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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

STATE OF WEST VIRGINIA, ex rel.,
TERMNET MERCHANT SERVICES,
INC., a foreign corporation, Defendant
below,
Petitioner,

vs.

THE HONORABLE PHILIP B. JORDAN,
Circuit Judge of Tucker County, West Virginia
and Yvonne Marson, Plaintiff below,
Respondents

Action No. 050709

Below:

Civil Action No. 01-C-28
Tucker County Circuit Court

YVONNE MARSON'S RESPONSE TO PETITIONERS WRIT FOR PROHIBITION OR MANDAMUS AND FOR STAY OF PROCEEDINGS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

POINTS AND AUTHORITIES iii

RESPONSE TO PETITION FOR WRIT..... 1

ADDITIONAL FACTS 1

ISSUE I 7

ISSUE II 11

ISSUE III. 13

CONCLUSION. 15

TABLE OF AUTHORITIES

CASE LAW

State ex rel. Robinson v. Michael,
166 W. Va. 660, 276 S.E.2d 812 (1981). 8

International UMWA v. Bagwell,
512 U.S. 821 (1994). 8,9

State Farm Mutual Auto Ins. Co., v. Stephens,
188 W. Va. 622, 425 S.E.2d 577 (1992) . .. .10,11

Given v. Field,
199 W. Va. 394, 484 S.E.2d 697 (1997).. 11

State ex rel. Hoover v. Berger,
199 W.Va. 12, 483 S.E.2d 12 (1996)... 12

Intercity Realty Co., v. Gibson,
175 S.E.2d 452, 455 W. Va (1972) ... .14,15

STATUTE

West Virginia Rules of Civil Procedure 60(b). 12,13,15

West Virginia Rule 55(b). 14

POINTS AND AUTHORITIES

Under West Virginia Law, "[w]hether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." Syl. pt. 1, *State ex rel. Robinson v. Michael*, 166 W. Va. 660, 276 S.E.2d 812 (1981).

Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner [sic] so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil." Syl. Pt. 2, *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981).

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)."

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RESPONDENT, YVONNE MARSON'S RESPONSE TO PETITIONERS WRIT FOR PROHIBITION OR MANDAMUS AND FOR STAY OF PROCEEDINGS

Comes now, the Respondent, Yvonne Marson, by and through her attorney, Frank P. Bush, Jr. and for her Response to Petitioner's Writ For Prohibition or Mandamus and for Stay of Proceedings states as follows:

ADDITIONAL FACTS

Default Judgement was awarded Yvonne Marson (Marson) against TermNet Merchant Services, Inc., (TermNet) on November 9, 2001. On December 17, 2001 a hearing was held on TermNet's motion to set aside the default judgment and denied by Order entered January 3, 2002. On January 11, 2002, TermNet filed a motion to reconsider which was also denied. A hearing was held on TermNet's Motion to Reconsider and also to assess the unliquidated damages in the case. TermNet's President Charles Thompson appeared at the hearing and was represented by counsel. By Order entered February 4, 2002, Marson was awarded $20,760.00 in addition to the $8,146.00

previously awarded. TermNet filed a second motion to reconsider and motion for new trial on February 13, 2002, which were again denied by Order entered March 4, 2002. After the Motion to set aside the default judgment was denied, TermNet appealed to the West Virginia Supreme Court of Appeals. The Petition for Appeal was refused by order dated July 29, 2002. Marson then served TermNet with interrogatories in aid of execution. A copy of the interrogatories are attached as Respondents Exhibit 1. TermNet filed incomplete answers, Respondents Exhibit 2. A motion to compel was filed and heard by the Hon., Judge Jordan in the Circuit Court of Tucker County, West Virginia. TermNet argued that assets located outside the state are not discoverable. The court ruled that out of state assets were discoverable because judgments may freely be transferred from state to state. Judge Jordan ordered TermNet to answer the discovery by April 25, 2002. Marson filed her first Petition for Contempt after TermNet refused to comply with the Court's Order. Judge Jordan held TermNet in Contempt and ordered that if TermNet failed to answer the discovery as ordered by July 1, 2002. TermNet would pay a *per diem* sanction of $250.00 until the discovery was answered. TermNet was represented by local counsel and by an Atlanta Law Firm throughout these proceedings and was presumably being advised not to answer the discovery or else refused against the advice of counsel. TermNet refused to answer the discovery as ordered. After three months Marson filed her Second Petition for Contempt. Marson asked that TermNet be compelled to answer or for an increase in the *per diem* sanction in an amount sufficient to compel TermNet to

