

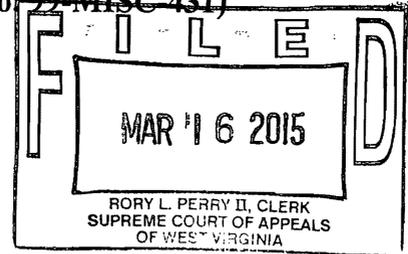
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-1261

(Kanawha County Circuit Court, Civil Action No. ~~99-MISC 431~~)

UNITED BANK, INC., Respondent Below,  
  
Petitioner,

v.

RONALD RAY TOWNSEND, Respondent Below,  
  
Respondent.



*Petitioner's Brief*

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UNITED BANK, INC.'S PETITION FOR APPEAL

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### III. ASSIGNMENTS OF ERROR

- A. **The Circuit Court committed *de novo* error in failing to give preclusive effect to the August 13, 2014 Dismissal Order.**
- B. **The Circuit Court committed *de novo* error when the Circuit Court failed to apply the statute of limitations to the Petition for Civil Contempt.**
- C. **The Circuit Court clearly erred in finding that Petitioner, United Bank, Inc., acted with the requisite intent to commit civil contempt.**

### IV. STATEMENT OF THE CASE

On December 30, 1999, the Circuit Court, in Civil Action No. 99-MISC-431 (“Infancy Proceeding”), conducted an infancy settlement proceeding on behalf of Respondent, Ronald Ray Townsend (“Mr. Townsend”). [R. at 1-5.] In the Infancy Proceeding, Karen Townsend, Mr. Townsend’s mother, petitioned the Circuit Court to approve a Ten Thousand Dollars (\$10,000.00) settlement negotiated on Mr. Townsend’s behalf with Westfield Insurance Company. Following the independent review of Mr. Townsend’s guardian *ad litem*, Troy Giatras (“Attorney Giatras”), the Circuit Court approved the settlement. [R. at 4.] After a reduction for attorney’s fees and expenses,<sup>1</sup> the Circuit Court ordered that Karen Townsend:

deposit the net proceeds of this settlement into an interest bearing account with a federally insured banking institution after any and all attorney’s fees and expenses, subrogation, and/or medical expenses have been paid until the minor reaches 18 yrs. of age. The principal and interest shall not be spent without Court approval.

[R. at 2.]

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<sup>1</sup> The Circuit Court awarded Mr. Townsend’s counsel Three Thousand Three Hundred Sixty-Seven Dollars and twelve cents (\$3,367.12) for his fees and expenses negotiating the infancy settlement. The Six Hundred Dollars (\$600.00) fee to Attorney Giatras was paid separate and apart from the settlement funds. [R. at 4.]

Thereafter, Karen Townsend deposited the net settlement proceeds of Six Thousand Six Hundred Thirty-Two Dollars and eighty-seven cents (\$6,632.87) in a certificate of deposit (“CD”) with Petitioner, United Bank, Inc. (“United Bank”). Karen Townsend signed the CD and next to her signature, the following typed message appeared: “Automatically renew until child is 18 and interest must go back to cd per court order.”<sup>2</sup> [R. at 43.] For approximately five-and-a-half (5.5) years following the Infancy Proceeding, the CD remained undisturbed.

Subsequently, from June 22, 2005 through August 2, 2005, Karen Townsend made twelve (12) withdrawals from the CD, outlined in the table below:

Date	Amount	Cashier’s Check No.
06/22/05	\$700.00	861723
06/23/05	\$1,000.00	861724
06/27/05	\$500.00	861731
07/11/05	\$1,200.00	861755
07/11/05	\$1,000.00	861758
07/15/05	\$500.00	861768
07/18/05	\$700.00	813901
07/18/05	\$500.00	861772
07/20/05	\$250.00	813906
07/22/05	\$400.00	861778
07/22/05	\$300.00	861779
07/22/05	\$300.00	861779
08/02/05	\$250.87	861805
<b>Total:</b>	<b>\$7,600.87</b>	

[R. at 7, 15-26.] In making these withdrawals, Karen Townsend stated that she had to purchase “school clothes and things” for Mr. Townsend and, following these purchases, Karen Townsend

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<sup>2</sup> At the time this settlement occurred, Mr. Townsend was over eight-and-a-half (8.5) years old.

gave Mr. Townsend the remaining money.<sup>3</sup> [R. at 56.] These withdrawals completely depleted the principal and interest on the CD and led to its closure.

