

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Sharon Mueller,
Plaintiff Below, Petitioner**

vs.) No. 11-0567 (Jefferson County 10-C-200)

**Shepherd University Board of Governors
Defendant Below, Respondent**

FILED

November 30, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Sharon Mueller appeals the November 22, 2010 order of the Circuit Court of Jefferson County dismissing her instant civil action on grounds of res judicata based upon a settlement agreement the parties reached in 2004. The instant appeal was timely filed by the petitioner with the entire record being designated on appeal. The Court has carefully reviewed the record, written arguments contained in the pro se petition, and the response thereto, and the case is mature for consideration.

This matter has been treated and considered under the Revised Rules of Appellate Procedure. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner has a long history of litigation against Respondent Shepherd College (now University).¹ A prior action ended between petitioner and Shepherd ended in a settlement agreement that compromised and settled all outstanding actions and claims.² The terms of the settlement agreement were set out in the circuit court's March 3, 2004 dismissal order and included the following:

¹ The prior litigation includes Jefferson County Civil Action Nos. 01-C-1565, 02-C-470, 02-C-581, 02-C-297, and 03-C-266. Petitioner appealed Civil Action No. 01-C-1565, which petition this Court refused.

² The settlement was reached in *Shepherd College Board of Governors, et al. v. Sharon Mueller*, Jefferson County Civil Action No. 03-C-266.

2. Shepherd agreed to pay [Petitioner] an untaxed, lump sum payment of three thousand dollars (\$3,000) for which [Petitioner] will be responsible for paying any taxes and for which Shepherd will issue a Form 1099.

* * *

4. [Petitioner] and Shepherd agreed that no changes or modifications to the Settlement Agreement or mutual release entered into by the parties shall be valid unless executed by both parties.

5. [Petitioner] agreed that she will not enter upon the campus of Shepherd College except for the purpose of attending public events held at the Butcher Center, McMurrin/Reynolds Hall, the Frank Arts Center and Ram Stadium.

6. [Petitioner] agreed that she would not talk with or call on the telephone the following: Kristi A. McWhirter, David Dunlop, President Shepherd College, K. Alan Perdue, Shepherd College Counsel, the members of the Shepherd College Board of Governors, its successors, officers and employees.

After the settlement, the Shepherd Wellness Center was built on campus. It shares a common wall with the Butcher Center.

According to petitioner, on June 11, 2009, she was attending a ribbon-cutting ceremony of an additional gym at the Butcher Center and that Shepherd's counsel, K. Alan Perdue, approached her and began harassing her. Petitioner alleged that she told Mr. Perdue that he was in violation of the circuit court's March 04, 2004 dismissal order for talking to her. In addition to violating the March 04, 2004 dismissal order, petitioner alleged that Mr. Perdue also violated her First Amendment right to peaceably assemble. Petitioner further alleged that Palmer Construction "[c]lassified the attached building structure, [i.e., the Shepherd Wellness Center] as an addition" to the Butcher Center. Petitioner alleged that she also called the West Virginia Attorney General's Office which informed her that "if the bldg. [sic] structure is attached to the Butcher Center, The [sic] Court Order would reasonably include any attachments." Petitioner alleged that because of "Shepherd's Violation," she missed a number of Open House events throughout 2009 and 2010. Petitioner made these allegations in a new action she filed, Civil Action No. 10-C-200. Shepherd subsequently filed a motion to dismiss petitioner's instant action based upon various grounds including res judicata.

In its November 22, 2010 order, the circuit court granted Shepherd's motion to dismiss. The circuit court found that petitioner's instant action was barred by the application of res judicata because of the following:

8) . . . First, the case [Civil Action No. 03-C-266] ended in a

final adjudication on the merits as embodied in the Court's Dismissal Order. Second, that case included the same parties: [Petitioner] and Shepherd University. Finally, the cause of action in the current case could have been resolved in the prior case as the issue of which buildings [Petitioner] was permitted to enter was addressed in the prior action. [Petitioner] had a full and fair opportunity to address the issue of new construction on the Shepherd University campus and chose not to.

9) The Court finds that the Wellness Center is a separate structure not specified in the settlement agreement as a location [Petitioner] may enter. Because the issue of what buildings on the Shepherd University campus [Petitioner] is permitted to enter was decided in Civil Action No. 03-C-266, [Petitioner]'s claim that she was denied access to a building not included on the list of approved buildings renders her claim res judicata.

Petitioner argues on appeal that because the Shepherd Wellness Center is merely an addition to the Butcher Center, she has a right to use the new facilities within the Wellness Center while attending public events. In its response, Shepherd argues that because the issue of which buildings on the Shepherd campus petitioner was permitted to enter was decided in Civil Action No. 03-C-266, the circuit court properly concluded that petitioner's claim in the instant action that she was denied access to a building not on the list of approved buildings was barred by the doctrine of res judicata.

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Three elements must be satisfied before the prosecution of a lawsuit may be barred on the basis of res judicata: (1) there must have been a final adjudication on the merits in the first proceeding; (2) the second proceeding must involve the same parties, or persons in privity with those same parties, as the first proceeding; and (3) the cause of action in the second proceeding must be identical to the cause of action determined in the first proceeding or must be such that it could have been resolved, had it been presented, in the first proceeding. *See* Syl. Pt. 1, *Antolini v. West Virginia Division of Natural Resources*, 220 W.Va. 255, 647 S.E.2d 535 (2007) (quoting Syl. Pt. 4, *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997)). This Court concludes that the circuit court properly determined that all three elements of res judicata were satisfied in the case sub judice.

For the foregoing reasons, we find no error in the decision of the circuit court and the dismissal of petitioner's civil action on the basis of res judicata is affirmed.

Affirmed.

ISSUED: November 30, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh