

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

**Marlon Ferguson,
Plaintiff Below, Petitioner**

vs) **No. 11-1209** (Kanawha County 09-C-390)

**Kevin Hensel and Hensel & Hensel, Ltd.,
Defendants Below, Respondents**

FILED

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

MEMORANDUM DECISION

Petitioner Marlon Ferguson appeals from the circuit court's order dismissing his action seeking to enforce and collect upon a prior monetary judgment against respondents Kevin Hensel and Hensel & Hensel, Ltd. ("Hensel & Hensel"). Respondents have filed a response brief, and petitioner has filed a reply.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on November 3, 2011. This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

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

Defendant Nicholas Wall filed a motion to dismiss the instant action pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Respondents Kevin Hensel and

¹ After pleadings were amended below and certain defendants were voluntarily dismissed, the remaining defendants were Nicholas Wall, respondent Hensel & Hensel, and respondent Kevin Hensel. Nicholas Wall is the respondent in a separate appeal filed in this Court by petitioner (Docket No. 11-0597).

Hensel & Hensel joined in that motion and, having previously answered the complaint, filed their motion pursuant to Rules 12(c) of the West Virginia Rules of Civil Procedure.

On November 30, 2010, the circuit court entered an order granting the motion to dismiss and ruling that petitioner's second amended complaint alleged no ground for relief against respondents other than seeking to bind them to the default judgment from his earlier lawsuit and, therefore, it failed to state a claim upon which relief may be granted. The circuit court further ruled, *inter alia*, that respondents were not named as defendants in petitioner's earlier civil action; that respondents were not served with the summons and complaint in that earlier action; and that even if respondents had somehow become aware of the earlier action, they still could not have discerned that petitioner sought to impose personal liability upon them. The circuit court concluded that the earlier judgment cannot be enforced against respondents without violating their due process rights.

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

Affirmed.

ISSUED: January 13, 2012

CONCURRED IN BY:

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

DISSENTING:

Justice Brent D. Benjamin