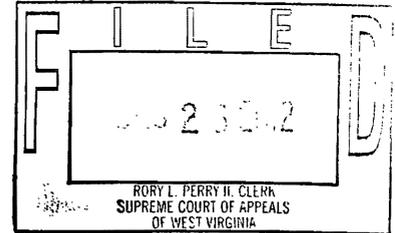


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0991



ROBERT BURNWORTH, Plaintiff Below,
Petitioner

vs.

Appeal from a final order of the
Circuit Court of Kanawha County
(11-C-1851)

KENT GEORGE, ROBINSON &
MCELWEE, PLLC, and JOHN T.
POFFENBARGER, Defendants Below,
Respondents

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

I. Whether the circuit court erred in granting the malpractice defendants' motion for summary judgment where it ruled, on the basis of basis of language in a consent order in a related contract action against other defendants - that entry of the consent order "shall operate to extinguish all obligations of all the defendants [in that action] under the note and [deed of trust]" and that the "note is canceled and merged into the judgment" [hereafter "the merger language"] - that the note and deed of trust were no longer available as evidence in this malpractice action and that Burnworth was, therefore, unable to prove the essential element of damages in his malpractice action.

II. Assuming, arguendo, that the circuit court's interpretation of the merger language was a possible one, whether the circuit court erred in granting defendants' motion for summary judgment where the court failed to find that the merger language, properly interpreted as part of a contract between Burnworth and the defendants in that action, was ambiguous and that the intent of the parties to such consent order was clearly not to eliminate the documents as necessary "evidentiary predicates" to Burnworth's damage claims in the malpractice action.

III. Assuming, arguendo, that the circuit court's interpretation of the merger language was a possible one, whether the circuit court erred in granting defendants' motion for summary judgment where it failed to find that the merger language in the consent order, properly interpreted as a contract between Burnworth and the defendants in that action, reflected a mutual mistake of the parties to the contract action and that the intent of the parties to such consent order was clearly not to eliminate the documents as necessary "evidentiary predicates" to Burnworth's damage claims in the malpractice action.

IV. Assuming, arguendo, that the circuit court did not err in granting summary judgment, whether the circuit court abused its discretion in denying plaintiff's Rule 60(b) motion where it refused to consider the *nunc pro tunc* order in the related contract action as evidence of the intent of the parties to the consent order to not eliminate the note and security agreement as evidence in Burnworths' malpractice action.

V. Assuming, arguendo, that the circuit court did not err in granting summary judgment, whether the circuit court abused its discretion in denying plaintiff's Rule 60(b) motion on the ground of judicial estoppel where Burnworth did not rely on the initial consent order in his opposition to the summary judgment motion.

STATEMENT OF THE CASE

Robert L. Burnworth (“Burnworth”) filed a Complaint in the Circuit Court of Kanawha County alleging that he retained Kent George (“George”) and Robinson & McElwee, PLLC (“R&M”) to represent him in the sale of his business in the year 2001. As part of that sale, a deed of trust on a valuable commercial building on MacCorkle Avenue in Kanawha City was to serve as collateral for the purchase money promissory note from the buyer in the amount of \$1,479,984. That deed of trust was prepared by co-defendant John Poffenbarger (“Poffenbarger”) who represented the buyer and two individual guarantors of the note. (JA 6, 10). The deed of trust named George as trustee and was signed and notarized at the closing which took place at R&M’s office. R&M filed the deed of trust at the courthouse and directed that the original be mailed back to R&M. (JA 6).

The buyer defaulted on the note in 2006, and Burnworth contacted R&M and George. (JA 7). According to billing records, R&M then spent several hours in the Record Room at the Kanawha County courthouse. They never disclosed to Burnworth that there was any problem with the deed of trust, nor did they disclose to him that they had **not** performed a title exam as part of their work leading up to the original closing. (JA 8).

After receiving further sporadic, intermittent payments, Burnworth hired a new lawyer who discovered in late 2009 that the deed of trust prepared by Poffenbarger purportedly to secure the payment of the note was bogus because the grantor was a corporation that had never owned the subject Kanawha City commercial building. He also learned that six weeks before the bogus deed of trust was presented by Poffenbarger at the closing, clear title to the subject property had been conveyed to the two individual guarantors on the note by a deed prepared by Poffenbarger

himself. For the deed of trust to have been valid, it should have been granted by these two individual owners instead of by a corporation that never owned the property. (JA 7).

In his Complaint Burnworth alleges that George and R&M were negligent in their representation of him and in breach of their contractual duty by failing to recommend or perform a title search on that deed of trust prior to closing; by failing to disclose in 2006 that they had not originally performed a title search; and by failing to disclose that the deed of trust was useless rendering the note unsecured when they made that discovery in 2006. (JA 8-9).

Burnworth alleges in the Complaint that Poffenbarger committed fraud because he knew that the property described in the bogus deed of trust was not owned by the corporate grantor since Poffenbarger himself had prepared a deed six weeks earlier conveying the same parcel to his two individual clients. Burnworth contends this deed of trust was brought to the closing by Poffenbarger in order to induce Burnworth to turn over assets to Poffenbarger's clients. Burnworth further alleged in the Complaint that Poffenbarger was negligent to him as a third-party beneficiary of Poffenbarger's work on behalf of the buyer. (JA 10).

Plaintiff alleges that he has sustained substantial damages proximately caused by these defendants. The promissory note was supposed to be a secured note, at least to the extent of the considerable value of the Kanawha City commercial building. Collecting on a secured note should have been simple and effective in 2006 upon the initial default. A foreclosure would have taken place, the property would have been sold, and the net proceeds would have been paid to Burnworth to apply to the note. But none of this occurred because, unbeknownst to Burnworth at the time, the deed of trust was invalid and did not secure the repayment of the note because it was not a conveyance by the owners of the property. This left Burnworth five years

later trying to collect on what appears to be a worthless, unsecured note and to sue the lawyers responsible for his plight. (JA 11).

Burnworth filed suit on the unsecured promissory note against the buyer and both guarantors in the Circuit Court of Kanawha County in Civil Action No. 11-C-2026. The defendants proceeded *pro se*, hired one lawyer then another, all the while seeking and receiving multiple voluntary extensions of the answer period and disputing the exact sum owed. Eventually an agreed “Stipulation of Settlement and Order of Dismissal” was entered on April 19, 2012 awarding Burnworth judgment against the defendants in the sum of \$725,715.28 plus interest to run at 7 ½%. (JA 156).

Paragraph 3 of this agreed order (JA 156) contained merger language inserted by defendants to clarify that once this judgment is entered, plaintiff may not sue defendants on the promissory note, i.e. that the note is cancelled and is replaced by the judgment and that defendant now owes a judgment not the note. Specifically the language is as follows:

[T]he entry of judgment in favor of the plaintiff [Burnworth] ... shall operate to extinguish all obligations of all the defendants under the [Promissory] Note, and any security instrument given to secure the same, and the subject Note is cancelled and merged into the judgment.

Based *solely* upon the language of this paragraph of this agreed judgment order, Circuit Judge Robert Chafin indicated he was going to grant the motion of all defendants to dismiss all malpractice, breach of contract and fraud claims against them stating, “The basis of the lawsuit is the note. That’s what the damages are predicated upon. By his action in extinguishing the note, I see no further basis for his claim in this action.” (JA 443).

Realizing that paragraph 3 of the agreed order in the promissory note case was being misconstrued and was apparently causing confusion elsewhere, Burnworth sought and obtained

on May 23, 2012, a “Corrected Stipulation of Settlement and Order of Dismissal” which the Circuit Court entered *nunc pro tunc* back to April 19, 2012. This corrected order became the final order in the promissory note case, and the merger language in paragraph 3 upon which Judge Chafin based his ruling was removed in its entirety. (JA 273).

Burnworth’s trial counsel moved Judge Chafin to reconsider his ruling in light of the correction and amendment of the original promissory note judgment order and the deletion of the paragraph 3 (JA 273), but he denied the request and entered the July 23, 2012 Judgment Order Granting Summary Judgment to all Defendants that is the subject of this appeal and thereafter denied Burnworth’s subsequent post-trial motions seeking relief. (JA 377).

SUMMARY OF ARGUMENT

This appeal is the result of the circuit court’s misinterpretation of seemingly unremarkable language in a consent order that simply announces that that agreed order effected a merger of the underlying cause of action on the note into that judgment, its refusal to recognize any ambiguity in the language, and its unwillingness to use familiar principles of contract interpretation to discern the intent of the parties to the consent order. The actual language was clearly meant to express the legal doctrine of merger. The extinguishing of the obligations *of the defendants in that action* under the note and deed of trust, and the cancellation of the note itself, did not (if such a thing were even possible) and were certainly not intended to, eradicate such documents as historical facts. Underlying much of the confusion is the malpractice defendants’ characterization of the consent order as “enforc[ing] payment of the note” (JA 162 ¶16), which if true would mean that Burnworth could show no damages resulting from any alleged defects in the deed of trust. But of course a judgment and satisfaction there under are two different things.

Burnworth's agreement with the collection-action defendants, as reduced to a judgment, may or may not lead to full payment, but until it does, his distinct claims against the malpractice defendants should be allowed to proceed.

At all times Burnworth has proceeded properly under the circumstances. When the buyer of his business defaulted on the note, he first sought to foreclose under a deed of trust tendered by the buyer of his business to secure payment of the purchase price. When Burnworth realized that he in fact had no such security – the grantor of the deed of trust did not own the property – and that the lack of security was caused by the negligence of lawyers who had worked on the 2001 sale of the business, he sued the lawyers (the “malpractice defendants”) in October 2011 (JA 3-11, the “malpractice action”¹) and a month later (with a different lawyer) he attempted to mitigate his damages by suing the corporate buyer and the individual guarantors on the note. (JA 108, the “collection action”). Burnworth quickly came to an agreement with the defendants in the collection action and reduced their contract dispute to a consent order (JA 156) entered just five months after suit had been filed.

The last paragraph of this seemingly routine consent order provided that it “shall operate to extinguish all obligations of all the defendants under the note [the corporate buyer and the individual guarantors], and any security instrument given to secure the same, and the subject note is cancelled and merged into the judgment.” It is on this sentence alone that the circuit court based its grant of summary judgment to the malpractice defendants, ruling that Burnworth's cancellation of the note and security interest operated to deprive him of the ability to prove any damages in the malpractice action because his injury in that case – the lawyers' negligence leading to his alleged inability to collect on the note from the buyer and guarantors -- could no

¹ Although the complaint also alleges fraud against Poffenbarger in preparing the deed of trust (JA 10), for purposes of this brief the defendants will be referred to collectively as the “malpractice defendants”.

longer be attributed to a note and deed of trust that no longer existed. While the lower court seemed to recognize that the consent order represented a memorialization of a contractual agreement, it consistently ignored the fundamental principle of contract interpretation to give effect to the intent of the parties. The court later compounded this error by refusing to give any effect to the immediate efforts of the parties to that consent order to make it crystal clear that the court had misinterpreted their intent by obtaining an amended consent order in which the merger language had been removed to the date of the initial consent order.

