No. 22-0333

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

ESTATE OF SHERRY CLINE TILLEY,
by and through Jesse Graybeal,
Candice Cline, Bradley Graybeal,
and Ernest Cline, Individually
and as Co-Administrators of
the Estate of Sherry Cline Tilley,

Plaintiffs below, Petitioners,

v.

Civil Action No. 09-C-30-M
Honorable Rudolph J. Murensky, II

JUSTIN JUSTICE,

Defendant below, Respondent

DEFENDANT'S REPLY BRIEF

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I. STATEMENT OF THE CASE

The Circuit Court of McDowell County was right to find that enforcement of the judgement order, not perfected for more than eleven years, was barred by the equitable doctrine of laches, and here are the facts supporting that ruling.

The facts related to this matter are actually straight forward and have nothing to do with the underlying allegations of the original complaint. This controversy concerns the extraordinarily delayed entry of a default judgement order and the doctrine of laches. The pertinent facts about the issue in question are as follows.

The Complaint was filed March 4, 2009 (Appendix at 7). The Circuit Court has found that service was obtained, either in person or on an adult resident of Respondent's home on April 10, 2009 (Appendix at 165-166), No answer having been filed, a default judgement hearing was conducted on October 25, 2010, and he Circuit Court instructed Petitioner's counsel to do two things: (1) submit an affidavit that the defendant (your Respondent herein) was not an infant, incompetent or convict so as to comply with West Virginia Rule fo Civil Procedure 55(b)(2), and (2) prepare an accurate default judgement order for submission to the Circuit Court of McDowell County (Appendix at 172).

Petitioner did not submit anything at all to the Circuit Court until November of 2019, and did not submit the Rule 555(b)(2) affidavit even then; nonetheless, the court did enter the incorrect order submitted by petitioner on November 20, 2019 (Appendix at 69). Almost another fifteen (15) months later on March 2, 2021, Petitioner attempted to submit a corrected order (which was still incorrect) and still did not comply with Rule 55(b)(2) (Appendix at 159), despite having at that point expended more than ten years from the default judgement award in which to

have done so. The Circuit Court made clear that entry of the default judgement was contingent upon submission of the affidavit (Appendix at 42 and 172).

The Order submitted in March of 2021 was also incorrect (Appendix at 159, Footnote 12). Eventually, Petitioner was represented by another counsel, Clinton Smith, who requested a hearing, and a hearing was held on September 14, 2021 (Appendix at 47-66). This was nearly ELEVEN YEARS after the default judgement hearing of October 25, 2010. The Circuit Court found that Counsel Smith could not account for his predecessor's delay in filing the Affidavit upon which said judgement was contingent (Appendix at 162). Even at the September 14, 2021, hearing, Petitioner had not filed the affidavit required by the Court (Appendix at 172, paragraph 27). It was not until October 6, 2021, more than a decade after being instructed to do so, that Petitioner submitted that affidavit (Appendix at 172, paragraph 27). Finally, on November 20, 2021, the Circuit Court of McDowell County entered a default judgement order more than eleven years after the October 25, 2010 default judgement hearing (Appendix at 172, paragraph 28).

This Respondent filed a motion to set the default judgement aside relying primarily on the doctrine of laches on December 8, 2021 (Appendix at 80) and a motion for stay of the judgement order (Appendix at 81). A judgement cannot be collected after ten years passage of time, and the default judgement order, because of Petitioner's unexplained delays, was not entered properly until more than eleven years later – the Circuit Court of McDowell County found that its entry of the November 2019 order was improvident as the affidavit was not submitted at that time (Appendix at 168, footnote 15).

The Petitioner allowed eleven years to pass before even submitting the affidavit, and the Circuit Court, in footnote 15 to its order, stated that the default judgement ruling was "...

contingent upon Plaintiff's counsel submitting an attorney affidavit and proposed order ...", which affidavit was not produced for almost eleven years (Appendix at 168).

The Petitioner spent eleven years getting an affidavit submitted on a judgement that would only have been enforceable for ten years if handled properly. **See, West Virginia Code 38-3-18.**

On hearing of your Respondent's motion to set aside default, the Circuit Court found the following occurred in court: (Appendix at 150-175).

