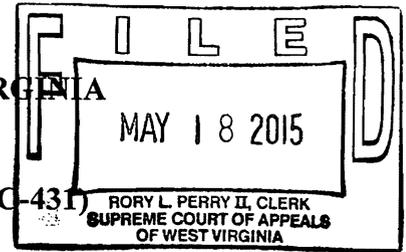


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 14-1261

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



UNITED BANK, INC., Respondent Below,

Petitioner,

v.

RONALD RAY TOWNSEND, Respondent Below,

Respondent.

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UNITED BANK, INC.'S REPLY BRIEF

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**Treatises**

Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., LITIGATION  
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### III. STATEMENT OF THE CASE

In his Response Brief, Respondent, Ronald Ray Townsend (“Mr. Townsend”), ignores critical, and uncontested events in this matter. Petitioner, United Bank, Inc. (“United Bank”) outlines below the procedural and factual events, which are necessary for this Court to resolve the issues on appeal:

- From June 22, 2005 through August 2, 2005, Mr. Townsend’s mother, Karen Townsend Taylor, made withdrawals from the Certificate of Deposit (“CD”) for the alleged purpose of purchasing Mr. Townsend “school clothes and things[,]” and Karen Townsend claims she gave Mr. Townsend the remaining money. [R. at 56.]
- On March 24, 2009, Mr. Townsend turned eighteen (18). [R. at 165, ¶ 13.]
- On or before July 14, 2009, Mr. Townsend retained Troy Giatras (“Attorney Giatras”) and the Giatras Law Firm, PLLC to investigate a potential claim against United Bank related to his CD. [R. at 61-62.]
- Mr. Townsend, through Attorney Giatras, received notice of Motion to Intervene on Behalf of United Bank, Inc. (“Motion to Interplead”). [R. at 32.] In the Motion to Interplead, United Bank requested that the Circuit Court, in Civil Action No. 99-MISC-431, allow United Bank the opportunity to deposit, with the Circuit Court, the principal and interest of the CD, as well as pursue Karen Townsend for reimbursement for her withdrawals. [R. at 6-32.]
- Also, Mr. Townsend, through Attorney Giatras, received notice of the October 15, 2010 hearing on the Motion to Interplead, and Attorney Giatras attended this hearing. [R. at 33-34.]

- Notwithstanding the above events, on November 5, 2013, Attorney Giatras, on behalf of Mr. Townsend, filed a five (5)-count Complaint against United Bank in a new action, Civil Action No. 13-C-2066. [R. at 64-72.]

- On March 24, 2014, United Bank moved to dismiss Mr. Townsend's Complaint, primarily on the grounds that the statutes of limitations expired as to all of Mr. Townsend's claims. [R. at 73-98.]

- On August 13, 2014, the Circuit Court granted United Bank's Motion to Dismiss ("Dismissal Order"). [R. at 164-78.]

- After the Circuit Court granted United Bank's Motion to Dismiss, Attorney Giatras, on behalf of Mr. Townsend, moved for reconsideration under Rule 60(b) [R. at 179-87], noticed an appeal to this Court [R. 198-203] and petitioned to hold United Bank in contempt. [R. at 35-43]

Mr. Townsend's Statement of the Case and Response Brief ignores these critical, undisputed and dispositive facts. As explained below, Mr. Townsend's repeated failure to acknowledge these facts defeats his arguments to uphold the November 13, 2014 Order ("Contempt Order"), which found that United Bank committed contempt.

#### **IV. ARGUMENT**

##### **A. The statute of limitations barred Mr. Townsend's Petition for Contempt.**

In his Response Brief, Mr. Townsend argues that no statute of limitations applies to contempt petitions. [Resp. Br. at pp. 11-12.] Mr. Townsend reaches this conclusion by noting that no express statute controls. Furthermore, Mr. Townsend asserts that if this Court applied statutes of limitations to contempt petitions, anarchy would ensue, and the courts would lack the means to address any non-compliance of their orders. Both arguments lack merit.

The West Virginia Code contains a statute of limitations for civil contempt. West Virginia Code § 55-2-12 provides, in pertinent part, 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 (emphasis added).

