

No. 33460

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

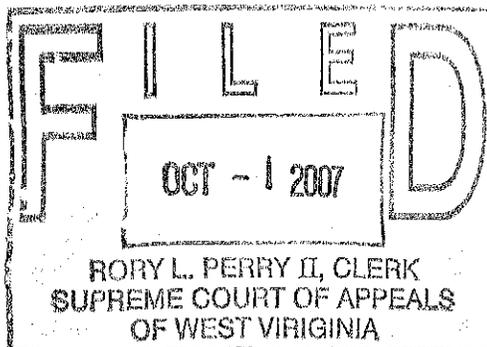
JOHNNIE HOOVER,

Appellant,  
Plaintiff Below,

v.

PETER K. MORAN,

Appellee,  
Defendant Below.



Appeal from the Circuit Court of  
Kanawha County, West Virginia  
Case No. 02-C-1058

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BRIEF ON BEHALF OF APPELLEE PETER K. MORAN

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JOHNNIE HOOVER,

Appellant,  
Plaintiff Below,

v.

Civil Action No. 02-C-1058  
Irene C. Berger, Circuit Judge  
Thirteenth Judicial Circuit

PETER K. MORAN,

Appellee,  
Defendant Below.

BRIEF ON BEHALF OF APPELLEE PETER K. MORAN

I. INTRODUCTION

This appeal represents the most recent chapter in a near-interminable saga of litigation, characterized throughout by a wishful but dilatory Plaintiff who has sought a financial windfall from an alleged twenty-year old oral contract which allegedly entitled him to a 10 percent share of a long-defunct and bankrupt corporation. The proceedings below came to a just resolution in the dismissal of the Plaintiff/Appellant's claims. Defendant/Appellee respectfully requests that this Court, for the reasons expressed in detail herein, affirm the Circuit Court's decision to dismiss this action or, alternatively, reverse the Circuit Court's earlier and erroneous decision to reinstate the civil action below after it had been dismissed for failure to prosecute.

II. NATURE OF PROCEEDINGS AND RULINGS BELOW

The civil action below was commenced by Plaintiff/Appellant Johnnie Hoover, alleging the breach of an oral contract by Defendant Princess Beverly Coal Company

and Defendant/Appellee Peter K. Moran. Two rulings from the proceedings below are at issue.

On August 4, 2006, upon motion of the Plaintiff and over the objection of Defendant/Appellee Moran, the Circuit Court granted the Plaintiff's motion to reinstate the action after dismissal for failure to prosecute. Pursuant to *West Virginia Rule of Appellate Procedure* 10(f), Appellant cross-assigns this ruling as prejudicial error and sets out argument and authority in support of such assignment below.

On December 8, 2006, upon motion of Defendant Moran and over the objection of Plaintiff/Appellant, the Circuit Court granted Defendant Moran's Rule 12(b)(6) motion and dismissed the action. Plaintiff/Appellant sought reconsideration of that Order, and the Court denied Plaintiff/Appellant's motion to reconsider on December 29, 2006. Plaintiff/Appellant appeals these rulings.

### **III. QUESTIONS PRESENTED**

1. On the merits, did the Circuit Court properly dismiss the Complaint against Defendant/Appellee Moran for failure to state a claim upon which relief could be granted where the corporate entity for which Moran acted as an agent had been dismissed with prejudice, where the Complaint failed to allege any acts by Moran in an individual capacity which would establish a breach of an oral contract, and where the applicable Statute of Frauds bars the alleged contract?
2. Procedurally, did the Circuit Court abuse its discretion in reinstating the civil action below after over two years of inactivity on the Plaintiff's part?

#### IV. STATEMENTS OF FACTS

On April 16, 2002, Plaintiff/Appellant filed with the Circuit Court of Kanawha County his Complaint against Defendants Princess Beverly Coal Company, a West Virginia corporation, ("Princess Beverly") and Defendant/Appellee Peter Moran, attempting to allege a breach of a 1985 oral contract for a 10 percent ownership stake in Princess Beverly. The case was assigned to the Hon. Irene Berger, Circuit Judge. Defendants Princess Beverly and Moran jointly filed a motion to dismiss the Complaint on July 29, 2002.<sup>1</sup>

On September 4, 2002, Plaintiff/Appellant responded to the Defendants' Motion to Dismiss. With this response, the Plaintiff/Appellee tendered a seven-page affidavit and accompanying documentary exhibits alleging additional facts outside the pleadings. Defendants' motion to dismiss was originally set for hearing on November 15, 2002.

On November 13, 2002, Princess Beverly, now represented by separate counsel, filed a reply brief to Plaintiff/Appellant's response to the joint Motion to Dismiss.

On November 14, 2002, counsel for Princess Beverly notified counsel for Defendant Moran and counsel for Plaintiff, via facsimile, that Princess Beverly Coal Company had filed for bankruptcy as of November 13, 2002. As a result of this filing, the November 15, 2002, hearing of Defendants' Motion to Dismiss was cancelled.

On November 21, 2002, Princess Beverly filed a formal notice of its bankruptcy filing and invocation of the automatic stay provisions of 11 U.S.C. § 362.