1. The Court orally announced intentions to grant default on October 25, 2010 contingent upon the provision of an attorney affidavit and proposed order.
2. Nothing at all happened in court for more than nine years until Petitioner's first counsel filed a proposed order without an attorney affidavit and the Court improvidently entered it.
3. Then, almost 15 months later, and still without affidavit, the Petitioner attempted to correct errors in the previously submitted order.
4. The Court declined to enter that order as it was incorrect, and then in the summer of 2021, Petitioner with new counsel sought a hearing to get a correct order entered.
5. Even by that hearing on September 14, 2021, after the passage of almost a full eleven years, there was still no affidavit.
6. Finally, once an affidavit was submitted, the Court entered the default judgement order on November 20, 2021.
7. The Court specifically found that the two tasks, submitting an affidavit and

proposed order, "... were not unduly difficult or complicated. They did not require significant periods of time to complete. Rather, these tasks were relatively routine practices for a practitioner of law, and the Plaintiffs were laboring under no cognizable disability or impairment, yet neither of these objectives were completed in a remotely timely manner. In fact, the said *Attorney Affidavit* was not filed until October 6, 2021 (almost eleven years following the October 25 2010 hearing). . ." (Appendix at 172, paragraph 27).

On hearing of your Respondent's motion to set aside default for laches, the Circuit Court found the following occurred factually:

1. Respondent Justin Justice would have been essentially judgement proof and able to bankrupt any judgement entered in 2010 or reasonably thereafter.
2. Respondent Justin Justice, without entry of a judgement order, had industrially gone to work and acquired property now in excess of the West Virginia bankruptcy exemptions.
3. Respondent Justin Justice was deprived of the opportunity to structure finances in a way so as to protect assets.
4. There was no explanation for Petitioner's delay. More than eleven years passed from the October 25, 2010 hearing before Petitioner submitted the affidavit upon which an order was contingent.
5. The Court specifically found, "The default judgement in favor of Plaintiffs would have been essentially uncollectible at the time it should have been entered in 2010. It is only now after [Respondent] Justin Justice has acquired certain assets

by virtue of engaging in a successful business for many years do the Plaintiffs seek to enforce their rights against him" See, Appendix at 173.

6. The Court specifically found "[Respondent] Justin Justice would undoubtably suffer great prejudice, extreme disadvantage, and manifest harm from Plaintiff's dilatory actions. See, Appendix at 173.

II. SUMMARY OF ARGUMENT

The Circuit Court of McDowell County properly analyzed and applied the Doctrine of Laches. The controlling element of the equitable defense of laches is prejudice. Maynard v. BOE of Wayne County, 178 W.Va 53, 59, 357 S.E.2d 246, 253 (1987). A court applying laches may choose to employ an analogy to the statute of limitations, but the time applied may also be longer or shorter, depending on a case by case basis. See, Maynard, 178 W.Va 53, 59, 357 S.E.2d 246, 253 (1987) (citing Ruckman v. Cox, 63 W.Va 74, 78, 59 S.E.2d 760, 761 (1907)).

Petitioner took 9 years to submit an order without an attorney affidavit. Had anyone attempted to enforce that order, it was both incorrect and subject to being vacated because the contingency was not achieved (attorney affidavit). Depending on which default judgement order you are looking at, the Petitioner took somewhere between over 9 and over 11 years to get an order entered. With the Circuit Court's finding that the default order was contingent on an attorney affidavit, the delay was really the eleven years.

During that inexcusable and inexplicable delay, Respondent's circumstances changed through the virtue of his good work, and so the delay places him as a great disadvantage.

III. STATEMENT REGARDING ORAL ARGUMENT

The issue at hand is the proper application of the doctrine of laches and the inequity of a delay of more than a decade between default judgement hearing and the ultimate submission of an attorney affidavit and proposed order. The statute of limitation on the enforcement of a judgement is irrelevant as there is no dispute that the Petitioners never tried to collect anything until fall of 2021. The continuing role of laches as a sound equitable source of relief from unexcused dilatory conduct is important enough for a Rule 19 argument and written opinion.

IV. ARGUMENT

The McDowell Circuit Court got this one right. It is not equitable to sit on one's right to a judgement for a decade, give or take, and then only try to enforce it after the other party, through his hard work and industry, makes a little something of himself.

