

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

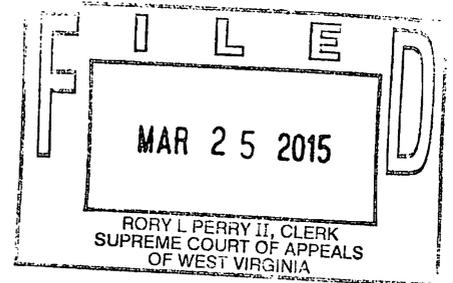
Petitioner,

v.

THE HONORABLE JANE HUSTEAD,
JUDGE OF THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA,
and JEFFREY B. POWERS,

Respondents.

No. 15-0151
(Civ. A. No. 13-C-415)



RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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Petitioner The First State Bank (the Bank) files this Writ of Prohibition as an attempt to lodge an improper interlocutory appeal of a discretionary circuit court order granting relief pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure. The Bank asks this Court prohibit Judge Jane Husted of the Circuit Court of Cabell County from properly and appropriately exercising her discretion to permit a case to be tried on the merits, in light of several irregularities that were revealed after entry of a judgment order. The Bank's request is a wholly inappropriate use of the Writ of Prohibition, and as a result, it should be denied.

STATEMENT OF THE CASE

This case arises out of a suit filed by Petitioner The First State Bank on June 14, 2013, alleging that Respondent Jeffrey B. Powers owes funds to it on an alleged debt. The alleged debt was solicited, arranged, and serviced by the Bank's former Vice President, Jackie Cantley. The present suit was one of countless others filed by the Bank in the wake of the discovery that Jackie Cantley was engaged in significant bank fraud was under federal investigation. Although the Bank was aware of the investigation at the time it filed its suit against Mr. Powers, this did not become public knowledge until September 2014.

In fact, immediately prior to the filing of the instant suit, in May 2013, an employee of the Bank contacted Mr. Powers and accused Mr. Powers of bank fraud, threatened to put him in jail, and threatened to take back collateral that supposedly secured the loan. (App. 14.) Because Mr. Powers did not know of any collateral related to the loan, he was confused and scared. (App. 14-15.) In response, he went to the Bank's offices the following day to request documentation supporting the allegations made against him. (App. 15.) The Bank's employee responded by telling Mr. Powers that, although the documentation existed, the Bank would not provide it to him. (App. 15.) Mr. Powers became terrified that he would be arrested and that he was at risk of losing

his home. (App. 14-15.) Identical conduct on behalf of the Bank has been testified to by numerous individuals who had been solicited into loans by Mr. Cantley—namely, that the Bank’s employees called borrowers into its offices and threatened them with criminal prosecution and bank fraud if they did not sign new agreements or pay alleged debts in full. (See App. 138.)

After meeting with the Bank, Mr. Powers then made his regular payment on the loan. (See App. 127.) Nonetheless, in June 2013, Mr. Powers received the Bank’s complaint by mail. (App. 15.) The Bank’s complaint states that documentation of the purported debt was attached thereto, but in fact, unbeknownst to Mr. Powers, the Bank did not file any such documentation or exhibit with the complaint or provide the exhibit to Mr. Powers. (App. 1-4, 15 ¶ 10.) Despite multiple requests from Mr. Powers, the Bank repeatedly refused to provide him with any documentation of the alleged debt, both prior to and after filing of the instant suit. (App. 14 ¶ 2, App. 15 ¶¶ 8, 10, 13, App. 16 ¶ 15.)

On August 16, 2013, without any discovery or fact-finding, judgment was entered against Mr. Powers for \$13,273.86—including \$175 in the Bank’s “costs” that are prohibited under the West Virginia Consumer Credit and Protection Act (WVCCPA), W. Va. Code § 46A-2-127. (App. 5-6.) Mr. Powers countersigned the order prepared by the Bank’s counsel because he was afraid of the Bank’s threats that it would take his home and send him to jail. (App. 15, 7.)¹ Mr. Powers further authorized the consent judgment because he feared that he would not be able to pay the purported debt on the terms insisted upon (but not supported) by the Bank. (App. 15 ¶ 11.)

¹ The Bank asserts in its petition that David Pence contacted the Bank’s counsel and “negotiated” a settlement of the matter. (Petr. Br. 4-5.) Despite multiple opportunities to submit evidence, the Bank makes this bald statement without reference to the record or even any late-attached affidavit. Instead, the record only demonstrates that the Bank’s counsel prepared and signed the faulty complaint and prepared the judgment order; the record further contains Mr. Powers’s uncontested affidavit in which he swears to the circumstances under which the judgment was entered. (See App. 1-2, 7, 14-16.)

