SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

NR DEED, LLC,

Plaintiff Below, Petitioner,

vs.) No. 20-0705

ROBERT E. SIMMONS,

Defendant Below, Respondent

APPELLANT'S REPLY BRIEF

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III. ASSIGNMENTS OF ERROR:

See the Assignments of Error as stated in the Appeal Brief, as follows:

A. The circuit court (Hon. Carrie Webster) erred in failing to recognize the preclusive *res judicata* effect upon this case of Judge Louis Bloom's April 30, 2019, denial of Mr. Simmons's request in Case Number 18C-1788 to set aside the particular April 30, 2018, sheriff sale deed Mr. Simmons's property (and that of 16 others) for purposes of allowing NR Deed, LLC to proceed to address the reason the instant suit was filed, namely, to address the residual issues of ejectment and damages (following Judge Bloom's rejection of the attack on the sheriff-sale deed).

B. The circuit court erred in failing to recognize the preclusive *res judicata* effect of Judge Louis Bloom's April 30, 2019, Order granting of the Appellant's motion to dismiss Mr. Simmons' Counterclaim with its necessarily implicit rejection and overruling of the several affirmative defenses asserted by the Appellee in that 2018 answer/counterclaim (~~including: the equitable doctrines of illegality, based GSRAN-Z's lack of a license to do business in West Virginia; of unclean hands; and of equity abhors a forfeiture~~) which were all thereby dismissed along with the attack on the sheriff-sale deed, "with prejudice." [Erroneous references omitted, see the discussion below at pages 12 and 13.]

C. The circuit court erred in denying the motion for summary judgment and/or the motion for dismissal for failure to state a claim upon which relief can be granted, in light of the complete failure of the record to sustain support for any theory by which Mr. Simmons should be permitted to retain either possession of or title to the particular real estate -- all in default of him putting forth a theory for (much less submission of even a scintilla of evidence for) a right to relief pursuant to either *West Virginia Code*, §11A-4-2, 3 or 4.

IV. ARGUMENT:

The general gist of the appellant's argument in its appeal brief began with its citation to, and its discussion of, the statutory mechanism adopted by the *West Virginia Legislature* to provide a means for adversely-affected property owners to obtain relief from certain sheriff-sale deeds -- in those circumstances legislatively-recognized to be appropriate for relief. It goes virtually without saying that the annual sheriff sales of real estate for the non-payment of taxes, in the current form in which they are held, are the

express creation of statute. In particular, the primary statute is Article 3 of Chapter 11A, entitled "Sale of Tax Liens and Nonentered and Escheated and Waste and Unappropriated Lands," which governs the process of those sales of real estate.

Mr. Simmons' only reference to any statute in his brief in response is to Section 1 of that tax-sale article (§11A-3-1, *et seq.*). From a review of Mr. Simmons' brief only, one would never know that the *West Virginia Legislature* adopted an entire article, Article 4, in Chapter 11A of the *West Virginia Code*, in which it set out a statutory scheme to address errors and/or inequities which might arise from time to time with the sheriff-sale process. Chapter 11A is entitled "Collection and Enforcement of Property Taxes." Article 4 is entitled "Remedies Relating to Tax Sales." Yet, Mr. Simmons drafted a brief for the West Virginia Supreme Court which makes no reference whatsoever to this Article 4 or to any of the statutory remedies enacted by the *Legislature* for the general type of situation of which he complains. Namely, he makes no reference whatsoever to any statutory remedy for the circumstance in which a party has lost his home pursuant to a government-sanctioned sale of land for non-payment of property taxes.

Mr. Simmons seems to ignore the notion that the *West Virginia Legislature* enacted an entire article in its *Code* dealing with the establishment of remedies for problems arising with respect to tax-sale transactions. The appellant submits that Mr. Simmons made no mention of the Article 4 remedies either before this Court or before the Kanawha County Circuit Court (in either the 2018 case or the 2019 case) simply because there is nothing about his situation which would make him eligible to obtain the relief that was contemplated by the *Legislature* when it conceived of the current statutory scheme. The equities of the matter do not seem to be with him. That is because, NR Deed

submits, the *West Virginia Legislature* (like old courts of equity) generally declines to reward with relief those who sit upon their rights.

In light of the failure of Mr. Simmons to mention the remedial framework contained in Article 4 in any manner, it is extraordinary yet laudable that Mr. Simmons would have gone out of his way to cite to a passage in a timely case (decided about two years ago) that suggests that the statutory sheriff-sale remedies are intended to comprise the universe of remedies. The pertinent language cited by Mr. Simmons, and relied upon by NR Deed here, is as follows:

> The Legislature's statutory scheme, without doubt, is aimed at protecting the due process rights of a delinquent land owner by requiring notice, ample redemption periods, and *delineating express causes of action in the event the Deed was improperly obtained or the sale improperly conducted.* [Emphasis added for this brief by appellant.]
>
> The Legislature's enumerated purpose for the remedies of redemption and corresponding rights and avenues to challenge the sale of tax-delinquent property is to "provide *reasonable opportunities for delinquent taxpayers* to protect their interests in their lands and to *provide reasonable remedies* in certain circumstances for persons with interests in delinquent and escheated lands." [Emphasis added for this brief by appellant.]

State ex rel. Southland Properties, LLC v. Janes, 811 S.E.2d 373 (W.Va. 2018). The Supreme Court in *Southland Properties* went on to point out the existence and availability of the statutory pre-deed Article 3 mechanisms and the statutory post-deed Article 4 mechanisms, all in denying the particular extraordinary relief sought by the former taxpayer in that case, as follows:

> Southland had the statutorily-created remedy of redemption of which it declined to avail itself prior to delivery of the deeds. Looking forward, Southland also retains alternate remedies under *West Virginia Code* §§ 11A-4-1 to - 7 to set aside the deeds or the sale within three years of delivery of the deeds.

State ex rel. Southland Props., LLC v. Janes, at page 283.

The failure of Mr. Simmons to address the general applicability of Article 4 to the situation before the Court is more than just pertinent to the ultimate decision in this case; it is controlling. *West Virginia Rules of Appellate Procedure*, Rule 10 (d) Respondent's Brief, provides, in pertinent part, as follows:

> If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.

See *Rule of Appellate Procedure* No. 10, part (d), *Respondent's Brief.*

The importance of *R.A.P.* Rule 10 at this point is, as can be seen from a review of NR Deed's third assignment of error, as follows:

> C. The circuit court erred in denying the motion for summary judgment and/or the motion for dismissal for failure to state a claim upon which relief can be granted, in light of the complete failure of the record to sustain support for any theory by which Mr. Simmons should be permitted to retain either possession of or title to the particular real estate -- all in default of him putting forth a theory for (much less submission of even a scintilla of evidence for) a right to relief pursuant to either *West Virginia Code*, §11A-4-2, 3 or 4.

That is, a review of these pertinent portions of the *West Virginia Code* demonstrates that Mr. Simmons never possessed (after the delivery of the sheriff-sale deed) any valid argument for the sale to be set aside. That is what the Court should assume from the appellee's failure to respond to this assignment of error.

Specifically, the *West Virginia Rules of Appellate Procedure*, Rule 10 (d), permits this Court to conclude that, if Mr. Simmons had an argument by which he could have intertwined his equitable-remedy theories into one or more of the statutorily-recognized remedies for tax-sale relief, he would have so asserted the same in his brief in response. Mr. Simmons did not so attempt to intertwine his equitable-relief arguments into, and/or to reformulate them as, any Article-4 remedy. Therefore, Rule 10 suggests that this Court

can assume that Mr. Simmons has nothing with which to contest the proposition in the third assignment of error (see C above) that *Code*, Chapter 11A, Article 4, provides the exclusive form of relief through which Mr. Simmons was required to make his claim for releif.

There is some support, independent of the *Rules of Appellate Procedure*, Rule No. 10, for this proposition (that Mr. Simmons has no theory to advance herein which is consistent with the statutorily-provided, Article-4 remedies available to him). The *West Virginia Legislature* made it clear that the interests of delinquent taxpayers in the protection of their lands are important interests, but also that those interests must be balanced with the need to generate funds so that the State of West Virginia can discharge the various obligations that it has for the overall protection, etc., of all its citizens. Toward that end, the remedies provided (namely, those specific to sheriff-sale deeds, etc.) should be *reasonable* remedies. Support for this proposition is found in *West Virginia Code*, §11A-4-1. Declaration of legislative purpose, as follows:

> In furtherance of the policy declared in section one, article three of this chapter, it is the intent and purpose of the Legislature to provide *reasonable opportunities* for delinquent taxpayers to protect their interests in their lands and to provide *reasonable remedies* in *certain circumstances* for persons with interests in delinquent and escheated lands. [Emphasis added.]

The apparent implication of this *Code* section is that it has been the express intent of the *West Virginia Legislature* that the remedies available for a person aggrieved by a tax sale occurring under Article 3 are those particular remedies which are found in Article 4. As stated, Mr. Simmons has entirely ignored even the existence of these statutes (*West Virginia Code*, §§ 11A-4-2, 3 and 4) in his brief in response.

The most conservative assumption to be made under the direction of *Rule of*

Appellate Procedure No. 10 is that the assumption that appellant's assignment of error number three is correct; that the Kanawha County circuit court did err; and that the propositions discussed on pages 12 to 14 of the appellant's original appeal brief are correct: that Mr. Simmons cannot dispute that the only remedies intended by the Legislature are those in either *West Virginia Code*, §§ 11A-4-2, 3 or 4 -- or else he would have addressed those authorities in some fashion to at least diffuse somewhat the significance of that assignment of error.

In turn (after disregarding, arguendo, the dispositive effect of Ms. Simmons' refusal to address the applicable statutory authority in any manner), there are some important assertions of fact and law by the appellee that demand attention. Nonetheless, this Reply will first address a point or two about which the parties agree. The parties seem to agree that syllabus point 4 of *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S. E. 2d 41 (1997) (citing to *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 281, 803 S.E.2d 521 (2017)) is controlling of the decision of this case. The acceptance by the appellee of the importance of the pertinent syllabus point can be found on page 7 of the appellant's brief in response, in the first full paragraph on that page, which reads as follows:

> For Appellant to prevail on this appeal, it would have to establish the following three elements to preclude Mr. Simmons from raising his equitable claims in the present case explained by this Court in Syllabus Point 4 of *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S. E. 2d 41 (1997): [See the cited syllabus point below.]

That is, Mr. Simmons seems to stipulate that the determination of whether he is entitled to re-litigate his equitable claim(s) in this action depends upon a basic *res judicata* analysis of Judge Bloom's decision of the 2018 matter. (The appellant accepts the

appellee's citation to syllabus point 2 of *Blake v. CAMC*, and notes that the appellant relied on the same case in its brief, except that the citation was more directly to the latter, 2017 case of *Dan Ryan Builders, Inc. v. Crystal Ridge Dev. Inc.*, in which the point was reaffirmed there as syllabus point 2.)

The appellee's analysis of the facts of the subject cases presented (the former before Judge Bloom and the latter one before Judge Webster) understandably forms the basis of appellee's argument that *res judicata* is not applicable to the case at bar to preclude his use of the affirmative defenses at this time. Mr. Simmons therein, on page 7, states the pertinent syllabus point, number 4, as follows:

> 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.* [Emphasis added by the undersigned author.]

Syl. Pt 2, *Dan Ryan Builders, Inc.* v. *Crystal Ridge Dev. Inc.*, citing Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997). The parties, of course, disagree in how the case controls for specific reasons. The parties may agree that the particular facts presented make syllabus point 4 above difficult to apply; the appellant certainly suggests that these facts invite some confusion.

The first issue under *Blake* is whether there has been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. The appellant perceives that the appellee does not dispute that the circuit court had jurisdiction over the entire matter in each of the cases. The appellant submits that the issue of whether there has been a final adjudication on the merits is more complicated. As for the appellant's

former complaint, it is clear that Judge Bloom's dismissal of that complaint is not a final adjudication, particularly insofar as it relates to the possession of the real estate. Judge Bloom expressly specified that the dismissal of NR Deed's complaint was "without prejudice." From this observation, it necessarily follows that the dismissal of NR Deed's first complaint (which sought quiet title) was not *on the merits*. As for the appellee's counterclaim, Judge Bloom expressly specified that the dismissal of the suit to set aside the deed was "with prejudice." [App., #1030] From this observation, it follows that the dismissal of Mr. Simmons's counterclaim (seeking to set aside the various foreclosure sales, and the sale of Mr. Simmons' house in particular) in the former case was, in fact, *on the merits*.

These are important points. They are restated here: Judge Bloom's dismissal in the 2018 case as to NR Deed's claims against Mr. Simmons was *not* on the merits and therefore *does not* preclude NR Deed from any later lawsuit or aspect of a lawsuit. This is supported by Judge Bloom's statement in the final order that the dismissal is "without prejudice." Judge Bloom's dismissal of the 2018 case, as to Mr. Simmons' request to set aside the sale, was *in fact* on the merits; and therefore does in fact preclude Mr. Simmons from a later lawsuit with the same or a similar object, as more particularly discussed below. This is supported by Judge Bloom's statement in the final order that the dismissal is "with prejudice." [App., #1030]

Support for these propositions as to the resolution of various facets of the particular matter can be traced backed to some early discussion of the pertinent legal principles found in *Bodkin v. Arnold*, 45 W.Va. 90, 30 S.E. 154 (W. Va. 1898). This 1898 opinion contains an early discussion of the significance of the characterization of a

dismissal order being *with prejudice* versus being *without prejudice*. Namely, as the characterization relates to whether or not there has been an adjudication on the merits, *Bodkin* recites, as follows:

> The law of res adjudicata is laid down in the case of Rogers v. Rogers, 37 W. Va. 407, 16 S. E. 633: "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being res adjudicata." Bank v. Hays, 37 W. Va. 476, 16 S. E. 561; Sayre's Adm'r v. Harpold, 33 W. Va. 553, 11 S. E. 16. It must be an adjudication on the merits. The dismissal of a suit without prejudice, or for want of jurisdiction, or any other cause that does not determine the questions raised by the pleadings, is not an estoppel. Wanzer v. Self, 30 Ohio St. 378; Lang v. Waring, 60 Am. Dec. 533; Crews v. Cleghorn, 13 Ind. 438; Thurston v. Thurston, 99 Mass. 39. "Accordingly, it is the general practice in this country, when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice. The omission of the qualification, in a proper case, will be corrected on appeal." Durant v. Essex Co., 7 Wall. 109. "When a decree on its face appears to be a dismissal on its merits, and the court has not considered the merits, it on appeal will be reversed, and the case will be remanded, with directions to the lower court to enter a decree dismissing the bill without prejudice to the plaintiff to bring any proper suit." Miles v. Caldwell, 2 Wall. 45; Hughes v. U. S., 4 Wall. 232; Barney v. City of Baltimore, 6 Wall. 289. In this court, without remanding, the decree would be corrected. Van Dorn v. Lewis Co. Ct., 38 W. Va. 267, 18 S. E. 579.
>
> The same rule applies to a defendant who sets up affirmative matter in defense of a suit against him. If the court dismisses him as to such matter without prejudice, it is not an adjudication on the merits, so far as such defense is concerned, and he has the right to institute any necessary suit to obtain such adjudication. And if the court decides such cause without considering the affirmative matter, and without preserving his rights as to the same, he may appeal, and have the decree reversed for this cause alone. And if the court does consider the case on the merits, and finally determines it, and yet reserves a right to either party to continue the litigation in a different form, this would be appealable matter, which would be corrected, on appeal by the party prejudiced thereby. And if the

> party in the latter case fails to appeal, he is bound by the reservation in the decree, even though it should be erroneous, as it is an adjudication by the court that for some reason it has not jurisdiction of the matter reserved to the defendant, and therefore sends him to another and different tribunal. When a court decides a jurisdictional question, either for or against the right, its decision is reviewable; but, if the party prejudiced thereby fails to have such decision reversed, it becomes res adjudicata as to him, and he can never afterwards be heard to say that it is erroneous.

Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. 154 (W. Va. 1898).

The parallels of *Bodkin* to the case at bar are significant. In the instant case, the previous circuit court below resolved the matter without mention in its decree of any treatment of any other affirmative defenses (other than the rejection of the subject affirmative defense of illegality). It is undisputed that the defendant in the earlier matter failed to appeal. Therefore, the decision (rejecting that affirmative defense and dismissing the counterclaim) is *res judicata* against the party failing to appeal, regardless of whether or not any other affirmative defenses were set up in that first case. What is material is that these additional, specified affirmative defenses could have been set up in that former case.

The undersigned, counsel for the appellant, has in the final hours of the preparation of this reply examined the appendix to find the specific reference for the proposition that Mr. Simmons in the former case (the 2018 case) had in fact plead the existence of the affirmative defenses of *unclean hands* and *equity abhors a forfeiture*. Unfortunately, that support was not found, largely because the appellee's answer and counterclaim in the earlier case was not included in the appendix. The frustration with this discovery is complicated with the additional recognition that the undersigned went so far as to have actually included the *now-unsupported* factual information in the appellant's second assignment of error, as follows:

> B. The circuit court erred in failing to recognize the preclusive *res judicata* effect of Judge Louis Bloom's April 30, 2019, Order granting of the Appellant's motion to dismiss Mr. Simmons' Counterclaim with its necessarily implicit rejection and overruling of the several affirmative defenses asserted by the Appellee in that 2018 answer/counterclaim (*including: the equitable doctrines of illegality, based GSRAN-Z's lack of a license to do business in West Virginia; of unclean hands; and of equity abhors a forfeiture*) which were all thereby dismissed along with the attack on the sheriff-sale deed, "with prejudice." [Emphasis added to demonstrate the concepts for which specific support may not actually be contained in the Appendix.]

[The appellant will move to supplement the appendix with Mr. Simmons's answer/counterclaim in the previous case, but, without a ruling on that at this point, this brief will proceed as though such planned motion to supplement has been denied.] See the second assignment of error on page 2 of the Appeal Brief.

Regardless of the above stipulation (that the current record does not currently support the proposition that Ms. Simmons advanced the specified affirmative defenses in the counterclaim that was dismissed by Judge Bloom), *Bodkin v. Arnold* can be cited for the proposition that *res judicata* would still apply to preclude Mr. Simmons from arguing in the 2019 case the affirmative defenses/causes of action of unclean hands and/or of equity abhors a forfeiture. NR Deed is entitled to the preclusion of those particular affirmative defenses (and all other ones Mr. Simmons may hope to attempt to litigate in the future) simply because Mr. Simmons could have argued the application of either or both of those affirmative defenses along with his presentation of the affirmative defense of illegality in the previous, 2018 action.

In particular, from the discussion in *Bodkin* recited above, it is restated here that the previous dismissal:

> is final and conclusive, not only as to the matters actually determined, but *as to every other matter which the parties might have litigated as incident*

> *thereto* and coming within the legitimate purview of the subject-matter of the action. [Emphasis added.]

40 W.Va. 90. The significance of this passage to this reply brief is that, in spite of the fact that at this point the undersigned cannot rely on what the appellee alleged in his answer/counterclaim before Judge Bloom, it does not really matter. All that matters is that Mr. Simmons could have raised in the earlier case the other affirmative defenses and/or causes of action he has recently attempted to litigate in the 2019 action, namely those: of unclean hands and equity abhors a forfeiture. The dismissal then of the 2018 counterclaim *with prejudice* should and does resolve the question of all affirmative defenses against the appellee forever.

Ms. Simmons in his brief in response before this Court sidesteps the precise question of whether or not he did raise and/or could have raised these other affirmative defenses before Judge Bloom. He executes his sidestep in a footnote, namely, footnote 3 on page 4 of the appellee's brief in response, as follows:

> In its brief, Appellant raises two issues relating to its res judicata arguments. These res judicata arguments are appealable at this time based upon the Rule 54(b) language included in the order denying Appellant's motion to dismiss. However, the third assignment of error raised by Appellant asks the Court to address the merits of Mr. Simmons's equitable defenses. Mr. Simmons respectfully submits *this argument seeks to address an issue where the facts have not been developed, the trial court never ruled on the merits,* and which goes beyond the trial court's final order making only the res judicata ruling appealable. Therefore, Mr. Simmons asks the Court to reject this premature invitation by Appellant to address the substance of his equitable defenses where this issue simply is not properly before the Court. [Emphasis added.]

Of course, the point of the assertion of *res judicata* is to prohibit a re-litigation of the affirmative defense in the 2019 action. The specific names of the affirmative defenses asserted by Mr. Simmons sound like they might be relevant, but there has been no

suggestion as to how they might support relief for his client. Mr. Simmons obviously is reluctant to submit a nonsense argument factual argument in support of the same at this level at the first instance. He instead opts to merely insist in that footnote that any demands to hold him to the limited obligations of notice pleading are uncalled for at this point.

That is, Mr. Simmons has failed to plead in either case a theory by which any development of facts would demonstrate a basis for a judgment in favor of him. In fact, even in the 2019 action, Mr. Simmons only recited the claimed existence of these affirmative defenses in conclusory fashion. Clearly, Mr. Simmons' assertion that the facts have not been developed can also be seen for what it truly is: an acknowledgement that no actual theory for a viable affirmative defense has yet been developed. If there was one, it would have surely made it to paper by now.

The fallacy of Mr. Simmons' arguments that he even has viable affirmative defenses to advance becomes quickly more apparent with further study. The appellee has not alleged facts which support in any manner a right to relief on the basis of *unclean hands* or *equity abhors a forfeiture*; it is difficult to fathom how he could logically come up with any purported factual scenario (truth or untrue) which would support either of those theories for equitable relief. No matter how mercenary Mr. Simmons claims NR Deed to be, appellee's gripe is not with the high bidder at the tax sale. His gripe is with the fact a sale of his house was held for non-payment of taxes; and a gripe like that can only logically be lodged against the party which put the lien on the market; which solicited the bids; and which delivered the deed to the highest bidder, NR Deed: the sheriff and/or the State. And, certainly, Chapter 11A, Article 3 is not being tossed out on

its ear. Equity does not abhor a forfeiture so much that the sheriff-sale process will be shut down. Again, the handling of inequitable sales can be handled through the Article 4 process.

The immateriality of the content of the list of other affirmative defense which Mr. Simmons actually raised in the first action is clearly addressed in *Blake*. The appellee completely ignores the subtle point that the appellant suggested by the use of italics in the appellant's citation to the same syllabus point in its earlier brief. Namely, the appellant's particular use of italics is found in the third sentence of such syllabus point 4, "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." That is, the appellee in his brief does not address at all the question whether he *could have presented* the causes of action/affirmative defenses of *unclean hands* and *equity abhors a forfeiture* in the original suit before Judge Bloom.

Instead of directly addressing whether or not the causes of action/affirmative defenses of *unclean hands* and *equity abhors a forfeiture* could have been presented in the first action, the appellee states his position on the point, as follows:

> Because the prior litigation did not adjudicate the merits of Mr. Simmons's equitable defenses raised for the first time here, Mr. Simmons's purely equitable defenses are not barred by the doctrine of res judicata.

See page 7 of the Brief in Response. The appellant submits that the factual assertion(s) and the legal assertion(s) contained in this sentence demand close scrutiny.

The appellant takes particular exception to the first proposition of that sentence, namely, that the prior litigation did not adjudicate the merits of Mr. Simmons's equitable

defenses. Of course, that is at the essence of what this whole appeal is about. Therefore, it would seem to the undersigned that the sentence is afflicted with circular logic. Our position in the matter, clearly and unequivocally, is that the prior litigation could have adjudicated the merits of all affirmative defenses; and, therefore, the prior litigation did adjudicate the merits of the particular causes of action/affirmative defenses of *unclean hands* and *equity abhors a forfeiture*. Therefore, since the issue of the two equitable causes of action/affirmative defenses could have been advanced by the appellee in the first action, per *Blake v. CAMC*, application of *res judicata* to preclude Mr. Simmons's equitable causes of action/affirmative defenses from the second action is proper and even mandatory.

Back to a study of the appellee's discussion of the implications to this case of the pertinent syllabus point 4, one may note that Mr. Simmons seems to dispute in part and admit in part aspects of the first element under that syllabus point. Namely, Judge Bloom's decision was a prior adjudication by a court having jurisdiction of the proceedings, to which proposition there is no question advanced by the appellee. It is noted as apparently agreed by both sides that there was no final adjudication rendered as to the appellant's claim for a quiet-title ruling as to the appellant's sheriff-sale deed. That claim was dismissed without prejudice. The appellee's claim in the former action was for an Order by Judge Bloom to dismiss various sheriff-sale deeds on the affirmative defense claim that the various sales were illegal. The appellee's claim in that case was expressly dismissed *with prejudice*. The appellee has no residual claim to assert.