On March 24, 2009, Mr. Townsend turned eighteen (18). [R. at 165, ¶ 13.] Thereafter, Mr. Townsend retained his former guardian *ad litem*, Attorney Giatras and the Giatras Law Firm, PLLC, to investigate United Bank's handling of his infancy settlement. On July 14, 2009, Attorney Giatras contacted Tara Martin of United Bank ("Ms. Martin") to discuss the handling of Mr. Townsend's CD. [R. at 62.] On August 31, 2009, Attorney Giatras, again, contracted Ms. Martin and stated that:

[t]his office has been asked by Delbert Townsend, father of Ronald Ray Townsend, to investigate the facts and circumstances surrounding the Certificate of Deposit #301-286106 that was set up for his son, Ronald Townsend on December 20 [sic], 1999. . . .

It would be appreciated if you could provide me a printout of all transactions; deposits; withdrawals; made from the Certificate of Deposit, so that I may review the same with Mr. Townsend and his son, Ronald Ray Townsend.

[R. at 61.]

Anticipating legal action, on August 10, 2010, United Bank requested intervenor relief in the Infancy Proceeding to interplead the funds removed from the CD ("Motion to Interplead").<sup>4</sup> [R. at 6-9, 241-42.] In seeking this interpleader relief, United Bank provided notice to Mr. Townsend, through Attorney Giatras, as reflected in the certificates of service. [R. at 32, 34.]

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<sup>3</sup> Mr. Townsend was approximately fourteen-and-a-half (14.5) years old at the times these withdrawals occurred.

<sup>4</sup> Additionally, United Bank requested permission to intervene to pursue a cross-claim against Karen Townsend for contribution for the withdrawals from the CD.

On October 15, 2010, the Circuit Court heard United Bank's Motion to Interplead. [R. at 33-34.] Subsequently, the Circuit Court orally denied United Bank's Motion to Interplead, based on a reluctance to re-open the Infancy Proceeding.<sup>5</sup> Following the denial of United Bank's Motion to Interplead, neither Mr. Townsend nor counsel took any further action against United Bank for years.

Unexpectedly, on November 5, 2013, more than three (3) years after the Motion to Interplead hearing, Mr. Townsend filed his Complaint against United Bank, Civil Action No. 13-C-2066 ("Breach of CD Litigation"), in the Circuit Court of Kanawha County. [R. at 64-71] In his Complaint, Mr. Townsend alleged five (5) causes of action against United Bank, including: (i) breach of contract; (ii) violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"); (iii) breach of trust and fiduciary duties; (iv) negligence; and (v) civil liability for aiding and abetting. [R. at 67-70.] All five (5) of Mr. Townsend's causes of action arose from United Bank's alleged violation of the December 30, 1999 Order. [R. at 67-68, ¶¶ 9-18.]

On March 24, 2014, United Bank moved to dismiss Mr. Townsend's Complaint on three (3) grounds. [R. at 73-98.] Primarily, United Bank argued that the applicable statute of limitations barred all of Mr. Townsend's claims. [R. at 76-81, 86-90.] Alternatively, United Bank asserted that no cause of action existed under the WVCCPA for the conduct alleged in the Complaint and that the CD never created a fiduciary relationship with Mr. Townsend. [R. at 81-85, 88-89.] Following additional briefing and oral argument, on August 13, 2014, Judge Zakaib dismissed Mr. Townsend's Complaint with prejudice ("Dismissal Order"). [R. at 164-78.] In

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<sup>5</sup> To the best of United Bank's knowledge and belief, the Circuit Court never entered an Order codifying its rulings from the October 15, 2010 hearing. [R. at 242.]

dismissing Plaintiff's Complaint, the Circuit Court found that Mr. Townsend knew of potential causes of action against United Bank but failed to timely pursue these causes of action in a legal proceeding. [R. at 169-77, ¶¶ 37-43, 68-91.]

Unsatisfied with this Dismissal Order, Mr. Townsend pursued three (3) avenues of relief. First, on August 29, 2014, Mr. Townsend filed a Motion for Reconsideration of Dismissal on the Pleadings ("Motion for Reconsideration").<sup>6</sup> [R. at 179-87.] Second, on September 10, 2014, Mr. Townsend petitioned the Circuit Court in the Infancy Proceeding to find United Bank in contempt ("Petition for Contempt"). [R. at 35-43.] Third, on September 12, 2014, Mr. Townsend noticed an appeal with this Court of the Dismissal Order.<sup>7</sup> [R. at 198-203.] Mr. Townsend's second avenue of relief necessitates United Bank's filing of this Petition for Appeal.

In the Petition for Contempt, Mr. Townsend requested that the Circuit Court, in the Infancy Proceeding, find United Bank in contempt, because United Bank released funds from Mr. Townsend's CD prior to Mr. Townsend reaching the age of eighteen (18), in violation of its December 30, 1999 Order. [R. at 35-36.] Indeed, the Petition for Contempt's allegations similarly resembles the facts set forth in Mr. Townsend's Complaint. [*Compare* R. at 35-37, ¶¶ 1, 3-4 *with* R. at 66-67, ¶¶ 9-10, 13-14.] Following subsequent briefing and oral argument, on

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<sup>6</sup> To date, this Motion for Reconsideration remains pending in the Circuit Court.

<sup>7</sup> On December 12, 2014 and following receipt of Mr. Townsend's Motion to Amend Scheduling Deadlines, this Court vacated its Scheduling Order and held Mr. Townsend's appeal in abeyance until the Circuit Court adjudicated his Motion for Reconsideration. *See supra* note 6 and accompanying text.

November 13, 2014, the Circuit Court found United Bank in civil contempt (“Contempt Order”).<sup>8</sup> [R. at 257-58.] United Bank appeals this Contempt Order.

## V. SUMMARY OF ARGUMENT

In finding that United Bank committed civil contempt, the Circuit Court made three (3) reversible errors. First, the Circuit Court failed to give preclusive effect to the August 13, 2014 Dismissal Order entered in the Breach of CD Litigation, which dismissed Mr. Townsend’s Complaint against United Bank, with prejudice. Preclusion applied because both the Petition for Contempt and Breach of CD Litigation involved the same factual predicate; namely, that United Bank violated the December 30, 1999 Order in permitting Mr. Townsend’s mother to take withdrawals from the CD prior to Mr. Townsend turning eighteen (18). Mr. Townsend elected to pursue claims for negligence, breach of fiduciary duties, WVCCPA and other torts against United Bank in the Breach of CD Litigation, rather than pursuing an action for civil contempt. As the Circuit Court dismissed Mr. Townsend’s Complaint, with prejudice, the doctrines of preclusion prevented Mr. Townsend from seeking civil contempt relief.

Additionally, the Circuit Court erred in failing to apply the statute of limitations to Mr. Townsend’s Petition for Contempt. The record shows that Mr. Townsend waited almost five-and-a-half (5.5) years to accuse United Bank of civil contempt after turning eighteen (18) and knowing of the depletion of his CD. In other words, if the statute of limitations barred all of Mr. Townsend’s claims against United Bank in the Breach of CD Litigation, then the statute of

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<sup>8</sup> Subsequent to this Order, Mr. Townsend again petitioned the Circuit Court to hold United Bank in contempt because United Bank requested a stay of the Contempt Order and noticed its appeal to this Court. On January 9, 2015, the Circuit Court found that United Bank did not commit civil contempt in appealing the Contempt Order and also granted United Bank a stay until adjudication of its appeal.

limitations should equally apply, and bar, Mr. Townsend's efforts to hold United Bank in civil contempt for the same conduct.

Finally, insufficient evidence existed to hold United Bank in civil contempt. Mr. Townsend had the burden of proof to show United Bank committed civil contempt, and Mr. Townsend presented no evidence of United Bank's requisite intent. Civil contempt requires an intentional, knowing deviation from the Circuit Court's Order. Indeed, United Bank attempted to interplead funds in August 2010; however, the Circuit Court in the Infancy Proceeding denied United Bank's Motion to Interplead. Clearly, United Bank attempted to comply and United Bank should not be held in civil contempt simply because the passage of time and inaction of Mr. Townsend allowed United Bank to assert a successful statute of limitations defense in the Breach of CD Litigation. For this reason, this Court should reverse and vacate the Contempt Order.

## **VI. STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, United Bank believes oral argument is unnecessary because "the facts and legal arguments are adequately presented" in its Petition for Appeal.

## **VII. ARGUMENT**

This Court uses a three (3) prong standard of review of the Contempt Order. First, this Court reviews the Contempt Order under an abuse of discretion standard. Second, this Court reviews the factual findings of the Contempt Order under a clearly erroneous standard. Third, this Court reviews questions of law and statutory interpretations under a *de novo* review.

Syl. pt. 1, *Watson v. Sunset Addition Prop. Owners Ass'n, Inc.*, 222 W. Va. 233, 664 S.E.2d 118 (2008).

**A. The Circuit Court committed *de novo* legal error in failing to give preclusive effect to the August 13, 2014 Dismissal Order.**

*Res judicata*, otherwise known as claim preclusion, requires three (3) elements to apply:

First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

Syl. pt. 1, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014). Similarly, collateral estoppel, or issue preclusion, applies when:

(1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The application of either preclusive doctrine prevented the Circuit Court from holding United Bank in civil contempt.

First, preclusion requires that both actions involve the same parties. Syl. pt. 1, in part, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 130; syl. pt. 1, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114. In this instance, no dispute exists that Mr. Townsend and United Bank were

both parties in the Breach of CD Litigation and the subject of Mr. Townsend's Petition for Contempt.

Second, preclusion requires a final adjudication on the merits from a court of competent jurisdiction. Syl. pt. 1, in part, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 130; syl. pt. 1, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114. The August 13, 2014 Dismissal Order from the Circuit Court in the Breach of CD Litigation constitutes a final adjudication on the merits. Syl. pt. 3, *James M.B. v. Carolyn M.*, 193 W. Va. 289, 456 S.E.2d 16 (1995) (“A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing done but to enforce by execution what has been determined.”); *see, e.g., Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 746, 310 S.E.2d 675, 678 (1983) (order dismissing complaint considered final when no amendment can save the action).<sup>9</sup>

Third, claim preclusion requires a finding that the first resolved action is identical to the second cause of action, or “must be such that it could have been resolved, had it been presented, in the prior action.” Syl. pt. 1, in part, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664. As set forth below, the allegations of Mr. Townsend's Complaint similarly resemble the facts underlying his Petition for Contempt:

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<sup>9</sup> Indeed, Mr. Townsend's counsel acknowledged that the August 13, 2014 Order constituted a final decision on the merits when he noticed a petition to this Court to appeal the August 13, 2014 Dismissal Order. [R. at 199.] *See supra* note 7 and accompanying text.

Complaint	Petition for Contempt
<p>“A Certificate of Deposit was set up for Ronald Ray Townsend pursuant to a Court Order issued by the Kanawha County Circuit Court.” [R. at 65, ¶ 9.]</p> <p>“The Court’s Order required that the funds at issue would be held in a CD until the minor child reached the age of 18.” [R. at 66, ¶ 10.]</p>	<p>“The <i>Final Order Establishing a Certificate of Deposit</i> (‘Final Order’) for Ronald Ray Townsend prohibited the release of any funds, principal or interest, until the infant reached the age of eighteen.” [R. at 35, ¶ 1.]</p>
<p>“The CD itself specifically stated, ‘[a]utomatically renew until the child is 18 and interest must go back to CD per court order.’” [R. at 66, ¶ 13.]</p>	<p>“Thereafter, a Certificate of Deposit (‘CD’) was established at United Bank for the benefit of Ronald Ray Townsend, and special instructions were typed on the face of the CD stating, ‘[a]utomatically renew until the child is 18 and interest must go back to CD per court order.’” [R. at 36, ¶ 3 (citation omitted) (emphasis removed).]</p>
<p>“On at least twelve separate occasions, the Defendant United Bank disturbed funds in clear violation of the Court’s Order. [R. at 66, ¶ 14.]</p>	<p>“Despite the clear instructions of both the Final Order and the CD, on at least 12 different occasions, United Bank violated this Court’s Final Order by distributing the infant’s funds and entirely depleting the CD before the minor child reach the age of eighteen.” [R. at 36, ¶ 4.]</p>

