IN THE

Supreme Court of Virginia

RECORD NO. 122069

THOMAS RALEY,

Appellant,

v.

NAIMEER HAIDER,
MINIMALLY INVASIVE PAIN INSTITUTE, PLLC
and
WISE, LLC.,

Appellees.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND PROCEEDINGS

There have been three civil actions filed by appellant Thomas J. Raley, M.D. ("Raley"), against appellees Naimeer Haider, M.D. ("Haider") and related parties. The latter two of them are the subject of this appeal.

Raley first sued Haider, along with Minimally Invasive Spine Institute, PLLC ("MISI"), in 2010. In Raley's Amended Complaint in Fairfax Civil Action No. CL 2010-11509[1], he sued MISI for breach of express contract (Count I) and also on an implied contract, *quantum meruit* theory (Count III). In Count II of that Amended Complaint, Raley also sued Haider as an individual, alleging that Haider had violated VA. CODE § 13.1-1035, governing distributions made by Virginia limited liability companies, to Raley's detriment.[2]

Haider filed a demurrer[3] to Count II of the Amended Complaint in this first suit, arguing (a) that VA. CODE §§ 13.1-1035 and 1036 allowed only the LLC itself (MISI) or one of its members to bring an action under that statute,

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[1] Joint Appendix ("JA") at pp. 41-48; additional copies may be found at JA at pp.85-90 & 99-104.

[2] *Id.*

[3] JA at pp. 65-70; an additional copy may be found at JA at pp. 114-119. *See* especially JA at p. 68, where Haider argued, "only the limited liability company (or other company representative designated by statute) could sue a member for taking distributions that allegedly rendered the company unable to pay its debts."

and (b) that since Raley was neither, but was merely an outside creditor, he did not have standing to maintain Count II.[4] Agreeing with Haider, the circuit court granted Haider's demurrer by Order entered April 1, 2011.[5] Because Count II was the only claim in this first suit that sought relief against Haider, this Order also excused Haider as a defendant from the case, leaving Raley to pursue only MISI in that action (under Counts I and III).[6] Raley later obtained judgment against MISI (but only MISI) on November 18, 2011, for $395,428.70 plus costs and interest.[7]

In 2012, Raley brought the two actions which are now the subject of this appeal.[8] The 2012 actions represent Raley's attempts to collect the judgment he had won in 2011 in the first case.[9]

On March 22, 2012, Raley filed a garnishment proceeding based upon the 2011 judgment against MISI, naming Haider as the sole suggested garnishee.[10] Then on May 24, 2012, Raley also filed a

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[4] JA at pp. 65-70.
[5] JA at 47-48; additional copies may be found at JA pp. 91-92 & 105-106.
[6] *Id.*
[7] *See* JA at p.18 (Complaint ¶ 16). *See also* the entirety of the record in the garnishment case, Fairfax Circuit Court Civil Action No. CL 2012-4643, which reflects the entry of the judgment in the prior action at JA at pp. 1-14, 49-55, 71-73.
[8] JA at 1-8, 15-33.
[9] *Id.*
[10] *See generally* JA at pp. 1-8 (Record of Fairfax Circuit Court Civil Action No. CL 2012-4643).

Complaint naming Haider, as well as two limited liability companies formed by Haider (Minimally Invasive Pain Institute, PLLC or "MIPI" and Wise, LLC or "Wise") as defendants.[11] In Count I of the Complaint, Raley alleged that he was MISI's judgment creditor and sought to assert MISI's rights against the three defendants.[12] In contrast, in Counts II through VIII, inclusive, Raley alleged several direct legal claims for improper transfers by which the defendants had essentially looted MISI of its assets so as to leave it unable to satisfy the 2011 judgment.[13]

By agreement of the parties, the garnishment action was consolidated into Count I of the Complaint.[14] The case was then submitted to the circuit court upon the Defendants' Revised Demurrer, Plea in Bar and Motion for Bill of Particulars.[15] After briefing by the parties[16] and a hearing to afford oral arguments[17], the circuit court granted the defendants'

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[11] JA at pp. 15-33.
[12] JA at pp. 18-20, 71-73.
[13] JA at pp. 20-33.
[14] *See* JA at pp.53-55 (Joint Motion to Consolidate), 71-73 (Agreed Order to Consolidate).
[15] JA at pp. 74-92.
[16] *See* JA at pp. 93-106 (Defendants' Memorandum in Support of Demurrer, Plea in Bar, and Motion for Bill of Particulars), 107-119 (Plaintiff's Memorandum in Opposition to Defendants' Demurrer, Plea in Bar, and Motion for Bill of Particulars).
[17] *See* JA at pp. 120-147 (Transcript of the court hearing held August 24, 2012 before Judge Brodie).

demurrer to all counts on grounds of *res judicata* by Order entered September 4, 2012, dismissing all of Raley's claims with prejudice.[18]

Raley filed Notices of Appeal in both the garnishment case[19] and the Complaint case.[20] Raley filed a Petition for Appeal, addressing the two consolidated cases.[21] The Appellees filed a Brief in Opposition.[22] Raley was awarded his appeal by the Supreme Court of Virginia on February 15, 2013.[23]

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[18] JA at p. 148.
[19] JA at pp. 149-150.
[20] *Id.*
[21] JA at pp. 151-177.
[22] JA at pp. 178-196.
[23] JA at pp. 197-198.

Assignments of Error[24]

I. The circuit court erred in granting the demurrer of all defendants to all counts of the Complaint, and to the Garnishment Summons that had been consolidated into Count I of the Complaint, on grounds of *res judicata*.[25] *See* the circuit court's Order entered September 4, 2012.)[26]

II. The circuit court erred in granting the demurrer of all defendants to plaintiff's garnishment action (which had been consolidated into Count I of the Complaint) on grounds of *res judicata*.[27] *See* the circuit court's Order entered September 4, 2012.[28]

III. The circuit court erred in granting the demurrer of defendant Haider to the new causes of action set forth in Counts II through VIII, inclusive, of the Complaint.[29] *See* the circuit court's Order entered September 4, 2012.[30]

IV. The circuit court erred in granting the demurrer of defendants Minimally Invasive Pain Institute, PLLC and Wise, LLC to the new causes of action set forth in Counts II through VIII, inclusive, of the Complaint.[31] *See* the circuit court's Order entered September 4, 2012.[32]

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[24] JA at p. 199.
[25] *See* Argument part I, *infra* pp. 10-17.
[26] JA at p. 148.
[27] *See* Argument part II, *infra* pp. 18-20.
[28] JA at p. 148; *See also* JA at pp. 71-73.
[29] *See* Argument part III, *infra* pp. 21-23.
[30] JA at p. 148.
[31] *See* Argument part IV, *infra* pp. 21-23.
[32] JA at p. 148.

STATEMENT OF THE FACTS

Because the circuit court granted defendants' demurrer below, the facts as alleged by the plaintiff must be assumed true for purposes of this appeal. *Doe v. Zwelling*, 270 Va. 594, 597, 620 S.E. 2d 750, 751 (2005). Those facts are as follows:

Raley worked at MISI, a medical practice owned and managed by Haider, in 2008 and 2009. MISI failed to pay Raley all amounts due to him from his tenure with MISI, and that ultimately became the foundation of a 2011 judgment granted to Raley, against MISI, in the principal amount of $395,428.70.[33]

With full knowledge of MISI's contractual obligation to Raley, Haider formed MIPI in December 2009 and Wise in March 2010.[34] Haider embarked on a course of conduct by which he rendered MISI insolvent, including (a) making improper distributions from MISI to himself,[35] (b) making fraudulent and voluntary conveyances from MISI to MIPI and

[33] JA at pp.16-18 (Complaint ¶¶ 9-16).
[34] JA at p. 18 (Complaint ¶ 19).
[35] JA at p.19 (Complaint ¶¶ 25-29).

