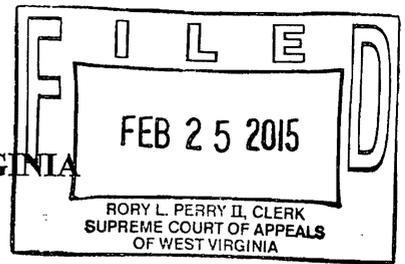


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA, EX. REL.
THE FIRST STATE BANK,

Petitioner,

v.

THE HONORABLE F. JANE HUSTEAD,
JUDGE OF THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

Respondent,

v.

JEFFREY B. POWERS,

Respondent.

Upon Original Jurisdiction

In Prohibition

No. 15-0151

(Circuit Court of Cabell County, WV)

(Case Number: 13-C-415)

PETITION FOR WRIT OF PROHIBITION

THE FIRST STATE BANK

By Counsel:

Daniel T Yon, Esquire (WV Bar #6139)

David D. Amsbary, Esquire (WV Bar #9968)

BAILES, CRAIG & YON, PLLC

401 Tenth Street, Suite 500

Post Office Box 1926

Huntington, West Virginia 25720-1926

Telephone: (304) 697-4700

Facsimile: (304) 697-4714

dty@bcyon.com

dda@bcyon.com

TABLE OF CONTENTS

PETITION FOR WRIT OF PROHIBITION.....1

STATEMENT OF JURISDICTION.....1

PARTIES.....3

QUESTIONS PRESENTED.....4

STATEMENT OF THE CASE.....4

SUMMARY OF ARGUMENT.....10

STATEMENT OF ORAL ARGUMENT AND DECISION.....11

ARGUMENT.....11

CONCLUSION.....20

PRAYER FOR RELIEF.....20

TABLE OF AUTHORITIES

Cases

Benjamin H. v. Walker,
2009 U.S. Dist. LEXIS 17617 (S.D.W.Va., 2009).....18, 19

Blankenship v. Bowen's Roof Bolts Sales and Serv., Inc.,
184 W.Va. 587, 402 S.E.2d 256 (1991).....15

Cox v. State,
197 W.Va. 210, 460 S.E.2d 25 (1990).....13

Cruciotti v. Tom McNeel,
183 W.Va. 424, 396 S.E.2d 191 (1990).....15, 19

Gabritsch v. Gabritsch,
164 W.Va. 146, 260 S.E.2d 841 (1979).....16

Gerver v. Benavides,
207 W.Va. 228, 530 S.E.2d 701 (2000).....8, 14

Hustead v. Ashland Oil, Inc.,
197 W.Va. 55, 475 S.E.2d 55 (1996).....12, 14

Intercity Realty Company v. Gibson,
154 W.Va. 369, 175 S.E.2d 452 (1970).....15

Kelly v. Belcher,
55 W.Va. 757, 187 S.E.2d 617 (1972).....13, 15

Meadows v. Daniels,
169 W.Va. 237, 238, 286 S.E.2d 423,423 (1982).....14, 16

Midkiff v. Kinney,
180 W.Va. 55, 375 S.E.2d 419 (1988).....15

Moore v. Canterbury,
181 W.Va. 389, 382 S.E.2d 583 (1989).....15

Norfolk & W.Ry. V. Pinnacle Coal Co.,
44 W.Va. 574, 576, 30 S.E. 196, 197 (1898).....2

Powderidge Unit Owners Ass'n v. Highland Properties,
196 W.Va. 692, 705, 474 S.E.2d 872, 885 (1996).....14

<i>Rose v. Thomas Memorial,</i> 208 W.Va. 406, 413, 541 S.E.2d 1, 22 (2000).....	14
<i>Savas v. Savas,</i> 181 W.Va. 316, 382 S.E.2d 510 (1989).....	19
<i>State ex rel. Allstate v. Honorable Martin Guaghan,</i> 203 W.Va. 358, 508 S.E.2d 75 (1998).....	2
<i>State ex rel. Hoover v. Berger,</i> 199 W.Va. 12, 483 S.E.2d 12 (1996).....	2, 11
<i>Strobridge v. Alger,</i> 184 W.Va. 192, 399 S.E.2d 903 (1990).....	19
<i>Toler v. Shelton,</i> 157 W.Va. 778, 204 S.E.2d 85 (1974).....	13
<i>Woodall v. Laurita,</i> 156 W.Va. 207, 195 S.E.2d 717 (1973).....	3

Statutes

West Virginia Code § 53-1-1.....	1
West Virginia Code § 46A-2.....	6, 19

Rules and Regulations

Federal Rules of Civil Procedure Rule 60(b).....	18, 19
West Virginia Rules of Civil Procedure Rule 60(b)(1-5).....	5, 8, 9, 13, 14, 15, 16, 20
West Virginia Rules of Civil Procedure Rule 60(b)(6).....	3, 4, 10, 11, 13, 14, 15, 16, 18, 19, 20
West Virginia Rules of Appellate Procedure 16(a).....	1
West Virginia Rules of Appellate Procedure 18(a)(4).....	11

2. “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 not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” West Virginia Code §53-1-1. *State ex rel. Allstate v. Honorable Martin Guaghan*, 203 W.Va. 358, 508 S.E.2d 75 (1998).

