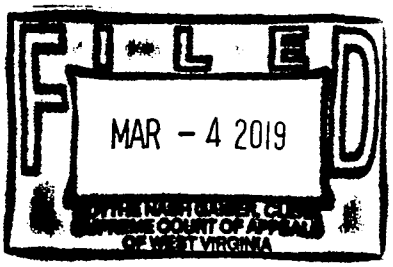
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**




ESTATE OF WAYNE A. JONES
by ROBERT L. JONES,

*Petitioner*,

v.

THE CITY OF MARTINSBURG,

*Respondent.*

CASE NO. 18-0927

# RESPONDENTS' BRIEF

Appeal Arising from Orders Entered on
August 2, 2018 and September 19, 2018
in Civil Action No. 16-C-490 in the
Circuit Court of Berkeley County, West Virginia

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## STATEMENT OF THE CASE

Petitioners (Plaintiffs) are the brothers of Wayne A. Jones and the administrators of his Estate. Respondents (Defendants) are the City of Martinsburg and five of its police officers – Pfc. Erik Herb, Pft. Daniel North, Ptlm. William Staubs, Ptlm. Paul Lehman, and Pft. Eric Neely. Respondent Officers Herb, North, Staubs, Lehman, and Neely were involved in a shooting incident with Wayne A. Jones on March 13, 2013.[1] First Amended Complaint, ¶¶1-3. [182]

On **March 13, 2013**, Wayne A. Jones, died as a result of the incident alleged in Petitioners' Complaint. First Amended Complaint, ¶ 7. [182-189]

On **June 13, 2013**, Petitioners filed a Complaint for Damages, Injunctive and Declaratory Relief against the Respondents in the United States District Court for the Northern District of West Virginia (Martinsburg Division) based upon the March 13, 2013 incident. [039-077]

On **May 21, 2014**, Petitioners filed a Second Amended Complaint for Damages, Injunctive and Declaratory Relief against the Respondents in the United States District Court for the Northern District of West Virginia (Martinsburg) based upon the March 13, 2013 incident. [079-137]

On **October 15, 2014**, after complete discovery, the District Court granted all Respondents summary judgment finding, *inter alia*, that Respondent Officers shot Wayne A. Jones while he was resisting arrest, after he struck one officer in the head, and after he stabbed another officer

[1] Petitioners have omitted several key facts from their rendition of the March 13, 2013 shooting incident (e.g. Wayne A. Jones resisted arrest, stabbed one officer with a concealed knife, and ignored multiple commands to drop his weapon before he was shot). Petitioners have also employed inflammatory rhetoric in their pleadings (e.g. their First Amended Complaint characterizes the March 13, 2013 incident as "a joy or thrill killing"). Respondents dispute Petitioners' selective presentation of the facts and biased characterization of the incident. However, because the Circuit Court correctly granted Respondents' Motion to Dismiss under the Rule 12(b)(6) standard (i.e. construing the factual allegations in the light most favorable to Petitioners), it is not necessary to discuss the disputed facts in detail. Even when Petitioners' mischaracterization of the March 13, 2013 shooting incident is taken as true, the Circuit Court correctly dismissed their "back-up" State Court case and properly deferred to the District Court's resolution of their original Federal Court case. Accordingly, Respondents' Statement of the Case is limited to the dispositive facts and procedural history which demonstrate the propriety of the Circuit Court's decisions.

with a knife. Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment. [139-159] Petitioners appealed this ruling to the United States Court of Appeals for the Fourth Circuit. [173]

On **September 15, 2016**, while their appeal was pending in the Court of Appeals, Petitioners filed a new Complaint in the Circuit Court of Berkeley County, West Virginia, based upon the same March 13, 2013 incident. [161-171]

On **December 2, 2016**, after a remand from the Court of Appeals to "consider the discretionary factors in Rule 36(b) in determining whether to allow the withdrawal of the [Petitioners' admissions]," the District Court denied Petitioners' request to withdraw certain factual admissions (e.g. Wayne Jones had a knife before the shooting incident) and confirmed its summary judgment ruling for Respondents. [173-180]

On **July 20, 2017**, Petitioners filed a First Amended Complaint in the Circuit Court based upon the same March 13, 2013 incident. [182-189] This First Amended Complaint alleged: 1) intentional homicide; 2) negligence; 3) constitutional violations; 4) statutory violations; and 5) wrongful death. It sought monetary damages and equitable relief in the form of: 1) an injunction against "BRIM" (State Board of Risk and Insurance Management); 2) the appointment of a commissioner to investigate Respondent City of Martinsburg's police department; 3) the appointment of a special prosecutor to review the March 13, 2013 incident; and 4) the appointment of a special grand jury advocate to make a second presentation to a second grand jury.[2]

On **August 21, 2017**, Respondents filed a Motion to Dismiss Petitioners' First Amended Complaint pursuant to Rule 12(b)(6) in the Circuit Court because "it duplicates their law suit

[2] The October 2013 Berkeley County grand jury found no probable cause for any criminal charges against any of the Respondent Officers related to the March 13, 2013 incident and Wayne A. Jones' death. Petitioners' Brief, pg. 24. [257]

currently pending in the United States Court of Appeals for the Fourth Circuit after it was dismissed on summary judgment" by the District Court. [022-223]

On **September 15, 2017**, Petitioners filed a Response in Opposition to Defendant's Rule 12(b)(6) Motion to Dismiss. [225-243]

On **September 18, 2017**, Petitioners filed a Motion for Additional Discovery pursuant to Rule 56(f) of the West Virginia Rules of Civil Procedure. [245-247] This Motion did not specify discoverable facts which Petitioners believed would be necessary to resist Respondents' Motion to Dismiss or otherwise meet the requirements of Rule 56(f).[3]

On **September 19, 2017**, Petitioners filed Requests for Production of Documents and Interrogatories to Respondents. [249-255] These discovery requests sought: 1) inspection of the knife Wayne A. Jones used to stab Respondent Officer William Staubs on March 13, 2013; and 2) the number of "jaywalking" tickets written by all Respondent Officers in the last ten years. [254]

On **September 19, 2017**, Petitioners also filed a Petition for Disclosure of Grand Jury Proceedings under West Virginia Code § 52-2-15(c)(2)(A) and Rule 6(e)(3)(c)(i) of the West Virginia Rules of Civil Procedure.[4] [257-259]

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[3] "An opponent of a summary judgment motion requesting a continuance for further discovery need not follow the exact letter of Rule 56(f) of the West Virginia Rules of Civil Procedure in order to obtain it. When a departure from the rule occurs, it should be made in written form and in a timely manner. The statement must be made, if not by affidavit, in some authoritative manner by the party under penalty of perjury or by written representations of counsel. At a minimum, the party making an informal Rule 56(f) motion must satisfy four requirements. It should (1) articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier." Syllabus, *Elliott v. Schoolcraft*, 213 W. Va. 69, 70, 576 S.E.2d 796, 797 (2002) citing Syllabus Point 1, *Powderidge Unit Owners Assoc. v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

[4] See footnote 2 supra.

