

IN THE SUPREME COURT OF APPEALS
OF THE STATE WEST VIRGINIA

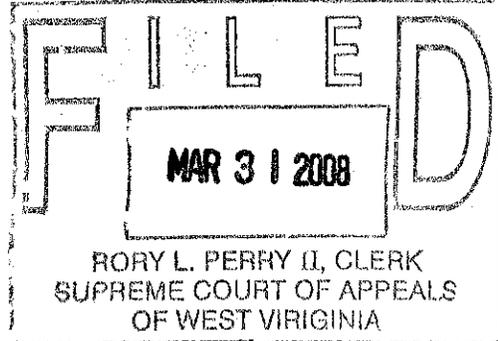
CHARLES V. BEAHM, JR.,
KATHRYN B. BEAHM,
KATHY A. JOHNSON,
RANDY W. JOHNSON, and
THE JEFFERSON COUNTY
COUNCIL ON AGING

Appellants,

v.

7-ELEVEN, INC. and
MELISSA SPINKS,

Appellees.



No. 07-2479

Appeal from the Circuit Court of Jefferson
County, West Virginia

BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. OVERVIEW	1
II. KIND OF PROCEEDING AND NATURE OF RULING BELOW	1
III. STATEMENT OF UNDISPUTED FACTS	3
IV. POINTS, AUTHORITIES AND LEGAL ANALYSIS	5
A. <i>Res judicata</i> is a complete bar to this suit	5
1. A final adjudication on the merits was reached in <i>Proctor</i>	6
2. The <i>Beahm</i> and <i>Proctor</i> plaintiffs are in privity with one another.....	6
3. The causes of action in <i>Beahm</i> are identical to the causes of action in <i>Proctor</i> which were resolved or could have been resolved, had they been presented.	12
4. The <i>Beahms</i> and the <i>Johnsons</i> admitted in <i>Proctor</i> that <i>res judicata</i> would bar their claims.....	14
B. The statute of limitations is a non-issue in this case.....	15
C. Summary judgment was appropriate because the Plaintiffs have no recoverable damages under West Virginia law.	17
1. Because the Plaintiffs' alleged property damage is reparable, their recovery is limited to the cost of repair.	17
2. The Plaintiffs did not lose the use of their properties.	20
3. Damages for mental anguish are unsupported by the record, as well.	22
V. CONCLUSION.....	25

TABLE OF AUTHORITIES

CASES

<i>Blake v. Charleston Area Med. Ctr., Inc.</i> , 201 W. Va. 469, 498 S.E.2d 41 (1997).....	6,13
<i>Conley v. Spillers</i> , 171 W. Va. 584, 588, 301 S.E.2d 216, 220 (1983).....	5, 6
<i>Evans v. Mutual Mining</i> , 199 W.Va. 526, 485 S.E.2d 695 (1997).....	22, 23
<i>Galanos v. National Steel Corp.</i> , 178 W. Va. 193, 195 (1987).....	10
<i>Gribben v. Kirk</i> , 195 W. Va. 488, 499 (1995).....	7, 8
<i>Hardman Trucking, Inc. v. Poling Trucking, Inc.</i> , 176 W. Va. 575, 580, 346 S.E. 2d 661, 556 (1986).....	24
<i>Jarrett v. E.L. Harper and Son, Inc.</i> , 160 W.Va. 399, 235 S.E.2d 362 (1977).....	17, 18, 20, 21, 26
<i>Montana v. United States</i> , 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979).....	5, 11, 12
<i>Pak-Mor Mfg. Co. v. Brown</i> , 364 S.W.2d 89 (Tex. App. 1962).....	24
<i>Petrelli v. West Virginia-Pittsburgh Coal Co.</i> , 86 W.Va. 607, 104 S.E. 103 (1920).....	13, 14
<i>Proctor v. 7-Eleven, Inc.</i> , 180 Fed. Appx. 453, 2006 U.S. App. LEXIS 12204 (4 th Cir. 2006)(unpublished).....	2, 14, 19, 23, 24
<i>Roberts v. W. Va. Am. Water Co.</i> , 655 S.E.2d 119, 124 (W. Va. 2007).....	16, 17
<i>Rowe v. Grapevine Corp.</i> , 206 W. Va. 703, 709 (1999).....	7
<i>State v. Miller</i> , 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995).....	5, 7
<i>Stemler v. Florence</i> , 350 F.3d 578, 587 (6th Cir. 2003).....	6
<i>Tolley v. Carboline Co.</i> , 217 W. Va. 158, 164 (2005).....	6
<i>Walle Corp. v. Rockwell Graphics Systems, Inc.</i> , 1992 U.S. Dist. LEXIS 14433 (E.D. La. 1992).....	24
<i>W. Va. Human Rights Comm'n v. Esquire Group, Inc.</i> , 217 W. Va. 454, 460-461 (2005)	7, 8, 10

RULES

W.Va. R. Civ. P., Rule 56..... 25

OTHER AUTHORITIES

46 Am Jur 2d Judgments § 587..... 7

I. OVERVIEW

This suit was conceived as an end-run around the rulings of the United States District Court for the Northern District of West Virginia in a case styled *Proctor v. 7-Eleven, Inc.*,¹ holding that the statute of limitations had expired on the Plaintiffs' claims. The Plaintiffs disagreed with the ruling, but instead of appealing to the Fourth Circuit, they filed an identical suit in state court, hoping for a different result. Jefferson County Circuit Judge David H. Sanders, recognizing the duplication, stayed this case until final judgment was entered in the federal suit, and all appeals were exhausted. He then entered summary judgment in 7-Eleven's favor on two grounds: (1) that this suit was barred by *res judicata*, and (2) that the Plaintiffs failed to present evidence demonstrating any damages recoverable under established West Virginia law. Judge Sanders' judgment must be affirmed because he correctly applied the elements of *res judicata* and correctly ruled that under West Virginia law, the Plaintiffs' evidence of damages was insufficient to create a genuine trialworthy issue.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This case is the second of two suits arising from a January, 2000 gasoline release at 7-Eleven, Inc.'s store in Ranson, West Virginia. The Plaintiffs below claim that gasoline from 7-Eleven's store contaminated groundwater that circulates beneath their properties, and that their properties have been devalued as a result. All of the Plaintiffs' properties are served by a public water system. None of the Plaintiffs have expended a single penny to clean up their properties. None of them have ever attempted to sell their properties. Nearly two years before any lawsuit was ever filed, 7-Eleven, Inc. began to pay, and has continued to pay, the entire cost of remediating these properties.

