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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DENISE JOHNSON,
Plaintiff Below, Petitioner

v.

RUTH ANN PINSON,
Defendant Below, Respondent

APPEAL NO.: 19-1014
(Civil Action No.: 19-C-178)

RESPONDENTS' BRIEF

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RESPONDENTS' RESPONSE TO ASSIGNMENTS OF ERRORS

1. The Circuit Court correctly concluded that the Petitioner's flawed theory of recovery was based on the contention that she had allegedly acquired and held a judgment against Mark Pinson, when the judgment she actually held was a judgment originally obtained by James River Coal Sales, Inc., solely against a corporate judgment debtor, i.e. Producers Coal, Inc.

2. The "relate back" provisions of Rule 15 of the West Virginia Rules of Civil Procedure could not be invoked where no "mistake" could reasonably have been made in discerning Mark Pinson's status and role in the facts of the case, so as to work an extension of the statute of limitations set forth in § 40-1A-9 of the West Virginia Uniform Fraudulent Transfers Act.

3. Petitioner, as plaintiff below, never properly and timely demonstrated that there existed discoverable evidence which could show that there is a genuine issue of material fact or law that Mark Pinson was liable on the judgment obligation—particularly where he had never been found liable on either the asserted promissory note, guaranty, or judgment.

STATEMENT OF THE CASE

The petition for appellate relief is brought by Denise Johnson, as plaintiff below. In it, she seeks to overturn the Circuit Court's ruling that a foreign judgment, which she allegedly acquired by assignment, cannot be used to undo a real estate conveyance between two parties under the Uniform Fraudulent Transfers Act—(W.Va. Code §§ 40-1A-1, et seq.)—neither of whom are judgment debtors on the foreign judgment she seeks to use in order to target the transferred real estate. (J.A. 002-4; 116-122)

Respondent and defendant below, Ruth Ann Pinson, is married to Mark Pinson (J.A. 003). Mark Pinson conveyed residential real estate in Huntington, Cabell County, West Virginia, to Ruth Ann Pinson, by deed dated April 22, 2015. (J.A. 018-021)

Mark Pinson was also a principal in a corporation named Producers Coal, Inc. Producers Coal settled a financial dispute with another company named James River Coal Sales, Inc.; and, in that agreement, executed a Promissory Note, dated November 25, 2014, promising to pay James River Coal the principal sum of $2,249,438.90, with interest. The note was executed by Producers (referred to on the note as "Obligor"), per the signature of Mark Pinson as its President. There was no endorsement of the note by a personal signature of any individual. (J.A. 029-033) However, by a "guaranty" agreement of the same date (November 25, 2014), the note was guaranteed by Mark Pinson and Dennis R. Johnson.[1]

It is uncontested that that debt gave rise to a later proceeding before the Circuit Court of the City of Richmond, Virginia, in a case its Clerk denominated as Case Number CL16-3594-8. That litigation, in turn, resolved with the entry of a "Confession of Judgment", entered on September 30, 2016. (J.A. 049) The judgment was awarded to James River Coal Sales, Inc., exclusively against Producers Coal, Inc. There is no evidence that Mark Pinson was ever sued, as a debt guarantor or otherwise, in that civil action. The judgment simply awarded judgment to James River Coal Sales, against Producers Coal, Inc., in the principal sum of $1,937,377.00.[2]

Although Petitioner never submitted any supportive and pertinent documentation into the record, she claims that that the judgment was "assigned" to her on March 29, 2017. (J.A. 003) She then, in May, 2017, undertook to have it "registered" in Cabell County, West Virginia, by applying for such "registration" with the Clerk of the Circuit Court of Cabell County, in a proceeding denominated as Civil Action Number 17-C-287. In multiple documents filed for that "registration", she referred to Mark Pinson as an "Obligor". (J.A. 025-026) Indeed, she obtained

[1] It has not been disputed that Petitioner Denise Johnson is the wife of Dennis R. Johnson. (J.A. 132)

[2] Presumably, some of the debt had been paid between the date of the Promissory Note of November 25, 2014 ($2,249,438.90) and the Confession of Judgment on September 30, 2016 ($1,937,377.00).

an Abstract of Judgment, which she recorded as notice of a lien and which stated that the Virginia judgment had been entered in favor of James River Coal "and against the Defendant Producers Coal, Inc., *and Mark Pinson* for $1,937,377.00" plus interest and costs.[3] (emphasis added) To further effectively freeze any attempt by Ruth Ann Pinson to market or encumber her property during this litigation, Denise Johnson caused a Memorandum of Lis Pendens to be recorded in the office of the Clerk of the County Commission of Cabell County. (J.A. 035-036)

With no more to support her position, Denise Johnson filed this proceeding below on April 18, 2019, solely against Ruth Ann Pinson, under the Uniform Fraudulent Transfers Act, W.Va. Code §§ 40-1A-1, et seq. (hereinafter referred to as the 'UFTA"), alleging that Mark Pinson, as a judgment debtor, had fraudulently conveyed his residential real estate to Respondent, Ruth Ann Pinson, on April 22, 2015, some 3 years and 361 days earlier. (J.A. 001-004)

Respondents countered with a Motion to Dismiss/or for Summary Judgment arguing *inter alia*, that the cause of action was flawed because Mark Pinson was not a judgment debtor as alleged; that even if he did try to engage in fraudulent conduct, he had not been timely joined as an indispensable party; and that it is not clear that the UFTA supports actions by mere assignees of a judgment or other original creditor. (J.A. 005-010; 060-064)

Mark Pinson specially appeared to contest a belated attempt by Denise Johnson to join him and made parallel arguments. (J.A. 066-073; 085-095; 101-109)

The Court agreed and granted judgment to both Respondents by separate orders. (J.A. 112-115; 116-122)

[3] The Abstract of Judgment also stated "Judgment Assigned to Denise Johnson via Sale and Assignment Agreement dated March 29, 2017". (J.A. 023) However, no such written assignment agreement was ever introduced into the record in this proceeding below.

SUMMARY OF ARGUMENT

The reasoning and theory of the Petitioner's case is almost too strained to clearly explain or analyze.

The Petitioner began the case by claiming in her Complaint that Respondent Mark Pinson was a judgment debtor on a Virginia state court Confessed Judgment entered in late September, 2016—when, in fact, Mark Pinson was not. He was merely a principal of the judgment debtor. And while he did also personally sign a guaranty designed to assure payment of a promissory note owed by Producers Coal, Inc. (of which he was an officer) to James River Coal Sales, Inc., he was never sued on that guaranty, promissory note, or ultimately, the 2016 Confessed Judgment—by James River Coal Sales, or anyone else. Indeed, Petitioner has never so much as presented evidence of a demand or simple invoice regarding the debt, directed to Mark Pinson.

The Petitioner has always and only alleged the acquisition of the 2016 Confessed Judgment. She has not claimed to have acquired any assignment of the corporate-to-corporate promissory note, or any right to recover on any guaranty made by Mark Pinson and Dennis Johnson to James River Coal Sales.

Nevertheless, Petitioner, as plaintiff below, and simply claiming without documentation that she had been "assigned" the James River Coal Sales judgment, sued only Respondent Ruth Ann Pinson, to whom Mark Pinson had conveyed Cabell County residential real estate in April, 2015. Her suit sought to set aside their 2015 spousal conveyance under the UFTA. Her complaint further claimed that Mark Pinson was a judgment debtor on her acquired 2016 judgment; that he was insolvent when he conveyed the real estate to his wife in 2015; and that he did so with a deliberate intent to defraud creditors. The suit filed by Petitioner, as plaintiff below, was subject to the limitation of actions of § 40-1A-9 of the West Virginia Code, which prescribes a four-year

statute of limitation.[4] Petitioner filed her Complaint on April 18, 2019, four days before the statutory limitation for the action would have expired.

However, when confronted with Respondent Ruth Ann Pinson's responsive motion to dismiss/for summary judgment, Petitioner—whose failure to join Mark Pinson had been questioned by the trial judge—belatedly sought to find a way to finally get an adjudication and determination that Mark Pinson was *personally* liable on the alleged judgment debt to James River Coal Sales—which, again, Petitioner simply *stated* that she had acquired by assignment. She did so, in August, 2019, by moving to amend her Complaint in an effort to add him and "relate back" his joinder to the filing date of the original suit below—itself filed only a mere four days before the expiration of the statute of limitations under § 40-1A-9. In her motion to amend, Petitioner, for the first time, argued that her failure to join Mark Pinson to begin with, was a "mistake".[5]

The motion to amend by Petitioner tellingly revealed the fatal flaws of her suit. As was clearly conceded in the give-and-take of argument before the trial court, Mark Pinson had always been an indispensable party. Yet, he had never been adjudicated personally liable on the promissory note, guaranty, or judgment. The suit in the Virginia court perhaps *suggested* a default on the note, and possibly thereby an opening to recover on the guaranty of Mark Pinson and Dennis Johnson—but there was no judicial finding or judgment on that point. (J.A. 126-130; 134-136) To be sure, just as the Petitioner on multiple key points has asked for certain assumptions to be made (for example, that she has a written assignment from James River Coal Sales; that Mark Pinson defaulted on his guaranty; and that he was actually "insolvent" when he made the transfer to his

---

[4] Since the deed from Respondent Mark Pinson to his wife, Respondent Ruth Ann Pinson, was promptly recorded, it timely gave notice to the world of its existence. Consequently, a four-year statute of limitation applied to sue under the UFTA regarding the April 22, 2015 transfer, under either a theory that the transfer was one done with actual fraudulent intent, or was done when the transferor was insolvent. See W.Va. Code § 40-1A-9.

[5] The need to try to excuse such a glaring omission, as a "mistake", was essential if the Petitioner was to meet the requirements set forth in Brooks v. Isinghood, 213 W.Va. 675, 584 S.E.2d 531 (2003). That failure will be further addressed in Respondents' Argument, *infra*.

wife on April 22, 2015); it is just as easy to conjecture that he was on good standing with his guaranty in light of the fact that apparently some $312,061.90 had been paid on the promissory note between November 25, 2014, and the time of the September 30, 2016, Confession of Judgment. In any case, there could have been no credible "mistake" by the Petitioner in failure to join him initially, because his roles in the controversy were the centerpieces of their claims.

Therefore, the flawed and untimely motion to amend and add Mark Pinson could not save and salvage his indispensably necessary joinder and place it within the necessary 4-year period of limitations.

Finally, as to the Petitioner's claim that her Complaint was prematurely dismissed without the opportunity for discovery, she was responsible for filing her suit only if there was a sufficient basis for it in law and fact, under Rule 11 of the WVRCP. If additional discovery was needed, Petitioner never countered the Respondents' motion for summary judgment with her own Rule 56(f) motion requesting time to submit additional affidavits and/or take specified deposition evidence to meet the motion. That, alone, is a fatal concession that Petitioner had no additional evidence with which to meet the motion.

In short, the circuit court was correct in finding that the Petitioner's theories and claims were untenable and that Respondents were entitled to judgment as a matter of law.

STATEMENT REGARDING ORAL ARGUMENT

Respondents contend that the facts and legal arguments of this case are adequately presented in the briefs and record, and that the decisional process would not be significantly aided by oral argument. Rule 18(a)(4) of the Rules of Appellate Procedure.

ARGUMENT

The Respondents do not deny the general statements of the Petitioner's brief regarding standards of appellate review of summary judgment awards by the lower court. However, this Court has also stated that it is the duty of a trial court to grant summary judgment if it appears that no genuine issue of material fact is involved. See Spangler v. Fisher, 152 W.Va. 141, 159 S.E.2d 903 (1968). Moreover, summary judgment should be granted if the case involves no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Lengyel v. Lent, 167 W.Va. 272, 280 S.E.2d 66 (1981), Wilkinson v. Searls, 155 W.Va. 475, 184 S.E.2d 735 (1971). In this case, Respondents met those standards for an award of summary judgment.

