In the

Supreme Court of Virginia

At Richmond

Record No. 122069

THOMAS RALEY, M.D.,

Appellant,

– v. –

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

Appellees.

APPELLEE'S BRIEF

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STATEMENT OF THE CASE TO THE EXTENT THAT APPELLEES DISAGREE WITH THE STATEMENT OF THE CASE PRESENTED BY THE APPELLANT

In addition to appellant Thomas J. Raley, M.D.'s ("Raley") statement of the case, the following facts are germane to this appeal. In Raley's initial Complaint in Fairfax Civil Action No. CL 2010-11509 ("first lawsuit"), among other claims, he asserted an "Accounting" claim against Minimally Invasive Spine Institute, PLLC ("MISI") and Naimeer Haider, M.D. ("Haider"). See Joint Appendix ("JA") at 65. Defendants demurred to the accounting claim and Haider demurred to be removed from the case entirely. See JA at 144-45 (p. 144 ln. 17 – p. 145 ln. 7). The court granted the demurrer on the accounting claim and gave leave for Raley to file an amended complaint. See JA at 65.

In Count II of the Amended Complaint, Raley asserted that Haider violated Virginia Code section 13.1-1035 ("Wrongful Distribution"). See id. at 44-45 (Amended Complaint ¶¶ 20-24). Contrary to Raley's statement of the case in this appeal, Opening Brief of Appellant ("Op. Brief of App.") at 2; JA at 157 (Petition for Appeal at 3) ("Count II was the only claim in this first suit that sought relief against Haider"), Raley also named Haider as a joint and several defendant in the case, apparently for all Counts or at least counts II and III. See JA at 45 (Amended Complaint ¶¶ 25-30) (see prayer

of relief after paragraph 30, asking for joint and several judgment against MISI and Haider). Upon Haider's demurrer, trial court dismissed the "Wrongful Distribution" claim with prejudice and also dismissed Haider from the case entirely with prejudice. See id. at 47. Raley did not appeal the dismissal of Haider.

The original garnishment claim, CL 2012-4643, was not only consolidated, but merged into Count I of CL 2012-7905 ("second lawsuit"). See JA at 71. In the joint motion requesting consolidation, the parties agreed and stipulated that "the garnishment action and Count I of CL 2012-7905 raise substantially similar question of law and fact and the two matters should be consolidated." See JA at 53-55.

QUESTION PRESENTED

As for Raley's "Questions Presented" (Op. Brief of App. at 8), he improperly assumes that first lawsuit's *res judicata* effect on second lawsuit is based on dismissal due to lack of standing. Instead, the proper question is as follows:

Where a trial court grants plaintiff an opportunity to amend a complaint after sustaining a demurrer, and plaintiff submits claims of wrongful distribution and *quantum meruit* against the LLC and the LLC member in the Amended Complaint, whereupon the trial court sustains

another demurrer and dismisses the wrongful distribution claim with prejudice and dismisses the LLC member entirely from the case with prejudice, does the trial court's ruling bar a subsequent lawsuit by plaintiff against the LLC member, arising out of the same transaction and occurrence, due to *res judicata*?

STANDARD OF REVIEW

All four assignments of error are challenging the trial court's grant of a demurrer. See Op. Brief of App. at 5. In reviewing a trial court's order sustaining a demurrer, the appellate court is "required to address the same issue that the trial court addressed, namely whether the amended [bill of complaint] alleged sufficient facts to constitute a foundation in law for the judgment sought." Hubbard v. Dresser, Inc., 271 Va. 117, 119, 624 S.E.2d 1, 2 (2006). The appellate court reviews the ruling *de novo*, accepting "as true all facts properly pleaded in the bill of complaint and all reasonable and fair inferences that may be drawn from those facts." Glazebrook v. Bd. of Supervisors of Spotsylvania County, 266 Va. 550, 554 (2003) (citations omitted).

SUMMARY OF ARGUMENT

Raley's appeal faces two procedural thresholds:

(1) Raley violated Supreme Court Rule 5:17(c)(1) and 5:27(c) by failing to cite to specific pages of the appendix where the alleged errors were preserved. Therefore, Raley's assignments of error merit no appellate consideration and he should not have an opportunity to present oral arguments pursuant to Rule 5:26(i). *See Argument I below, applicable to all assignments of error*.