3. “The writ is no longer a matter of sound discretion, but a matter of right; it lies in all proper cases whether there is a remedy or not.” *Norfolk & W.Ry. v. Pinnacle Coal Co.* 44 W. Va. 574, 576, 30 S.E. 196, 197 (1898).

4. In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors:

- 1) whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief;
- 2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal;
- 3) whether the lower tribunal’s order is clearly erroneous as a matter of law;
- 4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and
- 5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression.

These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

6. Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue." Syl. pt. 2, *Woodall v. Laurita*, 156 W.Va. 207, 195 S.E.2d 717 (1973).

Pursuant to this Court's original jurisdiction of matters related to usurpation of legitimate powers of a lower tribunal, Petitioner seeks relief in the form of issuance of a writ of prohibition as the Honorable Circuit Court of Cabell County has abused its legitimate powers by setting aside an Agreed Order Confessing Judgment negotiated between two parties and their respective counsel, without sufficient justification as required by Rule 60(b)(6) of the West Virginia Rules of Civil Procedure, and as such, is clearly erroneous as a matter of law.

PARTIES

1. The Petitioner, The First State Bank, is a West Virginia corporation, located in Huntington, West Virginia. Petitioner is Plaintiff in the action below in which it seeks payment of the outstanding balance remaining on a loan in the amount of Fifteen Thousand Dollars (\$15,000.00) issued to Jeffrey Powers, Defendant.

2. Respondent, the Honorable Jane F. Husted is a Judge of the Circuit Court of Cabell County, West Virginia. Judge Husted is the Circuit Judge who entered the Agreed Order Confessing Judgment, as well as the Order Granting Motion for Relief From Judgment, which is the subject of the instant petition.

QUESTIONS PRESENTED

1. Whether the Circuit Court committed clear legal error in setting aside an Agreed Order Confessing Judgment pursuant to West Virginia Rules of Civil Procedure Rule 60(b)(6) based upon its finding that “circumstances surrounding the loan at issue at a minimum make the loan questionable...[and] because a decision on the merits is favored.”
2. Whether the Circuit Court committed clear legal error in setting aside an Agreed Order Confessing Judgment pursuant to W.Va. R. Civ. P. Rule 60(b)(6) in the absence of a findings of fact which identify facts or circumstances which are sufficiently extraordinary to disturb the finality of a final order.
3. Whether the Circuit Court erred as a matter of law in setting aside an Agreed Order Confessing Judgment pursuant to W.Va. R. Civ. P. Rule 60(b)(6) in which there is no dispute that the Agreed Order was the subject of a negotiated agreement between the parties and their respective counsel.

STATEMENT OF THE CASE

The present matter arises out of Mr. Powers’ failure to timely repay Petitioner a loan with The First State Bank. In furtherance of its efforts to collect the outstanding balance, Petitioner filed a Complaint against Powers on or about June 14, 2013 in the Circuit Court of Cabell County. At the time of the filing of the Complaint, the balance owed on the loan was Thirteen Thousand Ninety-eight Dollars Eighty-six Cents (\$13,098.86). *See*, Exhibit A. By its Complaint, Petitioner sought the outstanding balance plus interest, costs, and attorney fees as provided for in a promissory note and related loan documents executed by Mr. Powers. After service of the Summons and Complaint on Powers, his counsel Attorney David Pence of the Carter Zerbe Law Office contacted Petitioner’s counsel, Attorney Daniel T Yon, seeking a

negotiated resolution of the matter on behalf of his client.

Rather than file a responsive pleading to the Complaint or serve discovery regarding the underlying debt, Mr. Powers negotiated a resolution of the matter including a payment plan which the parties subsequently memorialized in an Agreed Order Confessing Judgment (hereinafter "Agreed Order"). The Agreed Order was executed by three parties: Mr. Powers, his counsel Attorney David Pence and counsel for Petitioner, Attorney Daniel T. Yon. The Agreed Order was entered by Honorable F. Jane Husted, Judge on August 13, 2013. *See*, Exhibit B. After entry of the Agreed Order, Mr. Powers made regular monthly payments toward satisfaction of the judgment and in conformity with his agreement.