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<sup>1</sup> This motion was timely by agreement between Plaintiffs' then-counsel William Garrett and counsel for Defendants, then jointly represented by Bailey & Glasser, PLLC.

No activity occurred in the civil action from November 21, 2002, until on or about August 12, 2003, when Plaintiff/Appellant's present counsel filed his Notice of Appearance in this matter.

No further activity occurred in the civil action from August 12, 2003, until on or about March 30, 2004, a lapse of seven months, when an agreed Order dismissing Princess Beverly with prejudice was entered by the Court. This exit of Princess Beverly from the civil action removed the automatic stay imposed by federal bankruptcy law.

Despite the removal of the bankruptcy stay, no further activity occurred in the civil action for the next sixteen months, when the Circuit Court mailed notice of impending dismissal pursuant to West Virginia Rule of Civil Procedure 41(b) on July 1, 2005. The Court's docket sheet below simply shows that this Notice was "sent to parties." Docket Sheet, # 20. This same docket sheet shows that the Notice sent to Defendant/Appellee Moran was returned "marked 'unable to forward.'" Docket Sheet, # 21. No such entry is shown on the docket sheet as to Plaintiff/Appellant Hoover.

The Court entered its Order dismissing the civil action for failure to prosecute on July 15, 2005.

On May 24, 2006, twenty-five months after the Plaintiffs' last activity in the action (the agreed order dismissing Princess Beverly) and thirty-two months after Plaintiff/Appellant's present counsel's first appearance, Plaintiff/Appellant Hoover moved the Court to reinstate the civil action to the docket, alleging in a one-page motion that Plaintiff's counsel had not received notice of the impending dismissal and that motions were pending before the Court at the time of the entry of the Order of dismissal.

Plaintiff's Motion to Reinstate Action Dismissed Pursuant to Rule 41(b) of the West Virginia Rule of Civil Procedure, p.1.

Defendant/Appellee Moran timely responded to the Plaintiff's Motion to Reinstate on July 14, 2006. In that Reply, Defendant Moran argued, *inter alia*, that Plaintiff's motion failed to make out a prima facie case for reinstatement, and that even had the motion made out a prima facie case, substantial prejudice to Defendant Moran would result from reinstatement. See *generally* Defendant Moran's Reply to Plaintiff's Motion to Reinstate Action.

On July 18, 2006, the Circuit Court heard Plaintiff's Motion to Reinstate. At his hearing, Defendant/Appellee's counsel reiterated the arguments set forth in the prior filings with the Court. Transcript of Hearing of 7/18/2006.

On August 4, 2006, the Circuit Court issued its ruling on the Plaintiff/Appellant's motion to reinstate. The Court made only one finding in that Order: "that neither the plaintiff or plaintiff's counsel received notice of dismissal pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure and that notice is required." Order of August 4, 2006, p. 1. The Court failed to make any findings in this Order as to whether the Plaintiff's motion properly set out a prima facie case for reinstatement, what period of dormancy was involved, whether Plaintiff inquired of his counsel regarding the progress of the action, or whether Defendant/Appellee would be prejudiced by the granting of the motion to reinstate.

Plaintiff then, on or about August 16, 2006, noticed for hearing Defendants' original motion to dismiss, setting that hearing for November 20, 2006. Given that the original motion to dismiss had been filed more than four years earlier and that Princess

Beverly had been dismissed by agreement over two years earlier, Defendant/Appellee Moran served a Supplement to the Original Motion to Dismiss on November 9, 2006. In that Supplement, Defendant/Appellee focused on those issues relevant to Mr. Moran as an individual. Specifically, Defendant/Appellee argued that the Complaint failed to state a claim against Defendant Moran in his individual capacity for breach of an oral contract and that, even had the Complaint done so, such a contract would be unenforceable pursuant to the Statute of Frauds. See generally Defendant Peter Moran's Supplement to Motion to Dismiss. Plaintiff/Appellant responded to this Supplement simply by referring to "the facts, arguments, and plaintiff's response to defendant's arguments as set forth in Plaintiff's Response to and Memorandum in Opposition to Defendant's [sic] Motion to Dismiss filed September 19, 2002." Plaintiff's Response to Defendant, Peter K. Moran's Supplement to Motion to Dismiss, p. 1.

The Circuit Court heard Defendant/Appellee's Motion to Dismiss on November 20, 2006. At argument, Judge Berger specifically excluded matters outside the pleadings:

MR. MORRIS: Although, I would suggest to the Court that there is one preliminary question that ought to be resolved by the Court, which is whether matters outside the pleadings should be considered.

THE COURT: They will not be considered.

MR. MORRIS: Thank you.

THE COURT: It's a 12(b) (6) motion.

MR. MORRIS: Thank you, your Honor.

Transcript of Hearing, November 20, 2006, p. 3, lines 1-8. Counsel for Defendant/Appellee argued specifically that, because Princess Beverly had been dismissed with prejudice in the action, any claim remaining against Defendant Moran

must be against him in his individual, not his representative, capacity. *Id.* at pp. 2-3. Counsel then explained that none of the individual, as opposed to representative, allegations against Defendant Moran fulfilled the elements of a claim for a breach of an oral contract. *Id.* at pp. 3-5. Counsel for Defendant Moran also argued that, even assuming for the sake of argument that the elements for breach of an oral contract by Defendant Moran individually had been sufficiently pled, such a claim would be unequivocally barred by the Statute of Frauds. *Id.* at pp. 6-7.

Plaintiff responded first by mistakenly representing to the Court that the pending motion had not been raised under Rule 12(b)(6). *Id.* at pp. 7-8. Plaintiff's additional argument focused on the plural nature of many nouns in the Complaint, *Id.* at pp. 8-9, and Plaintiff's new contention, inconsistent with the Complaint itself, that Moran had not promised to give Plaintiff a portion of the company, but a portion of Moran's proceeds from the sale of the company. *Id.* at pp. 9-11.

On December 8, 2006, Judge Berger entered her Order granting Defendant/Appellee's motion to dismiss. In pertinent part, that Order held as follows:

The Court noted that the Motion to Dismiss had been presented pursuant to West Virginia Rule of Civil Procedure 12(b)(6) and that matters outside the pleadings had been referred to by certain of the documents filed by the parties. The Court, exercising the discretion conferred by Rule 12, elected to exclude all matters outside the pleadings from consideration in relation to the Motion.

The Court has considered all written submissions and oral arguments of counsel and has conducted a thorough review of the Complaint, assuming the allegations therein to be true. After this review, the Court finds no allegations in the Complaint against Peter Moran as an individual, and therefore grants the Motion to Dismiss.

Order, December 8, 2006, p. 1. Judge Berger then ordered the Complaint against Defendant/Appellee dismissed and the matter dismissed from the Court's docket. *Id.* at pp. 1-2.

**V. STANDARDS OF REVIEW**

Review of the Circuit Court's determination to dismiss the Complaint against Defendant/Appellee is *de novo*. Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

Review of the Circuit Court's determination to reinstate the Civil Action after Plaintiff's failure to prosecute is for an abuse of discretion. *Covington v. Smith*, 213 W.Va. 309, 316, 582 S.E.2d 756, 763 (2003); *Dimon v. Mansy*, 198 W.Va. 40, 46, 479 S.E.2d 339, 345 (1996).

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## VII. ARGUMENT

Plaintiff's quixotic pursuit of a share of the no-longer-extant Princess Beverly Coal Company was properly dismissed, and this Court should so hold. Plaintiff should have obtained his interest in the company, if he actually had one, in writing in 1985. Plaintiff should have pursued it, with the Company, through the 1990s. Plaintiff should have sought it in the Company's bankruptcy in this century, in 2002-2003. Having failed to do any of that, Plaintiff should not now be allowed to pursue a claim against this individual defendant, Peter Moran, whose only relevant actions, even as alleged by Plaintiff, were on behalf of the Company.

For all these reasons, the trial court's order dismissing this case was proper and should be affirmed. To that same end, the trial court's kindness in allowing plaintiff to reinstate the case, only to properly dismiss it shortly thereafter, was actually in error and constitutes a separate, alternative ground for finally dismissing Plaintiff's case.

**A. The Circuit Court properly dismissed the Plaintiff's civil action for failure to state a claim against Defendant/Appellee upon which relief may be granted.**

"Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Kessel v. Leavitt*, 204 W.Va. 95, 118, 511 S.E.2d 720, 743 (1998) (citations omitted). The Circuit Court nonetheless properly dismissed the action against Defendant/Appellee for failure to state a cognizable claim for breach of an oral contract, because no set of facts that could be proved consistent with the Plaintiff's allegations against Defendant/Appellant personally would allow relief to be granted the Plaintiff.

**1. The allegations of the Complaint relating to Defendant/Appellant primarily discuss acts conducted in Defendant/Appellant's representative capacity as an agent of Princess Beverly and so do not serve to bind Defendant/Appellant personally.**

It is an ancient principle, and one which the Plaintiff/Appellant has never disputed, that “[a] duly-authorized agent, acting in behalf of his principal, is not personally responsible on the contract when the third party knows that he acts in the name and in behalf of the principal.” *Johnson v. Welch*, 24 S.E. 585, 585 (W.Va. 1896). It is upon this sound principle which the Circuit Court’s dismissal of the Plaintiff/Appellant’s Complaint rests.

The Complaint alleges that Plaintiff lent money to Princess Beverly Coal Company “at the request of Defendant Peter Moran,” Complaint at ¶ 4(a); and that shortly before this loan was due,

defendant Peter Moran in his capacity as President of Princess Beverly Coal Company requested an extension of time [in] which to repay the loan. The consideration for this extension and later repayment was a promise made by Peter Moran that 10 percent of the profits would be given to the plaintiff if the company was ever sold.

*Id.* at ¶ 4(b). (emphasis added) This averment is the allegation of the oral contract allegedly formed between Defendant/Appellee and Plaintiff/Appellant in 1985.