On **September 21, 2017**, Petitioners filed Second Requests for Production of Documents and Interrogatories to Respondents. [261-266] These discovery requests sought: 1) the name of any insurance carrier(s) providing a defense for the Respondents; 2) the name of any insurance carrier(s) providing coverage for Respondents; 3) the name of any insurance carrier(s) defending Respondents under a reservation of rights; and 4) all documents related to Respondents' insurance coverage. [265]

On **October 12, 2017**, the Circuit Court held a hearing on Petitioners' Petition for Disclosure of Grand Jury Proceedings, denied the Petition without prejudice, and stayed all parallel State Court proceedings "until the related appeal is resolved by the U.S. Court of Appeals for the Fourth Circuit." [285-287] The Circuit Court allowed discovery to proceed in the case, but only by agreement of the parties, and allowed Petitioners to contact an expert witness the State of West Virginia presented to the October 2013 Berkeley County grand jury. [285]

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 [Respondent Officers] used was excessive" and, therefore, "summary judgment was improper on the [Petitioners'] § 1983 claim against the [Respondent] officers for use of excessive force in violation of the [Wayne A. Jones'] Fourth Amendment rights, as well as on the related § 1983 claim brought against the [Respondent City of Martinsburg]." Unpublished Opinion. [334-347]

On **March 27, 2018**, the Circuit Court held a status hearing and inquired about how Petitioners intended to proceed in their parallel Circuit Court case after their separate District Court case had been remanded for trial. Petitioners acknowledged some "overlap" between their Circuit Court case and their District Court case. Therefore, the Circuit Court directed Petitioners to file a

statement which fully identified the claims they intend to prosecute in the District Court and the claims they intend to prosecute in the Circuit Court. Status Hearing Order. [291-293]

On **April 10, 2018**, the District Court entered a Scheduling Order and set Petitioners' case for a jury trial on October 23, 2018. Scheduling Order. [353-358]

On **June 13, 2018**, Petitioners filed a Statement of Claims pursuant to the Circuit Court's March 27, 2018 Status Hearing Order. This Statement of Claims confirmed Petitioners are asserting various claims related to the March 13, 2013 incident in both the Circuit Court and the District Court and demonstrated the "overlap" in Petitioners' claims. Plaintiff's Statement of Claims. [360-392]

On **June 29, 2018**, Petitioners filed a Supplemental Response in Opposition to [Respondents'] Rule 12(b)(6) Motion to Dismiss. [298-315]

On **July 2, 2018**, Respondents filed an Updated Memorandum of Law in Support of Motion to Dismiss. [317-392]

On **July 24, 2018**, the Circuit Court held a hearing on Respondents' Motion to Dismiss. Petitioners and Respondents appeared by counsel for this hearing and argued their respective positions. [431]

On **August 2, 2018**, the Circuit Court granted Respondents' Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and entered an Order Granting Motion to Dismiss with specific findings of fact and conclusions of law. [394-409]

On **August 13, 2018**, Petitioners filed a Motion to Alter, Amend, and Vacate under Rule 59(e) of the West Virginia Rules of Civil Procedure and a Motion for Hearing. [411-417]

On **August 21, 2018**, Petitioners filed a First Addendum to their Motion to Alter, Amend, and Vacate. [420-422]

On **August 22, 2018**, the Circuit Court entered a Trial Court Rule 22 Scheduling Order. [424-425] This Order allowed Respondents fifteen days to file a response to Petitioners' Motion to Alter, Amend, and Vacate and allowed Petitioners ten days to file a rebuttal memorandum.

On **September 6, 2018**, the Circuit Court entered the parties' Agreed Order Extending [Respondents'] Deadline for Response to [Petitioners'] Motion to Vacate. [427] This Order extended Respondents' response deadline to September 10, 2018 and Petitioners' reply deadline to September 20, 2018.

On **September 7, 2018**, the District Court again granted all Respondents summary judgment finding, *inter alia*, that Wayne A. Jones "possessed a knife," "resisted arrest," "fled from the [Respondent] officers," and was, ultimately, shot after he "attempted to stab one of the [Respondent] officers." The District Court determined "it was not clearly established that an officer would violate an individual's Fourth Amendment" rights and, thus, Respondent "officers are entitled to qualified immunity." Because the Fourth Circuit previously affirmed the remainder of the District Court's prior order granting summary judgment, and the only claims remaining were Petitioners' § 1983 claims against Respondents, the District Court also dismissed Petitioners' entire case with prejudice. Memorandum Opinion and Order. [461-476]

On **September 10, 2018**, Respondents filed their Response to [Petitioners'] Motion to Vacate Order Granting Motion to Dismiss. [430-476]

On **September 19, 2018**, the Circuit Court denied Petitioners' Motion to Vacate with its Order Denying [Petitioners'] Motion to Vacate Order Granting Motion to Dismiss. [478-490] This Order specifically amended the Circuit Court's August 2, 2018 Order Granting Motion to Dismiss to include *res judicata* as a basis for dismissal given the District Court's September 7, 2018 Order granting Respondents summary judgment on all remaining issues. [488-489]

## SUMMARY OF ARGUMENT

Petitioners sued Respondents in District Court on June 13, 2013, only three months after the March 13, 2013 shooting incident. After full discovery and multiple amended pleadings, the District Court considered the merits of Petitioners' case and granted all Respondents summary judgment on October 15, 2014. While their appeal was pending in the Court of Appeals, Petitioners filed this duplicate "back-up" case in the Circuit Court on September 15, 2016, three and one-half years after the March 13, 2013 incident and nearly two years after the District Court's October 15, 2014 dismissal of their original case. Petitioners now have two identical cases based upon the same March 13, 2013 incident pending in two different courts.

The Circuit Court recognized Petitioners' clever procedural maneuvers and correctly dismissed their "back-up" case on August 2, 2018. After properly applying the Rule 12(b)(6) standard, the Circuit Court correctly determined that: 1) West Virginia's two-year statute of limitations bars Petitioners' negligence and wrongful death claims; 2) West Virginia's two-year statute of limitations also bars Petitioners' statutory and constitutional claims; 3) even if Petitioners' statutory and constitutional claims were timely filed, there is no private right of action for these claims under West Virginia law; 4) the doctrines of *res judicata* and "claim splitting" also bar Petitioners' claims; and 5) even if Petitioners' equitable claims were not barred by these doctrines, their equitable claims are not actionable under West Virginia law.

The Circuit Court also recognized Petitioners' obvious semantic maneuvers and correctly denied their Motion to Vacate on September 19, 2018. After properly applying the Rule 59(e) standard, the Circuit Court correctly determined that: 1) both Petitioners' District Court case and Petitioners' Circuit Court case allege the same negligence, wrongful death, statutory, and constitutional claims related to the March 13, 2013 incident; 2) both Petitioners' District Court case and Petitioners' Circuit Court case seek the same monetary damages and equitable relief

related to the March 13, 2013 incident; and, therefore, 3) it committed no "clear error of law" or "obvious injustice" by dismissing Petitioners' "back-up" case and deferring to the District Court's summary judgment dismissal of Petitioners' original case on its merits.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure because: 1) the Circuit Court correctly applied established law to decide the dispositive issues and dismiss Petitioners' "back-up" case; 2) the facts and legal arguments are adequately presented in the briefs and record on appeal; and 3) the decisional process would not be significantly aided by oral argument. W.Va. R. App. P. 18(a).

