IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-141

C.S.,

Plaintiff below, Petitioner,

v.

CHRISTOPHER MICHAEL JENSEN, et al.,

Defendants Below, Respondents

RESPONDENTS WHITCOMB, WRYE, AND NAEGLE'S RESPONSE IN OPPOSITION TO PETITIONER'S BRIEF IN SUPPORT OF APPEAL

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INTRODUCTION

Respondents Matthew Whitcomb, Don Wrye, and Anthony Naegle urge the Court to deny Petitioner C.S.' appeal. The appeal should be dismissed because C.S. failed to attach the Order at issue to his Notice of Appeal. Even if the Court considers his appeal, it should affirm both the circuit court's June 7, 2022, Order dismissing the action as barred by an Arbitration Agreement, and the July 20, 2022, Order denying Petitioner's subsequent motion to alter the judgment, as both rulings were not in error.

I. STATEMENT OF THE CASE

Petitioner C.S. claims he was abused by Respondent Christopher Michael Jensen ("Respondent Michael Jensen"). (Appx. at 17, ¶4.) This is Petitioner's third attempt to recover for the same claims that the Church[1]—through its agents and representatives—facilitated and attempted to cover up his sexual abuse, thus violating duties of care and resulting in his injuries. Petitioner's first attempt to recover was in 2013 when he and others filed *Jane Doe-1, et al., v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, et al.*, Civil Action No. 13-C-656, Circuit Court of Berkeley County, West Virginia ("*Doe-1*"). The second attempt was in 2019, when C.S. engaged, by agreement, in arbitration with the Church. After losing at arbitration, C.S. hired new counsel and filed this action, his third attempt.

A. The 2013 *Doe-1* Litigation

In the 2013 *Doe-1* litigation, several minor children and their parents, including C.S., alleged that the Church and its agents knew Respondent Michael Jensen was sexually abusing

[1] The Arbitration Agreement was executed by the Corporation of the President of The Church of Jesus Christ of Latter-day Saints. On January 5, 2022, the parties entered into a Joint Stipulation explaining the names of the various Church entities and agreeing that certain Church-Defendants were dismissed due to the Arbitration Agreement. (Appx. at 54.) For ease of reference, this Response in Opposition uses the term "the Church" to refer to the religious entity sued by Petitioner, as that is how the pleadings are written.

minors and failed to report such acts or prevent them. (Appx. at 98, ¶¶1–3.) The *Doe-1* plaintiffs asserted that from 2007 until Respondent Michael Jensen's incarceration in 2012, "[t]he Church was repeatedly put on notice and/or had knowledge of Michael Jensen's predatory acts." (Appx. at 165, ¶3.) They alleged the abuse that Michael Jensen inflicted upon minors occurred "with the knowledge and assistance or ratification of the Mormon Church, the Church officials and bodies in charge of the local 'ward' and 'stake' (including the Church's local 'Bishop,' 'Stake President,' 'Relief Society President,' and 'Stake High Council'), and other individual Defendants named in this action." (Appx. at 165, ¶2.)

Despite this alleged knowledge, plaintiffs, including C.S., claimed the Church and its agents failed to protect them from the abuse, alleging that "[i]nstead of reporting to the authorities, as required by West Virginia law, or taking action to warn or protect other young children, the Church, through *its agents,* took the opposite approach. It actively covered up the abuse[.]" (Appx. at 166, ¶4) (emphasis added). Thus, plaintiffs broadly alleged "[t]he Church Defendants are vicariously liable and legally responsible for the acts and omissions of, and breaches of duty by, *their agents and representatives,* as well as for their own wrongful acts, omissions and breaches of duty." (Appx. at 209, ¶135; Appx. at 212, ¶146; Appx. at 215, ¶157; Appx. at 218, ¶167; Appx. at 222, ¶182; Appx. at 231, ¶195; and Appx. at 238, ¶¶212–214) (emphasis added).

C.S. voluntarily dismissed his claims in *Doe-1* without prejudice after testifying that Jensen never abused him. (Appx. at 247–58.) After C.S. voluntarily dismissed his claims, the *Doe-1* litigation proceeded to trial in 2018 but was resolved by settlement mid-trial and then dismissed with prejudice. (Appx. at 272–73.)

B. The 2019 Arbitration

After the *Doe-1* litigation was settled and dismissed, C.S. threatened to sue and renew his

claims against the Church and its agents. (Appx. at 275–76.) Instead of proceeding with a civil action, C.S. agreed to arbitrate. (Appx. at 278–81.) C.S. and the Church entered into the 2019 Arbitration Agreement, which expressly provides that C.S. and the Church "mutually consent to the resolution by arbitration of all [C.S.'] claims or controversies that were or could have been asserted in Jane Doe-1, et al., v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, et al., Civil Action No. 13-C-656, Circuit Court of Berkeley County, West Virginia." (Appx. at 278.)

