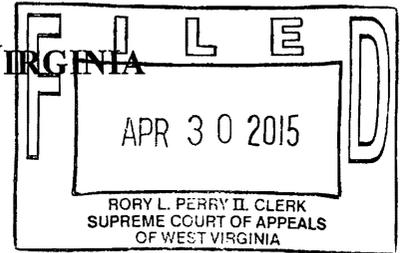


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1261



**UNITED BANK, INC.,
RESPONDENT BELOW,**

Appeal from an Order of the Circuit
Court of Kanawha County,
Civil Action No. 99-MISC-431

PETITIONER,

v.

**RONALD RAY TOWNSEND,
PETITIONER BELOW,**

RESPONDENT.

**Brief on Behalf of the
Respondent**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
A. United Bank Violated a Court Order Twelve Times and Effectively Depleted the Respondent's Entire Infant Settlement Proceeds.....	5
B. United Bank's Argument that Claim Preclusion Permits Disobedience of a Court Order Should Be Rejected.....	8
C. The Circuit Court did not Err in Determining that the Impact and Dominion of a Court Order Does Not Extinguish After Two Years.....	11
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	14

TABLE OF AUTHORITIES

CASES	<u>Page</u>
<i>In re B.C.</i> , 233 W.Va. 130, 755 S.E.2d 664 (2014).....	8,9
<i>James M.B. v. Carolyn M.</i> , 193 W.Va. 289, 294, 456 S.E.2d 16, 21 (1995).....	10
<i>State ex rel. Robinson v. Michael</i> , 276 S.E.2d 812 (W.Va. 1981).....	6,7,11
<i>Syllabus Pt. 2, State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995).....	9,10
<i>Syllabus Pt. 1, Watson v. Sunset Addition Prop. Owners Ass'n, Inc.</i> , 222 W.Va. 233, 664 S.E.2d 118 (2008).....	5,8

STATUTORY AUTHORITIES

Rev. R.A.P.18.....	2
W.Va. Code § 55-2-12.....	12

OTHER AUTHORITIES

LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, § 8(c) 213-14 (4th ed. 2012).....	10
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I. STATEMENT OF THE CASE

This appeal presents a straightforward case of contempt. In fact, Petitioner United Bank cannot deny that it disobeyed a circuit court order by repeatedly giving away a child's settlement funds. App. 3.¹ Even in United Bank's response to the contempt petition in the lower court, the Bank admits that "...these withdrawals depleted the entire balance of the CD, and this action led United to close the CD shortly after." App. 45. That United Bank gave away all of the Respondent's monies is simply not disputed. *Id.*

When Ronald Ray Townsend was a minor, a Kanawha County circuit court issued an order establishing a certificate of deposit² in his name as the result of an in infant summary proceeding. App. 1. As is customary, the court's order required that the child's funds be held in this CD until he reached the age of eighteen (18). App. 3. Importantly, this court order expressly prohibited the distribution of either principal or interest from the financial instrument without obtaining prior court approval. *Id.* United Bank was provided a copy of the circuit court's order and has never denied that the order required United Bank to safely secure the funds of Respondent Ronald Townsend and prohibited the distribution of the CD's proceeds without court approval.

Aside from the circuit court's clear instructions prohibiting distribution of the Respondent's settlement funds, the CD established at United Bank specifically stated, "[a]utomatically renew until the child is 18 and interest must go back to CD per court order." App. 43. Despite these facts, which are all undisputed, United Bank gave

¹ All references to the Petitioner's Appendix shall be set forth as "App. ___."

² Hereafter "CD."

away a child's money on at least twelve separate occasions³ and in clear violation of the circuit court order.

Even more troubling, United Bank concealed how it gave the Petitioner's money away and, in the end, all of the funds set aside by the circuit court order for Ronald Townsend were released by United Bank. The circuit court and the Respondent entrusted United Bank to safely secure infant settlement proceeds. App. 3, 43. Instead of properly holding and protecting those funds, United Bank depleted the Respondent's entire CD. App 45. This is the reason why the circuit court, on November 13, 2014, found United Bank in contempt of its original court order establishing the Respondent's CD. App. 257. Now, in a continued and persistent effort to escape responsibility for its clear wrongdoing, United Bank is requesting that this Court reverse the judgment of the circuit court finding United Bank in contempt. Apparently, United Bank is not only comfortable with illegally giving away the money of a child, but also comfortable permanently depriving that child of his money.

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent agrees with Petitioner that oral argument is unnecessary because "the facts and legal arguments are adequately presented" in the appellate briefing pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure.

³ United Bank's *Petition for Appeal* specifically lists and admits to disobedience with the circuit court order by charting out each of the transactions depleting the Respondent's CD in a chart on page two of its appellate brief.