## ARGUMENT

### I. THE CIRCUIT COURT CORRECTLY GRANTED RESPONDENTS' MOTION TO DISMISS UNDER RULE 12(b)(6) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

West Virginia's two-year statute of limitations bars Petitioners' negligence and wrongful death claims first filed in the Circuit Court on September 15, 2016, three and one-half years after the March 13, 2013 incident. Likewise, West Virginia's two-year statute of limitations bars Petitioners' statutory and constitutional claims. Even if Petitioners' statutory and constitutional claims were timely filed, there is no private right of action for these claims under West Virginia law. The doctrines of *res judicata* and "claim splitting" also bar Petitioners' claims. Even if Petitioners' equitable claims were not barred by these doctrines, their equitable claims are not actionable under West Virginia law.

#### A. Standard of Review

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va.

770, 773, 461 S.E.2d 516, 519 (1995). Accordingly, this Honorable Court should review the Circuit Court's August 2, 2018 Order Granting Motion to Dismiss under a *de novo* standard.

### B. The Circuit Court Correctly Applied the Rule 12(b)(6) Standard to Respondents' Motion to Dismiss, not the Rule 56 Standard as Petitioners Suggest.

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). 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).

Petitioners incorrectly argue the Circuit Court failed to apply this Rule 12(b)(6) standard to Respondents' Motion to Dismiss. They contend the Circuit Court improperly considered "matters outside the pleadings" and, therefore, converted Respondents' Motion to Dismiss into a motion for summary judgment subject to Rule 56 standards. Petitioners' Brief, pp. 6-8.[5] Petitioners' arguments fail because the Circuit Court clearly applied the correct Rule 12(b)(6) standard after properly taking notice of pleadings filed in Petitioners' District Court case.

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[5] Later in their Brief, Petitioners' argue that, "[b]ecause the circuit court failed to identify the criteria it used in granting [Respondents'] Motion to Dismiss, [its Order Granting Motion to Dismiss] must be reversed to allow meaningful review." Petitioners' Brief, pg. 22. This argument simply ignores the plain language of the Circuit Court's August 2, 2018 Order Granting Motion to Dismiss which specifically and correctly states: "The Court rejects [Petitioners'] arguments with regard to Rule 56 and finds [Respondents'] Motion is properly treated as a Rule 12(b)(6) motion to dismiss." [397] This finding necessarily eliminated any need to consider Petitioners' inadequate Motion Under Rule 56(f) for Additional Discovery [245-247] and Petitioners' Petition for Disclosure of Grand Jury Proceedings [257-259].

"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 Respondents' Motion to Dismiss are pleadings and orders from Petitioners' District Court case, submitted only to establish the fact of such prior litigation for purposes of *res judicata*, and pleadings and orders from Petitioners' Circuit Court case, submitted only to demonstrate the redundancy of their "back-up" case. Specifically, the Circuit Court's Order Granting Motion to Dismiss references Exhibit A (Petitioners' June 13, 2013 Complaint in District Court) [039-077], Exhibit C (District Court's October 15, 2014 Memorandum Opinion and Order Granting Summary Judgment) [139-159], Exhibit D (Petitioners' original September 15, 2016 Complaint in Circuit Court) [161-171], Exhibit F (Petitioners' July 20, 2017 First Amended Complaint in Circuit Court) [182-187], Exhibit M (Fourth Circuit's March 5, 2018 Opinion) [334-347], Exhibit N (Circuit Court's March 27, 2018 Hearing Order) [349-351], Exhibit O (District Court's April 10, 2018 Scheduling Order) [353-358], and Exhibit P (Petitioners' June 13, 2018 Statement of Claims) [360-362].[6] Contrary

[6] Petitioners suggest the Circuit Court considered "numerous matters outside the pleadings, to-wit: exhibits I, J, and K [to Respondent's Motion to Dismiss]." Petitioners' Brief, pp. 8-9. A closer review of the Circuit Court's Order Granting Motion to Dismiss reveals it did not rely on any of these Exhibits as a basis for granting Respondents' Motion to Dismiss. Exhibit I is an April 18, 2016 notice from the United States' Attorney's Office confirming that the "Justice Department announced today that there is insufficient evidence to pursue federal criminal civil rights charges against [Respondent Officers] in connection with the 2013 shooting death of Wayne Jones." [204-208] Exhibit J is an August 3, 2017 e-mail and an August 4, 2017 letter to Petitioners' counsel requesting that Petitioners voluntarily dismiss the Circuit Court case "[i]n light of the summary judgment rulings on the nearly identical law suit filed by the [Petitioners] in the [District Court]." [210-214] And, Exhibit K is Petitioners' January 3, 2017 Motion for Extension of Time for [Petitioners] to Serve Defendants with Summons and Complaint." [216-217] Petitioners recognize that none of these exhibits really introduces "matters outside the pleadings" because, later in their Brief, they acknowledge: "A review of the 'Findings of Fact' section of the subject August 2, 2018 Order Granting

to Petitioners' arguments, the Circuit Court may properly take judicial notice of these exhibits without converting Respondents' Motion to Dismiss into a motion for 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, this Honorable Court has rejected Petitioners' argument that a Rule 12(b)(6) motion to dismiss based on *res judicata* 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).

In light of these authorities, and upon a review of the actual "matters outside the pleadings" at issue, this Honorable Court should reject Petitioners' arguments suggesting the Circuit Court erred in its application of the Rule 12(b)(6) standard and somehow converted Respondents' Motion to Dismiss into a motion for summary judgment subject to the Rule 56 standard.

### C. The Circuit Court Correctly Determined West Virginia's Two-Year Statute of Limitations Bars Petitioners' Negligence and Wrongful Death Claims First Filed in the Circuit Court on September 15, 2016, Three and One-Half Years After the March 13, 2013 Incident.

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).[7] Petitioners filed their original Complaint in the

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Motion to Dismiss at pgs. 1-3 of the order . . . , demonstrates that it is merely a recitation of the procedural history of both the case *sub judice* and the parallel federal case." Petitioners' Brief, pg. 19.

[7] West Virginia Code § 55-2-12 provides: "Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; **(b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries**; and (c) within one year next after the right to

Circuit Court on September 15, 2016, **three and one-half years** after the March 13, 2013 incident. Therefore, the West Virginia's two-year statute of limitations bars these claims and the Circuit Court correctly dismissed these claims.