Approximately eight months later, on or about April 3, 2014, Mr. Powers mailed a letter to Petitioner and its counsel advising that he had hired a new attorney, Jennifer S. Wagner of Mountain State Justice, Inc. He expressed concern about his loan payments and requested a copy of his loan documents. *See*, correspondence of Jeffrey Powers attached as an exhibit to Powers' Motion for Relief from Judgment, Exhibit C herein. Approximately thirty days later, Powers filed his Motion For Relief from Judgment (hereinafter "Motion for Relief") demanding that the Agreed Order be set aside pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure upon the following grounds: that the judgment was void, W.Va. R. Civ. P. Rule 60(b)(4); that the judgment was procured by fraud, misrepresentation or other misconduct, W.Va. R. Civ. P. Rule 60(b)(3); and that the judgment should be set aside because of newly discovered evidence, W.Va. R. Civ. P. Rule 60(b)(2).

In response to Powers' Motion for Relief, Petitioner filed its Response to Motion for Relief from Judgment (hereinafter sometimes "Response"), attached hereto as Exhibit D. Attached to Petitioner's Response were the following loan documents, all of which were signed

by Mr. Power's signature: Promissory Note, Notice of Final Agreement, Commercial Security Agreement, Commercial Loan Application; Truth in Lending Extension Agreement, dated 11/7/2012; second Truth in Lending Extension Agreement, dated 3/15/2013; the loan check in the amount of \$15,000.00, including the back of the check which evidences that it was negotiated by Mr. Powers at Pioneer WV Federal Credit Union on February 3, 2012. Also attached to the Response was an invoice dated June 11, 2013 which provides the loan payoff information as of the date of the filing of the Complaint.

On July 10, 2014, Judge Husted provided the parties an opportunity for oral argument on Powers' Motion for Relief and Petitioner's Response. No evidence was taken other than documents in the file, which were comprised of the Complaint, Agreed Order Confessing Judgment, Powers' Motion for Relief from Judgment and attachments thereto, and Petitioner's Response to Motion for Relief from Judgment and attachments thereto.

A. The Court ruled that the Judgment was not void.

By motion and oral argument, Powers argued that the Agreed Order should be set aside because it was void as a matter of law. Powers' counsel's argument the judgment was void was premised upon the assertion that the West Virginia Consumer Protection Act (hereinafter "the Act") provides a complete bar to agreed orders confessing judgment. Petitioner, in response cited to the plain language of the statute which provides that "[a] consumer **may not authorize any person** to confess judgment on a claim arising out of a consumer credit sale, consumer lease or a consumer loan. An authorization in violation of this section is void." West Virginia Code § 46A-2-117. Petitioner argued that this language prohibits the entry of agreed orders that are not executed by the debtor, but rather are executed by other persons which the debtor has authorized to act on his or her behalf. The Agreed Order in this matter clearly contains the signature Mr.

Powers, as well as his counsel, Attorney David Pence. Therefore, Petitioner argued that the prohibition set forth in the Act does not apply to the Agreed Order at issue. *See*, Exhibit D. Ultimately, Judge Husted ruled that the judgment was not void. *See*, Exhibit E.

B. Powers argued that the Agreed Order was procured by fraud or misconduct.

Powers also argued that the Agreed Order should be set aside because of fraud or misconduct. In his Affidavit attached to his Motion for Relief, Powers alleged:

Paragraph 5. In May of 2013 a representative of The First State Bank accused me of bank fraud and stated I could go to jail for a long time. The First State Bank's representative also told me that it was going to take the collateral for the loan.

Paragraph 6. This scared me a great deal, and I became concerned that The First State Bank was going to send officers to arrest me, even though I do not believe that I did anything wrong. Even though I had not signed documents providing for collateral, The First State Bank's threats scared me that it would come take my family's home.

Paragraph 11. On or around August 16, 2013, I authorized [Attorney] David Pence to enter into a consent judgment in this case because I was scared of The First State Bank's threats that it would take my property; which made me concerned that I would lose my home; I also authorized him to enter into the consent judgment because I knew I could not afford to pay the amount that The First State Bank claimed I owed in one lump sum.

See, Exhibit C.

In response to these allegations, Petitioner pointed out that even if all of Powers' allegations set forth in his Affidavit were true, and even if they did constitute some degree of misconduct on the part of Petitioner, which they clearly do not, all of the circumstances which he claims justified setting aside the Agreed Order were known to him prior to two critical events: first, the moment Mr. Power retained his attorney, David Pence to represent his interests in response to the Complaint served upon him on or about June 14, 2013, and second, the date Powers and his Attorney Pence negotiated a final and binding resolution of all matters asserted in

the Complaint, and memorialized in an Agreed Order Confessing Judgment, entered by the Circuit Court of Cabell County on August 16, 2013.