Wise,[36] (c) converting MISI's property to his own use,[37] and (d) tortiously causing MISI to be unable to meet its contractual obligations to Raley.[38]

Through his consolidated actions (i.e., the 2012 garnishment and the 2012 Complaint), Raley has sought to recover the amount already found to be due and owing to him, from Haider and the entities he created to help him in depleting MISI of its assets.

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[36] JA at pp.20-21 (Complaint ¶¶ 34-43), 22-23 (Complaint ¶¶ 49-57).
[37] JA at p.24 (Complaint ¶¶ 65-69).
[38] JA at pp. 27-28 (Complaint ¶¶ 91-95).

QUESTIONS PRESENTED

Where a prior claim for improper limited liability company distributions was dismissed on the grounds that the plaintiff lacked standing to bring such claims on his own behalf, does that dismissal bar any attempt to bring later claims challenging the same or additional improper transactions under other legal theories?

STANDARD OF REVIEW

The circuit court's decision to sustain the appellees' demurrer[39] must be examined by Supreme Court of Virginia under a *de novo* standard of review because the decision to grant a demurrer is a pure question of law. *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557, 708 S.E.2d 867, 869 (2011). Under the well-established principles of appellate review, the Supreme Court of Virginia shall consider the facts set forth in the Appellant's garnishment action[40] and Complaint[41] "along with those reasonably and fairly implied from them, in the light most favorable to the plaintiff." *Doe v. Zwelling*, 270 Va. 594, 597, 620 S.E. 2d 750, 751 (2005).

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[39] JA at p. 148.
[40] JA at pp. 1-8.
[41] JA at pp. 15-33.

ARGUMENT

The doctrine of *res judicata* may apply to bar a newly filed suit, "if the prior adjudication was between the same parties or their privies and a valid final judgment was entered which resolved the claim on the merits." *Waterfront Marine Construction, Inc. v. North End 49ers Sandbridge Bulkhead Groups A, B and C*, 251 Va. 417, 430, 468 S.E.2d 894, 902, (1996)(citations omitted). Following the much-examined opinion in *Davis v. Marshall Homes, Inc.*, 265 Va. 159, 576 S.E.2d 504 (2003), this Court sought to establish the more modern statement of the applicable legal standards via its 2006 adoption of Rule 1:6:

> A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence, whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought.

In their demurrer, the defendants (Haider, MIPI and Wise) argued that Rule 1:6 (a) and (d) should operate to bar Raley's 2012 actions.[42] The circuit court agreed and dismissed all of Raley's actions.

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[42] JA at pp. 74-106.

I. BECAUSE THE PRIOR CASE WAS DISMISSED SOLELY BASED ON A LACK OF STANDING, A JURISDICTIONAL PRECONDITION TO SUIT, THE PRIOR DISMISSAL WAS NOT "ON THE MERITS" AND THUS DOES NOT BAR THE CURRENT ACTIONS.[43]

A. A Dismissal for Lack of Standing to Sue is Jurisdictional, and Jurisdictional Dismissals Do Not Implicate the Rules of *Res Judicata.*

Under the common law, a dismissal of an initial suit for lack of jurisdiction has never operated to bar a later filing. RESTATEMENT (SECOND) OF JUDGMENTS, § 20(1)(a) (1982). Scholarly commentators examining the state of the law of *res judicata* in Virginia in the wake of *Davis* and the subsequent adoption of new Rule 1:6 have concluded that this time-honored rule was left unaffected by those developments. Court of Appeals Judge Kelsey, for example, has specifically noted that jurisdictional dismissals have never barred later filings, and still do not. *See* D. Arthur Kelsey, *The Thing Decided: Rule 1:6's Rediscovery of Res Judicata in Virginia*, VIRGINIA BAR ASSOCIATION NEWS JOURNAL, June/July 2008 at p. 21, *citing* Kent Sinclair, *Guide to Virginia Law & Equity Reform & Other Landmark Changes* § 11.01 *et seq.* (2006). "Rule 1:6 does not change the accepted truth that sometimes one trial will not suffice, making the second trial a worthy price of full and complete justice." Kelsey, *id.* at p. 21.

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[43] Part I of the Argument Pertains to Assignment of Error I.

In his original suit against Haider, Raley sought to assert a direct claim under VA. CODE § 13.1-1035, the statute that Haider violated by taking improper limited liability company distributions that left MISI insolvent.[44] There had not been any reported case in Virginia addressing whether an outside creditor had the right to bring a claim under that statute. The most comparable statutory provisions applicable to Virginia corporations are VA. CODE §§ 13.1-653 and 692. While § 13.1-653 defines what distributions are improper, §13.1-692 establishes civil liability for a director who authorizes any improper distributions, and in so doing, the latter section specifies that the director would be liable not only to the corporation itself, but also to "its creditors." In contrast, the law governing limited liability companies does not explicitly address whether those who make distributions deemed improper under § 13.1-1035 are liable to outside creditors; § 13.1-1036 mentions only the recipient member's liability to the LLC itself. In Raley's first filing, he essentially asked the circuit court to imply such rights in favor of him as an outside creditor.[45] But in arguing his demurrer there, Haider cited cases from other jurisdictions that had found the omission of language comparable to that found in the corporation laws significant, so that outside creditors like Raley would not have the right

[44] JA at pp. 20-21.
[45] JA at pp. 41-48.

to sue for violations of § 13.1-1035.[46] Haider specifically argued, "only the limited liability company (or other company representative designated by statute) could sue a member for taking distributions that allegedly rendered the company unable to pay its debts."[47]

While it must be acknowledged that Raley's first attempt at holding Haider accountable was unsuccessful, this Court must be sure to note what the circuit court *did not do* in the first action. The court *did not* undertake any inquiry in the first case as to whether the facts alleged by Raley there were or were not true. The court also *did not* undertake any inquiry in the first case into whether, if true, those allegations would suffice to find Haider in violation of § 13.1-1035. The only inquiry undertaken by the circuit court was to determine whether Raley, as an outside creditor, was among those parties authorized by statute to ask the court to consider those questions. The circuit court, by adopting Haider's argument, concluded that Raley was not an eligible plaintiff.[48]

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[46] JA at pp. 66-69.

[47] JA at p. 68 (Defendants' Demurrer to Count II of Plaintiff's Amended Complaint).

[48] JA at pp. 47-48. The circuit court did not issue a written opinion; it merely entered an Order on April 1, 2011 granting Haider's demurrer. But since Haider's only contention was that Raley was not entitled to bring the claim asserted against Haider in Count II of the Amended Complaint in the initial case, the April 1, 2011 Order must be construed as adopting Haider's contentions.

Although the circuit court's brief Order did not used the term, the question of whether or not a plaintiff is entitled to assert a particular claim is commonly addressed as one of *standing*. "Standing to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action." Kent Sinclair and Leigh B. Middleditch, Jr., VIRGINIA CIVIL PROCEDURE § 3.1, at p. 197 (5th ed. 2008), *citing Andrews v. American Health and Life Insurance Co.*, 236 Va. 221, 226, 372 S.E.2d 399, 402 (1988).

Speaking in *Andrews*, this Court defined standing "as the requirement that a litigant have a 'sufficient interest in the subject matter of [a] case so that the parties will be actual adversaries and the issues will be fully and faithfully developed." 236 Va. at 226, 372 S.E.2d at 402 (citation omitted). Reviewing the record from Raley's first case filing, the dismissal of his claim against Haider there can clearly be understood as one based on a finding that, as an outside creditor, he lacked standing to enforce § 13.1-1035.[49]

Because standing is a "preliminary jurisdictional issue," the jurisdictional dismissal exception to the rules of *res judicata* applies here. The treatment of standing as a jurisdictional issue qualifying for the

[49] *See* JA at pp. 41-46 (Amended Complaint), 65-70 (Defendants' Demurrer to Court II of Plaintiff's Amended Complaint), 47-48 (Order).

exception from *res judicata* was explicitly upheld in *National American Insurance Co. v. Ruppert Landscape Co.*, 122 F. Supp. 670 (E.D. Va. 2000), with the court summarizing:

> Plaintiffs argue that the dismissal on standing grounds reflected the Court's lack of jurisdiction and was not a judgment on the merits for purposes of res judicata. For this reason, Plaintiffs claim they should be permitted to bring the current action even though it involves the same parties and same underlying transaction as [the prior case]. The Court agrees.

