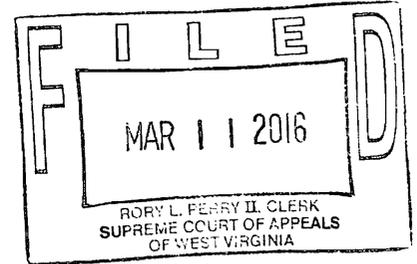


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-1056



**CRED-X, INC., a West Virginia corporation
d/b/a The Credit Corporation of America,**

Petitioner,

v.

**CABELL HUNTINGTON HOSPITAL, INC.,
a West Virginia corporation,**

Respondent.

*Appeal from the Circuit Court of Kanawha County, West Virginia
Civil Action No. 06-C-1209 "Kaufman, Judge"*

RESPONDENT'S BRIEF

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STATEMENT OF CASE

For sake of brevity and to avoid duplication, Respondent does not intend to recite to this Court a second “statement of the case.” Rather, Respondent will limit its “statement of the case” to correct factual inaccuracies and to advise of salient facts omitted by Petitioner.

The first matter which needs to be clarified in order to aid this Court in deciding this appeal is about the nature of this case. More specifically, on page 4 of its brief, Petitioner contends this case which was filed in 2006 is simply about an alleged breach of contract, fraud and misrepresentation. (Petitioner’s Brief (“PB”) at p. 4). While there are components of this case which relate to claims of breach of contract, fraud and misrepresentation, the impetus of this case is truly a declaratory judgment and injunction action. The Petitioner’s initial pleading unequivocally establishes the same. The Complaint, in plain language, is titled: “COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF“. (Joint Appendix (“JA”) at p. 1; no emphasis added – capitalization in original).

Moreover, the relief requested by Petitioner in its initial pleading is primarily in the form of a declaratory judgment and injunction, both of which are equitable in nature. To wit:

WHEREFORE, Plaintiff respectfully requests this Court to:

1. Enter an Order **declaring** the rights of the parties with respect to the contract.
2. Enter an Order **enjoining** the Defendant from taking any action with regard to the transfer of the collection accounts to the other collection agency until such time as the merits of this case are decided.
3. Enter an Order **finding** that the Defendant is not permitted to transfer the collection accounts to another

collection agency or attorney and must continue placing new accounts as outlined in the original agreement.

4. Award compensatory and punitive damages to the Plaintiff.

5. Such other relief and [sic] may be appropriate.

(JA at pp. 4-5; emphasis added). Therefore, according to Petitioner's own Complaint, the primary issues in this case are equitable in nature inasmuch as Petitioner seeks declaratory and injunctive relief.

In this regard, it is also important to note that Respondent's Counter-Claim in this case is primarily equitable in nature. More specifically, Respondent filed a Counter-Claim against Petitioner which also seeks an injunction and a declaratory judgment. (JA at pp. 16-18). Thus, in addition to Petitioner's request for equitable relief, the case before Judge Kaufman involved equitable claims and relief by Respondent. (*Id.*).

A point of clarification also needs to be made with respect to the Orders entered by the Bankruptcy Court which are discussed on page 5 of Petitioner's Brief. (PB at p. 5). Petitioner correctly states that the Bankruptcy Court assigned Petitioner's claims in this litigation to Mr. Davis on January 3, 2013. (*Id.*, see also JA at p. 59). And, Petitioner also correctly points out that the Bankruptcy Court clarified its January 3, 2013 Order with an Order dated February 21, 2013. (*Id.*; see also JA at pp. 76-77). However, the impression left by Petitioner's Statement of the Case is that the February 21, 2013 Order (JA at pp. 76-77) somehow clarified the assignment of this litigation to Mr. Davis. To the contrary, the February 21, 2013 Order in no way affected or impeded Mr. Davis's ability to proceed in this litigation as of January 3, 2013. To be clear, the Bankruptcy Court's February 21, 2013 Order only related to and, therefore,

clarified the Respondent's right to proceed with its Counter-Claim against Mr. Davis individually. (*Id.*). Accordingly, under the January 3, 2013 Bankruptcy Court Order, Mr. Davis stepped into the shoes of Petitioner and was free to proceed in seeking reinstatement of this litigation as of that date. (JA at p. 59). The February 21, 2013 Order did nothing to change the fact that Petitioner could seek reinstatement of the case in the Circuit Court of Kanawha County as of January 3, 2013. (JA at pp. 76-77).

The aforementioned fact is particularly important to the issue at bar because Petitioner maintains that there was no fifteen (15) month delay in seeking reinstatement and that Judge Kaufman erroneously made such a finding. (PB at p. 12). As addressed above, the Bankruptcy Court Order which assigned the right to prosecute this case to Mr. Davis was entered on January 3, 2013. (JA at p. 59). Although there was apparently a Motion to Transfer to Business Court in June of 2013, there is no question that Petitioner did not file a Motion to Reinstate at that time. Rather, Petitioner's Motion to Reinstate was not filed until April 14, 2014. (JA at pp. 85-86). Thus, there was a fifteen (15) month time period between the Bankruptcy Court's January 3, 2013 Order which granted Petitioner the right to seek reinstatement of this case and the actual filing of a Motion to Reinstate on April 14, 2014. Judge Kaufman's Orders, therefore, are factually accurate as to the fifteen (15) month delay in filing the Motion to Reinstate, despite Petitioner's protestations to the contrary.