None of the relevant allegations in the Plaintiff/Appellant’s Complaint involve Peter Moran acting in his own behalf. The Complaint identifies Defendant Peter Moran as “president and chief executive officer of defendant Princess Beverly Coal Company during all or most of the time plaintiff was its employee.” Complaint, p. 1, ¶ 3. The Complaint says generally that the Plaintiff/Appellant “made numerous loans to said defendant Coal Company so that said corporation could continue to operate.”

Complaint, p. 2, ¶ 4. Much of the remainder of the allegations of the Complaint constitute various allegations by the Plaintiff/Appellant of other loans made to the corporation after the formation of this alleged contract for a 10 percent interest in Princess Beverly and allegations that Plaintiff/Appellant made those loans in reliance "upon defendants' promise that he owned 10 percent interest in defendant Princess Beverly Coal Company, and if ever sold, he would receive 10 percent of its net sale proceeds." *Id.* at ¶ 7; see also Complaint ¶¶ 4(c) – 8. The Complaint also alleges that the Plaintiff believed that "in the event Princess Beverly Coal Company was ever sold, that he would be entitled to 10 percent of the profits of his assets." *Id.* at ¶ 8 (emphasis added). The Complaint then seeks as relief, *inter alia*, "a judgment recognizing his 10 percent interest in Princess Beverly Coal Company." Complaint, *ad damnum* clause. In short, Plaintiff/Appellant's Complaint alleges that he owned an interest in Princess Beverly and that he behaved as one who owned such an interest would behave, fostering and helping the corporation over time.

In West Virginia, to prove the existence of a contract, a plaintiff must demonstrate, by a preponderance of the evidence, that an offer to contract was made, that the offer was accepted, and that consideration was exchanged between the parties to the contract. *Warden v. Bank of Mingo*, 341 S.E.2d 679 (W. Va. 1985); *McCormick v. Hamilton Business Systems, Inc.*, 332 S.E.2d 234 (W. Va. 1985); *First National Bank of Gallipolis v. Marietta Manufacturing Company*, 153 S.E.2d 172 (W. Va. 1967). Plaintiff/Appellant's complaint fails to plead a *prima facie* case of any of these elements as between himself and Defendant Moran. The Complaint is devoid of any allegation that Defendant/Appellee Moran, on his own account and intending to bind himself rather

than Princess Beverly, made the Plaintiff/Appellant any offer. The Complaint is devoid of any allegation that the Plaintiff/Appellant accepted any such offer from Defendant/Appellee Moran. The Complaint is devoid of any allegation that Defendant/Appellee Moran, as opposed to Princess Beverly, was to provide any consideration to the Plaintiff/Appellant for anything. In fact, the Complaint is devoid of even the conclusory allegation that a contract existed between Defendant/Appellee Moran individually and the Plaintiff/Appellant.

The Complaint shows only the following averments only regarding Defendant Moran in his individual capacity:

- In 1986, Defendant Moran personally borrowed \$2,000 from the Plaintiff, which was repaid (Complaint, p.4, ¶ 6); and
- On February 13, 1997, Defendant Moran "in his own behalf and as President of Defendant Princess Beverly Coal Company, entered into negotiations with Plaintiff to satisfy him with his claim of his equitable interest in the Coal Company," with no resolution being achieved (Complaint, p. 4, ¶ 9). (emphasis added)

These two allegations of course utterly fail to aver the elements of a claim for breach of the alleged 1985 contract at issue in this case.

The Complaint, if it can be said to allege a claim at all, alleges only a breach of contract between Princess Beverly and the Plaintiff/Appellant, negotiated on Princess Beverly's behalf by its President and Chief Executive Officer, Defendant/Appellee. The Complaint does not, however, allege a contract between Defendant/Appellee Moran individually and the Plaintiff. Therefore, if the Plaintiff had a contract with any entity for

a 10 percent interest in Princess Beverly, that entity was Princess Beverly itself. Plaintiff/Appellant chose to dismiss Princess Beverly, now bankrupt, from this action with prejudice.

It is beyond doubt that, even if the Plaintiff/Appellant were to prove every allegation made against Defendant/Appellee in his individual capacity, there would still be no legal foundation upon which to grant the Plaintiff/Appellant relief. Thus the Circuit Court properly dismissed this civil action as not stating a claim against Defendant/Appellee.

**2. *Even had the Complaint alleged a claim against Defendant/Appellee for breach of contract, such a contract would be unenforceable pursuant to the Statute of Frauds.***

Plaintiff/Appellant's prayer for relief made clear what he sought as a result of the insufficiently alleged breach of contract: "a judgment recognizing his 10 percent interest in Princess Beverly Coal Company," an accounting of the sale of Princess Beverly Coal Company, and "10 percent of the net sale proceeds of Princess Beverly Coal Company." Complaint, p. 5. In short, Plaintiff wishes to be treated as a shareholder of Princess Beverly by virtue of an alleged oral agreement with Defendant Moran. Assuming for the sake of argument that the Plaintiff had adequately pled a breach of contract claim against Defendant Moran, the claim would be indisputably barred by the Statute of Frauds.