Personal actions have been defined at common law as including “all actions whether local or transitory that do not seek the specific recovery of lands, tenements, or hereditaments.” Personal actions are those actions “brought for the recovery of personal property, for the enforcement of a contract or to recover for its breach of damages for an injury to the person or property.”

*State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W. Va. 221, 232 n.14, 488 S.E.2d 901, 913 n.14 (1997) (internal citations omitted). Likewise, Black’s Law Dictionary defines “personal action” as “[a]n action brought for the recovery of debts, personal property, or damages arising from any cause.” BLACK’S LAW DICTIONARY, Personal Action (10th ed. 2014). Consequently, while the Legislature never prescribed a specific statute of limitations for a civil contempt petition, West Virginia Code § 55-2-12 sets forth the statutory period.

Furthermore, the Contempt Order awarded Mr. Townsend the compensatory benefit of the amount of the CD. [R. at 258.] In other words, the Court awarded Mr. Townsend property damage based on United Bank’s alleged contempt. In *Floyd v. Watson*, this Court noted that civil contempt does “not seek to punish the defendant, but rather **to benefit the complainant**[.]” and a compensatory benefit occurs when the complainant, in this instance Mr. Townsend, receives a pecuniary benefit from the contempt sanction. 163 W. Va. 65, 70-71, 254 S.E.2d 687, 691 (1979) quoting Comment, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 123-24 (1965) (emphasis added). Given the compensatory benefit / property damage awarded in the Contempt Order and the plain meaning of the phrase “personal action” in

West Virginia Code § 55-2-12, no justification exists not to apply the statute of limitations and bar Mr. Townsend's untimely Petition for Contempt.

Notwithstanding, Mr. Townsend argues, without any legal citation, that:

[i]f United Bank had its way, entities or individuals that violated court Orders involving parenting plans, alimony payments, property distributions, settlement structures, certificate of deposits stemming from infant summary proceedings, and many more examples, would have a free pass after two years. That result would be both unfair and untenable.

[Resp. BR. at p. 11.]<sup>1</sup> No unfairness occurs if this Court imposes the two (2)-year statute of limitations and bars the Petition for Contempt. As evidenced in the Record, Mr. Townsend knew of a potential cause of action for contempt almost five (5) years before filing the Petition for Contempt. On or before July 14, 2009, and after Mr. Townsend turned eighteen (18), Mr. Townsend retained Attorney Giatras to investigate Mr. Townsend's claims against United Bank. [R. at 61-62, 165, ¶ 13.] Moreover, Attorney Giatras represented Mr. Townsend at the October 15, 2010 Motion to Interplead. [R. at 33-34.] Nonetheless, Mr. Townsend and Attorney Giatras deliberately delayed seeking relief against United Bank until November 5, 2013. [R. at 63.] Further, when Mr. Townsend finally sought relief, Mr. Townsend elected an independent civil action rather than to proceed on a petition for contempt in Civil Action No. 99-MISC-431. [Compare R. at pp. 64-72 with R. at pp. 35-43.] Again, **nothing** prevented Mr. Townsend or Attorney Giatras from timely pursuing relief from United Bank. For this reason, this Court should reverse and vacate the Contempt Order following application of the two (2)-year statute of limitations.

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<sup>1</sup> As noted in United Bank's Petition, this Court has, on prior occasions, allowed a statute of limitations defense in a contempt proceeding for failure to pay child support. Syl. pt. 3, *Cottrill v. Cottrill*, 219 W. Va. 51, 631 S.E.2d 609 (2006); [Pet. at p. 12.]

Lastly, applying statutes of limitations to contempt proceedings benefits the claimants and the courts. Statutes of limitations exist to encourage promptness of actions and avoid staleness of evidences. *See Davey v. Estate of Haggerty*, 219 W. Va. 453, 458, 697 S.E.2d 350, 355 (2006) *citing Morgan v. Grace Hosp., Inc.*, 149 W. Va. 783, 791, 144 S.E.2d 156, 161 (1965). Again, as of July 14, 2009, Mr. Townsend and his counsel knew of a potential cause of action for contempt and, yet, elected not to act on the Petition for Contempt for more than five (5) years. [R. at 62.] Therefore, no unfairness occurs if this Court bars Mr. Townsend's Petition for Contempt pursuant to the two (2)-year statute of limitations and reverses and vacates the Contempt Order.