The similarity of the factual predicate underlying both the Breach of CD Litigation and Petition for Contempt satisfies the third requirement of claim preclusion. Nothing prevented Mr. Townsend from initiating civil contempt charges against United Bank in the Breach of CD Litigation, as the thrust of Mr. Townsend’s Complaint and Petition for Contempt alleged that United Bank violated the December 30, 1999 Order in allowing withdrawals from the CD prior to Mr. Townsend’s 18th birthday. This similarity between Mr. Townsend’s Complaint and the Petition for Contempt also satisfies the criteria to invoke the doctrine of issue preclusion. Syl. pt. 1, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114.

Finally, for issue preclusion to apply, Mr. Townsend needed a full and fair opportunity to litigate. Syl. pt. 1, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114. Prior to the August 13, 2014 Dismissal Order, the Circuit Court permitted Mr. Townsend to formally respond to United Bank’s Motion to Dismiss and to participate in oral argument. [R. at 105-18.] Mr. Townsend, through counsel, presented his best arguments, and the Circuit Court reviewed the alleged facts in a light most favorable to him; yet, the Circuit Court still found that no amendment could save Mr. Townsend’s claims from being barred by the statute of limitations. [R. at 164-78.] Further, in finding that the statute of limitations barred all of Mr. Townsend’s claims, the Circuit Court properly found that Mr. Townsend knew of his causes of actions but elected not to timely pursue.<sup>10</sup> This predicate satisfies the full and fair opportunity to litigation requirement of issue preclusion.

In sum, either preclusive doctrine prohibits Mr. Townsend from pursuing his Petition for Contempt. Following his 18th birthday, Mr. Townsend elected to wait years to pursue relief against United Bank and, when Mr. Townsend finally made his election to sue, he chose to proceed on his Complaint rather than on a Petition to hold United Bank in contempt. Only after dismissal with prejudice did Mr. Townsend choose to seek contempt charges against United Bank, from a different judge in the same tribunal. This Court should view such conduct unfavorably and, under the preclusion doctrines, this Court should reverse and vacate the Contempt Order.

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<sup>10</sup> West Virginia law imputes knowledge of counsel to the represented party. *See, e.g., Brewster v. Hines*, 155 W. Va. 302, 313, 185 S.E.2d 513, 521 (1971) (“Knowledge of, or notice to, the attorney for a litigant or party to a legal proceeding, of matters arising in the course of the litigation or proceeding, is ordinarily imputable to such litigant or party.”); *see also Painter v. Peavy*, 192 W. Va. 189, 193-94, 451 S.E.2d 755, 759-60 (1994); W. VA. R. PROF’L CONDUCT 4.2. The certificates of service for the Motion to Interplead further impute knowledge on Mr. Townsend of a potential claim against United Bank. [R. at 32, 34.]

**B. The Circuit Court committed *de novo* error when it failed to apply the statute of limitations to Mr. Townsend’s Petition for Contempt.**

“The ability of a lawsuit to survive in court is premised on a fundamental element - whether the suit was timely filed. If not, then a trial court need not reach the merits of the suit.” Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, §3.1(a), 18-19 (4th ed. 2012). Statutes of limitations represent pervasive legislative policy judgments that it is unfair or unjust to allow a claimant to proceed on their claim, based solely on the passage of time. *See id.*; *see also Jones v. Tr. of Bethany Coll.*, 177 W. Va. 168, 169, 351 S.E.2d 183, 184 (1986).

In this instance, Mr. Townsend proceeded with his Petition for Contempt: (i) almost five-and-a-half (5.5) years after Mr. Townsend turned eighteen (18) and knew of potential claims against United Bank; and (ii) following the Circuit Court’s August 13, 2014 Dismissal Order.<sup>11</sup> Given these facts and West Virginia law, the statute of limitation that barred Mr. Townsend’s Complaint also apply to bar his Petition for Contempt.