¹ Civil Action No. 3:02-CV-21 (N.D. W.Va.) (Broadwater, J.); Docket No. 05-1598, United States Court of Appeals for the Fourth Circuit.

The earlier suit, *Proctor v. 7-Eleven, Inc.*, was dismissed on summary judgment by the late Judge W. Craig Broadwater of the U.S. District Court for the Northern District of West Virginia. The present case is, for all intents and purposes, identical to *Proctor*. *Proctor* involved the same core facts, the same defenses, attorneys, expert witnesses, and expert opinions. In fact, four of the five Plaintiffs herein sought to join in the *Proctor* case, but were disallowed because the statute of limitations had expired on their claims. The Plaintiffs filed this second suit in state court to avoid Judge Broadwater's ruling refusing the Beahms and Johnsons joinder as plaintiffs in *Proctor*. To prevent removal of the case to federal court, the *Beahm* plaintiffs sued a non-diverse defendant, store manager Melissa Spinks. The case proceeded through discovery concurrently with *Proctor*. However, because *Proctor* was adjudicated first and presented identical questions of fact and law, Judge Sanders stayed this suit so that he could have the benefit of the Fourth Circuit's review of the *Proctor* case. The Fourth Circuit affirmed the summary judgment in favor of 7-Eleven in *Proctor* on May 18, 2006. *Proctor v. 7-Eleven, Inc.*, 180 Fed. Appx. 453, 2006 U.S. App. LEXIS 12204 (4th Cir. 2006) (unpublished). Although Judge Broadwater's ruling on the statute of limitations as to the Beahms and Johnsons could have been appealed, it was not. Thus, the interlocutory order denying their joinder on statute of limitations grounds became final.

The *Proctor* plaintiffs' petition for rehearing with the Fourth Circuit was denied, and the stay was lifted in *Beahm* on October 5, 2006. By order dated January 4, 2007, Judge Sanders granted summary judgment to the Defendants, finding that the judgment in *Proctor* was a binding prior adjudication on the merits of the claims set forth in *Beahm*, and that even if *res judicata* and collateral estoppel were not a complete bar, the Plaintiffs' claims were properly dismissed for the same reasons noted by Judge Broadwater and the Fourth Circuit in *Proctor*.

(See Order Granting Defs.' Mot. for Summ. J. dated 01/04/2007, hereafter "Judgment Order")
(Bates #1853)² Judge Sanders correctly recognized that *Beahm* and *Proctor* are two sides of the same coin, and that the case had already been adjudicated.

III. STATEMENT OF UNDISPUTED FACTS

When 7-Eleven received notice of the release in its underground storage tank, it immediately began the remediation process as required by state and federal law. 7-Eleven, Inc. and its insurers have paid all of the costs of remediating the site, which includes all of the Plaintiffs' properties, such that the Plaintiffs have not personally paid or expended any funds to repair their properties.

The first suit was filed by Vernon Proctor and seven other property owners in Ranson on February 21, 2002. (See Proctor Compl., attached as Ex. H to Defs.' Mot. for Summ. J. dated 11/06/2006) (Bates #1567) Even though they had never tested their properties for contaminants, the plaintiffs all alleged their groundwater was contaminated by the release of gasoline at 7-Eleven's Ranson store. After their case was removed to federal court, the plaintiffs in *Proctor* moved to amend their complaint twice. The first motion sought to add a former store manager, Melissa Spinks, as a defendant, and the second sought to add Charles and Kathryn Beahm, and Randy and Kathy Johnson as parties plaintiff. The court denied both motions for leave on the ground that the statute of limitations had expired for the torts alleged in the proposed amended complaints. (See Orders attached as Exs. J and K to Defs.' Mot. for Summ. J.) (Bates # 1567)

² An index for the designated record herein created by the Jefferson County Circuit Clerk provides bates number ranges for documents contained in the court record. Where possible, the beginning bates number of the documents referenced are provided herein. Because Defendants do not have a copy of the entire bates stamped record, pinpoint cites are not possible.

The Beahms and the Johnsons then filed a petition for a writ of mandamus with the United States Court of Appeals for the Fourth Circuit to force Judge Broadwater to allow them to join *Proctor* as parties plaintiff. (See Pet. for Writ of Mandamus, attached as Ex. O to Defs.' Renewed Mot. to Dismiss) (Bates #311) While their petition was pending, they filed, but did not serve, the *Beahm* suit just in case their bid to join in *Proctor* failed. After the Fourth Circuit summarily denied their mandamus petition, the Beahms and the Johnsons added the Jefferson County Council on Aging as a plaintiff and served their amended complaint in state court. (See Am. Compl. dated 03/06/2003) (Bates #12)

On April 26, 2005, Judge Broadwater entered summary judgment in favor of 7-Eleven, Inc. in *Proctor*, holding that the plaintiffs had no evidence of recoverable damages under West Virginia law. (See Order attached as Ex. M to Defs.' Mot. for Summ. J.) (Bates #1567) Although the plaintiffs appealed, they did not cite as error the court's refusal to allow the Beahms and Johnsons to join as parties plaintiff, and the Beahms and Johnsons made no attempt to intervene post-judgment for the purpose of challenging the ruling. The Fourth Circuit affirmed Judge Broadwater's judgment in *Proctor* by unpublished opinion dated May 18, 2006. *Proctor v. 7-Eleven, Inc.*, 180 Fed. Appx. 453, 2006 U.S. App. LEXIS 12204 (4th Cir. 2006).

The *Beahm* case relies upon the same expert real estate appraiser and environmental compliance witness as *Proctor*. Richard Parli, the Plaintiffs' appraiser, opined that any impact on the subject properties of the environmental contamination is temporary and that upon complete remediation, the monitoring wells (nearly all of which are in the public rights of way) will be removed and no stigma would remain. (See Report of Richard Parli, Ex. E to Defs.' Mot. for Summ. J., at p. 4) (Bates #1567) Plaintiffs' environmental compliance expert, Dr. Nicholas Cheremisinoff, also opined that the damage to the Plaintiffs' properties is

temporary, and that once the properties are remediated, the properties' normal market values will be restored. (Depo. of Nicholas Cheremisinoff, attached as Ex. F to Defs.' Mot. for Summ. J.) In other words, the evidence the *Beahms* wished to present at trial was virtually identical to the evidence presented in *Proctor*.

IV. POINTS, AUTHORITIES AND LEGAL ANALYSIS

The judgment of the Circuit Court of Jefferson County must be affirmed because the court below correctly ruled (1) that the judgment in *Proctor* bars this suit under the doctrines of *res judicata* and collateral estoppel, and (2) that even if the suit were not barred by those doctrines, it was properly dismissed because, as in *Proctor*, the Plaintiffs offered no evidence of recoverable damages under West Virginia law.

A. *Res judicata* is a complete bar to this suit.

Judge Sanders correctly applied the elements of *res judicata* in determining that this suit is barred by the final judgment in *Proctor*. *Res judicata* or claim preclusion "generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action." *State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995) (citing *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414, 66 L. Ed. 2d 308, 313 (1980); *In re Estate of McIntosh*, 144 W. Va. 583, 109 S.E.2d 153 (1959)). Claim preclusion serves to "conserve[] judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 220 (1983) (quoting *Montana v. United States*, 440 U.S. 147, 153-54, 99 S. Ct. 970, 973-74, 59 L. Ed. 2d 210, 217 (1979)).

This Court summarized the three requirements for invoking *res judicata* or claim preclusion in *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997): (1) “a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings;” (2) “the two actions must involve either the same parties or persons in privity with those same parties;” and (3) “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.” Syl. pt. 4, *id.* The third prong of this test is most often the focal point, since “the central inquiry on a plea of *res judicata* is whether the cause of action in the second suit is the same as in the first suit.” *Conley*, 171 W. Va. at 588, 301 S.E.2d at 220. Each of these three elements is analyzed in turn below.

1. A final adjudication on the merits was reached in *Proctor*.

The parties agree that the first element of *res judicata* is satisfied because on April 26, 2005 the United States District Court entered a final adjudication on the merits in favor of 7-Eleven. *Tolley v. Carboline Co.*, 217 W. Va. 158, 164 (2005) (holding that summary judgment is a final adjudication on the merits) (citing *Stemler v. Florence*, 350 F.3d 578, 587 (6th Cir. 2003) (“A summary judgment order is a decision on the merits.”)). The Plaintiffs apparently do not dispute that the federal court had jurisdiction over *Proctor* and that its decision is final. (Br. of Appellants at 6). This element is therefore satisfied.

2. The *Beahm* and *Proctor* plaintiffs are in privity with one another.

The Plaintiffs argue that the second element is not met because the Plaintiffs in *Beahm* were not technically parties in *Proctor*, nor were they in privity with the *Proctor*

plaintiffs. (Br. of Appellants at 7) However, Judge Sanders correctly recognized that under well-settled West Virginia law, the *Beahm* and *Proctor* plaintiffs were in privity with each other.

A party cannot escape the application of *res judicata* or collateral estoppel³ simply because he was not formally joined as a party in the prior litigation. As the West Virginia Supreme Court of Appeals explained in *Gribben v. Kirk*, 195 W. Va. 488, 499 (1995),

nonparties can be bound to a judgment or ruling where they are in privity with parties to the prior litigation, and the privity concept is fairly elastic under West Virginia law, as elsewhere. Logic suggests that collateral estoppel can achieve its goals only if the preclusive effects occasionally can reach persons, who, technically were not parties to the original action. The pitfalls of a more mechanical rule are obvious: making party status a sine qua non for the operation of collateral estoppel opens the door to countless varieties of manipulation, including claim-splitting, suits by proxy, and forum shopping.

Id. at 499 n.21.

Courts acknowledge that “there is no generally prevailing definition of privity which can be automatically applied to all cases involving *res judicata* and collateral estoppel.” 46 Am Jur 2d Judgments § 587; see *W. Va. Human Rights Comm'n v. Esquire Group, Inc.*, 217 W. Va. 454, 460-461 (2005) (“the concept of privity with regard to the issue of claim preclusion is difficult to define precisely but the key consideration for its existence is the sharing of the same legal right by parties allegedly in privity, so as to ensure that the interests of the party against whom preclusion is asserted have been adequately represented.”). It has been recognized that “[p]rivity ... ‘is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the *res judicata*.’” *Rowe*, 206 W. Va. at 715. Put another way, “preclusion is fair so long as the relationship between the

³ The concepts of *res judicata* and collateral estoppel are very similar. As this Court recognized in *Rowe v. Grapevine Corp.*, 206 W. Va. 703, 709 (1999), “*Res judicata* ‘is often analyzed . . . to consist of two preclusion concepts: ‘issue preclusion’ and ‘claim preclusion’.”

nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party." *Gribben v. Kirk*, 195 W.Va. 488, 498 n. 21, 466 S.E.2d 147, 157 n. 21 (1995) (quoting 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4466 at 430 (1981)); *Esquire Group, Inc.*, 217 W. Va. 454, 460-461.

a. The Beahms and Johnsons litigated their claims in *Proctor*.

Although the Beahms and Johnsons were not technically "parties plaintiff" in *Proctor*, it was not for lack of trying. They retained the same legal counsel as the *Proctor* plaintiffs, then sought leave of court to amend the *Proctor* complaint to add themselves as parties plaintiff. When Judge Broadwater denied the amendment because the statute of limitations had expired, the Beahms and Johnsons filed a petition for writ of mandamus with the Fourth Circuit, seeking to force Judge Broadwater to allow them in the suit. To argue now that they were not "parties" in *Proctor* is disingenuous. They voluntarily chose to insert themselves in the federal suit, and when they were rebuffed, they even pursued an extraordinary remedy to overturn the decision. They actively litigated their rights in the *Proctor* case, and all four of them should be considered "parties" to that suit for *res judicata* purposes.

b. All five of the Plaintiffs herein were in privity with the *Proctor* plaintiffs.

Even if their failed bid in *Proctor* does not make the Plaintiffs "parties" to that suit, it certainly put them in privity with the *Proctor* plaintiffs. Judge Sanders found that the following facts (undisputed by the Plaintiffs) established a privity relationship:

- (1) All of the parties to this case shared common counsel with the parties in *Proctor*;

- (2) All of the parties to this suit had notice of the *Proctor* suit.
- (3) The Beahms and Johnsons sought to be added as parties to the *Proctor* suit and the parties proposed a common complaint alleging the same claims as to all of those parties;
- (4) After being denied joinder, the Beahms and Johnsons sought an extraordinary writ with the Fourth Circuit to challenge the decision not to allow them to join;⁴
- (5) All of the parties' properties were allegedly injured by the same release of gasoline;
- (6) All of the parties relied on the same expert witnesses that appeared in *Proctor*;
- (7) All of the parties relied on the same expert opinions offered in *Proctor*;
- (8) All of parties relied on the same fact witnesses offered in *Proctor*; and
- (9) All of the parties relied on the same documents and exhibits offered in *Proctor*.

The only reason these two cases were filed separately was because the *Beahm* plaintiffs were thrown out of federal court for missing the statute of limitations. They voluntarily pursued their claims in federal court, received a ruling they did not like, then ran to state court to take a second bite at the apple.

The Plaintiffs are using state court as a "second chance" forum. They attempted to use this case to relitigate *Proctor*. The Plaintiffs herein are represented by the same counsel and advanced the same expert witnesses offering the same expert theories and opinions given in *Proctor*. The evidence they relied upon was reviewed and the case adjudicated in U.S. district

⁴ The Plaintiffs adamantly point out in their brief that they did not attempt to intervene in *Proctor* under Rule 24. Instead, the Beahms and Johnsons, through their common counsel, had the *Proctor* plaintiffs file a motion for leave to amend the complaint to add them as parties plaintiff. Saying these persons "sought to intervene" is merely a shorthand way of saying they "sought leave of court to amend the complaint to add themselves as parties plaintiff." Had they been granted joinder under Rule 15, the end result would have been the same as if they had intervened under Rule 24. It is a distinction without a difference.

court. The fact that they disagree with the outcome makes no difference. As this Court held in *Esquire Group, Inc.*, “the key consideration” in deciding whether privity exists is “to ensure that the interests of the party against whom preclusion is asserted have been adequately represented.” The fact that none of these plaintiffs received their “day in court” is irrelevant. Under the West Virginia Rules of Civil Procedure, specifically Rule 56, litigants are not guaranteed a day in court simply by filing a lawsuit. They must have, at the very least, evidence to support their claims for damages. Under the circumstances of this case, the only reasonable conclusion is the one reached by Judge Sanders—that these Plaintiffs’ interests were adequately represented through the *Proctor* litigation, and that the federal court correctly ruled that their evidence was insufficient to earn them a “day in court” under Rule 56.

c. **The *Proctor* plaintiffs were the *Beahm* plaintiffs’ virtual representatives.**

Judge Sanders correctly ruled that privity in this case is further established through the doctrine of virtual representation. (Judgment Order at 9) In past cases, this Court has looked to the doctrine of virtual representation to determine whether privity exists. Virtual representation, a variety of privity, “precludes relitigation ‘of any issue that [has] once been adequately tried by a person sharing a **substantial identity of interests** with a nonparty.’” *Galanos v. National Steel Corp.*, 178 W. Va. 193, 195 (1987) (emphasis added). *Galanos* offers several examples of circumstances which would give rise to a finding of virtual representation. One example offered is that “a nonparty is bound by a prior judgment where he actively participated in and exercised control over the conduct of the prior litigation.” *Galanos v. National Steel Corp.*, 178 W. Va. 193, 195 (1987) (citing *Montana v. United States*, 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979) (finding that collateral estoppel applied to bar a

federal case brought by the United States where it had exercised control over prior state court litigation by “directing and financing” the litigation.).

The Plaintiffs’ briefs below revealed that these Plaintiffs (including the Jefferson County Council on Aging) jointly financed their litigation with the *Proctor* plaintiffs. At page 14 of their appeal brief, the Appellants state that they “incurred litigation expenses of over One Hundred Thousand Dollars (\$100,000.00) bringing 7-Eleven, a recalcitrant and strictly liable tortfeasor, to the bar of justice.” (Br. of Appellants at 14). The same representation was made by the *Proctor* plaintiffs in their response to 7-Eleven’s motion for summary judgment in *Proctor*. (Pls.’ Memo in Opp. to Defs.’ Mot. for Summ. J. in *Proctor*, attached to Appellee’s Response to Petition for Appeal at 6). This confirms that not only are these parties using the same expert witnesses, they are spreading the costs of the litigation among the plaintiffs in both cases. Not only are the *Proctor* and *Beahm* plaintiffs presenting the same evidence, they are jointly bearing the costs of presenting their cases, which gives all of them a direct financial interest in each other’s case. Such a financing arrangement, coupled with the active participation of the Beahms and Johnsons in the *Proctor* litigation, made the *Proctor* plaintiffs the virtual representatives of the *Beahm* plaintiffs. See *Montana*, 440 U.S. 147, 153-154 (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. These interests are similarly implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved.”)

The *Montana* case, cited with approval by the West Virginia Supreme Court in *Galanos*, strongly supports application of claim preclusion in this case, as the five factors found to support collateral estoppel in that case are all present here. They are: (1) exercise of control of the prior litigation by directing and financing of the litigation; (2) the presentation of the same legal claims in the second case as were presented unsuccessfully in the first; (3) the similarity in the controlling facts in both cases; (4) there had been no changes in controlling law between the first case and the second; and (5) there were no special circumstances justifying an exception to general principles of estoppel. The undisputed record in this case supports all five of these factors. Therefore, the second element of *res judicata* is established.

3. The causes of action in *Beahm* are identical to the causes of action in *Proctor* which were resolved or could have been resolved, had they been presented.

Next, the Appellants argue that the final element of *res judicata* is not present because “the only common thread between the two groups of Plaintiffs is that they were both injured by the same gasoline leak.” (Br. of Appellants at 7-8) A simple comparison of the complaint filed in *Proctor* with the complaint filed herein belies this argument. The *Proctor* complaint alleged four causes of action: (1) strict liability, (2) negligence, (3) a demand for punitive damages, and (4) violation of West Virginia Code § 55-7-9. (Compl. in *Proctor*, attached as Ex. H to Defs.’ Mot. for Summ. J.) All four of these claims were brought in *Beahm*, (Am. Complaint) and the two claims added herein alleging common law nuisance and trespass, could have been brought in *Proctor* because they arose out of the same core of operative facts as all of the other claims. The prayer for relief in both cases is, again, nearly identical. In both cases, the plaintiffs requested the fair market value of their real estate prior to its “destruction”; inconvenience and loss of wages and income; fright, stress, aggravation and mental anguish; out-

of-pocket expenses; medical expenses, including costs of examinations and testing; emotional distress; and injuries to Plaintiffs' bodies.

The Plaintiffs point out three insignificant differences between this case and *Proctor* hoping to persuade the Court that the cases are different enough to avoid claim preclusion. They argue that the properties in the two cases were different, the damage was discovered at a different time,⁵ and that in the present case, there was "an invasion of harmful vapors" in the Senior Center. (Br. of Appellants. at 8). However, *res judicata* does not require the two cases to be exactly alike in every respect in order to operate. The third element requires that "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.**" *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997) (emphasis added). There are no claims presented in *Beahm* that could not have been resolved in *Proctor* had they been raised. In both cases, the plaintiffs claim damage to real property through strict liability, trespass, negligence, and other theories. The two cases seek identical relief. The plaintiffs tried to litigate the cases as a single case. It makes no difference that the properties are different. Every property is

⁵ The date of "actual discovery" of the leak is irrelevant. Under West Virginia law, the two year statute of limitations begins to run on the date when discovery of the leak was "reasonably possible." Syl. Pt. 4, *Petrelli v. West Virginia-Pittsburgh Coal Co.*, 86 W.Va. 607, 104 S.E. 103 (1920) (a cause of action for subterranean trespass accrues and the statute of limitations begins to run "from the time of actual discovery of the trespass, or the time when discovery was reasonably possible.") (emphasis added). All of the plaintiffs in *Proctor* discovered the leak in February 24, 2000. Therefore, "discovery was reasonably possible" at that time for the Plaintiffs herein as well. The Court will note that the *Proctor* complaint alleged that "[o]n or about February 24, 2000, Plaintiffs **became fully aware of and detected** that the Defendants had cast the leaking gasoline from its premises onto the property and residences of the Plaintiffs." Knowing this would present a statute of limitations problem for them, the Beahms and Johnsons removed that language in their proposed amended complaint in *Proctor*. (See Defs.' Renewed Mot. to Dismiss at 6-9) Then, after they filed suit in state court, they altered their complaint further by alleging in their First Amended Complaint herein that "[i]n **July 2002**, Plaintiffs became aware of and detected that the Defendants had cast the leaking gasoline from its premises onto the property and residences of the Plaintiffs." This was a blatant attempt to avoid dismissal of their state court suit. Such gamesmanship should not be condoned by the courts.

unique—including the three properties at issue in this case. The fact that the discovery of the leak occurred at different times is irrelevant under West Virginia law because the date when discovery of the leak was “reasonably possible” is the operative date for the commencement of the statute of limitations. Syl. Pt. 4, *Petrelli v. West Virginia-Pittsburgh Coal Co.*, 86 W.Va. 607, 104 S.E. 103 (1920). Finally, the fact that some properties had more “vapor infiltration” than others is a minor detail.⁶ The vapor infiltration in both cases was so insignificant it created nothing more than a *de minimis* loss of use. The Plaintiffs cannot credibly argue that these two cases are dissimilar, given that they voluntarily chose to combine the suits in federal court at the outset. Judge Sanders correctly recognized that the third element was met.

4. The Beahms and the Johnsons admitted in *Proctor* that *res judicata* would bar their claims.

Perhaps the most compelling argument for application of *res judicata* comes from the pens of the Plaintiffs themselves. As mentioned above, the Beahms and Johnsons filed a petition for writ of mandamus with the Fourth Circuit in *Proctor* after Judge Broadwater denied their request for joinder. At that point, they wanted desperately to join the *Proctor* suit because they feared they would be out of court altogether if they were denied joinder. In their Fourth Circuit petition, the Beahms and Johnsons made the following argument:

[D]isposition of the claims of the Plaintiffs in this action [*i.e.* the *Proctor* plaintiffs] in the absence of the Petitioners [*i.e.* the Beahms and the Johnsons] as parties Plaintiff will impair and impede the Petitioners' ability to protect their claim. **Petitioners, by not moving to join this action as parties Plaintiff, risk the barring of their claims by *res judicata* and or collateral estoppel, e.g. see *Haba v. Big Arm Bar & Grill, Inc.*, 196 W.Va. 129, 468 S.E.2d 915 (1996).**

⁶ The Court will note that some of the *Proctor* plaintiffs claimed they smelled vapors in their homes, as well. As the Fourth Circuit noted in its unpublished opinion, loss of use for a few hours because of fumes is regarded as *de minimis* damages. *Proctor v. 7-Eleven, Inc.*, 180 Fed. Appx. 453, 458-459.

(Pet. for Writ of Mandamus, attached as Ex. O to Defs.' Reply in Support of their Mot. for Summ. J., at p. 6) (Bates # 1726) Prophetic words, indeed. When they believed it suited their interests, the Plaintiffs argued fervently that their claims would be barred by *res judicata* or collateral estoppel if the *Proctor* case proceeded to final judgment. They made this representation even though they had already filed their complaint and their first amended complaint in this case in state court.⁷ Now, they argue *res judicata* is completely inapplicable. (Br. of Appellants at 6-11). This type of duplicity, along with the duplicity outlined in footnote 4 above, fits the Plaintiffs squarely within a second category of virtual representation recognized in *Galanos*, in which the court noted that where "a nonparty's actions involve deliberate maneuvering or manipulation in an effort to avoid the preclusive effects of a prior judgment" that non-party will be bound by the prior judgment. The instant case was filed in order to avoid the effects of a final judgment in *Proctor*. Judge Sanders, however, properly recognized the identity of interests and evidence between the cases, and dismissed this case.

Because all three elements of *res judicata* were satisfied, the circuit court properly found the Plaintiffs were barred from relitigating the same claims adjudicated in *Proctor*.

B. The statute of limitations is a non-issue in this case.

The Plaintiffs repeatedly attempt to reargue the statute of limitations issue even though Judge Sanders did not dismiss the present case on that basis. The same arguments raised here regarding the continuing tort doctrine were asserted, considered, and rejected in *Proctor*. Judge Sanders did not need to rule on the statute of limitations defense. He simply ruled that the federal court's previous ruling, once it became final, precluded reconsideration. (Judgment Order

⁷ The original complaint in this case was filed on January 24, 2003, and the First Amended Complaint was filed on March 6, 2003. The Petition for Writ of Mandamus was filed March 20, 2003.

at 5) The arguments the Plaintiffs raise herein should have been raised in an appeal to the Fourth Circuit, but they were not.⁸

Even when considered on its merits, the Plaintiffs' argument that the statute of limitations has "not even begun to run" is simply unsupported by law. A gasoline spill that is being properly remediated is not a continuing tort. The release is a completed act involving no ongoing tortious conduct on the part of 7-Eleven and Melissa Spinks. In the Fall 2007 term, this Court explained the distinction in *Roberts v. W. Va. Am. Water Co.*, 655 S.E.2d 119, 124 (W. Va. 2007):

To be clear, the distinguishing aspect of a continuing tort with respect to negligence actions is continuing tortious conduct, that is, a continuing violation of a duty owed the person alleging injury, rather than continuing damages emanating from a discrete tortious act. It is the continuing misconduct which serves to toll the statute of limitations under the continuing tort doctrine. Absent continuing misconduct, our holding in *Hall's Park Motel* applies and the statute of limitations begins to run from the date of the alleged tortious act.