In an Amended Notice of Arbitration, C.S. alleged nearly identical claims to those previously raised in the *Doe-1* litigation. (Appx. at 621–47.) As in *Doe-1,* C.S. asserted that certain individuals — whether named as defendants or not — at all relevant times were acting as the Church's agents and within the scope of their authority when they allegedly concealed Respondent Michael Jensen's predatory acts. (Appx. at 628, ¶¶ 24, 26.) He specifically claimed that "COP Agents, including but not limited to, Stake President Grow, Bishop Fishel, Bishop Vincent, and Bishop/Stake High Councilor Whitcomb, had a duty to exercise ordinary care," and that these agents, "in their capacities as agents and representatives of the Church, knew and/or had reasonable cause to suspect, as of early 2004 and continuing thru 2012, that Michael Jensen had sexually abused minor children." (Appx. at 639–40, ¶¶57–58.) Because these individuals were acting within the scope of their authority as the Church's agents, C.S. argued "[t]he Church is vicariously liable and legally responsible, for the acts and omissions of, and breaches of duty by, their agents and representatives, as well as for its own wrongful acts, omissions and breaches of duty." (Appx. at 641, ¶65; Appx. at 645, ¶75; and Appx. at 646, ¶83.)

The parties proceeded to arbitrate and, by agreement, used discovery materials produced in the *Doe-1* litigation, including depositions, and presented live witness testimony, including that

of Respondent Whitcomb. (Appx. at 279.) The Arbitrator found that C.S. failed to carry "his burden of proving, by a preponderance of the evidence, all required elements of his claim. Accordingly, Claimant has not established entitlement to any recovery against Respondent." (Appx. at 284.) Thus, the Final Award of Arbitrator concluded "[t]his Award is in full settlement of all claims, defenses, allegations and counterclaims which were, or could have been, submitted to this Arbitration. All claims, defenses, allegations and counterclaims not expressly granted herein are hereby denied." (Appx. at 284.)

C. The Current Litigation

On November 9, 2021, Petitioner C.S., with new counsel, filed the current Complaint in the Circuit Court of Berkeley County, West Virginia. (*See* Appx. at 16–48.) While Respondents Whitcomb, Wrye, and Naegle were not named as defendants in *Doe-1*, nor named as parties in the Arbitration Agreement, many of the allegations included in Petitioner's Complaint regarding these Respondents are recycled (and sometimes copied directly) from the *Doe-1* amended complaint, Appx. at 164–245, and/or the Amended Notice of Arbitration. (Appx. at 621–47.)

Allegations regarding Respondents Whitcomb, Wrye, and Naegle were based on their former positions within the Church and advanced by plaintiffs (including C.S. before his voluntary dismissal) in *Doe-1* to build their case against the Church and the other defendants, and then advanced by C.S. at arbitration. Respondents Whitcomb, Wrye, and Naegle were all specifically identified in the *Doe-1* plaintiffs' opening statement at trial. (Appx. at 385–86.) And Whitcomb testified at trial when called as an adverse witness in plaintiffs' case-in-chief. (Appx. at 391–409.) C.S. now uses these same allegations to argue that the Church and its agents and representatives violated duties of care by failing to prevent his alleged abuse. (*See, e.g.*, Appx. at 87–93.) A comparison of the allegations across the three proceedings makes this clear:

- **Matthew Whitcomb:** Both the current Complaint and C.S.' Amended Notice of Arbitration allege that Respondent Whitcomb was "at all relevant times" a Bishop of the Mill Creek Ward, Martinsburg Stake, and then later a Stake High Councilman, thus making him an agent of the Church. (*Compare* Appx. at 20, ¶21, *with* Appx. at 628, ¶23.) The current Complaint, the *Doe-1* amended complaint, and the Amended Notice of Arbitration all include the same allegation that Michael Jensen lived with Whitcomb from "the time [he] returned to West Virginia until approximately May 2012." (*See* Appx. at 38–39, ¶85; Appx. at 201, ¶109; Appx. at 395 (Whitcomb's *Doe-1* trial testimony); and Appx. at 635, ¶35.) In all three proceedings, C.S. also alleged that Whitcomb was present at a meeting in 2012, where various Church officials discussed concealing from the authorities Michael Jensen's return to West Virginia following his mission trip to Arizona. (*See* Appx. at 38, ¶83; Appx. at 200–01, ¶¶107–108; Appx. at 386 (*Doe-1* plaintiffs' opening statement); Appx. at 634–35, ¶¶32–33.) Finally, C.S. consistently alleged Whitcomb asked C.S.' father if Michael Jensen could stay with C.S.' family, but that Whitcomb concealed Jensen's history of abuse. (Appx. at 39, ¶86; Appx. at 201, ¶110; and Appx. at 636, ¶39); *see also Jane Doe-1 v. Corp. of President of The Church of Jesus Christ of Latter-day Saints*, 239 W. Va. 428, 440, 801 S.E.2d 443, 455 (2017) ("Mr. Whitcomb asked John Doe-5 if Michael could live with his family. Although the Doe-5s had young children, the plaintiffs allege that neither Mr. Whitcomb, nor any Church official or defendant, told the Doe-5s the reason for Michael's early return from his mission, or about Michael's history of sexual abuse.").