122 F. Supp. At 677.

After thoroughly considering the same question, the court in *Watkins v. Resorts International Hotel and Casino, Inc.*, 124 N.J. 398, 591 A.2d 592 (1991) came to the same conclusion. The proper view of a dismissal for lack of standing, the court there reasoned, was that the same theory of relief previously relied upon could not be brought again, since the question of whether the plaintiff had standing to raise that particular claim had indeed been resolved; but "where the second suit presents new theories of relief, admittedly based upon the same operative facts as alleged in the first action, it is not precluded ...." 124 N.J. at 419, 591 A.2d at 602, *quoting McCarney v. Ford Motor Co.*, 657 F.2d 230, 234 (1981).

Raley now asks this Court to follow this same line of reasoning to reach the same result here as was reached in *National American*, *Watkins* and *McCarney*. None of the legal theories brought in the 2012 filings are

the same as the direct claim under VA. CODE § 13.1-1035 that was dismissed in the first action. Once it is fully understood that the 2011 dismissal was based solely upon a finding that Raley lacked standing, the jurisdictional issue exception to *res judicata* must be applied so that Raley's 2012 actions (now consolidated) should be permitted to proceed, on all counts and against all three defendants.

B. Raley's Case Against Haider, MIPI and Wise Has Never Been Resolved "On the Merits."

Closely related to the standing/jurisdiction issue is the prong of the test for application of *res judicata* under which, in order for the bar to be applied, the prior case must have been resolved "on the merits." Indeed, the courts in *National American*, *Watkins* and *McCarney* all considered the two concepts as if they were interchangeable. *National American*, 122 F. Supp. at 677; *Watkins*, 124 N.J. at 419, 591 A.2d at 602; *McCarney*, 657 F.2d at 234.

In Raley's situation, the marriage of the two concepts is understandable. As noted above, the circuit court's 2011 Order in the first suit did not reach the merits of Raley's allegations against Haider's taking

of improper distributions.[50] That is, it did not hear evidence as to whether Raley's allegations on that subject were true, and it never considered whether the allegations, if proved, would be deemed legally sufficient. Once the circuit court ruled against Raley on standing grounds, it had no reason to reach those issues. And while that first suit continued on to a final judgment, the only claims ultimately adjudicated in the first case pertained to the contractual, compensation issues between Raley and MISI, the only defendant to that case's Amended Complaint Counts I and III.[51] Those issues had no overlap with the allegations of improper distributions, fraudulent and voluntary conveyances, conversion and tortious interference that are the foundation of Raley's 2012 filings.[52] This is further illustrated by the fact that none of the defendants to Raley's 2012 cases were involved in the merits decided in the first suit.[53]

Having escaped scrutiny in Raley's first case solely based on the standing issue[54], Haider's demurrer to the 2012 claims essentially argues that he should *never* have to face *any* liability for his improper looting of

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[50] *See supra* pp. 10-15.
[51] JA at pp. 41-46 (Amended Complaint), 65-70 (Defendants' Demurrer to Court II of Plaintiff's Amended Complaint), 47-48 (Order).
[52] JA at pp. 1-8, 15-33.
[53] JA at pp. 1-8, 15-33, 47-48.
[54] *See supra* pp. 10-15.

