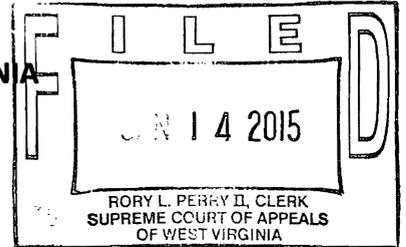


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0033



**STATE OF WEST VIRGINIA EX REL.
JAMES CAMPBELL and STEVEN FOSTER,**

Defendants below, Petitioners,

v.

**Petition for Writ of Prohibition from Circuit
Court of Jefferson County, West Virginia;
Civil Action No. 08-C-223**

**THE HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County,
and GLEN POE,**

Plaintiff Below, Respondent.

PETITION FOR WRIT OF PROHIBITION

**Counsel for Petitioners, James P. Campbell
and Steven Foster**

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PETITION FOR WRIT OF PROHIBITION

Arising from an Order issued by the Circuit Court of Jefferson County, West Virginia on January 17, 2014, and decision announced from the bench on January 5, 2015, each which improperly assert subject matter jurisdiction to modify Final Orders entered November 9, 2011 and January 5, 2012 in *Poe v. Campbell, et al.*, Civil Action 08-C-223, which resulted in this Court exercising final order jurisdiction as reflected in the Memorandum Decision in *Campbell v. Poe*, (12-0130) and *Foster v. Poe* (12-0165).

Petitioners James P. Campbell and Steven D. Foster (“Petitioners”) move for a Rule to Show Cause, Writ of Prohibition and a stay of all actions in Civil Action No. 08-C-223 in the Circuit Court of Jefferson County, West Virginia, until this Court adjudicates the merits of the instant Petition for Writ of Prohibition, regarding the Jefferson County Circuit Court’s lack of subject matter jurisdiction to modify the Final Orders of November 9, 2011 and January 5, 2012 by entering a Judgment Order on January 17, 2014, and by entering an Order on January 5, 2015 denying the Petitioners’ Motion to Alter, Amend or Vacate the January 17, 2014 Judgment Order, as follows:

1. The Circuit Court of Jefferson Court exceeded its jurisdiction by entering an alleged Judgment Order on January 17, 2014, two years and seven days following the entry of a Final Order on January 5, 2012, or in accordance with Rule 60(b) of the West Virginia Rules of Civil Procedure, more than one year after the Court was divested of subject matter jurisdiction.
2. The Circuit Court of Jefferson County exceeded its jurisdiction on January 5, 2015 by denying the Motion to Alter, Amend or Vacate the January 17, 2014 Judgment Order because of the lack of subject matter jurisdiction, and by directing the parties to appear on January 16,

2015 at 9:00 a.m. for the consideration of an attorney's fees claim by respondent Poe when the Court lacks subject matter jurisdiction, and when the Amended Complaint in the Circuit Court failed to seek attorney fees on the claim before the Court.

3. On January 23, 2012, a Notice of Appeal was filed in the Jefferson County Circuit Court by Petitioner Campbell in relation to the January 5, 2012 Final Order. Petitioner Foster filed a Notice of Appeal on January 27, 2012. This Court accepted "final order" jurisdiction as apparent from the June 7, 2013 Memorandum Decision in *Campbell v. Poe* (12-0130) and *Foster v. Poe* (12-0165).

4. On October 12, 2013 this Court issued a Mandate following the June 2, 2013 Memorandum Decision. The Mandate did not direct the Jefferson County Circuit Court to take any action, and directed that each party bear their own costs.

5. As set forth more fully in the attached Brief in Support of Petition for Writ of Prohibition the Appendix Record (A.R) and the transcript of proceedings in the Circuit Court on January 5, 2015, the Circuit Court lacked subject matter jurisdiction to amend the November 9, 2011 Judgment Order, and likewise lacks jurisdiction to consider an award of attorney's fees.

6. Pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure, a Rule to Show Cause must issue, and all proceedings in Civil Action 08-C-233 shall be stayed pending adjudication of the Petition for Writ of Prohibition.

7. Verification as required by law is attached as Exhibit A.

WHEREFORE the Petitioners, James P. Campbell and Steven D. Foster respectfully request the following relief:

a. That the Petition for Writ of Prohibition, Brief in Support of Petition for Writ of Prohibition the Appendix Record and transcript of proceedings of January 5, 2015 be accepted for filing; and

b. That a Rule to Show Cause issue against the Respondents directing them to show cause, if they can, as to why a Writ of Prohibition should not be awarded; and

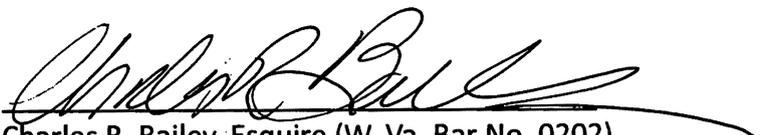
c. That all proceedings in the Circuit Court of Jefferson County, West Virginia in *Poe v. Campbell, et al*, Civil Action No. 08-C-288 be stayed pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure pending resolution of the subject matter jurisdiction issue raised in this Petition; and

d. Such further relief as this Court deems appropriate.

Respectfully Submitted,

**PETITIONERS JAMES P. CAMPBELL
AND STEVEN FOSTER**

By Counsel:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. _____

STATE OF WEST VIRGINIA EX REL.
JAMES CAMPBELL and STEVEN FOSTER,

Defendants below, Petitioners,

v.