At the hearing on Powers' Motion for Relief, Petitioner argued that the timing of its alleged misconduct was critical to the analysis under W.Va. R. Civ. P. Rule 60(b)(3) because "a judgment may be set aside for fraud or misrepresentation discovered **after** entry of judgment;..." *Gerver v. Benavides*, 207 W.Va. 228, 530 S.E.2d 701 (2000). [Emphasis added.] The only evidence supplied to the Court by Powers to demonstrate fraud or misconduct was set forth in his Affidavit. Every single alleged instance of fraud or misconduct he asserted in his affidavit occurred before he and his counsel entered into the Agreed Order, and as such, were known to him at the time he and his counsel elected to negotiate a final resolution of the matters asserted in the Complaint. If he had a defense or counterclaim to any of the matters asserted in the Complaint, the time to raise them was before he and his counsel executed an Agreed Order Confessing Judgment, not eight months after the final order dismissing the matter was entered by the Circuit Court.

The Court made no specific finding of fact with respect to fraud or misconduct under W.Va. R. Civ. P. Rule 60(b)(4). Instead, the Court ruled, "[a]t this time, the Court declines to rule conclusively on whether Plaintiff engaged in misconduct or fraud." *See*, Order, ¶ 12, Exhibit E.

- C. The Court found no newly discovered evidence sufficient to justify relief from the Agreed Order.

In support of his argument that the Agreed Order should be set aside as a result of newly discovered evidence, Powers provided the Court with a copy of the formal indictment of former First State Bank loan officer Jackie Cantley, filed September 25, 2014 with the United

States District Court for the Southern District of West Virginia, Charleston Grand Jury 2013-1, in the matter of *United States of America v. Jackie Cantley*, Criminal No. 3:13. *See*, Exhibit C. It is undisputed that Jackie Cantley, was indicted for fraud committed upon The First State Bank. There is no dispute that Mr. Cantley was the loan officer who initiated Mr. Powers' loan and released the funds to him. However, the only victim referenced in the indictment proffered to the Court by Powers was the Petitioner, The First State Bank. In fact, the indictment contains not one reference to Mr. Powers or to circumstances remotely similar to those alleged by Mr. Powers. It is absolutely undisputed that the acts of bank fraud were committed against The First State Bank, not Mr. Powers or loans similar to his loan.

Nevertheless, the indictment did occur after entry of the Agreed Order, and so Powers asserted that the same constituted newly discovered evidence which created some nexus between Powers' failure to satisfy the terms of his loan and Mr. Cantley's criminal conduct. To that end, Powers alleged in his Affidavit as follows:

- Paragraph 12. In around late February 2014, I learned that Jackie Cantley had pleaded guilty in federal court as the result of an indictment on bank fraud and misallocation of bank funds.
- Paragraph 13. After learning this, I became suspicious about this suit. As a result, I contacted a lawyer and mailed a letter to The First State Bank and its counsel on April 3, 2014, requesting documentation supporting the allegations in the Complaint, including a copy of the loan contract that the Complaint said was attached. I have received no response to this letter [as of the date of the Affidavit, May 5, 2014].
- Paragraph 14. As a result of Mr. Cantley's conviction and indictment, I suspect that there may be additional improprieties regarding my transaction with The First State Bank.

See, Exhibit C. Ultimately, the Court declined to issue any findings of fact or conclusions of law with regard to Powers' purported newly discovered evidence. W.Va. R. Civ. P. Rule 60(b)(2).

At the conclusion of the hearing, the Court set aside the Agreed Order upon the following grounds:

“I’m going to rule the way I’m ruling that it was valid [the Agreed Order Confessing Judgment], but I do also find that there appear to be circumstances which make this loan questionable and the court favors decisions made upon the merits of the case in all cases and, therefore, I’m going to give the defendant the benefit of the doubt in this matter and set aside judgment.”

See, Transcript, Exhibit F, pg. 26.

Thereafter, proposed orders and objections from both parties were submitted to the Court. *See*, Exhibit G. On October 7, 2014, the Court entered its Order Granting Motion for Relief from Judgment, noting Plaintiff’s objections. *See*, Exhibit E.

Pursuant to the Order Granting Motion for Relief from Judgment, the Court ruled that the judgment was not void, declined to rule on whether Plaintiff engaged in misconduct or fraud, did not address Defendant’s allegation that he had newly discovered evidence, but did find, as the basis for setting aside the Agreed Order, as follows:

...the circumstances surrounding the loan at issue at a minimum make the loan questionable. Because a decision on the merits is favored, the Court hereby concludes, within its sound discretion, that relief from judgment as justified pursuant to Rule 60(b)(6).

See, Order Granting Motion for Relief Judgment (hereinafter sometimes “Order Granting Relief”), Exhibit E at ¶ 13.

SUMMARY OF ARGUMENT

Petitioner respectfully objects to the Court’s Order Granting Motion for Relief and files the instant Petition for Writ of Prohibition to prohibit the Court from setting aside the parties’ negotiated Agreed Order upon grounds that the Circuit Court’s determination that the Agreed Order be set aside based upon W.Va. R. Civ. P. Rule 60(b)(6) constitutes clear legal error

in that the Court identified no extraordinary circumstances sufficient to justify disturbing the finality of a final order. Failure to vacate the Court's Order will cause Petitioner damage in the nature of substantial costs and attorney fees which will accompany the relitigation of a matter which the parties previously resolved, both with assistance of counsel and memorialized the same in an Agreed Order Confessing Judgment entered with the Circuit Court of Cabell County.

