

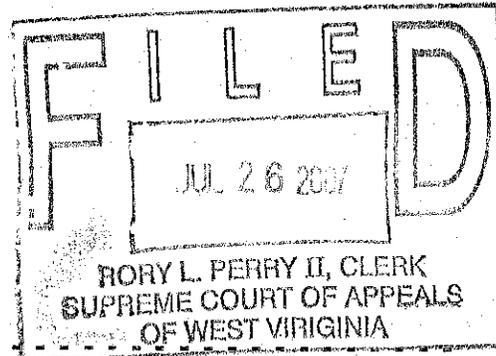
IN THE SUPREME COURT OF APPEALS
CHARLESTON

ANGELA L. VARNEY,
Appellant,

VS.

CECIL C. VARNEY
Appellee.

CASE NUMBER: 33332
Mingo Circuit Court
Case No. 89-C-7566



BRIEF OF APPELLEE

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS:

BRIEF AND MEMORANDUM OF APPELLEE, CECIL C. VARNEY

Comes now the Appellee, Cecil C. Varney, *pro se*, and herewith presents to the Court the following Brief/Memorandum in opposition to the Appeal of the Appellant.

THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER TRIBUNAL.

1. The parties were divorced by decree dated January 27, 1992, which incorporated the Findings of Fact and Conclusions of Law and Recommendations to the Court of the Family Law Master.

2. The incorporated findings contained a Paragraph No. 35, which stated as follows: "Whether, due to the delay of the entry of the order, the matter can be said not to constitute a decretal judgment, it nevertheless constituted a contractual commitment of the defendant to make such payments. Accordingly the plaintiff (Appellant) should be granted a judgment against the defendant (Appellee) for all arrearages of support and (emphasis added) \$5,200.00 for payments made by the plaintiff on the debts." The amount of "all arrearages of support" was later determined to be \$11,000.00. This amount, plus the \$5,200.00, was then incorporated in the modified order entered on March 23, 1992, to read \$16,200.00. The modification order, dated March 23, 1992 states, "Paragraph 35 of

[the January 27, 1992 decree] shall henceforth read...; as stated before, it assigned the amount to the arrearages of support, and added them to the determined amount of \$5,200.00 for payments made by the plaintiff on debts.

3. On May 19, 2003, the W.Va. Bureau for Child Support Enforcement (BCSE) and the Appellant herein, filed a Motion for determination of judgment with the Family Court, Judge Calfee presiding. A hearing was held on that Motion on November 12, 2003. The issue was specifically whether or not the judgment entered in favor of the Appellant in the January 27, 1992 decree, was subject to W.Va. Code §38-3-18, which would make it unenforceable under the statute of limitation contained in that statute in that it had exceeded the period of ten (10) years without an execution being issued. The Family Court Judge found that the proper date of the judgment in question was January 27, 1992 (not March 23, 1992 which was merely a modification of the order), and that no action other than administrative actions had been taken to preserve the judgment from January 27, 1992 through and including January 27, 2002. The Family Court also found that the statute of limitation does apply to the collection efforts that were instituted after January 27, 2002, and that the enforceability of the judgment was extinguished on January 27, 2002.

4. A Petition for Appeal from the Family Court's Final Order to the Circuit Court of Mingo County, West Virginia, Judge Michael Thornsby presiding, was filed on January 14, 2005 by Heidi L. Talmage, counsel for the BCSE, alleging certain errors by the Family Court in its Final Order dated 12/21/04. The Appellee herein filed a reply on or about January 24, 2005.