**1. West Virginia Code § 55-2-18 does not extend the statute of limitations.**

Petitioners incorrectly cite *Litten v. Peer*, 156 W.Va. 791, 197 S.E.2d 322 (1973), for the bald proposition that "[t]he statute of limitations was tolled by the filing of the federal action." Petitioners' Brief, pg. 13. In *Litten*, the Supreme Court of Appeals addressed the circumstances under which West Virginia Code § 55-2-18 could toll a statute of limitations. 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). Petitioners' argument fails because: 1) West Virginia Code § 55-2-18 does not apply to wrongful death actions; 2) Petitioners did not "re-file the action" in Circuit Court within one year of the District Court's dismissal; and 3) the District Court twice dismissed Petitioners' case on the merits.

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

"[T]he strict two-year limitation on bringing suits for wrongful death [is] a non-tollable condition precedent." *Michael v. Consolidation Coal Co.*, No. 1:14CV212, 2017 WL 1197828, at *7 (N.D. W.Va. Mar. 31, 2017) citing *Huggins v. Hospital Board of Monongalia County*, 165 W.

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bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative." (emphasis added).

West Virginia Code § 55-7-6(d) provides: "**Every such action shall be commenced within two years after the death of such deceased person**, subject to the provisions of section eighteen, article two, chapter fifty-five. The provisions of this section shall not apply to actions brought for the death of any person occurring prior to the first day of July, one thousand nine hundred eighty-eight." (emphasis added).

Va. 557, 270 S.E.2d 160 (W.Va. 1980). Thus, "the saving provision of Code 55-2-18 does not apply to actions for wrongful death." *Id* citing *Rosier v. Garron, Inc.*, 156 W. Va. 861, 199 S.E.2d 50, 53-54 (1973) (internal punctuation omitted). Petitioners must timely file any wrongful death claims in the Circuit Court within two years of the subject incident (March 13, 2013 to March 12, 2015). This is a "non-tollable condition precedent." Petitioners first filed their wrongful death claims in the Circuit Court on September 15, 2016, three and one-half years after the March 13, 2013 incident. Therefore, Petitioners' wrongful death claims are clearly time-barred.

Petitioners argue the holdings in *Huggins* and *Rosier* were overruled by *Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E.2d 682 (2001). Petitioners' Brief, pp. 25-26. This argument overstates the *Bradshaw* holding. In *Bradshaw*, the Supreme Court of Appeals created a narrow exception to *Huggins* and *Rosier* holding that the discovery rule may be applied to toll the two-year statute of limitations in a wrongful death case. *Id* at Syllabus Point 7.[8] However, the discovery rule is not at issue in this case. Petitioners were well-aware of their causes of action when they filed their original Complaint in the District Court on June 13, 2013, only three months after the March 13, 2013 incident. Therefore, Petitioners cannot rely upon *Bradshaw*, or the discovery rule, to suggest the two-year statute of limitations was somehow tolled in this case or to excuse their failure to file any wrongful death claim in the Circuit Court until September 15, 2016, three and one-half years after the March 13, 2013 incident and more than three years after they filed their original Complaint in the District Court on June 13, 2013.

[8] "It was not until 2001, . . . , that, in *Bradshaw v. Soulsby*, the Supreme Court of Appeals overruled *Miller v. Romero* and extended the discovery rule to wrongful death actions." *Michael v. Consolidation Coal Co.*, No. 1:14CV212, 2017 WL 1197828, at *8 (N.D. W. Va. Mar. 31, 2017).

### b. Petitioners did not "re-file the action" in Circuit Court within one year of the District Court's dismissal.

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." W.Va. Code § 55-2-18(a) (emphasis added.) The District Court first granted summary judgment and dismissed Petitioners' case on October 15, **2014**. Petitioners 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 Petitioners' case "not based upon the merits," Petitioners 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 Petitioners could not "re-file" their first case in Circuit Court, West Virginia Code § 55-2-18 does not apply.

### c. The District Court twice dismissed Petitioners' case 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." W.Va. Code § 55-2-18(a)(i) (emphasis added). "A summary judgment order is a decision on the merits." *Tolley v. Carboline Co.*, 217 W. Va. 158, 164, 617 S.E.2d 508, 514 (2005) citing *Stemler v. Florence,* 350 F.3d 578, 587 (6th Cir.2003); see also *Adkins v. Allstate Ins. Co.*, 729 F.2d 974, 976 n.3 (4th Cir. 1984) citing Restatement (Second) of Judgments § 19, comment g ("For purposes of *res judicata*, a summary judgment has always been considered a final disposition on the merits."); see *Pottratz v. Davis*, 588 F.Supp. 949, 954 (D.Md. 1984) ("A summary judgment dismissal is a final adjudication on the merits under Fourth Circuit cases.").[9] The District Court dismissed Petitioners'

[9] Petitioners offer no authority to rebut the principle that "a summary judgment dismissal is a final adjudication on the merits." Instead, they simply offer the bald assertion that "[b]ecause there has never been a final adjudication on the merits in the federal case, the statute of limitations remains tolled to this day." Petitioners' Brief, pg. 13.

case on the merits by its October 15, 2014 Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment and its September 7, 2018 Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment. Therefore, West Virginia Code § 55-2-18(a)(i) does not allow Petitioners' District Court case to extend the statute of limitations. [10]

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

Petitioners also incorrectly argue West Virginia Code § 55-2-21 tolls the two-year statute of limitations "upon the filing of the District Court suit." This argument fails upon the plain language of the statute because Petitioners' original clams 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

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[10] In *Litten v. Peer*, 156 W.Va. 791, 197 S.E.2d 322 (1973), the Supreme Court of Appeals considered the application of W.Va. Code § 55-2-18(a)(i) where a plaintiff's case was dismissed for failure to prosecute. The *Litten* Court determined 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. *Id.* It held at Syllabus Point 2:

> 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* at Syllabus Point 2 (emphasis added). In this case, the District Court's summary judgment rulings were an "involuntary dismissal which [was] an adjudication on the merits." This is certainly true when compared to the dismissal for failure to prosecute in *Litten*.

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).

Petitioners' attempt to broaden this statute, and include their original claims asserted in the District Court, is unavailing. By its plain language, either version of West Virginia Code § 55-2-21 does not apply to Petitioners' 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 does not save Petitioners' Circuit Court case, and direct claims, from the two-year statute of limitations.

### D. The Circuit Court Correctly Determined West Virginia's Two-Year Statute of Limitations Also Bars Petitioners' Statutory and Constitutional Claims First Filed in the Circuit Court on September 15, 2016, Three and One-Half Years After the March 13, 2013 Incident.

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).[11] If there were a private right of action for Petitioners' statutory and constitutional claims (i.e. "constitutional torts"), the same two-year statute of limitations would necessarily apply.[12] Petitioners filed their original Complaint in the Circuit Court on September 15, 2016, three and one-half years after the March 13, 2013 incident. Therefore, even if Petitioners' statutory and constitutional claims were otherwise viable, West Virginia's two-year statute of limitations bars these claims and the Circuit Court correctly dismissed these claims. Furthermore, for the same reasons discussed above, West Virginia Code § 55-2-18 and West Virginia Code § 55-2-21 would not toll the two-year statute of limitations as to these claims.

### E. The Circuit Court Correctly Determined There Is No Private Right of Action for Petitioners' Statutory and Constitutional Claims, Even if Those Claims Had Been Timely Filed.

