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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

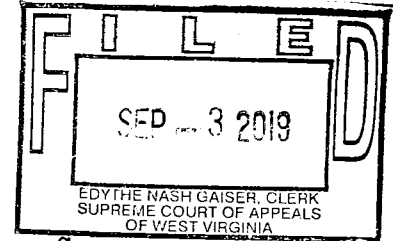
STATE OF WEST VIRGINIA EX REL.
JOHNSON & FREEDMAN, LLC,
a Georgia limited liability company,
and DAVID C. WHITRIDGE, an individual,

Petitioners,

v.

The Honorable WARREN R. MCGRAW,
Judge of the Circuit Court of Wyoming County,
and Nadine R. Rice, an individual,

Respondents.



Case No. 19-0772

VERIFIED PETITION FOR A WRIT OF PROHIBITION

**Arising from the May 9, 2019 Order Denying Defendants'
Rule 41(b) Motion to Dismiss Filed in the Circuit Court of Wyoming County,
West Virginia (Civil Action Number: 10-C-90)**

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The Honorable WARREN R. MCGRAW,
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and Nadine R. Rice, an individual,

Respondents.

Verified Petition for Writ of Prohibition

I. Question Presented

This Petition for Writ of Prohibition (“Writ of Prohibition”) presents a question of fundamental importance to the disposition of this case and calls into question whether Rule 41(b) of the West Virginia Rules of Civil Procedure grants the trial court unlimited and unfettered discretion to deny a defendant’s Rule 41(b) motion to dismiss. Specifically, the question before this Court is whether Respondent Circuit Court of Wyoming County, West Virginia (“Circuit Court”), abused or exceeded its legitimate powers by denying Johnson & Freedman, LLC’s and David C. Whitridge’s (“Petitioners”) Rule 41(b) Motion to Dismiss (“Rule 41(b) Motion”) when Respondent Nadine R. Rice (“Respondent Rice”) filed her underlying action in May of 2010 and failed to do anything to prosecute her claims other than serve her Complaint in July of 2011 until Petitioners filed a Rule 41(b) Motion to Dismiss for failure to prosecute in February of 2019.¹

¹ Undoubtedly, this case presents an important question regarding the scope of the trial court’s discretion under Rule 41(b). In fact, this Court previously acknowledged that its analysis of the “breadth of discretion enjoyed by the circuit court in making rulings pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure . . . implicate[s] both the administration of justice and judicial economy.” *Dimon v. Mansy*, 198 W. Va. 40, 44-45, 479 S.E.2d 339, 343-44 (1996). In *Dimon*, this Court dealt with the breadth of the trial court’s discretion to dismiss a case

II. Statement of Case

Over nine years ago, on May 28, 2010, Respondent Rice filed her Complaint in this matter. [Appendix at 4-19.] Respondent Rice's Complaint named Petitioners and Homecomings Financial, LLC ("Homecomings") as defendants and alleged unlawful detainer/ejectment, trespass, abuse of process, negligence, negligent infliction of emotional distress, and a quiet title action. [*Id.*] After several stipulations that extended Respondent Rice's time to serve Petitioners, Respondent Rice served her Complaint on Petitioners in July of 2011. [Appendix at 20-21.] On August 5, 2011, Petitioners filed an Answer to Plaintiff's Complaint and a Crossclaim against Homecomings. [Appendix at 22-33.] From August 5, 2011, until May 25, 2012, Respondent Rice failed to take any steps whatsoever to further the prosecution of her claims. [Appendix at 20-21.]

On May 25, 2012, nearly two years after Respondent Rice filed her Complaint, Homecomings filed a Notice of Bankruptcy and Effect of Automatic Stay ("Bankruptcy Notice"). [Appendix at 34-36.] Homecomings's Bankruptcy Notice resulted in an automatic stay of Respondent Rice's claims against Homecomings, pursuant to 11 U.S.C. § 362. [Appendix at 34-35.] Importantly, the May 25, 2012 Bankruptcy Notice did not result in an automatic stay of Respondent Rice's claims against Petitioners. [Appendix at 31-34.] As such, as Homecomings participated in bankruptcy proceedings, Respondent Rice still possessed the ability to prosecute her claims against Petitioners.

The bankruptcy court lifted the automatic bankruptcy stay of the proceedings against Homecomings on December 17, 2013. [Appendix at 37-38.] Subsequently, the Circuit Court dismissed the claims against Homecomings after Respondent Rice and Homecomings

under Rule 41(b). This case presents the opposite side of the coin—the breadth of the trial court's discretion to deny a Rule 41(b) motion to dismiss when the plaintiff fails to prosecute their claims for years-on-end.

resolved Respondent Rice's bankruptcy claim against Homecomings through settlement. [Appendix at 40.]² As such, only Respondent Rice's claims against Petitioners remained pending before the Circuit Court.