**B. Mr. Townsend and Attorney Giatras elected to pursue relief in Civil Action No. 13-C-2066, and this election barred consideration of the Petition for Contempt.**

In his Response Brief, Mr. Townsend argues that no preclusion applies to the Petition for Contempt. In asserting this argument, Mr. Townsend continues to ignore a critical fact: that “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.” [Pet. at p. 11 (emphasis added).] Ultimately, Mr. Townsend's election to proceed on his Complaint rather than on the Petition for Contempt precludes entry of the Contempt Order.

West Virginia law acknowledges that “[t]he ‘election of remedies’ doctrine is applicable only when there are two or more inconsistent remedies available to a litigant at time of election, and such litigant has knowledge of facts giving rise to a duty to elect.” Syl. pt. 4, *Harrison v. Miller*, 124 W. Va. 550, 21 S.E.2d 674 (1942); *see also* syl. pt. 1, *Cameron v. Cameron*, 111 W. Va. 375, 162 S.E. 173 (1931) (“Party to suit, under rule requiring election of remedies, is not estopped to maintain second suit, unless remedy is substantially same.”). The

Record undisputably shows that Mr. Townsend and his counsel elected to initially proceed on a Complaint in Civil Action No. 13-C-2066, rather than on the Petition for Contempt in Civil Action No. 99-MISC-431. [*Compare* R. at 64-72 with R. at 35-43.] At the time Mr. Townsend made this election, Mr. Townsend thought, and indeed alleged, that United Bank violated the December 30, 1999 Order. [R. at 66, ¶ 14 (“On at least twelve separate occasions, the Defendant United Bank distributed funds **in clear violation of the Court’s Order.**” (emphasis added).] Under the doctrine of election, Mr. Townsend’s election to proceed on the Complaint prohibited Mr. Townsend from subsequently proceeding on the Petition for Contempt.

Indeed, in *FMC Corporation v. West Virginia Human Rights Commission*, this Court addressed an analogous situation. 184 W. Va. 712, 403 S.E.2d 729 (1991). Plaintiff, Teresa Frymier (“Plaintiff Frymier”), pursued, and won, a sexual discrimination grievance against her employer, FMC Corporation (“Defendant FMC”), at the Human Rights Commission. *Id.* at 715, 403 S.E.2d at 732. On appeal to the Circuit Court, Plaintiff Frymier moved to amend her sexual discrimination petition to state a cause of action for damages. *Id.* at 716-17, 403 S.E.2d at 733-34. The Circuit Court denied this amendment and, on appeal, the Supreme Court of Appeals affirmed:

The general rule is that one must exhaust her administrative remedies before going into a court of law or equity to enforce a right created by statute. However, . . . we have allowed claimants under the Human Rights Act to proceed in circuit court as an alternative to initiating an administrative action. . . . **Thus, Ms. Frymier could have elected to file a civil action in circuit court, but chose instead to avail herself of the services of the Human Rights Commission. . . . Ms. Frymier chose one avenue of redress; she cannot now pursue the other.**

*Id.* at 717, 403 S.E.2d 734 (emphasis added). The same analysis in *FMC Corporation* applies in this instance. Mr. Townsend and Attorney Giatras elected to proceed on a five (5)-count

Complaint in Civil Action No. 13-C-2066, rather than pursue a contempt action in Civil Action No. 99-MISC-431. Only after the Circuit Court entered a Dismissal Order barring Mr. Townsend's Complaint, did Mr. Townsend and Attorney Giatras petition to hold United Bank in civil contempt. [*Compare* R. at 164-78 *with* R. at 36-43.] Therefore, pursuant to the doctrine of election, this Court should reverse and vacate the Contempt Order.