The discussion on page 5 of Petitioner's Brief relating to the Motion to Transfer to Business Court should also be elaborated on in order for this Court to have a better understanding of this case. (PB at p. 5). Importantly, the Motion to Transfer to Business Court was not filed, according to the Certificate of Service, until June 26, 2013, almost six (6) months after Mr. Davis

was assigned the right to proceed in this litigation. (JA at p. 79). The record is devoid of any evidence that the Motion to Transfer to Business Court was served on Judge Kaufman in June of 2013. Moreover, there is no evidence that the Motion to Transfer to Business Court was served on the Central Office of the Business Court Division. As will be demonstrated below, these omissions of Petitioner were fatal to any attempt of Petitioner to have this matter transferred to Business Court.¹

Petitioner also makes a point on page 7 and in footnote 2 of its Brief that Judge Kaufman never scheduled a hearing on the Motion to Transfer to Business Court. (PB at p. 7). Any such factual assertion by Petitioner is nothing more than a red-herring. According to Trial Court Rule 29.06, a Circuit Court is not the entity responsible for holding a hearing on a Motion to Transfer to Business Court. Rather, it is this Court or, if this Court so chooses, the Business Court Division who is to decide a Motion to Transfer to Business Court. W.Va. T.C.R. 29.06 (2013). Nevertheless, if Petitioner would like to find fault with Judge Kaufman not scheduling a hearing on the Motion to Transfer to Business Court, it should be pointed out that never petitioned for a Writ of Mandamus with this Court to compel a hearing before Judge Kaufman.

With respect to the discussion of Mr. Albertson's discharge by Petitioner on page 6 of its Brief, it is interesting that Petitioner fails to describe the timeline relevant thereto. (PB at p. 6). For instance, it is significant to this case that Mr. Davis' letter to Hal Albertson discharging him as counsel for Petitioner/Mr. Davis is dated December 30, 2013, even though it was not filed with the Court until January 30, 2014. (JA at p. 82). Since he was not discharged until December 30, 2013, Mr. Albertson remained counsel for Petitioner/Mr. Davis for almost

¹ See, Argument C *supra* at pp. 19-20.

one (1) full year after the right to seek reinstatement of this case and to proceed against Respondent was given by the Bankruptcy Court on January 3, 2013. The December 30, 2013 discharge of Mr. Albertson is also significant because, while Petitioner claims it “promptly sought replacement counsel”, Petitioner’s counsel apparently was not retained until sometime in April of 2014, almost six (6) months after learning of “issues’ with Mr. Albertson and more than ninety (90) after Mr. Albertson was discharged. (JA at pp. 83-88).

SUMMARY OF ARGUMENT

The crux of this case is not about Judge Kaufman’s Order of Dismissal entered in this case, as contended by Petitioner. Importantly, Judge Kaufman’s Order of Dismissal did not forever slam the door shut in this matter. Rather and even as Petitioner concedes, the Order gave the parties the right to seek reinstatement in the event the Bankruptcy Court did not approve of the settlement.² Thus, the Order of Dismissal is not the real issue with which this Court is confronted.

Simply put, the crux of this case is about Petitioner being dilatory. Petitioner knew, as early as January 3, 2013, that this litigation could proceed against Respondent in the Circuit Court of Kanawha County because of the Bankruptcy Court’s Order entered that day. For the following fifteen (15) months, Petitioner did not file a Motion to Reinstate as permitted under Judge Kaufman’s Order of Dismissal.

² The settlement between the parties which ultimately was not approved was not for One Hundred Thirty-three Thousand Dollars (\$133,000.00) cash to be paid to Petitioner as implied in Petitioner’s brief. Rather, the terms of the settlement were: Ninety Thousand Dollars (\$90,000.00) to be paid to Petitioner and waiver by Respondent of counter-claims totaling at least Forty-three Thousand Dollars (\$43,000.00) which were asserted against Petitioner. (JA at pp. 22-23).

Petitioner claims it took action by filing a Motion to Transfer to Business Court which, necessarily, would have been filed under Trial Court Rule 29. However, the case was not reinstated at that time and a Motion to Transfer to Business Court under Trial Court Rule 29 is entirely different from a Motion to Reinstate under Rule 59 or 60 of the Rules of Civil Procedure. Moreover, the Motion to Transfer to Business Court was filed both untimely and in an erroneous procedural manner under Trial Court Rule 29. Petitioner simply filed with the Circuit Clerk a Motion to Transfer to Business Court, unbeknownst to Respondent and Judge Kaufman, and did nothing else with respect to said Motion.³

The next action in the case taken by Respondent was to file and serve a Notice of Appearance for Petitioner on April 10, 2015 and a Motion to Reinstate the Case four (4) days later, i.e., on April 14, 2015. Judge Kaufman, given the facts and nature of this case, properly denied Petitioner's Motion to Reinstate, properly applied the doctrine of laches, correctly refused to refer the case to Business Court, and appropriately used his discretion in managing his docket, even though the Bankruptcy Court had not yet approved the settlement.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not believe the underlying facts or issues presented herein are sufficiently unique to warrant oral argument. Rather, Respondent believes that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process may not be significantly aided by oral argument. Thus, oral argument is unnecessary under

³ Although the Motion to Transfer to Business Court contains a Certificate of Service which claims the undersigned was served with it in June of 2013, Respondent's Counsel did not in fact receive said Motion at that time. (JA at p. 171). The undersigned only became aware of the Motion to Transfer to Business Court after receiving a telephone call from the Court's law clerk in December of 2013. (*Id.*).