- **Anthony Naegle:** In the current Complaint and in *Doe-1*, Respondent Naegle is alleged to have served as the Stake Secretary and was, therefore, an agent of the Church. (Appx. at 20, ¶24; Appx. at 385 (*Doe-1* plaintiffs' opening statement).) In both cases, Naegle is also alleged to have been one of the Church officials present at a 2007 meeting, where officials discussed Michael Jensen's predatory acts. (Appx. at 27, ¶51); *see also Jane Doe-1*, 239 W. Va. at 450, 801 S.E.2d at 443, 465 ("The plaintiffs have circumstantial evidence that a Stake High Council meeting occurred in either 2006 or 2007 during which, *inter alia*, Michael Jensen's abuse of a younger sister was allegedly discussed . . . . The plaintiffs argue there is extensive evidence that this meeting took place within the time frame they allege, including separate conversations that John Doe-5 had with Stake President Grow; President Grow's executive secretary at the time, Tony Naegle; and UD-1.").

- **Don Wrye:** In the *Doe-1* litigation, plaintiffs expressly singled out Respondent Wrye as "a criminal defense attorney," who was one of the Church officials present at the 2012 meeting where officials discussed Michael Jensen's return from Arizona. (Appx. at 386 (*Doe-1* plaintiffs' opening statement) ("The next morning there's a church meeting organized at the church building with President Grow, Sandralee, Michael Jensen, Matt Whitcomb, and another Stake-High Council member named Don Wrye. Don Wrye happened to be a criminal defense attorney. He says, Michael, you're not talking to the police. You're not cooperating with the

police.")) C.S. includes the same allegation in the current Complaint. (Appx. at 38, ¶83.)

Because Petitioner's Complaint here asserts the same claims as in the *Doe-1* litigation and again at arbitration, all Respondents filed motions to dismiss.[2] (*See* Appx. at 57, 347, and 363.) Respondents Whitcomb, Wrye, and Naegle argued that Petitioner's claims should be dismissed because the 2019 Arbitration Agreement expressly applied to "*all [C.S.'] claims or controversies that were or could have been asserted in Jane Doe-1*" and, therefore, extended to the claims against them that were, or which could have been, asserted in *Doe-1*. (Appx. at 377–78) (emphasis added). Alternatively, they argued that privity exists between the Church and Respondents Whitcomb, Wrye, and Naegle due to their previously held positions within the Church, thus barring Petitioner's claims based on *res judicata*. (Appx. at 375–77.) C.S. filed a single Response in Opposition to all the motions to dismiss, arguing that the Arbitration Agreement only applied to C.S. and the Church, and that non-signatories cannot be bound to arbitration agreements. (*See* Appx. at 411–26.)

On May 16, 2022, the circuit court heard oral argument on the motions to dismiss. (Appx. at 1313–73.) The court determined that the Arbitration Agreement was not ambiguous:

> The Court finds it compelling, persuasive and dispositive that all the allegations raised by C.S. in the current complaint could have been raised in prior litigation; i.e., *Jane Doe-1*, filed in 2013. Although there are some new factual allegations and individual defendants in the newly filed complaint, the allegations and the identification of other defendants could have been made in the original litigation. Indeed, Plaintiff's counsel admitted and acknowledged on the record that the facts alleged in the current complaint could have been raised in the initial complaint filed by C.S., and the Court recognizes that acknowledgement as an undisputable finding of fact.
>
> The Court therefore finds that the arbitration agreement, read in its totality, and with plain meaning given the language, is not ambiguous. The Court notes that C.S. was represented by counsel at all stages of the litigation, including arbitration, and

[2] M.S. was the other Plaintiff in this case, but he voluntarily dismissed his claims. M.S.' claims are not relevant to this appeal.

> that C.S. entered into mediation voluntarily. The Court further finds that a final disposition of C.S.'s claims through arbitration was the intent of the parties at the time as set forth in the arbitration agreement which clearly states, "[W]hereby the parties recognize and desire the benefits of a speedy, impartial, final and binding dispute resolution procedure."

(Appx. at 1210–11.) Accordingly, the circuit court dismissed Petitioner's claims by Order dated June 7, 2022. (Appx. at 1211.)

On June 21, 2022, C.S. filed a motion under Rule 59(e) of the West Virginia Rules of Civil Procedure seeking to alter the court's June 7, 2022, Order, arguing that the circuit court failed to properly address his argument that a valid contract did not exist between C.S. and the non-Church Respondents. (Appx. at 1213–14.) The circuit court denied the motion on July 20, 2022, finding that C.S. failed to provide a legally sufficient basis to challenge the court's prior ruling. (Appx. at 50–51.) The court also certified its June 7, 2022, Order as a final judgment under Rule 54(b) of the West Virginia Rules of Civil Procedure.[3] (Appx. at 51.) C.S. then filed a Notice of Appeal on August 19, 2022, which identified the circuit court's July 20, 2022, Order as the order being appealed and attached it to the Notice of Appeal.

II. SUMMARY OF ARGUMENT

Petitioner's appeal should be dismissed for three reasons. First, because he failed to attach the Order appealed from below to the Notice of Appeal as required by Rule 5 of the West Virginia Rules of Appellate Procedure. The circuit court granted Respondents' motions to dismiss by Order dated June 7, 2022, Appx. at 1209, and then denied Petitioner's Rule 59 motion for reconsideration on July 20, 2022. (Appx. at 50–52.) But the June 7, 2022, Order was not attached to the Notice of Appeal—only the later Order was. As a result, under Rule 5, Petitioner's arguments regarding the June 7, 2022, Order are not properly before this Court.

[3] At the time the Court entered the July 20, 2022, Order, Plaintiff M.S. had not yet voluntarily dismissed his claims.

Second, any argument that the circuit court's July 20, 2022, denial of the Rule 59(e) motion was in error must fail, as the record squarely demonstrates that Petitioner's motion merely rehashed arguments already made, or which could have been made, in response to the motions to dismiss. Because Rule 59 does not permit a "do over," the circuit court correctly denied the motion.

Third, even if the Court considers the merits of the June 7, 2022, Order, the appeal should be rejected because the circuit court correctly determined that the Arbitration Agreement executed by C.S. and the Church is not ambiguous and applies to all claims that "*were or could have been asserted*" in the prior *Doe-1* litigation. As admitted below, Petitioner's current claims were or could have been asserted in *Doe-1*; thus, his claims are precluded by the Arbitration Agreement. And even if the language of the Arbitration Agreement was ambiguous, the circuit court still could have concluded that Petitioner's claims were barred by *res judicata* based on the privity between the Church and Respondents Whitcomb, Wrye, and Naegle.

III. STATEMENT REGARDING ORAL ARGUMENT

This appeal can be resolved without oral argument because the facts and legal arguments are adequately presented in the parties' briefs and the record on appeal. A memorandum decision affirming the circuit court's July 20, 2022, Order Denying in Part and Granting in Part Plaintiff's Rule 59(e) Motion to Alter the Court's Order of June 7, 2022 or, in the Alternative, Request for Certification Under Rule 54(b) is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedures. W. Va. R. App. P. 21. To the extent the Court finds it necessary, oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate because the dispositive issues of this case involve settled areas of law. W. Va. R. App. P. 19.

IV. ARGUMENT

The circuit court appropriately rejected Petitioner's efforts to overturn the circuit court's

June 7, 2022, Order granting the Respondents' motions to dismiss. The Supreme Court of Appeals has said that when reviewing an order on a Rule 59(e) motion, "we typically apply the standard of review applicable to the underlying judgment that the motion seeks to alter or amend." *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 56, 717 S.E.2d 235, 243 (2011). Because the underlying judgment was a motion to dismiss, the standard of review is *de novo*. *Id.* Applying this standard, Petitioner has failed to satisfy his burden of showing that the circuit court erred in denying his Rule 59(e) motion, or if considered, the June 7, 2022, Order dismissing the action.

A. Petitioner's appeal is deficient because his Notice of Appeal did not identify the relevant order upon which his appeal is based.

Rule 5 of the West Virginia Rules of Appellate Procedure provides that "the party appealing shall file the notice of appeal, including attachments required in the notice of appeal form contained in Appendix A of these Rules." W. Va. R. App. P. 5(b). Appendix A requires the appealing party to attach "a copy of the lower tribunal's decision or order from which you are appealing." The Supreme Court of Appeals has held that failure to attach an order to the Notice of Appeal means the petitioner has failed to appeal that particular order. *See Campbell v. CSX Transportation, Inc.*, No. 17-1034, 2019 WL 4257173, at *3 n.8 (W. Va. Sept. 9, 2019) ("To the extent petitioners seek to challenge the October 21, 2016, CSX dismissal order, that order was not attached to the notice of appeal and is, therefore, not properly before this Court."); *McGowan v. Timberline Ass'n, Inc.*, No. 19-0403, 2020 WL 1243271, at *1 (W. Va. Mar. 13, 2020) (finding that party failed to appeal an order because "petitioner did not attach the April 22, 2019, order to this notice of appeal").

Here, the Petitioner's brief asserts a single Assignment of Error: "The Court erred in finding that the Arbitration Agreement was unambiguous and should be enforced along its clear terms while also finding that it should be stretched to include protections for non-signatories where

no language from the Agreement indicates any intent to benefit any third party." (Petitioner's Brief, at p. 1.) Petitioner's brief goes on to argue errors in the circuit court's June 7, 2022, Order dismissing the Complaint.

But Petitioner's Notice of Appeal did not identify or attach the June 7, 2022, Order as the relevant order on appeal. (*See* Transaction ID 68192523.) Instead, the "Date of Entry of Judgment on Appeal" is identified as July 20, 2022. The July 20, 2022, Order, which denied Petitioner's Rule 59(e) motion, is attached to the Notice of Appeal, but C.S. did not attach the June 7, 2022, Order to the Notice. (*Id.* at 2.)[4]

Applying *Campbell* and *McGowan*, C.S. did not appeal the circuit court's June 7, 2022, Order granting the Respondents' motions to dismiss because it was not attached to his Notice of Appeal as required by Appellate Rule 5. Arguments regarding the June 7, 2022, Order, therefore, are not properly before this Court. The only Order before this Court on appeal is the July 20, 2022, denial of Petitioner's Rule 59(e) motion.

B. The circuit court correctly denied Petitioner's Rule 59(e) motion because Petitioner merely reasserted arguments that were previously rejected.[5]

A Rule 59(e) motion to alter or amend a judgment "may be used to correct manifest errors of law or fact, or to present newly discovered evidence," and should only be granted where "(1) there is an intervening change in the controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy clear error of law or (4) to prevent obvious injustice." *Mey*, 228 W. Va. at 56–57, 717 S.E.2d at 243–44. "A motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have

[4] The June 7, 2022, Order is in the Appendix at pp. 1209–12.

[5] In the following pages, Respondents, as required by W. Va. R. App. P. 10(d), "specifically respond" to the single assignment of error set forth in Petitioner's brief.

previously been argued." *Id.* at 56, 717 S.E.2d at 243. Petitioner's Rule 59(e) motion failed to satisfy this standard.

In his Rule 59(e) motion, C.S. argued the circuit court should reconsider its June 7, 2022, Order because principles of contract law do not support an interpretation that the Arbitration Agreement was meant to apply to an "entire potential universe of other Plaintiffs and/or Defendants." (Appx. at 1217.) C.S. argued that the Arbitration Agreement "contains no language wherein C.S. explicitly gives up his right to raise any claim against any additional party." (Appx. at 1218.) As a result, C.S. argued that if the Arbitration Agreement was "ambiguous" about which parties were bound, then the circuit court should have construed the Agreement against the Church as the drafter. (Appx. at 1218–19.)

But these were the same arguments C.S. made in his initial opposition to the motions to dismiss and at the May 16, 2022, hearing. (*See* Appx. at 417 ("Here, any supposed contractual obligation obliging Plaintiff C.S. to forever release all non-COP Defendants from liability based on the Arbitration Agreement would appear to violate almost all of the above described elements [of a legal contract]."); Appx. at 1344–45 ("But I just don't think - - there's nothing in the contract to suggest that C.S. agreed to waive and hold harmless every other person in potentially the universe of people . . . in exchange for the arbitration against one of the defendants[.]"); Appx. at 417 ("Additionally, the Arbitration Agreement itself was drafted by Defendants and their counsel, and it is a well-known axiom of contract interpretation that ambiguities are constructed against the drafter.").)

The circuit court thus correctly found that "C.S. points to no new evidence or case law and does not raise new arguments," Appx. at 50, and reaffirmed the dismissal of the Complaint:

> [T]he arbitration agreement, read in its totality and with plain meaning given the language is not ambiguous. C.S. consented to resolve by arbitration all his claims

> or controversies that were or could have been asserted in the 2013 case and no other parties were necessary for C.S. to waive those rights. [. . .] Plaintiff's counsel acknowledged on the record that the facts alleged in the current complaint could have been raised in the initial complaint filed by C.S. and the Court recognized that acknowledgement as an undisputed finding of fact.

(Appx. at 51.)

Here, C.S. repeats almost verbatim the arguments he made in his Rule 59 motion below. (*Compare* Appx. at 1216–19, *with* Petitioner's Brief, at pp. 11–13.) C.S. again asserts the circuit court committed a "clear error of law" by improperly construing the Arbitration Agreement to apply to third parties in violation of "fundamental elements of contract law," because only C.S. and the Church were parties to the Agreement. (Petitioner's Brief, at pp. 12–13.) These arguments, advanced below, did not satisfy Rule 59(e) because C.S. did not provide new authority or evidence to demonstrate the circuit court committed "a clear error of law" in its plain-meaning interpretation of the Arbitration Agreement. *See* Syl. Pt. 2, *Mey*, 228 W. Va. at 50, 717 S.E.2d at 237. As a result, because the circuit court correctly applied the Rule 59(e) standard in denying Petitioner's motion, this Court should affirm the circuit court's Order dated July 20, 2022.

C. The circuit court did not err in granting the Respondents' motions to dismiss.

Petitioner's arguments regarding the June 7, 2022, dismissal Order are not properly before this Court. But even if the Court considers them, the record shows the circuit court correctly dismissed the Complaint.

1. The Arbitration Agreement precludes Petitioner's claims.

At the heart of this case is the meaning of paragraph 4 of the Arbitration Agreement between C.S. and the Church, which states: "[T]he Parties [C.S. and the Church] mutually consent to the resolution by arbitration of all [C.S.'] claims or controversies *that were or could have been asserted* in Jane Doe-1, et al., v. Corporation of the President of the Church of Jesus Christ of

Latter-Day Saints, et al., Civil Action No. 13-C-656, Circuit Court of Berkeley County, West Virginia." (Appx. at 616) (emphasis added).[6] The circuit court determined this language was not ambiguous. Finding this language "not reasonably susceptible to different meanings," the circuit court found the claims in Petitioner's Complaint either were asserted or could have been asserted in the *Doe-1* litigation:

> [A]ll the allegations raised by C.S. in the current complaint could have been raised in prior litigation, i.e., *Jane Doe-1*, filed in 2013. Although there are some new factual allegations and individual defendants in the newly filed complaint, the allegations and the identification of other defendants could have been made in the original litigation

(Appx. at 1210.)

C.S. does not really challenge the court's finding that paragraph 4 of the Arbitration Agreement was not ambiguous, choosing (as he did below) to argue the Agreement was never intended to extend beyond those who signed it. At oral argument on the motions to dismiss, the court stated, "I also did not see where you specifically addressed that language in the arbitration agreement." (Appx. at 1333.) When asked by the court to address whether paragraph 4 was ambiguous, C.S. argued it was ambiguous because only he and the Church signed the Arbitration Agreement. (Appx. at 1337–40.)

C.S. continues to ignore the operative language of the Arbitration Agreement. Instead, he focuses on arguments regarding contractual interpretation to limit the application of the Agreement. (Petitioner's Brief, at pp. 7–8.) But the cases he cites, like *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012), merely set forth general principles of contract interpretation. Nowhere does he dispute that where the language of a contract — be it an

[6] *See* Appx. at 1333–34 (Court states to Petitioner's counsel, "I also did not see where you specifically addressed that language in the arbitration agreement that has been referenced by counsel," and reads paragraph 4 of the Arbitration Agreement into the record).

arbitration agreement or otherwise — is not ambiguous, the court is to apply its plain language meaning. Despite his citation to cases about lack of consideration and unconscionability, nowhere does C.S. explain their application to the plain language presented in the Arbitration Agreement, which his prior counsel negotiated, and he agreed to. And none of the cases C.S. relies upon demonstrate that the language at issue in the Arbitration Agreement is ambiguous, and he submitted no evidence to the circuit court — affidavit or otherwise — to establish lack of consideration or unconscionability.[7]

Here, as below, C.S. focuses entirely on who signed the Agreement and ignores what they agreed to arbitrate. Despite the claim of ambiguity, C.S. provided no factual basis for the argument about what he intended. C.S. did not provide his own affidavit or obtain an affidavit from anyone else to factually support the argument.[8] The record is thus devoid of any evidence or testimony from C.S. supporting the argument that the Arbitration Agreement was ambiguous and meant to only apply to his claims against the Church and no one else.

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[7] The Church's Response explains why C.S. received valuable consideration for an agreement that was not unconscionable because he received a streamlined, economic way to present his claims at arbitration against the Church for the acts of those he claimed were its agents. (Church's Response, at p. 20.) These Respondents adopt the Church's Response.

[8] While Petitioner suggested at oral argument below that the circuit court could not consider materials from the *Doe-1* litigation or the Arbitration Agreement at "this stage of the litigation," Appx. at 1335–36, he does not challenge the circuit court's consideration of those materials on appeal. Nor could he because he did not move to strike or submit an affidavit demonstrating a need for discovery below. *See* W. Va. R. Civ. Pro. 56(f). And because Petitioner's Complaint expressly references both the *Doe-1* litigation, *see* Appx. at 22, ¶32, as well as the Arbitration Agreement, *see* Appx. at 18, 42, the circuit court was permitted to consider the documents attached to the Respondents' motions to dismiss. *See* Syl. Pt. 6, *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia*, 244 W. Va. 508, 854 S.E.2d 870, 876 (2020) (explaining that a court may consider documents attached to a Rule 12(b)(6) motion to dismiss if "(1) the pleading implicitly or explicitly refers to the document; (2) the document is integral to the pleading's allegations; and (3) no party questions the authenticity of the document"). The circuit court was also permitted to consider these documents because courts are permitted "to consider matters that are susceptible to judicial notice." *See Forshey v. Jackson*, 222 W. Va. 743, 747, 671 S.E.2d 748, 752 (2008) (citation omitted).