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE PETITIONER'S FLAWED THEORY OF RECOVERY WAS BASED ON THE CONTENTION THAT SHE HAD ACQUIRED AND HELD A JUDGMENT AGAINST MARK PINSON, WHEN THE SUBJECT JUDGMENT SHE HELD WAS A JUDGMENT ORIGINALLY OBTAINED BY JAMES RIVER COAL SALES, INC., ONLY AGAINST A CORPORATE JUDGMENT DEBTOR—PRODUCERS COAL, INC.

A. Respondent Mark Pinson is not a debtor of Petitioner, Denise Johnson, or James River Coal Sales, Inc., her alleged assignor.

Respondents' Statement of the Case clearly sets forth the simple and elementary point of this case: Petitioner Denise Johnson has only acquired a simple judgment owned by James River Coal Sales, Inc., against another corporation, Producers Coal, Inc. She did not claim to have been assigned the 2014 Promissory Note nor to have acquired some benefit of the Guaranty Agreement. The assigned judgment was entered as a Confessed Judgment on September 30, 2016, in the Virginia Court—over 17 months after the transfer by Mark Pinson, which the Petitioner sought to

attack under the Uniform Fraudulent Transfers Act.[6] Simply put, Respondent Mark Pinson was never made indebted to James River Coal Sales, Inc. Therefore, the Petitioner has no claim against Respondent Mark Pinson. It is as simple as that. And without that debt claim existing, Petitioner cannot void or interfere with any transfer of Respondent Mark Pinson—much less upset the earlier 2015 real estate conveyance to Respondent Ruth Ann Pinson.

As argued by Respondents below, the scope of a judgment is limited to its specific terms. See N.L.R.B. v. Heck's, Inc., 388 F.2d 668, 670 (4th Cir. 1967). In addition, this Court has stated that the legal operation and effect of a judgment must be ascertained by a construction and interpretation of **its** terms. (emphasis added) Coastal Tank Lines v. Hutchinson, 144 W.Va. 715, 721, 110 S.E.2d 735, 739 (1959). Therefore, the present judgment at issue here is limited to its provisions—a judgment solely against Producers Coal, Inc.

As further argued by Respondents, if the 2016 Virginia judgment arose from litigation over a default on the Promissory Note given by Producers Coal to James River Coal Sales, then James River Coal Sales could have sought judgment against Dennis Johnson and/or Mark Pinson as a part of those proceedings. For whatever reason, Mark Pinson was not sued on the guaranty, nor personally included in the confessed judgment.

As Respondents further argued in briefings, if a default on the Promissory Note resulted in the confessed judgment, then the note no longer stands alone to be the basis of any "second suit" and judgment on the same debt. See Sands v. Roller, 118 Va. 191, 86 S.E. 857, 858 (1915). As such, with no independent viability left in the note, there is no additional relevant mechanism to enforce it anew—such as through the leftover guaranty.

[6] The statute will be referred to as such herein, notwithstanding that it is also referred to as the Uniform Voidable Transactions Act.

To the extent that Mark Pinson became a focal point of interest of this debt owed to James River Coal Sales, Inc.; and to the extent it may have been acquired by Petitioner, the trial court below, in arguments on Respondents' summary judgment motion, posed a central series of questions to Petitioner's counsel:

> THE COURT: I still want to know, and you haven't answered this yet, why just the coal company was sued and not Mr. Pinson and Mr. Johnson after they had signed that agreement.
>
> MR. LATTANZI: Uh-huh.
>
> THE COURT: Why didn't you all sue them also?
>
> MR. LATTANZI: For this particular case?
>
> THE COURT: No.
>
> MR. LATTANZI: Or for – in the past?
>
> THE COURT: For the judgment, for the million-dollar judgment.
>
> MR. LATTANZI: Your Honor, that's not something I was – neither of us were a part of that case and –
>
> THE COURT: Well –
>
> MR. LATTANZI: -- that's not something –
>
> THE COURT: -- it may cause you major problems in this case.
>
> MR. LATTANZI: I understand.
>
> (J.A. 133-134)

However, apparently the Petitioner never fully understood. Indeed, from the time of the execution of the Promissory Note by Producers Coal, Inc., and the Guaranty, in November, 2014, through and until August, 2019, there was an apparent decision by James River Coal Sales and Petitioner Denise Johnson to <u>not</u> bring an action against Mark Pinson under any claim, document,

or acquired judgment. The persistence in that course of inaction fatally continued beyond the permissible statutory limit of August 22, 2019.

Consequently, once again, the simple conclusion in this case is that there never was a viable debt asserted against Mark Pinson on which to anchor the UFTA action against Respondent Ruth Ann Pinson. As a result, the Petitioner was left with the task of frantically finding a way to construct a viable link between Denise Johnson's acquired judgment against Producers Coal and Mark Pinson. As discussed hereinafter, none of those tenuous arguments can succeed.

B. Mark Pinson cannot be deemed liable under even the most liberal reading of the UFTA.

The same conclusions are inescapable under the most general reading of the UFTA. Under the definition of § 40-1A-1:

> (c) Claim means a "right to payment" (which admittedly need not in every case be reduced to judgment).
>
> (e) "Debt" means liability on a claim.
>
> (f) "Debtor" means a person who is liable on a claim.

Said yet again, Mark Pinson never was individually indebted on the 2016 judgment debt, or even the promissory note which appears to have given rise to the 2016 Confessed Judgment in Virginia state court. As discussed above, the promissory note, as the basis for the Virginia civil action, merged into the judgment. Indeed, a close reading of the Promissory Note shows that if a default occurred under it, designated attorneys-in-fact would enter a confessed judgment for the full amount then due. (J.A. 031) That was done by the Confessed Judgment of September 30, 2016. (J.A. 028) In as much as the entire amount currently due was presumably reflected in the judgment amount of $1,937,377.00, the prescribed remedy was effected with the judgment awarded to James River Coal Sales, against Producers Coal, Inc. Consequently, a "claim" remained the right of

Petitioner to payment on the judgment against Producers Coal, Inc. She is admittedly the "creditor" of that obligation. However, the "debt" is the judgment debt liability owed by Producers Coal, Inc. The "debtor" is Producers Coal. Indeed, the "debt" is not a debt of Respondent, Mark Pinson; and therefore, Mark Pinson is not a debtor of James River Coal Sales, Inc. Thus, the assignment of its judgment could not confer such a debtor status upon Mark Pinson. [7]

In an attempt to stretch the definitions of the UFTA, in such a way as to allow Petitioner to escape her ties exclusively to a judgment against Producers Coal, she, in her brief, argues that the UFTA does not require that a subject debt be reduced to judgment. Apparently, in an effort to move Petitioner into a general creditor class against Mark Pinson, she seeks to transcend above and beyond the only creditor status she has. In doing so, she argues that a creditor does not need to have a claim reduced to judgment. Indeed, much of her brief is concentrated on a request that this Court embrace the Missouri decision of Curtis v. James, 459 S.W.3d 471 (Mo. App. 2015).

In that case, after a serious automobile collision resulted in litigation, and with the litigation pending, the responsible parties attempted to move virtually all of their assets into a family trust. A separate suit was filed under the UFTA to avoid that transfer. The trial court ruled against the plaintiffs, stating that the underlying motor vehicle tort litigation had not been reduced to judgment. The appellate court reversed, citing the language of the UFTA stating that a claim need not be reduced to judgment in order to be actionable. Respondents contend that that decision has no effect on their own arguments, and gives no support to Petitioner's arguments. In Curtis, the same parties were involved in the two transactions. Moreover, as is the usual case, the event giving rise to liability was followed by the suspect transfer of assets. There was no litigation launched

[7] Again, at no time in any of these proceedings has the Petitioner ever revealed the document by which the judgment owed to James River Coal Sales, Inc., was assigned to Petitioner Denise Johnson—supposedly on March 29, 2017. (J.A. 003)

against third parties clearly beyond a statute of limitations. In those, and all other respects, there is nothing of significance to parallel the facts in this case.

To be sure, even if the Petitioner could be allowed to proceed with her litigation against the Respondents, with or without any judicial finding in any form of personal indebtedness of Mark Pinson on the debt represented by her acquired judgment, her task of going forward under the UFTA would still be formidable. She would be required to demonstrate that Mark Pinson, 17 months before the confessed judgment was even entered in Richmond, was insolvent and/or that he made the April 22, 2015, transfer to his wife in order to intentionally work a fraud on James River Coal Sales, Inc. which had only received the Promissory Note 6 months earlier, in November, 2014. The Petitioner offered no evidence to support these theories below and did not even ask to join Mark Pinson as a party until after Respondent Ruth Ann Pinson filed her motion to dismiss which became a motion for summary judgment upon her submission of extrinsic evidence. That maneuver came too late to comply with the statute of limitations (§ 40-1A-9); and was, as a result, fatal in any event.

C. While the option of a plaintiff to sue a transferee of a fraudulent conveyance under the UFTA is conceded, Respondent Mark Pinson was an indispensable party, whose timely joinder was essential to any conceivable cause of action consistent with the Plaintiff's/Petitioner's theory of recovery.

Rule 19(a) of the West Virginia Rules of Civil Procedure mandates the joinder of any party:

> "claiming an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leaving any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Admittedly, subpart (b) to Rule 19 lists factors for the Court to consider when joinder of such an indispensable party is not feasible, before it decides to proceed or dismiss the action. These

factors include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to those already parties; (2) the extent to which special provisions can lessen any prejudice to the existing parties can be lessened or avoided; (3) whether a judgment in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Under any analysis of the facts of this case, and as troubled the trial court during motion arguments as set forth above, Mark Pinson is clearly an indispensable party to this controversy. The lack of any known effort to collect against him on the guaranteed promissory note of 2014; the lack of including him in the confessed judgment of 2016; and the lack of finding him liable in any proceeding in any forum—but still attempting to claim that his 2015 transfer should be voided under the UFTA compels the recognition of him as a true and dispensable party. Yet, by the time of the attempted joinder of him as an additional defendant, following arguments on Respondents' motion for summary judgment, in August, 2019, the statute of limitations of § 40-1A-9 had expired. Thus, extreme prejudice would be worked against Mark Pinson, and particularly, Respondent Ruth Ann Pinson.[8] Consequently, his belated joinder is clearly "not feasible", under the criteria of WVRCP Rule 19(b).

Indeed, the belated effort came too late to save the already-flawed cause of action asserted by the Petitioner.

II. THE PETITIONER COULD NOT INVOKE THE "RELATE BACK" PROVISIONS OF RULE 15 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE SO AS TO BRING THE ATTEMPTED JOINDER OF MARK PINSON WITHIN THE STATUTE OF LIMITATIONS, WHERE THERE OBVIOUSLY HAS BEEN NO "MISTAKE" IN FAILING TO NAME HIM IN THE INITIAL COMMENCEMENT OF THE CIVIL ACTION.

[8] Indeed, when Petitioner launched her action, and she knew or should have known that Mark Pinson's status was, or could easily be argued to be, indispensable, she was required to state the reasons for his nonjoinder under WVRCP 19(c).

Even assuming, arguendo, that a factual basis existed to support the joinder of Mark Pinson, it can be seen that Petitioner cannot qualify to amend her pleadings to have him added to the case, and have the joinder fall within the 4-year statute of limitations provided by § 40-1A-9.

After apparently gleaning from the trial court judge, in arguments on the Respondent's motion to dismiss/for summary judgment, that Mark Pinson was likely an indispensable party, and that he had not been joined, the Petitioner feverishly, but belatedly, attempted to cure the omission with a motion to amend the complaint to personally name Mark Pinson as an additional defendant. In doing so, their motion strangely claimed that his omission from the initial framing of the suit, was the product of a "mistake". The usage of that term was an attempt to utilize the provisions of WVRCP Rule 15(c)(3). That Rule provides that an amendment adding a party may relate back to the date of the original pleading and the inception of the suit, when the party sought to be brought in has (A) received notice of the institution of the action and *will not be prejudiced*, and (B) knew or should have known that, but for **the mistake** concerning the identity of the proper party, the action would have been brought against that proposed party. (emphasis added)

