

NO. 25-ICA-432

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

GREGORY H. SCHILLACE,
Petitioner

v. 25-ICA-432

HORIZON VENTURES OF WEST VIRGINIA, INC.
Respondent

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JOE SHAFFER, JUDGE

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

GREGORY H. SCHILLACE

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT	1, 2
ARGUMENT	
A. <u>The Underlying Civil Action Does Not Seek to Modify the Refusal to Enforce the Attorney Charging Lien Filed in Marion County Civil Action No. 18-C-76.</u>	2, 3, 4, 5
B. <u>The Respondent Provided No Authority From Any Jurisdiction That the Denial of an Attorney Charging Lien Operates as Collateral Estoppel or Res Judicata to a Civil Action Brought by the Attorney to Recover Attorney Fees Owed by the Client.</u>	5, 6, 7
C. <u>The Doctrines Res Judicata and Collateral Estoppel Have No Application to the Underlying Civil Action and Do Not Allow the Respondent to Escape the Obligation to Pay Attorney Fees and Unreimbursed Costs From Which the Respondent Benefitted.</u>	8, 9, 10, 11
D. <u>The Doctrine of Unclean Hands Prevents the Respondent From Invoking the Equitable Doctrines of Collateral Estoppel and Res Judicata.</u>	11, 12
E. <u>The Respondent is Judicially Estopped From Denying the Admission by Its Counsel Admitting in the Marion County Action That a Separate Lawsuit "Should" be Filed by the Petitioner.</u>	12, 13
CONCLUSION.	14

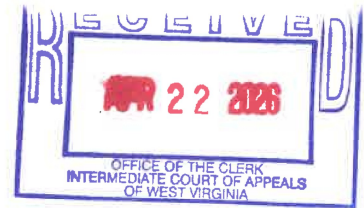
State Cases

<u>Blake v. Charleston Area Medical Center, Inc.,</u> 201 W.Va. 469, 498 S.E.2d 41 (1997).	9, 11
<u>Cato v. Silling,</u> 137 W.Va. 694, 73 S.E.2d 731 (1952).	4
<u>Chalifoux v. West Virginia Department of Health and Human Resources,</u> 250 W.Va. 617, 906 S.E.2d 270 (2023).	9
<u>Computer One, Inc. v. Grisham & Lawless P.A.,</u> 144 N.M. 424, 188 P.3d 1175 (2008).	7, 9, 10
<u>Dillon v. Board of Education of Mingo County,</u> 171 W.Va. 631, 301 S.E.2d 588 (1983).	12
<u>Evans v. Evans,</u> 439 P.3d 418 (OK App. 2018).	9
<u>Fisher v. Mylius,</u> 62 W.Va. 19, 57 S.E. 276 (1907).	8
<u>Hazeltine v. Keenan,</u> 54 W.Va. 600, 46 S.E.2d 609 (1904).	2, 8
<u>Kesterson v. Brown,</u> 94 W.Va. 447, 119 S.E. 677 (1923).	4
<u>Mullins v. Green,</u> 145 W.Va. 469, 115 S.E.2d 320 (1960).	4
<u>Northern Pueblos Enterprises v. Montgomery,</u> 98 N.M. 47, 644 P.2d 1036 (1982).	7
<u>Sammons & Berry, P.C. v. National Indemnity Company,</u> 2014 WL 3400713 (Texas App. 2014).	9
<u>Schofield v. West Virginia Department of Corrections,</u> 185 W.Va. 199, 406 S.E.2d 425 (1991).	3
<u>Security National Bank & Trust Company v. William,</u> 155 W.Va. 1, 180 S.E.2d 46 (1971).	6
<u>Shaffer v. Charleston Area Medical Center, Inc.,</u> 199 W.Va. 428, 485 S.E.2d 12 (1997).	6, 8
<u>Soward v. Soward,</u> 127 N.M. 114, 977 P.2d 1034 (1999).	7, 9
<u>Springer v. Runyon,</u> 2024 WL 2273398 (W.Va. Sup.Ct. 2024).	11, 12
<u>State ex rel. Bell & Bands, PLLC. v. Kaufman,</u> 213 W.Va. 718, 584 S.E.2d 574 (2003).	3

<u>State ex rel. Cecil v. Knapp,</u> 143 W.Va. 896, 105 S.E.2d 569 (1958)	5
<u>State ex rel. Shamblin v. Dostert,</u> 163 W.Va. 361, 255 S.E.2d 911 (1979)	3
<u>State ex rel. Showen v. O'Brien,</u> 89 W.Va. 634, 109 S.E. 830 (1921)	2
<u>Tilzer v. Davis, Bethune & Jones, LLC,</u> 288 Kan. 477, 204 P.3d 617 (2009)	9
<u>Trickett v. Laurita,</u> 223 W.Va. 357, 674 S.E.2d 218 (2009)	2, 3, 5, 6, 8
<u>West Virginia Department of Transportation,</u> <u>Division of Highways v. Robertson,</u> 217 W.Va. 497, 618 S.E.2d 506 (2005)	12

Constitution, Statutes and Regulations

West Virginia Code §30-2-15.	5, 8
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v. 25-ICA-432

HORIZON VENTURES OF WEST VIRGINIA, INC.
Respondent

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JOE SHAFFER, JUDGE

REPLY BRIEF OF THE PETITIONER, GREGORY H. SCHILLACE

TO: THE HONORABLE JUSTICES OF THE INTERMEDIATE COURT OF APPEALS OF
WEST VIRGINIA

I. Summary of Argument

- A. The Underlying Civil Action Does Not Seek to Modify the Refusal to Enforce the Attorney Charging Lien Filed in Marion County Civil Action No. 18-C-76.
- B. The Respondent Provided No Authority From Any Jurisdiction That the Denial of an Attorney Charging Lien Operates as Collateral Estoppel or Res Judicata to a Civil Action Brought by the Attorney to Recover Attorney Fees Owed by the Client.
- C. The Doctrines Res Judicata and Collateral Estoppel Have No Application to the Underlying Civil Action and Do Not Allow the Respondent to Escape the Obligation to Pay Attorney Fees and Unreimbursed Costs From Which the Respondent Benefitted.
- D. The Doctrine of Unclean Hands Prevents the Respondent From Invoking the Equitable Doctrines of Collateral Estoppel and Res Judicata.

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- E. The Respondent is Judicially Estopped From Denying the Admission by Its Counsel in the Marion County Action That a Separate Lawsuit "Should" be Filed by the Petitioner.

II. Argument

A. The Underlying Civil Action Does Not Seek to Modify the Refusal to Enforce the Attorney Charging Lien Filed in Marion County Civil Action No. 18-C-76.

Contrary to the assertion of the respondent, the petitioner did not and does not avoid addressing the claim of the respondent that the Harrison County civil action somehow sought to modify the November 4, 2024 Order of the Marion County Circuit Court regarding the objection of the petitioner to a proposed order which disregarded the attorney charging lien filed in Civil Action No. 18-C-76. Appendix at 142. The complaint initiating the underlying civil action clearly does not seek to alter, amend or address in any way the denial of the objection the petitioner filed to the Order regarding agreement and resolution filed in Marion County Civil Action No. 18-C-76. Appendix at 142.

An attorney charging lien is an equitable right of an attorney to recover attorney fees and costs for services rendered in a particular action secured by the judgment or recovery in that action. State ex rel. Showen v. O'Brien, 89 W.Va. 634, 109 S.E. 830 (1921); Trickett v. Laurita, 223 W.Va. 357, 674 S.E.2d 218 (2009). An attorney charging lien is not an attachment of the individual assets of the client, but is confined to the judgment or fund recovered for the client by the efforts of the attorney. Hazeltine v. Keenan, 54 W.Va. 600, 46 S.E. 609 (1904); Trickett v. Laurita,

223 W.Va. 357; 674 S.E.2d 218 (2009).

The West Virginia Supreme Court of Appeals has long held that one West Virginia circuit court can not modify the judgment of another circuit court. State ex rel. Shamblin v. Dostert, 163 W.Va. 361, 255 S.E.2d 911 (1979); Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 406 S.E.2d 425 (1991). Reaching this conclusion requires Article 8, Section 1; Article 8, Section 3; and, Article 8, Section 6, of the West Virginia Constitution to be read together resulting in the conclusion that "one circuit court may not directly or indirectly interfere with the orders of another circuit court unless specifically provided by statute or civil rule regardless of how erroneous such orders may be". State ex rel. Bell & Bands, PLLC. v. Kaufman, 213 W.Va. 718, 584 S.E.2d 574 (2003).

The West Virginia Supreme Court of Appeals concluded in State ex rel. Bell & Bands, PLLC. V. Kaufman, 213 W.Va. 718, 584 S.E.2d 574 (2003), that this rule applies where one circuit court order attempts to directly interfere with an order of another circuit court. The underlying civil action does not seek any review or interference with the order of the Circuit Court of Marion County denying the enforcement of the attorney charging lien with respect to funds held by the Clerk of the Circuit Court of Marion County in Marion County Civil Action No. 18-C-76.

The sole issue presented in Marion County Civil Action No. 18-C-76, directly involving the petitioner, was the attorney charging lien and the objection of the petitioner to the entry of the Order

regarding agreement and resolution. Appendix at 142. The November 4, 2024 Order entered by the Circuit Court of Marion County overruled the objection of the petitioner to the proposed order of the respondent which disregarded the attorney charging lien. Appendix at 142.

To the extent that the November 4, 2024 Order exceeded the matter at issue, it has long been held that circuit court may not enter an order that is not supported by the pleadings and any portion of an order which is unsupported by the pleadings is void. Mullins v. Green, 145 W.Va. 469, 115 S.E.2d 320 (1960). As the only issue directly involving the petitioner in the Marion County Civil Action No. 18-C-76 was the attorney charging lien and the objection to the entry of the order regarding agreement and resolution, the Marion County Circuit Court was without jurisdiction to include any other matter in The November 4, 2024 Order such as the reference to Civil Action No. 18-C-130 or any other matter between the petitioner and respondent. Appendix at 142. Cato v. Silling, 137 W.Va. 694, 73 S.E.2d 731 (1952).

With respect to the petitioner, the Marion County Circuit Court had jurisdiction to address the attorney charging lien and the objection of the petitioner to the order regarding agreement and resolution, however, there was no jurisdiction to address Civil Action No. 18-C-130, or to preclude the petitioner from filing a civil action seeking money due from the respondent. Kesterson v. Brown, 94 W.Va. 447, 119 S.E. 677 (1923). The Marion County Circuit

Court overruled the objection of the petitioner to the proposed order and refused to enforce the attorney charging lien, nothing further regarding the petitioner was before the Marion County Court and any attempt to exceed this jurisdiction is void. State ex rel. Cecil v. Knapp, 143 W.Va. 896, 105 S.E.2d 569 (1958).

The underlying civil action does not seek to enforce the attorney charging lien filed in Marion County, Civil Action No. 18-C-76 with respect to the specific fund of money held by the Circuit Clerk or the review of the denial of the objection of the petitioner to the order regarding agreement and resolution of Civil Action No. 18-C-76. As the underlying civil action does not request that the Harrison County Circuit Court interfere with the November 4, 2024 Order entered by the Marion County Circuit Court there is no bar to the underlying civil action proceeding and the Circuit Court erred in its dismissal.

B. The Respondent Provided No Authority From Any Jurisdiction That the Denial of an Attorney Charging Lien Operates as Collateral Estoppel or Res Judicata to a Civil Action Brought by the Attorney to Recover Attorney Fees Owed by the Client.

The West Virginia Supreme Court of Appeals held in Trickett v. Laurita, 223 W.Va. 357, 674 S.E.2d 218 (2009), that an attorney charging lien pursuant to West Virginia Code §30-2-15 is confined to the judgment or fund recovered by the attorney for the client. A charging lien is defined as the equitable right of an attorney to have fees and costs due to the attorney for services in a particular action secured by the judgment or recovery in such

action. Id. S.E.2d at 226.