In 1985, when this purported oral contract for an interest in Princess Beverly was allegedly executed,<sup>2</sup> West Virginia Code § 46-8-319 provided that no contract for the

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<sup>2</sup> "The rights and duties of the parties to a contract are controlled by the law in effect at the time the contract was executed." *McGinnis v. Cayton*, 312 S.E.2d 765, 768 (W.Va. 1984).

sale of securities is enforceable by action unless (a) the contract is in writing, (b) a stock certificate has been delivered to the purchaser, (c) within a reasonable time after the transfer of the interest the buyer sends a written memorial of the transaction to the seller who then fails to object in writing to the memorial, or (d) the party against whom enforcement of the oral contract is sought admits the existence of a contract. W.Va. Code § 46-8-319 (1985). The Uniform Commercial Code, of which the foregoing Statute of Frauds is a part, defined "securities" in 1985 as either certificated or uncertificated. W.Va. Code § 46-8-102(b) and (c) (1985). An uncertificated security, by statute, is "a share, participation, or other interest in . . . an enterprise of the issuer or an obligation of the issuer" which (i) is not represented by a document and the transfer of which is registered upon the books of the issuer, (ii) is of a type commonly dealt in on securities exchanges or markets, and (iii) is one of a class of obligations divisible into shares, interests, or obligations. W.Va. Code § 46-8-102(b) (1985).

Plaintiff's claimed 10 percent interest in Princess Beverly Coal Company is just such a share or interest in an enterprise. Plaintiff/Appellant's brief makes this point clear: "Appellee Moran's offer was for Appellant Hoover to receive an equitable interest in the company." Appellant's Brief, p.16. A ten percent interest in a company, whether equitable or otherwise, was an "uncertificated security" under West Virginia law in 1985. However, by virtue of its status as a security, no oral contract for such an interest may be the basis of a claim.<sup>3</sup>

The foregoing Statute of Frauds argument was raised in the original Motion to Dismiss by both Defendants. However, the argument resonated more fully in the

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<sup>3</sup> In 1995, W.Va. Code §46-8-113 was amended to remove a sale or purchase of securities from the Statute of Frauds, further underscoring the bar in 1985 to this alleged contract.

absence of former Defendant Princess Beverly. Plaintiff essentially sought to exercise the rights of a shareholder--an accounting and 10 percent of the net proceeds of the sale of Princess Beverly--against the alleged former CEO and President of the long ago sold company whose debts and obligations were discharged in bankruptcy. See Notice of Filing of Bankruptcy, Docket # 16, Nov. 25, 2002. However, Plaintiff utterly failed to provide to the Circuit Court in his Complaint any legally sufficient claim that Defendant Moran in his individual capacity should be required to provide such an accounting and disbursement. Even had the Plaintiff such a right, the right should have been exercised in the bankruptcy proceedings of which his counsel indisputably had notice. All of his allegations about contracts, loans, even later settlement negotiations with Mr. Moran while he was President of the Company, should have been raised in the bankruptcy, but were not.

Given the foregoing, the Circuit Court was correct in dismissing the Plaintiff's Complaint for failure to state a claim against Defendant/Appellant upon which relief could be granted.

**3. Plaintiff/Appellant's claim that Defendant/Appellee is estopped from raising the Statute of Frauds was not raised below and so is waived.**

Plaintiff/Appellant now raises for the first time the argument that Appellee is estopped from raising the Statute of Frauds as a defense. This argument was not raised in any of the filings of record or in oral argument at Defendant/Appellee's motion to dismiss. It is also without merit. The purpose of the Statute of Frauds is to avoid precisely the sort of belated and vague claims brought by Plaintiff in this case.

Procedurally, it is also abundantly clear in West Virginia jurisprudence that issues raised for the first time on appeal will not be considered by this Court. *Minshall v. Health Care & Retirement Corp. of America*, 208 W.Va. 4, 7-8, 537 S.E.2d 320, 323-324 (2000); *Mayhew v. Mayhew*, 205 W.Va. 490, 506, 519 S.E.2d 188, 204 (1999) (“Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal.”); *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W.Va. 570, 585, 490 S.E.2d 657, 672 (1997) (“We frequently have held that issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this Court.”); *Koffler v. City of Huntington*, 196 W.Va. 202, 206 n. 6, 469 S.E.2d 645, 649 n. 6 (1996) (“Because plaintiff’s arguments ..., and the City’s response thereto, were neither raised, argued nor considered by the circuit court on summary judgment, the subject of this appeal, they are not reviewable by this Court.”); *State v. Miller*, 197 W.Va. 588, 597, 476 S.E.2d 535, 544 (1996) (“Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal.”); *State v. Miller*, 197 W.Va. 588, 597, 476 S.E.2d 535, 544 (1996) (“Our general rule is that nonjurisdictional questions not raised at the circuit court level, but raised for the first time on appeal, will not be considered.”); *Whitlow v. Board of Educ. of Kanawha County*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993) (“When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal.”). Accordingly, this Court must reject any estoppel argument raised by the Appellant.