III. SUMMARY OF ARGUMENT

Giving away a child's money in violation of a court order is extremely difficult conduct to defend. This is the reason United Bank is inventing a statute of limitations out of thin air and attempting to apply the doctrine of claim preclusion in this case. With the distractions of inapplicable legal arguments, United Bank is hoping to steer attention away from the undeniable fact that it committed contempt of a court order by repeatedly giving away a minor's settlement funds and refusing to return that child's money.

For this appeal, it should be acknowledged from the outset that United Bank admits it released the entirety of Respondent Ronald Townsend's monies, which were set aside and protected by a circuit court's final order controlling those funds. United Bank's argument that claim preclusion permits disobedience of a court order should be rejected. First, United Bank fails to satisfy the factors required to achieve preclusive effect because the prior action it invokes is not identical to the contempt proceeding involved in this appeal, the prior action did not reach its final merits, and, the prior action was never fully litigated. More importantly, *nothing should insulate an individual or a corporation from strict obedience to a court's order*. A court must always maintain authority to restore dignity and compliance with its orders.

United Bank's request to place a time limit on how long circuit court orders must be obeyed should also be rejected. If this argument is accepted, when individuals violated court orders a court would be rendered powerless in punishing noncompliance with parenting plans, alimony payments, property distributions, settlement structures,

certificate of deposits stemming from infant summary proceedings, sentencing orders, and many more examples. That result would be both unfair and untenable. Court's must maintain the impact and effect of their orders to ensure faithful compliance to the same. Certainly a court order's dominion should not expire at the benefit of a contemnor.

Put simply, when a court order provides clear instruction and those orders are violated, a court must maintain dominion to enforce compliance. United Bank violated a court order prohibiting the distribution of a child's infant settlement funds until he reached the age of eighteen. United Bank admits this conduct. The only thing that United Bank needed to do to avoid being found in contempt was to return the Respondent's money. Instead of giving the Respondent his modest funds and bringing its conduct into compliance with the circuit court's original order, United Bank chose to tortuously litigate this case and permanently deprive the Respondent of his CD.

Consequently, United Bank was found in contempt. Then, after being found in contempt, United Bank had another opportunity to bring itself into compliance with the circuit court's order. Unfortunately, United Bank again refused to return the Respondent's money and chose instead to appeal the contempt ruling making the very same arguments that the circuit court rejected. The time has come for United Bank, once and for all, to return Respondent Townsend's infant settlement proceeds. The Appeal should be denied.

IV. ARGUMENT

A. **United Bank Violated a Court Order Twelve Times and Effectively Depleted the Respondent's Entire Infant Settlement Proceeds**

The circuit court properly found United Bank in contempt of its original order and United Bank failed to articulate anything close to clear error⁴ in the circuit court's finding. Unlike many contempt cases, where a party could actually dispute that it violated a court's order, United Bank admitted that it repeatedly gave away the Respondent's money contrary to the clear order of the circuit court.

In this case, the circuit court's final order established a certificate of deposit for Ronald Ray Townsend prohibiting the release of any funds, principal or interest, until the infant reached the age of eighteen. App. 3. The second paragraph on page three (3) of the final order clearly states:

The Legal Guardian is hereby ORDERED and authorized to 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 the 18 years of age. The principal and interests shall not be spent without court approval.**

Id. The circuit court's order was even memorialized on the face of the CD where special instructions state, "[a]utomatically renew until the child is 18 and interest must go back to CD per court order." App. 43. Despite the clear instructions of both the final order and the CD, on at least 12 different occasions, United Bank violated the circuit court's

⁴ Syl. pt. 1, *Watson v. Sunset Addition Prop. Owners Ass'n, Inc.*, 222 W. Va. 233, 664 S.E.2d 118 (2008).

instructions by distributing the infant's funds and entirely depleting the CD before the Respondent reached the age of eighteen.

Even worse, United Bank never informed Ronald Townsend of the withdrawals and unilaterally acted in closing the CD after giving away all of the infant's entrusted funds. App. 45. United Bank admits that it released the entirety of Ronald Townsend's monies, which were set aside and protected by the circuit court's order. This is why the circuit court determined that United Bank "...did not comply with that order, even indicating they knew of the order and the terms of the order, and I'm going to find that they were, in fact, in contempt of that order." App. 254.

In all, United Bank does not deny that it had the court's original order, United Bank admits it wrote the instructions of the circuit court on the CD itself, and then, United Bank released the Respondent's funds twelve times in *direct violation* of that order. App. 3, 43. Claiming that the circuit court committed clear error by finding United Bank in contempt is ludicrous.

The West Virginia Supreme Court of Appeals made its strongest pronouncement regarding contempt, and the appropriate sanctions for each type of contempt, in the seminal case of *State ex rel. Robinson v. Michael*, 276 S.E. 2d 812 (W.Va.1981). The Court in *Robinson v. Michael* noted that the purpose to be served by imposing a sanction for contempt is to punish the contemnor for an affront to the dignity or authority of the court and also to restore order and respect for the court. *Robinson v. Michael*, Syl. note 3, Id. at 813. The WVSCA specifically held that the contempt is civil:

Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner so as to benefit the party bringing a contempt action by enforcing, protecting, or assuring the right of that party under the order.

Here, the purpose served by the circuit court's finding of contempt was to compel compliance with this the court's original and unchanging order prohibiting the depletion of a child's funds. Finding United Bank in contempt was obviously necessary in "...enforcing, protecting, or assuring the right of that party (Ronald Townsend) under the order." *Robinson v. Michael*, Syl. note 3, *Id.* at 813.

United Bank comes before this Court in contempt and cannot dispute that it was bound by the circuit court's order to safely secure the Respondent's funds. The fact that United Bank itself specifically typed instructions on the face of the CD to "[a]utomatically renew until the child is 18 and interest must go back to CD per court order" is further evidence that United Bank had knowledge of the circuit court's order but disobeyed this explicit instruction. App. 43.

UNITED NATIONAL BANK NON-NEGOTIABLE/NON-TRANSFERABLE

Issue Date 12-30-99 Maturity Date 10-30-2001 On 12-30-99 22 mo

Payable To: Karen Townsend, Legal Guardian of Ronald Ray Townsend

Address 1429 5th Ave Char WV 25312 Telephone 776-5628 (mom's) Dollars \$ 6,632.87

Deposit

This certificate is SINGLE MATURITY and not automatically renewable. Present it PROMPTLY at maturity or no interest is payable after the maturity date.

This certificate matures on the date shown, but will AUTOMATICALLY RENEW if, on the maturity date, the amount of the deposit is equal to the original term, unless and only if the following conditions occur: 1) This certificate is presented to the bank on the maturity date or within ten days thereafter; 2) This institution receives written notice from the depositor before the maturity date or within ten days thereafter, in writing, of the intention not to renew the certificate. If the certificate automatically renews, IT WILL BE RENEWED AT THE RATE IN EFFECT AT THIS INSTITUTION ON THE MATURITY DATE or the maturity date of any subsequent renewal in the event this certificate does not renew, no interest is payable after the first maturity date.

See additional terms on reverse side and the attached disclosure.

Automatically renew until child is 18 and interest must go back to CD per court order.

Taxpayer ID # 233-39-2721 Under penalties of perjury I certify by signing below (1) that the number shown on this form is my correct taxpayer identification number and (2) that I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding for a failure to report all interest or dividends or the Internal Revenue has notified me that I am no longer subject to backup withholding. If #2 does not apply, please line through).

Signature Karen Townsend, Legal Guardian M. Parsons ALL CAPS AND SURNAME

If United Bank truly wanted to avoid being found in contempt, it simply could have brought a certified check in the amount of the original CD and interest to the hearing on October 1st, 2014. Instead, United Bank refused to follow the clear order of the court, refused to return Ronald Townsend's money, and appealed the contempt order seeking to forever deprive the Respondent of his infant settlement proceeds. The circuit court did not commit clear error in finding United Bank in contempt. App. 257. To the contrary, the circuit court properly enforced and restored dignity to its original order which prohibited the depletion of the Respondent's funds.

B. United Bank's Argument that Claim Preclusion Permits Disobedience of a Court Order Should be Rejected

The circuit court correctly determined that preclusive effect did not immunize United Bank's contempt. When the circuit court found United Bank in violation of the court's order for repeatedly giving away the funds of the Respondent, it did not commit *de novo*⁵ legal error. Despite United Bank's contentions, neither claim nor issue preclusion apply in this case.

Claim preclusion requires a final adjudication on the merits, the same parties must be in each action, and, crucially, claim preclusion requires that the cause of action identified in the subsequent proceeding is *identical* to the cause of action presented in the prior action. Syl. pt. 1, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014). Similarly, for issue preclusion to take effect, four factors must be satisfied:

⁵ Syl. pt. 1, *Watson v. Sunset Addition Prop. Owners Ass'n, Inc.* 222 W. Va. 233, 664 S.E.2d 118 (2008).

- 1) The issue previously decided is identical to the one presented in the action in question;
- 2) There is 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. 2, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In this case, nearly none of the factors required for issue or claim preclusion have been satisfied.