**C. The preclusion doctrines barred the Petition for Contempt.**

Additionally, the doctrines of claim and issue preclusion barred the Petition for contempt. As stated by this Court in *In re B.C.*, claim preclusion applies when “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 part, 233 W. Va. 130, 755 S.E.2d 664 (2014) (emphasis added). Mr. Townsend vehemently argues the differences between his Complaint, in particular, his West Virginia Consumer Credit Protection Act claim, and the remedy of contempt in an effort to show they involve unidentical issues. [Resp. Br. at p. 9.] However, Mr. Townsend ignores the subsequent language in *In re B.C.*, namely, that the issue “must be such that it could have been resolved, had it been presented, in the prior action.” Syl. pt. 1, in part, 233 W. Va. 130, 755 S.E.2d 664. Mr. Townsend's Complaint identified violations of the Court's December 30, 1999 Order as a factual issue and, therefore, the issue was “such that it could have been resolved, had it been presented, in the prior action.” [R. at 66, ¶¶ 14-15.] Consequently, this fact supports application of the claim preclusion doctrine.

Besides the issue of “identicalness,” Mr. Townsend asserts that no preclusion applies, because his Motion for Reconsideration suspended the finality of judgment. [Resp. Br. at p. 10.] First, in Mr. Townsend's Notice of Appeal of Civil Action No. 13-C-2066,

Mr. Townsend’s counsel acknowledged that the Dismissal Order constituted a final order. [R. at 199, § 9.] Second, Mr. Townsend’s counsel never filed a Rule 59 motion. Rule 59(b) of the West Virginia Rules of Civil Procedure requires that “[a]ny motion for a new trial . . . be filed not later than 10 days after the entry of judgment. W. VA. R. CIV. P. 59(b). The Circuit Court entered the Dismissal Order on August 13, 2014. [R. at 164, 178.] To file a Rule 59 motion, Mr. Townsend needed to pursue relief on or before August 27, 2014. W. VA. R. CIV. P. 6(a). Yet, Mr. Townsend filed his Motion for Reconsideration of Dismissal on the Pleadings on August 29, 2014, two (2) days after the deadline set forth in Rule 59(b). [R. at 186.]

When a party filing a motion for reconsideration does not indicate under which West Virginia Rule of Civil Procedure it is filing the motion, the motion will be considered to be either a Rule 59 motion to alter or amend a judgment or a Rule 60(b) motion for relief from a judgment order. If the motion is filed within ten days of the circuit court’s entry of judgment, the motion is treated as a motion to alter or amend under Rule 59(d). **If the motion is filed outside the ten-day limit, it can only be assessed under Rule 60(b).**

Syl. pt. 2, *Powderidge Unit Owners Ass’n v. Highland Props., Ltd.*, 196 W. Va. 692, 474 S.E.2d 872 (1996) (emphasis added). Unlike a Rule 59 motion, a Rule 60 motion does not toll the time period to seek appellate relief. *See Moten v. Stump*, 220 W. Va. 652, 656, 648 S.E.2d 639, 643 (2007); *see also* Franklin D. Cleckley, Robin Jean Davis & Louis J. Palmer, Jr., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, § 60(b) 1301 (4th ed. 2012) (“A motion made pursuant to Rule 60(b) does not toll the running of the appeal time. Rule 60(b) provides a remedy which exists concurrently with and independently of the remedy of appeal, therefore the failure to apply for such relief in the trial court does not affect the appealability of a

final judgment.”). Thus, Mr. Townsend’s Motion for Reconsideration does not impact the finality prong of either preclusion doctrine, and the Contempt Order should be vacated.<sup>2</sup>

**D. Absolutely no evidence exists to show United Bank intentionally disobeyed or resisted an Order of the Court.**

West Virginia Code § 61-5-26 states that: “[t]he courts and the judges thereof may issue attachment for contempt and punish them summarily on in the following cases: . . . (d) disobedience to or resistance of any officer of the court, juror, witness or other person, to any lawful process, judgment, decree or order of the said court.” W. VA. CODE § 61-5-26. The undisputed Record shows that on August 10, 2010, United Bank moved to interplead the funds of Mr. Townsend’s CD with the Circuit Court in Civil Action No. 99-MISC-431. [R. at 6-32.] Mr. Townsend, through his counsel, Attorney Giatras, received notice of this hearing and Mr. Townsend’s counsel attended. [R. at 33-34.] Ultimately, the Circuit Court denied United Bank’s Motion to Interplead. [R. at 241-42.]