Appellate Rule 18(a)(4). W.Va. R. App. P. 18. Nevertheless, Respondent will readily participate in Appellate Rule 19 oral arguments if the Court believes it would aid in the decisional process.

ARGUMENT

A. THE LOWER COURT CORRECTLY DENIED PETITIONER'S MOTION TO REINSTATE THE CASE

The first argument of Petitioner's Brief appears to mis-characterize the nature of the dismissal by Judge Kaufman in this action. Petitioner, on pages 8 and 9 of its Brief, cites to case law wherein the issue to be decided was whether dismissal was an appropriate sanction for some form of misconduct in discovery. (PB at pp. 8-9). The implication of these citations and discussion of the law is that Judge Kaufman's dismissal of this action was a result of him sanctioning Petitioner. The Dismissal Order entered by Judge Kaufman in this action was not as a result of a sanction. Rather, the dismissal order was simply a docket management tool.⁴ Accordingly, Petitioner's arguments and citation to law regarding sanctions are not a valid basis to overturn the lower court's decision.

Not surprisingly, Petitioner next argues that it should not be punished for the inaction of its prior counsel in the case.⁵ Significantly, Judge Kaufman's decision not only cited to, but heavily relied upon this Court's decision in *Murray v. Roberts*, which provides, among other things,

⁴ See Argument D *supra* at pp. 22-24 for a discussion regarding a trial court's ability to manage its docket and why Judge Kaufman's decision to enter a Dismissal Order pending approval of the settlement by the Bankruptcy Court was not an abuse of discretion.

⁵ The events which ultimately led to the disbarment of Mr. Albertson, former counsel of Petitioner, had nothing to do with this case. Even Petitioner concedes the same in footnote 3 of its Brief. (PB at pp. 7-8).

[i]t is regrettable that the plaintiff should suffer from the effect of a misunderstanding between her and some one or more of the attorneys she consulted, but we conclude that the discretion of the trial court in dismissing the case at the time and under the circumstances that he did dismiss it, was soundly exercised, and that the showing made by the plaintiff upon her motion to reinstate the case was insufficient to make the action of the trial court in refusing to do so an abuse of the discretion that he clearly had in the premise.

117 W.Va. 44, 49, 183 S.E.2d 688 (1936). While *Murray* may be an older case, it is still valid and binding West Virginia case law.⁶ Respondent can find no cases which overturns, modifies, or otherwise changes the relevant language of *Murray* which imputes the inaction of an attorney to a plaintiff. Accordingly, Judge Kaufman did not abuse his discretion in applying valid, West Virginia law to the facts of this case and, ultimately, imputing the acts or omissions of counsel to Petitioner.

It is also worth noting that Judge Kaufman did not solely rely on *Murray* in making the decision to impute the actions of Mr. Albertson to Petitioner. As cited in the Order denying reinstatement (JA at p. 110), the lower court also relied upon *Bell v. Inland Mutual Insurance Company*, 175 W.Va. 165, 332 S.E.2d 127 (1985). In *Bell*, this Court again confirmed that the acts or omissions of an attorney may be imputed to a client. To wit:

The appellants claim that their counsel failed to inform them that interrogatories had been served upon them or that orders had been entered compelling their answers. The appellants contend that if they had known about the interrogatories or the orders compelling discovery they would have answered the interrogatories because they had what they assert are

⁶ *Murray* was, in fact, cited with approval as recently as 2008. See, *Rashid v. Tarakji*, 223 W.Va 295, 674 S.E.2d 1 (2008).

meritorious defenses to the actions and would not, therefore, have risked liability with judgments by default.

Confronted with a similar argument, the court in *Cine Forty-Second Street Theatre Corp.* stated:

Considerations of fair play may dictate that courts eschew the harshest sanctions provided by Rule 37 where failure to comply is due to a mere oversight of counsel amounting to no more than simple negligence, *Affanato, supra*, 547 F.2d at 141; *see SEC v. Research Automation Corp.*, 521 F.2d 585 (2d Cir. 1975) (dictum). But where gross professional negligence has been found--that is, **where counsel clearly should have understood his duty to the court--**the full range of sanctions may be marshalled. Indeed, **in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions** where, as in this case, they are clearly warranted.

A litigant chooses counsel at his peril, *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962), and here, as in countless other contexts, counsel's disregard of his professional responsibilities can lead to extinction of his client's claim.

602 F.2d at 1068. In *Corchado v. Puerto Rico Marine Management, Inc.*, *supra* at 413, the United States Court of Appeals for the First Circuit, reaching a similar conclusion, noted: "**We realize that we are visiting the sins of the attorneys upon the client, but this is an unavoidable side effect of the adversary system.**"

We agree with the above reasoning . . .

Id. at pp. 173-174 (emphasis added). In the case *sub judice*, there is absolutely no evidence of record to refute that (a) Petitioner chose its counsel, and (b) said counsel should have understood his duties, but disregarded them. Moreover, there is no evidence of record which establishes that Mr. Albertson's acts or omissions were a mere oversight. As a result, Judge Kaufman did not

shirk his duty of visiting the sins of the attorney upon the Petitioner, particularly since the inactivity of Petitioner and/or counsel was extremely lengthy.

