No. 29327 -- Geraldine Willard and Denzil Rhodes, Co-Executors of the Estate of Alma Whited, deceased v. Gary Eugene Whited, Executor of the Estate of Delbert R. Whited, deceased

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Maynard, Justice, dissenting:

The majority casually disregards Court precedent and unnecessarily creates new law out of whole cloth. As a result, the Court's very important and traditional interest in promoting the finality of judgments is now in doubt.

The fact is this Court got it right in the first *Willard v. Whited* opinion (*Willard I)* filed on November 30, 2001, interestingly referred to as "a preliminary opinion" by the majority.[1] *Willard I* is based on sound and settled principles of *res judicata* and years of declaratory judgment law. The application of settled law to the facts of this case is straightforward and simple. As we explained in *Willard I,* "[u]nder 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), *quoting Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645 n. 5, 58 L.Ed.2d 552, 559 n. 5 (1979) (footnote omitted). Moreover:

> Before the prosecution of a lawsuit may be barred

[1]I must confess that when I voted to concur in *Willard I,* I did not realize that it was merely "a preliminary opinion."

> 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 Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

Applying this law to the instant facts plainly reveals that there was a previous final adjudication on the merits. In addition, the same parties participated in the original adjudication. Finally, the issue presented in the instant declaratory judgment action could have been resolved in the previous adjudication had it there been timely presented. The facts clearly illustrate that in the original adjudication, the special commissioner issued a written report on June 9, 1998. The appellants, who were represented by counsel, had ample opportunity to present evidence, cross examine witnesses, and object to the special commissioner's report. The appellants failed to exercise any of those three options. As a result, on August 6, 1998, the circuit court entered a final order approving the June 9 report. Accordingly, the application of the law to the facts mandates the conclusion that the appellants' declaratory judgment action is barred by *res judicata.*

Further, our law is clear that "[a] declaratory judgment action can not be used as

a substitute for a direct appeal." Syllabus Point 3, *Hustead v. Ashland Oil, Inc.,* 197 W.Va. 55, 475 S.E.2d 55 (1996). In this case, the appellants did not appeal the circuit court's August 6, 1998 final order. Rather, they waited well over one year before launching a collateral attack against the final judgment. This is clearly impermissible under our law and it should have been rejected by this Court.

In *Hustead,* we explained that "West Virginia Rule of Civil Procedure 60(b) provides the only means for bringing a collateral attack on a final judgment in a civil action." 197 W.Va. at 60, 475 S.E.2d at 60. In addition,

> one of the purposes of Rule 60(b) is to provide a mechanism for instituting a collateral attack on a final judgment in a civil action when certain enumerated extraordinary circumstances are present. When such extraordinary circumstances are absent, a collateral attack is an inappropriate means for attempting to defeat a final judgment in a civil action.

Hustead, 197 W.Va. at 61, 475 S.E.2d at 61. Because Rule of Civil Procedure 60(b) provides a mechanism for instituting a collateral attack on a final judgment, the new law crafted by the Court serves no meaningful purpose. Notably, the appellants failed to file a timely Rule 60(b) motion.

The appellants contend that the estate is entitled to a credit or credits for money that Delbert Whited had already received, and that this matter had been left unresolved by the

commissioner's report and the court's final order. The difficulty with the appellants' argument is that this issue was apparent on June 9, 1998, when the special commissioner issued the report and on August 6, 1998, when the circuit court issued its final order which approved of the commissioner's report. The appellants are coexecutors of the estate of Alma Whited. Alma died on December 8, 1994, and the special commissioner did not issue his report until three-and-a-half years later. Therefore, unless the appellants breached their fiduciary duty as coexecutors, they certainly cannot claim surprise or newly discovered evidence! Therefore, even if our precedent recognized a "special circumstances" exception to the rule that a declaratory judgment action cannot be used as a substitute for a direct appeal, such an exception does not aid the appellants. They have completely failed to show special circumstances in this case.

In sum, the majority cavalierly disregards settled precedent while creating new law that does not even apply to the facts of this case. The majority's opinion is nothing more than an attempt to aid parties who failed to avail themselves of the adequate legal mechanisms already in place. The result of all this is the obfuscation of well-settled principles concerning *res judicata* and the finality of judgments. For these reasons, I dissent.

I am authorized to state that Chief Justice Davis joins me in this dissent.