MISI.[55] True, *res judicata* is predicated on the concept that what could have been litigated in the prior action, should have been litigated – that a plaintiff should not get "two bites at the apple." *See* Kelsey, *supra*, at pp. 18-19. But unless this Court acts to reverse the action of the circuit court below here, Raley will never get even *one* bite at his apple. The claims found in the 2012 Complaint are not properly subject to the "should have been brought" standard, because the one claim Raley initially filed in his first action was found to be one he *could not* bring.[56] This Court must act to prevent Haider from evading his substantial liabilities to Raley through mere artifice.

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[55] JA at 74-106.

[56] JA at pp. 41-46 (Amended Complaint), 65-70 (Defendants' Demurrer to Court II of Plaintiff's Amended Complaint), 47-48 (Order).

II. COUNT I OF THE 2012 COMPLAINT, ALONG WITH THE GARNISHMENT ACTION, RAISE CLAIMS THAT BELONGED TO MISI AND THAT THEREFORE DO NOT INVOLVE THE SAME PARTIES AS THE FIRST SUIT.[57]

Raley's first 2012 filing was his garnishment, founded upon his judgment against MISI, and naming Haider as the garnishee.[58] In Count I of his 2012 Complaint, filed two months later, Raley also articulated his intention to assert the rights of MISI under Va. Code §§ 13.1-1035-36, based on his being a judgment creditor of MISI and further based upon the lien of *fieri facias* provided for by VA. CODE § 8.01-501-02.[59]

At the time of the first suit, Raley clearly was not in a position to assert any rights of MISI.[60] Becoming a judgment lien creditor, with rights under § 8.01-501-02 and under service of a garnishment summons, necessarily required Raley first to obtain judgment against MISI. Therefore, the claims that inhered in MISI prior to the 2011 judgment were not claims that anyone could contend "could have been brought" or "should have been brought" in the first suit.

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[57] Part II of the Argument pertains to Assignment of Error II.
[58] JA at pp. 1-8.
[59] JA at pp. 18-20 (Complaint ¶¶ 17,21-32).
[60] JA at pp. 65-70 (Defendants' Demurrer to Court II of Plaintiff's Amended Complaint), 47-48 (Order).

Indeed, the circuit court's ruling in the first case presupposed that only MISI could proceed against Haider under §§ 13.1-1035-36.[61] No one would expect Haider, as the sole member of MISI, to cause MISI to sue himself. The only way that MISI's rights against Haider would ever conceivably be asserted would be in the manner Raley has done, by using the statutory rights afforded to judgment creditors.

The lien of § 8.01-501-02 and the garnishment process combine to act "as an involuntary assignment of the judgment debtor's rights to the judgment creditor." *Virginia Builders' Supply, Inc. v. Brooks & Co. General Contractors, Inc.*, 250 Va. 209, 212, 462 S.E.2d 85, 87 (1995). That is, the rights that MISI had against Haider under §§ 13.1-1035-36 have been assigned from MISI, the judgment debtor, to Raley, MISI's judgment creditor. Because this "involuntary assignment" could not have occurred until after the 2011 judgment was in hand, Raley cannot be faulted for having not raised such claims previously. But now that he is MISI's judgment creditor, he clearly qualifies to pursue MISI's rights against Haider for his liabilities under §§ 13.1-1035-36, or otherwise. *Network Solutions, Inc. v. Umbro International, Inc.*, 259 Va. 759, 768, 529 S.E.2d 80, 85 (2000).

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[61] *Id.*

What Haider has argued, and what the circuit court's Order of September 4, 2012 essentially endorsed, was the notion that if Raley is barred from asserting his own claims, then he is also disqualified from asserting MISI's claims even after he becomes MISI's judgment creditor.[62] As argued in part I, above, Raley is not disqualified in his own right. But even if this Court were to hold him disqualified, it cannot go so far as to say that when the circuit court dismissed Raley's first suit against Haider on April 1, 2011, that also had the effect of barring a suit by MISI against Haider as well. Neither can this Court hold that MISI may have had rights that were unaffected initially, but that became forfeit once acquired by Raley through the "involuntary assignment" of a garnishment. In short, there is simply no rational basis for the circuit court's dismissal of the garnishment or the 2012 Complaint's Count I. It seems that, having erred with respect to the standing and jurisdictional issue, the circuit court proceeded to throw out this particular baby with the proverbial bath water.

