly treated as a Rule 12(b)(6) motion to dismiss. "Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice." *Forshey v. Jackson*, 222 W.Va. 743, 747, 671 S.E.2d 748, 752 (2008). Thus, "a court may take judicial notice of the

orders of another court” for the limited purpose of “establishing the fact of such litigation and related filings.” Syllabus Point 11, *Arnold Agency v. West Virginia Lottery Com’n*, 206 W.Va. 583, 526 S.E.2d 814 (1999). The exhibits attached to the Defendants’ Motion to Dismiss are pleadings and orders from the Plaintiffs’ District Court case, submitted to establish the fact of such parallel litigation. Therefore, this Court may properly take judicial notice of those exhibits without converting the Defendants’ motion into a summary judgment. *See Ballard v. Pomponio*, No. 15-738, 2016 WL 4579066, at *3 n.1 (W.Va. Supreme Court, September 2, 2016) (memorandum decision) (“Respondent also notes, correctly, that the circuit court was able to take judicial notice of the proceedings in the federal district court without converting respondent’s motion to dismiss into a motion for summary judgment because, in deciding such motions, a court is permitted to consider matters that are susceptible to judicial notice.”). Indeed, the Supreme Court of Appeals of West Virginia has specifically rejected Plaintiffs’ argument that a Rule 12(b)(6) motion to dismiss based on claim preclusion must be converted to a motion for summary judgment. *See Gulas v. Infocision Management Corp.*, 215 W.Va. 225, 229 n.4, 599 S.E.2d 648, 652 n.4 (2004) (rejecting argument that motion to dismiss based on *res judicata* must be converted to a summary judgment).

B. Rule 12(b)(6) Dismissal Standard

1. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure requires dismissal when a complaint “fail[s] to state a claim upon which relief can be granted.” W.Va. R. Civ. P. 12(b)(6). It enables a court to “weed out” unfounded law suits. *Harrison v. Davis*, 197 W.Va. 651, 478 S.E.2d 104 (1996). Thus, the purpose of a Rule 12(b)(6) motion is to test the formal sufficiency of the complaint. *Cantley v. Lincoln County Com’n*, 221 W.Va. 468, 655 S.E.2d 490 (2007); *Collia v. McJunkin*, 178 W.Va. 158, 358 S.E.2d 242 (1987).

2. When considering a Rule 12(b)(6) motion to dismiss, a circuit court should “constru[e] the factual allegations in the light most favorable to the [non-moving party]” and grant the motion “where ‘it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” *Kessel v. Leavitt*, 204 W.Va. 95, 118, 511 S.E.2d 720, 743 (1998) (citing *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (additional citations omitted)); *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

3. The Court finds that, even when this liberal standard is applied to the Plaintiffs’ pending law suit, the Defendants are entitled to dismissal as a matter of law for the following reasons because (1) Plaintiffs’ negligence and wrongful death claims are barred by the statute of limitations; (2) Plaintiffs’ alleged violations of state statutes and the state Constitution fail to state a claim, as those provisions do not provide a private right of action; (3) The doctrine of claim splitting prohibits all claims; (4) and Plaintiffs’ equitable claims are not actionable under West Virginia law.

C. Plaintiffs’ Negligence and Wrongful Death Claims Are Barred by the Two-Year Statute of Limitations.

West Virginia sets a two-year statute of limitations for personal injury and wrongful death claims. W.Va. Code § 55-2-12 and § 55-7-6(d). Plaintiffs filed their original Complaint in this Court on September 15, 2016 – three and one-half years after the March 13, 2013 incident. Therefore, the statute of limitations bars these claims in this Court.

1. West Virginia Code § 55-2-18 Does Not Extend the Statute of Limitations.

Plaintiffs argue West Virginia Code § 55-2-18 tolls the statute of limitations “upon the filing of the District Court suit.” Plaintiffs’ Response, pg. 15. Plaintiffs are mistaken. This

statute provides:

For a period of one year from the date of an order dismissing an action or reversing a judgment, a party may refile the action if the initial pleading was timely filed and: (i) the action was involuntarily dismissed for any reason *not based upon the merits* of the action; or (ii) the judgment was reversed on a ground which does not preclude a filing of new action for the same cause.

W. Va. Code § 55-2-18(a) (emphasis added). Plaintiff's argument fails because: (1) the District Court dismissed Plaintiffs' District Court case on its merits; (2) Plaintiffs did not timely "re-file" the action after dismissal; (3) the Fourth Circuit Court reversed and remanded Plaintiffs' District Court case for a trial on the merits; and (4) West Virginia Code § 55-2-18 does not apply to actions for wrongful death.

a. Plaintiffs' District Court case was resolved on the merits.