Regardless of the means by which the Petitioner claims that Mark Pinson should have received "notice" of the Petitioner's novel theories of recovery against him and against the transfer of his real estate to his wife almost a year and a half before the confessed judgment was entered in Virginia, it can hardly be said that Mark Pinson was "overlooked" or that there had been some "mistake" in failing to identify him as a principal figure in the Petitioner's theory or theories of recovery. Specifically, and literally relying on this theory of "mistake" in their very motion to amend, the circuit court was clearly correct in finding that such a representation that Mark Pinson was overlooked by "mistake" in these proceedings is preposterous. Accordingly, since such a theory of "mistake" is an integral and necessary part of the criteria in order to achieve the "relation

back" of any amendment, joining Mark Pinson as a party, without the benefit of such "relation back", would doom the complaint and theory of recovery under the UFTA, in any event. See also Brooks v. Isinghood, 213 W.Va. 675, 584 S.E.2d 531, (2003).

Statutes of limitation are not simply ruses to hide behind. The import of statutes of limitation is stressed in many decisions of this Court. In Perdue v. Hess, 199 W.Va. 299, 484 S.E.2d 182 (1997), it was explained that:

> Statutes of limitation are statutes of repose and the legislative purpose is to compel the exercise of a right of action within a reasonable time; such statutes represent a statement of public policy with regard to the privilege to litigate and are a valid and constitutional exercise of the legislative power. 484 S.E.2d at 185.

More recently, this Court has observed that:

> The basic purpose of statutes of limitation is to encourage promptness in instituting actions; to suppress state demands or fraudulent claims; and to avoid inconvenience, which may result from delay in asserting rights or claims when it is practicable to assert them. *citing* Morgan v. Grace Hospital, Inc., 149 W.Va. 783, 791, 144 S.E.2d 156, 161 (1965).

Within the context of this case, a 4-year time within which an inter-spousal transfer between the Pinsons could be attacked under the UFTA for a transfer 17 months before the entry of a judgment against a company in which Mark Pinson happened to be a principal, is clearly not harsh—much less unreasonable.

To be sure, there is a weak representation in Petitioner's brief that her claim for relief is equitable and not bound by any express statute of limitation. In examination of her Complaint demonstrates that it is wholly founded on the UFTA and merely, in passing, asks that any further transfers of the property be enjoined. (J.A. 002-003)

III. PETITIONER, AS PLAINTIFF BELOW, FAILED TO DEMONSTRATE THAT DISCOVERABLE EVIDENCE WAS EVEN AVAILABLE OR DESIRED WHICH WOULD PRESUMABLY SUPPORT THEIR CONTENTION THAT MARK PINSON WAS INSOLVENT AT

THE TIME OF THE PRE-JUDGMENT 2015 PROPERTY TRANSFER OR THAT HE DID SO WITH ACTUAL FRAUDULENT INTENT.

Petitioner has made general and passing arguments that dismissal of the suit was premature in that the opportunity for appropriate discovery was precluded. However, when one examines the 2019 commencement of the suit below, it is clear that the Petitioner chose to plead the following, without service of any discovery requests:

> (A) The Respondent Mark Pinson is a judgment debtor on the 2016 confessed judgment running exclusively between two corporations (he is not);
>
> (B) That the Petitioner has a clear right to sue him to collect a judgment against Producers Coal, Inc., on which he is a judgment debtor (she does not);
>
> (C) That the UFTA clearly allows an assignee of a judgment creditor to sue on such a "claim" (it does not);
>
> (D) That the Petitioner could sue solely the transferee (Ruth Ann Pinson) of the earlier, pre-judgment property transfer, to set aside the conveyance; and that
>
> (E) Petitioner could do so because Mark Pinson was insolvent at the time of the 2015 property transfer and made the transfer in an intentional attempt to defraud the original judgment creditor: James River Coal Sales, Inc.[9]