(2) Raley also failed to preserve the issue for appeal with respects to assignments of error related to Counts II through VIII. As mentioned by Haider's counsel at the August 24, 2012 hearing, Raley did not address *res judicata* with respect to Counts II through VIII in his opposition memo. Raley also failed to argue why *res judicata* should not apply to Counts II through VIII at the hearing in the Circuit Court on August 24, 2012. Further, Raley has failed to point out what grounds were used to object to the dismissal of Count I at trial. *See Argument II below, applicable to all assignments of error.*

Even if Raley is able to get past the threshold issues of (1) violations of Rule 5:17(c)(1) and Rule 5:27(c) and (2) preserving the issues for appeal, contrary to Raley's assertions, the first dismissal of Haider was a dismissal

on the merits. In the Amended Complaint, there were two claims asserted against Haider, wrongful distribution and *quantum meruit*. Although dismissal of the wrongful distribution claim was due to standing, dismissal of the *quantum meruit* claim was on the merits. *See Argument III.A below, applicable to all assignments of error.*

Failure to file a proper amended complaint as to Haider after the trial court's initial dismissal and leave to amend renders the second dismissal a judgment on the merits. *See Argument III.B below, applicable to all assignments of error.*

Also, because Haider's dismissal was with prejudice, it operates as *res judicata* bar to subsequent lawsuits between the parties even if the factual allegations were not adjudicated. *See Argument III.C below, applicable to all assignments of error.*

The argument that the initial dismissal was for standing and therefore does not implicate *res judicata* was not presented to the trial court and not preserved for appeal. *See Argument III.D below, applicable to assignment of error 1.*

As for Count I of the second lawsuit, the "wrongful distribution" claim, Raley's position as a judgment creditor of MISI does not change the fact that his claim is barred by Virginia Code section 13.1-1043 and 13.1-1044

["… *In a derivative action, the plaintiff shall be a member at the time of bringing the action*."]. Therefore, Count I of the second lawsuit is barred by *res judicata* as it is the exact same claim dismissed in the first lawsuit. *See Argument IV below, applicable to assignment of error 2.*

Application of *res judicata* to MIPI and Wise was proper because they are parties in privity with Haider. *See Argument V below, applicable to assignment of error 4.*

Lastly, Raley's argument that part of the factual occurrences forming the basis for Counts II through VIII occurred after the first dismissal was not argued at the trial court level and was not preserved for appeal. Also, Raley conceded at the trial court hearing that MIPI and Wise could have been joined as defendants to the first lawsuit. Further, the alleged wrongful transfer to Wise occurred on or about November 2010, which was prior to the filing of the Amended Complaint in the initial case. *See Argument VI below, applicable to assignment of error 3.*

ARGUMENT

I. RALEY'S APPEAL SHOULD BE DENIED AS ALL OF THE ASSIGNMENTS OF ERROR IN HIS PETITION FOR APPEAL AND OPENING BRIEF VIOLATE SUPREME COURT RULE 5:17(c)(1) AND 5:27(c).

As a threshold matter, all of Raley's assignments of error should be deemed waived and his appeal denied due to his flagrant violation of Supreme Court Rules 5:17(c)(1) and 5:27(c).

Rule 5:17(c)(1) clearly requires that petition for appeal include a separate heading entitled "Assignment of Error" and clearly specify the error in the rulings below and include "[a]n exact reference to the page(s) of the transcript, written statement of facts or record where the alleged error has been preserved . . . ." Va. Sup. Ct. R. 5:17(c)(1). The corollary Rule 5:27(c) specifically requires that opening brief of appellant contain "[t]he assignments of error, with a clear and exact reference to the pages of the appendix where the alleged error has been preserved." See id. R. 5:27(c).

Violations of rules pertaining to form and contents of petition for appeal or brief are not jurisdictional and do not mandate a *per se* dismissal. See Jay v. Commonwealth, 275 Va. 510, 517, 659 S.E.2d 311 (2008). That is not to say, however, that violations of the rules are condoned or excused. See id. at 520, 659 S.E.2d at 317. Appellate courts have wide

discretion to fashion appropriate sanctions, including treating question presented as waived. See id. The Court should consider the gravity of the violation in fashioning the appropriate sanctions. See id. (discussing the hypothetical of mandatory dismissal for failure to list cases alphabetically in violation of Rule 5A:20(a) as too harsh). Furthermore, Rule 5:26(i) provides that "[a]ny party who fails to file a brief in compliance with these Rules . . . will not be heard orally, except for good cause shown." Va. Sup. Ct. R. 5:26(i).