Despite the foregoing, Petitioner claims on pages 9 and 10 of its Brief that this Court's decisions in *Foster v. Good Faith Shepard Interfaith Volunteer Caregivers, Inc.*, 202 W.Va. 81, 502 S.E.2d 178 (1998) and *Davis v. Sheppe*, 187 W.Va. 194, 417 S.E.2d 113 (1992) establish that an attorney's actions which lead to dismissal should only be imputed to the client in "extreme circumstances."⁷ (PB at pp. 9-10). Respondent does not dispute the validity of those cases. In fact, Respondent believes the facts and law set forth in *Foster* and *Davis* actually support its position and Judge Kaufman's ruling in this regard. As noted in *Davis* and as *Foster* cited with approval, "the decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a **clear record of delay** or contumacious conduct by the plaintiff.' [internet citation omitted]." *Foster*, 202 W.Va. at 83 (*quoting Davis*, 187 W.Va. 194, 417 S.E.2d 113 (W.Va. 1992)(emphasis added)).

In this case, there is a clear and unequivocal record of delay by Petitioner with respect to the filing of a Motion to Reinstate this action. Again, the Bankruptcy Court Order which assigned the right to prosecute this case to Mr. Davis was entered on January 3, 2013. (JA at p. 59). Although Petitioner had counsel for almost one (1) year thereafter, no Motion to Reinstate was filed during that time period. Instead, the Motion to Reinstate was not filed until April 14, 2014. (JA at pp. 85-86). Accordingly, there was a fifteen (15) month delay in seeking

⁷ In footnote 5 on page 10 of Petitioner's Brief, Petitioner suggests that Judge Kaufman could have also applied the "positive misconduct rule" as articulated by California case law. (PB at p. 10). Petitioner did not present such an argument to Judge Kaufman in the lower court. Additionally, it should be noted that there is no case or statute which Respondent could find which suggests or holds that the "positive misconduct rule" is valid under West Virginia law.

reinstatement of this case. It is not an abuse of Judge Kaufman's discretion to find such a fifteen (15) month delay as being within the "extreme circumstances" contemplated in the *Foster* and *Davis* decisions. Accordingly, Judge Kaufman's Order denying Petitioner's Motion to Reinstate appropriately applied the facts of this case to the law of West Virginia. The Order denying Petitioner's Motion to Reinstate, therefore, was properly entered, was clearly not an abuse of discretion, and should not be reversed.

Moreover and even if this Court ultimately attributes most of the delay in this case to Mr. Albertson, the lower court's refusal to reinstate the case was still proper based solely on Mr. Davis' delay. Mr. Davis admits to knowing the following, at least as of November 20, 2013: (1) Mr. Albertson was criminally charged for tax evasion; (2) Mr. Albertson's law license had a cloud over it due to the ethical issues for commingling client funds; (3) the Motion to Transfer to Business Court was not the proper Motion to have a case reinstated; and, (4) even if a Motion to Transfer to Business Court were the proper vehicle, no action on the Motion had been taken. (JA at p. 118).

While armed with that knowledge, Mr. Davis waited until December 30, 2013 – 40 days after knowing of the aforementioned issues with Mr. Albertson – to discharge him. Mr. Davis, after discharging Mr. Albertson on December 30, 2013, did not retain new counsel to protect his or Petitioner's interest for approximately another 100 days, i.e., April 10, 2014. (JA at pp. 83-84). The Motion to Reinstate was finally filed by Petitioner four (4) days later on April 14, 2014. (JA at pp. 85-86). Accordingly, a delay of 144 days occurred between the time Mr. Davis became aware, on November 20, 2013, of the fact that the case was not reinstated to the actual filing of the Motion to Reinstate on April 14, 2014. Thus, Petitioner's argument which

essentially claims it was punished for its attorneys failure to act should not be accepted by this Court. Petitioner, in addition to Petitioner's prior counsel, bears responsibility for failure to seek timely reinstatement of this case. Judge Kaufman, therefore, did not abuse his discretion and properly denied Petitioner's Motion to Reinstate.

Petitioner next argues that Judge Kaufman's decision not to reinstate the case violated public policy which favors a trial on the merits.⁸ While Petitioner's assertion that a trial on the merits is preferred as a policy in this State is correct, Petitioner's attempt to extrapolate that policy to mean that every case in West Virginia is to be tried on the merits is flawed.

This Court has previously affirmed trial court orders which dismiss a case for reasons other than on the merits, particularly where a party fails to act in a timely fashion. More specifically, this Court has repeatedly affirmed a trial court's refusal to set aside default judgments when the party seeking a trial on the merits fails to establish good cause for a failure to act in a timely fashion. *See generally, Hardwood Group v. Larocco*, 219 W.Va. 56, 631 S.E.2d 614 (2006); *Intercity Realty Co. v. Gibson*, 154 W.Va. 369, 175 S.E.2d 452 (1970); *Hamilton Watch Co. v. Atlas Container, Inc.*, 158 W.Va. 52, 190 S.E.2d 779 (1972); *Cordell v. Jarrett*, 171 W.Va. 596, 301 S.E.2d 227 (1982); *Blair v. Ford Motor Credit Co.*, 193 W.Va. 250, 455 S.E.2d 809 (1995); *Evans v. Hall*, 193 W.Va. 578, 457 S.E.2d 515 (1995). Accordingly, a trial on the merits is not required in every lawsuit, especially when the party arguing for a trial on the merits has been dilatory or otherwise timely act.