**4. Appellant's recitation of "facts" outside the Complaint is of no consequence to this Court's or the Circuit Court's determination of whether the Complaint stated a cause of action against Defendant/Appellee.**

West Virginia Rule of Civil Procedure 12(b) provides that, where in relation to a Rule 12(b)(6) motion "matters outside the pleadings are presented to and not excluded by the court," such a motion should be considered under Rule 56. (emphasis added); see also *Harrison v. Davis*, 478 S.E.2d 104, 110 -111 (W.Va. 1996) (holding that, even if the circuit court inappropriately relied on matters outside the pleadings, this Court will affirm the dismissal if the Rule 12(b)(6) standards are met without reference to the extrinsic materials).

As noted above, the Circuit Court below specifically excluded matters outside the pleadings in considering its ruling on the Motion to Dismiss:

MR. MORRIS: Although, I would suggest to the Court that there is one preliminary question that ought to be resolved by the Court, which is whether matters outside the pleadings should be considered.

THE COURT: They will not be considered.

MR. MORRIS: Thank you.

THE COURT: It's a 12(b) (6) motion.

MR. MORRIS: Thank you, your Honor.

Transcript of Hearing, November 20, 2006, p. 3, lines 1-8. Appellant acknowledges in his brief that "the circuit court, exercising the discretion conferred by Rule 12, elected to exclude all matters outside the pleadings from consideration in relation to the Motion." Appellant's Brief, p. 8, citing Order of December 8, 2006, p. 1. Despite this acknowledgement, the Appellant presents to this Court nearly seven pages of "facts" taken from the Plaintiff/Appellant's self-serving Affidavit presented in response the

Defendants' original Motion to Dismiss. Appellant's Brief, pp. 1-7. These alleged facts were not considered by the Circuit Court below, and are therefore irrelevant to the question of whether the Circuit Court erred below. This Court too should exclude these alleged "facts" from consideration in determining whether the Plaintiff/Appellant's Complaint states a claim against Defendant/Appellee upon which relief may be granted.

**5. Appellant's late-conceived argument regarding piercing the corporate veil was not raised below and must be disregarded; even had the issue been raised below, no allegations in the Complaint exist to support such a theory.**

As noted in detail above, issues raised for the first time on appeal will not be considered by this Court. See Section VII.A.3 above and authority there cited. Plaintiff/Appellant's brief argues that Defendant/Appellee "must be held individually and personally liable for breach of the contract with Appellant Hoover pursuant to the equitable remedy of piercing the corporate veil." Appellant's Brief, p. 19. This brief goes on to expound on the remedy of piercing the corporate veil for the following seven pages. *Id.*, pp. 19-26. This argument, however, was never raised below, either in oral argument regarding the motion to dismiss or in the written responses to the Defendant/Appellant's filings in relation to the motion to dismiss. Accordingly, the issue must not be considered by this Court.

Even were the court to disregard the legion of authority directing it not to consider this argument, such an argument would nonetheless fail because the allegations of the Complaint do not, even if true, support piercing the corporate veil. The case of *Laya v. Erin Homes, Inc.*, upon which Appellant relies, provides that

[i]n a case involving an alleged breach of contract, to 'pierce the corporate veil' in order to hold the shareholder(s) actively participating in the

operation of the business personally liable for such breach to the party who entered into the contract with the corporation, there is normally a two-prong test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement).

*Laya v. Erin Homes, Inc.*, 177 W.Va. 343, 343-344, 352 S.E.2d 93, 94 (1986). This decision provides nineteen separate factors which should be reviewed to determine whether there is such unity of interest and ownership that that the separate personalities of the corporation and of the individual shareholder no longer exist:

- (1) commingling of funds and other assets of the corporation with those of the individual shareholders;
- (2) diversion of the corporation's funds or assets to noncorporate uses (to the personal uses of the corporation's shareholders);
- (3) failure to maintain the corporate formalities necessary for the issuance of or subscription to the corporation's stock, such as formal approval of the stock issue by the board of directors;
- (4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation;
- (5) failure to maintain corporate minutes or adequate corporate records;
- (6) identical equitable ownership in two entities;
- (7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties);
- (8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;
- (9) absence of separately held corporate assets;
- (10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation;
- (11) sole ownership of all the stock by one individual or members of a single family;
- (12) use of the same office or business location by the corporation and its individual shareholder(s);
- (13) employment of the same employees or attorney by the corporation and its shareholder(s);
- (14) concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, and concealment of personal business activities of the shareholders (sole shareholders do not

reveal the association with a corporation, which makes loans to them without adequate security);

(15) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities;

(16) use of a corporate entity as a conduit to procure labor, services or merchandise for another person or entity;

(17) diversion of corporate assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;

(18) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity; or the use of a corporation as a subterfuge for illegal transactions;

(19) the formation and use of the corporation to assume the existing liabilities of another person or entity.

*Laya*, 177 W.Va. 343, 347-348, 352 S.E.2d 93, 98-99 (1986) The Complaint below is utterly devoid of, and Plaintiff/Appellant has not pointed to, any allegation of unity of interest and ownership between Defendant Moran generally, or any allegation which would support a finding of any of the nineteen factors set forth in *Laya* as indicators of such unity. There is no allegation that Princess Beverly was some mere legal formality; indeed, Plaintiff's claims depended upon the substantial nature of Princess Beverly. Additionally, Appellant's "factual" argument in relation to this late-raised claim is limited to one allegation of fact taken not from the Complaint, but from the Affidavit excluded by the Circuit Court in its consideration of the Motion to Dismiss. Appellant's Brief, p. 23.

