

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Marlon Ferguson,
Plaintiff Below, Petitioner**

vs) No. 11-0597 (Kanawha County 09-C-390)

**Nicholas J. Wall,
Defendant Below, Respondent**

FILED

January 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Marlon Ferguson appeals from the circuit court's order granting respondent Nicholas J. Wall's motion to dismiss this action seeking to enforce and collect upon a prior monetary judgment. Respondent has filed a response brief, and petitioner has filed a reply.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on September 15, 2011. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In an earlier personal injury action, petitioner obtained a default judgment against Charleston Entertainment, LLC ("Charleston Entertainment"), an Ohio limited liability company. In the case *sub judice*, petitioner sought to enforce his default judgment against the sole member of Charleston Entertainment, defendant Hensel & Hensel, Ltd., an Ohio limited liability company, and, in turn, Hensel & Hensel's owners, defendant Kevin Hensel and respondent Nicholas Wall.¹

Respondent Wall filed a motion to dismiss the instant action pursuant to Rule 12(b)(6)

¹ After pleadings were amended below and certain defendants were voluntarily dismissed, the remaining defendants were respondent Wall, Hensel & Hensel, Ltd., and Kevin Hensel, the latter two of whom are the respondents in a separate appeal filed in this Court by petitioner (Docket No. 11-1209).

of the West Virginia Rules of Civil Procedure. On October 28, 2010, the circuit court entered an order granting the motion and ruling, *inter alia*, that respondent Wall was neither a party to nor given notice of the earlier litigation. The circuit court further found, *inter alia*, that because the judgment from the earlier lawsuit cannot be enforced against respondent Wall without violating his due process rights, petitioner had failed to state a claim upon which relief can be granted.

“‘Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.’ Syllabus point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).” Syl. Pt. 1, *Albright v. White*, 202 W. Va. 292, 503 S.E.2d 860 (1998). Upon a careful review of the record on appeal, as well as the parties’ briefs and arguments in support of their respective positions, we conclude that the circuit court did not err in granting respondent Wall’s motion to dismiss. Accordingly, we affirm.

Affirmed.

ISSUED: January 13, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin