

IN THE
SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

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

Petitioners,

vs.

No. 24-373

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,

Respondents.

PETITIONERS' REPLY BRIEF

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

Counsel for Petitioners

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MEASURING LOCAL DISCRETIONARY AUTHORITY (1981).

Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683
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ARGUMENT

I. PETITIONERS ARE NOT COLLATERALLY ESTOPPED FROM PURSUING THEIR CLAIMS BY THE DECISION OF THE JEFFERSON CIRCUIT COURT IN *PUBLIC ASSET PROTECTION, INC. v. CORPORATION OF HARPERS FERRY*.

Respondents continue to maintain that the Jefferson Circuit Court's ruling in *Public Asset Protection, Inc. v. Corporation of Harpers Ferry*, Civ. Act. No. CC-19-2021 (2022), JA at 50-71 ("*PAPF*"), collaterally estops the petitioners from pursuing their claims in this case. The respondents are mistaken.

The parties agree on the elements of the estoppel: "Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *Haba v. Big Arm Bar and Grill, Inc.*, 196 W. Va. 129, 133, 468 S.E.2d 915, 919 (1996); *State v. Miller*, Syl. Pt. 1, 194 W. Va. 3, 459 S.E.2d 114 (1995); see Respondents' Brief ("RB") at 31. The parties also agree that the critical issue relates to the third element. To be sure, none of the petitioners in this case was a named party in the *PAPI* litigation. Thus, the question is whether the petitioners are in privity with the *PAPI* corporation. Respondents' argument that they are stretches the facts in this case and the law of privity.

First, beginning with page 1 and the "Introduction" to their brief, respondents lump together the petitioners with the PAPI members characterizing them all as "disaffected residents," even though the record contains no evidence to support that contention. Respondents do identify one person as a PAPI member and organizer, Mr. Myles Morse, but he obviously is

not among the petitioners here. Contrary to respondents’ assertions, petitioners are not among the disgruntled who “opposed the [Hill Top] project.” Respondents’ Brief at 4. Petitioners have never sought to stop the SWaN undertaking from moving forward. Rather, they, and this law suit, have merely sought to hold SWaN and the Hill Top project subject to the same municipal regulatory authority to which every other business and resident of Harpers Ferry is governed.

Respondents make much of the fact that petitioner Alexander Fleming submitted a testimonial affidavit in the *PAPI* case. Respondents then characterize the initiation of this law suit as “his [Fleming’s]” complaint, RB at 7, and that he then amended the complaint to add the other plaintiffs and to bring in respondent Carmichael as the Secretary of the Department of Economic Development. Technically, that assertion is accurate, but it is misleading. Six plaintiffs simultaneously filed five complaints – identical in content and by the same counsel – in the Kanawha Circuit Court challenging West Virginia Code § 5B-1-9. Pursuant to the “rules” of that circuit, the plaintiffs had to file their complaints separately and pay separate filing fees.¹ Within a month after the filing of the complaints, the parties filed a joint motion to consolidate the cases, which was readily granted. Joint Appendix (“JA”) at 12-19. The plaintiffs then amended Dr. Fleming’s complaint to join all the plaintiffs and bring in Secretary Carmichael as a defendant. JA at 20-25.

Respondents maintain (RB at 9) that “Petitioners’ interests . . . were ‘fully aligned with

¹The six original plaintiffs filed “just” five complaints because the circuit clerk allowed husband and wife plaintiffs Ben Buckley and Roberta Mead to file a joint complaint. Ms. Mead did not join in this appeal because she had filed to run for a seat on the Harpers Ferry Town Council.

Whether a circuit clerk or circuit court has the authority to establish rules requiring separate complaints and filing fees from each individual plaintiff in what is a clearly singular case is perhaps a matter that this Court should address.

those asserted by PAP's and Harpers Ferry residents who opposed the Hill Top project.” (As noted above, however, petitioners are not “oppos[ing]” the project, but only seek to protect the Town’s regulatory authority.) In that same sentence, respondents claim that petitioner Fleming “actively participated” in the PAPI case. Yet his only participation revealed by the record is the submission of a two-page affidavit. JA at 130-31. Whether that amounts to “active” participation is open to serious question. More to the point, that participation does not operate to deprive him of his due process right to pursue the current litigation, let alone the rights of the other petitioners. Nevertheless, the respondents argue that “[i]f the party in the first suit and the party in the second share a set of interests that is functionally indistinguishable, the collateral estoppel is proper.” RB at 35.