STATEMENT OF ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument is likely unnecessary pursuant to the grounds set forth in West Virginia Rule of Appellate Procedure Rule 18(a)(4). However, should the Court determine that oral argument would be helpful to address the issues set forth in the Petition, Petitioner will comply with the Court's direction.

ARGUMENT

The central issue in the present matter is whether the Circuit Court of Cabell County abused its discretion under W.Va. R. Civ. P. Rule 60(b)(6) when it set aside an Agreed Order Confessing Judgment entered into between the parties and their respective counsel, in the absence of a finding by the Court of extraordinary circumstances justifying such relief.

As set forth in Syllabus Point 4, *State ex rel. Hoover v. Berger*,

In determining whether to entertain and issue the writ of prohibition for cases... where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression."

199 W. Va. 12, 483 S.E.2d 12 (1996).

A. Petitioner has no other adequate means to obtain the desired relief.

A writ of prohibition is the only means by which Petitioner can be awarded relief from the Circuit Court's Order Granting Relief from Judgment because the order is not a final appealable decision. Therefore, Petitioner does not have the ability to petition the Court for an appeal of the lower Court's decision. Consequently, if this Court does not issue a writ of prohibition in this instance, the Petitioner will be left with no other option but to litigate a matter which the parties clearly have negotiated and resolved, by and with assistance of counsel.

B. Petitioner will be damaged or prejudiced in a way that is not correctable on appeal.

The harm that Petitioner seeks to avoid is valuable time and expense associated with relitigating a claim that has already been resolved by an Agreed Order. The time and expense that will be required of Petitioner to return this matter to litigation and essentially re-litigate this matter to a second conclusion cannot be recovered by Petitioner, on appeal of a final judgment in this matter.

To the extent that the Court has held that this matter has not been resolved on the merits, Petitioner respectfully disagrees. The Agreed Order Confessing Judgment most certainly is a judgment on the merits. See, for example, *Hustead v. Ashland Oil*,

When "a party to a settlement objects to the terms of the settlement that ultimately is approved by the circuit court, that party's appropriate course of action is to seek review of the circuit court's action under the provisions of West Virginia Code § 58-5-4, which requires a timely appeal to this Court. **Failure to appeal the circuit court's final court-approved settlement order to this Court necessarily results in [a] final judgment on the merits of an action** [and] precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Further, the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong. . . ."

197 W. Va. 55, 60, 475, S.E.2d 55, 60 (1996) [Internal citations omitted][Emphasis added].

The judgment was also most certainly not entered as a result of an error caused by or the result of the actions or inactions of the parties, the Court or counsel. Both Powers and his counsel were sufficiently put on notice of the issues set forth in the Complaint. They had ample time and opportunity to meet the issues as they saw fit. Though they elected to resolve the dispute early in litigation, the matter was clearly the subject of litigation and resolved on the merits. For purposes of this analysis of fault, or error, it is critical to note that there has been absolutely no allegation by Powers that Attorney Pence failed him in any respect with regard to his representation in the underlying matter.

Despite the fact that a final judgment has been entered in this matter which Powers did not timely appeal, absent an order from this court vacating the Circuit Court's Order Granting Relief from Judgment, Petitioner will be forced to relitigate a matter a second time which it has already resolved once.

- C. The Circuit Court committed clear legal error when it set aside the parties' Agreed Order Confessing Judgment without finding the existence of any extraordinary circumstances.

A circuit court's decision to reinstate previously dismissed litigation pursuant to Rule 60(b) is a decision within that circuit court's sound discretion. Syl. pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974). The West Virginia Supreme Court of Appeals has made clear that Rule 60(b) should be liberally construed to accomplish justice." *Kelly v. Belcher*, 155 W.Va. 757, 773, 187 S.E.2d 617, 626 (1972). However, relief from a final judgment pursuant to Rule 60(b) is an extraordinary form of relief that is not to be liberally granted. As Justice Cleckly explained in *Cox v. State*:

"there is a significant disadvantage and tradeoff in proceeding under Rule 60(b). Rarely is relief granted under this rule because it provides a remedy

that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted.”

See, footnote 5 of Justice Cleckly’s concurring opinion, 197 W.Va. 210, 460 S.E.2d 25 (1990).