Here, Raley's violations are not minor or insignificant. In his assignments of error sections of the petition for appeal and the opening brief, Raley only cites one part of the record, the trial court's September 4, 2012 order sustaining the Defendants' demurrer and dismissing the case. See JA at 155; Op. Brief of App. at 5. This order was entered without either counsels' endorsement pursuant to Rule 1:13 and thus does not even contain the perfunctory "seen and objected" language. See JA at 148. Clearly, the September 4, 2012 order contains nothing that would be sufficient to preserve any objections for appeal. See Va. Sup. Ct. R. 5:25. Therefore, Raley clearly violated Rule 5:17(c)(1) and 5:27(c) by utterly failing to include any citation to the appendix or the record that would indicate where the alleged errors were preserved for appeal. See JA at

148, 155; Op. Brief of App. at 5. Therefore, all of Raley's assignments of error should be deemed waived and his appeal should be denied. Further, pursuant to Rule 5:26(i), Raley should not be afforded an opportunity to present oral argument.

II. RALEY'S APPEAL SHOULD BE DENIED BECAUSE HE HAS FAILED TO PRESERVE HIS OBJECTIONS TO DISMISSAL OF COUNTS II THROUGH VIII AT TRIAL COURT AND HAS FAILED TO INDENTIFY THE NATURE OF HIS OBJECTIONS TO DISMISSAL OF COUNT I.

Raley's appeal should be denied because he has failed to preserve his objections to the dismissal of Counts II through VIII by the trial court, and has failed to identify the nature of his preserved objections to the dismissal of Count I.

Virginia Supreme Court Rule 5:25 makes clear that "[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. Sup. Ct. R. 5:25. "A party must state the grounds for an objection 'so that the trial judge may understand the precise question or questions he is called upon to decide.'" Scialdone v. Commonwealth, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) (quoting Jackson v. Chesapeake & Ohio Ry. Co., 179 Va. 642, 651, 20 S.E.2d 489, 492 (1942)). The purpose of the

rule “is that the trial judge may be informed of the precise points of objection in the minds of counsel so that it may be advised and rule intelligently.” Ross v. Schneider, 181 Va. 931, 941, 27 S.E.2d 154, 158 (1943) (interpreting former version of the rule with substantially the same requirements).

It is well established appellate jurisprudence that the appellate court “do not search the record for errors not thus indicated.” Law v. Commonwealth, 171 Va. 449, 455, 199 S.E. 516, 519 (1938); see also Buchanan v. Buchanan, 14 Va. App. 53, 56, 415 S.E. 2d 237, 239 (Va. App. 1992) (holding that Court of Appeals “will not search the record for errors in order to interpret the appellant’s contention and correct the deficiencies in a brief.”).

As noted by the Defendants in their arguments at trial court and in the opposition to the petition for appeal, Raley failed to specify his arguments against dismissal of Counts II through VIII. See JA at 123 (ln 12-23). Even if Raley preserved his objections and the grounds for dismissal of Counts II through VIII, having failed to identify them to the court, any assignments of error as to dismissal of Counts II through VIII should be denied. See Law, 171 Va. at 455, 199 S.E. at 519.

As for dismissal of Count I, the arguments Raley may present on appeal are confined to the grounds for the objections he presented in the trial court. See Scialdone v. Commonwealth, 279 Va. at 437, 689 S.E.2d at 724. Because Raley does not identify where his objections were preserved and what grounds were given for his objections, neither this Court nor the Appellees are able to discern which grounds were presented before the trial court and which grounds are newly raised arguments. This highlights the gravity of Raley's Rule 5:17(c)(1) and 5:27(c) violations. Having failed to identify which specific objections and grounds were preserved at trial court, Raley's assignments of error regarding dismissal of Count I should also be denied.

III. THE FIRST DISMISSAL WITH PREJUDICE AGAINST DR. HAIDER OPERATES AS RES JUDICATA BAR FOR ALL SUBSEQUENT LAWSUITS BETWEEN THE PARTIES.