Petition for Writ of Prohibition from Circuit
Court of Jefferson County, West Virginia;
Civil Action No. 08-C-223

THE HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County,
and GLEN POE,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

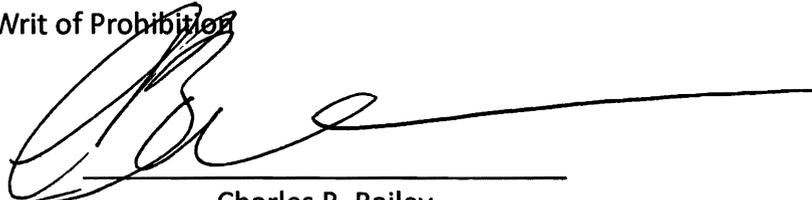
I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: First-Class, U.S. Mail, Facsimile and Electronic Mail

Date of Service: January 14, 2015

Persons served and address: David M. Hammer, Esquire
Robert J. Schiavoni, Esquire
Hammer, Ferretti & Schiavoni
408 West King Street
Martinsburg, West Virginia 25401

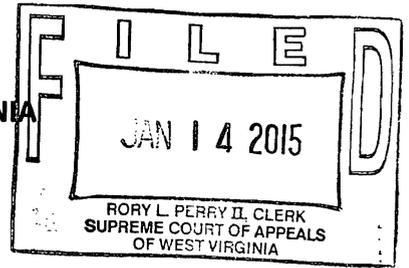
Item Served: Petition for Writ of Prohibition



Charles R. Bailey

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 15-0083



STATE OF WEST VIRGINIA EX REL.
JAMES CAMPBELL and STEVEN FOSTER,

Defendants below, Petitioners,

v.

Petition for Writ of Prohibition from Circuit
Court of Jefferson County, West Virginia;
Civil Action No. 08-C-223

THE HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County,
and GLEN POE,

Plaintiff Below, Respondent.

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION

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and Steven Foster

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I. QUESTION PRESENTED

Are Petitioners entitled to a Writ of Prohibition to be issued to the Circuit Court of Jefferson County, West Virginia, because the Circuit Court lacks subject matter jurisdiction to modify the Final Order of November 9, 2011 and award of attorney's fees following the entry of a final order on January 5, 2012; the June 2, 2013 Memorandum Decision in *James P. Campbell v. Poe*, Case No. 12-0130 and *Steven Foster v. Poe*, Case No. 12-0165; and following the October 1, 2013 Mandate from this Supreme Court.

Answer: Yes. The Supreme Court of Appeals of West Virginia issued a final Memorandum Decision on June 7, 2013 regarding the decision of the Circuit Court to grant summary judgment to Petitioner, but did not remand any matters back to the Circuit Court for further disposition and Petitioner failed to take any steps to reestablish the Circuit Court with jurisdiction over the case to modify the Final Order in the Circuit Court or to award attorney's fees.

II. RELEVANT STATEMENT OF THE CASE

On November 9, 2011, the Circuit Court of Jefferson County, West Virginia ("hereafter "Circuit Court"), entered an Order Granting Judgment against James P. Campbell and Steven D. Foster (collectively "Petitioners") upon Promissory Note (hereafter "Judgment Order") which granted judgment in favor of Glen Poe ("Respondent" or "Poe"), based on Petitioners' personal guarantees of a defaulted Promissory Note. (A.R. 000001-000005). The Judgment Order directed Poe to make a submission relating to any issues as to liquidating an amount due under the Promissory Note, including attorneys' fees and costs, within twenty (20) days, which Poe failed to do. (A.R. 000001-000005). The Judgment Order also granted Poe election to non-suit his remaining claims. (A.R. 000001-000005). The Judgment Order did not include: (1) a judgment amount; (2) details about the interest payments that had been already paid under the Promissory Note; (3) the amount of the interest owed under the Promissory Note at the time the Judgment Order was entered; or (4) anything about a specific grant of attorneys' fees and costs or specific amounts with respect to the same. (A.R. 000001-000005).

On November 23, 2011, Petitioners, separately, filed Motions to Alter, Amend or Vacate the Judgment Order. (A.R. 000110-000125). Petitioners' Motions were denied in the Circuit Court's Order entered on January 5, 2012. (A.R. 000021-000025). Again, the Circuit Court's Order did not include: (1) a judgment amount; (2) details about the interest payments that had been already paid under the Promissory Note; (3) the amount of the interest owed under the Promissory Note at the time the Judgment Order was entered; or (4) anything about a specific grant of attorneys' fees and costs or specific amounts with respect to the same. (A.R. 000021-000025).

On January 23, 2012, Petitioner Campbell filed a Notice of Appeal with the Supreme Court of Appeals of West Virginia which assigned error to the Circuit Court's November 9, 2011 Judgment Order and the Circuit Court's January 5, 2012 Final Order denying their Motions to Alter or Amend the Judgment Order. Petitioner Foster filed a similar Notice of Appeal on or about January 27, 2012. The Supreme Court accepted "final order" jurisdiction, as made clear by the June 7, 2013 Memorandum Decision in *Campbell, v. Poe*, No. 12-0130, and *Foster v. Poe*, No. 12-0165, which affirmed the January 5, 2012 Final Order denying Petitioners' Motions to Alter or Amend the Judgment Order and found, based on a *de novo* review of the record, that summary judgment was properly granted in favor of Poe. (A.R. 000026-000034). On October 1, 2013, a Mandate was issued by the Supreme Court stating that its June 7, 2013 Memorandum Decision was final. (A.R. 000035). Neither the Memorandum Decision nor the Mandate remanded the underlying case to the Circuit Court for the purpose of taking any action. (A.R. 000026-000035).

On November 13, 2013, Poe filed a Motion to Record Fixed Amount of the Judgment with the Circuit Court, pursuant to the terms of the Promissory Note. This Motion was filed one (1) year and eleven (11) months and fifteen (15) days after the deadline established in the November 9, 2011 Final Order. (A.R. 000209-000225). Shortly thereafter, Petitioner filed a Petition for Fees and Costs that included over \$197,000 in attorneys' fees and costs allegedly incurred in the pursuit of the enforcement of the Promissory Note. (A.R. 000036-000106. However, the claim for relief in the Amended Complaint does not request or demand the award of attorneys' fees in relation to the claim appealed to the Supreme Court. (A.R. 000173-000190)

On January 17, 2014, the Circuit Court entered an Order Granting Poe's Motion to Record Fixed Amount of the Judgment and awarded Poe a judgment amount of \$173,000 (principal of \$100,000 and interest of \$73,000 through October 31, 2013). (A.R. 000035-000036). On January 30, 2014, Campbell filed a Motion to Alter, Amend, or Vacate the Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment under Rule 59 of the *West Virginia Rules of Civil Procedure*, again, raising the Circuit Court's lack of jurisdiction based on the "final order rule". (A.R. 000109-000125). On February 4, 2014, Foster joined in the Motion to Alter, Amend, or Vacate. As of March 7, 2014, the parties had fully briefed the issues raised in said Motion. Thereafter, on March 31, 2014, undersigned appeared as counsel for Petitioners and filed a Motion for Oral Argument with respect to the Motion in order to make a complete record given the pending jurisdictional issues. (A.R. 000191-000196).

On or about October 7, 2014, Poe filed a Petition for Writ of Mandamus from the Circuit Court of Jefferson County, West Virginia Civil Action 08-C-223 in which he requested that the Supreme Court of Appeals of West Virginia, based on an express finding that the Circuit Court

has jurisdiction, issue a Rule to Show Cause to the Circuit Court: (1) as to why immediate relief cannot be granted denying the pending Motion to Alter, Amend, or Vacate; and (2) as to why an order awarding attorneys' fees and costs has not been entered, or, in the alternative, as to why a hearing has not been conducted on the request for attorneys' fees and costs.

On November 18, 2014, the Supreme Court issued a Rule to Show Cause to the Jefferson County Circuit Court, as to why a Writ of Mandamus should not be issued, unless the Circuit Court first determined the outcome with respect to the Motion to Alter, Amend or Vacate the Judgment Order of January 17, 2014. On January 5, 2015, the Circuit Court of Jefferson County entertained oral argument with respect to the Motion to Alter, Amend or Vacate the Judgment Order of January 17, 2014.

The Circuit Court denied the Motion to Alter, Amend or Vacate the Judgment Order of January 17, 2014, concluding that subject matter jurisdiction continues, whenever attorney's fees are requested in a fee shifting case by contract or otherwise. However, neither the original Complaint (A.R. 000131-000172) nor the Amended Complaint (A.R. 000173-000190) demanded an award of attorney's fees arising out of Count IV, relating to the promissory note guarantee claim. Other than the assertion regarding subject matter jurisdiction to award attorney's fees, the Jefferson County Circuit Court did not identify any statute, Rule of Civil Procedure, or case law from any appellate court in support of this proposition of continuing subject matter jurisdiction, continued generally, exactly two years following the January 5, 2013 Final Order.

III. SUMMARY OF ARGUMENT

On November 9, 2011 the Circuit to Jefferson County granted summary judgment in favor of Glen Poe, and ordered him to make any submission for a specific judgment amount and attorney's fees within twenty (20) days, or by November 29, 2011. Poe did not do so until November 13, 2013, following an appeal to this Court, which resulted in a Memorandum Decision on the merits on June 7, 2013. Subsequent to the Memorandum Decision, the Supreme Court issued a Mandate on October 1, 2013.

Poe sought to comply with the November 9, 2011 Order of the Circuit Court of Jefferson County, West Virginia by making a submission for a specific judgment amount on November 13, 2013, one (1) year eleven (11) months and fifteen (15) days after he was ordered to do so. Poe also made a separate submission for attorneys' fees on November 25, 2013. Your Petitioners respectfully assert that under the West Virginia Rules of Civil Procedure, and the common law of this state, no Circuit Court judge has authority to relieve a party from an error more than one year following the entry of a final order.

On January 17, 2014 the Circuit Court of Jefferson County granted a specific judgment amount over the objection of your Petitioners. Your Petitioners filed a Motion for relief from this Order pursuant to Rule 59 of the West Virginia Rules of Civil Procedure on January 30, 2014. After facing a potential Show Cause Order from this Court, the Circuit Court of Jefferson County scheduled oral argument on January 5, 2015, the two-year anniversary of the original Rule 59 "Final Order."