answer. The Second Petition for Contempt was served on both TermNet and on Gary S. Freed, Esq., its Atlanta counsel. TermNet's local counsel moved to withdraw from the case, which was granted. See Certificate Respondents Exhibit 3. TermNet intentionally refused to answer and chose not to reply to the Second Petition or appear at the hearing. After notice and hearing held October 27, 2003, the *per diem* sanction was increased prospectively to $1,000.00 for every day after October 27, 2003 that TermNet refused to comply with the Court's Order.

After Marson filed a Third Petition for Contempt, seeking answers to her discovery requests. Judge Jordan raised the *per diem* sanction prospectively to $2,500.00. Judge Jordan granted Marson final judgment for the accrued sanctions at that time. TermNet received notice of the hearing and was served with the Third Petition for Contempt. Its Atlanta attorney was also served with both. TermNet chose not to respond and not to appear as ordered and chose not to answer the discovery request. TermNet did not appeal Judge Jordan's ruling on the Third Petition for contempt. Rather than comply with the Court's order, TermNet chose instead to file a civil suit in Cobb County, Georgia on March 12, 2004 against Marson claiming that Marson perpetrated a fraud upon the Circuit Court Tucker County. TermNet sought compensatory damages, attorney fees and $250,000.00 in punitive damages in the Georgia suit.

The Georgia case was removed to Federal Court. In a comprehensive opinion attached as Respondents Exhibit 4, Judge Duffey, the federal district judge, granted

Marson summary judgement and dismissed TermNet's Complaint. Judge Duffey analyzed the applicable West Virginia Law and upheld the decision of Judge Jordan. Judge Duffey also found no basis for TermNet's claims of fraud. See Duffey Order. TermNet is misleading this Court by claiming actions are pending in Georgia and Florida. In actuality all efforts in Florida and Georgia have failed. TermNet is trying to appeal the Georgia and Florida decisions.

Marson filed her fourth Petition for Contempt on September 8, 2004. TermNet appeared by counsel and asked the Court to stay further proceedings pending the outcome of the case in Federal Court in Georgia. TermNet still refused to answer and was held in contempt and the daily sanction was increased to $3,500.00 because the previous sanctions proved inadequate to cause TermNet to answer. TermNet continued to refuse to answer Marson's discovery. TermNet again argued that it was denied due process in the Tucker County Court and further alleged that the West Virginia Supreme Court of Appeals "rubber stamped" Judge Jordan's original decision without addressing the issues. See TermNet Motion for Stay Petitioner's Appendix 10. By Order entered October 25, 2004 the Fourth Petition for Contempt was granted and the accrued *per diem* sanctions were reduced to a final judgment. See Order Petitioner's Appendix 9. TermNet did not appeal the judgment within the four month time limit.

Marson filed a Fifth Petition for contempt, seeking an order compelling answers, which was granted along with a final judgment for the additional accrued sanctions and

attorney fees.

Marson filed an action in Florida to record two of the five Tucker County Judgments on February 17, 2005. TermNet objected but the Florida Court ruled that the Judgment was valid and enforceable as if rendered in the State of Florida. See Order Respondent's Exhibit 5. TermNet was served with discovery requests in the Florida action. TermNet once against refused to answer any discovery. A Motion for Contempt was filed against TermNet in Florida also. See Motion for Contempt Respondent's Exhibit 6.

Under Rule 3 of the West Virginia Rules of Appellate Procedure the deadline to appeal a final order is four months. Any applicable appeal deadline has expired on the first four final judgments rendered by Judge Jordan in Tucker County. The Deadline to file a motion under Rule60(b) to set aside the original judgment based on allegations of fraud expired in December of 2002.

The deadline to appeal the decision on the Fifth Petition to Compel has not expired. TermNet has a pending appeal in the 11th Circuit Court of Appeals and in the Bay County Circuit Court in Florida. Thus TermNet has remedies besides the writ of prohibition.

After being compelled to do so and held in contempt and sanctioned on five separate occasions, TermNet refuses to answer Plaintiff's interrogatories as ordered. TermNet has not advanced any valid legal arguments as to why it should not be

compelled to answer, rather, it has let the sanctions accrue for nearly two years. TermNet tried filing suit in Georgia seeking $250,000.00 in compensatory damages. The suit was dismissed. The Federal Court analyzed the Tucker County Judgment under West Virginia Law and ruled that Judge Jordan made the right decision. See opinion of Hon. Judge Duffey of the Federal District Court in the Northern District of Georgia, Respondent's Exhibit 4. TermNet tried to challenge the transfer of the previous judgments in Florida. Those efforts have also failed. The Circuit Court of Bay County Florida rejected TermNet's argument and ruled that the Tucker County judgments were valid and enforceable as if they had been entered in Florida. Thus far TermNet has lost at every turn in three states. TermNet has not succeeded in any court, state or federal in having the judgment of the Circuit Court of Tucker County rendered invalid and rightly so. TermNet refused to answer interrogatories requesting identification of assets. TermNet has not asserted any legally valid argument as to why it should not answer. In fact at the hearing held March 24, 2005, TermNet's counsel stated that he could not explain why TermNet refuses to answer the interrogatories, and made sure to explain that he was not involved in that decision. One appeal has been refused. The time to appeal the first, second, third and fourth Motions for contempt expired. Summary Judgment was granted in the Federal Court in Georgia and judgment was entered in Florida. This same attack has been tried and has failed now seven times.

TermNet claims that answering discovery impacts it ability to exercise its rights to

challenge the validity of the Tucker County judgments. There is no legal basis for that statement. In fact TermNet has tried to get three different courts to set aside the judgment each effort has failed. TermNet is shielding its assets to prevent Ms. Marson from collecting her judgment.

Ms. Marson seeks only to collect her judgment. She has not done anything to adversely affect TermNet's efforts to collaterally attack the judgment. TermNet has lost at every turn thus far, having let deadlines go, made unfounded legal arguments and filed a frivolous suit in Cobb County, Georgia.

ISSUE I

TermNet claims the contempt sanctions for discovery violations are criminal and not civil and thus may only be rendered after a jury trial. There is no question, that TermNet blatantly and intentionally refused to answer the seven interrogatories propounded by Marson. TermNet was first ordered to answer the interrogatories or pay a *per diem* sanction of $250.00. The *per diem* sanction was levied in an amount calculated to create an adequate incentive for TermNet to answer the interrogatories. TermNet was given seven days within which to answer before the sanction began. See Order dated June 24, 2003, Respondent's Exhibit 7. TermNet, was represented by both local and Atlanta counsel decided not to answer and defy the Court's order. Over the next several months, Judge Jordan increased the *per diem* sanction because the previous sanction proved inadequate to compel TermNet to answer.

Under West Virginia Law, "[w]hether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate." Syl. pt. 1, *State ex rel. Robinson v. Michael,* 166 W. Va. 660, 276 S.E.2d 812 (1981).

"Where the purpose to be served by imposing a sanction for contempt is to compel compliance with a court order by the contemner [sic] so as to benefit the party bringing the contempt action by enforcing, protecting, or assuring the right of that party under the order, the contempt is civil." Syl. Pt. 2, *State ex rel. Robinson v. Michael,* 166 W.Va. 660, 276 S.E.2d 812 (1981).

TermNet cites *International UMWA v. Bagwell,* a U.S. Supreme Court case in its motion. If that case is applied to the case at bar, the sanctions imposed by Judge Jordan are civil and not criminal. *Bagwell* involved sanctions against protesting mine workers who engaged in unlawful labor activities. The union was sanctioned $64, 000,000.00. In that case the Supreme explained the distinction between criminal contempt and civil contempt at syllabus points (a) and (b) as follows:

> (a) A criminal contempt fine is punitive and can be imposed only through criminal proceedings, including the right to jury trial. A contempt fine is considered civil and remedial if it either coerces a defendant into compliance with a court order or compensates the complainant for losses sustained. United States v. United Mine Workers of America, 330 U.S. 258, 303-304. Where a fine is not compensatory, it is civil only if the condemner has an opportunity to purge, such as

with *per diem* fines and fixed, suspended fines. Pp. 5-9.

(b) Most contempt sanctions share punitive and coercive characteristics, and the fundamental question underlying the distinction between civil and criminal contempt is what process is due for the imposition of any particular contempt sanction. Direct contempt can be penalized summarily in light of the court's substantial interest in maintaining order and because the need for extensive fact-finding and the likelihood of an erroneous deprivation are reduced. Greater procedural protections are afforded for sanctions of indirect contempt. Certain indirect contempt are particularly appropriate for imposition through civil proceedings, including contempt impeding the court's ability to adjudicate the proceedings before it and those contempt involving discrete, readily ascertainable acts. For contempt of more complex injunctions, however, criminal procedures may be required. Pp. 13-17. *International UMWA v. Bagwell,* 512 U.S. 821 (1994).

When this analysis is applied to the case at bar, the penalties in this case are *per diem* with an opportunity for TermNet to purge itself of contempt by answering the interrogatories. Thus under syllabus point (a) the sanctions are civil, not criminal.

There is no question that TermNet has not answered the discovery requests. The Court need not make an extensive factual inquiry into that issue. Certainly a jury trial is not required. TermNet has essentially admitted it hasn't answered and from day one has maintained that it is not obligated to answer.

TermNet has been provided notice and has had a simple remedy to purge itself of contempt. Answer the interrogatories. There is no factual dispute about whether TermNet answered as ordered.

TermNet admits it received notice of all of the Motions for Contempt and actually appeared by counsel in the first, fourth and fifth Motions for contempt. In each order the Court gave TermNet the opportunity to purge itself of contempt by answering the

discovery requests, In fact, in the First order, TermNet could have avoided every penny of the sanctions leveled against it by answering the Plaintiff's discovery request within 10 days. TermNet never appealed that order and never answered either.

TermNet argues that the accumulated sanctions are excessive and not reflective of any damages suffered by the Plaintiff. This analysis is flawed as well. The amount of the sanction to be levied for failure to answer discovery is an amount that the Court deems sufficient to compel the respondent to answer. *State Farm Mutual Auto Ins. Co., v. Stephens,* 188 W. Va. 622, 425 S.E.2d 577 (1992). The proof is in the pudding. In this case, a *per diem* sanction of $250.00 proved an inadequate amount to compel TermNet to respond. $1,000.00 per day was inadequate, as was, $2,500.00 per day. It was not until the sanction was raised to $3,500.00 that TermNet filed a partial response. The Court's approached was incremental, in accord with the applicable law within the Court's discretion.

It is no argument that a pending motion stays discovery. Discovery is not stayed because of a pending motion. As paltry as the pending Motions, a stay should not be granted. By Order dated February 18, 2005, the Circuit Court of Bay County, Florida recognized the judgments West Virginia as if it had been rendered in the State of Florida. See Order Attached as Respondent's Exhibit 5.

TermNet represents to this Court that it is making good faith efforts in Florida and Georgia's Federal Court when in fact they have lost in each venue, and have a pending

Motion to Compel for failure to answer discovery in Florida, See Respondent's Exhibit 5. TermNet has willfully and intentionally disobeyed Judge Jordan's Orders.

A monetary *per diem* penalty is permissible where it is set prospectively from the date of the contempt order as a means of ensuring compliance with the underlying discovery order. *State Farm Mut. Auto Ins., Co., v. Stephens,* 188 W. Va. 622, 425 S.E.2d 577 (1992). The imposition of sanctions by a circuit court for the failure of a party to obey the court's order to provide or permit discovery is within the sound discretion of the court and will not be disturbed on appeal unless there has been an abuse of discretion. *Given v. Field,* 199 W. Va. 394, 484 S.E.2d 697 (1997).

Each sanction imposed by Judge Jordan increased incrementally until TermNet finally answered five of the seven interrogatories. Although TermNet failed to answer the key request, which was the location of bank accounts, the amount that accumulated created a sufficient incentive to get at least some response. Judge Jordan did not abuse his discretion because each sanction proved insufficient to ensure compliance with the court's order.

As Judge Jordan clearly states in each order in which he held TermNet in contempt, the purpose of the *per diem* penalty was to "compel" TermNet to answer Marson's interrogatories as previously ordered. Thus under *Robinson,* and *Bagwell,* the sanction is civil and not criminal.