On prior occasions, this Court has found that the statute of limitations applies to charges of contempt. *See* syl. pt. 3, *Cottrill v. Cottrill*, 219 W. Va. 51, 631 S.E.2d 609 (2006) (Circuit Court erred in failing to permit alleged contemnor to assert statute of limitations as a defense to the action). However, it is unclear what statute of limitations applies to charges of civil contempt for disobedience of the December 30, 1999 Order.<sup>12</sup> Mr. Townsend contends that

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<sup>11</sup> United Bank focuses its discussion on statute of limitations because the civil contempt finding resulted in monetary relief to Mr. Townsend. United Bank submits that if this Court finds that the November 13, 2014 Order awarded equity relief, then the doctrine of laches would aptly apply and also bar Mr. Townsend’s Petition for Contempt.

<sup>12</sup> Other jurisdictions utilize specific statute of limitations for only contempt. *See, e.g.*, U.S.C. § 3285 (“No proceeding for criminal contempt within section 402 of this title shall be instituted against any

no statutes of limitations apply to any Court Order and contempt sanctions are always warranted for a violation irrespective of the passage of time. [R. at 237-38.] Conversely, United Bank respectfully submits that West Virginia Code § 55-2-12 applies. This statute of limitations provides that: “[e]very personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property . . . .” W. VA. CODE § 55-2-12. Applying this statute of limitations in this instance is reasonable given that the individuals impacted by a court’s orders typically know of their existence and contents, and the injured party has the ability to seek immediate redress when they know, or suspect, a violation has occurred. To not have a statute of limitations would allow potential violations to linger and the evidence to become stale.

Again, Mr. Townsend sought contempt sanctions against United Bank approximately five-and-a-half (5.5) years after reaching the age of majority and suspecting a cause of action existed. Mr. Townsend knew of the December 30, 1999 Order and its requirements and, yet, Mr. Townsend delayed alleging contempt until after the Circuit Court dismissed his Complaint with prejudice. Lastly, both Mr. Townsend’s Complaint and his Petition for Contempt pursued monetary relief from United Bank for reimbursement of the principal and interest taken from Karen Townsend’s withdrawals from the CD. Given these facts and allegations of property damages, the two (2)-year statute of limitations of West Virginia Code § 55-2-12 applies. W. VA. CODE § 55-2-12. As Mr. Townsend pursued his

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person, corporation or association unless begun within one year from the date of the act complained of. . . .”); OR. REV. STAT. § 33.135(1) (“[e]xcept as provided in subsection (5) of this section; proceedings under ORS 33.055 to impose remedial sanctions for contempt and under ORS 33.065 to impose punitive sanctions for contempt shall be commenced within two years of the act or omission constituting contempt.”)

Petition for Contempt well beyond the applicable statute of limitations, this Court should reverse and vacate the Contempt Order.

**C. The Circuit Court clearly erred in finding that United Bank acted with the requisite intent to commit civil contempt of Court.**

Civil contempt, like its criminal counterpart, requires a requisite intent to disobey or resist the Order of the court and actual disobedience. *See* W. VA. CODE § 61-5-26; *see Flanigan v. W. Va. Pub. Emps. Ret. Sys.*, 177 W. Va. 331, 336, 352 S.E.2d 81, 86 (1986). Without an intentional violation of an Order, no contempt can occur. *See United States v. Warlick*, 742 F.2d 113, 117 (4th Cir. 1984); *Breen v. Tucker*, 821 F. Supp. 2d 375, 382-83 (D.D.C. 2011) (insufficient evidence of intent to violate Order existed to justify a civil contempt sanction); *Univ. of Kansas v. Sinks*, 644 F. Supp. 2d 1287, 1312 (D. Kan. 2009) (no clear and convincing evidence that the alleged contemnor knowingly violated Order of the Court).

At the contempt hearing, Mr. Townsend presented no evidence of United Bank's intent to disobey the December 30, 1999 Order. Instead, it appears that United Bank attempted to fully comply with the December 30, 1999 Order. On August 10, 2010, United Bank requested that the Circuit Court permit United Bank to intervene in the Infancy Proceeding and interplead the funds missing from the CD. [R. at 6-26.] However, the Circuit Court denied United Bank's Motion to Interplead. *See* syl. pt. 2, *Watson*, 222 W. Va. 233, 664 S.E.2d 118 ("A party may not ordinarily be held in contempt for failure to perform an act that the party is unable to legally perform, if the evidence establishes that the party's inability to legally perform the act is not the party's fault.")