One would hope that the Petitioner sought to determine whether there was an actual and factual basis to file her action below, when it was brought in April, 2019. Rule 11 of the West Virginia Rules of Civil Procedure, requires as much by providing, in part:

> By presenting to the court...a pleading..., an attorney...is certifying that to the best of the person's knowledge, information, and belief formed after an inquiry reasonable under the circumstances,...(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other

[9] It should be noted that the facts of the transactions were, or reasonably should have been known, to the Petitioner from the time of her alleged "acquisition" of the judgment in 2017, through her "registration" proceeding later in 2017, as well, when she caused an Abstract of Judgment to be recorded.

> factual contentions have evidentiary support or, of specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and...

However, even more compelling is the fact that the Petitioner, in responding to the Respondent Ruth Ann Pinson's motion to dismiss/for summary judgment, never availed herself of WVRCP 56(f) which provides:

> (f) *When affidavits are unavailable.* – Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

To be sure, beyond the bare text of Rule 56(f), this court has held that there is a burden to show a valid basis for the continuance from hearings upon a motion for summary judgment so that discovery can be obtained. That holding requires:

> In order to obtain a discovery continuance under subdivision (f), a plaintiff must: (1) articulate some plausible basis for the belief that specified "discoverable" material facts likely exist that have not yet become accessible to the plaintiff; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier. Harrison v. Davis, 197 W.Va. 651, 478 S.E.2d 104, (1996) W.Va. LEXIS 157 (1996); Harbaugh v. Coffinbarger, 209 W.Va. 57, 543 S.E.2d 338 (2000).

Clearly, such a showing would have required effort. Petitioner did not even try.

CONCLUSION

The trial court correctly held that the subject foreign judgment from the Virginia state court was not a judgment against Respondent Mark Pinson in his individual capacity. Therefore, assuming that Petitioner Denise Johnson "acquired" the judgment of James River Coal Sales, Inc., against Producers Coal, Inc., she acquired that judgment and nothing more.

Petitioner's attempt to maintain this action depended upon the adjudication of a debt owed by Mark Pinson arising out of the corporation/corporation Virginia judgment of 2016. There is no evidence that such a "claim" was ever made upon Mark Pinson, much less an adjudication that he was an adjudicated debtor upon it.

Petitioner's belated attempt to join Mark Pinson in order to finally obtain that adjudication is fatally flawed in that the attempt to join him by an amendment to pleadings was based on the assertion that his omission was a "mistake", a position the trial court properly found unattainable. Without his joinder, an unquestionable indispensable party is lacking.

To the extent that, somehow, additional evidence could have been presented to show why, with or without Mark Pinson's joinder, the Petitioner's case was viable, was fatally undercut by Petitioner's failure to utilize and invoke Rule 56(f) of the WVRCP.[10]

Based on all of the above, the trial court correctly refused the late motion to join Mark Pinson, granted summary judgment for dismissal, and removed the clouds on Ruth Ann Pinson's residential real estate.

The petition of Petitioner, Denise Johnson, for appeal should be dismissed.

RUTH ANN PINSON,
Respondent,

By Counsel:

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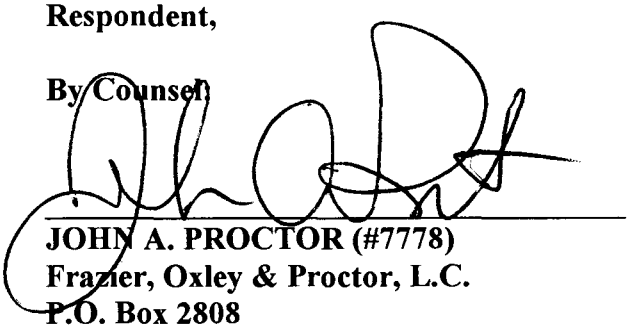
[10] It is certainly the hope of Respondents that the finding and conclusion of the trial court that the Petitioner should have been sufficiently diligent to use Rule 56(f) if there was such evidence, will not be undercut.

MARK PINSON,
Respondent,

By Counsel:



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