⁸ Petitioner's Motion to Reconsider or, in the Alternative, to Refer This Case To The Business Court does not in any fashion raise the argument about the public policy of this State "favoring a trial on the merits". (JA at pp. 112-125). Petitioner's Motion to Reinstate, without citation, does refer to a trial on the merits, but is not made in any discussion of law. (JA at pp. 85-88).

In this particular instance, Judge Kaufman did not abuse his discretion when refusing to reinstate Petitioner's case because it failed to prove "good cause" for failing to timely seek reinstatement. As described throughout this submission, fifteen (15) months lapsed between the time when Petitioner could have moved to reinstate the case and when Petitioner in fact filed its Motion to Reinstate. The only true argument advanced to date by Petitioner to establish "good cause" for its failure to timely act is to the blame prior counsel, Mr. Albertson. As discussed above, there are two fallacies with this argument. First, the acts or omissions of counsel are imputed to Petitioner.⁹ Second, Mr. Davis failed to act timely when he discovered the issues with Mr. Albertson.¹⁰ Stating this second point in another way, Mr. Davis knew the case was not reinstated in November of 2013 (JA at p. 118), yet the Motion to Reinstate was not filed until April 14, 2014, approximately six (6) months later. (JA at pp. 85-88). Petitioner therefore failed to prove "good cause" for its failure to timely seek reinstatement and it was not an abuse of Judge Kaufman's discretion to deny reinstatement, despite the policy to favor a trial on the merits.

B. THE LOWER COURT CORRECTLY APPLIED THE DOCTRINE OF LACHES IN WHEN DENYING PETITIONER'S MOTION TO REINSTATE THE CASE

Petitioner argues, on page 12 of its Brief, that the doctrine of laches is equitable in nature and, therefore, applies only to cases in equity, not in law. (PB at p. 12). Petitioner then goes on to argue that this case is one of law, not equity, and therefore laches does not apply.

⁹ See, pp. 7-11, *supra*.

¹⁰ See, pp. 11-12, *supra*.

(*Id.*). There are two (2) flaws with Petitioner’s argument. Each of these flaws are fatal and will be discussed in turn below.

First, Petitioner’s argument fails to recognize that, in 1950, the *Hoffman* decision itself noted a changing trend with respect to whether the doctrine of laches applied only to cases in equity or to both cases of law and equity. *Hoffman v. Wheeling Sav. & Loan Ass’n*, 133 W.Va. 64, 57 S.E.2d 725 (1950). More specifically, in *Hoffman*, this Court noted that “[m]odern decisions have somewhat changed the original theory of laches, . . .” *Id.* In fact, more recent decisions have undisputedly applied the doctrine laches to actions based in law. *See generally, State ex rel. Webb v. West Va. Bd. of Med.*, 203 W.Va. 234, 506 S.E.2d 830 (1998)(“the doctrine of laches may be applicable in proceedings by and before the West Virginia Board of Medicine pursuant to W.Va. Code 30-3-1”). Thus, the doctrine of laches is not exclusively limited to actions in equity as contended by Petitioner.

Second, Petitioner’s argument is flawed because, even if laches only applies to cases of equity, this is a case of equity. As noted by this Court in *Maynard v. Board of Education of Wayne Country*, “[s]ince proceedings for declaratory relief have much in common with equitable proceedings, the equitable doctrine of laches has been applied in such proceedings.” 178 W.Va. 53, 61, 357 S.E.2d 246 (1987)(citing *Taylor v. City of Raleigh*, 227 S.E.2d 576 (N.C. 1976) quoting 22 Am. Jur.2d *Declaratory Judgments* §78 (1965); citing E. Borchard, *Declaratory Judgments* 238, 240, 348 (2d ed. 1941)(declaratory judgment actions are largely equitable in nature)). Thus, declaratory judgment actions such as the one filed herein are equitable and are subject to the defense of laches.

Respondent recognizes that Petitioner, in its Complaint, does seek monetary damages for an alleged breach of contract, misrepresentation, and fraud. However, these claims should not be serve as an absolute prohibition on the use of the doctrine of laches. As this Court also explained in *Maynard*,

“[w]e are aware that at least one other jurisdiction has held that the fact that both equitable relief (a declaratory judgment construing a contract) and legal relief (a money judgment based on breach of contract) are requested in the same action does not render all issues and relief sought equitable in nature for the purpose of applying the equitable defense of laches to the legal relief sought. . . . While we believe this principle is generally valid, it should not be applied under the particular circumstances of this case. ‘What constitutes laches depends upon the facts and the circumstances of each particular case.’[internal citations omitted].”

Id. at p. 61. Moreover, in *Maynard*, this Court held that “plaintiffs’ claims for retroactive monetary relief in the underlying declaratory judgment action against the country board of education are barred by laches”. *Id.* at p. 62. Accordingly, under this precedent, it is clear that a trial court should consider the specific facts of the case in determining whether it is equitable in nature such that laches applies or an action at law to which laches may not apply.