Petitioners allege Respondents violated the general provisions of Article III, § 3 of the West Virginia Constitution ("Government is instituted for the common benefit, protection, and security of the people, nation, or community."), which they term "self-executing." First Amended

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[11] See footnote 7 supra.

[12] "Constitutional torts, as the name implies, seek recovery of money damages for constitutional wrongs. Most commonly, these actions are brought under 42 U.S.C. § 1983, which enables a private citizen to seek money damages in tort against a government official in his or her *personal* capacity for constitutional wrongs to be taken from the state official's pocket, not the state treasury's." *W. Virginia Lottery v. A-1 Amusement, Inc.*, 240 W. Va. 89, 103, 807 S.E.2d 760, 774 (2017).

Complaint, ¶ 16. [184] However, the Supreme Court of Appeals has never recognized a private right of action for violation of Article III, § 3. In Syllabus Point 2 of *Harrah v. Leverette*, 165 W. Va. 665, 271 S.E.2d 322 (1980), the Court held:

> A person brutalized by state agents while in jail or prison may be entitled to:
> (a) A reduction in the extent of his confinement or his time of confinement;
> (b) Injunctive relief, and subsequent enforcement by contempt proceedings including but not limited to, prohibiting the use of physical force as punishment, requiring psychological testing of guards, and ordering guards discharged if at a hearing they are proved to have abused inmates;
> (c) A federal cause of action authorized by 42 U.S.C. § 1983; and
> (d) A civil action in tort.

*Id* at 666, 324. The United States District Court for the Southern District of West Virginia has interpreted *Harrah* several times to hold that "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) citing *Howard v. Ballard*, No. 2:13–cv–11006, 2015 WL 1481836, at *4 (S.D. W. Va. Mar. 31, 2015); *McMillion-Tolliver v. Kowalski*, No. 2:13-CV-29533, 2014 WL 1329790, at *2 (S.D. W.Va. Apr. 1, 2014) ("The *Harrah* court did not include a cause of action under the state constitution for money damages among the remedies it listed. Without an independent statute authorizing money damages for violations of the West Virginia Constitution, the plaintiff's claim must fail."); *Smoot v. Green*, No. 2:13–10148, 2013 WL 5918753, at *4–5 (S.D. W. Va. Nov. 1, 2013) ("Inasmuch as the decision in *Harrah* does not contemplate a damages award for Article III violations in this setting, it is ORDERED that, to the extent the claims under Article III seek monetary relief, they be, and hereby are, dismissed."). Given that the Supreme Court of Appeals has never specifically recognized a private right of action for violation of Article III, § 3 of the

West Virginia Constitution, the Circuit Court correctly followed the District Court's analysis and refused to create such a private right of action in this case.[13]

Petitioners also allege "[n]umerous statutes have been violated by the [Respondents]," but do not specify the statutes allegedly violated. First Amended Complaint, ¶ 22. [185]. Given this bald, unsupported allegation, the Circuit Court correctly determined it was impossible to divine whether these "numerous statutes" provided Petitioners a private right of action. The Circuit Court thus correctly concluded Petitioners' alleged violations of unspecified statutes fail to state a claim against Respondents because the statutes do not create a private right 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,

[13] Like the District Court in *Harper*, Respondents recognize a split of authority on this issue. In *Hutchison v. City of Huntington*, 198 W.Va. 139, 479 S.E.2d 649 (1996), the Supreme Court of Appeals held that "[u]nless barred by [a recognized immunity], a private cause of action exists where a municipality or local government unit causes injury by denying that person rights that are protected by the Due Process Clause embodied within Article 3, § 10 of the West Virginia Constitution." *Id* at 144, 654. Also, the United States District Court for the Northern District of West Virginia has held in at least one instance that *Hutchinson* generally "recognizes a private right of action for violations of the West Virginia Constitution." *Ray v. Cutlip*, No. 2:13–CV–75, 2014 WL 858736, at *3 n.1 (N.D. W. Va. Mar. 5, 2014) ("West Virginia recognizes a private right of action for violations of the West Virginia Constitution."); but see *Wood v. Harshbarger*, 2013 WL 5603243, at *6 (S.D. W. Va. Oct. 3, 2013) (finding plaintiff had alleged sufficient facts to state a claim under Article III, Section 5 of the West Virginia Constitution and reserving the question of whether monetary damages were an available remedy for another day). Despite this split of authority, neither the *Hutchison* Court, nor any District Court, has specifically recognized a private right of action for an alleged violation of Article III, § 3. Therefore, the Circuit Court was still correct in following the *Harper* District Court's analysis and refusing to extend the law beyond *Harrah*.

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).[14]

### F. The Circuit Court Correctly Determined *Res Judicata* and "Claim Splitting" Bar Petitioners' Claims.

Petitioners currently have two law suits pending in two separate courts (i.e. the Fourth Circuit Court of Appeals and the Supreme Court of Appeals of West Virginia). Both cases seek the same monetary damages arising from the same incident – wrongful death damages based on Wayne A. Jones' March 13, 2013 shooting. This is not proper. Petitioners cannot proceed on the same claims in two separate courts.

#### 1. The doctrine of *res judicata* bars Petitioners' claims.

The doctrine of *res judicata* precludes re-litigation of the same causes of action among parties or their privies. *Christian v. Sizemore,* 185 W.Va. 409, 412, 407 S.E.2d 715, 718 (1991). "'Under 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., Inc.*

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[14] In the District Court, Petitioners alleged Respondents violated W. Va. Code § 61-6-21(b) ("If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both."). The District Court rejected this claim, and granted Respondents' Motion to Dismiss, because West Virginia Code § 61-6-21(b) only provides for criminal sanctions and does not create a private civil cause of action. [145] See *Kearns v. Timmiah*, Civil Action No. 5:06CV105, 2007 WL 2220506, at *2 (N.D. W.Va. Aug. 2, 2007) (declining to find that section 61-6-21(b) provides for a civil action). The Circuit Court correctly reached the same conclusion as to Petitioners' unspecified statutory claims.

*v. Shore,* 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552, 559 n. 5 (1979) (footnote omitted).

> Before 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 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). Each of these *res judicata* elements is satisfied by Petitioners' District Court case and the District Court's dismissal of their case on the merits by its October 15, 2014 Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment and its September 7, 2018 Memorandum Opinion and Order Granting Defendants' Motion for Summary Judgment.

**a. The District Court's summary judgment orders are final adjudications on the merits of Petitioners' case by a court having jurisdiction.**

"In a state court proceeding, federal rules of *res judicata* or claim preclusion dictate the preclusive effect of a federal court judgment on a federal question." Syllabus Point 1, in part, *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 803 S.E.2d 519 (2017).

Petitioners incorrectly argue that, because "this case is on appeal in both state and federal court, there has never been a final decision on the merits." Petitioners' Brief, pg. 3. They base this argument on three faulty premises: 1) the District Court's summary judgment rulings are on appeal and, thus not final; 2) summary judgment is not preclusive because "in the absence of a trial, nothing is decided on the merits"; and 3) their "equitable claims" were not presented in the District Court. Each of these arguments fails because a Federal judgment is preclusive even while under appeal; summary judgment is unquestionably a final judgment on the merits; and Petitioners'

"equitable claims" arise out of the same operative set of facts decided by the District Court (i.e. the March 13, 2013 incident).