This merger language of the initial consent order simply recognizes the legal principle by which the debt to Burnworth, represented by the note, was transformed or merged into a judgment that obviates any legal need for the continued existence of the note *as between the parties to the contract action*. Reciting that the collection-action defendants' "obligations under the note and deed of trust" were being "extinguished" simply recognizes the immediate legal effect of transforming such contractual obligations to a new form of obligation under a judgment. But to say, as the malpractice defendants phrased it, that Burnworth "completely abandoned the documents that underlie" his malpractice claims (JA 199), hardly comports with the contracting parties' intent. Moreover, to rule that the parties' agreement foreclosed the use of the note and defective deed of trust as evidence in the malpractice action is patently unreasonable and ignores basic tenets of interpretation of contracts. Moreover, the merger language by its terms only operates with respect to Burnworth's claims against the *defendants in that action*. A distinct cause of action, brought against an entirely different set of defendants, is not affected. The evidence -- of the debt, as represented by the note, and of the malpractice defendants' negligence, evidence of which includes the allegedly defective deed of trust -- did not somehow vanish for all purposes and with respect to all persons. The consent order's language simply stated the usual

effect of such a judgment - to merge the note into the judgment - and the lower court erred as a matter of law in interpreting the agreement of the parties to do anything more than that.² This point was made perfectly by Burnworth's counsel during the hearing on the summary judgment motion – the consent order “is just a judgment ... There has been no satisfaction. [Burnworth] has not been paid, and therefore he is still damaged. ... We know what the exact amount is that he's owed through the [consent order]. He had a duty to mitigate his damages, and that's what he attempted to do in the [collection action]. ...” (JA 319). But, she added, it is “just a judgment ... just an empty judgment at this point.” (JA 319). To interpret the merger language as representing a decision to effectively dismiss a potentially valuable malpractice action for an “empty judgment” ignores what this entire matter is about and how courts should proceed.

The consent order is subject to interpretation as a contract. Even if the merger language is capable of the interpretation given it by the circuit court, it is nevertheless sufficiently ambiguous to require a search for the intent of the parties to the agreement. The fact that the judgment on appeal arose in the context of a proceeding in which Burnworth was arguing for an opposite interpretation, and the court's own lack of any reference point in his long experience for similar language (JA 363 n.2) should have been sufficient alone to demonstrate an ambiguity that in turn should have triggered a search for the parties' intent.

After the lower announced its intention to grant summary judgment (JA 324), Burnworth again acted expeditiously by (1) obtaining an amended consent order - the day after the May 23rd summary judgment hearing - that removed the merger language effective *nunc pro tunc* to the April 19, 2012 date of the initial order (JA 273); and (2) filing a Rule 60(b) motion for relief

² The malpractice defendants argued a slightly different angle in their summary judgment motion, that Burnworth's failure to demonstrate mitigation efforts vis a vis *execution of the judgment* is tantamount to a failure “to demonstrate any quantifiable damages against [the malpractice] defendants” (JA 200). The court did not include this as a basis for its rulings.

from the summary judgment two weeks later. (JA 269). In denying Rule 60 relief (JA 377-88), the lower court refused to consider any modification of what it characterized as Burnworth's unambiguous, voluntary decision to "render null and void ... the evidentiary predicates of his malpractice action." (JA 385). In refusing to even consider giving any effect to the obvious clarification of the agreement of the parties to that action, a clarification that clearly reflected the intent of the parties from the outset, the court misconstrued the nature of the contract memorialized in the consent orders. As contracts, they were subject to modification of the contracting parties, and if a mutual mistake was made in "extinguishing/canceling" the note and security agreement, that mistake was rectified with the second consent order. The refusal to grant the Rule 60 motion ignored the underlying policy basis of such rule and contravened the strong policy that liberal effect must be given so that disputes are determined on their merits. The result of the court's ruling is that a potentially meritorious negligence action will never be heard on its merits.

ARGUMENT

Standard of review -- "A circuit court's entry of summary judgment is reviewed de novo." *Syl. pt. 1, Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."; *Syl. pt. 1, Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002) "Determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law."

"... The question as to whether a contract is ambiguous is a question of law to be determined by the court." *Syl. pt. 1, Berkeley Co. Public Service Dist. v. Vitro Corporation of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968). "Where a contract is ambiguous, then issues

of fact arise and a summary judgment is ordinarily not proper." Syl. pt. 2, *Lee Enterprises, Inc. v. Twentieth Century-Fox Film Corp.*, 172 W. Va. 63, 303 S.E.2d 702 (1983).

"A court, in the exercise of discretion given it by the remedial provisions of *Rule 60(b)*, W.Va. R.C.P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits." Syl. pt. 6, *Toler v. Shelton*, 157 W. Va. 778; 204 S.E.2d 85 (1974).

A. The first consent order's merger language correctly sets forth the principle of merger and did not operate to foreclose the use of the note and deed of trust in Burnworth's malpractice action against different defendants.

The doctrine of merger was explained by this Court in *J. & G. Const. Co. v. Freeport Coal Co.*, 147 W. Va. 563, 567-68, 129 S.E.2d 834, 837-38 (1963):

The portion of the account covered by the judgment became merged in the judgment and lost its identity as a portion of an open or unsecured account. *Fisher's Ex'rs v. Hartley*, 48 W.Va. 339, 37 S.E. 578, 54 L.R.A. 215, 86 Am.St.Rep. 39; *Beazley's Adm'r v. Sims, Adm'r*, 81 Va. 644; 12 *Michie's Jurisprudence*, Merger, Section 7; 30A *Am.Jur.*, Judgments, Sections 313, 315, 317, 321. In the opinion in the *Fisher* case this Court said: '... when a personal judgment is rendered upon any cause of action, that cause cannot be again made the subject of a suit, and the judgment is thereafter the sole test of the rights of the parties, constitutes a new debt of the highest dignity, closing the statute of limitation on the original cause of action. Such is the general law. 15 Am. & Eng. Encyl.L. 336; Freeman on Judgments, ss. 215, 216, 217. By the judgment the debt is 'changed into a matter of record and merged in the judgment, and the plaintiff's remedy is upon the latter security while it remains in force.' 'The original claim, has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect.' Black on Judgments, s. 674."

See also, State ex rel Queen v Sawyers, 148 W. Va. 130, 136, 133 S.E.2d 257, 261 (1963) “A valid agreement of compromise and settlement is a merger and bar of all preexisting claims” quoting 15 C.J.S. Compromise and Settlement § 24, p. 739. The initial consent order did no more than this, and the last paragraph was nothing more than the parties’ attempt to include reference to this long-standing legal principle.

The lower court noted the “unique” nature of the merger language and repeatedly expressed concern about why Burnworth would “inexplicably and voluntarily give up rights he has” in the malpractice action. (JA 363 n.2). The court noted that a default judgment, had that course been chosen by Burnworth, would not have led to the same outcome because such a judgment “would not have 'extinguished' and 'cancelled' the Promissory Note and security, but would have served as a vehicle for enforcing the same.” (JA 364). Although Burnworth was unable to pursue a default judgment after the collection-action defendants received a string of voluntary extensions to answer, this observation by the court nonetheless demonstrates the fault in its reasoning relative to the legal effect of the language in question. A default judgment, entered without the language of the consent order, would also have led to the same merger of the note into the final judgment as was affected by the initial consent order. (JA 156). The only difference would have been the absence of the merger language used here.

The merger operates *as to the parties to that action only*. The court's error was in going beyond the merger of Burnworth's claim against the collection-action defendants and using that statement of merger to eradicate all vestiges of the note and deed of trust for all purposes and with respect to all persons. The debt to Burnworth, which was originally memorialized by the note, has simply been transformed to a judgment against the note defendants. There were no indicia whatsoever that the parties intended the consent order's merger language to act as an

effective dismissal of the related malpractice action. The court's characterization of the consent order's language as Burnworth's "release of all [his] rights under the note and security" (JA 366) has no basis in logic or the law. He did not, as the court stated, give up his "right to collect against the promissory note and security pledged." (JA 366). First, there was no *valid* security pledged. Second, while he did indeed give up his right to "collect against the note", this surrender of rights extended only to the defendants in that action. Transforming the note to a judgment did not, however, somehow lead to the conclusion that the note was now "non-existent". (JA 366). Burnworth acted prudently in reducing his claim on the note to a judgment, and his claim in the malpractice action should not be dismissed on the basis of his and the collection-action defendants' reasonable attempt to articulate the effect of merger in their initial consent order. At worst, the wording of the attempt was ambiguous, and any reasonable attempt to discern the parties' intent would have readily led to a different result.

B. To the extent that the merger language can be interpreted as the circuit court did, such language, when correctly viewed under rules applicable to interpretation of contracts, should have been found to be ambiguous and should have been interpreted in light of other evidence to reflect the obvious intent of the parties.

It is beyond dispute that the consent is subject to interpretation as a contract, and the circuit court's failure to properly view it as such has led to mistakes in interpreting the merger language.

A consent decree constitutes a contract between the parties thereto, and it is beyond the power of the court to alter it, except by the action or consent of the parties, or as to mere clerical errors. Stannard Supply Co. v. Delmar Co., 110 W.Va. 560, 564, 158 S.E. 907; Castle v. Castle, supra; Myllius v. Smith, 53 W.Va. 173, 44 S.E. 542; McArthur v. Thompson, 140 Neb. 408, 299 N.W. 519, 139 A.L.R. 413, 422n; 31 Am.Jur., Judgments, Sections 458-464. The consent, however, must appear from the face of the record. Shinn v. Shinn, 105 W.Va. 246, 142 S.E. 63; Bank of Gauley v.

Osenton, 92 W.Va. 1, 114 S.E. 435. ‘The consent should be so clear and specific in terms that no mistake can arise respecting the concurrence of the parties and it should be complete and unqualified.’ 49 C.J.S., Judgments, § 175. A consent decree must be construed in the same manner as other contracts. Seiler v. Union Manufacturing Co., 50 W.Va. 208, 40 S.E. 547; Morris v. Peyton, 29 W.Va. 201, 11 S.E. 954; 49 C.J.S., Judgments, § 178.

Blair v Dickenson, 136 W. Va. 611, 614-15, 68 S.E.2d 16, 18 (1951); *see also*, *EurEnergy Resources Corp. v. S & A Property Research*, 228 W. Va. 434, 439; 720 S.E.2d 163, 168 (2011) (*per curiam*) (“The general rule is that a compromise or settlement agreement is favored by law and is to be construed as any other contract”).

Properly seen as a contract, the court’s interpretation of the merger language finds unquestioned clarity where there is none. Ambiguity demands a further analysis of the parties’ intent. “A meeting of the minds of the parties is a *sine qua non* of all contracts.” Syl. pt. 1, *EurEnergy*, 720 S.E.2d 163 (citations omitted). The court’s ruling that Burnworth had clearly and unambiguously dismissed his malpractice claim occurred immediately after listening to arguments by Burnworth opposing the malpractice defendants’ motion for summary judgment. (JA 324). Even the judge, however unambiguous he may have *ruled* the words to be, noted that there was “something strange about this”. (JA 321). All indications pointed to an ambiguity that should have led to a different conclusion.

Contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken. ... In making such a determination of contractual ambiguity, we consider whether the subject contract is capable of more than one interpretation. Thus, contract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken.

Syl. pt. 6, *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 212 W. Va. 275, 569 S.E.2d 796 (2002) (citations omitted); *see also, Flanagan v. Stalnaker*, 216 W. Va. 436, 440 n.4; 607 S.E.2d 765, 769 (2004) (*per curiam*) (“A latent ambiguity arises when the instrument upon its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain”) (citation omitted). Everything below pointed to some confusion as to what the merger language meant.

Once ambiguity is shown, more analysis is called for.

Once we have determined a contract to be ambiguous, we look to the parties' relationship to glean the parties' intent in entering into the agreement under scrutiny. “Evidence of usage or custom may be considered in the construction of language of a written instrument which is uncertain or ambiguous but may not be considered to alter the legal effect of or to engraft stipulations upon language which is clear and unambiguous.” Syl. pt. 5, *Cotiga*, 147 W.Va. 484, 128 S.E.2d 626.

In Re Joseph, 214 W.Va. 365, 370, 589 S.E.2d 507, 512 (2003). By never allowing for any other interpretation other than the one given by the court, the one that led to an admittedly “strange result,” the court ignored this fundamental principle of divining the meaning of contracts. Even if the merger language is less than clear, the question of the collection-action parties' intent was at the very least ambiguous, and the court erred by never attempting to look beyond the words to discover that intent.

Moreover, the circuit court's refusal to look beyond words of the merger language thwarts sound public policy that encourages settlements such as that represented by the consent order. *See EurEnergy*, 720 S.E.2d 163 noting in syllabus 2 that “[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.” (citation omitted). Despite the

court's statements to the contrary, the consent order served precisely the same function as a default judgment would have, and to (incorrectly) fault Burnworth for not proceeding in a different path to the same result exalts form over substance to a degree that the modern rules of civil procedure was intended to eliminate

C. To the extent that the merger language can be interpreted as the circuit court did, such interpretation, when correctly viewed under rules applicable to interpretation of contracts, should have been found to be a result of mutual mistake and should have been interpreted to reflect the obvious intent of the parties.

A *mutual* mistake as to a material assumption which underlies a contractual agreement is sufficient grounds to find that agreement void. The *Restatement (Second) of Contracts* specifically provides in § 152(1): ‘Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has the material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake....’” Syl. pt, 2, *McGinnis v. Cayton*, 173 W. Va. 102, 312 S.E.2d 765 (1984). The ends of justice is the lodestar, not a technical interpretation that yields an unusual result frustrates that purposes.

This Court has held, concerning the reformation of contracts, that “[t]he jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, if the evidence be sufficiently cogent to thoroughly satisfy the mind of the court, is fully established and undoubted.” Syllabus Point 2, *Nutter v. Brown*, 51 W.Va. 598, 42 S.E. 661 (1902). However, “[s]uch equitable remedy [to reform a written instrument] is not absolute, but depends upon whether the reformation sought is essential to the ends of justice.” Syllabus Point 2, *Buford v. Chichester*, 69 W.Va. 213, 71 S.E. 120 (1911).

First American Title Co. v. Firriolo, 225 W. Va. 688, 696, 695 S.E.2d 918, 926 (2010). This Court should not allow the ends of justice to be trumped by an interpretation at odds with the intent of the parties to the consent order, with logic and with sound public policy.

D. Even if the merger language supported the grant of summary judgment, relief under Rule 60 should have been granted after the initial consent order was amended by entry of a *nunc pro tunc* consent order that did not contain the merger language.

Assuming that the circuit court was correct in interpreting the merger language and in refusing to find ambiguity or mistake as would permit a different interpretation, the parties' intent became unequivocally clear and free of any ambiguity in the second consent order presented to the court only days after the court had announced its summary judgment ruling. This second consent order had removed the merger language altogether on which the court had relied as the sole basis for its grant of summary judgment, yet the court refused to find sufficient grounds to change its earlier ruling. The court's first ground for refusing Rule 60(b) relief seems to rely solely on its view as to the lack of any ambiguity in the first consent order. (JA 385). The second ground for refusing to reconsider its earlier ruling is that Burnworth was "judicially estopped" from even raising the second consent order because he had relied on the initial consent order in his opposition to the malpractice defendants' motion for summary judgment. These grounds ignore the obvious intent of the parties, an intent expressed at a number of steps in this litigation, and the court's adamant refusal to recognize this intent constitutes an abuse of its discretion.

The court's first ground is fairly stated as follows: Burnworth, for reasons known only to him, effectively dismissed his claims in a pending malpractice action in order to obtain a consent order that Burnworth conceded was uncollectable, that this inexplicable surrender of a potentially valuable judgment was accomplished in terms so clear as to be incapable of any other interpretation, and that the subsequent agreement of the parties to the consent agreement to

reform their agreement was of no consequence whatsoever. In short, the court refused to even consider that the parties could act to clarify their initial agreement to have it express their true intention.

While the general rule is that the construction of a writing is for the court; yet where the meaning is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and *the practical construction given to the contract by the parties themselves either contemporaneously or subsequently....*

Syl. pt. 7, *Frederick Management Co., L.L.C. v. City Nat. Bank*, 228 W. Va. 550, 723 S.E.2d 277 (2010) (citation omitted) (emphasis added). Burnworth contends that this unexplained refusal to even consider this unambiguous evidence of the parties' agreement constitutes an abuse of discretion.

E. Judicial estoppel was not a proper basis for the denial of Rule 60(b) relief because Burnworth's opposition to the summary judgment was not based on the merger language in the initial consent order.

The estoppel ground is baseless. The court ruled that Burnworth "implicitly relied on" the agreement (as set out in the initial consent order) when he contended that his malpractice action was based on *his inability to collect under the consent order* because the collection-action defendants were judgment proof. (JA 385). It is unclear how a statement of opinion as to the collection-action defendants' assets could act to erase a distinct claim against different defendants. "When the causes of action are different, the former decision is conclusive only as to questions, rights and facts actually decided therein and nothing more." Syl. pt., *Moore v Sun Lumber*, 66 W. Va. 735, 276 S.E.2d 797 (1981) (*per curiam*) (citation omitted). Nothing in Burnworth's articulation of his position supports the circuit court's view that Burnworth's malpractice action somehow hinged on the initial consent order, much less on the merger language; as his counsel explained during arguments on the summary judgment motion, the

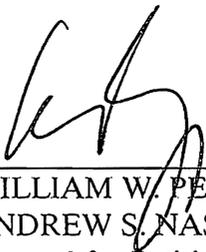
consent order was “an empty judgment” that merely set the amount of her client’s damages.³ (JA 319). The arguments in opposition to summary judgment simply did not in any way involve the language removed in the *nunc pro tunc* order.

STATEMENT REGARDING ARGUMENT AND DECISION

While petitioner believes that the facts and legal arguments are adequately presented in this brief and record on appeal, he requests a Rule 19 argument because his assignment of error involve error in the application of settled contract law and unsustainable exercise of discretion by the lower court.

CONCLUSION

Burnworth requests that this Court reverse the Circuit Court's order of July 23, 2012, dismissing all claims against all the defendants and the order of August 15, 2012 denying relief pursuant to Rule 60(b) and remand the case for discovery and trial.



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³ The fact that the contract and negligence claims have the same measure of damages is immaterial to this appeal. Should Burnworth eventually obtain a judgment against one or more of the malpractice defendants, they would have a right of contribution against the collection-action defendants. *See Board of Ed. Of McDowell Co. v. Zando, Martin & Milstead*, 182 W. Va. 597, 603; 390 S.E.2d 796, 802 (1990) (explaining that “inchoate contribution ... arises under any theory of liability which results in a common obligation to the plaintiff”).

CERTIFICATE OF SERVICE

I, William W. Pepper, counsel of record for the Petitioner, Robert L. Burnworth, hereby certify that I filed and served a true and exact copy of that certain **PETITIONER'S BRIEF** by mailing the same to Guy Bucci, Esq., to Bucci, Bailey & Javins, L.C., 213 Hale Street, Charleston, West Virginia 25301-2207 and to Michael J. Farrell, Esq. and Charlette A. Hoffman Norris, Esq. to Farrell, White & Legg, PLLC, 914 5th Avenue, P.O. Box 6457, Huntington, West Virginia 25772-6457, by First Class United States Mail, postage prepaid, on this 26th day of December, 2012.



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