At no point did the Bank provide any evidence supporting the allegations in its complaint. (App. 1-5, 14-16.) Pursuant to the order, Mr. Powers was required to pay \$871.56 and thereafter payments of \$200 per month. (App. 5-6.) Mr. Powers made these payments, as instructed, directly to the Bank's counsel, who is also on the Board of Directors for the Bank. (App. 127.) After the first payment, neither the Bank nor its counsel provided any receipts for any payments made by Mr. Powers. In the course of the first year, Mr. Powers made nearly \$3100 in payments, at significant personal struggle. (See App. 138.)

Thereafter, on September 26, 2014, the Bank's Vice President, Jackie Cantley, was federally indicted on six counts of bank fraud and related charges. (App. 17-32.) The indictment sets forth that Mr. Cantley made loans in violation of bank policies, did not appropriately underwrite loans, misapplied funds, moved loan funds between different people's accounts without authorization, forged signatures, made multiple disbursements from closed end loans, and failed to keep appropriate or accurate records. (App. 17-20.) On February 19, 2014, Mr. Cantley reached a plea deal on the charges in which he admitted several of the allegations contained in the indictment. (App. 33-45.) The Bank asserts that "it is absolutely undisputed that the acts of bank fraud were committed against [the Bank], not Mr. Powers or loans similar to his loan." (Petr. Br. 9.) While the criminal indictment itself does not directly refer to Mr. Powers, Judge Hustead and the Bank's counsel is aware that there are numerous allegations in several civil matters that the Bank and Mr. Cantley perpetrated fraud against their borrowers, including Mr. Powers, utilizing the same exact conduct outlined in the indictment and the plea agreement.

After learning of said guilty plea, Mr. Powers became suspicious regarding the facts and circumstances underlying the instant suit. (App. 15.) As a result, Mr. Powers mailed a letter to the Bank and the Bank's counsel on April 3, 2014, requesting documentation supporting the

allegations in the complaint, including a copy of the exhibit that the complaint represents was attached thereto. Despite the Bank's and its counsel's receipt of said letter, the Bank did not provide any of the requested documentation evidencing the purported loan or setting forth how his post-judgment payments had been applied. (App. 46-47, 15 ¶ 13.)

After providing the Bank over one month to respond to the request, on May 5, 2014, Mr. Powers timely filed a motion for relief from judgment pursuant to Rule 60 of the West Virginia Rules of Civil Procedure. (App. 8-61.) Mr. Powers further requested leave to file an answer, affirmative defenses, and counterclaims against the Bank. (*Id.*) The affirmative defenses and counterclaims seek relief from the Bank's illegal threats and conversion, illegal debt collection conduct under the West Virginia Consumer Credit Protection Act, fraud, breach of contract, abuse of process, and malicious prosecution. (App. 121-132.) Notably, said counterclaims can (and will) be raised as affirmative claims whether or not the judgment is set aside. Mr. Powers, however, sought to reach the most efficient resolution of the issues by presenting them in one case for resolution on the merits.

The Bank did not provide any response to either the May 5 motion or to the April 3 letter until over two months later, on July 8, 2014, when it served a response just three days prior to the scheduled hearing on the matter. (App. 91.) For the very first time—despite required disclosures that were not made in 2012, Mr. Powers's requests for documentation in May 2013, the lawsuit filed in June 2013, the request by letter in April 2014, and the motion similarly requesting documentation in May 2014—the response provided purported documentation of the loan to the court and to Mr. Powers. (App. 72-83.) This so-called documentation is suspect for numerous reasons. For instance, while the loan application clearly states that Mr. Powers was employed as staff at Mardi Gras Casino, the loan documents purport to be a commercial loan and to take a

security interest in commercial property that does not exist (as is clear from the face of the documents). (See App. 75-78, 80.) Indeed, Mr. Powers's signature or initials are missing from all pages setting forth the terms for said agreement. (Id.) Furthermore, although a signature of Mr. Powers's name appears on other documents, Mr. Cantley has been federally charged with forgery of signatures on loan documents, and numerous other borrowers have asserted that their signatures were also forged on bank documents. (See App. 20, 137-38.) Again, Mr. Powers did not have the opportunity to review or raise defenses to any of said documents prior to entry of the judgment order in his case in August 2013.