V. CLOSING

The appellant's sheriff-sale deed at issue in this case was among the many sheriff-sale deeds which the appellee sought to have set aside in the former action. The appellee's attempts to set aside those various sheriff-sale deeds (among them, the one *sub judice*) failed. The appellee clearly placed all its eggs in the earlier, 2018 case in the basket of attempting to set aside the Simmons' sale along with a number of others. Judge Bloom was, admittedly, completely silent in his order about Ms. Simmons' claims that NR Deed's claims for relief should be denied on the basis of the equitable principles of *unclean hands* and *equity abhors a forfeiture.* However, the failure of Judge Bloom to specifically address Mr. Simmons' pleading of those principles in his final order does nothing to undermine the proposition that *res judicata* applies to preclude re-litigation of all affirmative defenses -- along with that of illegality.

The appellee asserts throughout his brief the proposition that the appellant requested a quieting of the appellant's title in the second case (that before Judge Webster). The reason for this assertion is clear. The appellee seeks to introduce a logical basis for establishing a foothold upon which to introduce into this case the relevance and/or applicability of his various arguments for equitable relief. But, that assertion, that the appellant's second suit seeks a quieting of title, is simply not at all true.

The appellant's complaint in the second case sought only legal remedies and not equitable remedies. The appellant unequivocally asserted in its complaint in the 2019 matter that it was seeking three things: a) ejectment (which is a legal remedy based upon the appellant's legal title acquired through the sheriff-sale deed); b) a declaratory judgment (as to the fact that Judge Bloom's dismissal of Mr. Simmons' 2018 equitable suit to set aside the sheriff sale effectively quieted any question of title in NR Deed

arising from the validity of the sale, a statutory remedy to which NR Deed is entitled as a matter of law); and c) damages for Mr. Simmons' wrongful possession of the property, etc. (a legal remedy as well).

The accuracy of Ms. Simmons' representations as to the notion that the appellant is not seeking quiet title can be seen from a review of paragraphs 6 and 7 of the complaint, what was specifically sought in the 2019 action, as follows:

> 6. The specific relief requested by the plaintiff in this action is an Order ejecting defendant from, and ending the defendant's unlawful detainer of, the relevant real estate. The plaintiff previously filed suit seeking similar and other relief before the Kanawha County Circuit Court. That matter was dismissed without prejudice.
>
> 7. The plaintiff also seeks damages in this case; and a declaratory judgment affirming that the circuit court's dismissal of the defendant's counterclaim in that previous case quiets plaintiff's title to the real estate. Namely, the plaintiff seeks in this matter an order declaring the previous dismissal to be *res judicata* to the extent that it specifically dismissed with prejudice the counterclaims against the plaintiff (including an action to quiet title filed by Robert E. Simmons); and by specifically declaring that such dismissal effectively quiets the plaintiff's title to the subject real estate (as against any claim formerly held by the defendant, Robert E. Simmons).

See the complaint [App., #1003]. It is clear that the appellant seeks only a ruling that the title has already been judicially quieted; and to be allowed to pursue his claim for possession of the property and for damages.

VI. CONCLUSION:

The Appellant asserts that the record is clear that the question of the appellant's title to the real estate was settled by Judge Bloom's order of April 30, 2019. Appellant therefore requests that the matter be remanded to Judge Webster with directions for her to take cognizance of that settled title and to proceed to address appellant's requests for possession of the real estate and for damages for its loss of use of the real estate since the

delivery of the deed (or at least for those accruing since the filing of the most recent complaint before Judge Webster).

VII. CERTIFICATE OF SERVICE:

The undersigned counsel certifies that service by mail to each of the counsel of record for the Appellee before the Kanawha County Circuit Court in Case No. 19-C-1086 will be served by mail delivered to the U.S. Postal service on or before February 16, 2021.

WHEREFORE, the respondents request that the petition for appeal be denied; that the judgment of the circuit be affirmed; and that this Court grant all other relief proper under the circumstances.

Respectfully submitted,

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