The Circuit Court of Kanawha County did not abuse his discretion in determining this matter was equitable in nature and, therefore, the doctrine of laches could apply. The title of the Petitioner’s initial pleading establishes that this is a suit in equity since it labeled as a “COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF“. (JA at p. 1; no emphasis added – capitalization in original). Moreover, the primary relief requested by Petitioner in its initial pleading is equitable in nature because it requested: (1) entry of an Order

declaring the rights of the parties; (2) entry of an Order **enjoining** the Defendant from taking any action with regard to the transfer of the collection accounts to other collection agencies; (3) entry of an Order **finding** that the Defendant is not permitted to transfer the collection accounts to another collection agency or attorney; and, (4) such other relief as may be appropriate.¹¹ (JA at pp. 4-5; emphasis added). The plain language of Petitioner’s Complaint, therefore, establishes this suit as an equitable case. Additionally, the Counter-Claims filed by Respondent reinforce that the primary focus of this case is equitable inasmuch as Respondent asserts causes of action for declaratory judgment and an injunction. (JA at pp. 16-18). Thus, Judge Kaufman’s decision that the doctrine of laches may bar reinstatement was not in error and should be affirmed.

After properly determining laches could apply due to the equitable nature of this case, Judge Kaufman next undertook an analysis of whether the doctrine of laches should apply under the specific facts of this case. In the Circuit Court’s Order denying reinstatement, Judge Kaufman appropriately noted that “[l]aches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party waived his right.” (JA at p. 0107); *see also*, *Syl. Pt. 2, Bank of Marlinton v. McLaughlin*, 123 W.Va. 608, 17 S.E.2d 213 (1941); *Syl. Pt. 3, Carter v. Price*, 85 W.Va. 744, 102 S.E. 65 (1920).

Judge Kaufman first analyzed whether – and ultimately correctly found that – Petitioner delayed in asserting a known right which worked to the disadvantage of Respondent. In the Order denying reinstatement, Judge Kaufman properly found the fifteen (15) month delay was sufficient to constitute the waiver of a known right. In the same Order, Judge Kaufman espoused one form of disadvantage to Respondent, additional damages due to pre-judgment

¹¹ Only one (1) of the five (5) reliefs requested seek monetary damages. (JA at p. 4-5).

interest, caused by Petitioners delay. (JA at pp. 107-108). Certainly, exposure to additional damages is one disadvantage or prejudice a party may suffer in the context of laches. *See, Apotex, Inc. v. UCB, Inc.*, 970 F. Supp.2d 1297 (S.D. Fla. 2013)(“material prejudice can take the form of either evidentiary or economic prejudice”; “[e]conomic prejudice arises when a defendant and possibly others will . . . incur damages which likely would have been prevented by earlier suit.”); *Cornetta v. United States*, 851 F.2d 1372 (Ct. App. Fed. Cir. 1988) (establishing economic damages as one (1) of two (2) types of prejudice which can be sustained when laches is applicable). But, there is at least one (1) other prejudice suffered in this case as well.

As pointed out by Judge Kaufman when denying the Motion to Reconsider, witnesses’ memories have faded over the nine (9) years this case has been pending and, as a result, Respondent will be prejudiced as a result thereof. (JA at p. 171).¹² Accordingly, the accumulation of pre-judgment interest was not the only prejudice recognized by the lower court that would be suffered by Respondent in the event of reinstatement. Having properly found both a waiver of a known right and prejudice to Respondent, Judge Kaufman’s decision to apply the doctrine of laches as a bar to reinstatement is not an abuse of discretion.

Although it could have, Judge Kaufman’s careful consideration of this issue did not simply stop upon a finding of unreasonable delay and prejudice to Respondent. Rather, the lower court also analyzed whether a presumption that Petitioner waived its rights was also warranted. (JA at p. 172). “A presumption is a standardized practice under which certain facts

¹² Although not of record due to the timing of the lower court Order versus this appeal, it should be pointed out that one (1) or more of Respondent’s employees who had intimate knowledge of the relationship between the parties to this litigation are no longer employed by Respondent.

are held to call for uniform treatment with respect to their effect as proof of other facts.”

Burnside v. Burnside, 194 W.Va. 263, 460 S.E.2d 264 (1995).

As indicated on pages 6 through 8 of the Order denying the Motion to Reinstate, Judge Kaufman articulately explained several reasons a presumption of waiver applied due to Petitioner’s failing to file a Motion to Reinstate for fifteen (15) months. (JA at pp. 108-110). For instance, Judge Kaufman’s Order refers to Rule 41 of the West Virginia Rules of Civil Procedure which allows for dismissal of a case which has no activity for a period of one (1) year. (JA at p. 108); *see also*, W.Va. R. Civ. 41(b). Here, the delay was five (5) months longer than the one (1) year time period prescribed in Rule 41(b).

Next, the Circuit Court considered West Virginia Code §56-8-12 which requires a Motion to Reinstate to be filed within three (3) terms and found that Petitioner did not timely apply within three (3) terms of January 3, 2013. (JA at pp. 108-109); *see also*, W.Va. Code §56-8-12. Accordingly, Judge Kaufman found ample support in the law to establish that a fifteen (15) month delay seeking reinstatement warranted the presumption that Petitioner had waived its rights and that laches applied.

“To rebut the presumption of laches, [Petitioner] must present some evidence to show that the delay was justifiable or present evidence to place the evidentiary or economic prejudice in dispute. [internal citation omitted]” *Apotex, Inc.*, 970 F. Supp. at 336; *see also*, *Watcher v. Watcher*, 178 W.Va. 5, 357 S.E.2d 38 (1987)(stating that the presumption of a marital gift is not rebutted by merely asserting that a spouse did not intend the contribution to be a gift). Judge’s Kaufman’s Order analyzed whether Petitioner was able to rebut and, therefore, overcome the presumption that it waived its rights and that laches applied. To wit: “[Petitioner] has failed

to rebut the aforementioned presumption of a waiver of rights or otherwise state any ‘good cause’ for the delay in moving this Court to reinstate the case.” (JA at p. 109).