Judge Husted held a hearing on the matter on July 11, 2014. Notably, the instant hearing was followed directly by another hearing on a case asserting that the Bank had engaged in significant misconduct, also before Judge Husted. Indeed, Judge Husted has heard numerous cases involving the Bank since investigation of Jackie Cantley and the Bank began, and has significant experience regarding the Bank's course of conduct and the various allegations against it. At the hearing on this matter, Judge Husted received extensive argument from the parties and was able to observe the demeanor of Mr. Powers, who was present. (App. 137-43.) Judge Husted asked several pointed questions about the alleged facts, including the specific identity of Bank employees making representations to Mr. Powers, and about witnesses to the conduct alleged. (Id.)

Importantly, it was noted several times during the hearing that numerous other low-income borrowers have come forward with sworn testimony that the Bank engaged in similar misconduct with them, namely, threatening them with criminal prosecution if they refused to confess judgment, make payment in full, or enter into contracts with the Bank. (App. 138.) These same borrowers have similarly testified that they had been defrauded into loans with terms that they did not agree to, that the Bank had increased their loan balances without authorization, that loans had

been deemed “commercial” notwithstanding that the borrowers did not own businesses, and that their signatures had been forged on documents or documents had been altered without their authorization. (See App. 137.) This information was known by the Bank’s counsel in the instant matter, the Bank’s representatives, and the undersigned, each of whom attended depositions in which this testimony was provided; this testimony was also known by Judge Hustead, who had reviewed the transcripts of said testimony. (See App. 138.)²

At the hearing and on brief, Mr. Powers argued that relief from judgment was appropriate pursuant to Rule 60(b)(2), (3), (4), (6), and pursuant to the general provision under Rule 60 that permits setting aside a judgment that was procured by fraud on the court. In response, the Bank did not dispute that it had never provided a copy of the loan documents to Mr. Powers prior to July 8, 2014, three days before the hearing to set aside the judgment. (App. 140.) The Bank further conceded that the motion was timely under Rule 60(b), because it was filed well before one year had elapsed from the time the judgment was entered and was filed in a reasonable time period. (App. 141.)

In response to the arguments, Judge Hustead held that the judgment was not void pursuant to Rule 60(b)(4). (App. 138.) Judge Hustead noted, however, that Mr. Powers would have had no reason to suspect irregularities regarding Mr. Cantley’s conduct until after the indictment—which occurred after judgment was entered. (App. 141.) The circuit court noted: “I don’t think any due

² In a different case in which the undersigned represented a low-income borrower against foreclosure by the Bank, testimony was taken of several witnesses who alleged that they had been defrauded, harassed, and threatened by Mr. Cantley and the Bank as described herein. The Bank’s counsel in the instant matter, Dan Yon, was present at the depositions, and the deposition testimony was reviewed by Judge Hustead pursuant to motion under Rule 404(b) of the West Virginia Rules of Evidence. This evidence was referred to numerous times at the hearing in the instant matter without objection, although they were never formally entered in the record. In the event that this Court would like to review said transcripts, Mr. Powers would be happy to supplement them at the Court’s request.

diligence on [Mr. Powers's and his counsel's] part would have allowed them to discover [Mr. Cantley's conduct] prior to the indictment.” (App. 141.) The court further noted that no discovery had been completed in the case. (*Id.*) The court went on to recognize the discrepancies about the status of the loan as a purported commercial loan. (App. 142.) Finally, the court held:

I'm going to use my discretionary powers and section 1 of 60(b)(3), because I do believe that that doesn't have to be newly discovered. There's enough to this to pass the smell test to me.

. . . I do also find that there appear to be circumstance[s] 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 the judgment.

(App. 142-43.)³

On July 30, 2014, Mr. Powers submitted a proposed order to the court, and on August 8, 2014, the Bank submitted objections to the proposed order. In response, the parties sought to reconcile the proposed orders for sake of expediency. On October 7, 2014, the Order Granting Motion for Relief from Judgment was entered. (App. 92-95.) Over four months later, after refusing

³ At the hearing, the Bank asserted that relief was not available under Rule 60(b)(3) because the evidence of the Bank's fraud or misconduct was not newly discovered. As an initial matter, this Court does not need to reach this issue because the circuit court's order also rested on Rule 60(b)(6).