A. THE FIRST DISMISSAL OF DR. HAIDER WAS NOT SOLELY BASED ON LACK OF STANDING. RALEY ALSO ASSERTED QUANTUM MERUIT AGAINST DR. HAIDER, WHICH WAS DISMISSED WITH PREJUDICE AS AGAINST HAIDER.

Contrary to repeated assertions by Raley, the first dismissal of Haider was not solely based on lack of standing. Raley also asserted *quantum meruit* against Haider, which was also dismissed with prejudice.

As discussed in the statement of the case, trial court granted a demurrer to the initial complaint by Raley against MISI and Haider and granted Raley an opportunity to amend his complaint. See JA at 65. In Raley's Amended Complaint, there were two counts against Haider individually, wrongful distribution and *quantum meruit*.[1] See id. at 44-45. Both counts alleged that Haider depleted MISI funds rendering MISI unable to pay Raley. See id. at 44-45 (¶¶ 22, 25); id. at 142-145 (p. 142 ln. 18- p. 145 ln. 15). Although wrongful distribution claim was dismissed based on standing, there was no such procedural defect with regards to *quantum meruit*.

The trial court's order sustaining the demurrer to the Amended Complaint clearly shows that Haider was not just a defendant to the wrongful distribution claim. See id. at 47. Upon Haider's demurrer, trial court dismissed the "Wrongful Distribution" claim with prejudice. See id. The trial court then went on to dismiss Haider from the case entirely with

[1] The Amended Complaint's prayer for relief asks for joint and several judgment against MISI and Haider without distinguishing which claim applies to which defendant. See JA at 45. Only counts II and III include allegations of wrongdoing against Haider. See JA at 44-45 (¶¶ 22, 25). Therefore, it appears that only counts II and III are asserted against Haider.

prejudice. See id. If Haider was just a defendant to the wrongful distribution count, there would be no reason to add the language of dismissing Haider entirely from the case with prejudice. See id. The trial court dismissed the *quantum meruit* claim as it applied to Haider when the court dismissed the entire case against Haider with prejudice. See id. at 45, 47. Thus, contrary to Raley's contention, the first case involved dismissal on the merits because the dismissal of the *quantum meruit* claim did not involve any procedural defect. See id.

Raley's petition for appeal and opening brief completely fail to discuss the dismissal of the *quantum meruit* claim against Haider and its effect on Raley's contention that the dismissal was based on standing alone. Raley's failure is particularly striking, considering the importance of this discussion at the August 24, 2012 *res judicata* hearing. See id. at 142-145 (p. 142 ln. 18- p. 145 ln. 15). At the August 24, 2012 hearing, Raley incorrectly represented to the trial court that the first case against Haider only asserted wrongful distribution. See id. at 129 (ln. 14-16). Haider's counsel had to correct the procedural posture, pointing out that Haider was also a defendant for *quantum meruit* and that claim was dismissed with prejudice against Haider as well. See id. at 142-145 (p. 142 ln. 18- p. 145 ln. 15). Therefore, contrary to Raley's repeated misrepresentations to the

trial court and to this Court, the first dismissal of Haider was not only for wrongful distribution and was not for standing reasons alone. See id.

B. EVEN THOUGH THE FIRST DISMISSAL OF HAIDER DID NOT INVOLVE ADJUDICATION OF THE FACTUAL ALLEGATIONS AGAINST HAIDER, RES JUDICATA STILL APPLIES.

Although the first dismissal of Haider did not involve adjudication of whether Raley's allegations against Haider were true, *res judicata* still applies.

Pursuant to Virginia Supreme Court Rule 1:6, Raley is barred from bringing any claims arising out of the same conduct, transaction, or occurrence that was the subject of the first lawsuit between the Raley and Haider. The rule not only bars re-litigation of claims and issues which were the subject of the prior lawsuit, but also includes "any claim or cause of action that arises from that same conduct, transaction or occurrence . . . ." Va. Sup. Ct. R. 1:6 (a). The rule bars re-litigation against all named parties and those in privity. See id. (d).