In *Roberts*, the plaintiff claimed damages for a defendant's "single, discrete act of constructing and installing the waterline and not for any continuing malfunction of the installation or further misconduct." *Roberts*, 655 S.E.2d at 124. Similarly here, the Plaintiffs claim to be damaged by a single, discrete act of failing to ensure the integrity of an underground storage tank, and not for any continuing malfunction of the system after the leak was discovered and the tanks were shut down and removed in February 2000. It is undisputed that as soon as 7-Eleven confirmed the leak in February 2000, it shut down the tanks, reported the leak to the state of West Virginia on February 24, 2000, and complied with the mandatory clean-up procedures.

⁸ To preserve their rights, the Beahms and the Johnsons should have moved to intervene in *Proctor* after entry of final judgment for the purposes of appeal. By doing so, they could have appealed the district court's order denying them leave to join the *Proctor* suit as parties plaintiff due to expiration of the statute of limitations. They failed to do so, and the *Proctor* plaintiffs did not raise the issue on their behalf.

Proctor v. 7-Eleven, Inc., 180 Fed. Appx. 453, 459 (4th Cir. 2006). Thus, the last tortious act or omission alleged by the Plaintiffs to have been committed by 7-Eleven was before February 24, 2000 when repair and remediation began. The Plaintiffs' argument that the statute does not begin to run until the last molecule of gasoline is removed from their properties misstates the law. "Without demonstration of a continuing duty or further misconduct on the part of any Appellees, there is no reason why the continuing tort doctrine should apply." *Roberts*, 655 S.E.2d at 124-125. Accordingly, even if it *were* proper for this Court to reopen and re-adjudicate the statute of limitations issue, summary judgment for the Defendants would be proper. However, because the issue was resolved against the plaintiffs and their privies by a court of competent jurisdiction, the court need not even consider the merits of the statute of limitations defense.

C. Summary judgment was appropriate because the Plaintiffs have no recoverable damages under West Virginia law.

Judge Sanders held that even if *res judicata* were not a bar to this suit, summary judgment was proper for the same reasons summary judgment was entered against the *Proctor* plaintiffs—the Plaintiffs lack evidence of damages recoverable under state law.

1. Because the Plaintiffs' alleged property damage is reparable, their recovery is limited to the cost of repair.

This Court set forth the standard for the measure of damages to real property in syllabus points two and three of *Jarrett v. E.L. Harper and Son, Inc.*, 160 W.Va. 399, 235 S.E.2d 362 (1977), as follows:

2. Damages. When realty is injured the owner may recover the cost of repairing it, plus his expenses stemming from the injury, including loss of use during the repair period. If the injury cannot be repaired or the cost of repair would exceed the property's market value, then the owner may recover its lost value,

plus his expenses stemming from the injury including loss of use during the time he has been deprived of his property.

3. *Damages – Evidence.* Annoyance and inconvenience can be considered as elements of proof in measuring damages **for loss of use** of real property.

Syl. Pts. 2-3, *Jarrett* (emphasis added). In other words, if property damage is reparable, the plaintiff can recover from the tortfeasor (1) the owner's cost of repairing the property; (2) the owner's out of pocket expenses including loss of use during the repair period; and (3) if the owner suffers loss of use, then annoyance and inconvenience damages. *Id.* The Plaintiffs' evidence of property damage in both this case and *Proctor* supported only a claim of *temporary, reparable* damage. Although they wanted to offer evidence of supposed "diminished value,"⁹ that measure of damages only comes into play where the damage cannot be repaired or where the owner would have to pay more to repair the property than the property is worth. *Jarrett, supra.*

The Plaintiffs contend that the federal district court, the U.S. Court of Appeals, and the Circuit Court of Jefferson County have all misapplied *Jarrett*. (Br. of Appellants at 11). The Plaintiffs contend that even though the damage to their properties was reparable, the Courts should have allowed them to use the irreparable damages standard and let them collect money for what they claimed to be the diminished value of their properties. This would have given the Plaintiffs a double recovery. As the Fourth Circuit explained in *Proctor*:

Because 7-Eleven has paid the full costs of remediation for the properties, the property owners seek damages in the form of diminution in value.

In a typical case, a plaintiff may recover the diminution in value only where the property cannot be repaired or the cost of repair

⁹ The Appellants incorrectly argue at page 11 that "7-Eleven admitted that there is evidence that the properties have been damaged and suffer from diminished value...." (Br. of Appellants at 11) However, 7-Eleven has never admitted that the Plaintiffs' properties have decreased in value. In fact, Defendants were prepared to show by expert testimony that the value of Plaintiffs' properties was unaffected.

exceeds the market value of the property. The property owners in this case cannot recover for diminution in value because the restoration process is ongoing and the property owners recognize that their properties will be restored pursuant to state and federal law. Because the law requires that 7-Eleven restore the properties and the process remains ongoing, **if we allowed the property owners to recover for diminution in value, at this juncture, they may ultimately receive double recovery for the same loss by having their properties restored and receiving diminution in value damages.** Such double recovery is not contemplated by Jarrett, which sets forth an "either or" option for repair damages or loss of value damages. Thus, the property owners may not receive damages for any temporary diminution in value of their properties and the grant of summary judgment on the real property damages was appropriate.

Proctor v. 7-Eleven, Inc., 180 Fed. Appx. 453, 457 (4th Cir. 2006). The Plaintiffs herein, like the Plaintiffs in *Proctor*, had two experts prepared to testify that the damage to their properties was temporary and reparable, yet none of them had any evidence that they incurred costs of repair.