More than three (3) years later, Mr. Townsend filed a five (5)-count Complaint in Civil Action No. 13-C-2066, rather than pursuing any contempt petition in Civil Action No. 99-MISC-431. [*Compare* R. at 64-72 *with* R. at 36-43.] In response, United Bank moved to dismiss, in part, based on the expiration of the statutes of limitations to **all** of Mr. Townsend’s claims. [R. at 104-18.] After review of the briefing and oral argument, on August 13, 2014, the Circuit Court granted United Bank’s Motion to Dismiss and dismissed, with prejudice, all of Mr. Townsend’s claims. [R. at 164-78.] After this dismissal, for the first time on September 10,

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<sup>2</sup> Additionally, Mr. Townsend contends that no final decision on the merits occurred, because Mr. Townsend never conducted discovery prior to entry of the Dismissal Order. This Court recognizes that a dismissal order with prejudice constitutes a decision on the merits. *See Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 746, 310 S.E.2d 675, 678 (1983).

2014, Mr. Townsend and Attorney Giatras moved to find United Bank in contempt in Civil Action No. 99-MISC-431. [R. at 35.]

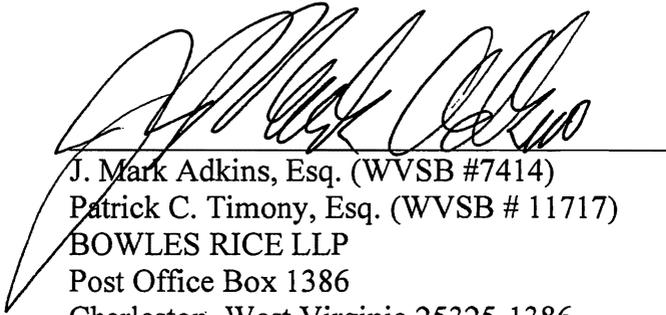
Therefore, at the time Mr. Townsend requested to hold United Bank in contempt, the Circuit Court, in Civil Action No. 13-C-2066, already dismissed, with prejudice, all of Mr. Townsend's claims related to the CD and December 30, 1999 Order. The entry of the August 13, 2014 Dismissal Order evidences that no disobedience or resistance to the Court's authority occurred because the Circuit Court found United Bank was not obligated to pay Mr. Townsend damages related to the CD. For this reason, the Circuit Court erred in finding United Bank in civil contempt.

#### **V. CONCLUSION**

As stated in United Bank's Petition and throughout this Reply Brief, this Court should reverse and vacate the Contempt Order. First, West Virginia Code § 55-2-12 barred the Petition for Contempt because Mr. Townsend and his counsel failed to timely pursue relief against United Bank. Second, Mr. Townsend elected to pursue remedies in Civil Action No. 13-C-2066, and this election barred Mr. Townsend from petitioning for contempt in Civil Action No. 99-MISC-431. Third, the Circuit Court's prior Dismissal Order in Civil Action No. 13-C-2006 precluded the Contempt Order in Civil Action No. 99-MISC- 431. Lastly, United Bank never disobeyed or resisted the Court's orders. Any of these reasons independently accord United Bank relief. Therefore, for these reasons, this Court should reverse and vacate the November 14, 2014 Contempt Order.

UNITED BANK, INC.,

By Counsel,

A large, stylized handwritten signature in black ink, appearing to read 'J. Mark Adkins', is written over a horizontal line.

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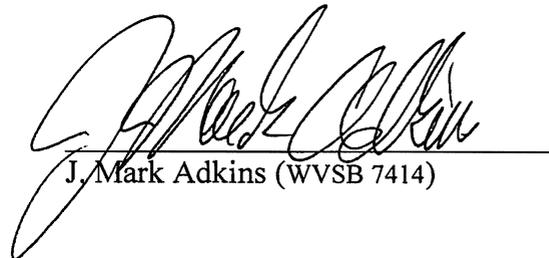
Respondent.

**CERTIFICATE OF SERVICE**

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

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by hand-delivery on this **18th day of May 2015**.

  
J. Mark Adkins (WVSB 7414)