No.31391 – *State of West Virginia ex rel. Frazier & Oxley, L.C., a West Virginia Legal Corporation, and William M. Frazier, Individually, v. The Honorable John L. Cummings, Judge of the Circuit Court of Cabell County, West Virginia, and St. James Management Company, L.L.C., a West Virginia Limited Liability Company*

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Albright, Justice, dissenting:

Although the majority accurately discusses the law with regard to remand after an appeal and addresses a related doctrine known as the law of the case, application of those principles to this case was not warranted given the jurisdictional basis for this Court's ruling in *Oxley I*,[1] the extremely limited nature of our substantive rulings in *Oxley I*, and the absolute lack of procedural limitations placed on the lower court's actions by our previous ruling. Through its ruling in the case *sub judice*, an original jurisdiction petition for a writ of prohibition, the majority has denied to the lower court the power to make a procedural ruling which it has the discretion to make in a case over which it continues to have jurisdiction. Accordingly, I must respectfully dissent to the majority's decision.

Because our decision in *Oxley I* was to grant a writ of prohibition, nothing was before us in *Oxley I* regarding the underlying civil action except petitioners' successful effort

[1]*See State ex rel. Frazier* & *Oxley, L.C. v. Cummings*, 212 W.Va. 275, 569 S.E.2d 796 (2002) (granting writ of prohibition to prevent enforcement of partial summary judgment ruling).

to prevent enforcement of the lower court's grant of partial summary judgment in that underlying civil action. Accordingly, there was no prototypical remand in *Oxley I* in the sense that this Court directed the lower court to hold further proceedings for the purpose of resolving a particular factual or legal issue. Instead, this Court, through its issuance of a writ of prohibition in *Oxley I*, simply refused to allow the enforcement of a partial summary judgment ruling in the underlying case. Otherwise, the lower court retained jurisdiction of the underlying civil action throughout our consideration of *Oxley I* and this Court never acquired jurisdiction of that underlying civil action. Consequently, the effect of this Court's issuance of an extraordinary writ in *Oxley I* was merely to put the parties back in the midst of the litigation, headed for a trial on the issues presented. *See MOM Corp. v. Chattahoochee Bank*, 418 S.E.2d 74, 76 (Ga.App.1992) (recognizing that "[o]n a reversal of summary judgment, a case is remanded in the posture existing prior to summary judgment").

The majority's attempt to cloak its decision with legitimacy by suggesting that the law of the case prevents the lower court from granting a motion to amend a complaint was exceedingly imprudent. Had this Court through its ruling in *Oxley I* expressly ruled that no amendments to the complaint could be entertained, then the law of the case doctrine would prevent the trial court from subsequently allowing such an amendment. Instead, under the guise of a supposed failure of the lower court to observe our mandate in *Oxley I*

(including our opinion in that proceeding), this Court has stripped the trial judge of his discretion to permit an amendment of the pleadings by characterizing his decision in that regard as being in excess of his jurisdiction, and thereby justifying the issuance of a second writ of prohibition. The trial judge clearly acted within his jurisdiction and is vested by our law with discretion to permit an amendment of the pleadings. The most this Court might say if his ruling were later to come before us on appeal, and we disagreed with his decision regarding amendment of the pleadings, is that the trial court abused that discretion. Such an abuse of discretion, however, does not constitute an act in excess of a lower court's jurisdiction and is an insufficient basis for the issuance by this Court of a writ of prohibition, as was done in this case.

To justify its inappropriate and untimely intrusion upon the discretion vested in the trial court, the majority concludes that the trial court disregarded the law of the case. That is wholly unjustified. In fact, in just over three pages of discussion in *Oxley I*, this Court made only one ruling that could be viewed as controlling under the law of the case doctrine: That the settlement agreement between the parties was ambiguous. Were the trial court to have sought to uphold the settlement agreement following the issuance of the writ of prohibition, the law of the case would have controlled and prevented the enforcement of such a ruling. No such ruling was made by the trial court.

Instead the majority seeks to elevate what is merely dicta in *Oxley I* to the status of binding direction to the trial court. The majority asserts that our speculative comment that "[a]bsent that [settlement] agreement, we would simply reverse the circuit court's award of summary judgment . . . and remand for a factual determination of whether a surrender of the prime lease occurred" constituted a binding direction to the trial court which prohibited consideration of any motions to amend the pleadings.[2] 212 W.Va. at 281, 569 S.E.2d at 802. The fact is that this Court issued a straightforward writ of prohibition simply prohibiting the enforcement of the lower court's partial judgment order. The writ in *Oxley I* was not moulded in any manner to instruct the lower court to do or not do anything else in the underlying case.