West Virginia Code § 55-2-18(a)(i) only tolls a statute of limitations "if the action was involuntarily dismissed for any reason not based upon the merits of the action." Plaintiffs timely filed their initial Complaint in the District Court; however, that court did not dismiss the state court action, but instead resolved the District Court case on the merits by its October 15, 2015 Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment (Motion to Dismiss - Exhibit C) and its December 2, 2016 Order Denying Withdrawal of Admissions (Motion to Dismiss - Exhibit E). Therefore, Plaintiffs' District Court case was not "involuntarily dismissed for any reason not based upon the merits of the action" and West Virginia Code § 55-2-18(a)(i) has no application here.

In *Litten v. Peer*, 156 W.Va. 791, 197 S.E.2d 322 (1973), the West Virginia Supreme Court considered an argument similar to the Plaintiffs' argument in this case. It held that, "although the pendency of the prior action [in federal court], which had been timely filed, tolled

the statute of limitations, the dismissal of the federal court action for lack of prosecution was a dismissal on the merits, and acted as *res judicata* to bar the later state court action.” The Supreme Court explained:

While the effect of the provisions of [W.Va. Code § 55-2-18] is to extend the statute of limitations for a period of one year from the date of an involuntary dismissal, the statute does not abrogate the doctrine of *res judicata*. Thus, where the party incurs an involuntary dismissal which is an adjudication on the merits, operating as *res judicata*, the effect of [W.Va. Code § 55-2-18] is nullified.

Id. (emphasis added). Here, the District Court did not dismiss Plaintiffs’ state law claims, but instead resolved them on the merits in a summary judgment decision. Using the language of this statute, this was an “involuntary dismissal which [was] an adjudication on the merits,” especially when compared to the dismissal for failure to prosecute in *Litten*. Accordingly, West Virginia Code § 55-2-18(a)(i) is inapplicable.

b. Plaintiffs did not “re-file the action” within one year of the date of the District Court’s summary judgment order.

West Virginia Code § 55-2-18(a) only tolls a statute of limitations if a plaintiff “re-files” his case within “a period of one year from the date of an order dismissing an action or reversing a judgment.” (Emphasis added.) The District Court granted summary judgment and dismissed the action on October 15, 2014. Motion to Dismiss, Exhibit C. Plaintiffs did not file any case in the Circuit Court, let alone “re-file” a case in the Circuit Court, until September 15, 2016. Thus, even if the District Court had dismissed Plaintiffs’ case “not based upon the merits,” Plaintiffs missed the one-year window to re-file, as they waited one year and eleven months to file their first case in the Circuit Court. Given this delay, and the fact Plaintiffs could not “re-file” their first case in Circuit Court, West Virginia Code § 55-2-18 does not apply.

c. The District Court case was remanded for a trial on the merits,

thus precluding a new action for the same cause.

West Virginia Code § 55-2-18(a)(ii) only tolls a statute of limitations if “the judgment was reversed on a ground which does not preclude a filing of new action for the same cause.” The Fourth Circuit reversed the District Court’s summary judgment in part and remanded the case for a trial on the merits. As discussed below, the doctrine of “claim splitting” precludes litigation of the same causes of action and the same damages in two separate courts at the same time. Therefore, summary judgment in the District Court case was not “reversed on a ground which does not preclude a filing of new action for the same cause,” and West Virginia Code § 55-2-18(a)(ii) does not operate to save Plaintiffs’ Circuit Court case from the two-year statute of limitations.

d. West Virginia Code § 55-2-18 does not apply to actions for wrongful death.

In addition to the foregoing, “the saving provision of Code 55-2-18 does not apply to actions for wrongful death.” *Michael v. Consolidation Coal Co.*, No. 1:14CV212, 2017 U.S. Dist. LEXIS 49159, at *19 (N.D.W. Va. Mar. 31, 2017) (citing *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50, 53-54 (1973) (internal punctuation omitted)). “[T]he strict two-year limitation on bringing suits for wrongful death was a non-tollable condition precedent.” *Id.* (citing *Huggins v. Hospital Board of Monongalia County*, 165 W. Va. 557, 270 S.E.2d 160 (W.Va. 1980)). Thus, under no set of circumstances could Plaintiffs have filed their wrongful death claim in this case any later than two years after the incident (March 13, 2013 to March 12, 2015). Accordingly, Plaintiffs’ wrongful death claim is time-barred in this Court.

