No. 32781 – *The Hardwood Group d/b/a Plywood and Plastics of Roanoke v. Claire V. Larocco*

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Albright, Justice, concurring:

While I agree with the result reached in this case, I write separately because the majority has omitted from its discussion any reference to the well-established approach this Court has applied to its review of default judgments. Historically, default judgments have been a disfavored mechanism for case resolution. This is because of our stated policy of preferring that cases be resolved on their merits. As a result, this Court has regularly applied the provisions of Rule 60(b) in a liberal or flexible manner with the objective of encouraging the resolution of a case on its merits rather than through the entry of a default judgment. *See* Syl. Pt. 2, *Hamilton Watch Co. v. Atlas Container, Inc.*, 156 W.Va. 52, 190 S.E.2d 779 (1972) (holding that "[i]nasmuch as courts favor the adjudication of cases on their merits, Rule 60(b) of the West Virginia Rules of Civil Procedure should be given a liberal construction"); *accord Budget Blinds, Inc. v. White,* 2006 WL 891187 (D. N.J. 2006) (recognizing that "[c]ourts in this circuit are instructed that, when 'passing upon default judgments, Rule 60(b) should be "given a liberal construction [and][a]ny doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on the merits"'") (citations omitted); *Nisson v. Lundy*, 975 F.2d 802, 807 (11th Cir. 1992) (stating that "Rule 60(b) is to be given a liberal and remedial construction"); *see generally*

Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* vol. 11, 231-32 § 2852 (2nd ed., West 1995) (observing that especially with regard to default judgments "courts have been more flexible in providing relief [under Rule 60(b)] in order to decide cases on the merits").

In *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 256 S.E.2d 758 (1979), we recognized that our policy of liberally construing Rule 60(b) motions to vacate default judgments was expressly in accord with the approach taken by the federal courts to this same issue.[1] *Id.* at 471, 256 S.E.2d at 762. Thus, in cases where material issues of fact exist; meritorious defenses have been asserted; significant interests are at stake; and the defaulting party's degree of intransigence is either minimal or not readily apparent, this Court has made it clear that our policy is to prefer that a decision be reached on the merits of the case rather than to permit the case to be abruptly terminated on procedural grounds. *See id.*

[1]Interestingly, the majority relies upon federal law as support for its analysis of Rule 55(c) and yet steers clear of any acknowledgment of this Court's parallel approach to that of the federal courts with regard to reviewing Rule 60(b) motions to vacate default judgments in a liberal manner. What the majority does is to hide behind eponymous commentary which recognizes that, as between defaults and default judgments, the former is reviewed more liberally than the latter based on finality principles. This distinction, however, does not "explain away" the accepted and established liberal review of Rule 60(b) motions seeking to set aside default judgments.

By omitting any serious discussion regarding the critical policy considerations that underlie a Rule 60(b) motion to set aside a default judgment, the majority has, in my opinion, wrongly eviscerated a necessary element of elasticity from the inquiry into the existence of good cause. And, by advancing a more rigid approach to this issue, the majority imprudently elevates concerns for finality over the equally, if not more, compelling policy concern of preferring that cases be resolved on their merits where possible. *See Meadows v. Cohen*, 409 F.2d 750, 752 n.4 (5th Cir. 1969) (recognizing that "[a] proceeding under the rule [60(b)] 'calls for a delicate adjustment between the desirability of finality and the prevention of injustice'") (quoting *In re Casco Chem. Co.*, 335 F.2d 645, 651 (5th Cir. 1964)).

In failing to recognize that the "good cause" inquiry that accompanies any analysis of whether there are grounds to vacate a default judgment is traditionally performed in a liberal manner, the majority veers sharply from the longstanding approach taken by this Court. Moreover, by adopting a test for determining "good cause" that seeks to sidestep the need for flexibility and overlooks the need to promote case resolution based on merit, the approach taken by the majority is likely to prove a disservice to the very interests of promoting justice and fairness it arguably seeks to advance. *See MIF Realty L.P. v. Rochester Asssoc.*, 92 F.3d 752, 755 (8th Cir. 1996) (explaining that a liberal construction is afforded to Rule 60(b) to do substantial justice and "'"to prevent the judgment from becoming a vehicle of injustice"'") (citations omitted).

I am authorized to state that Justice Starcher joins in the concurring opinion.