First, the fact that Petitioners appealed the District Court's summary judgment rulings does not affect the finality of the District Court's judgment for purposes of *res judicata*. "[W]here the judgment or decree of the Federal court determines a right under a Federal statute, that decision is final until reversed in an appellate court, or modified or set aside in the court of its rendition." *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938). "The bare act of taking an appeal is no more effective to defeat preclusion than a failure to appeal ... this federal rule is binding when the preclusive effects of a federal judgment are asserted in a state action, but federal courts will honor the contrary rule of a state court whose judgment is offered in a federal action." 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4433 (2d ed. 1995). Petitioners filed their original case in District Court pursuant to 42 U.S.C. § 1983, alleging violations of Wayne A. Jones' federal rights under the United States Constitution. By doing so, Petitioners specifically invoked the District Court's federal question jurisdiction. See 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Accordingly, there is no question the District Court had jurisdiction and its summary judgment on Petitioners' claims precludes "the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action," regardless of the pendency of their appeal. *Dan Ryan Builders,* supra at 560, 530.[15]

Second, Petitioners' argument that summary judgment is not a decision "on the merits" is plainly wrong. "For purposes of *res judicata*, a summary judgment has always been considered a

[15] Should Petitioners prevail in their Fourth Circuit appeal, they may simply continue their litigation in the District Court. They cannot, under any circumstances, continue to file or prosecute "back up" cases.

final disposition on the merits." *Adkins v. Allstate Ins. Co.*, 729 F.2d 974, 976 n.3 (4th Cir. 1984) citing Restatement (Second) of Judgments § 19, comment g; see also *Pottratz v. Davis*, 588 F.Supp. 949, 954 (D. Md. 1984) ("A summary judgment dismissal is a final adjudication on the merits under Fourth Circuit cases."). The only purpose of a trial is to decide disputed questions of material fact. If a court finds there are no disputed questions of material fact, then a trial is unnecessary and the court decides the case "on the merits" through summary judgment. This is precisely what the District Court did. It dismissed Petitioners' case "on the merits" after determining there are no genuine issues of material fact and Respondents are entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. Accordingly, the District Court's summary judgment rulings "on the merits" are now fully binding on Petitioners for purposes of *res judicata*.

Third, Petitioners' "equitable claims" depend upon proof of the same operative facts as their District Court claims and are, therefore, barred as well. "*Res judicata* or claim preclusion ... precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action." *Dan Ryan Builders,* supra at 560, 530. "The test to determine if the issue or cause of action involved in the two suits is identical is to inquire whether the same evidence would support both actions or issues." *Id* at Syllabus Point 3. "The now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action depends on factual overlap, barring 'claims arising from the same transaction.'" *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011). Here, there is obvious "factual overlap." The "transaction" at issue in Petitioners' Circuit Court case is identical to the "transaction" at issue in their District Court case – the March 13, 2013 shooting incident. Although Petitioners may be using different words to describe their claims, or requesting different forms of relief, their claims all arise from the same event or "transaction." The fact that Petitioners failed to make all the same

requests in their District Court case is irrelevant. Petitioners cannot "save back" related claims or causes of action for a separate Circuit Court case.

**b. Petitioners' District Court case and Circuit Court case involve the same parties.**

Both cases name as Defendants the City of Martinsburg, West Virginia, Pfc. Erik Herb, Pft. Daniel North, Ptlm. William Staubs, Ptlm. Paul Lehman, and Pft. Eric Neely. There is no dispute over this element of *res judicata*.

**c. Petitioners' Circuit Court case is identical to their District Court case or, at the least, involves legal and equitable claims which "could have been resolved, had [they] been presented, in the [District Court] action."**

Both Petitioners' District Court case and their Circuit Court case allege negligence, wrongful death, statutory, and constitutional claims arising from the March 13, 2013 incident. Both seek unspecified compensatory and general damages, along with attorney fees, punitive damages, funeral expenses, and multiple forms of equitable relief (i.e. injunction, mandamus, appointment of commissioners). Thus, Petitioners' District Court case and their Circuit Court case are essentially identical. Petitioners' attempts to distinguish their District Court claims from their Circuit Court claims are unavailing and strain credibility.[16] Likewise, Petitioners' attempts to

[16] Petitioners' argue: "The claims shown (on the chart) to be in the circuit court side are specifically new, distinct claims to those shown in the District Court chart. Those separate claims [(1) violation of special duty, (2) negligent management, nonfeasance, misfeasance, (3) negligence of Mayor and City Council, and (4) violation of statute, (5) equitable relief,] could allow the plaintiffs to recover in this action. These claims are not connected with the wrongful death issue raised in both the state and federal actions." Petitioners' Brief, pg. 13. A plain reading of Petitioners' First Amended Complaint filed July 20, 2017 [015-021], along with Petitioners' Statement of Claims filed June 13, 2018 [295-296], demonstrates that each of these allegedly "separate" claims is based upon the same March 13, 2013 incident alleged in Petitioners' District Court case and seeks the same monetary damages claimed in their District Court case. The only difference between the two cases is Petitioners' claims for equitable relief in the Circuit Court (i.e. injunction against the Respondent City's insurer, appointment of Commissioner, appointment of Special Prosecutor, and Appointment of Grand Jury Advocate). Therefore, it is obviously wrong for Petitioners to suggest they have alleged any "new, distinct claims" which are "not connected with the wrongful death issue" and, therefore, constitute a separate, viable set of facts upon which they could recover. Clearly, all of Petitioners' claims relate to the March 13, 2013 incident – the same set of facts and

recharacterize their equitable claims as "statutory" claims are also unavailing and strain credibility.[17] There is no dispute that both cases are premised upon the March 13, 2013 shooting incident and involve claims which "could have been resolved, had [they] been presented in the [District Court] action."

"It would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4468 (2d ed. 1995). Nevertheless, this is precisely what Petitioners now ask this Honorable Court to do. The District Court rendered a final judgment on the merits of Petitioners' claims arising from the March 13, 2013 incident. It twice granted Respondents' summary judgment. These decisions bar re-litigation of all claims arising from the same incident, including all of Petitioners' claims filed in the Circuit Court as part of their "back-up" case. The Circuit Court correctly recognized this and properly deferred to the District Court's summary judgment rulings. Given that each of the three elements of *res judicata* is satisfied, Petitioners are clearly

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the same types of claims addressed in Petitioners' District Court case – and should not be duplicated in the Circuit Court case.