The application of the doctrine of laches is nothing new in our jurisprudence and offers relief to one who is significantly prejudiced by another's delay in exercising a right, claim or judgement. Delay which places another party at a disadvantage constitutes laches. Syl Pt 3., Carter v. Carter, 107 W.Va, 394, 148 S.E.2d 378 (1029). The doctrine of laches applies even where a statute of limitations may not. Syl Pt. 2, Condry v. Pope, 152 W.Va. 714, 166 S.E.2d 167 (1969).

This case, from October 25, 2010, languished on the Circuit Court's docket for nine years without any activity whatsoever. It should have been dismissed under Rule 41(b) eight or nine times before the next activity. Then, when Petitioner acted at all, Petitioner did so incorrectly without the attorney affidavit upon which the Circuit Court ruled the judgement was contingent.

In fact, the attorney affidavit was filed almost eleven years after the Circuit Court ordered it done.

During that delay, the Circuit Court found, after a hearing during which the court entertained both testimony and proffer, that There was no explanation for Petitioner's delay of more than eleven years between the October 25, 2010 and the eventual submission of Petitioner's attorney affidavit.

The Court further found that, "The default judgement in favor of Plaintiffs would have been essentially uncollectible at the time it should have been entered in 2010. It is only now after [Respondent] Justin Justice has acquired certain assets by virtue of engaging in a successful business for many years do the Plaintiffs seek to enforce their rights against him" See, Appendix at 173.

And the Court concluded that, "[Respondent] Justin Justice would undoubtably suffer great prejudice, extreme disadvantage, and manifest harm from Plaintiff's dilatory actions. See, Appendix at 173.

On these facts, the Circuit Court was right to sustain the defense of laches and bar enforcement of the judgement order. We cannot allow a plaintiff to sit idly by for nine years to seek entry of a judgement while an impoverished defendant makes something of himself following the American dream. Here, the defense of laches is appropriate, See, Maynard, 178 W.Va. At 60, 357 S.E.2d at 254 (citing 2 J. Pomeroy, A Treatise on Equity Jurisprudence Sections 419a, 419b, 419d, (5th ed 1941) (for the proposition that laches does not require the expiration of a statute of limitations).

In the case *sub judice*, even when Petitioner finally submitted a proposed order, it was wrong and without the attorney affidavit. In a very real sense, the Petitioner did not comply with

the Court's order until almost eleven years had passed.

To quote the Circuit Court, "[l]aches is an equitable defense, and its application depends upon the facts of each case." (Citing ex rel DHHR v. Carl Lee H, 196 W.Va 369, 374, 472 S.E.2d 815, 820 (1996). And quoting the West Virginia Supreme Court, "Laches is a delay in the assertion of a right which works to the disadvantage of another ..." Syl Pt. 4, ex rel DHHR v. Carl Lee H, 196 W.Va 369, 374, 472 S.E.2d 815, 820 (1996).

The order from which this appeal was taken is not erroneous. Any decision to the contrary essentially deletes the doctrine of laches from jurisprudence. As the West Virginia Supreme Court stated in Syl Pt 3, Carter v Price, 85 W.Va 744, 102 S.E. 685 (1920) and more recently in Syl Pt 2, Mundy v. Arcuri, 165 W.Va 128, 267 S.E.2d 454 (1980):

> **"Where a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state if the right be then enforced, delay become inequitable, and operates as estoppel against the assertion of the right . . . When a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."**

Respondent would have been fully within his rights to bankrupt that judgement in 2010 or shortly thereafter. Respondent would have been fully within his rights to structure his business, property, and assets to as to protect the same. He could have availed himself of that to avoid loss to the judgement. However, a decade later, he has lost a full decade of opportunity to protect himself and to avail himself of legal opportunities to advance his interests.

V. CONCLUSION

A party cannot be allowed to sit on a right such as this for eleven years and wait for another to be so substantially changed that the other is prejudiced and loses rights to self-protection. The Petitioner did not comply with the Court's order for almost a full eleven years. That delay enormously prejudiced the defendant, Justin Justice. The doctrine of laches exists in the law to prevent one party's negligence and resulting delay from exactly the result that would otherwise occur here.

This is a textbook example of laches.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I, Timothy P. Lupardus, hereby certify that I have served the foregoing **DEFENDANT'S REPLY BRIEF** upon counsel for Plaintiff by placing a true copy thereof into the United States mail, postage prepaid, addressed to counsel of record as follows:

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Amanda J. Taylor, Esq.
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on this the 11th day of October 2022.

Timothy P. Lupardus (#6252)