It is further provided in Trickett v. Laurita, 223 W.Va. 357, 674 S.E.2d 218 (2009), that a party:

to a suit accepting the services of an attorney, with knowledge thereof, as the services are performed from time to time, and in the absence of any agreement for gratuitous service and circumstances from which gratuitous service would be implied in law, are liable therefore.

The Supreme Court reaffirmed the general rule that the creation of an attorney/client relationship as well as the obligation to compensate the attorney for services rendered can be by either an express or implied contract. Id. S.E.2d at 226. See also, Security National Bank & Trust Company v. William, 155 W.Va. 1, 180 S.E.2d 46 (1971).

In Shaffer v. Charleston Area Medical Center, Inc., 199 W.Va. 428, 485 S.E.2d 12 (1997), the West Virginia Supreme Court of Appeals held that a charging lien may proceed in a separate action or in the underlying action where the representation occurred. No decision of the West Virginia Supreme Court of Appeals or this Court, provides that the filing of an attorney charging lien precludes the filing of a separate civil action to collect attorney fees and costs especially when those fees due may exceed the amount of the fund subject to the charging lien.

In its discussion regarding the four requirements for the imposition of an attorney charging lien in Trickett v. Laurita, 223 W.Va. 357, 674 S.E.2d 218 (2009), the West Virginia Supreme Court of Appeals relied upon the decision of the Supreme Court of New

Mexico in Computer One, Inc. v. Grisham Lawless, P.A., 144 N.M. 424, 188 P.3d 1175 (2008). The ultimate holding of the Supreme Court of New Mexico was that the doctrines of res judicata and collateral estoppel did not bar a malpractice claim against an attorney who prevailed in an earlier attorney charging lien claim. Id. P.3d at 1184.

The Supreme Court of New Mexico made clear that beyond the limits of a charging lien, the lawyer is free to go against the client for the remaining amount of fees owed to the attorney. Id. P.3d at 1180; Northern Pueblos Enterprises v. Montgomery, 98 N.M. 47, 644 P.2d 1036 (1982). In Soward v. Soward, 127 N.M. 114, 977 P.2d 1034 (1999), the Court of Appeals of New Mexico, after concluding that the untimely assertion of an attorney charging lien resulted in a waiver of the lien left the attorney to "look to [the] client alone for ... compensation".

There is no support in West Virginia or any other jurisdiction for the proposition that the refusal to enforce an attorney charging lien precludes a civil action by the attorney to recover attorney fees and costs owed to the attorney by the client. The absurdity of this claim by the respondent is highlighted where the amount to which the attorney charging lien could apply is significantly less than the total amount owed by the respondent to the petitioner.

C. The Doctrines Res Judicata and Collateral Estoppel Have No Application to the Underlying Civil Action and Do Not Allow the Respondent to Escape the Obligation to Pay Attorney Fees and Unreimbursed Costs From Which the Respondent Benefitted.

The Appellate Courts of West Virginia have not addressed the interaction between the doctrines of res judicata and collateral estoppel and an attorney charging lien filed pursuant to West Virginia Code §30-2-15. Further, the respondent has presented no decision from any jurisdiction that supports its claim that the refusal of one court to enforce an attorney lien precludes a subsequent civil action by the attorney against the client to recover attorney fees and costs owed.

An attorney charging lien pursuant to West Virginia Code §30-2-15 provides for an equitable right of an attorney to have fees and costs due to the attorney for services in a particular action secured by the judgment or recovery in such an action. Shaffer v Charleston Area Medical Center, Inc., 199 W.Va. 428, 485 S.E.2d 12 (1997); Fisher v. Mylius, 62 W.Va. 19, 57 S.E. 276 (1907). An attorney charging lien is confined to the judgment or fund recovered by the attorney. Hazeltine v. Keenan, 54 W.Va. 600, 46 S.E.2d 609 (1904).