When deciding the Rule 59 Motion, your petitioners requested that the Circuit Court Jefferson County articulate its' basis for subject matter jurisdiction. Rather than citing any Rule of Civil Procedure, West Virginia statute or case law authority, the Circuit Court asserted that it

had continuing subject matter jurisdiction because Poe was entitled to an award of attorney fees in relation to his claim. This is precisely how the Circuit Court explained jurisdiction:

...It appears to this Court that in a case that is the enforcement of a promissory note, a fee shifting case, that it is uniquely part of that case that fees and expenses, since they are anticipated by contract, are a calculation for the Court to make, a calculation that the Court doesn't lose jurisdiction for until it is done.

That while the appeal had been considered by the Supreme Court, a final mandate had been issued after all the other variety of motions had been made, and the Court ruled partially at least that the promissory note be paid and the interest mentioned as the contractual interest be the interest. The attorney's fees that were petitioned for way back much earlier in the case but never ruled upon, are still before this Court and before the proper jurisdiction of this Court.

We'll note that the Defendant objects to the Court's ruling. But I think that whether the ruling was interlocutory or a final judgment is of no moment in a fee shifting case where a promissory note clearly implicates fees and costs and the Court needs to resolve that matter before the matter is final. January 5, 2015 Transcript, page 27-28. (A.R. 000226-000259)

Petitioners respectfully assert that the Circuit Court did not have subject matter jurisdiction to amend the November 9, 2011 and January 5, 2012 Orders for any purpose including an award of attorneys' fees. The Amended Complaint before the Circuit Court does not contain a demand for the award of attorney fees on the basis of the contract between the parties. (A.R. 000173-000190) Accordingly, even if the Circuit Court of Jefferson County retained subject matter jurisdiction, two years following the Final Order, for the purposes of awarding attorneys' fees, the law of the case mandates that attorneys' fees can only be awarded if they were in fact demanded in the Complaint.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners believe that oral argument will assist this Court in the decisional process. Oral argument will allow the parties to further articulate the issue of subject matter jurisdiction in

this State following a final order in a circuit court, and an appeal on the merits to this Supreme Court.

Petitioners respectfully assert that the Jefferson County Circuit Court exceeded its jurisdiction in relation to well-settled mandates of West Virginia law. Consideration of this Petition and oral argument should occur pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. However, the Circuit Court of Jefferson County asserts continuing subject matter jurisdiction, following a final order, which would be an issue of first impression in West Virginia, considered pursuant to Rule 20.

V. ARGUMENT

A. Legal standard for issuance of Writ of Prohibition.

Under Article VIII, Section 12 of the Constitution of West Virginia and West Virginia Code §§ 51-2-2 and 53-1-2, "circuit courts are granted jurisdiction to supervise and control all proceedings before justices and other inferior tribunals, by mandamus, prohibition and certiorari." *State ex ret. Huntington v. Lombardo*, 143 S.E.2d 535, 540 (W.Va. 1965). West Virginia Code § 53-1-1 sets forth the standard for obtaining a writ of prohibition stating that: "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." *State ex rel. Medical Assurance v. Recht*, 583 S.E.2d 80, 87 (W.Va. 2003).

Whenever a circuit court does not have jurisdiction or exceeds its legitimate powers, prohibition lies as a matter of right under West Virginia Code § 53-1-1:

The writ of prohibition shall lie as a matter of right .in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter

in controversy, or, having such jurisdiction, exceeds its legitimate powers.

"A writ of prohibition lies only to restrain inferior courts from proceedings in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." *Crawford v. Taylor*, 75 S.E.2d 370 (W.Va. 1953).

Prohibition is a preventive remedy. One seeking relief by prohibition in a proper case is not required, as a prerequisite to his right to resort to such remedy, to wait until the inferior court or tribunal has determined the question of its jurisdiction, or to wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed." Syl. Pt. 5, *State ex rei. Huntington v. Lombardo*, 149 W.Va. 671 (1965).

B. The Circuit Court Had No Authority to Enter Orders Following the October 1, 2013 Mandate.

In re Name Change of Jenna A.J., No. 14-0041 (W. Va. Oct. 16, 2014), the Supreme Court of Appeals of West Virginia addressed the issue of a Circuit Court's jurisdiction following a ruling of the Circuit Court's decision without a remand for further proceedings. *Id.*, at 3-4. After the Supreme Court's Mandate provided that its previously issued opinion was final and the Circuit Court's decision was reversed without a remand, the Circuit Court proceeded to hold a hearing in an effort to obtain evidence that the Supreme Court found lacking in the appeal and entered an Order thereafter. *Id.*, at 4. The Supreme Court ruled that since there was no remand, its decision in the first appeal "was final and constituted a definitive determination of the merits of the parties' dispute" and the Circuit Court had no authority to hold the subsequent hearing or enter the Order. *Id.*, at 7-8.

Just as in the *Jenna A.J. case*, the Supreme Court's Memorandum Decision entered on

June 7, 2013 was a final decision on the merits with no remand directing the Circuit Court to take any additional actions. (A.R. 000026-000034). The Mandate issued in the *Jenna A.J.* case and in the Respondents' appeal of the January 5, 2012 Order both stated that the decision in "the case is now final . . . and it is hereby ordered that the parties shall each bear their own costs . . . [and] [t]he Clerk is directed to remove this action from the docket of this Court." Accordingly, the Circuit Court in the underlying action had no authority to enter the Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment on January 17, 2014 and it has no authority to enter any future Orders in the underlying action. Moreover, the Mandate directs that the parties are to bear their own costs.