See, also Rose v. Thomas Memorial, 208 W.Va. 406, 413, 541 S.E.2d 1, 22 (2000)(citing footnote 5 with approval). When “extraordinary circumstances are absent, a collateral attack [employing W.Va. Rule 60(b)] is an inappropriate means for attempting to defeat a final judgment in a civil action.” Syl. pt 2., *Hustead v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996). Finally, “Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit.” *Powderidge Unit Owners Ass’n v. Highland Properties*, 196 W.Va. 692, 705, 474 S.E.2d 872, 885 (1996).

In the present matter, the Circuit Court granted Powers relief from the Agreed Order pursuant to Rule 60(b)(6). Unlike Rule 60(b)(1-5), which provide specific grounds for relief such as fraud or misconduct, Rule 60(b)(6) permits relief under “any other reason justifying relief from the operation of judgment.” Despite the open ended nature of this catch-all provision, the Court still must be presented with and ultimately find a sufficient factual basis to justify disturbing the finality of a final judgment. *Meadows v. Daniels*, 169 W.Va. 237, 238, 286 S.E.2d 423, 423 (1982). *See, also Gerver v. Benavides*, 207 W.Va. 228, 232, 530 S.E.2d 701, 706 (1999). The requisite factual findings must evidence circumstances which are sufficiently extraordinary to justify disturbing the finality of the Agreed Order. *Rose*, 208 W.Va. 406, 541 S.E.2d 1(2000). Such extraordinary circumstances have not been found in the present matter because they do not exist. Consequently, to the extent the Circuit Court has provided relief pursuant to Rule 60(b)(6), the Order Granting Relief from Judgment must be vacated.

1. The Court's Order Granting Relief is clear error in that it fails to identify any extraordinary circumstances sufficient to justify disturbing a final order pursuant to Rule 60(b)(6).

In the instant matter, the Circuit Court made no findings setting forth the existence of extraordinary circumstances. Instead, the Court found, "that the circumstances surrounding the loan at issue at a minimum make the loan questionable....". See, Exhibit E. Such a ruling, without a finding of compelling extraordinary circumstances simply does not justify setting aside a final judgment which the parties entered with the assistance of counsel under any provision of Rule 60(b).

The extraordinary circumstances that typically accompany Rule 60(b) motions involve entries by default where a party does not have notice of a trial through no fault of his own. *Blankenship v. Bowen's Roof Bolts Sales and Serv., Inc.*, 184 W.Va. 587, 402 S.E.2d 256 (1991) (Default judgment entered against a party who failed to appear at trial due to lack of notice, set aside); *Midkiff v. Kinney*, 180 W.Va. 55, 375 S.E.2d 419 (1988) (Default judgment entered because party and counsel failed to appear at trial due to lack of notice, set aside). Courts have also granted relief pursuant to Rule 60(b) due to error committed by the Court. *Moore v. Canterbury*, 181 W.Va. 389, 382 S.E.2d 583 (1989) (Non-suit for failure to prosecute case, in part due to Court's failure to act on counsel's withdraw from case, set aside). *Cruciotti v. McNeel*, 183 W.Va. 424, 396 S.E.2d 191 (1990) (Court prevented party from fully presenting evidence in initial hearing, order set aside). Attorney misconduct has also been found to be sufficient grounds for setting aside a judgment. See, for example *Intercity Realty Company v. Gibson*, 154 W.Va. 369, 175 S.E.2d 452 (1970) (Judgment entered against party due to attorney inaction and without client's knowledge or fault, set aside). See, *Kelly v. Belcher*, 155 W.Va. 757, 187 S.E.2d 617

(1972). (Party dismissed from an action after attorney settled a case without authority, set aside).
See also Meadows v. Daniels, 169 W.Va. 237, 286 S.E.2d 423 (Remand to trial court for hearing and findings of fact regarding to whether the parties had reached a settlement which excused defendant from appearing at trial).

Circuit Courts have refused to grant relief under Rule 60(b) for failure to present extraordinary circumstances, such as in *Gabritsch v. Gabritsch*, a matter in which a party argued that her counsel had settled a case without her permission because she had relieved him of his duties, but had permitted her counsel to continue to appear on the record on her behalf. 164 W.Va. 146, 260 S.E.2d 841 (1979) (“Dissatisfaction by the parties with the results of a divorce [settlement] is common, but such dissatisfaction does not constitute ground for relief under Rule 60(b)”) *Id.* at 151, 840.

While the West Virginia Supreme Court has not defined extraordinary circumstances, the circumstances which give rise to entry of judgment that a movant demands be set aside pursuant to Rule 60(b) ought not to involve fault of the moving party and certainly not be the result of mere dissatisfaction with a settlement. Unlike any of the scenarios addressed above, the Circuit Court in the instant matter provides no finding with regard to whether any party was at fault with regard to the entry of the judgment. The Court provides only that “circumstances surrounding the loan at issue at a minimum make the loan questionable [and]... a decision on the merits is favored.” The Court provided no finding of fault or error on any party’s part because no party, including the Court, counsel or the litigants were at fault with regard to entry of the Agreed Order. Like in *Gabritsch*, Powers is simply dissatisfied with the settlement he reached and wishes to get another bite at the apple with assistance of new counsel.