Critically, the majority seeks to apply the law of the case doctrine to bar the lower court from its jurisdictional right to make discretionary rulings on matters of procedure in cases over which it has, and has always retained, original jurisdiction rather than, as might have been appropriate, to bar additional litigation of a substantive matter that might have been – but was not in *Oxley I* – ruled upon and resolved by this Court. The law simply does not bind the hands of a trial court in the manner imposed by the majority here. While the

[2]Even if this statement the majority relied upon is viewed as direction to resolve this factual issue, nothing in *Oxley I* directly or indirectly precluded the lower court from considering a properly presented issue of procedure such as a motion to amend the complaint. Simply put, the majority goes too far in its attempt to control the actions of the trial court.

law of the case doctrine bars reopening or reconsideration of a question of law or fact that has been definitively determined by this Court,[3] it does not abrogate the lower court's authority to consider motions for the addition of new parties or the amendment of pleadings or the taking of additional evidence. *See Cauble v. Cauble*, 515 S.E.2d 708 (N.C. App. 1999) (holding that trial court on remand could in its sole discretion receive such further evidence and argument from parties as it deemed necessary and appropriate); *Chattahoochee Bank*, 418 S.E.2d at 75 (finding that failure of appellate court upon reversal of summary judgment to expressly direct taking of new evidence did not prohibit lower court from receiving additional evidence on remand); *Blue v. Campbell*, 57 W.Va. 34, 49 S.E. 909 (1905) (observing that even absent directions to permit amendment of pleadings, such amendment may occur on remand); *see also* Syl. Pt. 5, *Maynard v. Hammond*, 139 W.Va. 230, 79 S.E.2d 295 (1953) ("The determination of an issue in an extraordinary proceeding in this Court constitutes the law of the case in a subsequent proceeding on writ of error or appeal wherein the real parties in interest and the issues are the same, and there has been nothing new injected by pleadings or evidence which calls for a different conclusion."); Syl. Pt. 2, *Moran v. Leccony Smokeless Coal Co.*,124 W.Va. 54, 18 S.E.2d 808 (1942) ("In the absence of new pleadings, or new evidence, calling for a different judgment, the decisions of this Court in a suit or action brought before it for review will be treated as the law of the case on second appeal or writ of error."); Syl. Pt. 2, *Keyser Canning Co. v. Klots Throwing*

[3]*See generally Windon v. Stewart*, 48 W.Va. 488, 37 S.E. 603 (1900).

Co., 98 W.Va. 487, 128 S.E. 280 (1925) ("The decision of this court on a particular point on a former hearing will be regarded as the law of the case on a second appeal, unless new pleadings and new evidence adduced on the subsequent trial call for a different judgment.")

In reaching its decision, the majority completely sidesteps the fact that discretion remains in the trial court on remand[4] as to matters that routinely fall within the lower court's decision making authority. *See generally* 5 Am.Jur.2d *Appellate Review* § 786 (1995) (observing that trial courts are vested with broad discretion regarding handling of matters remanded with general directions for further proceedings); 1B Michie's Jurisprudence *Appeal and Error* § 342 (stating that while mandate controls as to matters within its compass, lower court is free as to other issues left open on remand).

While the majority waxes on about how the trial court acted counter to its mandate, the mandate was issued without any specific directions on its face or in the accompanying opinion. That mandate, which the majority chose not to recite in its opinion, says nothing other than the writ of prohibition is granted and "this action is remanded to the Circuit Court of Cabell County for further proceedings in accordance with the written opinion." The opinion, which is viewed as part of the mandate, is also without direction as

[4]While I strongly disagree with the majority's position that this Court "remanded" the case to the trial court upon our issuance of the writ in *Oxley I*, I use the term remand solely to respond to the analysis employed by the majority in deciding this case.

to what specific action the trial court is supposed to take, or not take, when the matter is permitted to proceed before the lower court. *Oxley I* closes with a simple holding that summary judgment was wrongly granted. No guidelines for remand were provided by this Court and consequently no limits were placed on the trial court's actions other than to act consistent with the mandate.