In addition, the Bank's argument lacks merit. The Bank's argument improperly conflates Rule 60(b)(2), which applies to newly discovered evidence, and Rule 60(b)(3), which applies to fraud, misrepresentation, or other misconduct of the adverse party. W. Va. R. Civ. P. 60(b)(2), (3). Under the Bank's argument, there would be no need for the separate provisions, and section 60(b)(3) would be rendered superfluous. This conflicts with settled rules of statutory interpretation that require that all language in statutes be given meaning. *See* Syl. Pt. 3, *Osborne v. United States*, 211 W. Va. 667, 668, 567 S.E.2d 677, 678 (2002). The case cited by the Bank, *Gerver v. Benavides*, 207 W. Va. 228, 530 S.E.2d 701 (1999), also does not support the Bank's point. In *Gerver*, the language used by the Court regarding to the timing of discovery was simply descriptive of the scenario in that case, in which the purported evidence of fraud happened to be discovered after trial. Indeed, there was no dispute about the timing of discovery or interpretation of the Rule for the Court to decide in that case. As a result, any statement related to timing was dicta and has no bearing on the wholly distinct case at hand.

to respond with discovery requests issued by Mr. Powers, the Bank filed the instant Petition for Writ of Prohibition.

SUMMARY OF THE ARGUMENT

Petitioner The First State Bank fails to satisfy any factor in support of issuance of a writ of prohibition, which, under this Court's binding authority, is not meant to address a circuit court's exercise of its discretion on an interlocutory order.

First, any concern raised by the Bank can be addressed on direct appeal after final judgment on the merits, just as with any interlocutory order on a dispositive motion.

Second, and more importantly, the Bank presents no clear error of law in the circuit court's ruling. It is well-settled that orders entered pursuant to Rule 60(b) are within the sound discretion of the trial court. Further, the Rule is to be liberally construed to do justice. Here, the circuit court exercised its sound discretion to set aside a judgment in light of evidence of the Bank's misconduct and real questions about the underlying merits of the case resulting from the subsequent criminal conviction of the loan officer. This Court has repeatedly held that a writ of prohibition is the wrong vehicle to challenge such an order, and that a writ cannot issue on an allegation of abuse of discretion. Indeed, the Bank cites no case in which the writ has been used in the way it requests. Instead, the Bank requests that this Court ignore its own precedent and the underlying facts of this matter to improperly intervene in the interlocutory order. The Court should decline this invitation.

Finally, the Bank fails entirely to support the last two factors for consideration on a writ of prohibition. Because the order below fully complies with the law at issue and because it raises no new or important legal problems, the Court should further decline to exercise its discretion to grant the extraordinary relief requested.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Mr. Powers believes that oral argument is not necessary because the request for issuance of a writ of prohibition is frivolous and should clearly be denied under settled law. W. Va. R. App. P. 18(a)(2), (3). However, Mr. Powers would be prepared to engage in oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, should the Court determine that such argument would aid the Court in its decision-making process. In the event that Rule 19 argument is held, Mr. Power believes that a memorandum decision would be appropriate.

ARGUMENT

To obtain a writ of prohibition, the Bank must demonstrate either that the circuit court did not have jurisdiction to enter its order, or that the circuit court exceeded its legitimate powers and that the Bank is prohibited from seeking relief through a direct appeal. Syl. Pt. 1, State ex rel. Shelton v. Burnside, 212 W. Va. 514, 575 S.E.2d 124 (2002). The Bank reasonably does not appear to be claiming that the circuit court had no jurisdiction. As a result, the Bank must make an adequate showing on the following factors to be successful:

(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. 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. 2, id. (quoting Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996)). Further, the Supreme Court of Appeals of West Virginia has been clear that “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court.” Syl. Pt. 5, Id.

(quoting Syl. Pt. 2, in part, State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977)). Because the Bank cannot satisfy even one of these grounds, the petition should be denied.

1. Petitioner Can Seek Relief Through Direct Appeal and Any Damage Could Be Corrected on Appeal.

The Bank argues that it has no other adequate means to obtain the desired relief because, without interlocutory involvement by this Court, the Bank will be required to litigate the merits of this action. The Bank goes on to assert that it will be harmed by the time and expense incurred as the result of engaging in litigation. The Bank's position is contrary to the law of this State.

First, under the Bank's reasoning, this Court would be required to consider extraordinary writs any time a court denies a motion to dismiss. In that circumstance, if the circuit court were wrong, the parties would be required to incur the costs of litigation notwithstanding the pointlessness of that litigation. However, judicial efficiency and the rules adopted by the Legislature and this Court requires the litigation to be ended prior to an appeal on the merits being heard. In setting forth the first and second factor of the test for a writ of prohibition, the Court thus clearly envisioned real and meaningful harm beyond the costs of litigation.

