No. _____

In The Supreme Court of the United States

Robert Brumfield, Petitioner,
v.
Christina McComas, Respondent,

On Petition for a Writ Of Certiorari to the
West Virginia Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

West Virginia courts at all levels have ignored their duties to guarantee due process involving Petitioner's fundamental rights to fair proceedings for over sixteen years. The current trial judge previously affirmed the order now attacked in the instant case. Petitioner moved to disqualify for prior participation, then for misconduct when the judge scheduled a dismissal hearing instead of "proceed[ing] no further." After disqualification was denied, the judge dismissed all claims, including constitutional claims concerning fundamental rights to divorce and appointment of counsel, on the ground of his belief that the independent action does not exist.

The W. Va. Supreme Court disregarded its own case law to grant a motion to strike 144 previously unchallenged pages of transcripts, after briefings were closed, and refused to recognize statutory exemptions. It lost evidence and "ignore[d]" constitutional and jurisdictional issues, a stipulation, and orders from the prior case due to the absence of evidence that it created—for a dismissal, not summary judgment. It refused to hear disqualification and rejected all trial grounds for dismissal, yet made novel argument on Respondent's behalf to dismiss with "expressly overrul[ed]" parts of its own case law, find *res judicata*, and remove all avenues to amend.

Subject to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Questions Presented are:

1. Whether family court rules or policies, as written or as applied, violated due process or equal protection, including service, notice, and rights to counsel.
2. Whether due process requires courts to hear constitutional issues, or to equally apply statutes, rules, their own case law, and opinions from this Court.

List of Related Proceedings

Robert Darren Brumfield, Plaintiff, v. Christina McComas, Defendant, No. 21-C-02, Sixth Judicial Circuit of Cabell County, West Virginia. Motion to dismiss granted November 29, 2021; Rule 59 motion to alter or amend denied December 15, 2021.

RE: Robert Darren Brumfield, Plaintiff, v. Christina McComas, Defendant, No. 21-C-02, West Virginia Supreme Court of Appeals, Honorable Chief Justice Evan Jenkins presiding over judicial disqualification of Judge Hon. Alfred E. Ferguson. Disqualification denied July 16, 2021.

Robert Darren Brumfield, Plaintiff Below, Petitioner in Appeal, v. Christina McComas, Defendant Below, Respondent in Appeal, No. 22-0037, West Virginia Supreme Court of Appeals. Memorandum Decision entered February 7, 2023; Petition for rehearing refused April 27, 2023.

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Robert Brumfield respectfully petitions for a writ of certiorari to review the judgment of the West Virginia Supreme Court of Appeals.

Opinions and Decisions Below

The Memorandum Decision of the West Virginia Supreme Court of Appeals affirming dismissal of Civil Action 21-C-02 is reported as *Brumfield v. McComas*, No. 22-0037 (W. Va. Feb. 7, 2023). That decision is attached in the Appendix ("*App.*"). At 5-17.

The April 27, 2023 Order denying as moot Brumfield's motion to resubmit allegedly missing[1] video files to the record that the West Virginia Supreme Court of Appeals lost, and refusing his petition to rehear the *Memorandum Decision* (App. At 7) is not reported to Brumfield's knowledge.

Jurisdiction

The West Virginia Supreme Court of Appeals refused Brumfield's petition for rehearing on April 27,

[1] In the *Memorandum Decision* at footnote 8, *App.* 14-15, the court stated that the video records of the proceedings for the family case challenged by Civil Action 21-C-02 were "missing" on February 7, 2023. However those records apparently reappeared on or before April 27, 2023, which is the reason the court denied Brumfield's motion to resubmit them as "moot." *App.*18.

2023. *App.* 18. Brumfield invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the West Virginia Supreme Court of Appeals's refusal to rehear his appeal.

Constitutional Provisions Involved

United States Constitution, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

According to a 2018 United States Census Bureau press release, only "*44 Percent of Custodial Parents Receive the Full Amount of Child Support.*" PRESS RELEASE NO. CB18-TPS.03 (January 30, 2018). <www.census.gov/ newsroom/press-releases/2018/ cb18-tps03.html>.While this illustrates a significant national concern involving a 56% Majority of support obligors, it offers no insight as to how this problem likely originated, or why it is ongoing.

Other than criminal cases, family proceedings for enforcement of support obligations are the only other common, nationwide instances where the accused faces government representation acting on behalf of a private citizen. Criminal courts assure constitutional protections for defendants, including assistance of counsel, but this is often not the case for indigent divorce respondents when their obligations are established. Like jailors, support enforcement agents care little about the propriety of judgments enforced. Brumfield's essential constitutional argument in the case concerns notice of the right to request counsel.

As it comes to this Honorable Court, the case presents two related questions of fundamental, national importance. The first concerns due process and equal protection, including notice of the right to request counsel during a divorce involving establishment of legal paternity and support liabilities that "are often more severe than ones that attend violations of criminal laws *** affect[ing] his liberty, his estate and his earnings." *State ex rel. Graves v. Daugherty*, 164 W. Va. 726, 732 (W. Va. 1980) (discussing paternity and support). The second question concerns the rights to relief from judgments, and to

be heard before fair and impartial courts and judges who recognize, obey, and equally apply the laws.

The case involves a 2007 divorce and the resulting judgments between former spouses, petitioner Brumfield and respondent McComas. Brumfield attacks the judgments for voidness, unconscionability, and fraud upon the court, *See Appendix II* (*"A2."*), at 1-7 (the table of contents and authorities from the amended complaint, which is a summary of a voluminous writing), and seeks to be made whole for ongoing or newly discovered harms and damages resulting from McComas's bad acts. *See Id.* At 4-5.

Brumfield was an indigent, involuntarily self-represented divorce respondent in January 2007,[2] *App.* 41-42. Like the 56% Majority, he faced establishment of legal paternity and child support obligations as a matter of law because there were minor children involved and, although parentage is presumed, a legally binding monthly support obligation per specified terms is not until there is a support order. *App.* 92.

McComas, who solely controlled the marital finances, *A2,* at 95 § H.4, was represented in the divorce by counsel paid from marital funds. Brumfield did not know he could request counsel to be paid from marital funds or by the financially stronger party until 3 am the day before the final hearing, *App.* 41-42, but even then he did not realize the significance of that information nor did he know what to do

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[2] Robert Darren Brumfield earned his Juris Doctor degree from the William S. Boyd School of Law at the University of Nevada Las Vegas in 2015. Although he passed the Multi-State Bar examination in 2017, he has not been admitted to the practice of law due in large part to the financial havoc created by the judgments challenged in the case presented for certiorari here. In 2007-2008, he lacked formal education beyond high school.

with it, especially after the family court judge told him there is no right to counsel in divorce cases, *Ibid.*

Discussing indigent divorcing fathers, the family judge at the final hearing told Brumfield that there is no right to counsel in family proceedings, and that there "ought to be an equal playing field" in family courts; that "most of the time ... the role's reversed. *** [T]he man's the high [] wage earner, and the wife is here without an attorney." The judge openly admitted that family courts present an unequal playing field where indigent, unrepresented parties often face moneyed spouses represented by counsel likely paid from marital funds, but stated "that's the way it is. That's where it's been." *See App.* 41-42; 61 n. 15; 75. n. 40.

Less than a year after the final hearing, Brumfield faced contempt for support arrears due to an excessive support obligation, much like the others in the 56% Majority who were in arrears in 2018. This excessive obligation, *A2* 95 § J, was established at the temporary hearing through Brumfield's reliance upon McComas's fraudulent agreement to issue a check for $9100.00 in settlement of the marital estate if she was awarded temporary possession of the marital home, which was awarded to her at that hearing. The temporary obligation was continued after the final hearing despite a stipulation entered by the parties and accepted by the court at that hearing. *A2.* 96 § H.5. This stipulation did not make it to the final order, *Id.* § H.6, even though Brumfield notified the family court and Linda Wichman ("Wichman"), McComas's attorney who was assigned to write all orders on behalf of the court, that the stipulation was not incorporated into the order *App.* 68-69. He moved the court to reconsider, but was ignored. *Ibid.*

There was no significant development in the case because the trial court dismissed the entire complaint, including fraud upon the court, constitutional claims, and ongoing or newly discovered harms, for failure to state a "cause of action" upon which relief can be granted, *App.* 39. The court stated its lack of belief that the independent action exists[3] as its basis despite Brumfield's briefings to the contrary, and despite the plain language of Rule 60(b).[4]

This petition for certiorari concerns egregious actions and decisions of the West Virginia Supreme Court of Appeals ("WVSCA") more than an erroneous decision by a county trial court.