- 2. West Virginia Code § 55-2-21 does not extend the two-year statute of limitations for the Circuit Court action because it only applies to a defendant’s counterclaims, cross-claims, and third-party claims.**

Plaintiffs also argue West Virginia Code § 55-2-21 tolls the two-year statute of limitations “upon the filing of the District Court suit.” Plaintiffs’ Response, pg. 15. This argument fails upon the plain language of the statute because the Plaintiffs’ original claims in their District Court case are not counterclaims, cross-claims, or third-party claims.

Through June 4, 2016, West Virginia Code § 55-2-21 stated:

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

W. Va. Code § 55-2-21 (emphasis added).

Effective June 5, 2016, West Virginia Code § 55-2-21 states:

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

[...]

(d) This section tolls the running of any statute of limitation with respect to any claim for which the statute of limitation has not expired on the effective date of this section, but only for so long as

the action tolling the statute of limitations is pending. This section does not limit the ability of a court to use the doctrine of equitable tolling or the discovery rule to toll the statute of limitations in any action, including any third-party complaint that would otherwise be subject to subsection (b) of this section.

W. Va. Code § 55-2-21 (emphasis added).

Plaintiffs attempt to broaden this statute to include their original claims asserted in the District Court. This argument is unavailing. By its plain language, either version of West Virginia Code § 55-2-21 does not apply to Plaintiffs' original claims because it only tolls the statute of limitation on a defendant's counterclaims, cross-claims, and third-party claims. See *J.A. St. & Assocs., Inc. v. Thundering Herd Dev., LLC*, 228 W. Va. 695, 705, 724 S.E.2d 299, 309 (2011) (finding the circuit court prematurely determined that W.Va. Code § 55-2-21 did not apply to original claims and remanding for a proper analysis of whether the defendant's claims arose out of the same transaction or occurrence as the original action, thus allowing those claims to be classified as cross-claims such that the statute of limitations would be tolled under W. Va. Code § 55-2-21). Therefore, West Virginia Code § 55-2-21 also does not save Plaintiffs' Circuit Court case from the two-year statute of limitations.

D. There is No Private Right of Action for Plaintiffs' Alleged Statutory and Constitutional Claims.

Plaintiffs' fail to state a claim against Defendant City of Martinsburg for violation of the state Constitution because "claims for money damages are not independently available to remedy violations of Article III of the West Virginia Constitution." *Harper v. Barbagallo*, No. 2:14-cv-07529, 2016 U.S. Dist. LEXIS 132261, at *38 (S.D. W. Va. Sep. 27, 2016). Likewise, Plaintiffs' alleged violations of state statutes fail to state a claim, as the statutes do not create a private cause of action. See generally *Kearns v. Timmiah*, Civil Action No. 5:06CV105, 2007 U.S. Dist.

LEXIS 56507, at *5-6 (N.D.W. Va. Aug. 2, 2007) (“[N]othing in the language of the West Virginia [] statute evidences a legislative intent to confer a private cause of action. ... Accordingly, the plaintiff’s complaint must be dismissed for failure to state a claim.”); *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 759 S.E.2d 192, 2014 W. Va. LEXIS 574 (W. Va. 2014) (city, a police department, and its employees were statutorily immune where the statute at issue did not have a private cause of action, its objective was to secure the necessary towing services requested through 911 calls in a speedy, fair, and effective manner, it did not expressly prohibit the towing practice being employed by the city, and there was no basis from which to conclude that the city’s towing policy exceeded its authority).

E. Plaintiffs’ Negligence, Wrongful Death, and Statutory and Constitutional Violation Claims in the Circuit Court Are Barred the Doctrine of Claim Splitting.

Plaintiffs currently have two law suits pending in two separate courts based upon the same incident. Both suits seek the same monetary damages arising out of the same incident. This is not proper. Plaintiffs cannot proceed on the same claims in two separate courts.

In *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 560–61, 803 S.E.2d 519, 530–31 (2017), the West Virginia Supreme Court discussed the interplay between the doctrine of claim splitting and the doctrine of *res judicata* and distinguished claim splitting as a separate doctrine. “Like *res judicata*, claim splitting prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action.” *Id.* (citations and internal punctuation omitted) (emphasis added).

Here, the doctrine of claim splitting prohibits Plaintiffs from prosecuting two parallel actions based upon the same incident. Because this action is prohibited by the doctrine of claim splitting, it is subject to dismissal. *See id.* The District Court case (which has been pending for

more than five years and is currently set for trial in October) will serve as *res judicata* as to all claims in the Circuit Court case. Any other outcome would result in prohibited “claim splitting” and a significant waste of the Circuit Court’s and the parties’ resources.