In support of its position, the Bank cites one case, Hustead v. Ashland Oil, 197 W. Va. 55, 475 S.E.2d 55 (1996). If anything, Ashland Oil supports Mr. Powers, not the Bank. In Ashland Oil, the plaintiff filed a declaratory action to collaterally attack a settlement agreement that had been court approved, after challenge, in a different, highly litigated case. Id. at 57-58, 475 S.E.2d at 57-58. This Court held that the use of the declaratory action procedure was improper. 197 W. Va. 55, 475 S.E.2d 55. Instead, the Court explained that either a direct appeal should have been lodged or the resolution could have been subject to a Rule 60(b) motion. Id. Specifically, the Court explained, "West Virginia Rule of Civil Procedure 60(b) provides the only means for bringing a collateral attack on a final judgment in a civil action," including where the order related

to a court ordered settlement. Ashland Oil, 197 W. Va. at 60, 474 S.E.2d at 60. In that case, no party made the proper Rule 60(b) motion. Here, however, Mr. Powers appropriately and timely moved under Rule 60(b). As a result, Ashland Oil *supports* the circuit court's use of its discretion to set aside the prior consent order.

Ignoring this, the Bank cites to Ashland Oil to assert that the judgment order was a final judgment on the merits. (Petr. Br. 12.) But this portion of Ashland Oil solely stands for the proposition that a settlement approved in a court order is a final judgment giving rise to the right to appeal under West Virginia law. Ashland Oil, 197 W. Va. at 59-60, 474 S.E.2d at 59-60. Mr. Powers does not dispute that the order was final; this is the very reason he made a motion under Rule 60(b) rather than seek relief from an interlocutory order. The Bank apparently attempts to use this language to assert that the Powers matter was fully litigated on the merits, rather than decided prior to discovery, briefing, or even an answer being filed. Of course, this simply was not the case—a final judgment was indisputably entered, but at no point did the circuit court undertake consideration of the evidence related to the underlying case, as the circuit court noted. (App. 141-43.) Indeed, the Bank is not being required to “relitigate” anything, given that it never engaged in litigation in this case other than filing its deficient complaint.

In short, the Bank has provided no reason that it cannot seek appropriate relief on direct appeal of any final judgment in this matter, after both parties have the opportunity to present evidence to the fact-finder.

2. The Circuit Court's Order Is Not Clearly Erroneous.

The circuit court held, in a proper exercise of its discretion, that the judgment should be set aside under Rule 60(b)(3) and (6) of the West Virginia Rules of Civil Procedure.⁴ As set forth in more detail below, this ruling was an appropriate and routine exercise of the circuit court's discretion, and thus is clearly not appropriate for the extraordinary relief requested in a petition for writ of prohibition. See Syl. Pt. 5, State ex rel. Shelton, 212 W. Va. 514 (2002).

a. Orders on Rule 60(b) motions are within the sound discretion of the circuit court.

Rule 60(b) permits a circuit court to vacate a prior order under the following circumstances:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to . . . set aside a judgment for fraud upon the court. . . .

W. Va. R. Civ. P. 60(b). The Rule applies equally to consent judgments as to any other judgment.

Ashland Oil, 197 W. Va. at 60, 474 S.E.2d at 60; Green v. Ford Motor Credit Co., No. 13-0243, 2014 WL 274474 at *3 n.5 (W. Va. Jan. 24, 2014) (reversing lower court order refusing to set aside settlement). This Court has expanded on Rule 60(b)(6) specifically, noting that it should be “liberally applied to accomplish justice” and that “[t]his catch-all clause in Rule 60 gives the [trial]

⁴ Although the order only references Rule 60(b)(6), the circuit court's oral ruling at the hearing also relied upon Rule 60(b)(3).

court a ‘grand reservoir of equitable power to do justice in a particular case.’” Cruciotti v. McNeel, 183 W. Va. 424, 430, 396 S.E.2d 191, 197 (1990) (citations omitted).

Even on direct appeal, an order rendered under Rule 60(b) may only be overturned for abuse of discretion. Syl. Pt. 6, Law v. Monongahela Power Co., 210 W. Va. 549, 558 S.E.2d 349 (2001) (“A motion to vacate a judgment made pursuant to Rule 60(b), W. Va. R.C.P., is addressed to the sound discretion of the court and the court’s ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of discretion.” (quoting Syl. Pt. 5, Toler v. Shelton, 157 W. Va. 778, 204 S.E.2d 85 (1974))); State ex rel. Moore v. Canterbury, 181 W. Va. 389, 393, 382 S.E.2d 583, 587 (1989). Further, it is well-established that

“[a] court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), W. Va. R. C. P., should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits.”