As a preliminary matter, The court delayed mailing the order refusing to rehear the appeal, *App.* 18, by five out of seven available days to file a motion for stay. Brumfield filed motions to stay the mandate and for leave to file out of time because he was incapable of complying with the rules due to this delayed mailing. These motions were refused by a three-two vote.

Brumfield was incapable of raising Fourteenth Amendment Due Process and Equal Protections con-

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[3] The WVSCA found in its *Memorandum Decision* that "[w]ith regard to this basis for the dismissal, the circuit court relied on two grounds: (1) an independent action seeking relief from a prior judgment did not exist in West Virginia; and (2) petitioner impermissibly sought to relitigate issues from the parties' divorce case, as "everything goes back to the divorce."" *App.* 9-10.

[4] W.Va. R. Civ. P. 60(b) states in pertinent part:

> This rule does not limit the power of a court to entertain an *independent action* to relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for *fraud upon the court* (emphases added).

cerns regarding the WVSCA before that court because its actions were not complete until it issued and entered the mandate. Brumfield could not timely move to stay the mandate because he received the order refusing rehearing the day the mandate was entered, thus depriving the WVSCA of jurisdiction because the case was mandated back to the trial court. *See Appendix III* (*"A3"*), which is included as a final supplement at the end of this petition, at 1-14.

2. The WVSCA rejected the dismissal as erroneous on all trial court grounds stated on the face of the order, but affirmed the decision by what can be described as an engineered condition to achieve an erroneous, results-driven decision. *See A3.* At 16-17 § E; *A3.* At 22-27 "BACKGROUND."

a. When reaching its *Memorandum Decision* (*"Decision"*), the WVSCA did not hear the preliminary issue of judicial disqualification, *A3.*, at 6.

b. The WVSCA made an entirely new argument on McComas's behalf, *App.* 10, based on misstatements of law by applying expressly overruled parts of a per curiam opinion, *App.* 27-36, to find finality of the judgments that Brumfield challenged in the instant case. Finality is an element of res judicata, *App.* 13-14, which the WVSCA found to dismiss all grounds.

c. This was after the court allegedly lost video files from the appendix record, *App.* 14 n. 8,[5] and improperly struck 144 pages of evidence from the appendix that were never challenged at trial nor pre-

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[5] "[T]his Court, by order entered on August 18, 2022, granted respondent's motion to strike portions of petitioner's appendix, including the family court transcripts from the parties' divorce case. While petitioner states that he also provides video recordings of the family court hearings, we do not find any such recordings in the appendix."

sented any jurisdictional questions, by applying a statute governing professional court reporters which expressly exempted video recorded proceedings from its application. *See App.* 18-63 (Brumfield's response to McComas's motion to strike); *W. Va. Code § 47-27-1 et seq.*

d. The court then continued onward, relying upon the absence of the video recordings and the lack of evidence within the appendix record due to the strike it granted to find that the family court judge's actions in the divorce proceedings were not unconscionable. *App.* 14-15 n.8 ("Accordingly, we "take as non[-]existing all facts that do not appear in the [appendix record] and ... ignore those issues where the missing record is needed to give factual support to the claim." *State v. Honaker,* 193 W. Va. 51, 26 n.4, 454 S.E.2d 96, 101 n.4 (1994)."), Unconscionability is the first element for an independent action, *App.* 11, and the WVSCA used this finding based on a lack of evidence to defeat Brumfield's independent action.

e. Despite Brumfield's allegations of civil conspiracy involving McComas, her counsel at the time, and the family court judge, the WVSCA completely "ignored" all claims concerning party and attorney impropriety. It apparently found that, because there was no basis within the record despite Brumfield's scores of allegations to the contrary (which were supported by those stricken transcripts and those allegedly missing video files), none of the actions that led to Brumfield's ongoing harms actually occurred or were unconscionable. The WVSCA stepped in on behalf of the trial court and the jury, finding that the allegations before it (which were to be evaluated in the best light toward Brumfield, and were to be taken as true because the case was dismissed under Rule 12(b)(6)) and applied what was in effect a sum-

mary judgment standard to defeat the unconscionability element of Brumfield's independent action, in all aspects, including fraud upon the court.

f. Based on this engineered condition, the WVSCA decided its own novel argument on McComas's behalf against Brumfield, before Brumfield knew the video files were allegedly missing, before he could resubmit them for the court's consideration, and before he had any opportunity to counterargue. *App.* 26. To add insult to injury, after the court entered its *Decision*, *App.* 5-17, on February 7, 2023, Brumfield resubmitted the lost files along with with a motion to resubmit, and petitioned the court to rehear while considering those files after they were received, *App.* 19-37. On April 27, 2023, the court refused the petition for rehearing and the motion to resubmit as "moot" *because those allegedly missing files were already in the appendix record. App.* 18.

The court relied upon the absence of that evidence, an absence the court created, to support every ruling against Brumfield in footnote 8 of the *Decision*. *App.* 14 n. 8 (hereafter "Footnote 8"). There is a strong suggestion of dishonesty here because the files could not conveniently disappear to create the pretext for the *Decision* in Footnote 8, then magically reappear when their presence apparently relieved the WVSCA of any duty or reason to re-hear. Brumfield had nothing to do with their disappearance or reappearance within the clerk's records. This observation comes directly from the written words of the West Virginia Supreme Court of Appeals in its April 27, 2023 *Order* refusing rehearing. *App.* 18.

g. Further, the *Decision* did not address Brumfield's claims of structural debilities and denials of due process and equal protection caused by the family court rules as written or as applied, *App.* 70-76;

A2., at 92, especially concerning Family Court Rule 6's prejudicial effects on indigent respondents, any of which could support a claim of unconscionability if not voidness. *See App.* 59-62.

h. Particularly, Family Court Rule 6 presents a vital question of state and national importance because that rule prohibits access to family case filings and to family court proceedings. This hinders the due process rights of indigent, involuntarily unrepresented respondents to prepare a defense and counterclaims. *App.* 77-80. These same parties often will face the legal establishment of parentage and support obligations and eventually, likely become part of the 56% Majority.

Family Court Rule 6 creates a need for court-appointed counsel, or at least creates the need for conspicuous notice of the right to request counsel because those parties, who are captive to the process, have broken no laws yet face liabilities often exceeding criminal sanctions. *Graves*, supra. The right to request needs-based counsel is already established in West Virginia Code § 48-1-305, WVC § 48-5-504, and WVC § 48-5-611, and West Virginia case law recognizes the right in *Smith v. Smith*, 187 W. Va. 645, 650 (W. Va. 1992) and other contexts,[6] but there was no conspicuous notice of this right on any family court forms in 2007 and to Brumfield's knowledge there still is no conspicuous notice to this day. Further, there was no conspicuous notice of where the

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[6] "An indigent defendant has a right to court appointed counsel, *Code*, 49-5-10 (1975), and all parties, particularly parents, guardians, or other custodians must be *fully and meaningfully* informed *of their rights and must be accorded a reasonable time to confer with counsel and prepare a defense* (emphasis added)." *State ex rel. Harris v. Calendine*, 160 W. Va. 172, 176 (W. Va. 1977).

divorce statutes could be found on the mandatory family court forms in 2007. There were no citations to statutes or case law in opinions, findings of fact, conclusions of law, or orders issued by the family court in 2007-2008, with the exception of "Rule 22(b) Notices" on proposed orders.

Brumfield implores this Honorable Court to exercise is supervisory, equitable, or inherent powers of review on behalf of himself and the rest of the 56% Majority who are in child support arrears because there is a constitutionally intolerable likelihood that their support obligations were improvidently established, and will likely be enforced by publicly funded agencies.

Background

Brumfield was served with a divorce on December 29, 2006. He had a couple of hundred dollars to his name, no unemployment, no income, and no available credit to speak of because his credit cards were nearly maxed due to charges to cover a failing business startup and Christmas spending. *App.* 73. McComas had the advantage of preparing and planning for months, and had already hired counsel out of the marital funds, which she solely controlled, *A2.* 95, when the divorce was served.

Having no other known alternatives, Brumfield formulated a response by relying solely upon the West Virginia Rules of Practice and Procedure for Family Courts ("Family Court Rules" or "WVFCR"), which he found on the internet. He soon realized that mandatory court forms were missing and that he was not afforded the proper amount of time under the rules. *App.* 61 n. 12; *App.* 94 ("service did not include an FCR 9(b) mandatory financial statement or parent education notice, or a FCR 14-mandated parent-

ing plan because these mandatory forms were created on January 10, 2007.").

Brumfield asked McComas for the forms but she refused, so he in unsophisticated fashion moved to continue the hearing and for service of complete process among several other things (which he learned how to do off the internet in the week that he had to try to prepare) including objecting to jurisdiction, which were poorly received. *App.* 94 n.59. The court refused to continue and refused to require service of complete process as mandated by the Family Court Rules, *App.* 93, under the rationale that it was a temporary hearing, which denied Brumfield his due process rights of notice and opportunity to be heard in a meaningful manner. Brumfield was handed those mandatory forms in a stack of papers in the hallway outside the courtroom, *App.* 84 n. 47, because McComas created those forms the day of the hearing, *App.* 94.

McComas was awarded temporary custody of the parties' minor children, likely based on her claims of "90-100% involvement" with child development, *App.* 95, a claim that was never spoken at the hearing, and which Brumfield did not see until the hearing was over and the damage done. All hearings in the divorce were held on evidence presented by proffer, even though Brumfield moved the court from his first filings to prohibit the practice, *App.* 72 n. 26, and even though the family judge had a clear duty under *W. Va. Code* § 48-5-511 to order those disclosures be made before the temporary hearing. *App.* 82 fn. 44.

Further, McComas's counsel wrote all the orders. Widhman often left out or changed material orders spoken in the premises by the court, to her client's advantage. Wichman was per se biased toward her client in formulating those orders, which the court

signed unmodified every time over Brumfield's objections and notices that the orders did not accurately reflect the court's spoken orders in the proceedings. The family rules allowed for all of this.

Particularly, Family Court Rule 6 is unduly burdensome and prejudicial to preparing a defense or counterclaim, *App., 77-78,* because it limited Brumfield's options for research to such a degree that he had no meaningful opportunity to prepare his defense in law. Family Rule 6[7] prohibited access to family case files and observing divorce hearings. The lack of conspicuous notice that he could request counsel or suit money as a right, or even notice of applicable statutes, during this most dire and crucial of times unduly burdened him and denied him due process and equal protection when McComas controlled the marital funds, and used them to hire an attorney.

Statutes requiring disclosure under penalty of false swearing did little to protect Brumfield, especially when he was forced into pro se status because he believed he had no other options. The court recognized the need for counsel, but the only notice or "advice" it gave to Brumfield was that "I would not be sitting in your position representing myself."

The previous statements illustrate a need for changes to the family court rules, and a need for assistance of counsel because a self-represented party is placed under a constitutionally intolerable disadvantage when they are handed stacks of evidence in the premises that have never been seen, but are ex-

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[7] Family Court Rule 6(a) provides in pertinent part, "All pleadings, recordings, exhibits, transcripts, or other documents contained in a court file are confidential, and shall not be available for public inspection." Family Court Rule 6(b) states that "Family court proceedings are not open to the public."

pected to spontaneously formulate an intelligent and informed response.

As is pertinent to Brumfield's quest for relief from judgments and to be made whole, there was a stipulation between the parties concerning income amounts to be used for child support calculations due to the sporadic nature of Brumfield's work. He had worked five weeks in the year preceding the final hearing due in part to his failed business startup, which lost money and put him in significant debt. *App.* 91-92. The family court accepted this stipulation at the final hearing, *App.* 91 ("Child support payments will be calculated based on $2200 a month gross. Uh. That's fine by me if it's fine by them. [(there is a formatting error in the transcript.) The Judge says "] She's-she indicated it was."). Upon this acceptance, Brumfield stopped presenting evidence concerning the nature of his work and stopped explaining why it would be necessary to deviate from the formula, relying upon the court's acceptance of that stipulation. *App.* 91-92.

Secondly, the family court ordered McComas to disclose records for financial accounts held with her mother that Brumfield discovered during his cross-examination of McComas at the final hearing. *App.* 73 n. 31 ("One year. *** I would want to see [the records for Respondent's joint bank account held with her mother]."). Brumfield did not discover that these martial assets likely exceeded $200,000.00 from the parties' paycheck deposits for the previous three years until January 2021 when he wrote the amended complaint for the instant case. *App.* 35 ¶39.

In the final order, Brumfield was charged $387.77 to equalize the marital estate because McComas fraudulently concealed these marital assets. In addition to relief from fraudulently estab-

lished child support obligations, Brumfield seeks relief from that fraudulently obtained judgment of marital property division.

Brumfield notified the family court in writing about the stipulation, and that McComas did not make those ordered financial disclosures, believing that the court would schedule another hearing because the judge plainly stated at the end of the final hearing that he would call the parties back in if anything needed his attention. Brumfield waited on a new scheduling order but eventually received the final order. He moved the court to reconsider its final order to reflect the stipulation and the disclosure. *A2.* At 104-105.

The family court did nothing. Brumfield appealed to the county circuit court, relaying the above information. That appeal was denied by the Honorable Judge Alfred Ferguson, who also presided over the instant case. *App.* At 1. Brumfield's appeal to the WVSCA was refused.

McComas has never denied the existence of that child support stipulation or the family court's order that required her to disclose financial accounts held jointly with her mother. She also has never denied Brumfield's claim that she did not make those ordered financial disclosures.

The above circumstances led to a contempt hearing and finding of contempt less than a year later. Brumfield had relied on McComas's waiver of a few months of child support when he had to repair his house, which is where their elder son lived, who was in college. She also waived two months to help Brumfield afford to promote a concert for their minor sons' band. Brumfield was served with an order to show cause a few weeks after that concert. He learned at the contempt hearing that McComas could not waive

those support payments, which were twice the correct amount per that stipulation, which is the reason Brumfield asked McComas for help.

At that preliminary contempt hearing, Brumfield asked for counsel and was denied. At the actual hearing, he had a severe scald on his ankle from a burst radiator line on a friend's tractor at her farm. The doctor told him it would take three months for the skin to grow back before he could wear work boots. The family judge set a permanent support obligation based on Brumfield's recent paystubs even though he was out of work due to injury for the next several weeks. The judge allowed Brumfield to pay one month at $50.00, *App.* 7 n. 2, thus ensuring even more arrearages because Brumfield could not work. Brumfield's appeal to the county circuit court was denied.

Having lived this experience, Brumfield resigned to bearing this burden as best as he could, living in fear of going back before the family court again because he was concerned that the next time he went there, he would be incarcerated. As he said in his affidavit, "I was and have been in sharp fear for my liberty this entire time. The figurative mental image of the shackled and chained scarecrow outside the Cabell County Courthouse has utterly kept me away this entire time. I have been defeated in spirit and ground to pulp in soul by the supposed wheels of family court "justice.""*App.* At 105.

Procedural History

After he was served with a writ of execution on December 21, 2020 that sought to enforce judgments that ensued from the order that Judge Ferguson upheld on appeal, Brumfield studied West Virginia law and found the independent action. This was the only avenue he could take that would put him before a

court with the full complement of procedural rules that the family court rules do not provide. *App.* 62 n.17. The core reason for this was his experiences before the family court back in 2007-2008, which were so bad that he developed extreme claustrophobia after the contempt hearing. *A2.* At 10.

The case presented two main aspects concerning relief from judgment and the right to be made whole, which are demonstrated within the table of contents in Appendix II at 93-99, and the Brief for the Petitioner. *App.* 70-86.

Once Brumfield discovered that Judge Ferguson had previously participated as an appellate judge in the case, he sought judicial disqualification.*App.* 44-55. After his motions were denied, the dismissal hearing went forward.

The only things that concerned Judge Ferguson were the legal existence of the independent action, timeliness for statutes of limitations purposes, and laches. *App.* At 39. Judge Ferguson raised laches sua sponte on McComas's behalf. *App.* At 67. Brumfield raised the defenses of unclean hands and the discovery rule, which were sufficient to ward off the application of either by the WVSCA. Judge Ferguson dismissed for "failure to state a cause of action upon which relief can be granted," statutes of limitations, and laches. *App.* 38.

Brumfield appealed to the WVSCA, believing that minimally, dismissal "with prejudice" would be reversed so he could amend his complaint if the dismissal in fact was meritorious. He was wrong.