The elements necessary to obtain an attorney charging lien are greater than the elements necessary to state a cause of action by an attorney against a former client for attorney fees owed and unreimbursed advanced costs. See, Trickett v. Laurita, 223 W.Va. 357, 674 S.E.2d 218 (2009). None of the elements necessary for the

application of collateral estoppel or res judicata exist in this matter. Evans v. Evans, 439 P.3d 418 (OK App. 2018); Tilzer v. Davis, Bethune & Jones, LLC, 288 Kan. 477, 204 P.3d 617 (2009).

Other jurisdictions addressing this issue have held that where the requirements for an attorney lien are not satisfied, the attorney may "still resort to remedies at law, such as a subsequent suit for breach of contract". Sammons & Berry, P.C. v. National Indemnity Company, 2014 WL 3400713 (Texas App. 2014); Computer One, Inc. v. Grisham Lawless, P.A., 144 N.M. 424, 188 P.3d 1175 (2008). The Court of Appeals of New Mexico decision in Soward v. Soward, 127 N.M. 114, 977 P.2d 1034 (1999), makes clear that if the equitable remedy of an attorney charging lien fails, the attorney is free to seek recovery through another method.

The doctrines of res judicata and collateral estoppel intend to bar relitigation of causes of action which had been fully and fairly decided. Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997). The elements of collateral estoppel are more restrictive than those of res judicata as collateral estoppel requires:

that an identical issue was actually litigated among the parties.

Chalifoux v. West Virginia Department of Health and Human Services, 250 W.Va. 617, 906 S.E.2d 270 (2023).

The doctrine of res judicata not only bar claims that were actually litigated but also claims which could have been litigated.

Id. S.E.2d at 21. As the only issue in Marion County Civil Action No. 18-C-76, involving the petitioner, was the objection to the order regarding agreement and resolution and the application of the attorney charging lien neither doctrine applies to this matter.

The respondent owes the petitioner attorney fees and unreimbursed advanced costs well in excess of the \$50,000.00 which was available from the Marion County Circuit Clerk in Civil Action No. 18-C-76, therefore, the total claim of the petitioner against the respondent could not have been resolved in Marion County Civil Action No. 18-C-76. Id. S.E.2d at 281. There is no legal support for the assertion by the respondent that the filing of an attorney charging lien gives up the entitlement to attorney fees in excess of the amount which could be attached by the lien.

A common requirement of the doctrines of collateral estoppel and res judicata which can not be established in this matter is that the prior action must involve the same parties. Id. S.E.2d at 281. The petitioner was not a party to the Marion County action as the filing of an attorney charging lien does not make the attorney a party to the action. Computer One, Inc. v. Grisham & Lawless P.A., 144 N.M. 424, 188 P.3d 1175 (2008). (ancillary participants in a lawsuit may find themselves at odds with each other, but not necessarily be opposing parties.)

The final death nail for the application of either the doctrine of collateral estoppel or res judicata is that the petitioner was not afforded the constitutional right to trial by

jury in Marion County Civil Action No. 18-C-76. Id. P.3d at 1184. The doctrines of res judicata and collateral estoppel are not rigidly enforced where to do so would plainly defeat the ends of justice. Blake v. Charleston Area Medical Center, Inc., 201 W.Va. 469, 498 S.E.2d 41 (1997).

The Circuit Court erred in concluding that the petitioner was precluded in bringing the underlying civil action for the full amount of attorney fees and unreimbursed advanced costs owed by the respondent to the petitioner. The petitioner was never afforded the opportunity to present claims against the respondent in the abbreviated, equitable proceeding regarding the attorney charging lien for the limited fund held by the Marion county Circuit Clerk.

D. The Doctrine of Unclean Hands Prevents the Respondent From Invoking the Equitable Doctrines of Collateral Estoppel and Res Judicata.