The Plaintiffs counter that because the repair costs **expended solely by Defendant 7-Eleven** exceed the market value of their properties, the Plaintiffs should be permitted to recover the diminished market value.¹⁰ This argument finds no support in *Jarrett* or any other case authorities. The clear intent of the second sentence of syllabus point 2 of *Jarrett* is to **limit** the damages a property owner may recover. The owner cannot recover *his* repair costs to the extent those costs exceed the value of the property. The Plaintiffs' reading of *Jarrett* would allow a landowner not only to enjoy the benefits of repairs made by the alleged tortfeasor, but also to recover the entire market value of their properties, even though their properties will regain their full value at no cost to them. As Judge Broadwater, Judge Sanders and the Fourth

¹⁰ It is also important to note that the record contains no evidence of 7-Eleven's costs incurred in repairing any particular property. No effort was made by either side to apportion the total cleanup cost to individual properties. Therefore, the Plaintiffs cannot be heard to argue that the costs of repair exceeded their properties' values. There is no evidence to support such a claim.

Circuit recognized, this interpretation defies all notions of equity and common sense and would give the landowners a double recovery. The only reasonable interpretation of syllabus point two is that a landowner can recover the market value of the property only where the damage is irreparable or *the owner's* costs of repair exceed the market value. Here, the government requires that the properties be repaired regardless of the costs, and the Plaintiffs do not have to pay a penny of it. To interpret *Jarrett* otherwise would make the Defendant responsible for paying both the repair costs and the diminished market value of each property. Therefore, Judge Sanders correctly recognized that under *Jarrett*, the Plaintiffs could not recover for "diminished value" in a reparable property damage case, even if they could have proven diminished value at trial. He therefore adopted the reasoning of Judge Broadwater and the Fourth Circuit, and rendered summary judgment in the Defendants' favor.

2. The Plaintiffs did not lose the use of their properties.

The undisputed record reveals that the Plaintiffs suffered no legally significant loss of use of their property or out of pocket expenses. (Defs. Mot. for Summ. J. at 17) Although the Plaintiffs' claim that the Ranson Senior Center suffered a loss of use of its property when the center was "forced to evacuate" on October 17, 2003, the record reveals otherwise. In her deposition, Anna Mae Reedy, the Ranson Senior Center's director, testified that the seniors were already going home for the day on the afternoon of the evacuation when the remediation contractors caused fumes to enter the Senior Center. The only persons remaining in the center were 11 or 12 workers. (Reedy Depo., Ex. Q to Defs.' Reply in Support of their Mot. for Summ. J. at 66). She testified that the Senior Center's activities were never affected by the gasoline release or remediation:

Q. - [By Mr. Printz] Has the gasoline release and the remediation activities reduced the senior participation in any programs or activities at the senior center?

A. [By Ms. Reedy] No. The seniors really don't realize what's going on and I've never discussed it with them.

Q. So the activities and the programs of the senior center to your knowledge have not been impacted by the fact that there was a gasoline release near by and there had been remediation activities; correct?

A. That's right.

(Reedy Depo., *id.* at 92). The "lost use" alleged by the Senior Center is actually less than the loss of use allegedly suffered by Mr. and Mrs. Proctor in the *Proctor* case, which the court found to be *de minimis* and non-recoverable. *Proctor*, 180 Fed. Appx. at 458-459. When questioned about the Senior Center's alleged damages, Ms. Reedy testified that the only damages the Senior Center was claiming were for diminution in property value, not for loss of use:

Q. Has the Council on Aging incurred any out of pocket expenses or additional cost because of the release of gasoline and the remediation activities that have occurred in the neighborhood?

A. The only thing I can think of is we purchased the little monitors, and they weren't that expensive, to show if there is gas in the building.

Q. Is that an item of damage that's being claimed by the Council on Aging in this case?

A. No. We just did that on our own to make sure the seniors are safe.

Q. Has the Council on Aging suffered any increased expenses or costs? In other words have certain line items on your budget increased because of the gasoline release or any of the remediation activities that have occurred in the neighborhood since that time?

A. No.

Q. Have any services to seniors been interrupted because of the gasoline release or the remediation activities that have occurred since that time?

A. No.

Q. Am I to understand that at least as of today the only claim, the only damage claim that the Council on Aging is pursuing is whether or not the value of its properties have been affected by the release and the remediation activities?

A. That's right.

(*Id.* at 86-87). Therefore, Judge Sanders correctly found that even when viewed in a light most favorable to the Plaintiffs, the underground migration of gasoline resulted in no significant loss of use of any of these properties.

3. Damages for mental anguish are unsupported by the record, as well.

Finally, the Plaintiffs incorrectly argue that they are entitled to damages for "aggravation and mental anguish," even though they failed to come forward with any evidence that they suffered such damages at the summary judgment stage. First, it is doubtful that the Plaintiffs could, as a matter of law, recover for mental anguish in this case.¹¹ Even if they could assert such claims, summary judgment on the claims was appropriate because the record contained no evidence to support them.

The facts and circumstances of this case simply do not support an aggravation or mental anguish claim. The Plaintiffs allege a subterranean trespass of gasoline. They do not allege any frightening or spectacular event. They do not allege that they ever came into contact

¹¹ Although *Jarrett* allows damages for annoyance and inconvenience incident to loss of use, such damages are not recoverable here because none of the Plaintiffs lost use of their properties. In addition, this Court has repeatedly declined to allow mental distress damages in property damage cases. In *Jarrett*, the Court disallowed mental distress damages to the plaintiffs, holding that "[w]e are not prepared in this case to allow recovery for mental pain and suffering." In the later case of *Evans v. Mutual Mining*, 199 W.Va. 526, 485 S.E.2d 695 (1997), the court again declined the invitation to allow mental distress damages resulting from property damage.

with any gasoline or contaminated groundwater. Because their homes are all served by a municipal water source, there is no evidence of any danger to their health or safety. In discovery the Beahms and Johnsons were specifically asked about the damages they alleged, and they responded in identical fashion as follows:

7. At paragraph 10 of your Amended Complaint, you state that you suffered "losses" as a result of Defendants' conduct. Please give an itemized account of those losses, including, but not limited to, the following: (a) Any lost wages and income; (b) any medical treatments, examinations and tests; and (c) any other out-of-pocket expenses.

ANSWER: Objection: calls for legal conclusion. Without waiving said objection, Plaintiffs have suffered diminution in property value, annoyance, inconvenience, and fear of contacting cancer.¹² Plaintiffs have also incurred litigation expenses.

8. At paragraph 15 of your Amended Complaint, you claim to have suffered damage to your property and your person. State with specificity the nature of the damages you claim to have suffered to your property and to your person.

ANSWER: Objection: calls for legal conclusion. Without waiving said objection, Plaintiffs have suffered diminution in property value. Plaintiffs also suffer from fear of contacting cancer.

10. Describe, with specificity, all other damages, including general damages, which you allegedly suffered as a result of the Defendants' actions, indicating the nature of those damages and your calculation of the amount of each item of such damages.

¹² The Beahms' and Johnsons' "fear of cancer" is unsubstantiated. None of them produced any evidence that they were actually exposed to any dangerous levels of gasoline, gasoline fumes, BTEX, contaminated groundwater, or any other gasoline-related substance. None of them underwent any medical testing or treatment to determine whether any of them had actually been exposed to any carcinogen. The Fourth Circuit addressed the same type of "fear of cancer" claim in *Proctor* and found the claim to be untenable. 180 Fed. Appx. at 458-459. In *Evans v. Mutual Mining*, 199 W.Va. 526, 485 S.E.2d 695 (1997), this Court denied mental anguish damages where the plaintiffs claimed they "feared for their lives" when their real property was damaged by a flood. The court noted, in footnote 3 of that opinion, that because it had "insufficient evidence of whether, using an objective standard, an ordinary person would have feared for his or her life" when the property was damaged, the plaintiffs could not recover for their mental anguish. Applying the same objective standard here, the Court must again decline to extend the law to allow a mental anguish claim in a property damage case. The Plaintiffs have simply offered no evidence that a reasonable person would have "feared cancer" under the circumstances present in this case.

ANSWER: Objection: calls for legal conclusion. Without waiving said objection, Plaintiffs have suffered annoyance and inconvenience. This response will be supplemented.

(footnote added) At the summary judgment stage, Defendant also pointed to deposition testimony from all of the natural person plaintiffs indicating they have not suffered any personal injuries, including mental anguish. (Defs.' Mot. for Summ. J. at 17).¹³ Even in their appellate brief, the Plaintiffs offer only the conclusory argument that "[b]ecause Appellants *may* introduce such evidence to a jury, genuine issues of material fact precluding summary judgment exist on the existence of such damages." (Br. of Appellants at 15) The Plaintiff's unsupported speculation that they *could* or "may" present evidence of mental anguish at trial is completely insufficient to avoid summary judgment. Pursuant to Rule 56, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided . . . , must set forth specific facts showing that there is a genuine issue for trial." Even if the Plaintiffs were correct that recovery of mental anguish in a property damage case is theoretically *possible*, they have shown no evidence of such damages so as to create a trialworthy issue. This happens to be the same position the *Proctor* plaintiffs were in, and the Court dismissed their claims. *Proctor, supra*.

On appeal, the Plaintiffs are pursuing the same strategy they pursued before the trial court in the face of Defendants' summary judgment motion. They offer conclusory

¹³ Although the West Virginia Supreme Court of Appeals has not ruled on the recoverability of annoyance and inconvenience damages by a corporation, see *Hardman Trucking, Inc. v. Poling Trucking, Inc.*, 176 W. Va. 575, 580, 346 S.E. 2d 661, 556 (1986) (declining to rule on the issue), other courts have held that such damages are not recoverable. See, e.g., *Pak-Mor Mfg. Co. v. Brown*, 364 S.W.2d 89 (Tex. App. 1962) (reversing jury award of annoyance and inconvenience damages for corporation, holding that property "annoyance, inconvenience and discomfort was suffered by the officers and employees of the corporation, but not by the corporation."); *Walle Corp. v. Rockwell Graphics Systems, Inc.*, 1992 U.S. Dist. LEXIS 14433 (E.D. La. 1992) ("It is well-settled that a corporation cannot recover emotional distress or mental anguish damages." ... "This Court holds that a corporation cannot recover inconvenience damages.").

allegations of damages that are theoretically possible without offering any actual evidence from the record that could support a jury verdict in their favor. Simply stating that the Plaintiffs “may introduce” at trial evidence of mental anguish, annoyance, inconvenience, emotional distress, and loss of use is insufficient to defeat summary judgment. W.Va. R. Civ. P., Rule 56 (“[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleadings, but the adverse party’s response, by affidavits or as otherwise provided . . . , **must set forth specific facts showing that there is a genuine issue for trial.**”) (emphasis added). The Plaintiffs failed to submit so much as a self-serving affidavit supporting their damages claims. They offered nothing. Therefore, Judge Sanders properly awarded summary judgment to the Defendants on the merits.

V. CONCLUSION

Based on the undisputed factual record, Judge Sanders properly ruled that *res judicata* bars the Plaintiffs’ claims. This case, which involves the same claims, issues, defendants, attorneys, fact witnesses, expert witnesses, expert opinions, and exhibits as presented in *Proctor v. 7-Eleven, Inc.* has already been adjudicated, appealed and affirmed by the federal courts. In this case, the Plaintiffs offered the same evidence and arguments that were offered in *Proctor*, hoping for a different result. However, *res judicata* bars their claims because they were in privity with the *Proctor* plaintiffs, and the *Proctor* case was decided against their interests.

Even if *res judicata* did not bar this suit, Judge Sanders properly granted summary judgment because the Plaintiffs suffered no legally cognizable damages under state law. Viewing the Plaintiffs’ evidence in a light most favorable to them, Judge Sanders found that the Plaintiffs could not show any damages recoverable under the controlling case authority, *Jarrett*

v. *E.L. Harper and Son, Inc.* The Plaintiffs offer nothing in their brief showing that Judge Sanders, Judge Broadwater and the Fourth Circuit misapplied *Jarrett*. They offer no evidence from the record that Judge Sanders overlooked. They also offer nothing that distinguishes this case from *Proctor*. Therefore, summary judgment was properly entered against the Plaintiffs. For these reasons, the Circuit Court of Jefferson County must be affirmed.

7-ELEVEN, INC. and
MELISSA SPINKS,
Appellees, by Counsel

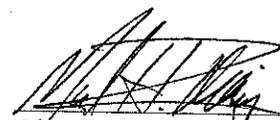
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CERTIFICATE OF SERVICE

I, Charles F. Printz, Jr., hereby certify that a true and exact copy of the foregoing **BRIEF OF APPELLEES** has been served by United States mail, postage prepaid, upon the following individual:

Paul G. Taylor, Esq.
Attorney for Appellants
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this 31st day of March, 2008.


for Charles F. Printz, Jr. WVSB # 07703