Given this absence, Plaintiff/Appellant cannot reasonably suggest to the Court that an unpled claim to pierce the corporate veil between Defendant/Appellee and Princess Beverly somehow indicates error on the part of the Circuit Court below.

Further, as Plaintiff/Appellant well knows, Defendant/Appellee is not now and was not at the time of the filing of the civil action, a shareholder in Princess Beverly. The complaint specifically alleges that Princess Beverly was sold to Addington Enterprises; Complaint, ¶ 10; and also attaches as an exhibit portions of the stock

purchase agreement in which Appellee's shares in Princess Beverly were sold. If, at the time of the filing of the Complaint, Defendant/Appellee Moran was not a shareholder of Princess Beverly, it is abundantly clear that there is no corporate veil between the two entities for any court to pierce.

Finally, piecing the corporate veil is generally a tool used by plaintiffs at the end of a case, seeking recourse for damages, not a defense to a motion to dismiss. Accordingly, even had this issue been raised below, the issue could not, as a matter of law, have been prevented the dismissal of the Plaintiff's Complaint for failure to state a claim upon which relief could be granted.

**B. The Circuit Court abused its discretion in granting the Plaintiff's motion to reinstate the civil action after more than two years of inactivity.**

This Court has identified those factors which indicate an abuse of discretion: "an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." *State ex rel. Leung v. Sanders*, 213 W.Va. 569, 575, 584 S.E.2d 203, 209 (W.Va.,2003); *see also State v. Hedrick*, 204 W.Va. 547, 553, 514 S.E.2d 397, 403 (1999); *Gentry v. Mangum*, 195 W.Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995). Although the abuse of discretion standard is lenient, appellate review under this standard is not to be a "rubber stamp." *Sanders*, 213 W.Va. at 575, 584 S.E.2d at 209. In this instance, the Circuit Court ignored multiple material factors deserving significant weight, including the Plaintiff's failure to show good cause for his neglect in prosecution of the case, the amount of time involved in the dormancy of the case, any inquiries by Plaintiff to his counsel, and the prejudice to Defendant/Appellee in allowing reinstatement.

**1. The Circuit Court erroneously ignored the fact that the Plaintiff failed to show any good cause which adequately excused his neglect in prosecuting the case.**

The Plaintiff/Appellant failed to show good cause for the failure to prosecute in his motion to reinstate, and the Circuit Court failed to make the findings necessary to reinstate the Plaintiff's civil action. As Justice Cleckley wrote in Syl. Pt. 3 of *Dimon v. Mansy*, "should a plaintiff seek reinstatement under Rule 41(b), the burden of going forward with the evidence and the burden of persuasion shall be the same as if the plaintiff had responded to the court's initial notice." 198 W.Va. 40, 43, 479 S.E.2d 339, 342 (1996). In short, once the Court determined to hear the Plaintiff's motion to reinstate after the delay between dismissal and the motion to reinstate, the Plaintiff had the burden of explaining to the Court why the case had been inactive in the first place. That burden requires the dismissed Plaintiff to "make a showing of good cause which adequately excuses his neglect in prosecution of the case." *Covington v. Smith*, 582 S.E.2d 756, 213 W.Va. 309 (2003).

The Plaintiff never identified, in filings or in argument, any evidence of good cause in support of the Plaintiff's failure to prosecute the action below. The only allegation that the Plaintiff raised below that could even be construed as good cause for failure to prosecute is the allegation that "there were motions pending before the Court awaiting ruling at the time this action was dismissed." Plaintiff's Motion to Reinstate, p. 1. A review of the record shows that the only motion pending at the time of the Court's dismissal for failure to prosecute was the motion to dismiss the Complaint filed by the defendants on July 30, 2002. This pending motion of the defendants does not represent activity by the Plaintiff and did not excuse the Plaintiff's failure to advance the

litigation below. At oral argument, Plaintiff's counsel suggested that the case had been moved forward by discussions with Princess Beverly ultimately leading to that Defendant's dismissal with prejudice, but no explanation was offered for the fact that there was a twenty-five month delay between the agreed dismissal order and the motion to reinstate. In fact, Plaintiff's counsel candidly admitted that there was no such explanation:

MR. MYER: Yes, your Honor. I understand there was a lot of time lag there. We – part of the time that has caused the lag was we were definitely negotiation with the other defendant in the case, Princess Beverly Coal, regarding its status, and finally we agreed upon an order to dismiss them entirely. And also in the interim there was a bankruptcy and a, a notice that there was a bankruptcy, and on the next day -- that delayed it. So, we just really got off, off of a schedule because of the intervening matters of the bankruptcy and the change of counsel and the change of address.

And so, we – certainly I guess we could be determined a bit dilatory in not scheduling an following up quicker but we got off on a tangent with the dismissal of Beverly; then after that they were, there was a stay, and that's the only, that's the only excuse, your Honor.

