

IN THE
INTERMEDIATE COURT OF APPEALS
STATE OF WEST VIRGINIA

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ALEXANDER FLEMING, CAROLE
CARTER, CAROL GALLANT,
BARBARA HUMES, and BENJAMIN
BUCKLEY,

Plaintiffs/Petitioners,

VS.

No. 23-ICA-174

MITCH CARMICHAEL, in His Official
Capacity as Secretary of the West Virginia
Department of Economic Development, and
MIKE GRANEY, in His Official Capacity
as Director of the West Virginia Department
of Economic Development,

Defendants/Respondents.

PETITIONERS' REPLY BRIEF

Robert M. Bastress, Jr.
P.O. Box 1295
Morgantown, W. Va. 26507
(304) 319-0860
rmbastress@gmail.com

Counsel for Petitioners

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RES JUDICATA DOES NOT BAR ANY OF PETITIONERS' CLAIMS.

Respondents repeatedly maintain (using a variety of formulations) in their brief that petitioners cannot under the doctrine of *res judicata* “relitigate” their case or get a second bite at the apple, referring to the earlier Jefferson circuit court decision in *Public Asset Protection, Inc. v. Corporation of Harpers Ferry*, Jefferson Cir. Civ. Act. No. CC-19-2021 (2022) (“*PAPI*”). None of the plaintiffs was a party to that litigation, however, and none of them was a member of or affiliated with the organization, PAPI, that brought the claim. They have had no opportunity to vindicate their due process rights to advance their claims.

Nor are the petitioners in any sense in privity with the plaintiff in that case. “Something more than a common interest is required for privity to be established. *Gribben [v. Kirk]*, 195 W.Va. 488, 498 n. 21, 466 S.E.2d 147, 157 n. 21 [1995].” *Beahm v. 7-Eleven, Inc.*, 223 W. Va. 269, 274, 672 S.E.2d 598, 603 (2008). Rather, some kind of close or formal relationship is required, as existed in the cases the respondents themselves cite on page 17 of their brief. “Privity exists if a nonparty either substantially controlled a party’s involvement in the initial litigation to function as its *de facto* representative. 18 Charles A. Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 4466 at 430 (1981) (arguing that ‘[p]rivity is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party’)[.]” *Gribben, supra*, 195 W. Va. at 498, n. 21, 466 S.E.2d at 603 n. 21. Nothing that approaches that kind of relationship existed in this case.*

*As petitioners noted in their prior brief, at page 8, the fact that petitioner Fleming satisfied a civic duty and provided testimony in the *PAPI* case hardly serves to satisfy his due process right to pursue his claim – let alone the due process rights of the other petitioners to

CONCLUSION

No further reply is needed. For the reasons stated above and in petitioners' previously filed brief, this Court must reverse the decision of the Kanawha Circuit Court and remand the case to that court for further proceedings.

Robert M. Bastress, Jr.

Robert M. Bastress, Jr. (ID # 263)
P.O. Box 1295
Morgantown, W. Va. 26507-1295
(304) 319-0860
rmbastress@gmail.com

Counsel for Petitioners

CERTIFICATE OF SERVICE

I have served a copy of the foregoing Brief on respondents' counsel, Michael R. Williams, Sean M. Whelan, and Mark S. Weiler, Assistant Attorneys General, Room 26E, State Capitol, Charleston, W. Va. 25305, through the Court's Filing System, on this the 1st day of October, 2023.

Robert M. Bastress, Jr.

pursue their claims.