The petitioner provided legal representation to the respondent for five (5) years expending effort on behalf of the respondent based upon the hours of the petitioner and staff equal to three hundred eleven thousand nine hundred twenty-five dollars and sixty-seven cents (\$311,925.67) and unreimbursed expenses of seventeen thousand two hundred twenty-three dollars and seventy cents (\$17,223.70). It is inequitable for the respondent to now claim that the petitioner is barred from recovery in this civil action when the respondent represented in Civil Action No. 18-C-76 that the petitioner was required to file a separate law suit to recovery under the principle of quantum meruit. Springer v. Runyon, 2024 WL

2273398 (W.Va. Sup.Ct. 2024). Appendix at 171.

As acknowledged by the Circuit Court of Marion County during the September 19, 2024 hearing:

it's clear to this Court that Mr. Schillace provided services. I think it would be absurd for any party to deny that. He did work on this case.

Appendix at 166. It is inequitable for the respondent to have the benefit of five (5) years of legal services and unreimbursed advanced expenses and not pay the amounts owed to the petitioner.

E. The Respondent is Judicially Estopped From Denying the Admission by Its Counsel Admitting in the Marion County Action That a Separate Lawsuit "Should" be Filed by the Petitioner.

The doctrine of judicial estoppel is a common law principle which precludes a party from asserting in a legal proceeding inconsistent with a position taken in prior litigation. West Virginia Department of Transportation, Division of Highways v. Robertson, 217 W.Va. 497, 618 S.E.2d 506 (2005). Judicial estoppel prevents a party from assuming inconsistent positions in a series of suits in reference to the same facts or state of facts. Dillon v. Board of Education of Mingo County, 171 W.Va. 631, 301 S.E.2d 588 (1983).

During the September 19, 2024 hearing in Civil Action No. 18-C-76 counsel for the respondent made the following representations:

- (1) "...although the undersigned [plaintiff] is not entitled to a contingent fee, the undersigned [plaintiff] is entitled to compensation for services performed. That's a quantum meruit argument. That's a suit he has to bring. That's not a charging lien." **Transcript at page 8.**
Appendix at 157.

- (2) "Now, quantum meruit, maybe he [plaintiff] prevails, may he [plaintiff] gets some money on that, but that's a civil suit..." **Transcript at page 15.** Appendix at 164.
- (3) "If he [plaintiff] wants to file suit against Horizon, like everybody else, you know, would have to do, that's what he [plaintiff] needs to do, and we'll defend that case or we'll pay what's due." **Transcript at page 16.** Appendix at 165.
- (4) "This charging lien is simply not valid. Now, I'm not saying he doesn't get it right under quantum meruit to have this case, but what happens in that is very important. And he [plaintiff] brings his case and at that point Horizon gets to a certain defense, that defense may be, yeah, you're right. You get some value for what you did but there's also some harm that you did to Horizon in your representation. There's not opportunity for us to push back on that." **Transcript at page 21.** Appendix at 170.
- (5) "If he [plaintiff] has a case to bring, then let him [plaintiff] bring it." **Transcript at page 22.** Appendix at 171.

In Civil Action No. 18-C-76 the respondent, represented by the same attorneys representing it now, made representations to the Circuit Court of Marion County regarding the need for a separate civil action to establish entitlement by the petitioner to attorneys fees calculated pursuant to the principle of quantum meruit. Appendix at 171. The respondent then claimed that the ruling of the Marion County Circuit Court conforming to the respondent's argument in Civil Action No. 18-C-76 operates as res judicata to the underlying action, clearly this is an improper, inconsistent position by the respondent.

VII. Conclusion

The Final Order of the Circuit Court of Harrison County should be reversed and this action remanded to the Circuit Court for further proceedings.

Dated this 26th day of March, 2026.



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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

GREGORY H. SCHILLACE
d/b/a SCHILLACE LAW OFFICE
Plaintiff Below, Petitioner

v.) No. 25-ICA-432

HORIZON VENTURES OF WEST VIRGINIA, INC.
Defendant Below, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2026, I served the foregoing **REPLY BRIEF OF THE PETITIONER, GREGORY H. SCHILLACE** upon all opposing counsel of record by U.S. mail, in an envelope addressed as follows:

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A handwritten signature in dark ink, appearing to read "J. G. Nogay", is written over a horizontal line.