In its Memorandum in support of its appeal to the Circuit Court, the BCSE set forth a section labeled "Facts", and then proceeded to give over six (6) pages of the history of the divorce case back to 1992. In its reply the Appellee objected to the inclusions of these pages in the Memorandum before the Court in that it was not necessary for the determination of the appeal to rehash the incidents and problems that happened in the past, and further objected in that it is also fraught with errors and misstatements that are designed to be prejudicial to the Appellee, while having nothing to do with the review of the Family Court proceeding. The Appellee moved that the impertinent and inappropriate inclusion of the history of the case labeled "Facts" be stricken and disregarded by the Court. Specifically, it was noted that the points made in the "Facts" section were raised for the first time on the appeal to the Circuit Court, and should be disregarded under W.Va. Code §51-2A-14B

5. The Circuit Court found that it can only consider the exclusive record of the case pursuant to §51-2A-8(d), and did in fact review the complete record of the case. The Court then found that the modification order of March 23, 1992, clearly alters some of the

language of the January 27, 1992 findings, directly, but does not establish a new decretal amount. Therefore, the Circuit Court found that the Family Court did not commit error or abuse of discretion in finding that the appropriate date of the decretal judgment was January 27, 1992.

The Circuit Court additionally found that the issue of Appellee's bankruptcy was not raised during the proceedings before the Family Court Judge, and therefore were not properly before the Court and were not considered by the Circuit Court.

In its lengthy and complete Opinion Order, the Circuit Court made several findings of fact and conclusions of law all leading to the denial of the Petition for Appeal and the affirmation of the Family Law Judge's decision.

It is from the Circuit Court's Final Order of September 8, 2005 that the Appellant now appeals.

6. The Appellant, in filing her Petition for Appeal, does so *pro se*, and it is noteworthy that the BCSE does not join in the appeal. It is further noteworthy that the Statement of Facts of the Case and Memorandum of Law in Support of the Petition for Appeal presented by the Appellant, *pro se*, is a plagiarized copy of the Petition for Appeal from Family Court to the Circuit Court filed by the BCSE. It offers nothing new than what was presented to the Circuit Court. Unfortunately it also contains the same "Statement of Facts" mentioned above that goes through the history of the divorce case back to 1992, and includes the impertinent and inappropriate information that should be stricken and disregarded by this Court. The information is not only fraught with errors and misstatements, but is prejudicial and defamatory to the Appellee.

In accepting this case, this Court gave the Appellant thirty (30) days within which to file nine (9) copies of a Brief. The Appellant did not follow the direction of the Court in its Order of March 15, 2007. The Clerk of this Court then, by letter dated May 7, 2007 to the Appellant, extended the time for Appellant to file her Brief to thirty (30) days past the date of that letter. Appellant did finally file her "Brief of Appellant" which consists of the same plagiarized version of Statement of Facts and Memorandum of Law prepared by the BCSE in its appeal from the Family Court to the Circuit Court. Again, the Brief of Appellant contains the same inappropriate, impertinent, misleading, prejudicial, and defamatory remarks that have been before the judicial system twice before.

STATEMENT OF FACTS

The parties hereto were divorced by Decree signed on the 27th day of January, 1992 by the Special Judge sitting as the Judge of the Circuit Court of Mingo County. It was later filed with the Circuit Court on January 29, 1992. That Decree contained

Paragraph No. 35 which read as follows: "Since the time a temporary hearing was held in this matter by the former Special Family Law Master the Defendant has failed to comply with his agreement made. Whether, due to the delay of the entry of the order, the matter can be said not to constitute a decretal judgment, it nevertheless constituted a contractual commitment of the Defendant to make such payments. Accordingly the Plaintiff should be granted a judgment against the Defendant for all arrearages of support and (emphasis added) \$5,200.00 for payments made by the Plaintiff on the debts."

The Family Law Master makes note of the delay of the entry of the order because of the fact that the temporary hearing was held in 1989 and a final decree was not entered until 1992. This was due to the Special Family Law Master at the time delaying hearings because of the expected termination of his position as Family Law Master, which indeed did happen. The back log created by that delay caused a further delay when the new Family Law Master took over. The agreement referred to in the paragraph was a voluntary agreement made by the Appellee at the time of the temporary hearing to help the Appellant with some of the outstanding bills by paying \$1,000.00 a month to her until the final hearing which was anticipated in two (2) to three (3) months after the temporary hearing. As it turned out, the final hearing did not take place until some twenty (20) months later, during which the Appellant continued to pay \$1,000.00 a month for nine (9) months thereafter. He then ran out of money, and sought a hearing for a modification of the order entered at the temporary hearing, but again, because of the back log and caseload of the new Family Law Master, was unable to get a hearing for that purpose. That is how the \$11,000.00 portion of the judgment came into being.

From the date of the awarding of the judgment, January 27, 1992, Appellant took no action to have a Writ of Execution issued. The Affidavit of the Deputy Clerk of the County Commission of Mingo County, Margaret Kohari, which was accepted into evidence by the Family Law Judge, made it clear that in her examination of the Execution Docket Book No. 2 which covered the dates from March 7, 1989 to the date of her Affidavit, April 22, 2002, that she found no executions of judgment filed with that office in the case of Varney vs. Varney, Case Number 89-C-7566, with the exception of the one (1) Execution that was sought and obtained and placed on record after these proceedings began, on March 21, 2002, and therefore after the ten (10) year statute of limitation had run pursuant to W.Va. Code §38-3-18.

It was the BCSE who initiated the proceedings in Family Court to obtain a determination of the validity and enforceability of the judgment. The issues therein were simply whether the judgment was dated January 27, 1992, or whether the date of judgment should have been determined to be the date of March 19, 1992, which was the date that the

Circuit Court modified the original judgment. It is infinitely clear, and the Family Court Judge found, and the Circuit Court Judge affirmed, that the Order of March 19, 1992, on its face, announces that it is a modification order. In the body of the Order it modifies the original judgment by simply renaming it alimony, and assigning to it specific amounts as determined by mathematical calculations. The modification order even stated that "Paragraph 35 of [the January 22, 1992 decree] shall henceforth read..."

While it is true, and the Family Law Court did find, that over the course of several years, Appellant caused the Clerk of the Circuit Court to issue various Abstracts of Judgment, Suggestions, and Notices to employers of income withholding, none of those rose to the level of a "judgment execution" as set forth in W.Va. Code §38-3-18. Even though some of the issuances of the Clerk of this Court erroneously identified the date of judgment as March 23, 1992 (which is the date of the modification order), it did not change the fact that the correct date of the judgment order was January 27, 1992.

It is clear that the only issue presented to the Family Law Judge, and the only one he addressed in his Final Order was the correct date of the original judgment, and whether or not Appellant had caused to be issued any judgment execution within ten (10) years of that date. Relative to those facts, the Family Law Court found that the date of the judgment was January 27, 1992, and that Appellant had not issued a Writ of Execution necessary to toll the statute of limitation set forth in Section 38-3-18 of the W.Va. Code. No other issues were raised at that time, and the Family Court Judge concluded that the judgment set forth in the Decree of January 27, 2002 was no longer enforceable, and that efforts to collect the judgment were subject to bar by the affirmative defense of statute of limitation as set forth in W.Va. Code §38-3-18.

The Circuit Court Judge then had to try to contend with all of the other issues raised for the first time on appeal, but rightfully declined to do so, citing W.Va. Code §51-2A-8(d), which states that, "The recording of the hearing or the transcript of the testimony, as the case may be, and the exhibits, together with all documents filed in the proceeding, constitute the exclusive (emphasis added) record and, on payment of lawfully prescribed cost, shall be made available to the parties." Based on that statute, the Court can only consider the exclusive record of the case. The Circuit Court reviewed the Family Court's Final Order, and the complete record of the case, and noted that the additional issues raised for the first time on appeal were in fact not raised in the proceedings below, and chose not to consider those issues. The Circuit Court further examined the findings of the Family Law Court as it related to the issues that were raised, i.e., the date of the judgment and the affect of §38-3-18 on the failure to file a Writ of Execution, and agreed that the Family Court did not abuse its discretion in finding that the Appellant took no actions other than

administrative actions to preserve the judgment between the dates of January 27, 1992 and January 27, 2002.

AUTHORITIES RELIED UPON AND ARGUMENT

1. The issues to be considered are limited to those raised in the Family Court.

As pointed out earlier, the Appellant herein, with the help of counsel from BCSE, initiated the proceedings before the Family Court from which she then appealed to the Circuit Court and now appeals to this Court. The Appellant had every opportunity to prepare and present all of her issues and exhibits at the time of the hearing. A review of the transcript or recording of the hearing, as well as examination of the pleadings and exhibits will show that many points that were raised later in the appeal to Circuit Court, were not raised at the hearing. The Circuit Court disregarded those points, as should this Court. In W.Va. Code §51-2A-14(b), the Legislature has very clearly stated that in considering a petition for appeal, the Circuit Court may only (emphasis added) consider the record as provided in §51-2A-8(d) of the Code. That section of the code provides that the exclusive record shall be constituted of, "the recording of the (emphasis added) hearing or the (emphasis added) transcript of the testimony, as the case may be, and the exhibits together with all documents filed in the (emphasis added) proceeding"... The plagiarized version of the BCSE's memorandum which Appellant seeks to now use as a Brief for this appeal, seeks to present point after point that was not part of the record of the hearing and should now be disregarded. It is well settled that this Court will not decide non-jurisdictional questions which were not considered and decided by the Court from which the appeal has been taken. *Shackleford v. Catlett*, 244 S.E.2d 327 (W.Va. 1978). Likewise, this Court has decided it will not consider questions, non-jurisdictional in their nature, and not acted upon by the Circuit Court as an intermediate appellant court. *Chafin v. Wellman*, 155 W.Va. 236, 192 S.E.2d 490 (1972). In the exercise of its appellant jurisdiction, this Court cannot consider non-jurisdictional errors not raised and decided by the trial court. *Young v. Young*, 212 S.E.2d 310 (W.Va. 1975). See also, *Smith vs. Smith*, 187 W.Va. 645, 420 S.E.2d 916 (1992).

2. The Family Court and the Circuit Court did not err in finding that during the ten (10) year period in question no actions other than administrative actions were taken by the Appellant to preserve the decretal judgment.

The lower Courts ignored nothing. It is not a true statement to say that there were two (2) decretal judgments entered on January 27, 1992, and again on March 23, 1992. In

looking at that issue, the Family Court, affirmed by the Circuit Court, found that in fact the decretal judgment was dated January 27, 1992, and that the Appellant could not chose from the two (2) judgments to determine which judgment she wanted to enforce. In making that statement, the BCSE before, and the Appellant now, presents no case law in support. The Family Court specifically and rightfully found the March 23, 1992 Order was, as it says on its face, a modification, not a new order. The Divorce Decree, which is a part of the record, and was again presented by the Appellee at the initial hearing before the Family Court, indicated clearly an award of judgment in favor of the plaintiff on January 27, 1992. It was against the Appellee for certain amounts of what the Court called a contractual obligation, and only later termed it temporary alimony, unpaid by the defendant. The Order of March 19, 1992, on its face, announces it is a modification order. In the body of the Order it modifies the original judgment by calling it alimony, and by assigning to it specific amounts as determined by mathematical calculations. The Appellant seems to be arguing that the assigning of specific amounts to the judgment makes it a new judgment that should be deemed as originating on the date of the March Order. The lower Courts disagreed, and they are correct. The judgment was clearly entered in the Order dated January 27, 1992, and the amounts of that judgment were ascertainable as of that date. The amounts would have been determined and held to be a judgment against the defendant, even if no modification order had ever been entered. It is therefore clear that the judgment in question shall be dated January 27, 1992 for purposes of determining the statute of limitation.

3. The Circuit Court did not err in disregarding the bankruptcy issue.

Reluctantly, Appellee is again forced to address the issue of the filing of bankruptcy and whether or not that tolled the statute. Again, it is emphasized this was an attempt to raise a point that was not raised at the initial hearing, and nothing was said about it during the hearing. The Circuit Court chose to disregard it, and rightfully so. Nevertheless, it was pointed out to the Circuit Court, and now being pointed out to this Court, that the bankruptcy information had nothing to do with the automatic stay. It merely tried to impose upon the Court an execution from the Federal Court that had nothing to do with this case. In fact, it was not even an execution for money judgment. No tolling argument was set forth in the initial hearing, and should not be allowed at this point in time.

In the alternative, the bankruptcy filing at no time resulted in a motion for an order of discontinuance of the original divorce case. At no time was such an order entered by the Courts. No attempt was made during the three (3) month period between the filing and the discharge to collect or otherwise take any action in this matter. W. Va. Code §55-2-22 does not apply, inasmuch as it says that the running of any statute of limitation shall be tolled for

any claim or cause of action for which the prosecution of the same within the period of limitations has been stayed. The claim or cause of action had already been prosecuted by the time of the filing for bankruptcy protection. In fact, at one point the Appellant moved for a stay of the enforcement of that judgment evidencing the fact that the stay was not in effect. By Order entered June 23, 1993, as referenced in the Memorandum "Fact" section of the BCSE (now Appellant), that motion was denied.

4. The Court did not err in finding that the enforceability of the judgment was extinguished on January 27, 2002.

The Memorandum of BCSE (now Appellant) argues that over the years, "numerous executions" issued would have preserved the judgment. Appellant is again attempting to raise points on the appeal that were not raised at the hearing. At the hearing, the Appellee produced evidence in the form of an Affidavit from Margaret Kohari, Deputy Clerk of the County Commission of Mingo County, that no executions were docketed in the bound book kept by the Clerk of the County Commission during the ten (10) year period between January 27, 1992 and January 27, 2002. The BCSE nor the Appellant were able to present any documentary evidence of any Writs of Executions that had been issued during that period of time. The only one they presented was entered on March 20, 2002 (after the statute of limitation had run). To now come forward, after having a full opportunity to present their case, which they initiated, and represent to this Court that there are "numerous executions" that have been issued to preserve the judgment, is inappropriate and should not be considered.

Moreover, the "writs" that they refer to are not in fact Writs of Executions. They are either Abstracts of Judgments or Suggestions, which do not satisfy the requirements of the statute. Further, they do not satisfy the requirements of case law, specifically, *Shafer vs. Stanley*, 203 W.Va. Lexis 160 (Nov. 26, 2003), where this Court made it clear that Writs of Executions are special, and that other types of collection efforts are simply not what are required to renew the period of limitation under W.Va. Code §38-3-18.

The only exhibits brought forward by the Appellant at the underlying hearing were those attached to her motion which were either Abstracts of Judgment or requests for Abstracts of Judgment, and even her attempt to present later evidence which was evidently filed after the date of the hearing, was in fact not an execution (Writ of Execution), that would be necessary to issue within the ten (10) years after the date of judgment so as to extend the statutory period of time. An execution is different than an abstract of judgment. An abstract of judgment is simply a document that is prepared by the Clerk's office based upon an affidavit of a judgment creditor. It is the experience of this writer that in many cases those affidavits are not correct or accurate, but yet a Circuit Clerk will proceed to

issue such an abstract for the purposes of perfecting a judgment lien by having the abstract of judgment recorded in the Office of the Clerk of the County Commission. It has nothing to do with the running of a statute of limitation or enforcement of judgments. W. Va. Code clearly provides that, "A Writ of *Fieri Facias* or Writ of Execution shall create a lien from the time it is delivered to the Sheriff or other officer to be executed. See W. Va. Code §38-4-8. It is certain then, that a Writ of Execution must be delivered to the Sheriff or other office to be executed, unlike an Abstract of Judgment, which is simply prepared and hand carried by any person to the Clerk's office for recording. The *Shafer vs. Stanley case, supra*, is squarely on point as to this issue. That case told us that an income withholding order does not amount to an execution under W. Va. Code §33-3-18, and that an Abstract of Judgment is merely part of the process of obtaining an execution, and not an execution in and of itself. It is the income withholding order that was argued at the hearing below as being the action by the Appellant or the BCSE that would have preserved the judgment. The *Shafer case* answered that question definitively. Only a writ of execution can be a writ of execution, and evidence presented at the hearing by the Appellee clearly shows that no writ of execution was issued in the necessary ten (10) year period. Likewise, no evidence was presented to contradict that evidence of the Appellee, other than the attempt by the Appellant to present other types of documents calling them writs of execution or asking the court to give them the status and importance of a writ of execution.

The Family Court even made a finding that on the various abstracts of judgments, suggestions and notices, etc., presented by the Appellant, the Circuit Clerk erroneously identified the date of the judgment as March 23, 1992, instead of the correct date of January 27, 1992. This is obviously a result of the fact that the person giving the information to the Clerk, who was the Appellant acting *pro se*, gave false and perhaps fraudulent information to the Clerk to obtain the issuance of such various abstracts of judgment, suggestions, etc. In most cases, attorneys representing the parties are the ones who make those affidavits to obtain such abstracts of judgments, suggestions, etc. They are under a strict ethical code that would preclude them from giving false information to a Clerk to obtain an erroneous abstract. The Appellant, acting *pro se*, and presumably without the assistance of counsel for the BCSE, simply took it upon herself to make these affidavits. This points out a flaw in the judicial system where an important document, such as an abstract of judgment that could cause a lien to be placed upon someone's property, or could cause a bad credit report to be issued, can simply be obtained by the unverified and uncorroborated affidavit of a lay person.

With the evidence presented at the Family Court hearing, the Court was right to find that no actions were taken by the Appellant to preserve the decretal judgment other than

administrative actions which do not satisfy the requirements set forth in *Shafer vs. Stanley, supra*.

The Appellant's Brief goes on to state that the Circuit Clerk of Mingo County records show that over the years numerous executions have issued pursuant to W.Va. Code §38-3-18, which would satisfy the requirements of *Shafer v. Stanley, supra*. No such records were presented to the Family Court. The "Computerized Action Log" from the Circuit Clerk's office, a copy of which is purportedly attached to the Brief of Appellant, is in fact not attached to the copy of the Brief received by Appellee. Appellee can affirmatively state that he has never seen such a log.

Appellant's Brief goes on to argue that a Writ of Execution was entered on February 23, 2004, purportedly being as a result of a judgment order granted by the Federal Court on February 17, 1994. Again, it is averred that this was not something that was a part of, or a point raised during the underlying hearing. This Federal "Writ of Execution" was submitted sometime after the hearing had closed by way of a letter to the Family Law Judge from the Appellant. By letter dated February 25, 2004, Appellee objected to the submission in that it was untimely, and therefore did not give Appellee an opportunity to respond or object. No hearing was held regarding the offer of the submission and Appellee's objection. Appellee did make argument in his letter essentially to the point that the submission is irrelevant in that it has nothing to do with the action at hand. It arose out of a bankruptcy proceeding where the Appellee was attempting to have the judgment, that is the subject of this matter, discharged. That judgment was not discharged. Your Appellee appealed, and a Memorandum and Opinion Order entered on February 17, 1994 simply affirms the Bankruptcy Court's decision not to discharge the judgment. A simple reading of the opinion and of the judgment order attached to it clearly shows that it is an order that is simply affirming a default judgment against the Appellee in his efforts to have the underlying judgment discharged, and that this judgment order simply dismisses the action and strikes it from the docket of the Court. It is not a money judgment order. The Writ of Execution that has been submitted from the United States District Court and which evidently has now been filed with the Clerk's office of the Mingo County Commission, does not give judgment for a dollar amount. It simply is a judgment affirming the ruling of a bankruptcy court and dismissing the action from the docket of the court.

The BCSE argued, and now by virtue of using their brief, the Appellant argues that the case of *Robinson v. McKinney*, 189 W.Va. 458, 432 S.E.2d 543 (1993), has something to do with this case. Unfortunately, the BCSE simply misread this case. Appellant's argument is that the appellant in that case was not barred by the statute of limitation from collecting child support when she began the collection process by a notice

of employer/source of income and by a motion to establish arrearages. Appellant and BCSE evidently gleaned from this case that the various court actions which are alleged to have been filed by the Appellant herein were sufficient enough to toll the statute of limitation, and therefore arose to the same level as a "Writ of Execution" as required by the statute of limitation, W.Va. Code §38-3-18. The *Shafer v. Stanley case, supra*, which was cited in BCSE's Memorandum, flies in the face of its argument. The *Shafer v. Stanley case* clearly states, "This issue is a matter of straight forward statutory interpretations. We have previously held that 'a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the court but will be given full force and effect.' In addition ' in the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning.' We conclude that the word 'execution' in W.Va. Code §38-3-18 is unambiguous, and that its common, ordinary and accepted meaning does not include income tax intercepts." The Court then went on to define an execution upon a money judgment and to discuss the method in which a writ of execution may be issued. Then the Court stated that it did not find dispositive the case cited by the BCSE (or in this case the Appellant) for the proposition that actions other than executions may toll the limitation period in W.Va. Code §38-3-18, because these cases are completely devoid of any analysis or citation of authority which support such a proposition. For example, the cases the Court "did not find dispositive" include *Robinson v. McKinney, supra*, which is cited here again by the Appellant for the proposition that has clearly been found irrelevant by the Supreme Court in a later case. Moreover, counsel for the BCSE, and now the Appellant, totally misreads the case of *Robinson v. McKinney, supra*. The *Robinson case* does not even say what Appellant purports it to say in her argument. The *Robinson case* says that the husband had a child support judgment entered against him in September, 1982. In February, 1992 the wife began the collection process by filing a "Notice to Employer/Source of Income", and a motion to establish arrearages dated March 12, 1992. The husband tried to defend on the doctrine of laches, but the Supreme Court said that laches do not apply when there is a statute of limitation in place. The Court then went on to say that the wife's action of February, 1992 and March 1992 fell within the statute of limitation, because they were filed within eight (8) months of the ten (10) year statute of limitation. That is to say, the wife beat the statute of limitation by some eight (8) months with the February filing, and some seven (7) months with the March filing. It says nothing about the statute of limitation then being extended beyond September, 1992 by the filing of those two (2) documents. The whole case was about the lower Court's mistake in ruling that laches was applicable to these judgments. The Supreme Court ruled that since there is a statute of limitation that is

applicable to the judgment, laches simply does not apply. The BCSE, and now the Appellant, has misread this case to say that the filing of a Notice to Employer/Source of Income, or a Motion to establish arrearages, somehow renews an expired statute of limitation. The statute of limitation had not expired in the *Robinson case*, and therefore the wife was not outside the statute when she filed those documents. There is absolutely nothing in that case that says either of those two (2) kinds of filings would extend the statute of limitation for another ten (10) years.

5. The delay of the Family Law Court and the Circuit Court in making their decisions did not toll the statute of limitation.

The next argument raised by the BCSE, and now the Appellant, is that the motion to determine judgment was filed in this case on May 19, 2003, and that it remained pending before the Family Law Court until the entry of the December 12, 2004 Order, which was then appealed to the Circuit Court. BCSE or Appellant now makes this statement, "The pendency of the motion to determine judgment thus tolled the statute of limitation for approximately eighteen (18) months."

First of all, like other points raised on this appeal, and the appeal to the Circuit Court, this issue was not raised during the underlying hearing. Secondly, counsel gives no authority for the fact that a motion to determine judgment would toll the statute of limitation during the time it was pending. Finally, the statute of limitation in this case ended on January 27, 2002. It is certainly outside this counsel's understanding as to how a filing made on May 19, 2003, some sixteen (16) to seventeen (17) months after the statute has expired, can then toll that statute of limitation. The statute cannot be tolled after it has expired.

Again, another point not raised during the hearing from which this appeal is taken, is Appellant's argument that a contempt action heard in 1992, and another filed on September 22, 1997, all of which resulted in an Order on August 26, 2002, would have tolled the statute of limitation. First of all, the Court found there was no contempt present. Secondly, there is no citation of any authority which would support the argument that any such action would toll the statute of limitation. Certainly the *Robinson case, supra*, does not stand for that proposition.

