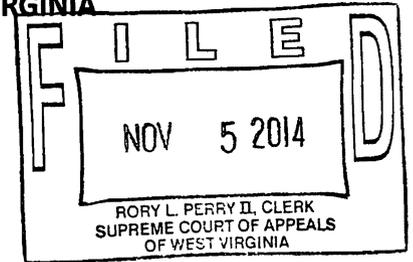


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 14-1031



**STATE OF WEST VIRGINIA EX REL.
GLEN POE**

Plaintiffs below, Petitioners,

v.

**Petition for Writ of Mandamus 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 JAMES P. CAMPBELL, ESQ., and STEVEN FOSTER**

Defendants Below, Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

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I. QUESTION PRESENTED

Is the Petitioner entitled to a Writ of Mandamus to be issued to the Circuit Court of Jefferson County, West Virginia, when neither the Supreme Court of Appeals of West Virginia nor the Circuit Court has (1) subject matter jurisdiction or, (2) in the alternative, the Circuit Court has not yet ruled on the issues identified in the Petition for the Writ of Mandamus.

Answer: No. 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 or, in the alternative, the Circuit Court should be able to rule on the matters pending before it, including whether it may exercise jurisdiction over the Motions pending before it.

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 Upon Promissory Note (hereafter “Judgment Order”) which granted judgment in favor of Petitioner, Glen Poe, based on Respondents’ personal guarantees of a defaulted Promissory Note. (A.R. 000025-000029). The Judgment Order directed Petitioner 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 Petitioner failed to do. (A.R. 000025-000029). The Judgment Order also granted Petitioner’s election to non-suit his remaining claims. (A.R. 000025-000029). The Judgment Order did not include: (1) the details about the interest payments that had been already paid under the Promissory Note; (2) the amount of the interest owed under the Promissory Note at the time the Judgment Order was entered; or (3) anything about a specific grant of attorneys’ fees and costs or specific amounts with respect to the same. (A.R. 000025-000029).

On or about November 23, 2011, Respondents, James P. Campbell and Steven D. Foster, separately, filed Motions to Alter or Amend the Judgment Order. (A.R. 000012). Respondents' Motions were denied in the Circuit Court's Order entered on January 5, 2012. (A.R. 000030-000034). Again, the Circuit Court's Order did not include: (1) the details about the interest payments that has been already paid under the Promissory Note; (2) the amount of the interest owed under the Promissory Note at the time the Judgment Order was entered; or (3) anything about a specific grant of attorneys' fees and costs or specific amounts with respect to the same. (A.R. 000030-000034).

On or about January 23, 2012, Respondent 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 and Respondent Foster filed a similar Notice of Appeal on or about January 27, 2012. 9A.R. 000013). 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 Respondents' 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 Petitioner. (A.R. 000016-000024). On October 1, 2013, a Mandate was issued by the Supreme Court stating that its June 7, 2013 Memorandum Decision was final. (A.R. 000013). Neither the Memorandum Decision nor the Mandate remanded the underlying case to the Circuit Court for the purpose of taking any action. (A.R. 000016-000024).

In November of 2013, Petitioner filed a Motion to Record Fixed Amount of the Judgment with the Circuit Court, pursuant to the terms of the Promissory Note. (A.R. 000013). 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. 000037-000107). For reasons unknown, Respondents did not receive a copy of these pleadings and the Circuit Court directed that they be served again in December of 2013. Respondents, separately, objected based on the Circuit Court's lack of jurisdiction. (A.R. 000014, 000107).

On January 17, 2014, the Circuit Court entered an Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment which awarded Petitioner 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, Respondent 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. 000108-000124). On February 4, 2014, Respondent Foster joined in the Motion to Alter, Amend, or Vacate. (A.R. 000014). As of March 7, 2014, the parties had fully briefed the issues raised in said Motion. (A.R. 000014-000015). Thereafter, on March 31, 2014, undersigned appeared as counsel for Respondents and filed a Motion for Oral Argument with respect to said Motion in order to make a complete record given the pending jurisdictional issues. (A.R. 000015).

To date, the Circuit Court has not scheduled a hearing on the Motion to Alter, Amend, or Vacate the Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment. (A.R.

000001-000015). Also, the Circuit Court has neither entered a briefing schedule with respect to Petitioner's Petition for Fees and Costs nor scheduled a hearing on the same. (A.R. 000001-000015). On or about October 7, 2014, Petitioner filed a Petition for Writ of Mandamus from Circuit Court of Jefferson County, West Virginia Civil Action 08-C-223 in which he has sought 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. (Petition, *see generally*).

III. SUMMARY OF ARGUMENT

Petitioner's Petition for Writ of Mandamus should be denied because: (1) the Supreme Court of Appeals of West Virginia lacks subject matter jurisdiction to issue the requested Writ of Mandamus given its June 7, 2013 Memorandum Decision on the merits of the appeal in *Campbell, v. Poe*, No. 12-0130, and *Foster v. Poe*, No. 12-0165; (2) Petitioner has not undertaken efforts to obtain a ruling from the Circuit Court on Respondents' Motion to Alter, Amend, or Vacate the Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment Order which would have resulted in the Circuit Court addressing its lack of jurisdiction; and (3) Petitioner seeks to have the Supreme Court render a decision on the underlying merits of Respondents' pending Motion to Alter, Amend, or Vacate and also Petitioner's pending Petition for Fees and Costs which is improper under West Virginia law.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents believe that the record and briefs in this case will provide the Supreme Court of Appeals of West Virginia with all necessary information needed to decide the issues, and therefore, oral argument under Rule 18(a) of the *Rules of Appellate Procedure* is not necessary unless the Supreme Court determines that other issues arising upon the record should be addressed.

V. ARGUMENT

The controlling standard as to whether a writ of mandamus should be issued is set forth in Syl. Pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969), which states that:

A writ of mandamus will not issue unless three elements coexist (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

The burden of proof on all three elements rests with the petitioner. Syl. Pt. 2, *Myers v. Bartle* 167 W. Va. 194, 279 S.E.2d 206 (1981). The issue of “whether one has a clear legal right to relief ‘is generally a question of standing.’” *State ex rel. Billy Ray C. v. Skaff*, 190 W. Va. 504, 507, 438 S.E.2d 847, 850 (1993) (quoting *Smith v. West Virginia State Bd. of Educ.*, 170 W. Va. 593, 596, 295 S.E.2d 680, 683 (1982)). While a writ of mandamus is a remedy to compel a mandatory duty of tribunals and officers, “it is never employed to prescribe in what manner they shall act, or to correct errors they have made.” Syl. Pt. 4, *Paxton v. State Dep't of Tax & Revenue*, 192 W. Va. 213, 451 S.E.2d 779 (1994).

A. The Supreme Court of Appeals of West Virginia Cannot Issue a Writ of Mandamus Because of the Absence of Subject Matter Jurisdiction.

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. 000016-000024). 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. So contrary to the mandate of *Bartles*, Petitioner states that the Circuit Court specifically allowed for continuing jurisdiction in the November 9, 2011 Order. (Petition, at 6-7). This statement is incorrect. 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. 000016-000024). 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. 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. 000016-000024). 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.

iii. 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* 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. 000030-000034). 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 and the Appendix submitted to this Court by the Petitioner makes it clear that 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.

iv. 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, that 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 Petitioner failed to do. (A.R. 000001-000015, 000025-000029). The failure of Petitioner 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.

Petitioner has not identified Rule 60(a) as a basis for continuing jurisdiction in Jefferson County Circuit Court because it is clear that any error was by Petitioner and not the Circuit Court. The November 9, 2011 Order plainly directed Petitioner to make his submission within

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

twenty (20) days. Petitioner did not do so. Neither the Circuit Court nor this Honorable Supreme Court has subject matter jurisdiction to relieve Petitioner from this error.

B. There is Nothing in the Record that Reflects Petitioner Actively Sought a Ruling on the Pending Motion to Alter, Amend, or Vacate from the Circuit Court.