On November 25, 2014 in *Quicken Loans v. Brown*, W.Va. Lexis 10, 1307 (2014) this Court further clarified the rule of mandate. In *Quicken* the Supreme Court mandated that each party bear their own costs. After remand the trial court considered attorney fees and additional compensatory damages. This Court found the award of compensatory damages to be a violation of the mandate and reversible error. In *Quicken* the Supreme Court likewise reversed the trial court on remand, because the trial court awarded attorney's fees billed during the earlier appeal to the Supreme Court. In this opinion this Court noted that ordinarily appellate courts "order an award for a specified amount or remand the cause after affirmance solely for determination of the amount of appellate fees." The Supreme Court did not do so in the instant case.

The Supreme Court established a rule that in *Quicken* that is easy to follow:

The mandate required the parties to "bear their own costs." Therefore, the circuit court abused its discretion by awarding litigation costs for the appellate proceeding. Additionally, because attorney's fees are costs to this case, an award of attorney fees for work conducted by plaintiff's counsel on appeal

violates the mandate. *Id* at 42-43.

The essence of *Quicken* is to make clear that when the West Virginia Supreme Court intends further proceedings on remand, it shall so instruct the Circuit Court in the mandate. It is axiomatic when a mandate simply affirms a final order that there is nothing more for the Circuit Court to do. This conclusion has also been reached in Courts throughout the country. The fact that a trial court does not have continuing subject matter jurisdiction, after being affirmed on appeal, has been consistently adopted by courts in our sister states. See *Tietsworth v. Harley-Davidson*, 2007 WI97 303 Wis 2d. 94 (2007); *Madeksho v. Abraham, Watkins, Nichols, & Friend*, 112 S.W.3d 679, 695-96 (Tex. App. 2003) (holding that where "the judgment of the trial court is simply affirmed, there is no reinvestiture of any 'jurisdiction' (limited or otherwise) in the trial court"); *Griset v. Fair Political Practices Comm'n*, 25 Cal. 4th 688, 107 Cal. Rptr. 2d 149, 23 P.3d 43, 51 (Cal. 2001) (holding unqualified affirmance ordinarily sustains judgment and ends litigation; therefore, trial court did not have jurisdiction to reopen case once supreme court's decision became final); *Waterhouse v. Iowa Dist. Ct. for Linn County*, 593 N.W.2d 141, 142 (Iowa 1999) (holding that in absence of remand directing further proceedings in trial court, jurisdiction of district court terminates both as to parties and subject matter when district court judgment has been affirmed); See also *Ins. Corp. of Am. v. Barker*, 628 A.2d 38 (Del. 1993).

C. The Circuit Court Lacked Jurisdiction to Modify the November 9, 2011 Order and Award Attorneys' Fees.

The issue here is the absence of jurisdiction. The Circuit Court did not have jurisdiction to modify the November 9, 2011 or January 5, 2012 Orders, by virtue of the "final order rule" and also lacks subject matter jurisdiction to award attorneys' fees. The relief granted by the Judgment Order of January 17, 2014 constitutes a clear error of law.

A court has jurisdiction to correct a clerical error by the court "at any time" pursuant to Rule 60(a) of the West Virginia Rules of Civil Procedure. The relief granted on January 17, 2014 was not the correction of a clerical error, but was relief granted to Poe from his failure to comply with the November 9, 2011 Final Order. The November 9, 2011 Final Order of Jefferson County Circuit Court mandated that Poe file a motion for the entry of a specific judgment amount due within twenty (20) days. Poe failed to pursue the entry of a specific judgment amount from the date ordered - November 29, 2011 through November 15, 2013, a period of one (1) year, eleven (11) months and fifteen (15) days. This is not a clerical error by the Jefferson County Circuit Court.

A court may relieve a party from error in limited circumstances pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. However, a request for relief pursuant to Rule 60(b) must be made within one year of the final order. The Circuit Court's jurisdiction to consider Rule 60(b) relief (which has never been requested) terminated on January 4, 2013.

Even if Rule 60(b) were applicable, it would be difficult for Poe to satisfy the excusable neglect standard established by this Court. For many years in this jurisdiction the negligence of an attorney in failing to satisfy deadlines could not qualify as excusable neglect. See *White v. Berryman*, 187 W.Va. 323, 418 S.E.2d 917 (1992). However, in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed. 2d 74 (1973) the United States Supreme Court mandated that four factors must be considered to address excusable neglect. They are (1) the danger of prejudice; (2) length of the delay; (3) reason for the delay; and (4) whether the delay was within the reasonable control of the party causing the neglect. Factors 2, 3 and 4 cannot support excusable neglect in this case.

Your Petitioners assert that *Purdue v. Hess*, 199 W.Va. 299, 484 SE2d. 182 (1997) is most applicable to this case. In *Purdue* a plaintiff sought to enlarge the statute limitations after the plaintiff's attorney filed a personal action two days after the statute of limitations had tolled. The analysis of this Court was that failure to file a complaint by a date mandated by the statute limitations could not be excusable neglect.

The Final Order of November 9, 2011 directed Poe to make his application for a specific judgment amount and attorney's fees within twenty (20) days or on November 29, 2011. Instead Poe made his application on November 9, 2013, one (1) year, eleven (11) months and fifteen (15) days after the deadline established by the Final Order. The Circuit Court of Jefferson County did not have subject matter jurisdiction to relieve Poe of this neglect.