6. The statute of limitation is founded on sound public policy.

The Appellant now seeks, in her conclusion, to argue the purpose of the statute of limitation by stating that it is to "bar stale claims that have long been idle." Again, an argument relating to the purpose of the statute of limitation was not made in the lower Courts by the Appellant or the BCSE. Only the Appellee herein made reference to the purpose of the statute of limitation in his written response to the motion to exclude later

evidence. As stated therein, statute of limitations are founded on sound public policy and should be so construed as to advance the policy they were designed to promote. In light of the policy that surrounds statute of limitations the bar of these statutes should not be lifted unless the legislature makes it unmistakably clear that such is to occur in a given case. When there exists any doubt, it should be resolved in favor of the operation of the statute. (emphasis added). See 12A Michie's Jurisprudence, Limitation Of Actions, Section 2, citing, *Beury Brothers Coal vs. Fayette County Court*, 76 W.Va. 610, 87 S.E. 258 (1958), and *Burns v. Board of Supervisors*, 227 Va. 354, 315 S.E.2d 856 (1984).

Statutes of Limitation are merely legislative devices to prevent unjust harassment of debtors, and, on the contrary to compel assertions of legal rights within reasonable time limits. *United States vs. Polan Industries, Inc.*, 196 F.Supp. 333 (SDWVA 1961, commented on in 64 W.Va. Law Review, 228 [1962]). Even our own Fourth Circuit has said, "Statutes of Limitations are statutes of repose and under Virginia law must be construed strictly to that end." *Barns vs. Sears, Roebuck & Company*, 406 F.2d 859 (4th Cir. 1969). These cases make it abundantly clear that the Legislature is the only body that can change the statute of limitation in this case by substituting the Abstract of Judgment or the "Notice to Employer/Source of Income" for an execution as the operable document. The W.Va. Supreme Court of Appeals would not, and did not make such a legislative ruling.

CONCLUSION

Based solely on the evidence in the initial hearing, which was reviewed by the Circuit Court, and the record below, and without consideration of new points raised on appeals, and impertinent, prejudicial, and defamatory language by the Appellant, it is clear that the question at hand is whether or not the Appellant caused to be issued a Writ of Execution within the ten (10) year statute of limitation. The evidence of the hearings below is clear and uncontroverted. The Appellant did not file such a Writ of Execution, and the attempt to substitute other filings, such as Abstracts of Judgment, etc., should not be allowed. Those documents do not rise to the level of a Writ of Execution, they do not require delivery to an officer for execution, they do not have a return date, and simply cannot be as judicious and as important as a Writ of Execution. Moreover, the West Virginia Supreme Court has now ruled that such an inferior document cannot be substituted for a formal Writ of Execution as contemplated by W.Va. Code §38-3-18.

The many "filings" that Appellant points to in her Memorandum as being an action which would toll the statute of limitation, are simply evidence of the harassment the Appellee has had to endure over the last twelve (12) years from the Appellant; the kind of harassment that is sought to be curtailed by the legislative device known as the statute of

limitation codified in §38-3-18 of the W.Va. Code. The misstatements, the accusations, and the libelous statements made by the Appellant in her Brief are further indications of that same kind of vengeful and harassing treatment made against the Appellee for more than fifteen (15) years. The only child of the parties', custody of whom was awarded to the Appellee herein, is now grown and finished college and is twenty-three (23) years old. The judgment herein sought to be declared unenforceable is the only tie between the Appellant and the Appellee that has not yet been cut. It is time to extinguish all ties and let the parties go their separate ways. Appellee implores this Court to accomplish that by upholding the findings and rulings of the Family Law Judge and the affirmation of the Circuit Court Judge, and end this matter once and for all.

RESPECTFULLY SUBMITTED:



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IN THE SUPREME COURT OF APPEALS
CHARLESTON

ANGELA L. VARNEY,
Appellant,

VS.

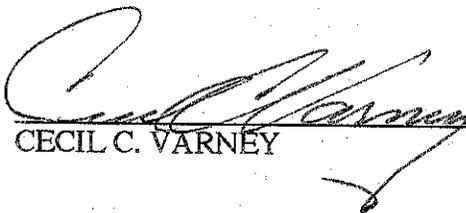
CASE NUMBER: 33332
Mingo Circuit Court
Case No. 89-C-7566

CECIL C. VARNEY
Appellee.

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing **BRIEF OF APPELLEE** has been served, postage prepaid in the United States mail, on this the 23rd day of July, 2007, upon the following:

Angela L. Varney
Rt. 1, Box 41
Delbarton, WV 25670
Appellant, pro se



CECIL C. VARNEY