The circuit court's finding that the language was not ambiguous is correct. C.S. and the Church entered into the Arbitration Agreement after years of litigation in *Doe-1*. In this context, the only reasonable meaning was that the parties agreed to arbitrate the claims C.S. asserted or could have asserted in *Doe-1*— claims he voluntarily dismissed. The Agreement would make no sense if afterwards, regardless of the result of the arbitration, C.S. could bring additional claims against the Church's agents, like the claims he makes here. The only fair read of the Arbitration Agreement is that C.S. and the Church agreed to arbitrate, once and for all, the claims C.S. pressed against the Church and its agents in the *Doe-1* litigation. (Appx. at 519–20.) The circuit court got it right.

It follows that the circuit court's conclusion that the language — "claims or controversies that were or could have been asserted in *Jane Doe-1*"— applies to the claims against Respondents Whitcomb, Wrye and Naegle is also correct.

> C.S.'s argument that the language does not include individuals is unsupported given the plain, unambiguous language of the agreement amongst the parties. Finally, with respect to the arbitration agreement itself, it was undisputed that C.S. was represented by counsel at all stages of the litigation, including arbitration, that C.S. participated in arbitration voluntarily, and that it fulfilled the intent of the parties to the arbitration agreement.

(Appx. at 51.) Allegations regarding Respondents Whitcomb, Wrye, and Naegle were made throughout the *Doe-1* litigation. C.S. knew about their involvement because all three were deposed in *Doe-1*, and were accused of fault at the trial, in which Whitcomb testified as an adverse witness. (Appx. at 382–409.)[9] That the current claims could have been asserted in the *Doe-1* litigation was conceded by C.S. during the May 16, 2022, hearing:

[9] *See supra* at p. 5 (describing the claims in *Doe-1* that are re-asserted virtually verbatim here); *see also* Appx. at 87–93 (chart attached to the Church's motion detailing the claims made in *Doe-1*, and re-asserted in the arbitration and this action); Appx. at 1326 (Circuit court commented the Church submitted a "a pretty detailed chart to demonstrate to the Court that there was virtually no difference between the parties or the claims that were raised initially and those that Mr. Riddell is asserting in the new complaint.").

> The Court: So let's find out what they are because we want once again to be clear so that counsel can respond to that. So we already know that you're telling the Court today that paragraph 82 through 96 allege new facts.
>
> Mr. Riddell: Right.
>
> The Court: That were not considered before.
>
> Mr. Riddell: Um-hum.
>
> The Court: Could they have been considered before?
>
> Mr. Riddell: Yes.

(Appx. at 1343.) Based on the record, and Petitioner's counsel's concession, the circuit court correctly found "as an undisputed finding of fact," that "the facts alleged in the current complaint could have been raised in the initial complaint filed by C.S." (Appx. at 51.) And because C.S. was at all times represented by counsel, including during arbitration, the circuit court correctly held "that a final disposition of C.S.'s claims through arbitration was the intent of the parties at the time as set forth in the arbitration agreement." (Appx. at 1210–11.) For that reason, the circuit court did not err in dismissing Petitioner's claims because the 2019 Arbitration was a "final disposition of C.S.'s claims." (Appx. at 1211.)

2. Petitioner's claims are barred by *res judicata*.

Even if the plain language of the Arbitration Agreement did not clearly preclude Petitioner's claims, the circuit court could have found, as argued below, Appx. at 375–77, that his claims were barred by *res judicata* based on the privity between the Church and Respondents Whitcomb, Wrye, and Naegle. Syl. Pt. 2, *Adkins v. Gatson*, 218 W. Va. 332, 333, 624 S.E.2d 769, 770 (2005) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.").

During the 2019 arbitration and in the current litigation, C.S. sought and still seeks to hold the Church liable for the acts of its alleged agents. All of Petitioner's claims against Respondents Whitcomb, Wrye, and Naegle are based on their previously held positions within the Church: "Bishop Whitcomb, High Councilor Wrye, and Secretary Naegel [*sic*] each operated as supervisory agents or leaders within the Church . . . . [T]hey were held out by the Church as its agents and placed in positions of responsibility and authority over church members." (Appx. at 26–27, ¶49.) Because of their positions, C.S. alleged that "[t]his relationship gave rise to a duty to protect members of the congregation . . . from foreseeable risk of harm." (Appx. at 27, ¶49.) When these Respondents allegedly failed to protect him, C.S. claims that the Church, due to its agents' conduct, became liable for his injuries. (Appx. at 29, ¶55) ("However, despite this special relationship, the danger and risk the Church and its agents created . . . caused serious and permanent harm to the minor Plaintiffs and their families . . . .").

Privity exists between the Church and Respondents Whitcomb, Wrye, and Naegle because Petitioner alleged that all three were acting, at all relevant times, as the Church's agents. (*See* Appx. at 20, ¶¶21–24.[10]) An agency relationship can establish privity for purposes of *res judicata* if "the interests of the parties are aligned with respect to the litigation." *Harrison v. Burford*, No. 2:11-CV-00700, 2012 WL 2064499, at *5 (S.D.W. Va. June 7, 2012). Here, the interests of the Church and these Respondents were aligned during the 2019 arbitration because C.S. sought to prove his negligence claim against the Church by putting on evidence relating to the acts of these individuals as the Church's agents. *See Richardson v. Church of God Int'l*, No. 1:13-21821, 2014

[10] "Defendant Matthew Whitcomb . . . was, at all relevant times, a member of the Church Clergy via his role as High Councilman. He was also a former Bishop of the Mill Creek Ward, Martinsburg Stake from approximately 2006-2010." (Appx. at 20, ¶21.) "Defendant Donald Wrye . . . was, at all relevant times, a member of the Church Clergy via his role as High Councilman, serving directly under Stake President Grow." (Appx. at 20, ¶23.) "Defendant Anthony Naegel [*sic*] . . . was, at all relevant times, a member of the Church Clergy via his role as Stake Secretary." (Appx. at 20, ¶24.)

WL 4202619, at *3 (S.D.W. Va. Aug. 22, 2014) (holding that claims against church leaders were barred by *res judicata* because the leaders were in privity with the church, which had been previously sued by the same plaintiffs based on the same allegations).[11]

C.S. now claims this "appeal is exclusively related to Petitioner's claims against the named Respondents in their personal and individual capacities." (Petitioner's Brief, at p. 3 n.2.) But none of the allegations against Respondents Whitcomb, Wrye, and Naegle in the Complaint were for actions undertaken in their individual capacities. In fact, the duties C.S. seeks to impose are grounded in actions taken on behalf of the Church. Despite his position here, C.S. effectively conceded below that the Complaint does not make "individual" claims, stating in a footnote that "to the extent the Court believes it unclear from the face of the Complaint that Plaintiff's claims against the named individual Defendants are applied to them in their individual capacity, Plaintiff would request leave to amend . . . ." (Appx. at 414 n.1.) Despite this footnote reference, C.S. never sought leave to file an amended complaint. Thus, he is constrained to his Complaint, which alleges that Respondents Whitcomb, Wrye, and Naegle were, at all relevant times, acting as the Church's agents. (*See* Appx. at 20, ¶¶ 21–24.) As a result, all are in privity with the Church, and this action is barred by *res judicata*.

V. CONCLUSION

Petitioner's appeal lacks merit. Petitioner's arguments relate to an Order that was not properly attached to his Notice of Appeal. C.S. has not met his burden of demonstrating that the circuit court erred in denying his Rule 59(e) motion. If the dismissal itself is considered, C.S. failed to demonstrate the court erred in dismissing the Complaint as barred by the language of the

[11] While C.S. was a party in *Doe-1*, plaintiffs affirmatively asserted that the individually named defendants *and* "other responsible actors" were "indisputably agents" of both "Church" defendants. (Appx. at 500.)

Arbitration Agreement and *res judicata*. For these reasons, as well as for the arguments included in the Brief of Respondents Steven Grow and Donald Fishel, the Court should affirm the circuit court's decision denying Petitioner's Rule 59(e) motion to alter the circuit court's June 7, 2022, Order granting Respondents' motions to dismiss, and dismiss Petitioner's appeal.

Respectfully submitted,

MATTHEW WHITCOMB, DON WRYE, and ANTHONY NAEGLE

By Counsel

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-141

C.S.,

Plaintiff below, Petitioner,

v.

CHRISTOPHER MICHAEL JENSEN, et al.,

Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., hereby certify that service of the foregoing ***Respondents Whitcomb, Wrye, and Naegle's Response in Opposition to Petitioner's Brief in Support of Appeal*** was made via this Court's File & ServeXpress electronic filing system, which will deliver electronic notice of this filing to all e-filing participants in this action, on February 6, 2023.

/s/ *Thomas J. Hurney, Jr.*
Thomas J. Hurney, Jr. (WVSB No. 1833)