D. The January 5, 2012 Order is a Final Order by *res judicata*.

On June 7, 2013, the Supreme Court of Appeals of West Virginia issued a Memorandum Decision on the merits of the appeal in *Campbell, v. Poe*, No. 12-0130, and *Foster v. Poe*, No. 12-0165. (A.R. 000026-000034). Pursuant to *W. Va. Code* § 58-5-1, "appeals only may be taken from final decisions of a circuit court." "The required finality is a statutory mandate, not a rule of discretion. This rule, commonly referred to as the 'rule of finality,' is designed to prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation." *James M.B. v. Carolyn M.*, 193 W. Va. 289, 292, 456 S.E.2d 16, 19 (1995); *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 265, 102 S. Ct. 3081, 3082 (1982). The June 7, 2013 Memorandum Decision affirming the January 5, 2012 Circuit Court Order is *res judicata* that said Order was a "Final Order."

i. Bartles Confirms the Absence of Subject Matter Jurisdiction in the Circuit Court.

In *Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d. 827 (1996) the Supreme Court of Appeals of West Virginia addressed the issue of a Circuit Court's jurisdiction to entertain motions and additional matters after the entry of a final judgment order. In *Bartles*, Plaintiffs were injured in an automobile accident involving a Domino's Pizza delivery truck. *Id.*, 196 W. Va. at 385, 472 S.E.2d at 831. A jury found that Domino's was not liable for damages and Plaintiffs filed a Motion for New Trial which was denied by the Circuit Court. *Id.*, 196 W. Va. at 387, 472 S.E.2d at 833. Plaintiffs appealed the denial of the Motion for New Trial to the Supreme Court. The appeal was denied because, attached to the appeal, there was a Motion for Sanctions against Domino's arising out of alleged discovery violations which constituted a viable motion that did not have a final ruling. *Id.* The Supreme Court lacked jurisdiction to act on the interlocutory Order denying the Motion for New Trial. *Id.* After the appeal was denied, the Circuit Court held a hearing on the sanctions motion and ordered Domino's to pay \$10,000 for discovery violations. *Id.*, 196 W. Va. at 387-88, 472 S.E.2d at 833-34. Domino's then appealed that sanction to the Supreme Court and asserted that, among other errors, the Circuit Court lacked jurisdiction to rule on the sanctions motion after the Supreme Court denied Plaintiffs' appeal. *Id.*, 196 W. Va. at 388, 472 S.E.2d at 834. The Supreme Court found that because the sanctions motion was pending before the Circuit Court at the time of the first appeal, jurisdiction remained with the Circuit Court and not with it. *Id.*

In the *Bartles* decision, the Supreme Court confirmed the well-settled rule that "[a] trial court is deprived of jurisdiction only when it has entered a 'final' order within the contemplation of W. Va. Code, 58-5-1, and the final order has been appealed properly to this Court." *Id.* "The required finality is a statutory mandate, not a rule of discretion." *Id.* (quoting

Province v. Province, 196 W. Va. 473, 478, 473 S.E.2d 894, 899 (1996). “Our cases consistently hold a final order is one that ‘leaves nothing to be done but to enforce by execution what has been determined.’” *Id.* (quoting *James M.B.*, 193 W. Va. at 292, 456 S.E.2d at 19).

Any circuit court’s attempt to maintain jurisdiction following the entry of a final order is contrary to the express mandate in *Bartles* that “a trial court cannot write its own jurisdictional ticket, but it must act within the confines of constitutional as well as statutory limits on its jurisdiction”. *Id.*, 196 W. Va. at 389, 472 S.E.2d at 835. The Supreme Court’s June 7, 2013 Memorandum Decision was not based on an interlocutory order but from a final order of the Circuit Court and did not remand any matters back to the Circuit Court to take any more action. (A.R. 000026-000034). Thus, the June 7, 2013 Memorandum Decision is *res judicata* in that a final order was entered by the Circuit Court on January 5, 2012.

ii. Poe Waived the Right to Seek Relief.

On November 9, 2011 the Circuit Court of Jefferson County, West Virginia granted summary judgment in what it identified as a Final Order. The Circuit Court did not award any judgment amount; did not award attorney’s fees; and directed that if the Plaintiff sought the entry of a specific judgment amount and for attorney’s fees, he was directed to file a motion within twenty (20) days of the Order.

During the pendency of the appeal from January 23, 2012, through the issuance of the Mandate in the appeal of this case on October 1, 2013, Poe did not mention to this Supreme Court that a specific judgment amount had not been awarded by the Circuit Court of Jefferson County or that any issue remained with respect to the award of attorneys’ fees. Stated differently, during the one (1) year, eight (8) months and twenty-seven (27) days that the West

Virginia Supreme Court had jurisdiction over this appeal, Glen Poe waived any remaining issue to be decided by the Supreme Court or by the Circuit Court of Jefferson County. In *Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Sys. of the Midsouth, Inc.*, 266 S.W. 3d 421 (2007), the Tennessee Appeals Court addressed a similar issue:

Stated another way, "[o]nce the notice of appeal was filed, the jurisdiction of [the appellate] court attached, and, correlatively, the trial court lost jurisdiction." *State v. Snowden*, 2006 Tenn. Crim. App. LEXIS 383, 2006 WL 1303946, at *2 (Tenn. Crim. App. 2006) (citing *State v. Armstrong*, 126 S.W.3d 908, 912 (Tenn. 2003); *State v. Irwin*, 962 S.W.2d 477, 479 (Tenn. 1998); *Pendergrass*, 937 S.W.2d at 837-38; *State v. Ogle*, No. E2000-00421-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 31, 2001 WL 38755, at *4 (Tenn. Crim. App. Jan. 17, 2001)); *State v. Peele*, 58 S.W.3d 701, 704 (Tenn. 2001) ("After the trial court loses jurisdiction, generally it retains no power to amend a judgment"). If a party wishes to seek relief from a judgment during that time, he has the option of applying to the appellate court for an order of remand. *Spence*, 883 S.W.2d at 595; see *City of Memphis v. Civil Serv. Comm'n of the City of Memphis*, No. W2002-01556-COA-R3-CV, 2003 Tenn. App. LEXIS 682, 2003 WL 22204496, at *2 (Tenn. Ct. App. Sept. 15, 2003). [**10] Absent an application for remand, the trial court's attempt to enter further orders addressing a party's Rule 60.02 motion is a nullity. See *Moore v. Teddleton*, 2006 Tenn. App. LEXIS 723, 2006 WL 3199273, at *4. Additionally, "jurisdiction to modify a final judgment cannot be grounded upon waiver or agreement by the parties." *State v. Moore*, 814 S.W.2d at 382; see also *Chorost v. Chorost*, No. M2000-00251-COA-R3-CV, 2003 Tenn. App. LEXIS 441, 2003 WL 21392065, at *4 (Tenn. Ct. App. June 17, 2003).

The relief Poe sought was to amend the November 9, 2011 Order by inserting a judgment amount and awarding attorneys' fees. Without subject matter jurisdiction the Circuit Court of Jefferson County had no authority to do so.

iii. Poe Did Not Make an Attorney's Fee Claim in his Amended Complaint.

Rule 8(a) of the West Virginia the Rules of Civil Procedure requires that every Complaint specify the claim for relief requested, i.e. "A pleading ... shall contain ... (2) a demand for judgment for the relief the pleader seeks."

On January 5, 2014 at oral argument on the Petitioners' Rule 59 Motions, the Jefferson County Circuit Court asserted that it had continuing subject matter jurisdiction to award a specific judgment amount and to award attorney fees because subject matter jurisdiction is retained in attorney fee shifting cases. While your petitioners assert that this assertion is without jurisprudential support, neither the Complaint (A.R. 000131-000172), nor the Amended Complaint (A.R. 000173-000190) contain a demand or request for the relief of the award of attorney fees in relation to Count 4, the Breach of Contract claim. The claim for relief in the Complaint and Amended Complaint states the following:

WHEREFORE, plaintiff requests all relief as permitted by law and equity, including contractual, compensatory and punitive damages, and pre and post judgment interest, and further all statutory damages, including, but not limited to, consideration, out of pocket expenses and labor costs, liquidated damages, interest, and **attorney's fees and costs as contemplated by the West Virginia Uniform Securities Act, the West Virginia Uniform Fraudulent Transfers Act, and the Wage Payment and Collection Act.** Emphasis added.

While the Amended Complaint sought an award of attorney's fees, for the statutory claims which Poe dismissed, it does not demand attorney fees pursuant to the contract claim. During the one (1) year, eight (8) months and twenty-seven (27) days (January 23, 2012 through October 2, 2013) the appeal was pending, no pleading or briefing to the Supreme Court by Poe addressed any issue with respect to an undecided attorney's fee claim. In fact, in the Summary Response (A.R. 000197-000208) filed by Poe in response to the earlier appeal, the words "attorney's fees" do not so much as even appear within the four corners of the pleading. Therefore any alleged claim for attorney's fees is not a basis for subject matter jurisdiction.

- iv. **No Request for Relief under Rule 60(b) of the *West Virginia Rules of Civil Procedure* has been made by the Petitioner.**

Given the mandate of *Bartles, Jenna A.J., Quicken* and the *res judicata* effect of the June 7, 2013 Memorandum Decision, the January 5, 2012 Order in the Circuit Court was a final order as a matter of law. (A.R. 000021-000034). Rule 60(b) of the *West Virginia Rules of Civil Procedure* provides a basis for relieving a party from a final order upon the following grounds: (1) mistake, surprise, excusable neglect, or unavoidable cause, (2) newly discovered evidence, (3) fraud, misrepresentation, or misconduct, (4) void judgment, (5) satisfied or vacated judgment, or (6) any other reason justifying relief. The motion for relief must be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than one year after the judgment order is entered. *Syl. Pt. 1, Delapp v. Delapp*, 213 W.Va. 757, 584 S.E.2d 899 (2003). Pursuant to Rule 60(b), the one-year time limit for seeking relief must be strictly construed. "In order to benefit from this rule, the party must file a motion for relief within the time constraints found in Rule 60(b)." *Corathers v. Facemire*, 185 W. Va. 78, 80, 404 S.E.2d 769, 771 (1991) (emphasis added).

In this case, the one-year time period expired on January 4, 2013. No request for relief has ever been made pursuant to Rule 60(b). (A.R. 000001-000015). Accordingly, the Circuit Court does not have jurisdiction to amend the Final Order which was the subject of the June 7, 2013 Memorandum Decision because the one-year time period expired on January 4, 2013.

v. Relief Cannot be Granted Pursuant to Rule 60(a) of the *West Virginia Rules of Civil Procedure*.