[62] JA at p. 148.

III. COUNTS II THROUGH VIII OF THE 2012 COMPLAINT ALSO STAND ON THEIR OWN.[63]

In Counts II through VIII, inclusive, of his 2012 Complaint, Raley alleged additional legal theories for liability of Haider and his two later-formed LLC's, MIPI and Wise.[64] Pursuant to the arguments set forth in part I, above, the dismissal of these claims was also reversible error. But even if this Court should disagree with Raley's arguments in part I, the circuit court still went too far in discarding Counts II through VIII wholesale.

Under Rule 1:6, the bar of *res judicata* would apply only to claims arising out of the "same conduct, transaction or occurrence" as what was resolved on the merits in the first case. What the circuit court failed to appreciate was that Counts II through VIII relied at least in substantial part upon events that occurred *after* the first suit against Haider had been dismissed. Even if this Court adheres to the precept that "what could have been brought, should have been brought," it should recognize that Raley could not have brought suit in 2010-11 over wrongs that, at that time, had not yet been committed.[65]

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[63] Part III of the Argument pertains to Assignments of Error III and IV.
[64] JA at pp. 15-18, 20-33.
[65] Although the timing of the events relied upon was not specified in the 2012 Complaint (JA at pp.15-33), the circuit court was informed at the August 24, 2012 hearing that some of the events relied upon post-dated

Because the circuit court dismissed Raley's 2012 case at the demurrer stage, it was bound to consider all of his allegations as true, and to give him the benefit of any reasonable inferences. *Thompson v. Skate America, Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 126-27 (2001). By treating his case as if all of the events for which relief was sought were already in the past at the time of the first suit, the circuit court failed to follow the demurrer standard of review properly.

Rule 1:6(a) also requires that the prior action and the instant action involve "the same opposing party or parties." While Rule 1:6(d) maintains the traditional, common law qualification that this also extends to those parties "in privity" with parties from the prior case, this cannot be stretched so far as to discard all cases against corporate entities that are owned by a party from the prior case. To allow such stretching is to negate the concept that incorporated business entities are legal persons in their own right, separate and distinct from their owners.[66] For this reason, the circuit court

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the first lawsuit. *See* JA p. 132 (p.13, lines 15-19). At most, the circuit court might have granted Haider's motion seeking a bill of particulars.

[66] Haider certainly took advantage of the corporate liability shield to insulate himself from personal liability in the first action. *See* JA at pp. 41-46 (Amended Complaint), 65-70 (Defendants' Demurrer to Court II of Plaintiff's Amended Complaint), 47-48 (Order). It would be unjust to allow him to pretend that his LLC's are mere extensions of himself, now that this view would suit his current objectives.

was wrong to include MIPI and Wise in its dismissal, when it was Haider who sought to establish those defendants as wholly independent of himself.

Conclusion

For the foregoing reasons, appellant Thomas J. Raley, M.D., prays that this Court will reverse the decision of the circuit court below, as established by its Order of September 4, 2012, and that this Court will remand appellant's consolidated cases with instructions for trial on the merits.

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CERTIFICATE

I hereby certify that this Opening Brief of Appellant has been filed, and that copies of it have been served upon all other counsel of record, all in compliance with Rules 5:28(g) and 5:26(d), all on this 26th day of March, 2013. Electronic copies in PDF will be filed with the Court by CD and sent to all opposing counsel in accordance with the Rules of this Court.

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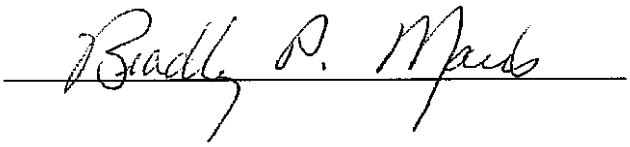
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