MARYLAND WOOD PROCESSING INDUSTRIES, represented by and thru its Managing Director ABBAS A. FAWAZ, Appellant, *v.* AMERICAN INSURANCE MANAGEMENT, INC., by and thru its Assistant Vice President, SAMUEL O. MINTAH, WHISTONDALE AND PARTNERS PLC, by and thru its Claims Manager, ANDREW PITTMAN and WILLIE FABER (UNDERWRITING-MANAGEMENT LTD.), represented by its Claims Manager, CECELIA ABBOTT, Appellees.

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: April 10, 2003. Decided: May 9, 2003.

1. The proper way to withdraw an action, where the parties have exchanged pleadings, is governed by the provisions of section 11.6 of the Civil Procedure Law.
2. An action can only be discontinued without the order of court, where a responsive pleading has been filed, by the filing with the court of a stipulation in writing signed by the attorneys of record for all parties.
3. Alternatively, an action can be discontinued by order of court upon such terms and conditions as the court deems proper.
4. The procedure for withdrawing a complaint is governed by section 9.10 of the Civil Procedure Law which stipulated that such withdrawal may be done *ex parte*, without reference to opposing counsel or the court, merely by the filing and serving of a notice of withdrawal.
5. If an action is timely commenced and is terminated in any manner other than by a dismissal of the complaint for failure to prosecute the action or a final judgment on the merits, the plaintiff may commence a new action upon the same right to relief after the expiration of the time limited by statute therefor and within six months after the termination.
6. *Res judicata* can only be properly invoked and applied where there has been a determination of the matter on the merits; that there is an existing final judgment rendered upon the merits of a cause by a court of competent jurisdiction and is conclusive as to the rights, questions and facts in issue as to the parties.
7. The doctrine of *res judicata* cannot be invoked when the subject matter involving the identical parties was never judicially determined.

Appellant, who had secured insurance coverage from the appellee for its premises and facilities, instituted an action of damages against co-appellee AIM for breach of an insurance contract, growing out of the appellee's offer to compensate appellant a lesser amount than claimed and demanded for damages to appellant's plant. The appellant subsequently withdrew its complaint, reserving the right to refile. But rather than filing an amended complaint, appellant's counsel filed a new action, which was dismissed by the trial court, on motion of the co-appellee. Thereafter, and upon change of counsel, the appellant filed a motion for voluntary discontinuance. The motion was denied, with no appeal taken from the denial. Another motion, this time to dismiss the action, filed by the appellee, on the ground of failure of the appellant to proceed with an appeal, was granted and the appeal denied. A bill of costs prepared by the court was approved by the appellant's counsel and payment made by said counsel. A new cause of action for damages was then instituted by the appellant, and dismissed by the court on motion of the appellee. It was from this dismissal that an appeal was taken to the Supreme Court.

The Supreme Court reversed the trial court, holding that the ground of *res judicata*, relied on by the trial court to dismiss the action, was inapplicable since the case had been decided on a procedural technicality rather than on the merits. The Court acknowledged that both of the appellant's counsels had erred in handling the appellant's claim, including the filing of a new action rather than an amended complaint since the original action was still before the court, the filing of a motion for voluntary discontinuance, and the filing of the third action. But the Court held that the errors were more of a technical nature and that it would not have the appellant's rights affected by those technical errors, attributed solely to the appellant's counsels. In addition, the Court said that the judges of the trial court had also erred in their rulings, and that those errors required that corrective measures be taken. Accordingly, in reversing the trial court's dismissal of the appellant's action, the Court directed that the appellant be granted the right to file a new action, with the appellee retaining the right to assert any defense available to it.

C. Alexander B. Zoe of Providence Law Associates appeared for the appellant. *G. Moses Paegar* and *J. Johnny Momoh* of Sherman & Sherman, Inc. appeared for the appellees.

MR. JUSTICE SACKOR delivered the opinion of the Court

This appeal is before us from a July 31, 2002 final judgment rendered by His Honour Yusuf D. Kaba, Assigned Circuit Judge presiding over the June, A. D. 2002 Term of the Circuit Court, Sixth Judicial Circuit, Montserrado County, granting the appellee's motion to dismiss the appellant's action of damages for breach of contract instituted against the appellee.

The certified records before us indicate that on September 12, 1989, the appellant secured a boiler and machinery breakdown insurance coverage with Co-appellee American Insurance Management, Inc. (AIM). The insurance covered sudden and unforeseen damage, including explosion, to the appellant's machinery and equipment located at River Gbeh, Grand Gedeh County. The records also reveal that there were two separate accidents at the appellant's premises on March 5, 1990 resulting into the total loss of appellant's steam boiler generating plant and substantial damage to the building in which the steam boiler generating plant was installed. The following day, March 6, 1990, the appellant notified Co- appellee AIM of the accident and filed a claim for the losses it had sustained. The appellant requested the co-appellee to examine the claim and to replace the steam boiler generating plant.

There are no indications in the records before us that any further communications were exchanged between the parties until December 26, 1995 when the appellant re-submitted its claim and January 5, 1996, when Co-appellee AIM acknow-ledged receipt of both of the appellant's demand letters of March 6, 1990 and December 26, 1995. It would appear that the lapse of

time was due to the intervening period of The Liberian civil war.

It also appears from the certified records that the parties then proceeded to engage in a series of discussions in an attempt to effect an out-of-court settlement of the appellant's claim. These apparently culminated in a March 6, 1996 settlement offer of US$16,500.00 from the co-appellee, which was rejected by the appellant. Finally, on January 17, 1998, Dunbar & Dunbar Law Firm filed, on behalf of the appellant, an action of damages against the appellee for breach of insurance contract, praying for the entry of a judgment in the total amount of US$1,250,000.00 calculated as follow: US$850,000.00 special damages and US$400,000.00 general damages.

We think it is important that the opinion details the subsequent re-filings and other procedural actions taken by the parties.

1. On January 17, 1998, Dunbar & Dunbar Law Firm filed the initial action against Co-appellee AIM on behalf of the appellant. AIM filed an answer and two separate motions, one to dismiss the action and the other to drop it as a party. The defenses raised in the co-appellee's motion to dismiss were that: (a) the contract provided for arbitration as the sole remedy for settling disputes between the parties; (b) the insured was time barred because the appellant should have filed its action within one year from the date of its rejection of the appellee's March 6, 1996 settlement offer of US$16,500.00; and (c) that Counsellor Stephen Dunbar, Jr., who drafted and filed the complaint, had not obtained a lawyer's license for 1997 and 1998, thereby making any pleadings filed by him a legal nullity.

2. On February 9, 1998, Dunbar & Dunbar Law Firm withdrew the complaint with reservation to file an amended complaint. (Emphasis ours)

3. On May 15, 1998, instead of filing an amended complaint, Dunbar & Dunbar Law firm filed a new action, to which Co-appellee AIM filed an answer and again, as before, a motion to dismiss as well as a motion to drop.

The answer and motion to dismiss were essentially a reiteration of the contents of the prior pleadings except that the motion to dismiss raised an additional issue, which was that there was a lack of verification of the affidavit by Counsellor Dunbar. (Emphasis ours)

4. On May 10, 2001, Dunbar & Dunbar withdrew as counsel for appellant.

5. On August 11, 2001, Counselor C. Alexander Zoe replaced Dunbar & Dunbar as counsel for appellant.

6. On August 30, 2001, Counsellor Zoe filed a motion for voluntary discontinuance of the January 17, 1998 action in which he conceded the irregularity of an unlicensed attorney preparing and filing pleadings. However, he suggested that Counsellor Dunbar's negligence should not constitute a basis to jeopardize the client's interest. The motion was resisted by Co-appellee AIM, which took the position that there was no pending action to discontinue since the pleadings filed by Counsellor Dunbar were a legal nullity, in that (a) he was unlicensed and (b) the pleadings were not verified. Further-more, AIM asserted that as the attorney was an agent of the client, the act of the attorney should be attributed to the client.

7. On November 20, 2001, Judge Wynston Henries, the trial judge, ruled denying the appellant's motion for voluntary discontinuance and dismissed the appellant's action on the grounds that: (a) there was nothing pending before the court since the action had been previously withdrawn by Counsellor Dunbar; (b) that although the appellant's counsel had excepted to the dismissal and announced an appeal to the Supreme Court, Counsellor Zoe had failed to file a bill of exceptions or to comply with the other statutory requirements of section 51.4 of the Civil Procedure Law regarding the completion of an appeal.

8. On December 6, 2001, Co-appellee AIM filed a motion in the trial court to dismiss the appeal for failure to proceed. On the date assigned for the hearing of the motion, Counsellor Zoe did not appear. Hence, upon application made by the appellees, the motion was

heard *ex parte* and a ruling made by Judge Henries dismissing the appeal.

9. A bill of costs was subsequently prepared and taxed by appellant's counsel, Counsellor Zoe, who also paid the costs approved in the bill of costs.

10. On January 3, 2002, Counsellor Zoe filed, on behalf of the appellant, a third action of damages for breach of contract against the appellees. The action contained the same subject matter as the previous action and was filed with the same Civil Law Court, Sixth Judicial Circuit, Montserrado County, except that this time the court was presided over by Judge Yusuf D. Kaba. Again, Co-appellee AIM filed an answer and two motions, one to drop it as a party and the other to dismiss the action. In addition to reiterating the same defenses previously raised in the prior pleadings, Co-appellee AIM also raised the defense of *res judicata* predicated upon the dismissal of the previous action by Judge Wynston Henries on December 6, 2001.

In its resistance to the motion to dismiss, the appellant contended that the doctrine of *res judicata* was not applicable because the action had not been heard and decided on the merits and, further, that the dismissal was only on technical legal grounds.

11. The records revealed further that on July 31, 2002 Judge Yusuf D. Kaba, in disposing of the motion to dismiss, handed down what was designated "Court's Final Judgment." In the ruling, Judge Kaba dismissed the action, stating as the grounds that (a) the doctrine of *res judicata* was applicable and that it prevented the appellant from reinstituting the action; (b) the complaint was a legal nullity because of Counsellor Dunbar's unlicensed status and that the acts of the agents were attributable to the principal, the appellant herein.

It is from Judge Kaba's dismissal of the action that the appellant's counsel announced an appeal to this Honourable Supreme Court.

The Court feels compelled to comment on the action of counsel for appellant as well as those of the trial judges who handled this matter in the trial court. Their

actions can only be described as a comedy of errors. This Court is truly shocked and surprised that experienced counsels of the caliber of Counsellors Stephen B. Dunbar, Jr. and C. Alexander Zoe would be so grossly inept and incompetent in handling their client's case. Although Counsellor Dunbar is one of the oldest practicing counselors of the Supreme Court Bar, his action appears to indicate that he is confused as to the difference between the withdrawal of an action and the withdrawal of a complaint with reservation to re-file an amended complaint. According to the records in these proceedings, on January 17, 1998 Counsellor Dunbar instituted on behalf of the appellant an action of damages for breach of contract. Subsequently, on February 9, 1998, he withdrew the complaint in the action. Obviously, this meant that notwithstanding the withdrawal of the complaint, the action was still pending. Yet, instead of following the provisions of section 9.10 of the Civil Procedure Law and filing an amended complaint on May 15, 1998, Counsellor Dunbar chose to file a new action. In effect, this meant that Counsellor Dunbar now had two actions pending at the same time, in the same court, involving the same parties, and for the same subject matter. If Counsellor Dunbar wanted to file a new action, it was obvious that he should first have effected a withdrawal of the first action which was still pending.

It is recognized in this jurisdiction that the proper way to withdraw an action is governed by the provisions of section 11.6 of the Civil Procedure Law. Since a responsive pleading had already been filed to the complaint, the action could only have been discontinued without an order of court by "filing with the court a stipulation in writing signed by the attorneys of record for all parties." Civil Procedure Law, Rev. Code 1:11.6(1)(b). Otherwise, the action could only have been discontinued by order of court ". . . and upon such terms and conditions as the court may deem proper." *Id.*, section 11.6(2). On the other hand, the procedure for withdrawing a complaint is governed by section 9.10 of

the Civil Procedure Law, which stipulates that such withdrawal may be done *ex parte* without reference to opposing counsel or the court merely by the filing and serving a notice of withdrawal.

The confusion was compounded when on August 30, 2001, Counsellor C. Alexander Zoe, who had replaced Counsellor Dunbar of Dunbar and Dunbar Law Firm as counsel for the appellant, attempted to voluntarily discontinue the first action filed on January 17, 1998 by filing a motion for voluntary discontinuance of the action, wherein he requested the court to permit him to discontinue the action. But the error did not stop there.

Judge Wynston Henries also erred when in his ruling made on November 20, 2001, denying the motion to voluntarily discontinue the action, he stated as the basis for denial that there was nothing before the court to discontinue since the appellant's first action had been withdrawn on February 9, 1998. This was clearly incorrect because, as has been previously noted, only the complaint had been withdrawn with reservation to refile an amended complaint. This is further confirmed by the fact that if the action had been withdrawn on February 9, 1998, as was asserted by the trial judge, Coun-sellor Zoe would not have filed a motion to voluntarily discontinue the action on August 30, 2001.

It is important to emphasize that Counsellor Zoe's motion for voluntary discontinuance was specifically restricted only to the first action which was filed on January 17, 1998. This Court feels compelled to ask what then was the status of the second action filed on May 15, 1998? Counsellor Zoe did not include this in his motion for voluntary discontinuance and it was therefore not passed upon by Judge Henries in his November 20, 2001 ruling.

Judge Kaba, in his ruling of July 31, 2002, granted Co-appellee's AIM's motion to dismiss the appellant's action, relying on the doctrine of *res judicata* and the impropriety of reviewing the prior ruling of his colleague, Judge Wynston Henries. However, Judge Kaba wrongly assumed and asserted in the said ruling that Judge

Henries' November 20, 2001 ruling had passed upon and disposed not only of appellant's first action, but also of appellant's second action. This was clearly an erroneous and unfounded assumption on Judge Kaba's part because the appellant's motion for voluntary discontinuance was limited only to the first action and Judge Henries' ruling was therefore limited to passing upon and disposing only of the first action. He could not and did not pass on the second action.

We are also of the opinion that Judge Kaba erred as a matter of law when he relied on the doctrine of *res judicata* in dismissing appellant's action. Section 2.73 of the Civil Procedure Law provides as follows:

> 'If an action is timely commenced and is terminated in any manner other than by a dismissal of the complaint for failure to prosecute the action or a final judgment on the merits, the plaintiff may commence a new action upon the same right to relief after the expiration of the time limited by statute therefor and within six months after the termination. . . ."

The law is clear in this jurisdiction that the doctrine of *res judicata* can only be properly invoked and applied where there has been a determination of the matter on the merits.

"*Res judicata* means that there is an existing final judgment rendered upon the merits of a cause by a court of competent jurisdiction and is conclusive as to the rights, questions, and facts in issue as to the parties and privies . . . ." *Kiazolu v. Pearson*, 35 LLR 550 (1988), Syl. 3.

"The doctrine of *res judicata* is applicable in a proceeding only when the same subject matter involving the same parties has been judicially determined." *Monrovia Breweries, Inc. v. Karpeh*, 37 LLR 288 (1993), Syl. 2.

"The doctrine of *res judicata* cannot be invoked when the subject mater involving the identical parties was never judi-cially determined". *Monrovia Breweries, Inc. v. Karpeh*, 37 LLR 288 (1993), Syl. 3.

It is obvious that the matter was not heard or decided on its merits, but was dismissed on the grounds that Counsellor Stephen B. Dunbar, Jr. was an unlicensed attorney at the time he prepared and filed the first action on January 17, 1998 on behalf of the appellant.

Civil actions are instituted in our courts by party litigants to assert, protect and defend their rights. Both the appellant and the appellees in these proceedings are entitled under our law to have their respective claims and defenses properly presented before, and fairly adjudicated, by our courts. How-ever, it is our considered opinion that from our review of the records of the proceedings in the trial court in the instant case, the rights of the party litigants were not properly presented, addressed or protected, due entirely to the multiplicity of errors committed both by appellant's counsels and the trial court.

In *Donzo v. Ahmed*, 37 LLR 103 (1992), this Court made the following observations: ". . . we come face to face with the behavior of one of the most experienced and reputable lawyers who has handled his client's interest with such acts of neglect and total disregard for the kind of professional behavior expected of a lawyer admitted to the bar of this Court. This act of course permits the adversary to seek the application of one of the harsh provisions of our procedural statute, the appeal statute. . . . ." *Id*., text on page 110. The Court went on to observe that the case was replete with irregularities which had resulted in a miscarriage of justice. The Court attributed the irregularities to both the trial judge and the appellant's lawyer, adding: "This matter is one that must be decided upon a fair determination of the substantiative rights of the parties. We therefore cannot permit a procedural technicality which has been invoked because of the deliberate neglect of counsel of one of the parties to prevent us from making a fair determi-nation of this case on the merits...." *Id*., text on page 111.

It is obvious that the facts in the *Donzo* case are similar to those in the instant case, in that the two cases

involve serious professional neglect and mishandling of clients cases by counsellors of this bar as well as errors committed by the trial court. We have followed the action taken by this Court in the *Donzo* case by also fining the appellant's lawyers and we think it entirely proper and consistent with that case that in deciding this case, we also adopt the principle enunciated in the *Donzo* case. Our decision is also consistent and in harmony with our prior holding in *The Management of Catholic Relief Services v. Junius,* 39 LLR 397 (1998), which also relied on the *Donzo* case. In that case, this Court held that strict compliance with our procedural laws should not defeat the ends of substantial justice and that the interpretation of such procedural code should always promote the ends of substantial justice *Id.*, text at page 403.

Because of the unprofessional and negligent manner in which Counsellors Stephen B. Dunbar, Jr. and C. Alexander B. Zoe conducted the appellant's case to the detriment of their client's interest, Counsellor Dunbar and Counsellor Zoe are fined the amount of L$3,000.00 each, to be paid into the government revenue within 72 hours. Each attorney is required to submit a copy of the official revenue receipt to the Marshal of the Supreme Court. A failure to do so will result in the automatic suspension of the two counsellors, directly and indirectly, from the practice of law for a period of six months.

Wherefore and in view of the foregoing, it is the decision of this Court that the ruling of the lower court is reversed and the matter is remanded to the trial court with instructions that the appellant be required to recommence the action by the filing of a new complaint *nunc pro tunc* if it so desires, within a maximum period of six months as of the date of this opinion. This Court wishes to emphasize that our decision in no way adversely affects the substantive rights of the appellees who may interpose any defense or counterclaim in the event the appellant elects to refile its action. The Clerk of this Court is hereby ordered to send a mandate to the court below instructing the trial judge presiding therein to

resume jurisdiction over the case and to give effect to this opinion. Costs are to abide the final determination of this matter. And it is hereby so ordered.

Ruling reversed.