Put another way, "[e]very litigant should have opportunity to present whatever grievance he may have but if given an opportunity to do so and having failed to avail himself of it, he must accept the consequences. Thus, the effect of a final decree is not only to conclude the parties as to every question actually raised and decided, but as to every claim which properly

belonged to the subject of litigation and which the parties, by the exercise of reasonable diligence, might have raised at the time." Brock v. Voith Siemens Hydro Power Generation, 59 Va. App. 39, 46 (Va. App. 2011) (internal quotation and citation omitted); see also Va. Imports, Ltd. v. Kirin Brewery of Am., LLC, 50 Va. App. 395, 410 n. (Va. App. 2007) (noting that the "could-have-litigated-should-have-litigated" principle applies to the broader transactional approach of Rule 1:6).

The factual underpinnings of the two lawsuits are the same as applied to Haider. Raley claims that Haider depleted MISI funds and rendered it unable to pay Raley. See JA at pp. 44-45; id. at 21-27 (Complaint ¶¶ 40, 41, 54, 55, 65, 75-77, 81, 91). For whatever reason, Raley chose to bifurcate his cause of action between the two cases. Although Raley could have chosen to proceed against MISI alone in the first case, Raley named Haider as a co-defendant and was thus required to bring all claims he wished to assert against Haider or risk *res judicata* bar. See Brock, 59 Va. App. at 46.

Raley now argues that *res judicata* bar did not apply because the trial court in its first dismissal of Haider did not consider whether Raley's factual allegations were true or not. See id. at 163-70 (Petition for Appeal at 9-16);

Op. Brief of App. at 9-17. Raley takes too narrow a view of *res judicata* principles.

Even in the absence of adjudication of the factual allegations, *res judicata* bar may still apply. See e.g. Gilbreath v. Brewster, 250 Va. 436, 440, 463 S.E.2d 836, 838 (1995) (violation of timely service under Rule 3:3 results in dismissal with prejudice and *res judicata* bar of subsequent suits); Griffin v. Griffin, 183 Va. 443, 448-52, 32 S.E.2d 700, 702-03 (1945) (holding where plaintiff fails to amend complaint after demurrer is sustained due to vague allegations, *res judicata* applies); Gimbert v. Norfolk S. Railroad Co., 152 Va. 684, 688-90, 148 S.E. 680, 682-83 (1929) (same where demurrer sustained due to vague allegations and failure to allege negligence).

That the first dismissal of Haider operates as *res judicata* bar is further supported by well-established principles under Griffin v. Griffin, 183 Va. 443 (1945) and Gimbert v. Norfolk S. Railroad Co., 152 Va. 684 (1929); see also Bibber v. McCreary, 194 Va. 394, 397, 73 S.E.2d 382, 384 (1952) (holding that where litigant fails to comply with trial court's terms and conditions in amending motion for judgment, *res judicata* applies).

In both Griffin and Gimbert, the Virginia Supreme Court upheld application of *res judicata* where the demurrer of the initial complaint as too

vague was sustained and the trial court ordered the plaintiffs to file an amended complaint within a set deadline. See Griffin, 183 Va. at 446-49, 32 S.E.2d at 701-02; Gimbert, 152 Va. at 689, 148 S.E. at 682. The plaintiffs failed to do so and the first case was dismissed with prejudice. See id. Upon refiling, the second trial court held that the cause of action was barred by *res judicata*. See id. The Virginia Supreme Court upheld the trial court's ruling in both cases, holding that "[a] decision of an issue of law on a demurrer is a decision on the merits and constitutes *res judicata* as to any other proceedings where the same parties and the same issues are involved". See Gimbert, 152 Va. at 689, 148 S.E. at 682. Furthermore, the "trial court, in the exercise of its discretion, may permit a litigant to amend his motion for judgment, and impose such terms and conditions as may be reasonable and proper, and if the litigant fails to comply with the conditions within time specified, he is barred from further prosecution of the same cause, against the same parties." Bibber, 194 Va. at 397, 73 S.E.2d at 384.