Judicial Disqualification

After Brumfield discovered Judge Ferguson's previous involvement in 2007, he moved to disqualify initially for an "appearance of impropriety" because the instant case by operation is an attack on the

judge's own prior appellate decision affirming the challenged judgment, which he has already decided once. *App.*44-55. The judge ignored this motion, and his mandate under West Virginia Trial Court Rule ("WVTCR") 17.01(b) to "proceed no further in the matter,"[8] instead opting to schedule McComas's Rule 12(b)(6) motion to dismiss.

After verifying that Judge Ferguson intended to hear the motion, Brumfield submitted a second motion to disqualify, this time for misconduct or diminished mental capacity (the judge, who was 83, had already retired once in 2008). *A2.* 1-42. The judge again ignored his clear mandate to "proceed no further," *A2,* at 28, and held the scheduled hearing. At that hearing of Brumfield's motions, the Judge sought no opening statement from Brumfield. After the initial statements of parties present, etc., Judge Ferguson stated that as he understood it, he was not allowed to do anything.

Instead of not doing anything, the Judge went straight to McComas's counsel for advice concerning Brumfield's disqualification motions. *App.* 62-63. Kuhl agreed with the Judge's conclusion and stated

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[8] W.Va. Trial. Ct. R. 17.01 (b) Upon the judge's receipt of a copy of such motion, *regardless of whether the judge finds good cause and agrees to the disqualification motion or not,* the judge shall (emphasis added):

(1) proceed no further in the matter;

(2) transmit forthwith to the Chief Justice a copy of the motion and certificate, together with a letter stating the judge's response to the motion and the reasons therefor, including such matters and considerations as the judge may deem relevant; and

(3) make a copy of the letter part of the record and file same in the office of the circuit clerk with copies to counsel of record and any unrepresented party.

that she was "confident" that the Judge would not be disqualified. After he obtained Kuhl's agreement, Judge Ferguson then decided to follow his mandate and promised to mail to the parties copies of what he sent to the West Virginia Chief Justice. *Ibid.*

Judge Ferguson did not mail anything to Brumfield, which deprived him of any opportunity to rebut or to even know the contents of Judge Ferguson's submission, which was possibly material. *App.* at 64. Brumfield went to the clerk's office days after the hearing and discovered documents that would place him in a false light if they were sent instead of the originals because these documents were stamped to indicate they were filed nearly a month later than the originals actually were filed. *Ibid.*

After receiving the order denying disqualification, Brumfield moved under Rule 59 to reconsider in light of these newly discovered documents then three days later amended that motion based on more new information obtained when he hand-delivered the first Rule 59 motion to the WVSCA, when he discovered that there are apparently several other people besides the chief justice who determine judicial disqualifications in West Virginia, even though Trial Court Rule 17 states otherwise.

This time, Bruce Kayuha ("Kayuha") of the West Virginia Office of Chief Counsel ruled on Brumfield's Rule 59 motions, stating that they were improper because Trial Court Rule 17 does not allow appellate review, and then stating in a second letter that he directed the court staff to ignore everything Brumfield wrote. *App.* 64-65.

The Office of Chief Counsel is not authorized to rule on anything generally, *App.* 68, much less a

question of whether WVTCR 17.05[9] prohibits Rule 59 motions, because Trial Court Rule 17 specifically authorizes only the chief justice and the trial judge to decide motions relating to judicial disqualification. *State v. King*, No. 19-0037, at *4 (W. Va. Apr. 6, 2020) ("The matter of judicial recusal and disqualification is a matter of discretion reposed *solely* in the presiding judge and the Chief Justice of this Court (emphasis added).").This act of ruling on motions was misconduct by the Office of Chief Counsel.

Kayuha's denials resulted in the case going back before Judge Ferguson, who immediately and erroneously dismissed in spite of Brumfield's several citations to clear West Virginia law demonstrating, minimally, the existence of the independent action—the main reason the dismissal was granted.

Direct Appeal

As is relevant here, Brumfield raises the following errors and issues concerning the West Virginia Supreme Court of Appeals.

1. In the instant case, Brumfield supported his allegations by citing to references contained within several transcripts of the hearings that he created because video recordings are the only official record of family court proceedings in West Virginia, and he could not afford to hire a transcriptionist. At no time did McComas challenge those transcripts at the trial

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[9] W.Va. Trial. Ct. R. 17.05 All rulings and orders relating to the recusal or disqualification of a judge shall be considered interlocutory in nature and not subject to direct or immediate appeal. This rule shall not, however, prohibit any party from seeking or using redress available by writ of prohibition, mandamus, or any other appropriate extraordinary writ as may be necessary to assure compliance with these rules by a circuit court judge. This rule is not intended to provide a means to challenge an interlocutory ruling by the Chief Justice on such disqualification issues.

level. After Brumfield on appeal submitted the Petitioner's Brief, *App.* 56-107, McComas submitted a Reply Brief and a motion to strike portions of the Appendix Record. *App.* 43-47. Brumfield filed his Response Brief and opposed the motions to strike. *App.* 48-63.

The WVSCA clearly erred when it granted McComas's motion to strike because she chiefly relied upon violation of a statute governing trade, *W. Va. Code* §47-27-1 *et seq.*, which expressly states that "(d) [t]he provisions of this article do not apply to ... legal proceedings recorded with sound-and-visual devices." WVC § 47-27-1(d). McComas also relied upon West Virginia Rules of Appellate Procedure ("WVRAP") Rule 9(f) [10] which discusses the duties of a court reporter who prepares new transcripts for cases currently before the WVSCA.

That rule, which applies to court reporters, requires a certification of the transcript when it is submitted to the clerk's office. Brumfield swore to his transcripts before a notary, *A2,* at 83, filed a notice with the county clerk, and invited McComas to object to those documents when he filed and served them.

Further, McComas had the opportunity to object when Brumfield indicated that he intended to submit those transcripts in his WVRAP 7(e) letter (a letter of agreement concerning what is to be included within the appendix record on appeal), and she had the option to have her own transcripts prepared under WVRAP 9(d) if she found Brumfield's to be insuffi-

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[10] W. Va. R. App. Proc. 9 states in pertinent part, "(f) Upon completion of the transcript, the court reporter must promptly provide a copy to the requesting party, file the original transcript in the circuit clerk's office, and provide a completed certification—setting forth the date the transcript was filed—to the Clerk."

cient. *A2.* At 87. She exercised neither of these options.

Brumfield also argued that the WVSCA was bound to accept the record from below as presented, *A2.*, at 80, *App.* at 30; that McComas had not contested the transcripts, *A2.*, at 75 ¶2; and, that "non-jurisdictional issues raised for the first time on appeal" are not considered. *A2.* At 58-59. The WVSCA disregarded counterarguments from binding case law, and Brumfield's clear prejudice seeing how the motion to strike was granted after the appellate briefs were closed, and after he had relied upon those document scores of times throughout the case below, several of those filings being referenced in the appeal. *A2.* At 75-76 n. 9.

Brumfield then petitioned for rehearing or, in the alternative, moved the court to allow him to have the documents certified by an official court reporter or to accept these documents under evidentiary rule 1006, which allows "summaries of voluminous writings not easily accessible in court." *See A2.* 64-91.The WVSCA refused this motion. *A2.* 92 Brumfield nevertheless relied upon the WVSCA's practice of reviewing the video record, *A2,* at 79-80, to at least demonstrate that there were enough allegations to survive a simple Rule 12(b)(6) motion to dismiss on the clearly erroneous ground that the "independent action does not exist." His motions were refused.

2. The WVSCA erred when it stated in Footnote 8 that it could "ignore" issues not supported by evidence within the record, which is a rule from a criminal case adjudicated on the merits that states "we will take as nonexisting all facts that do not appear in the designated record and will ignore those issues where the missing record is needed to give factual support to the claim." *State v. Honaker*, 193 W. Va.

51, 56 n.4 (W. Va. 1994). The instant case was an appeal of a Rule 12(b)(6) motion to dismiss, not a summary judgment. *Honaker* involved a habeas petition for review of a criminal case that was adjudicated on the merits.

The WVSCA's dismissal under Rule 12(b)(6) under the rationales it used from *Honaker* was clearly erroneous. "A plaintiff "is not required to establish a prima facie case at the pleading stage."" *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W.Va.* 244 508, 522 (W. Va. 2020). The "court reviewing the sufficiency of a complaint . . . should presume all of the plaintiff's factual allegations are true, and should construe those facts, and inferences arising from those facts, in the light most favorable to the plaintiff." *Id.* At 520. Motions to dismiss are disfavored in West Virginia. *Sticklen v. Kittle,* 168 W. Va. 147, 164 (W. Va. 1981).

"[D]ismissal under Rule 12(b)(6) is not warranted merely because the pleading *fails to state all of the elements* of the particular legal theory advanced; instead, the circuit court should examine the *allegations as a whole* to determine whether they call for relief on *any possible theory* (emphases and bracketed terms added)[.]" *Mountaineer* at 520.

The *Decision* runs afoul of *Mountaineer Fire* when it upholds the dismissal on the ground that "[P]etitioner failed to plead the essential five elements [of an independent action]," *Decision*, at *5, even if the WVSCA's approach to throwing out 144 pages of transcripts, or temporarily losing custody of evidence is allowed, because Brumfield alleged unconscionability in three separate forms: 1) The family court judge's actions, including bias, protectionism, and interference during the hearings were unconscionable; 2) the Family Court Rules as written or as

applied violated Brumfield's due process rights and were thus unconscionable in addition to being unconstitutional; and 3) the actions of McComas and Wichman throughout the proceedings, including fraud and fraud upon the court, were unconscionable.

Further, Petitioner alleged in several writings that he suffered harms that were compensable through remedies, damages, or other monetary relief through a constructive trust available under *W. Va. Code* § 48-6-202(2) "at any time" after discovery of undisclosed assets exceeding $500.00; or for unjust enrichment due to Respondent's willful failures to disclose assets exceeding $500.00 in value that were also ordered to be disclosed by the family court; or relief from judgments under the separate action of "fraud upon the court," recently discovered fraud or fraudulent concealments, and when the facts alleged throughout the complaint supported other theories for relief.

In *Mountaineer*, all that is required to survive a Rule 12(b)(6) dismissal at the pleading stage is allegations of facts, when "taken as a whole" "in the best possible light" for Brumfield, could support "relief on any possible theory." Here, the WVSCA disregarded all claims after it struck 144 pages from the record that directly demonstrated Brumfield's claims, and temporarily lost evidence, to inexplicably apply a summary judgment standard from a criminal habeas case to all of Brumfield's alternative causes of action besides the independent action, including newly discovered harms.

The WVSCA ignored its own case law, which applies to everyone else who faces a motion to dismiss, to justify an erroneous dismissal of a case that implicates the family courts and the family court rules.

3. The WVSCA clearly erred by misstating and ignoring or disregarding its own case law to find finality of the underlying judgments, stating that the case relied upon, *Ray v. Ray* was "overruled on other grounds" by *Allen v. Allen.* This signal is patently false because *Ray v. Ray* was overruled for the exact ground relied upon in the *Decision.* Brumfield argued this explicitly in his petition for rehearing, block quoting the exact passages from *Allen* that overruled *Ray. App.* 27 ¶¶19-22. The court used this disregard for its own case law to find finality of judgments and then find res judicata, which was an entirely new argument on McComas's behalf that Brumfield had no chance to oppose before the WVSCA entered a final opinion.

The *Decision's* signal at *6 (that *Ray v. Ray*, 216 W. Va. 11 (2004), was "*overruled on other grounds*") is misleading. "The sole authority upon which the [Decision] bases [its] decision is a *per curam* opinion, *Ray v. Ray*, 216 W. Va. 11, 602 S.E.2d 454 (2004)." *Allen v. Allen*, 226 W. Va. 384, 389 (W. Va. 2009). The exact rationales resurrected by the *Decision* were in fact overruled in *Allen v. Allen,* 226 W. Va. 391:

> "[W]e have carefully examined *Ray* and f[ou]nd that it is written so broadly that it contravenes both our child support statutes and the *Rules of Practice and Procedure for Family Courts* (bracketed terms are Petitioner's)." *** "We ... overrule *Ray* in *all respects* except for its conclusion that a petition to modify a child support order [under *W.Va.Code,* 48-11-105] may not be used in lieu of an appeal (emphasis added)." *Id.*, at 389-391.

The Decision errs when it relies upon *Ray* for anything beyond whether "a petition to modify a child

support order may not be used in lieu of an appeal," or when it constructs a conclusion that is expressly overruled like *Ray* did. *Ibid.* Family Rule 25 *does* toll the time for an appeal, as plainly discussed in *Allen v. Allen*, which Brumfield block quotes for clarity:

> Our conclusion in footnote 16 of Ray that a motion for reconsideration under W.Va.Code, 51-2A-10 "does not toll the time for appeal" is, unfortunately, flatly contradicted by the Rules of Practice and Procedure for Family Court. Rule 25 of the Rules makes it clear that a petition to appeal a family court order tolls the time for filing a motion for reconsideration, and vice-versa, Rule 28 makes it clear that a motion for reconsideration filed within the appeal period tolls the time for filing an appeal. ***
>
> In light of the language of these rules, our statement in footnote 16 of Ray — that a ruling on a motion for reconsideration within 30 days is mandatory because a motion for reconsideration does not toll the time for appeal — is plainly wrong. A motion for reconsideration does toll the time for appeal, and a timely petition for appeal does toll the time for filing a motion for reconsideration, and there is nothing else in the statute to indicate that the 30-day time limit[for the family court to hear a motion to reconsider under W. Va. Code 51-2A-10] is a jurisdictional requirement.

Allen v. Allen, 226 W. Va. 390-91.

Further, Family Court Rule 24(c)[11] expressly mandates the family court to schedule another hear-

[11] "Any final hearing held by the Court that is not a hearing resolving all issues in the case shall require a subsequent

ing upon notice of unresolved issues from the final hearing. In operation, WVFCR 24(c) functions as a motion to reconsider due to the mandate of another hearing. It requires less formality than a motion to reconsider, likely because it was designed to protect self-represented parties with little legal education.

In *Allen*, a motion to reconsider, which is a Family Court Rule 25 motion, tolls the time for an appeal, just like a Rule 59 motion does for civil cases. In *James M.B. v. Carolyn M*, 193 W. Va. 289, 294 n.10 (W. Va. 1995), the WVSCA held that "a Rule 59 motion technically reopens the case." "Thus, in West Virginia, a 'motion for reconsideration' filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. Furthermore, when the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion." *Id.* At 294-95.

Here, Brumfield did notify the family court that he did not receive the financial disclosures ordered by that court at the final hearing, triggering Family Rule 24(c)'s mandate for a new hearing. He also notified the family court that it did not apply the stipulation to the child support calculation. He also filed a motion to reconsider, which the court ignored. Both the notice and the motion to reconsider deprived the judgment of finality under both *Allen* and *James M.B. v. Carolyn M.* The WVSCA disregarded all of this, opting instead to apply *Ray*, an overruled decision.

Further, although the WVSCA erroneously struck the transcripts and lost the video files, the

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scheduling order to be entered within 20 days of the hearing. The content of the scheduling order shall comply with subsection (b) of this rule." Family Court Rule 24(c).

case filings demonstrating the above were in the record. The WVSCA not only trampled its own clear law here, it ignored filings within the appendix record to make a finding that facts did not exist within the record to support Brumfield's claims. The *Memorandum Decision* was decided and entered before Brumfield could even respond to at least point out the several above errors.

Once the WVSCA found finality in contravention of its own case law, it applied res judicata to all of Brumfield's claims, including newly discovered causes of action that could not have been presented in the family proceedings. "[I]f the party was unable to foresee the necessity of litigating the matter in the previous adjudication, res judicata should not be used to dismiss the second case (emphasis added). "... [I]t is imperative that the party bringing the subsequent lawsuit was, during the prior action, able to foresee the consequences of his/her failure to raise the subsequently raised issue in the prior action." *Blake v. Charleston Area Med Ctr.*, 201 W.Va. 477 (1997).

In West Virginia, "[a]n erroneous ruling of the Court will not prevent the matter from being res judicata." Syl. Pt. 1 Sayre's Adm'r v. Harpold, 33 W.Va. 553 (1890)." *Ibid.* In other words, an erroneous finding of res judicata (a decision) is also res judicata. *Ibid.* This finding forecloses Brumfield's ability to be made whole for newly discovered causes of action by amending his complaint, and forecloses his statutory right to the creation of a constructive trust under *W. Va. Code* § 48-7-206(2).[12]

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[12] WVC 48-7-206(2) "If any party deliberately or negligently fails to disclose information which is required by this part 2 and in consequence thereof any asset or assets with a fair market value of $500 or more is omitted from the final distribution of

4. On appeal, Brumfield asked the WVSCA to grant judicial disqualification, citing error in the original decision, and further for new grounds of actual bias when Judge Ferguson's dismissal went beyond mere error because he refused to accept the plain language of Rule 60(b) and Brumfield's direct briefing concerning the existence of the independent action. *App.* At 101-102. He incorporated by reference his prior Rule 59 motions, which were never heard, as part of his argument. The West Virginia Supreme Court of Appeals completely disregarded or ignored this core constitutional issue, including Kayuha's involvement in deciding motions as the Chief Counsel.

West Virginia Trial Court Rule ("WVTCR" or "Trial Rule") 17.01 establishes the process for judicial disqualifications in West Virginia. That rule, and the rule it references, Canon 2, Rule 2.11 of the Code of Judicial Conduct both contain the same prefatory language, which changes the *appearance of impropriety* standard from *Caperton* into a *reasonable question of impartiality* standard under the Trial Court Rules. West Virginia Code of Judicial Conduct ("WVCJC" or "Conduct Rule") Canon 2, Rule 2.11(A)(5) lists several instances where a judge may be disqualified, including when a judge "(d) previous-

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property, the party aggrieved by the nondisclosure may at any time petition a court of competent jurisdiction to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependent children, if any, with the party in whose name the assets are held declared the constructive trustee, such trust to include such terms and conditions as the court may determine. The court shall impose the trust upon a finding of a failure to disclose such assets as required under this part 2."

ly presided as a judge over the matter in another court." W. Va. Jud. Cond. 2.11.

In 2009, this Honorable Court referenced West Virginia's "appearance of impropriety" standard, which is "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired" for judicial disqualifications. *Caperton.* 556 U.S. 888. The Court also stated that "'[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.' The Federalist No. 10, p. 59 (J. Cooke ed.1961) (J. Madison)." *Id.* At 876.

Brumfield presented several reasons that demonstrated an appearance of impropriety to the West Virginia Chief Justice, and to the West Virginia Supreme Court of Appeals. *App.* 44-55 and *A2* at1-42, including the fact that Judge Ferguson previously participated in the family case. A core component of Brumfield's independent action is the conscionability of prior judgments from his 2007 divorce case, which Judge Ferguson affirmed on intermediate appeal to his court December 3, 2007. In essence Brumfield is attacking Judge Ferguson's judgment.

Under Conduct Rule 2.11(A)(5)(d), prior participation is an express reason for granting dismissal. Here, Judge Ferguson participated and affirmed the challenged judgment.

In *Caperton,* the West Virginia Supreme Court of Appeals failed to protect Caperton's due process right to a fair trial before an impartial justice. Here, the West Virginia Supreme Court of Appeals refused to follow its own clear, express trial court rules and refused the opinion of this Honorable Court to deny Brumfield his due process right to a fair trial before

an impartial judge, while straining its own laws to uphold what the WVSCA admitted was an erroneous decision. The dismissal was fruit of the poisonous vine because Judge Ferguson should not have heard the dismissal, but should have been disqualified.

Reasons for Granting the Petition

The West Virginia Supreme Court of Appeals has failed to guarantee Brumfield's Due Process and Equal Protection rights under the Fourteenth Amendment by misstating and misapplying laws in such a fashion that its *Decision* can reasonably be seen to be results-driven when viewed as a whole.

> "In general, the Equal Protection Clause guarantees that the Government will treat similarly situated individuals in a similar manner." *United States v. Madero,* 142 S. Ct. 1539, 1559 (2022).

The WVSCA's granting of McComas's motion to strike after the appellate briefs were closed in unprecedented. In reaching this decisions, the court applied a statute that expressly exempted the video recordings from its application. The court breached separation of powers to reach this decision.

The instant case was on appeal ultimately for an erroneously granted Rule 12(b)(6) dismissal. The standard to survive dismissal in West Virginia at the pleading stage for everyone else other than Brumfield is less than a prima facie standard under *Mountaineer Fire*, not the standard the WVSCA relied upon from *State v. Honaker*, which concerned a criminal habeas proceeding after the case was fully adjudicated. The finding that the family judge's orders had reasonable bases in law and, therefore, his actions and McComas's actions were not unconscionable, defies logic. The WVSCA did not consider the effects of the family court rules in light of conscionabil-

ity whatsoever, particularly Family Rule 6. This rule defeats the due process requirement of meaningful opportunity to be heard for pro se parties. Unconstitutional laws are per se unconscionable.

The WVSCA was required to hear judicial disqualification on appeal as a preliminary matter because, as this Honorable Court has held, "public confidence in the fairness and integrity of the nation's elected judges *** is a vital state interest *** of the highest order."*Caperton* 556 U.S. 889. Conduct Rule 2.11(A)(5)(d) plainly called for Judge Ferguson's disqualification. This is beyond mere error. It reaches purposeful error.

The WVSCA's disregard for its own case holdings completes the picture. The *Decision* relies upon abrogated holdings and rationales from *Ray v. Ray* that the WVSCA expressly overruled "in all respects" in *Allen v. Allen* to deny Petitioner's claims of lacking finality over the family court judgments. Although the WVSCA may employ any available means to uphold an erroneous decision, surely it may not disregard its own holdings without an opinion explaining the changes. Reliance upon the law is core to both due process and equal protection.

The above combined errors denied to Brumfield equal protection of the laws because in every instance, the laws that applied to others similarly situated were not applied to him, or clear laws were ignored.

The *Decision's* conversion of Family Rule 25 to a sole Civil Rule 60(b) analysis strips parties in family courts of vital protections that are otherwise enjoyed by parties before the circuit courts involved in cases or controversies where the value is as little as $1500.00, and effectively overrules *Allen v. Allen* without an opinion as to why. If this *Decision* is al-

lowed to stand, it will uproot what little protections indigent self-represented parties have remaining, including the right to have all issues resolved by the family court under Family Court Rules 24(c) and 25.

In closing, the current family law system is structurally and fundamentally unfair for the several reasons concerning the family court rules that are chronicled in the instant case, which is a representative example of involuntarily unrepresented divorce respondents during the establishment of legal paternity and support obligations, and division of marital property.

When support orders written by opposing, interested counsel do not comport with decisions of the court or the laws, and the courts do nothing in response to notices or motions to reconsider, these fathers are put at higher risks of arrearages and government enforcement due to excessive obligations. Because these mothers will enjoy state enforcement under federal law as an unqualified right, it is imperative that the support obligations are correct from the beginning.

Rule 6 so shrouds family law from any research into ongoing case law that there needs to be at least a conspicuous notice that any parties to a divorce may request the assistance of counsel if they can not afford one. This is the root of a national problem.

The 56% Majority is proof that things are broken in the family courts, and have been for a long time.

Brumfield humbly pleads with this Honorable Court to grant certiorari.

CONCLUSION

For the foregoing reasons, Robert Brumfield respectfully requests that this Court issue a writ of certiorari to review the judgment of the West Virginia Supreme Court of Appeals.

DATED this 22nd day of July, 2023.
Respectfully submitted,

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STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Robert Brumfield,
Plaintiff Below, Petitioner

vs.) No. 22-0037 (Cabell County 21-C-02)

Christina McComas,
Defendant Below, Respondent

MEMORANDUM DECISION

Self-represented Petitioner Robert Brumfield appeals the December 15, 2021, order of the Circuit Court of Cabell County denying his motion to alter or amend its November 29, 2012, order.[1] In the November 29, 2012, order, the circuit court granted Respondent Christina McComas's amended motion to dismiss petitioner's civil action seeking relief from the August 21, 2007, final order and the August 5, 2008, contempt order entered by the Family Court of Cabell County in the parties' divorce case. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21.

Respondent filed her petition for divorce in the family court in December of 2006. At that time, two of the parties' children were minors. The family court, by temporary order entered on April 21, 2007, set petitioner's child support obligation at $500 per month "as this is the traditional amount that he is accustomed to contributing toward the monthly expenses of the household." In the August 21, 2007, final order granting the parties a divorce, the family court continued petitioner's child support obligation at $500 per month, finding that neither party had provided the financial information necessary "to run the child support formula" and that "[c]hild support should continue as set forth in the [t]emporary [o]rder until such time as the financial information is provided." The family court further directed the equitable distribution of the marital estate according to an assets and debt sheet attached to the final order. The family court ordered that

[1]Petitioner is self-represented. Respondent Christina McComas appears by counsel Maggie J. Kuhl.

petitioner pay respondent $387.77 to equalize the equitable distribution. Petitioner appealed the family court's final order to the circuit court, which, by an order entered on December 3, 2007, affirmed the final order. This Court, by order entered on December 29, 2008, refused petitioner's appeal from the circuit court's December 3, 2007, order.

While petitioner's appeal of the circuit court's December 3, 2007, order was pending before this Court, the family court, by order entered on August 5, 2008, found that petitioner was in contempt due to the non-payment of child support. In making its contempt finding, the family court noted that it intended that both parties "should provide appropriate income information," but attributed the difficulty in calculating petitioner's child support obligation to his failure to provide "reports from an accountant, tax returns, book work from his business or W-2's or 1099's." The family court determined that the child support issue did not remain open following the entry of the final order. Rather, if the appropriate information would have been provided, and "[i]f a modification was indicated based on that information, the previous order could be modified upon the appropriate filing of a [p]etition for [m]odification." Moreover, the family court had information about petitioner's earnings during 2007 and 2008, through June 19, 2008. Based upon that information, the family court found that it would not have modified petitioner's child support obligation because "the $500.00 [per month] child support previously set was appropriate." Therefore, the family court continued petitioner's child support obligation at $500 per month.[2] Finally, the family court granted respondent a judgment for $4,000, the amount of petitioner's child support arrearage at that time, plus interest. Petitioner appealed to the circuit court which, by order entered on November 14, 2008, denied the appeal. Petitioner did not appeal the circuit court's November 14, 2008, order to this Court. Subsequently, in December of 2020, the West Virginia Bureau of Child Support Enforcement ("BCSE") served a writ of execution, with an attached affidavit of accrued support, upon petitioner. The BCSE stated that, as of November 23, 2020, petitioner's child support arrearage totaled $24,188.98.[3]

On January 4, 2021, petitioner filed an independent action in the circuit court against respondent, pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, seeking relief from the family court's August 21, 2007, final order and August 5, 2008, contempt order. On May 4, 2021, petitioner filed an amended complaint, which was served upon respondent. In the amended complaint, petitioner sought a constructive trust to preserve "[his] interest in [respondent]'s property located . . . [in] Barboursville, West Virginia," due to "[respondent]'s use of $4000.00 in marital funds for the purchase of that property" and "[respondent]'s use of the monies that exceeded the correct child support obligations due from [petitioner] from January 2007 through June 2007[.]" Petitioner also asked for a determination that respondent conspired with her

[2]For June of 2008 only, the family court reduced petitioner's child support obligation to $50 due to an injury he had suffered.

[3]As of August of 2021, the parties no longer had any minor children. Therefore, only petitioner's child support arrearage is now at issue.

attorney and the family court judge to obtain rulings against petitioner in the parties' divorce case.[4] Respondent filed a motion and then an amended motion to dismiss petitioner's independent action. Following an October 29, 2021, hearing, the circuit court, by order entered on November 29, 2021, dismissed petitioner's action, finding that the amended complaint failed to state a claim on which relief can be granted. Petitioner filed a motion to alter or amend the November 29, 2021, dismissal order, pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, which the circuit court denied on December 15, 2021.

Petitioner now appeals the circuit court's December 15, 2021, and November 29, 2021, orders. We have held that the standard of review for a Rule 59(e) motion to alter or amend a judgment "is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt. 1, *Wickland v. Am. Travellers Life In. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998). Therefore, we apply the standard applicable to motions to dismiss and review the dismissal of petitioner's amended complaint de novo. Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

On appeal, petitioner initially argues that the November 29, 2021, order dismissing the amended complaint "with prejudice" does not accurately reflect the circuit court's ruling at the October 29, 2021, hearing.[5] Petitioner asserts that the circuit court intended the dismissal of the amended complaint to be without prejudice because the court stated that it was dismissing the amended complaint "at this time." However, it is clear that the circuit court dismissed the amended complaint for a failure to state a claim on which relief can be granted. With regard to this basis for the dismissal,[6] the circuit court relied on two grounds: (1) an independent action seeking relief

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[4] Petitioner sought compensatory damages from respondent due to (1) child support payments that were allegedly calculated erroneously; (2) alleged errors in the marital distribution; (3) "the loss of consortium with the parties' [youngest child], and for parental alienation which occurred as a result of [respondent]'s actions"; (4) various types of emotional distress due to "[respondent]'s sole or collusive actions [(with respondent's attorney and the family court judge in the parties' divorce case)]"; (5) mental anguish, aggravation, annoyance, and inconvenience; (6) impediments to petitioner practicing law since he passed the bar examination in 2017 (petitioner explained that his child support arrearage prevents him from being licensed as an attorney); and (8) "[respondent]'s criminal false swearing." Petitioner further asked for punitive damages for respondent's alleged false swearing and to punish her for causing harm to petitioner. Finally, petitioner sought incidental and consequential damages, as well as court costs and prejudgment interest.

[5] Respondent's counsel prepared the November 29, 2021, dismissal order.

[6] In the November 29, 2021, order, the circuit court set forth additional reasons for the dismissal of the amended complaint. However, herein, we discuss only the amended complaint's failure to state a claim on which relief can be granted as we find that the circuit court properly dismissed the amended complaint on that basis.

from a prior judgment did not exist in West Virginia; and (2) petitioner impermissibly sought to relitigate issues from the parties' divorce case, as "everything goes back to the divorce." Petitioner asked for clarification, and the circuit court stated that "[petitioner's] *total complaint* fails to state a cause of action in West Virginia upon which relief can be granted." (Emphasis added.) Therefore, based upon our review of the October 29, 2021, hearing transcript, we find that the circuit court intended to dismiss the amended complaint with prejudice, as accurately reflected in the November 29, 2021, order.

Next, we find that petitioner is correct in arguing that the circuit court erred in finding that an independent action seeking relief from a prior judgment did not exist in West Virginia. Rule 60(b) of the West Virginia Rules of Civil Procedure permits "an independent action to relieve a party from a judgment, order or proceeding, . . . or to set aside a judgment for fraud upon the court." However, "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965); *see also Noland v. Va. Ins. Reciprocal*, 224 W. Va. 372, 382, 686 S.E.2d 23, 33 (2009) (citing *Yourtee v. Hubbard*, 196 W. Va. 683, 690 n.9, 474 S.E.2d 613, 620 n.9 (1996)) ("In reviewing an appeal of a circuit court's order, we look not to the correctness of the legal ground upon which the circuit court based its order, but rather, to whether the order itself is correct, and we will uphold the judgment if there is another valid legal ground to sustain it.").

With regard to independent actions seeking relief from a prior judgment, we have held:

> "The definition of an independent action, as contemplated by [Rule] 60(b), is an equitable action that does not relitigate the issues of the final judgment, order or proceeding from which relief is sought and is one that is limited to special circumstances." Syllabus Point 2, *N.C. v. W.R.C.*, 173 W. Va. 434, 317 S.E.2d 793 (1984).
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> "In order to obtain relief from a final judgment, order or proceeding through an independent action, the independent action must contain the following elements: (1) the final judgment, order or proceeding from which relief is sought must be one that, in equity and good conscience, should not be enforced; (2) the party seeking relief should have a good defense to the cause of action upon which the final judgment, order or proceeding is based; (3) there must have been fraud, accident or mistake that prevented the party seeking relief from obtaining the benefit of his defense; (4) there must be absence of fault or negligence on the part of the party seeking relief; and (5) there must be no adequate legal remedy." Syllabus Point 3, *N.C. v. W.R.C.*, 173 W. Va. 434, 317 S.E.2d 793 (1984).

Syl. Pts. 1 & 2, *Downing v. Ashley*, 193 W. Va. 77, 454 S.E.2d 371 (1994). Therefore, while the circuit court erred in finding that no independent action was available pursuant to Rule 60(b), we find that the circuit court's dismissal of the amended complaint was correct due to the alternative ground that petitioner impermissibly sought to relitigate issues from the parties' divorce case.

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure provides that an action may be dismissed for "[a] failure to state a claim upon which relief can be granted." The sufficiency of a complaint may be tested pursuant to Rule 12(b)(6). *See Newton v. Morgantown Machine & Hydraulics of W. Va., Inc.*, 242 W. Va. 650, 653, 838 S.E.2d 734, 737 (2019). Respondent argues that the circuit court properly granted her amended motion to dismiss petitioner's independent action. We agree with respondent. We have recognized that "liberalization in the rules of pleading in civil cases does not justify a . . . baseless pleading." *Sticklen v. Kittle*, 168 W. Va. 147, 164, 287 S.E.2d 148, 157-58 (1981). Accordingly, "[i]f a plaintiff does not plead all of the essential elements of his or her legal claim, a [trial] court is required to dismiss the complaint pursuant to Rule 12(b)(6)." *Newton*, 242 W. Va. at 653, 838 S.E.2d at 737 (quoting Louis J. Palmer, Jr. and Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, 406-07 (5th ed. 2017) (quotations and citation omitted); *see Sticklen*, 168 W. Va. at 164, 287 S.E.2d at 158 (finding that a plaintiff must state every essential element of the cause of action in the complaint).

Pursuant to Syllabus Point 1 of *Downing*, an independent action is limited to special circumstances, not including the re-litigation of the issues from the prior action. 193 W. Va. at 78, 454 S.E.2d at 372. While petitioner attempted to assert claims for fraud and conspiracy involving respondent, respondent's divorce attorney, and the family court judge who presided in the parties' divorce case, all of petitioner's allegations to support those ostensible claims involved issues litigated during the parties' divorce case. Furthermore, in the amended complaint, petitioner failed to plead the essential five elements set forth in Syllabus Point 2 of *Downing* to maintain an independent action contemplated by Rule 60(b). *Id.* at 78, 454 S.E.2d at 372. The amended complaint alleged that respondent not only colluded with her attorney to conceal assets, but also conspired with the family court judge to obtain rulings against petitioner. Based upon our review of the family court's orders in the divorce case,[7] we find that its rulings had reasonable bases in law, and there is no reason to question the family court judge's impartiality. *See State v. Brown*, 177 W. Va. 633, 641, 355 S.E.2d 614, 622 (1987). On the other hand, it is obvious from the amended complaint that petitioner wishes to relitigate the equitable distribution of the marital estate and the establishment of his child support obligation. Therefore, we conclude that petitioner's amended complaint is a baseless pleading, and there is no reason, in equity and good conscience, not to enforce the various orders entered by the family court in the parties' divorce case merely because petitioner is dissatisfied with those orders.

In *Downing*, we found that such a determination "not only invalidate[s] the claim as an independent action, but also bar[s] [the action] under the doctrine of res judicata." 193 W. Va. at 81, 454 S.E.2d at 375. Three elements must be satisfied before the prosecution of an action may be barred on the basis of res judicata: (1) there must have been a final adjudication on the merits by a court having jurisdiction of the proceedings; (2) the second proceeding must involve the same

[7]Petitioner includes the family court's orders in his appendix. As we found in *Forshey v. Jackson*, 222 W. Va. 743, 747, 671 S.E.2d 748, 752 (2008), a motion to dismiss is not converted into a summary judgment motion when a court "consider[s] matters that are susceptible to judicial notice." (internal quotations and citations omitted).

parties, or persons in privity with those same parties, as the first proceeding; and (3) the cause of action in the second proceeding must be identical to the cause of action determined in the first proceeding or must be such that it could have been resolved, had it been presented, in the first proceeding. Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 201 W. Va. 469, 498 S.E.2d 41 (1997). Considering the last two elements first, there is no dispute that petitioner's independent action involves the same parties as their divorce case. Due to our finding that petitioner attempted to use his independent action to pursue a re-litigation of issues, we find that the third element necessary for the doctrine of res judicata to apply is also satisfied.

Nevertheless, petitioner argues that the doctrine of res judicata does not apply because there was no final adjudication on the merits.[8] We disagree. Petitioner argues that the family court's August 21, 2007, final order and August 5, 2008, contempt order never became final due to the family court's failure to rule on motions he filed asking for reconsideration of its rulings. Rule 25 of the West Virginia Rules of Practice and Procedure for Family Court provides, in pertinent part, that "[a]ny party may file a motion for reconsideration of a family court order as provided in [West Virginia Code] § 51-2A-10." Petitioner analogizes motions filed pursuant to West Virginia Code § 51-2A-10 to motions to alter or amend judgment pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure, which "suspend[ ] the finality of the judgment and make[ ] the judgment unripe for appeal." Syl. Pt. 7, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995). However, petitioner's argument is misplaced.

In *Ray v. Ray*, 216 W. Va. 11, 14 n.13, 602 S.E.2d 454, 457 n.13 (2004), *overruled on other grounds by Allen v. Allen*, 226 W. Va. 384, 701 S.E.2d 106 (2009), we found that motions pursuant to West Virginia Code § 51-2A-10 have replaced motions for relief from judgment under Rule 60(b) of the West Virginia Rules of Civil Procedure in the family court. Like Rule 60(b) motions, motions for reconsideration filed under West Virginia Code § 51-2A-10 do not suspend the finality of an order. *See* Syl. Pt. 1, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974) (holding that, unlike Rule 59(e) motions, Rule 60(b) motions do not toll running of the applicable appeal period on the underlying order). Rule 25 of the West Virginia Rules of Practice and Procedure for Family Court provides, in pertinent part, that it is an appeal of a family court order

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[8]To the extent that petitioner raises other issues, including challenges to the family court's jurisdiction in the parties' divorce case, we do not address any such issues herein because we find them to be without arguable merit. Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure provides, in pertinent part, that "[t]he brief must contain an argument clearly exhibiting the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error" and that this Court "may disregard errors that are not adequately supported by specific references to the record on appeal." In addition to the confusing nature and sheer frivolity of petitioner's arguments, this Court, by order entered on August 18, 2022, granted respondent's motion to strike portions of petitioner's appendix, including the family court transcripts from the parties' divorce case. While petitioner states that he also provides video recordings of the family court hearings, we do not find any such recordings in the appendix. Accordingly, we "take as non[-]existing all facts that do not appear in the [appendix record] and . . . ignore those issues where the missing record is needed to give factual support to the claim." *State v. Honaker*, 193 W. Va. 51, 26 n.4, 454 S.E.2d 96, 101 n.4 (1994).

that suspends "the time for filing a motion for reconsideration . . . during the pendency of the appeal." Therefore, we find that the family court's failure to rule on petitioner's motions for reconsideration did not prevent the August 21, 2007, final order and the August 5, 2008, contempt order from becoming final adjudications on the merits.

Due to petitioner's allegations of fraud, we note that an exception to the doctrine of res judicata exists where one party's fraud prevents the other party from litigating his claims in the previous case. *See Blake*, 201 W. Va. at 477, 498 S.E.2d at 49. Respondent argues that, while petitioner bases some of his fraud claims upon alleged newly discovered evidence, those claims have been developed from petitioner's review of the records from the parties' divorce case. As we have held, for the doctrine of res judicata to bar a subsequent action, "[i]t is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the status of the suit was such that the parties might have had the matter disposed of on its merits. [Furthermore,] [a]n erroneous ruling of the court will not prevent the matter from being *res judicata*." Syl. Pt. 3, in part, *Downing*, 193 W. Va. at 78, 454 S.E.2d 372 (quoting Syl. Pt. 1, *In re McIntosh's Estate*, 144 W. Va. 583, 109 S.E.2d 153 (1959)). Petitioner appealed the family court's orders in the parties' divorce case, and the family court's orders were upheld. Pursuant to Syllabus Point 3 of *Downing*, even if the family court's rulings regarding the distribution of the marital estate and petitioner's child support obligation were erroneous, its rulings have become final and trigger the doctrine of res judicata to bar petitioner's Rule 60(b) action. 193 W. Va. at 78, 454 S.E.2d at 372. Therefore, we conclude that the circuit court properly dismissed the amended complaint for a failure to state a claim on which relief can be granted.

For the foregoing reasons, we affirm the circuit court's December 15, 2021, order denying petitioner's motion to alter or amend judgment and its November 29, 2021, order granting respondent's amended motion to dismiss petitioner's civil action seeking relief from the family court's August 21, 2007, final order and August 5, 2008, contempt order in the parties' divorce case.

Affirmed.

ISSUED: February 7, 2023

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Tim Armstead
Justice John A. Hutchison
Justice William R. Wooton
Justice C. Haley Bunn

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the April 27, 2023, the following order was made and entered:

Robert Brumfield, Plaintiff Below, Petitioner

vs.) No. 22-0037

Christina McComas, Defendant Below, Respondent

[April 27, 2023]
ORDER
[Denying Petition for Rehearing]

The Court, having maturely considered the petition for rehearing filed by the petitioner Robert Brumfield, self-represented, is of opinion to and does refuse the petition for rehearing. The motion filed by petitioner, on March 10, 2023, to resubmit lost video files is refused as moot. The video files are part of the record in this appeal.

A True Copy. Attest: /s/ Edythe Nash Gaiser
Clerk of Court (SEAL)

Additional material from this filing is available in the Clerk's Office.