Both the respondents and the circuit court get it wrong to conclude that either some shared interests with prior litigants or a person’s “participation” in a prior law suit is sufficient to show privity. “[S]omething more than a common interest between the prior and present litigants is required for privity to be established.” *Beahm v. 7 Eleven, Inc.*, 223 W. Va. 269, 274, 672 S.E.2d 598, 603 (2008); *accord, Gribben v. Kirk*, 195 W. Va. 488, 498 n.21, 466 S.E.2d 147, 157 n.21 (1995). “Preclusion 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.” *Id.* No such demonstration has been made in this case.

II. WEST VIRGINIA CODE § 5B-1-9 CREATES LOCAL AND SPECIAL LEGISLATION THAT VIOLATES ARTICLE VI, §§ 39 AND 39a OF THE WEST VIRGINIA CONSTITUTION.

Respondents have failed to distinguish this Court’s leading case on special laws, *City of Charleston v. Bosely*, 165 W. Va. 332, 268, S.E.2d 590 (1980), which struck down as a special

law a statute that authorized Class I cities (but no others) to impose a hotel tax. According to respondents, “the Legislature designed the [*Bosely*] statute to ‘implement a general statewide program of civic and economic development, . . . but by choosing to ‘confer these benefits only upon those cities with a population in excess of fifty thousand,’ it failed to satisfy those statewide goals[.]” RB at 19. That describes this case. Section 5B-1-9 was enacted to implement a general program for economic development (which is why it is administered by the Department of Economic Development and why it is codified as part of the “West Virginia Economic Development Act”). The *Bosely* law at the time effectively created a class of two (Charleston and Huntington), although it was theoretically open to an unlimited number of cities. Here, the Legislature has effectively created a class of one, although it is theoretically expandable to five.

On page 21 of their brief, respondents contend that the challenged Act’s “benefits are open to any large tourism development in the State’s smallest municipalities.” That, of course, is incorrect. The Act’s benefits are open to no more than five small municipalities. The respondents’ brief continues to say, “‘because the Act operates uniformly on all’ developers ‘who voluntarily choose to’ apply for one of the four remaining designations, ‘the Act must be considered a general law.’ [*State v.*] *Beaver*, 248 W. Va. [177], 201-02, 887 S.E.2d [610,] 634-35 [(2022)]. That is a complete *non sequitur*. That the few potential sites are open to bidding does not make the law general; it is still capped at four towns and developments. Nor does this case have anything in common with *Beaver*, which upheld the statewide Hope Scholarship program that was open to applications from all West Virginia families with school-aged children.

Finally, in what must be described as a whopping understatement, respondents describe the Act’s reallocation of authority as merely a “measured shift” of responsibilities from the town

to the state and not drastic one. RB at 26. Although the Act does leave in place the Town's (meager²) revenue-raising capacity, it nevertheless completely strips the Town of regulatory authority over the tourism district, exempting the district wholesale from municipal regulations. W. Va. Code § 5B-1-9(l).

CONCLUSION

This Court should meet its responsibility to enforce the provisions of the West Virginia Constitution and invalidate West Virginia Code § 5B-1-9 as in violation of that charter's Article III, § 10's Due Process Clause and Article VI, § 39a's prohibition on special laws regulating municipal affairs. The Court must, accordingly, reverse the lower courts' judgments and remand the case to the circuit 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

²West Virginia notoriously constricts the powers of its local governments. One study ranked the State as “forty-ninth in the amount of discretion it accorded its local governments [and] forty-sixth out of forty-nine in giving cities discretion.” Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683, 683-84 (2007), citing JOSEPH F. ZIMMERMAN, U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, MEASURING LOCAL DISCRETIONARY AUTHORITY 6, 59 tbl. 20 (1981).

CERTIFICATE OF SERVICE

I have electronically served a copy of the foregoing Brief on respondents' counsel, Sean M. Whelan, Assistant Attorney General, Room 26E, State Capitol, Charleston, W. Va. 25305, and Sean.M.Whelan@wvago.gov this the 16th day of December, 2024.

Robert M. Bastress, Jr.