Transcript of July 18, 2006, Hearing, pp. 5-6. Of course, the bankruptcy, the notice of bankruptcy, the change of counsel, and the change of address attendant to that change of counsel all happened before the agreed dismissal of Princess Beverly and the subsequent twenty-five month failure to prosecute. No explanation was offered for Plaintiff's apparent failure to seek or obtain relief in the bankruptcy itself. As a matter of law, no good cause was alleged or shown below for this failure to litigate, and the Circuit Court's failure to make any findings on this issue constituted an abuse of discretion, as did the Circuit Court's order reinstating the action in the absence of such findings.

**2. The Court erroneously made no findings in relation to the amount of time involved in the dormancy of the case, any inquiries by Plaintiff to his counsel, or any other relevant factors.**

In addition to the evidence of good cause (not present here) adduced by a movant who seeks reinstatement, the ruling court "should also consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause . . . ." *Dimon v. Mansy*, 198 W.Va. 40, 43, 479 S.E.2d 339, 342 (1996). Defendant/Appellee pointed out to the Court below that over two years had elapsed since any impediment to the Plaintiff's ability to move forward had been removed. Reply to Plaintiff's Motion to Reinstate Action, p. 6. Defendant/Appellee pointed out that the record was devoid of any inquiry by the Plaintiff to his counsel. *Id.* Yet the Court made no findings on these issues.

Importantly, Defendant/Appellee raised a number of additional relevant factors bearing on good cause. Specifically, Defendant/Appellee pointed out that Plaintiff's action is based on an alleged oral contract formed between the Plaintiff and Defendant in 1985 and allegedly breached on February 18, 1999. Given that this alleged contract is oral, the memories of key witnesses and their recollections of the circumstances and events of this fourteen-year period were crucial to the defense of this action. These witnesses may be unavailable, having moved or died. These witnesses' memories may have deteriorated over time. Further, no discovery was undertaken to preserve such evidence. Today, over twenty years have elapsed since the events surrounding this alleged oral contract. In a real sense, the evidence on which Defendant/Appellee Moran would have to rely for his defense has almost certainly deteriorated significantly,

and Defendant/Appellee argued to the Court that the deterioration of that evidence would be a substantial prejudice to Defendant Moran should this action be reinstated.

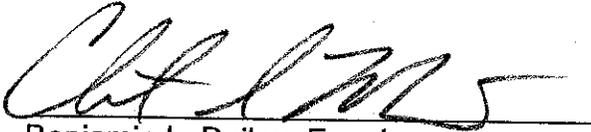
In its ruling allowing the reinstatement of the Plaintiff's civil action, the Circuit Court failed to make a single finding regarding good cause for failure to prosecute for the two-year period of inactivity and failed to make any findings regarding prejudice to the defendant from reinstatement. This failure means that multiple material factors deserving significant weight were ignored in this determination and therefore that the Circuit Court abused its discretion in ordering the Plaintiff's civil action reinstated to the active docket. Such an abuse of discretion requires reversal of the Circuit's decision to reinstate the underlying civil action. Had the Circuit Court more fully analyzed the motion to reinstate, there would have been no necessity to hear Defendant/Appellee's motion to dismiss, and the issues related to the propriety of dismissal for failure to state a claim presently appealed by the Plaintiff/Appellant would be mooted.

#### **VIII. CONCLUSION AND PRAYER FOR RELIEF**

Twenty-two years after the alleged formation of an oral contract which would, if it had existed, been unenforceable at inception pursuant to the Statute of Frauds, the Appellee comes to this Court seeking to have the Circuit Court's proper decision to dismiss his claim overturned. The only inappropriate ruling below was the Circuit Court's decision to allow the Plaintiff/Appellant to reinstate his claims after over two years of failure to pursue his faulty claims. This Court can end this saga, and do so justly, in either of two ways: affirming the Circuit Court's proper decision to dismiss the civil action below for failure to state a claim upon which relief may be granted, or

overruling the Circuit Court's erroneous decision to allow the reinstatement of the civil action below. Defendant/Appellee respectfully asks this Court to do that which justice requires, and conclude this pointless litigation.

*Respectfully submitted,  
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No. 33460

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOHNNIE HOOVER,

Appellant,  
Plaintiff Below,

v.

Civil Action No. 02-C-1058  
Irene C. Berger, Circuit Judge  
Thirteenth Judicial Circuit

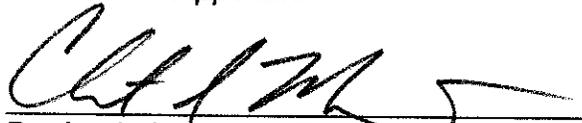
PETER K. MORAN,

Appellee,  
Defendant Below.

CERTIFICATE OF SERVICE

I, Christopher S. Morris, counsel for the Appellee, do hereby certify that true and exact copies of the foregoing **Brief on Behalf of the Appellee Peter K. Moran** were served upon the following by first-class mail, postage prepaid, this **1st day of October, 2007**:

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