[17] Petitioners incorrectly argue the Circuit Court erred by finding certain of their claims to be "equitable" and, therefore, not actionable. Petitioners' Brief, pg. 29. Petitioners also incorrectly argue their request for injunction and other forms of non-monetary relief are mischaracterized as equitable relief when they should be considered "statutory" relief. Petitioners' Brief, pp. 17-18. This exercise in semantics ignores the basic distinction between legal and equitable relief which can be awarded by a court and ignores the fact that West Virginia Code § 53-5-1, *et seq.* and Rule 65 of the West Virginia Rules of Civil Procedure simply codify the procedures a court must follow when considering certain requests for equitable relief (e.g. injunction). See *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 77, 380 S.E.2d 238, 244 (1989) ("The test most often applied by the Supreme Court under its expansive reading of the seventh amendment is whether the relief sought is essentially legal (e.g. money damages) or equitable (e.g. injunctive relief)."); *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 608, 490 S.E.2d 678, 695 (1997) (Maynard dissent) ("According to *Dobson v. Eastern Associated Coal Corp.*, 188 W. Va. 17, 24, 422 S.E.2d 494, 501 (1992), 'other legal and equitable relief' means that a plaintiff bringing a discrimination claim may generally recover damages available in tort."); *Thompson v. Town of Alderson*, 215 W. Va. 578, 581, 600 S.E.2d 290, 293 (2004) fn. 5 citing *Realmark Developments, Inc. v. Ranson*, 214 W. Va. 161, 588 S.E.2d 150 (2003) ("Where relief to be awarded is money damages, even though the underlying claim is historically one in equity, then the ordinary characterization of the monetary award is as a legal remedy, to which the right to trial by jury attaches.").

precluded from re-litigating their District Court case through their "back-up" Circuit Court case and the Circuit Court correctly dismissed their First Amended Complaint under Rule 12(b)(6).

**2. The doctrine of "Claim splitting" bars Petitioners' claims.**

In *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, supra at 560–61, 530–31, the Supreme Court of Appeals 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).

> The law against splitting causes of action mandatorily requires that all damages sustained or accruing to one as a result of a single wrongful act must be claimed and recovered in one action or not at all; stated differently, **the rule against splitting causes of action makes it incumbent upon plaintiffs to raise all available claims involving the same circumstances in one action.** Thus, a cause of action against a tortfeasor cannot be made the subject of separate suits although there is authority for the view that a tort causing both personal injury and property damage gives rise to two distinct causes of action.
>
> **In the case of a personal injury caused by a single tortious act, separate actions for different elements of damages are not maintainable.** A recovery in an action for personal injury is generally deemed to be in full for all damages resulting from the tort, whether past, present, or future. This rule, however, may be relaxed in extraordinary cases as where a new and unforeseen medical condition arises after the conclusion of the action.

1 Am. Jur. 2d Actions § 110 (emphasis added). In this case, the doctrine of claim splitting prohibits Petitioners from prosecuting two parallel cases – one in the District Court (now Court of Appeals) and one in the Circuit Court – based upon the same incident. All of Petitioners' claims arising from the March 13, 2013 incident must be presented and resolved in one action (i.e. their original District Court case).[18] Accordingly, the Circuit Court correctly dismissed Petitioners' "back-up"

[18] "West Virginia's law of *res judicata* prohibits not only the re-litigation of claims that were actually asserted in the prior action, but also precludes 'every other matter which the parties might have litigated as incident thereto[.]'" *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 803

case as an attempt to litigate their claims piecemeal and, ultimately, re-litigate their claims once they failed in the District Court.[19]

Petitioners incorrectly argue the *Dan Ryan Builders* Court "recognized that [Petitioners] 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. This argument misinterprets the Court's discussion which merely quotes a recitation of plaintiff's options found in Moore's Federal Practice. In the sentence preceding the quotation, the *Dan Ryan Builders* 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 discussion arises 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). In proper context, it is simply not true that the *Dan Ryan Builders* Court somehow "recognized" Petitioners, or any plaintiffs, have the option to split their claims. The opposite is true, as the *Dan Ryan Builders* Court explicitly recognized that a party may **not** split his claims.

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S.E.2d 519 (2017) citing *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997), 201 W.Va. at 477, 498 S.E.2d at 49 (quoting Syllabus Point 1, *Sayre's Adm'r v. Harpold*, 33 W.Va. 553, 11 S.E. 16 (1890).

[19] "[O]ne of the primary goals of any system of justice [is] to avoid piecemeal litigation which cultivates a multiplicity of suits and often results in disparate and unjust verdicts." *Charleston Area Medical Ctr., Inc. v. Parke-Davis*, 217 W.Va. 15, 21, 614 S.E.2d 15, 22 (2005).

### G. Even If Petitioners' Equitable Claims Were Not Barred by *Res Judicata* and "Claim Splitting," Those Claims Are Not 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).

Petitioners' 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.[20] These equitable claims fail 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 Respondent City of Martinsburg failed to perform. Second, they seek to prescribe the manner in which Respondent City of Martinsburg operates its police

[20] BRIM (the State Board of Risk and Insurance Management) was named as a Defendant in the Circuit Court case, but was never served with Petitioners' Complaint or First Amended Complaint. The Circuit Court correctly found it would be improper for Petitioners to proceed on any injunction claim against BRIM before it had been properly served and appeared in the case. W.Va. R. Civ. P. 65(a)(1) ("Notice. – No preliminary injunction shall be issued without notice to the adverse party.").

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.[21] Finally, they seek to correct alleged errors made by Respondent City of Martinsburg and/or the Berkeley County Prosecuting Attorney in the execution of their discretionary duties. Therefore, even if Petitioners' equitable claims were properly pled with the proper parties before the Court, the Circuit Court correctly determined each failed for lack of any viable legal basis.

## II. THE CIRCUIT COURT CORRECTLY DENIED PETITIONER'S MOTION TO VACATE UNDER RULE 59(e) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.

After the Circuit Court correctly granted Respondents' Motion to Dismiss, Petitioners filed a Motion to Vacate pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. This Motion to Vacate essentially asked the Circuit Court to "change its mind" without any legal or factual basis. Given no good reason to "change its mind," the Circuit Court correctly affirmed its dismissal of Petitioners' First Amended Complaint under the Rule 59(e) standard.

### A. Standard of Review

"The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syllabus Point 1, *Alden v. Harpers Ferry Police Civil Serv. Comm'n*, 209 W. Va. 83, 84,

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[21] The Berkeley County Prosecuting Attorney was not named as a Defendant in the Circuit Court case and, thus, was never been served with Petitioners' Complaint or First Amended Complaint. The Circuit Court also correctly found it would be improper for Petitioners to proceed on any mandamus claim against the Berkeley County Prosecuting Attorney when her office had not been named as a party-defendant in the case. W.Va. R. Civ P. 71B(c)(1) ("Caption. – The complaint [for an extraordinary writ] shall contain a caption . . . [and] shall name as defendants the agencies, entities, or individuals of the State of West Virginia to which the relief shall be directed.").

543 S.E.2d 364, 365 (2001) (internal citations omitted). Accordingly, this Honorable Court should review the Circuit Court's September 19, 210 Order Denying [Petitioners'] Motion to Vacate Order Granting Motion to Dismiss [478-490] under a *de novo* standard. See Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*").

### B. The Circuit Court Correctly Applied the Rule 59(e) Standard to Petitioners' Motion to Vacate.

Rule 59(e) states: "Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." W.Va. R. Civ. P. 59(e). In Syllabus Point 2 of *Mey v. The Pep Boys–Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011), the Supreme Court of Appeals explained that:

> [a] motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Id. Petitioners acknowledged there was no change in controlling law and no new evidence for the Court's consideration. They simply claimed the Circuit Court should vacate its Order Granting Motion to Dismiss "to remedy a clear error of law" or "to prevent obvious injustice." Petitioners' Motion to Vacate, pg. 2. [412] Thus, Petitioners' Motion to Vacate was essentially a motion for reconsideration of the Circuit Court's prior ruling.

Motions for reconsideration are not favored in the law. Such "motions may not be used ... to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." *Robinson v. Wix Filtration Corp. LLC*, 599 F.3d 403, 411 (4th Cir. 2010). Likewise, such motions may not be used to ask the court to "rethink what the court has already

thought through - rightly or wrongly." *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983). This is precisely what Petitioners asked the Circuit Court to do – "rethink what the court has already thought through" and consider novel legal theories which could have been raised **before** the Court entered its Order Granting Motion to Dismiss. Petitioners' untimely and novel legal theories had no merit under the law or the undisputed procedural facts. Therefore, the Circuit Court correctly denied Petitioners' Motion to Vacate under Rule 59(e).

### C. The Circuit Court Did Not Commit Prejudicial or Reversible Error by Ruling on Petitioners' Motion to Vacate Before Holding a Second Hearing or Considering a Fifth Opposition Brief.

Petitioners' Motion to Vacate did not address a change in controlling law or new evidence for the Circuit Court's consideration. It simply asked the Circuit Court to change its mind. The Circuit Court considered no fewer than four briefs Petitioners filed in opposition to Respondents' Motion to Dismiss: 1) Petitioners' Response filed September 15, 2017 [225-243]; 2) Petitioner's Supplemental Response filed June 29, 2018 [299-301]; 3) Petitioners' Motion to Vacate filed August 13, 2018 [411-416]; and 4) Petitioners' First Addendum to Motion to Vacate filed August 21, 2018 [420-422]. The Circuit Court also heard Petitioners' oral argument in opposition to Respondents' Motion to Dismiss at a July 24, 2018 hearing. [478] Under these circumstances, Petitioners cannot credibly claim the Circuit Court "short sheeted" them or somehow failed to consider the "merits" of their case. Petitioners' Brief, pg. 30. This is simply not true.

Rule 22.02 of the Trial Court Rules allows Circuit Courts to give motions to dismiss "priority status." W.Va. Trial Ct. R. 22.02. Meanwhile, Rule 22.04 of the Trial Court Rules directs Circuit Courts to decide all motions "expeditiously." W.Va. Trial Ct. R. 22.04. In this case, the Circuit Court allowed Petitioners an extraordinary amount of time to resist Respondents' Motion to Dismiss (August 21, 2017 to September 19, 2018). The Circuit Court even stayed Petitioners' case for several months while their parallel District Court case was on appeal in the Fourth Circuit

Court of Appeals. It also allowed them to request ongoing discovery and contact the State of West Virginia's grand jury expert during the stay. See Circuit Court's October 12, 2017 Hearing Order. [285-287] Under these circumstances, Petitioners cannot credibly claim the Circuit Court prevented them from developing information necessary to resist Respondents' Motion to Dismiss or otherwise denied them a fair opportunity to avoid dismissal. This is simply not true.

Petitioners argue, without any legal authority or demonstration of prejudice, that the "Circuit Court order denying [their] Rule 59(e) motion was in derogation of the Circuit Court's own scheduling order . . . [and] prejudiced [them] by denying [them] an opportunity to exercise [their] right to file a reply brief." On this ground alone, Petitioners suggest the Circuit Court's Order Denying Motion to Vacate should be reversed. Petitioners' Brief, pp. 30-31. This is purely form over function. Rule 22.03 of the Trial Court Rules provides that Circuit Courts "**may** require or permit hearings on motions." W.Va. Trial Ct. R. 22.03 (emphasis added). This provision is discretionary, not mandatory. While it is true the Circuit Court originally allowed Petitioners to file a Reply brief (their **fifth** opposition brief) by September 20, 2018 [424-427], it was certainly within the Circuit Court's discretion to rescind its Trial Court Rule 22 Scheduling Order and issue its ruling once it believed it was fully-informed. Given that motions for reconsideration are not favored in the law, it is also understandable that the Circuit Court determined it was ready to rule on Petitioners' Motion to Vacate before receiving a reply brief.[22] Under these circumstances, this Honorable Court should not find the Circuit Court committed any prejudicial or reversible error. This is simply not the case.

[22] The Circuit Court's readiness to rule on Petitioners' Motion to Vacate by September 19, 2018 was likely enhanced by the District Court's September 7, 2018 summary judgment ruling and its *res judicata* effect.

## CONCLUSION

Petitioners' duplicate "back-up" Circuit Court case is a legally-flawed attempt to avoid the District Court's unfavorable rulings. The Circuit Court wisely recognized this and correctly dismissed Petitioners' First Amended Complaint under Rule 12(b)(6). First and foremost, West Virginia's two-year statute of limitations expired long before Petitioners filed their "back-up" case in the Circuit Court. No tolling provision applies. For that reason alone, the Circuit Court correctly dismissed Petitioners' First Amended Complaint. Petitioners have no private right of action for their alleged statutory and constitutional claims. Furthermore, there is no set of facts Petitioners can prove to avoid the District Court's summary judgment rulings and the doctrines of *res judicata* and claim splitting. No matter how Petitioners vary the wording of their complaints or tweak the wording of the relief they request, there is simply no basis for Petitioners' "back-up" case to proceed in the Circuit Court, particularly while they are still prosecuting their original case based upon the same March 13, 2013 shooting incident in the Court of Appeals. The Circuit Court carefully and thoughtfully considered Petitioners' "back-up" case in comparison to their District Court case. Under the appropriate Rule 12(b)(6) standard, viewing the facts in the light most favorable to Petitioners, the Circuit Court correctly determined that all of Petitioners' claims asserted in their First Amended Complaint should be dismissed with prejudice.

WHEREFORE Respondents respectfully request this Honorable Court to deny Petitioners' appeal and affirm the Circuit Court's August 2, 2018 Order Granting Motion to Dismiss and the Circuit Court's September 19, 2019 Order Denying [Petitioners'] Motion to Vacate Order Granting Motion to Dismiss.

DATED the 4th day of March 2019.

**RESPONDENTS**
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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

ESTATE OF WAYNE A. JONES
by ROBERT L. JONES,

*Petitioner*,

v.

THE CITY OF MARTINSBURG,

*Respondent*.

CASE NO. 18-0927

## CERTIFICATE OF SERVICE

I certify that I served the foregoing RESPONDENT'S BRIEF upon all parties, or their counsel of record, by hand delivering a true and accurate copy as follows:

**Paul G. Taylor, Esq.**
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on the 4th day of March 2019.

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