The Respondent's civil action alleging violations of the West Virginia Consumer Credit and Protection Act, breach of contract, negligence, and aiding and abetting, is completely distinct from the Respondent's request to find United Bank in contempt. Thus, from the outset it must be acknowledged that the issues in each action are not "identical" as required to achieve preclusive impact. Syl. pt. 2, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995); Syl. pt. 1, *In re B.C.*, 233 W. Va. 130, 755 S.E.2d 664 (2014). More specifically, the questions of whether or not United Bank violated the West Virginia Consumer Credit and Protection Act, whether or not Ronald Townsend is a consumer as defined by the Act, whether or not United Bank committed breach of contract, and whether or not the Uniform Commercial Code abrogates Respondent Ronald Townsend's common law claims, are obviously not identical to the nature of the contempt proceeding, which simply addressed whether United Bank's conduct violated a circuit court order.

United Bank falls short not only in regard to the identical issue requirement, but also because the Respondent's prior action did not reach a final adjudication on the merits. The prior action invoked by United Bank is presently the subject of a motion to reconsider. App. 179. As this Court has noted, "in West Virginia, a 'motion for reconsideration' filed within ten days of judgment being entered **suspends the finality of the judgment.**" *James M.B. v. Carolyn M.*, 193 W. Va. 289, 294, 456 S.E.2d 16, 21 (1995)(emphasis supplied). Thus, United Bank cannot genuinely represent to the Court that it achieved a final adjudication "on the merits" as is required by factor number two in *State v. Miller*, 194 W. Va. 3 (1995); *See also* Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr. *Litigation Handbook on West Virginia Rules of Civil Procedure*, 8(c) 213-14 (4th ed. 2012) (Stating that "...it is sufficient that the status of the action was such that the parties might have had the matter disposed of on its merits").

In the prior action, not a single interrogatory, request for production of documents, request for admission, or deposition ever took place in what United Bank refers to as a final decision on the merits. Without a doubt, the Respondent was never afforded a full and fair opportunity to litigate his case. To suggest that a single hearing constitutes a full and fair opportunity as described in *State v. Miller* stretches the doctrine of claim preclusion into virtually every single proceeding and is contrary to the strict tests designed to limit claim preclusion.

More importantly, **nothing should insulate a party from obedience to a court's order.** If a court order provides instruction for securing infant settlement proceeds, the

court order must be followed. United Bank is requesting that this Court immunize its contempt with the doctrine of claim preclusion but ignores that the issues are not identical and that the prior case was not fully litigated. In the end, it is clear that the circuit did not commit error in rejecting United Bank's claim preclusion arguments.

C. The Circuit Court did not Err in Determining that the Impact and Dominion of a Court Order Does Not Extinguish After Two Years

Even though United Bank admits that “West Virginia’s statutory paradigm contains no specific statutory period for contempt,”⁶ and that “it is unclear what statute of limitations applies to charges of civil contempt”⁷ the Bank requests that this Court impose a time limit for how long parties must obey a court order. However, as long as a party’s conduct violates a court order, a contempt petition may be initiated to bring that party’s conduct into compliance with the instruction of the court. *State ex rel. Robinson v. Michael*, 276 S.E. 2d 812 (W.Va.1981). The notion that noncompliance with a court order is acceptable after two years is bizarre and would disintegrate both the civil and criminal justice systems.

If 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. The truth is, anytime that a court order is clearly violated, as it was

⁶ App. 51.

⁷ See *Petitioner’s Appeal*, Page 12, Line 18.

repeatedly in this case, an individual may seek relief to bring the contemnor's conduct into compliance with the instructions and rulings of the court.

Finally, an examination of the suggested statute of limitations found in W. Va. Code § 55-2-12 reveals that even if this statute applied, the contempt petition was timely filed because United Bank continued to thwart the will of the circuit court by refusing to provide Respondent Townsend with the funds established by the circuit court's order. App. 3.

United Bank's argument fails because the impact and effect of a court order does not expire at the benefit of a contemnor. When an individual or entity repeatedly violates a court order, as is the case here, a Judge must exercise dominion and control to ensure faithful compliance with the instructions of the court in order to preserve the sanctity and power of the tribunal.

V. CONCLUSION

Based on the foregoing recitations of fact and arguments of law, the Respondent respectfully requests that this Honorable Court affirm the order finding United Bank in contempt dated November 14, 2014. United Bank violated the circuit court's order twelve times, was properly found in contempt, and still refuses to return Respondent Ronald Townsend's infant settlement proceeds.

Instead of returning the Respondent's modest settlement funds, United Bank prefers to tortuously litigate this matter and permanently deprive Ronald Townsend of his

property. United Bank's Appeal should be denied and the circuit court's order should be affirmed.

Signed: 

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Troy N. Giatras (WV Bar #5602)

Attorneys of Record for Respondent

CERTIFICATE OF SERVICE

I, Matthew W. Stonestreet, Esquire, do hereby certify that on this 30th day of April, 2015, true and accurate copies of the foregoing "***Brief on Behalf of the Respondent***" has been forwarded via United States Mail, postage prepaid, in an envelope addressed to the following:

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