A circuit court has jurisdiction "at any time" pursuant to Rule 60(a) of the *West Virginia Rules of Civil Procedure* to correct a clerical error. During the pendency of an appeal, relief under Rule 60(a) requires leave from the appellate court.

In this case, there was no clerical error. The November 9, 2011 Judgment Order mandated the submission of a calculation of a specific amount due¹ under the Promissory Note, including attorneys' fees and costs within twenty (20) days from the date of the entry of the Order, which Respondent failed to do. (A.R. 000001-000005). The failure of Respondent to comply with this directive is not a clerical error by the Circuit Court. Rule 60(a) is not designed to relieve a party from a mistake.

In *Barber v. Barber*, 195 W. Va. 38, 43, 464 S.E.2d 358, 363 (1995), the Supreme Court provided a definition of clerical errors based upon the common law and Rule 60(a) of the *West Virginia Rules of Civil Procedure* consistent with *Stephenson v. Ashburn*, 137 W. Va. 141, 146, 70 S.E.2d 585, 588 (1952) and *Johnson v. Nedeff*, 192 W.Va. 260, 265, 452 S.E.2d 63, 68 (1994):

An error committed in the performance of clerical work, no matter by whom committed; more specifically, a mistake in copying or writing; a mistake which naturally excludes any idea that its insertion was made in the exercise of any judgment or discretion, or in pursuance of any determination; an error made by a clerk in transcribing, or otherwise, which must be apparent on the face of the record, and capable of being corrected by reference to the record only.

Neither Poe nor the Jefferson County Circuit Court identified Rule 60(a) as a basis for continuing jurisdiction because it is clear that any error was by Poe and not the Circuit Court. The November 9, 2011 Order plainly directed Poe to make his submission within twenty (20) days. Poe did not do so. Neither the Circuit Court nor this Honorable Supreme Court has subject matter jurisdiction to relieve Poe from this error.

VI. CONCLUSION

The Circuit Court of Jefferson County asserts that it has subject matter jurisdiction to

¹ Nothing in the record prior to the appeal filed on January 23, 2012 indicates the allocation of credits and the calculation of interest.

amend the November 9, 2011 Final Order, and to consider an award of attorneys' fees, notwithstanding this Honorable Court's Memorandum Decision of June 2, 2013, and the Mandate of October 1, 2013.

Jurisdiction of a circuit court is based on West Virginia's constitution, statutory authority, the Rules of Civil Procedure, and the common law. The Jefferson County Circuit Court's assertion of subject matter jurisdiction one (1) year, eleven (11) months and fifteen (15) days after entry of a final order is without basis under the law. A Writ of Prohibition should issue prohibiting any action to seek the enforcement of the January 17, 2014 Order; and/or any action to seek the award of attorneys' fees.

Respectfully Submitted,

**PETITIONERS JAMES P. CAMPBELL
AND STEVEN FOSTER**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. _____

STATE OF WEST VIRGINIA EX REL.
JAMES CAMPBELL and STEVEN FOSTER,

Defendants below, Petitioners,

v.

Petition for Writ of Prohibition from Circuit
Court of Jefferson County, West Virginia;
Civil Action No. 08-C-223

THE HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County,
and GLEN POE,

Plaintiff Below, Respondent.

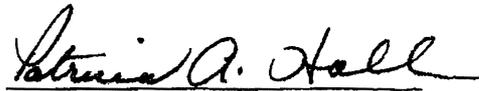
VERIFICATION OF PETITION FOR WRIT OF PROHIBITION AND BRIEF IN SUPPORT

James P. Campbell, one of the Petitioners in this proceeding, under oath, hereby verifies, pursuant to West Virginia Code Section 53-1-3, and Rule 16 (d)(9), that the factual assertions contained in the Petition for Writ of Prohibition and the Brief in Support of the Petition for Writ of Prohibition filed with this Verification are true and correct.

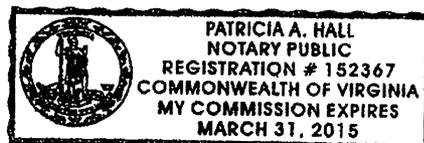

James P. Campbell

COMMONWEALTH OF VIRGINIA
COUNTY OF LOUDOUN, to wit:

The foregoing instrument was sworn to before me this 14th day of January, 2015, by James P. Campbell, who is personally known to me.


Patricia A. Hall
Notary Public

My commission expires: 03/31/2015



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CERTIFICATE OF SERVICE

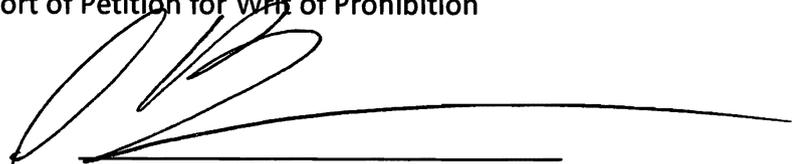
I hereby certify that service of a true copy of the foregoing has been made as follows:

Type of Service: First-Class, U.S. Mail, Facsimile and Electronic Mail

Date of Service: January 14, 2015

Persons served and address: David M. Hammer, Esquire
Robert J. Schiavoni, Esquire
Hammer, Ferretti & Schiavoni
408 West King Street
Martinsburg, West Virginia 25401

Item Served: Brief In Support of Petition for Writ of Prohibition



Charles R. Bailey