ISSUE II

TermNet argues that a writ is warranted because Judge Jordan denied TermNet's Rule 60(b) Motion for rendering judgments for the accrued sanctions. TermNet admits that an appeal is available. As noted above, *per diem* sanctions for failure to answer discovery are within the sound discretion of the judge and appropriate when gauged to ensure compliance. TermNet has still not been sanctioned in an amount to ensure compliance.

"In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight. Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)."

Under the West Virginia Rules of Civil Procedure, the judge has jurisdiction and it is in his or her discretion to impose *per diem* sanctions. Therefore it cannot be said that Judge Jordan made a flagrant violation of TermNet's rights to a clear cut legal error plainly in contravention of a clear statutory, constitutional, or common law mandate when both the rules and the case law permit a *per diem* penalty.

TermNet can cite no legal authority to support its refusal to identify its assets. Obviously TermNet does not want to pay the judgments. TermNet refuses to pay or to tell Marson where the assets are. Judge Jordan has taken appropriate legal action to compel TermNet to answer. A writ should not lie under the circumstances.

ISSUE III

TermNet argues that Judge Jordan's actions are not supported by the facts, the law ands his actions do not serve the policy behind the contempt rules.

TermNet states that it has not acted in a willful or disrespectful manner either to Marson or the Court. TermNet has been held in contempt five times for not answering discovery. TermNet accused Marson of perpetrating a fraud on the Tucker County Court and sued her for $250,000.00 in punitive damages in Cobb County, Georgia and has been held in contempt five times.

As noted above, after removal to Federal Court, Marson was granted Summary Judgment and the case was dismissed.

TermNet has tried to litigate and re-litigate the same issues in West Virginia,

Florida and Georgia, failing each time. The gravamen of their complaint is TermNet was not given three days notice of the default judgment and that failing to give three days notice to TermNet prior to entry of Default Judgment constitutes fraud. Federal Circuit Judge, Duffey, in granting Marson summary judgment addressed the issue and the handling by Judge Jordan in Tucker County. According to Judge Duffey, [TermNet] asserts its procedural due process guarantees were denied because West Virginia Rule 55(b) requires three days' notice prior to a hearing on default judgment when a party has appeared in an action, and the West Virginia Trial Court incorrectly, as a matter of West Virginia Law, determined that [TermNet's] telephone conference with [Marson's] attorney did not constitute an appearance. [TermNet] further claims its subsequent effort to overturn the improperly granted Default Judgment can[not] substitute for, or cure, [Marson's] violation of the specific notice requirement mandated by rule 55(b)." Duffey Order at Pages 9,10.

Judge Duffey explained that as a matter of West Virginia Law, "the West Virginia Trial Court correctly decided the notice issue under the law at the time of its decision in December of 2001." Id. At 11. Judge Duffey quoted *Intercity Realty Co., v. Gibson*, 175 S.E.2d 452, 455 W. Va (1972) which held that oral communication between parties' attorneys did not satisfy the appearance requirement of Rule 55(b). See Duffey Order Respondents Exhibit 4.

CONCLUSION

The issues in this case have been fully adjudicated in three forums and should be considered *res judicata*. Each forum has rejected TermNet's fraud argument. Judge Jordan's decision is *res judicata* in two states and a federal district court. TermNet cannot support its refusal to answer Marson's interrogatories. There was no fraud in this case by Ms. Marson. TermNet offers nothing in support of its rule 60(b) argument other than to caption its Motion as a rule 60(b) Motion. No analysis under Rule 60(b) or the relevant case law is offered by TermNet. Even if there were fraud, under Rule 60(b) of the West Virginia Rules of Civil Procedure the time limit to challenge a judgment because of fraud is one year if fraud is alleged. Judge Jordan sanctioned TermNet incrementally and prospectively in an amount determined to provide an incentive to cause TermNet to comply with the Court's Order, rendering the sanctions civil and not criminal. Thus TermNet is not entitled to a jury trial on the Contempt Sanctions. No amount yet sanctioned has provided adequate incentive for TermNet to comply with the Court's order. TermNet is avoiding payment of the judgment by hiding information about bank accounts and assets. TermNet has adequate appeal rights to challenge the ruling rendered by Judge Jordan on April 6, 2005. The sanctions imposed by Judge Jordan have proved inadequate to compel TermNet to comply with the Court's order and thus cannot be said to be an abuse of discretion Accordingly, the writ should be denied.

Yvonne Marson
t/dba Third Street Trading Company
By Counsel

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