The only attempt by Petitioner to explain its dilatory action in this case was, again, to point the finger at its prior counsel. Judge Kaufman did not abuse his discretion by finding that Petitioner did not rebut the presumption of laches because, as described at length above: there was an actual fifteen (15) month delay in seeking reinstatement of this case; as of November 20, 2013, Mr. Davis knew the attorney of record was criminally charged for tax evasion, his law license had a cloud over it, the Motion to Transfer to Business Court was not the proper Motion to have a case reinstate, no action on said the Motion had been taken; despite that knowledge, Mr. Davis waited until December 30, 2013 to fire counsel; after firing Mr. Albertson on December 30, 2013, Mr. Davis did not retain new counsel to protect his or Petitioner’s interest until April of 2014; and, the Motion to Reinstate was finally filed on April 14, 2014. Thus, Petitioner’s argument which essentially claims it was punished for its attorneys failure to act was, as discussed above,¹³ properly rejected by the lower court and the doctrine of laches was correctly applied to deny reinstatement of this action.

C. THE LOWER COURT CORRECTLY DENIED PETITIONER’S REQUEST TO REFER THE CASE TO BUSINESS COURT

Petitioner’s next argument claims that, in lieu of reinstating the case, the lower court should have transferred this matter to Business Court. (PB at p. 16). Petitioner’s argument is fallacious for three different, but equally compelling, reasons.

¹³ See, Argument A, *supra*, at pp. 7-11.

First, the Motion to Transfer to Business Court was not ripe inasmuch as the case had not been reinstated in June of 2013. Petitioner's attempts to have this Court overlook the fact that a Motion to Transfer to Business Court is not the equivalent in form or function as a Motion to Reinstatement. A Motion to Transfer to Business Court is controlled by Rule 29 of the Trial Court Rules. W.Va. T.C.R. 29. A Motion to Reinstatement is neither controlled by, nor referenced in Rule 29 of the Trial Court Rules. *Id.* Rather, a Motion to Reinstatement is controlled by Rule 59 or 60 of the West Virginia Rules of Civil Procedure which allow for amendment of judgments or relief from judgments and orders. W.Va. R. Civ. P. 59, 60. Petitioner did not avail itself of either Rule 59 or 60 for fifteen (15) months after it could have and, therefore, the Circuit Court's finding in that regard should be affirmed.

Second, even if one were to somehow consider the filing of a Motion to Transfer to Business Court in a dismissed case which had not been reinstated as being the equivalent of a Motion to Reinstatement, Petitioner's argument is flawed because the Motion to Transfer to Business Court was not timely or properly presented under Trial Court Rule 29. West Virginia's Business Court was established in September of 2012 upon this Court's approval of Trial Court Rule 29. *Id.* W.Va. R. 29.06 (2012). Under the 2012 version of Trial Court 29.06, any motion to transfer to business court had to be filed within three (3) months after the filing of the litigation. *Id.* Since this action was already pending in 2012 when the Business Court came into existence, Trial Court Rule 29.06 would require a party to this action to move for a transfer to the Business Court within three (3) months of it being established, e.g., by the end of 2012. *Id.* However, Petitioner's Motion to Transfer was not filed until June 26, 2013. (JA at pp. 78-79). The deadline for Petitioner to seek transfer to the Business Court, therefore, expired six (6) months

before the Motion to Transfer this litigation to Business Court was filed. Thus, Petitioner's Motion to Transfer was not timely presented and is not a ground to excuse Petitioner's failure to timely file a Motion to Reinstate this case.

The Motion to Transfer to Business Court was, likewise, not properly presented or served by Petitioner in June of 2013. More specifically, the Motion was not submitted to all appropriate parties. To date, the only evidence of record is that the undersigned was served with the Motion to Reinstate.¹⁴ (JA at pp. 78-79). Trial Court Rule 29.06(a)(3), however, requires service of the Motion on the Circuit Court as well as the Central Office of the Business Court Division. W.Va. T.C.R. 29 (2013). There is absolutely no evidence of record that Judge Kaufman was served with or received the Motion. Nor is there any evidence that the Central Office of the Business Court Division was ever served with the Motion to Transfer to Business Court. Thus, the Motion to Transfer to Business Court was neither timely, nor properly served. Under these facts, Petitioner should not be permitted to boot-strap its Motion to Transfer to Business Court into a Motion to Reinstate for any purpose, let alone for purposes of trying to excuse a fifteen (15) month delay in actually filing the Motion to Reinstate.

Third, it is important to note that, even after the Motion to Transfer to Business Court was filed unbeknownst to the undersigned, the Court and the Central Office of the Business Court Division, Petitioner failed to take any other action with respect to said Motion. Petitioner just blithely let time pass. If Petitioner truly believed that a Motion to Transfer to

¹⁴ Rule 29.06(a)(3) requires service upon opposing counsel. W.Va. T.C.R. 29.06 (2013). Although the certificate of service indicates otherwise, Respondent's counsel was not served in June of 2013. In fact, the undersigned did not become aware of the submission of the Motion to Transfer to Business Court until sometime in December of 2013. (JA at p. 171).