Syl. Pt. 2, Moore, 181 W. Va. 389, 382 S.E.2d 583 (1989) (quoting Syl. Pt. 6, Toler, 157 W. Va. 778, 204 S.E.2d 85) (denying writ of prohibition related to reinstatement of action under Rule 60(b)). Whether the movant has a meritorious claim “is one of the factors which a court must consider when it is asked to reconsider its judgment.” Toler, 157 W. Va. at 785, 204 S.E.2d at 89. On direct appeal—which requires less substantial showing than for a writ of prohibition—all presumptions are in favor of the correctness of the judgment of the circuit court. Ross v. Ross, 187 W. Va. 68, 71, 415 S.E.2d 614, 671 (1992) (citing Alexander v. Jennings, 150 W. Va. 629, 149 S.E.2d 213 (1966)) (refusing to overturn circuit court’s ruling on Rule 60(b) motion because there was no evidence of abuse of discretion); see also Powderidge Unit Owners Ass’n v. Highland Properties, Ltd., 196 W. Va. 692, 705, 707, 474 S.E.2d 872, 885, 887 (1986) (holding that it is wholly the circuit court’s responsibility to consider the evidence supporting a Rule 60(b) motion, and that the Supreme Court of Appeals of West Virginia’s role is solely to consider errors of law).

b. A writ of prohibition is not the appropriate vehicle to challenge the order below, which was well within the circuit court's discretion.

As set forth above, a writ of prohibition will not issue “to prevent a simple abuse of discretion by a trial court.” Syl. Pt. 5, State ex rel. Shelton v. Burnside, 212 W. Va. 514, 575 S.E.2d 124. Instead,

 this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syl. Pt. 3, in part, Moore, 181 W. Va. 389, 382 S.E.2d 583 (quoting Syl. Pt. 1, Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979)).

As a result, this Court has only addressed Rule 60(b) rulings in very limited circumstances on petitions for this extraordinary writ, and has repeatedly refused to interfere with a circuit court's discretion to grant Rule 60(b) relief. For instance, in Moore, the Court declined to issue the writ where the circuit judge reinstated a civil action three years after it had been previously dismissed, finding “no clear legal error” in the timing of the decision. 181 W. Va. 389, 382 S.E.2d 583. Similarly, in State ex rel. Consolidation Coal Co. v. Clawges, 206 W. Va. 222, 523 S.E.2d 282 (1999), the Court declined to issue the writ prohibiting a circuit judge from setting aside its prior judgment. The Court held that, even though no Rule 60(b) motion had been made, the circuit court's decision would have been well within its discretion to grant such a motion under subsection (b)(6), which permits an order to be set aside “for any other reason justifying relief.”

In contrast, this Court has only granted a writ of prohibition regarding a Rule 60(b) order in circumstances where the law was entirely ignored, such as when Rule 60(b) did not apply at all, or when the entire proceeding was prohibited under the doctrine of collateral estoppel. State ex rel. Crafton v. Burnside, 207 W. Va. 74, 528 S.E.2d 768 (2000) (circuit court committed clear

legal error by applying Rule 60(b) when the Rule was not applicable); State ex rel. Leach v. Schlaegel, 191 W. Va. 538, 447 S.E.2d 1 (1994) (proceeding barred by collateral estoppel); see also State ex rel. United Mine Workers of Am., Local Union 1938 v. Waters, 200 W. Va. 289, 297-99, 489 S.E.2d 270, 274-76 (1997) (issuing writ in response to a circuit court order that improperly *denied* a Rule 60(b) motion to set aside a default judgment without considering the motion under the appropriate legal standards for setting aside default).

Indeed, the Bank cites no case in which this Court issued a writ of prohibition on a Rule 60(b) order to support its position, nor can it. Instead, like in Moore, the Bank improperly “asks the Court to restrain a trial judge’s discretion on [a Rule 60(b) motion] by considering the order in prohibition,” without demonstrating any clear legal error. Moore, 181 W. Va. at 393, 382 S.E.2d at 587.

c. The Bank misstates the law and urges this Court to apply the wrong standards.

The Bank makes two arguments in support of its contention that “clear error” exists in the circuit court’s discretionary ruling. Neither is availing. First, the Bank asserts that the circuit court erred by failing to identify extraordinary circumstances necessary for Rule 60(b) relief. However, it is not required that the circuit court provide this level of specificity. See Cruciotti, 183 W. Va. at 430, 396 S.E.2d at 197 (“Although the circuit court failed to articulate *specifically* the grounds for relief under Rule 60, apparently it recognized that the interests of justice required conducting further proceedings on the matter.”). At bottom, this argument simply amounts to a request that this Court override the circuit court’s discretionary finding that such appropriate circumstances do, in fact, exist.