In their Response in Opposition to Defendants’ Rule 12(b)(6) Motion to Dismiss, Plaintiffs incorrectly argue that the West Virginia Supreme Court in *Dan Ryan Builders* “recognized that Plaintiffs have the option ‘ . . . to split the federal and state claims and wait to see which court decides first.’” *Id* at 561, 531 (citing 18 Moore’s Federal Practice § 133.13). Plaintiff’s Response, pg. 11. This argument misinterprets the Court’s *dicta* which merely quotes a recitation of plaintiff’s options found in Moore’s Federal Practice. In the sentence preceding the quotation, the Supreme Court recognized that “a party with both state and federal questions may face a conundrum when choosing a courtroom forum” because West Virginia’s law of *res judicata* precludes litigation of “every other matter which the parties might have litigated as incident” to the claims asserted in the prior action. *Id*. Moreover, this *dicta* is found in the context of the Court’s explanation that “the rule against splitting causes of action applies to preclude [a party who voluntarily drops a claim in an earlier action] from maintaining the separate second suit on the abandoned claim.” *Id*. (citing *Dade Cty. v. Matheson*, 605 So.2d 469, 472 (Fla.Ct.App. 1992)). Given proper context, this Court is not persuaded by the Plaintiffs’ suggestion that the West Virginia Supreme Court “recognized” they have the option to split their claims. The opposite is true, as the West Virginia Supreme Court recognized in *Dan Ryan Builders* that a party may not split his claims. Despite a clear prohibition against claim splitting, and a sound basis for the doctrine, Plaintiffs ask this Court to allow precisely what the Supreme Court has prohibited. This Court rejects Plaintiffs’ attempt to split their claims and prosecute them piecemeal in two separate courts.

F. None Of Plaintiffs' Claims For Equitable Relief In The Circuit Court Are Actionable Under West Virginia Law.

“A writ of mandamus will not issue unless three elements coexist (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 539, 170 S.E.2d 367, 367 (1969). “Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” Syllabus Point 2, *State ex rel. McLaughlin v. W. Virginia Court of Claims*, 209 W. Va. 412, 413, 549 S.E.2d 286, 287 (2001) (internal citations omitted) (emphasis added). Although “[m]andamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, . . . it is never employed to prescribe in what manner they shall act, or to correct errors they have made.” Syllabus Point 3, *Thompson v. W. Virginia Bd. of Osteopathy*, 191 W. Va. 15, 16, 442 S.E.2d 712, 713 (1994) (internal citations omitted).

Plaintiffs' First Amended Complaint generally states four claims for equitable relief: 1) injunction against “BRIM”; 2) appointment of a commissioner; 3) appointment of a special prosecutor; and 4) appointment of a grand jury advocate. Motion to Dismiss, Exhibit F, pp. 3-5. These equitable claims are barred for at least three reasons. First, they do not identify a source of legal authority for the relief requested and do not identify a non-discretionary duty the Defendant City of Martinsburg has failed to perform. Second, they seek to prescribe the manner in which the City of Martinsburg operates its police department, the manner in which the Berkeley County Prosecuting Attorney investigates and prosecutes alleged crimes, and the manner in which the Berkeley County Prosecuting Attorney conducts grand jury proceedings. Finally, they seek to correct alleged errors made by the City of Martinsburg and/or the Berkeley

County Prosecuting Attorney in the execution of their discretionary duties. Therefore, even if Plaintiffs' equitable claims were properly pled with the proper parties before the Court, those claims must fail for lack of any viable legal basis.

III. RULING

Plaintiffs' First Amended Complaint is legally insufficient and must be dismissed with prejudice pursuant to Rule 12(b)(6). First and foremost, the statute of limitations expired before Plaintiffs filed their action in this Court. No tolling provision applies. Plaintiffs have no private right of action for their alleged statutory and constitutional violation claims. Furthermore, there is no set of facts Plaintiffs can prove to avoid application of the doctrine of claim splitting. No matter how Plaintiffs attempt to alter the wording of their Complaint or tweak the wording of the relief they request, there is simply no basis for Plaintiffs' First Amended Complaint to proceed in the Circuit Court, particularly while they prosecute a case based upon the same March 13, 2013 shooting incident in the District Court.

It is accordingly **ORDERED** that 1) Defendants' Motion to Dismiss shall be, and hereby is, **GRANTED** pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure; 2) Plaintiffs' First Amended Complaint shall be **DISMISSED WITH PREJUDICE** once the Court considers and rules on the Defendants' pending Motion for Rule 11 Sanctions; and 3) the Court shall retain jurisdiction over the Plaintiffs and their counsel to consider Defendants' Motion for Rule 11 Sanctions.

Plaintiffs' objections to all adverse rulings are hereby noted and preserved.

The Court's Clerk shall transmit an attested copy of this Order to all counsel of record.

/s/ Laura Faircloth
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.