Following this denial, several years of inactivity passed before Mr. Townsend unexpectedly initiated his Complaint against United Bank on November 5, 2013. [R. at 64-71.]

At this time, given Mr. Townsend's knowledge of his claim and inactivity in procuring relief, United Bank was within its right to resist Mr. Townsend's untimely request on statute of limitations grounds. Such action does not warrant a finding of civil contempt. Further, the Contempt Order fails to address or acknowledge the Dismissal Order and subsequent Breach of CD Litigation and their impact, if any, on a finding of contempt. Syl. pt. 1, *Watson*, 222 W. Va. 233, 664 S.E.2d 118 (2008). [R. at 241-42, 257-58.] These failures requires this Court to reverse and remand the Contempt Order.

### VIII. CONCLUSION

This Court possesses ample authority to reverse and vacate the Contempt Order. First, the August 13, 2014 Dismissal Order precluded Mr. Townsend from seeking civil contempt relief. The Dismissal Order acted as a decision on the merits and both the Breach of CD Litigation and the Petition for Contempt involved United Bank and Mr. Townsend. Finally, both the Breach of CD Litigation and Petition for Contempt requested monetary relief on substantially similar factual predicates; namely, United Bank's alleged violation of the December 30, 1999 Order. For these reasons, the doctrines of preclusion applied and prohibited Mr. Townsend from seeking civil contempt relief.

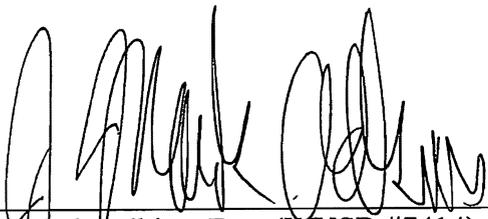
Further, the Circuit Court committed *de novo* error in failing to apply the statute of limitations to the Petition for Contempt. Mr. Townsend pursued his Petition for Contempt five-and-a-half (5.5) years after Mr. Townsend turned eighteen (18) and knew of potential claims against United Bank. Moreover, Mr. Townsend elected to proceed on his Complaint, rather than on a Petition for Contempt. This Court should not allow Mr. Townsend to purposefully stalled

filing a contempt action as he determines the relief available through an alternative civil action. For these reasons, this Court should reverse and vacate the Contempt Order.

Finally, the Circuit Court clearly erred in finding United Bank acted with the requisite intent to commit civil contempt. After all, United Bank, on August 10, 2010, filed its Motion to Interplead, which the Circuit Court denied. The Circuit Court should not be able to find civil contempt given this action. Moreover, the Contempt Order contains no findings of fact or conclusions of law concerning these actions and their impact, if any, on a charge of contempt. These failures allow this Court, in the event it finds that preclusion and statute of limitations fail to apply, to reverse and remand the Contempt Order.

UNITED BANK, INC.,

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-1261

(Kanawha County Circuit Court, Civil Action No. 99-MISC-431)

UNITED BANK, INC., Respondent Below,

Petitioner,

v.

RONALD RAY TOWNSEND, Respondent Below,

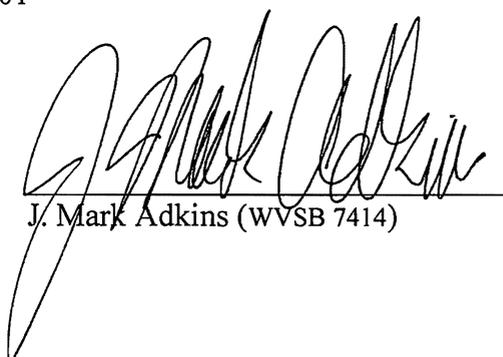
Respondent.

**CERTIFICATE OF SERVICE**

I, J. Mark Adkins, do hereby certify that I have caused copies of the hereto attached *United Bank, Inc.'s Petition for Appeal* to be served upon the following:

Troy N. Giatras, Esquire  
Matthew Stonestreet, Esquire  
The Giatras Law Firm, PLLC  
118 Capitol Street, Suite 400  
Charleston, West Virginia 25301  
Counsel for Respondent

by hand-delivery on this **16th day of March 2015.**

  
\_\_\_\_\_  
J. Mark Adkins (WVSB 7414)