Indeed, although the circuit court did not use the phrase “extraordinary” in its ruling, it did hear substantial argument and take evidence on the circumstances supporting the motion. The

circuit court then noted several factors impacting its decision, including the lack of discovery in the case, the fact that the loan officer at issue was later convicted of fraud, allegations of fraudulent inducement in the subject transaction, newly discovered evidence of said fraudulent activities, and irregularities in documentation that the Bank had previously repeatedly refused to provide and that were not in Mr. Powers's possession at the time of the prior judgment. (App. 97-104.) The court correctly held as a matter of law that rulings under Rule 60(b) are discretionary and that the court favors decisions on the merits. (App. 103-04.) Finally, the court further explicitly held that pursuant to the recent conviction of Jackie Cantley and other issues that arose, "there appear to be circumstance[s] which make this loan questionable" that make a decision on the facts of the case preferable and in the interests of justice. (App. 104.)

In support of its argument, the Bank simply string-cites several cases where, on direct appeal, this Court agreed that appropriate circumstances existed to set aside a prior order. (Petr. Br. 15.) These cases simply support the long-standing rule that granting Rule 60 relief is within the circuit court's discretion. Indeed, as the Bank notes, the cases cited by the Bank make clear that this Court has never cabined a circuit court's discretion or provided precise guidelines for the circumstances that warrant relief under the Rule. (See Petr. Br. 16 (admitting that "the West Virginia Supreme Court [sic] has not defined extraordinary circumstances").) Instead, the Bank's brief urges this Court to develop a new rule of law that would restrain the circuit court's discretion on a Rule 60(b) motion. (Id.) Of course, a writ of prohibition is not the appropriate vehicle for such action; instead, as this Court has repeatedly instructed, the writ of prohibition can only be used to correct a clear error of law that cannot be otherwise addressed.

Furthermore, the Bank's characterization of underlying facts is simply incorrect. Mr. Powers is not "simply dissatisfied with the settlement he reached." (Petr. Br. 16.) Instead, as the

record makes clear, the judgment was entered as the result of the Bank's misconduct and threats, which made Mr. Powers afraid that if he did not sign the agreement the Bank would cause him to be falsely charged with criminal misconduct or, at a minimum, seek to take his home. Further, after the judgement order was entered, new information came to light that raised additional questions about the Bank's conduct and led to Mr. Powers seeking more information about the underlying obligation—which the Bank refused to provide him. Even after the Bank provided alleged documentation just before the hearing on Mr. Powers's motion to vacate the judgment, significant questions remained regarding the validity of the documents, especially in light of Mr. Cantley's pattern of forging loan documents. At bottom, the Bank's argument simply rests on a list of factual disputes.⁵ (Petr. Br. 16-17.) While the circuit court refused to resolve those factual disputes definitively, it was well within the circuit court's discretion to decide that it was in the interests of justice to allow factual development of the claims.

The Bank's second argument appears to simply be a restatement of its first. The Bank again asserts that the circuit court's order was clear error because, again, there was an insufficient showing of extraordinary circumstances warranting relief. (Petr. Br. 18.) Here, the Bank appears to assert that a trial court's discretion is more limited on Rule 60(b) motions addressing consent orders than others. Again, this misstates the law. This Court has clearly held that in all

⁵ For instance, Mr. Powers submitted a sworn statement to the circuit court stating that he was threatened with enforcement of collateral by the Bank, but that the Bank refused to provide him with documentation, and that he feared losing his home as a result. The Bank asserts that no one told Mr. Powers that his home would be taken, but provides no factual support for that statement. (Petr. Br. 17.) Similarly, the Bank disputes that it threatened to have Mr. Powers criminally prosecuted, despite Mr. Powers's sworn statement that this did, in fact, occur. (Id.; App. 14-16.) The Bank further apparently seeks to defend its conduct by asserting that "it is absolutely true that imprisonment may be the consequence of bank fraud." (Petr. Br. 17.) The Bank ignores that a threat of criminal prosecution for fraud in the course of debt collection is expressly prohibited by statute. W. Va. Code § 46A-2-124.

circumstances “Rule 60(b) should be liberally construed to accomplish justice.” Cruciotti, 183 W. Va. at 430, 396 S.E.2d at 197 (quoting Kelly v. Belcher, 155 W. Va. 757, 773, 187 S.E.2d 617, 626 (1972) and noting different types of circumstances warranting this liberal review). An order entered by consent—especially in which the consent was obtained through questionable tactics and given without all of the relevant facts, which were being withheld by the prevailing party—is clearly reviewable under the same liberal standard. See id.; see also Strobridge v. Alger, 184 W. Va. 192, 194, 399 S.E.2d 903, 905 (1990) (applying standard to motion to vacate a consent order); Pauley v. Pauley, 164 W. Va. 349, 263 S.E.2d 897 (1980) (Rule 60(b) motion was appropriate vehicle to determine whether fraud or change of circumstances warranted setting aside settlement). This Court should decline the Bank’s request that it issue a new rule of law holding that a consent order, reached before any discovery or litigation and agreed to as the result of coercion and improper threat by the opposing party, cannot be overturned on a Rule 60(b) motion.

The Bank focuses on an unpublished federal decision refusing to set aside a consent decree entered by the West Virginia Department of Health and Human Resources (DHHR) on a litigated and certified class action suit, challenged nine years after the consent order was entered. Benjamin H. v. Walker, No. 3:99-0338, 2009 WL 590160 (S.D.W. Va. Mar. 6, 2009). Importantly, this case was decided under federal standards, which although not dissimilar, have not been adopted in the West Virginia courts. Moreover, the movant (the Secretary of DHHR) did not demonstrate any particular support for her motion, other than a new legal theory that she had not previously advanced. Id. To the extent that Benjamin H. is even instructive, it clearly did not present the circumstances here. In that case, the state agency had negotiated a settlement of a certified class action, whereas here Mr. Powers was intimidated into entering a consent order on the terms presented by the Bank in response to threats by the Bank. Furthermore, unlike in Benjamin H.,

new factual information became available after entry of the judgment order that raised serious questions about the merit of the underlying suit. Finally, unlike in Benjamin H., in the instant matter Mr. Powers seeks to assert new defenses that were not available to him at the time of judgment, including claims based on evidence of the Bank's Vice President's fraud, which was not available at the time of the judgment. Most importantly, however, both in Benjamin H. and in the instant suit, the lower court reviewed the underlying circumstances and appropriately exercised its sound discretion.

d. The Bank has failed to demonstrate clear error.

In short, the request for issuance of a writ of prohibition is not appropriate, because the Bank has failed to demonstrate the most important factor—that the circuit court committed clear error. Because all of this Court's precedent makes clear that the circuit court's order was well within its discretion, the writ should not issue.

3. The Circuit Court's Order Is Not an Oft Repeated Error, Does Not Manifest Persistent Disregard for the Law, and Does Not Raise New or Important Problems.

The Bank fails to even attempt to make a showing on the final two factors for a writ of prohibition. This decision is correct—there is no error, and definitely not one that demonstrates disregard for the law or a new, important, legal question. Instead, as set forth above, the circuit court's order does no more than appropriately exercise the circuit court's discretion to grant relief from judgment where there is evidence of misconduct of the opposing party and where justice requires a hearing on the merits.

CONCLUSION

The Bank has entirely failed to demonstrate that the extraordinary relief of a writ of prohibition is appropriate in the instant matter. The circuit court has clearly not exceeded its

authority. Rather, this is a matter of the circuit court's appropriate exercise of its equitable power to grant discretionary relief under Rule 60(b) of the West Virginia Rules of Civil Procedure, to accomplish justice. The circuit court abided by all rules of law in reaching its decision, and while the matter could be raised again on direct appeal, it is certainly not an appropriate issue for a writ of prohibition. Because the Bank has failed to satisfy any the factors supporting the extraordinary writ, the writ should not issue.

WHEREFORE, Mr. Powers respectfully requests the following relief:

- (1) That this Court decline to issue a writ of prohibition;
- (2) That this Court decline to issue a stay in the underlying action; and
- (3) That this Court award Mr. Powers the reasonable attorney fees and costs incurred in responding to the Bank's petition.

Respondent,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

No. 15-0151
(Civ. A. No. 13-C-415)

THE HONORABLE JANE HUSTEAD,
JUDGE OF THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA,
and JEFFREY B. POWERS,

Respondents.

CERTIFICATE OF SERVICE

I, Jennifer S. Wagner, counsel for the Respondent Jeffrey B. Powers in the above-styled matter, do hereby certify that I have served a true and exact copy of the foregoing ***Response to Petition for Writ of Prohibition*** upon counsel for Petitioner via U.S. Mail on this 25th day of March, 2015, as follows:

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