Petitioner presumes that the factual basis for the Court's finding was Powers' Affidavit in which he admits that he received the proceeds of a loan which were the subject of the Agreed Order, but alleges that there were no loan documents. Though this allegation has no bearing on the issue of setting aside entry of the final judgment, The First State Bank provided the loan documents, each personally executed by Mr. Powers, as attachments to its Response. *See*, Exhibit D. Powers does allege in his Affidavit that he feared that he would lose his home if he did not consent to judgment. However, he did not allege that anyone from The First State Bank told him that he would lose his home. He only alleges that an employee of the bank accused him of fraud and told him that imprisonment was a potential penalty for bank fraud. Whether this statement was uttered by a First State Bank representative or not, an allegation which First State Bank denies, it is absolutely true that imprisonment may be the consequence of bank fraud. Moreover, it is a statement that, if true, certainly is not grounds for setting aside a final judgment that Mr. Powers entered into subsequent to this alleged statement with the assistance of counsel.

As this Court is well aware, an agreed order confessing judgment is an agreement entered into between two litigants which is memorialized in an order and entered with a court. Countless disputes are resolved by such orders, particularly those in which liability is clear. In the present matter, there is no question that Powers received the proceeds of the loan at issue. It is also undisputed that Powers made payments toward its satisfaction; that he was extended several modifications to the terms of the loan and finally, that he, with assistance of counsel, ultimately entered into an Agreed Order which included a payment plan and which he personally executed. *See*, Exhibit B. It is also undisputed that he began making payments in satisfaction of this judgment.

For purposes of an Rule 60(b)(6) analysis, it is critical to note that the case at bar presents no error on the part of Powers or his counsel. There was no failure to appear due to lack of notice. There was no violation of due process. There was not even a disagreement between attorney and client. Mr. Powers knowingly and voluntarily entered into the Agreed Order, with assistance of his counsel. The real issue in this case is that Powers settled a case which he now believes he should not have settled. His dissatisfaction includes his failure to assert a defense and counterclaims, all of which were available to him up to and including the day he and Attorney Pence executed the Agreed Order confessing Judgment.

2. **The Court's Order is clear error in that it permits Powers' to relitigate a matter he previously compromised to final judgment with assistance of counsel, absent a showing of some extraordinary circumstance sufficient to disturb a final order pursuant to Rule 60(b)(6).**

In another case in which a party changes his mind about the strategy for litigation, *Benjamin H. v. Walker*, Judge Chambers of the United States District Court for the Southern District of West Virginia explained certain boundaries with respect to setting aside judgments under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

The 'other reason that justifies relief' offered by a movant under Rule 60(b)(6) must amount to extraordinary circumstances' in order for the court to grant relief....To qualify for relief under Rule 60(b)(6), the Defendant must show that she is completely free of fault for the extraordinary circumstances. Failure to litigate an issue before choosing to settle the dispute does not create an extraordinary circumstance. Here, [as in the case of Powers] Defendant simply wants to raise a possible defense to Plaintiff's original claims that she did not pursue before reaching a settlement under the terms of the agreed Order.

2009 U.S. Dist. LEXIS 17617 (S.D.W.Va., 2009). Though Judge Chambers ruling is not dispositive of the issue presently before this Court, it is persuasive in that FRCP Rule 60(b) and W.Va. R.Civ.P 60(b) are very similar and the federal rule is often relied upon by West Virginia

Supreme Court of Appeals in analyzing the proper application of the state rule. For example, in *Strobridge v. Alger*, the Court recognized that:

West Virginia Rules of Civil Procedure, Rule 60(b) is similar to the same provision of the Federal Rules of Civil Procedure in that: [t]he provisions of this rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments, expressed in the doctrine of res judicata, and the incessant command of the court's conscience that justice done in light of all the facts.

(184 W.Va. 192, 194, 399 S.E.2d 903, 905 (1990) (citing Syl. pt.1 *Savas v. Savas*, 181 W.Va. 316, 382 S.E.2d 510 (1989).) *See also Crucioti v. McNeel*, 183 W.Va. 424, 396 S.E.2d 191 (1990).

In *Benjamin v. Walker*, the Court refused to allow a party to reopen a matter that had been resolved by voluntary settlement and dismissed from the docket by final judgment. The moving party, citing F.R.C.P. 60(b)(6) argued that the matter should be returned to litigation after entry of a final judgment so that it could assert a new position it had not previously asserted in its defense. In response, Judge Chambers denied the motion upon concluding that the litigant had filed the motion because it had changed its mind about a defense it could have raised prior to settling the case, but failed to assert.