Respondents assert that it is unfair for Petitioner to claim that, through counsel, he has undertaken efforts to expedite a ruling on the pending Motion to Alter, Amend, or Vacate the Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment by contacting the Circuit Court, but to no avail. (Petition, at 4). Neither Respondents, nor their counsel, have received any pleadings or been contacted by Petitioner's counsel and/or the Circuit Court regarding a hearing or expediting a ruling on said Motion. There is just no evidence in the record to indicate that Petitioner has actively sought an expedited ruling. (A.R. 000001-000015). Moreover, had Petitioner sought a ruling from the Circuit Court, there would be no reason for this Petition for Writ of Mandamus as the Circuit Court lacks jurisdiction to rule on the merits of the underlying November 13, 2013 Motion to Record Fixed Amount of Judgment given. The Supreme Court has already exercised appellate jurisdiction over the November 9, 2011 and January 5, 2012 Orders in *Campbell, v. Poe*, No. 12-0130, and *Foster v. Poe*, No. 12-0165, and did not issue a remand or direct the Circuit Court to take any further action. (A.R. 000016-000024). Therefore, the Petition for Writ of Mandamus should be denied.

C. Any Writ of Mandamus Issued by the Supreme Court of Appeals of West Virginia Should Not Direct the Circuit Court How to Rule on the Underlying Merits of the Pending Motions.

Should the Supreme Court of Appeals of West Virginia be inclined to issue the requested Writ of Mandamus, it should not direct the Circuit Court how to rule on the underlying merits of the pending Motions. Petitioner has filed a Petition for Writ of Mandamus from Circuit Court of

Jefferson County, West Virginia Civil Action 08-C-223 in which he has requested that the Supreme Court make an express finding that the Circuit Court has jurisdiction and issue a rule to show cause to the Circuit Court: (1) as to why immediate relief cannot be granted denying Respondents' Motion to Alter, Amend, or Vacate the Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment; and (2) as to why an order granting his Petition for Fees and Costs has not been entered, or, in the alternative, as to why a hearing has not been conducted on said Petition. (Petition, *see generally*). Thus, he is clearly asking the Supreme Court to direct the Circuit Court how to rule on the merits and find that the Circuit Court has jurisdiction and that said Motion is to be denied and also find that the Petition for Fees and Costs is to be granted. This is improper under West Virginia law as a writ of mandamus is a remedy to compel a mandatory duty of tribunals and officers, but "it is never employed to prescribe in what manner they shall act, or to correct errors they have made." Syl. Pt. 4, *Paxton*, 192 W. Va. 213, 451 S.E.2d 779. Accordingly, if the Supreme Court declines to decide the jurisdictional issue, any Writ of Mandamus issued in this matter should not dictate the manner in which the Circuit Court is to act with respect to the jurisdictional issue and/or any other issues raised in the pending Motion to Alter, Amend, or Vacate and pending Petition for Fees and Costs.

VI. CONCLUSION

Petitioner's Petition for Writ of Mandamus should be denied because: (1) the Supreme Court of Appeals of West Virginia lacks subject matter jurisdiction to issue the requested Writ of Mandamus given its June 7, 2013 Memorandum Decision on the merits of the appeal in *Campbell, v. Poe*, No. 12-0130, and *Foster v. Poe*, No. 12-0165; (2) Petitioner has not undertaken efforts to obtain a ruling from the Circuit Court on Respondents' Motion to Alter, Amend, or

Vacate the Order Granting Plaintiff's Motion to Record Fixed Amount of the Judgment Order which would have resulted in the Circuit Court addressing its lack of jurisdiction; and (3) Petitioner seeks to have the Supreme Court render a decision on the underlying merits of Respondents' pending Motion to Alter, Amend, or Vacate and also Petitioner's pending Petition for Fees and Costs which is improper under West Virginia law.

Respectfully Submitted,

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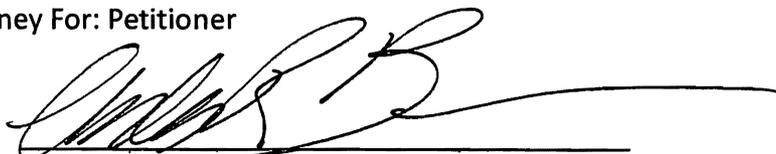
THE HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County,
and JAMES P. CAMPBELL, ESQ., and STEVEN FOSTER

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Respondents Brief in Opposition to Petition for Writ of Mandamus" was served upon the following parties by U.S. Mail on this 5th day of November, 2014:

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