Such failure "to comply with conditions" is exactly what happened in the current case. Here, the trial court partially sustained the first demurrer which sought to dismiss the accounting claim and Haider from the case. See JA at 65; JA at 144-45 (p. 144 ln. 17 – p. 145 ln. 7). In partially

granting the demurrer, the trial court gave leave to file an amended complaint. See JA at 65. Unlike the plaintiffs in Griffin and Gimbert, Raley did file an amended complaint, but as to Haider, the amended complaint was deficient yet again. See id. at 47 (Order dismissing Haider from the case with prejudice). Thus, the trial court sustained the second demurrer and dismissed Haider entirely from the case with prejudice. See id. There should be no reason to distinguish filing a deficient amended complaint from not filing any complaint at all. Either way, Plaintiff Raley failed to comply with a reasonable condition imposed by the trial court upon the grant of the first demurrer: assert a proper claim against the defendant Haider. Therefore, the current case is similar to Griffin and Gimbert; Haider's dismissal with prejudice is a dismissal on the merits. Bibber, 194 Va. at 397, 73 S.E.2d at 384; Griffin, 183 Va. 446-49, 32 S.E.2d at 701-02; Gimbert, 152 Va. at 689, 148 S.E. at 682.

C. THE FIRST DISMISSAL OF HAIDER ALSO OPERATES AS RES JUDICATA BAR BECAUSE IT WAS A DISMISSAL WITH PREJUDICE.

Regardless of adjudication of the substantive facts, the first dismissal of Haider operates as *res judicata* bar because it was a dismissal with prejudice.

"As a general proposition a judgment of dismissal which expressly provides that it is 'with prejudice' operates as *res judicata* and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final disposition adverse to the plaintiff." Estate of Lambert v. Javed, 273 Va. 307, 310, 641 S.E.2d 109, 110 (2007) (internal citation omitted). "A dismissal with prejudice extinguishes the viability of the plaintiff's claim against the dismissed party, even though the dismissal may not be based on an adjudication of the merits of the cause of action." Id. at 310, 641 S.E.2d at 111 (emphasis added).

Here, there is no question that the first dismissal of Haider was a dismissal with prejudice. See JA at 47. Even though there was no adjudication on the veracity of the factual allegation, the dismissal with prejudice still operates as *res judicata* bar. See Estate of Lambert, 273 Va. at 310, 641 S.E.2d at 111. Therefore, Raley's argument that lack of adjudication on his factual allegation precludes *res judicata* bar is without merit.

D. RALEY DID NOT PRESERVE HIS ARGUMENT REGARDING THE STANDING ISSUE AT TRIAL.

Raley also argues that the initial dismissal of Haider was for lack of standing and therefore does not implicate *res judicata*. See Op. Brief of App. at 10-15. This argument was never presented to the trial court and

thus not preserved for appeal. See JA at 57-60 (Memorandum in Opposition to Demurrer); JA at 132-33 (August 24, 2012 Hearing Transcript); see also Va. Sup. Ct. R. 5:25.

Neither in his opposition brief at trial court nor at the hearing did Raley argue that the initial dismissal was for standing alone and thus does not implicate res judicata. See JA at 57-60 (Memorandum in Opposition to Demurrer); JA at 132-33 (August 24, 2012 Hearing Transcript). Therefore, the argument regarding standing was not preserved and does not merit appellate consideration.

IV. RALEY'S STATUS AS JUDGMENT CREDITOR OF MISI DOES NOT GIVE HIM STANDING TO CLAIM WRONGFUL DISTRIBUTION

Raley claims that now as a judgment creditor, he can bring a "wrongful distribution" claim where he could not before. This position is clearly erroneous.

Virginia Code sections 13.1-1043 and 13.1-1044 restrict the right to bring derivative action to members of an LLC at the time of the alleged improper distribution and at the time of the lawsuit. See Va. Code § 13.1-1043, 1044. Therefore, a judgment creditor who is not a member of the LLC does not have the right to bring derivate actions based on alleged violations of section 13.1-1035.

The LLC statute's restrictions on judgment creditor's rights are more easily understandable when viewed from the perspective of a judgment creditor of a member of an LLC. It is well settled that due to section 13.1-1041.1, a judgment creditor of a member of an LLC is only entitled to a charging order. See id. § 13.1-1041.1. Thus, the LLC statute places specific limits on what a judgment creditor of a member of an LLC may do against the judgment debtor's LLC interests.

Similarly, the legislature clearly intended that only members of an LLC may bring derivative suits to enforce the rights of an LLC. See id. § 13.1-1043, 1044. This clear unequivocal statute operates to limit the rights of an LLC judgment creditor, just as section 13.1-1041.1 operates to limit the rights of a judgment creditor of an LLC member.