In the present matter, Powers and The First State Bank, both assisted by counsel, negotiated a settlement and brought the underlying matter to its conclusion. A final judgment on the matter was entered and Powers did not timely appeal. Eight months later, Powers hired new counsel and, apparently, became dissatisfied that he did not assert a defense or counterclaims under the West Virginia Consumer Credit Protection Act, West Virginia Code § 46A-2, *et seq.*, which he now seeks to assert against Petitioner.

Powers' failure to pursue a defense and counterclaims prior to entry of the Agreed Order was the result of his own choice. His dissatisfaction now, under a second light of new

counsel does not constitute an extraordinary circumstance sufficient to justify granting him relief from his settlement agreement.

CONCLUSION

Although it is clear that the Circuit Court has wide discretion to set aside a judgment based upon either enumerated circumstances set forth in 60(b)(1-5) or “other reason justifying relief” as set forth in 60(b)(6), the Circuit Court may not abuse its discretion by setting aside an agreed order confessing judgment for reasons which are not extraordinary- particularly in light of the fact that the final judgment was an agreed order entered with the consent and participation of both Powers and his counsel. For the foregoing reasons, it is clear that in the instant matter the Honorable F. Jane Husted abused her discretion in setting aside the Agreed Order and the Order Granting Relief should be vacated and stricken from the record.

PRAYER FOR RELIEF

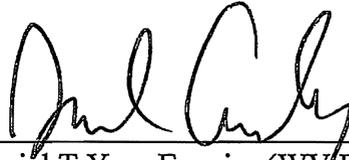
WHEREFORE, Petitioner The First State Bank, prays as follows:

- a. That the Petition for Writ of Prohibition be accepted for filing;
- b. That this Court issue a rule directing the Respondent to show cause as to why a Writ of Prohibition should not be awarded;
- c. That the case be stayed until resolution of the issues raised in this Petition;
and
- d. That the Court award such other and further relief as the Court may deem proper.

THE FIRST STATE BANK

By Counsel

DATED: February 24th, 2015.



Daniel T Yon, Esquire (WV Bar #6139)
David D. Amsbary, Esquire (WV Bar #9968)
BAILES, CRAIG & YON, PLLC
401 Tenth Street, Suite 500
Post Office Box 1926
Huntington, West Virginia 25720-1926
Telephone: (304) 697-4700

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, EX. REL.
THE FIRST STATE BANK,

Petitioner,

v.

No. _____

JEFFREY B. POWERS,

Defendant,

v.

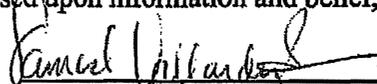
THE HONORABLE F. JANE HUSTEAD,

Respondent.

VERIFICATION

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, TO-WIT:

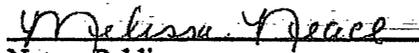
The undersigned, Samuel Vallandingham, President of The First State Bank, upon his oath, being duly sworn, says that the facts and statements contained in the attached **Petition for Writ of Prohibition** are true insofar as they are based upon information and belief, he believes to be true:



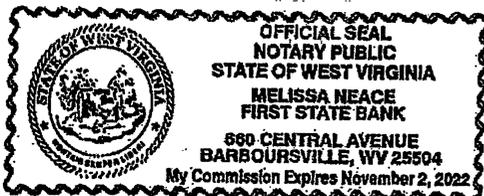
Samuel Vallandingham

Taken, subscribed and sworn to before me in my presence on this 23 day of February, 2015.

My Commission expires: November 2, 2022



Notary Public



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, EX. REL.
THE FIRST STATE BANK,

Petitioner,

v.

THE HONORABLE F. JANE HUSTEAD,
JUDGE OF THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA

Respondent,

v.

JEFFREY B. POWERS,

Respondent.

Upon Original Jurisdiction
In Prohibition
No. _____

(Circuit Court of Cabell County, WV)
(Case Number: 13-C-415)

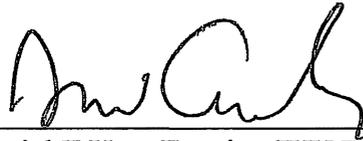
CERTIFICATE OF SERVICE

The undersigned attorney hereby certified that on the 24th day of February, 2015 a true and correct copy of the **Petition for Writ of Prohibition and Appendix** was served upon the following via Hand Delivery:

The Honorable F. Jane Hustead, Judge
Cabell County Circuit Court
750 Fifth Avenue
Huntington, West Virginia 25701

and via U.S. Mail, postage prepaid, and addressed to the following:

Jennifer S. Wagner, Esquire
Mountain State Justice, Inc.
321 W. Main Street, Suite 401
Clarksburg, West Virginia 26301



Daniel T Yon, Esquire (WV Bar #6139)
David D. Amsbary, Esquire (WV Bar #9968)
BAILES, CRAIG & YON, PLLC
401 Tenth Street, Suite 500
Post Office Box 1926
Huntington, West Virginia 25720-1926
Telephone: (304) 697-4700