Business Court was the equivalent of seeking reinstatement, why was there no action taken to ensure reinstatement between June of 2013 and April of 2014? Any or all of the following actions would have been prudent: contacting the Court directly to see if it was aware of the Motion and/or to obtain a hearing date; seeking the location of the Business Court which would be hearing this matter; and/or, seeking the identity of the Business Court Judge who would preside over the matter. Yet, Petitioner did not undertake any of those actions to ensure the case was reinstated and moving forward either in the Circuit Court or Business Court.

In sum, Petitioner attempts to hide the dilatory nature of the filing of the Motion to Reinstate by referring to a Motion to Transfer to Business Court which was filed in a case which had already been dismissed. A Motion to Transfer to Business Court is not the procedural or functional equivalent of a Motion to Reinstate. Even if one were to believe those two, separate motions are procedural and functional equivalents, Petitioner failed to timely present and serve all necessary parties with the Motion to Transfer to Business Court. Accordingly, the findings and Order of the Circuit Court of Kanawha County, West Virginia were proper, were not an abuse of discretion, and should be affirmed.

D. THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY DISMISSING THE CASE BEFORE THE SETTLEMENT WAS APPROVED BY THE BANKRUPTCY COURT

The entry of Judge Kaufman's March 12, 2012 Order which dismissed the case was not in error or an abuse of discretion. Petitioner's assertion that the lower court had no legal basis to dismiss the case is quite ironic given that it failed to cite this Court to any legal authority supporting its argument that Judge Kaufman abused his discretion. Contrary to Petitioner's

position, there is ample legal authority which grants a trial court judge such as Judge Kaufman broad discretion to manage his docket. For instance, in *Dimon v. Mansy*, the Court has stated,

[i]n the course of discharging their traditional responsibilities, circuit courts are vested with inherent and rule authority to protect their proceedings from the corrosion that emanates from procrastination, delay and inactivity. ... The power to resort to the dismissal of an action is in the interest of orderly administration of justice because the general control of the judicial business is essential to the trial court if it is to function.

198 W.Va. 40, 45, 479 S.E.2d 339 (1996). Likewise, a trial court is given broad discretion to manage its docket under Rules 16 and 37 of the West Virginia Rules of Civil Procedure and case law interpreting the same. W.Va. R. Civ. P. 16, 37; *Caruso v. Pearce*, 223 W.Va. 544, 678 S.E.2d 50 (2009)(Rule 16(b) requires active judicial management of a case); Syl. Pt. 2, *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W.Va. 1, 479 S.E.2d 300 (1996) ("Trial courts have the inherent power to manage their judicial affairs that arise during proceedings in their courts, which includes the right to manage their trial docket.' [internal citation omitted]"); *Covington v. Smith*, 213 W.Va. 309, 582 S.E.2d 756 (2003); *Dimon v. Mansy*, 198 W.Va. at 45, 479 S.E.2d at 344; *Brent v. Board of Trs. of Davis & Elkins Coll.*, 173 W.Va. 36, 39, 311 S.E.2d 153, 157 (1983); and, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006)(Maynard, dissenting)("Circuit judges have the authority to control and manage their dockets. To do so effectively, judges must have wide discretion to place reasonable restrictions and limitations upon litigants . . ."). Thus, there is legal authority which grants Judge Kaufman broad discretion to manage his docket, including the dismissal of case.

Respondent admits that Petitioner's Argument may have merit if the March 12, 2012 Order of Dismissal was with prejudice or did not in any fashion address the possibility of the Bankruptcy Court refusing to approve the settlement. However, the March 12, 2012 Order did in fact recognize that the Bankruptcy Court may not approve of the settlement and, in such event, the case may need to be reinstated. To wit:

While this court understands that the settlement reached of all claims is subject to approval by the Bankruptcy Court, the Court is still dismissing the case from the Circuit Court docket. Should the Bankruptcy Court reject the settlement, the parties in this case may petition the court for reinstatement of this action.

(JA at 0021). Accordingly, Judge Kaufman knew the case may need to be reinstated and gave the parties a vehicle – in the form of a motion to reinstate – to get the case back before the Court if need be. The problem, however and as stated throughout this brief, is that Petitioner did not timely seek reinstatement. Because Judge Kaufman's Order was essentially an Order of case management which allowed Petitioner to seek reinstatement in the event the Bankruptcy Court did not approve the settlement, Judge Kaufman did not abuse his discretion in entering the Order of Dismissal.

CONCLUSION

For all the foregoing reasons, this Court should deny the instant Petition for Appeal and affirm the decision of the Circuit Court of Kanawha County, West Virginia.

CERTIFICATE OF SERVICE

I, Todd A. Biddle, counsel for Respondent herein, do hereby certify that a true and correct copy of the foregoing **RESPONDENT'S BRIEF** was served upon the following counsel of record by placing the same in the United States Mail, postage prepaid, this 11th day of March, 2016, and addressed as follows:

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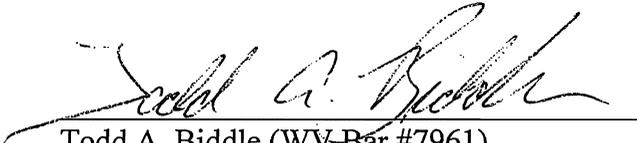
Honorable Tod J. Kaufman, Judge
Kanawha County Circuit Court
111 Court Street
Charleston, WV 25301



Todd A. Biddle (WV Bar #7961)

**CABELL HUNTINGTON HOSPITAL, INC.,
a West Virginia corporation,**

Respondent, By Counsel

A handwritten signature in black ink, appearing to read "Todd A. Biddle", is written over a horizontal line.

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