Although there is no Virginia case law on point that this counsel could find, at least one other jurisdiction reviewing substantially the same LLC laws came to the same conclusion. See CML V, LLC v. Bax, 28 A. 3d 1037, 1041-43 (Del. Sup. Ct. 2011).

In CML V, LLC, the Delaware Supreme Court construed section 18-1002 of the Delaware Limited Liability Company Act, which is almost identical to Virginia Limited Liability Company Act section 13.1-1043, to hold that creditors of an LLC do not have standing to bring derivative

lawsuits on behalf of an LLC. See 28 A. 3d at 1041-43. The Delaware Supreme Court held that the statutory language was clear and unambiguous in mandating that in a derivative action, the plaintiff must be a member of the LLC at the time of bringing the action. See id.

Same analysis applies to Virginia law. Section 13.1-1043 clearly states "[i]n a derivative action, the plaintiff shall be a member at the time of bringing the action . . . ." Va. Code § 13.1-1043. Therefore, Raley, whether a creditor or a judgment creditor, has no standing to bring a derivative lawsuit to enforce the rights of MISI. See id.

V. MIPI AND WISE ARE PARTIES IN PRIVITY WITH HAIDER

MIPI and Wise, the other defendants to this case, are parties clearly in privity with Haider.

There is no single fixed definition of privity for purposes of *res judicata*. Whether privity exists is determined through a case-by-case examination of the relationship and interests of the parties. The touchstone of privity for purposes of res judicata is that a party's interest is so identical with another that representation by one party is representation of the other's legal right. Nero v. Ferris, 222 Va. 807, 813, 284 S.E.2d 828, 831 (1981); Storm v. Nationwide Mut. Ins. Co., 199 Va. 130, 134-35, 97 S.E.2d 759, 762 (1957);

see also State Water Control v. Smithfield Foods, 542 S.E.2d 766, 261 Va. 209 (Va., 2001).

MIPI and Wise are limited liability companies owned by Haider. The only theory the plaintiff asserts for MIPI and Wise's liability is that of vicarious liability deriving from Defendant Haider. See JA at 21-28 (Complaint ¶¶ 44, 45, 58, 59, 70, 71, 93, 96). Although Raley complains in his brief that privity should not extend to all corporate entities owned by party to whom res judicata applies, see Op. Brief of App. at 22, it is important here that the only theory of liability for MIPI and Wise is that of vicarious liability for actions of Haider, see JA at 21-28. Therefore, MIPI and Wise's legal liability runs with Haider and they are parties in privity for purposes of this lawsuit.

VI. RALEY CONCEDED THAT CASES AGAINST MIPI AND WISE COULD HAVE BEEN BROUGHT IN THE FIRST LAWSUIT.

Raley conceded that claims against MIPI and Wise could have been brought in the first lawsuit.

In this appeal, Raley also argues that some acts underlying Counts II through VIII are not barred by *res judicata* because they occurred after the dismissal of the first suit. See JA at 173-74 (Petition for Appeal at 19-20); Op. Brief of App. at 21-23. This argument ignores the fact that Raley's

counsel conceded during the August 24, 2012 hearing that transactions involving MIPI and Wise took place prior to the filing of the amended complaint. See JA at 131 (ln. 10-22) (discussing MIPI and Wise transaction occurring in 2010); at 136-37 (p. 136 ln. 21 – p. 137 ln. 18) (conceding claims against MIPI and Wise could have been brought in the earlier case). Furthermore, the alleged wrongful transfer to Wise occurred on or around November of 2010, see JA at 25, 30-33, which was before the Amended Complaint in the first lawsuit.

Therefore, Raley cannot appeal the dismissal of Counts II through VIII because he failed to preserve any objections and conceded that all transactions involving MIPI and Wise took place prior to the filing of the amended complaint.

CONCLUSION

For the foregoing reasons, the Appellees respectfully request this Court to deem the assignments of error as waived, deny Raley the opportunity to present oral arguments, and deny his appeal. Appellees further requests that the Court remand this case to trial court for determination and award of attorney's fees and costs.

Date: 22 April 2013.

Respectfully Submitted,

/s/ Mike Meier

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CERTIFICATE OF SERVICE

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