By failing to heed the significance of the special nature of the Court's prohibition jurisdiction in *Oxley I*, the majority overlooks the rationale underlying the rule of the case doctrine. Our review in cases that are accepted pursuant to this Court's extraordinary jurisdiction is by design more circumscribed than in matters that are reviewed under our general appellate jurisdiction. As was the case in both *Oxley I* and *II*, extraordinary jurisdiction cases typically involve consideration of limited issues and often require a decision before the case has been fully litigated. What the rule of the case doctrine is aimed at preventing is relitigation of issues that have been fully addressed by an appeals court. In marked contrast to a case that is properly remanded by this Court following appeal, our scope of review in *Oxley I* was confined to considering solely the partial summary judgment issue, based on a limited factual development. In setting aside the lower court's judgment, this Court decided a single, narrow question of law. Because we did not decide the ultimate issue in *Oxley I* concerning the underlying case – whether a surrender of the prime lease had occurred – and did not give the Circuit Court of Cabell County any direction

related to that ultimate issue, the majority's reliance on the rule of the case doctrine as barring the circuit court's discretionary grant of a motion to amend pleadings is clearly wrong. *See Chattahoochee Bank*, 418 S.E.2d at 75 (holding that "following appellate review of summary judgment, 'the law of the case' rule does not limit or prohibit the trial court from receiving new evidence which changes the evidentiary posture of the case").

To suggest that the trial court was essentially thumbing its nose at this Court's rulings by permitting an amended complaint to be filed when this Court made no determination on the ultimate issue, in my opinion, is an injudicious and unjustified attempt to broaden the law of the case doctrine.[5] Furthermore, to conclude, as did the majority, that the trial court failed to adhere to the scope of the mandate is an undeniable and indefensible reach given that the mandate issued by this Court in *Oxley I* imposed no limitations on the trial court other than a reversal of its grant of partial summary judgment based on the ambiguous terms of the settlement agreement.[6] The majority opinion is patently unfair to the circuit judge because this Court gave him no reason whatsoever to conclude that he had

[5]I also take issue with the majority's characterization of the basis for the amended complaint as involving a new theory of the case, as the issue sought to be included in the litigation was a matter of proof based on the alleged failure to record and not an entirely new approach to the case.

[6]Moreover, I cannot but conclude that an insurmountable burden has been inflicted on the circuit courts as a result of *Oxley II* if trial courts will uniformly be held accountable for guessing what this Court has in mind with regard to the limits imposed on a lower court's authority following a directionless remand.

been deprived of discretion to permit subsequent amendment of the pleadings. A review of his exercise of that discretion might have been appropriate upon appeal of the underlying case but not by way of the instant writ of prohibition

I would have refused the writ in this case and allowed the matter to proceed to trial without further interference by this Court. I cannot escape the conclusion that the majority's view of this case proceeds, at least in part, from a settled effort to choose the winner before the relevant issues have been fully tried and heard.

I further observe that this case illustrates an unfortunate confusion that has slipped into the practice and procedures of this Court which should be remedied by us in future cases. The majority's entire discussion about remands is misplaced in this case and the inclusion in the mandate in *Oxley I* of language about a "remand" underlines the problem.

When a case is before us on appeal, where we have taken appellate jurisdiction of a matter first heard in a lower tribunal, we do indeed "remand" that case to a lower tribunal, most often with directions that bind and direct the lower court. Those directions may be expressed in the opinion which forms a part of our judgment in the case but may also be set forth *in extenso* in the mandate.

On the other hand, when we undertake a ruling in a case where we are exercising original jurisdiction, such as mandamus or prohibition, we do not proceed based on the case that was initiated in the lower court, although we may indeed have before us certain facts or rulings developed in a lower court. We may, in exercising our original jurisdiction, impose one or more directions on a lower court applicable to and forming a part of the law of a case then pending in that lower court. Importantly, the case proceeds in a manner that is separate from and thus viewed as extraordinary in comparison to our appellate jurisdiction. The relief we grant in that situation is awarded by a writ. It may be a simple, straightforward direction to the lower court; it may be a more complex, multi-faceted directive. In the former case, the relief awarded is by means of a writ; in the latter case, it most often is a moulded writ. What it is not is a "remand."[7]

Unfortunately, a search of our order books discloses that on numerous occasions this Court, and on occasion, this author, has spoken in original jurisdiction cases of "remanding" the case and the mandate has, on occasion also utilized such "remand" language. We should stop both practices immediately. Upon appeal we may remand. In an original jurisdiction case, we may grant a straightforward writ or mould it in one or more

[7]While the majority posits that a "remand" following *Oxley I* was ordered, the correct usage of that term cannot result in relief that this Court did not award.

particulars. However, in such original jurisdiction cases we should be careful not to assert that we "remand."[8] We should stop that practice now!

For the above stated reasons, I respectfully dissent.

[8]I am not speaking here of original jurisdiction cases where we remand the entire extraordinary remedy case to a lower court for factual development after we have accepted original jurisdiction.