After Respondent Rice failed to prosecute her claims for approximately 91 consecutive months, Petitioners moved to dismiss Petitioners' claims under Rule 41(b) of the West Virginia Rules of Civil Procedure for failure to prosecute. [Appendix at 51-61.] Subsequently, the parties fully briefed Petitioners' Rule 41(b) Motion. [Appendix at 62-85.] On April 17, 2019, the Circuit Court held a hearing on the Rule 41(b) Motion to Dismiss. [Appendix at 86-100.] After the April 17, 2019 hearing, the Circuit Court denied Petitioners' Rule 41(b) Motion ("Circuit Court's Order")—despite the fact Respondent Rice failed to prosecute her claims against Petitioners since she served her Complaint in July of 2011—a period of approximately 91 consecutive months. [Appendix at 1-3.]³ After the Circuit Court's Order, Respondent Rice set a status conference in the underlying action. [Appendix at 111-113.] Subsequently, Petitioners filed a motion to stay the underlying action pending resolution of Petitioners' Writ of Prohibition. [Appendix at 114-24.] Petitioners' Motion to Stay is set for hearing before the Circuit Court on September 11, 2019. [Appendix at 123-24.]

III. Summary of Argument

This Petition for Writ of Prohibition concerns the Circuit Court's Order denying Petitioners' Rule 41(b) Motion, which sought dismissal of Respondent Rice's claims against

² Respondent Rice's dilatory conduct throughout these proceedings is even evidenced in Homecomings's Motion to Dismiss wherein Homecomings advises the Circuit Court that it has "repeatedly requested [Respondent Rice] dismiss this action as [Respondent Rice's] claims have been resolved in the Bankruptcy Court." [Appendix at 43-50.]

³ The Circuit Court's Order is dated May 9, 2019. [Appendix 1-3.] However, Petitioners did not receive notice of the Circuit Court's Order until mid-June of 2019 when Respondent Rice's counsel advised Petitioners of the Circuit Court's Order.

Petitioners for failure to prosecute after Respondent Rice failed to prosecute her claims against Petitioners for approximately 91 consecutive months. This Court should grant Petitioners' Writ of Prohibition because Petitioners possess no other adequate means to obtain relief from the Order, and Petitioners will suffer irreparable harm if the Order is permitted to stand. Additionally, the Circuit Court's Order constitutes substantial, clear legal error and a flagrant abuse of discretion. Respondent Rice filed her Complaint against Petitioners in May of 2010 and served Petitioners in July of 2011. Since serving her Complaint on Petitioners in July of 2011, Respondent Rice failed to advance the prosecution of her claims against Petitioners in any way. The Circuit Court's Order disregards significant West Virginia authority that grants Rule 41(b) motions when plaintiffs fail to prosecute their claims for a period of time much shorter, and far less flagrant, than Respondent Rice's failure to prosecute her claims in this case for approximately 91 consecutive months. Additionally, the Circuit Court's Order erroneously held that good cause existed for Respondent Rice's delay in prosecuting her claims due to an automatic bankruptcy stay in the underlying action that **never stayed Respondent Rice's claims against Petitioners** and, even if it did, ended over five years prior to Petitioners' Rule 41(b) Motion to Dismiss. Likewise, the Circuit Court's Order erroneously held that Petitioners would not be prejudiced by the Circuit Court's denial of Petitioners' Rule 41(b) Motion to Dismiss. However, the passage of approximately 91 consecutive months since Respondent Rice serve her Complaint against Petitioners is presumptively prejudicial to Petitioners because evidence will be difficult, if not impossible, to obtain and no witness will still maintain a strong first-hand recollection of the events underlying Respondent Rice's allegations. Finally, the Circuit Court's Order, if allowed to stand, would create a precedent that would permit a circuit court to wield absolute, unlimited discretion to subject a defendant to suit in perpetuity—even when the plaintiff takes no steps to prosecute their claims for 91 months.

Accordingly, Petitioners respectfully request that this Court grant Petitioners' Writ of Prohibition to prevent the Circuit Court from enforcing its Order.

IV. Statement Regarding Oral Argument and Decision

Pursuant to Rules 18 and 19 of the Revised Rules of Appellate Procedure, Petitioners assert that oral argument is both necessary and appropriate. *See* W. VA. R. APP. P. 18, 19. While many of the facts and legal arguments are adequately presented through briefs and the record below, oral argument pursuant to Rule 19 is necessary because this Petition for Writ of Prohibition claims the Circuit Court's Order constitutes an unsustainable exercise of the Circuit Court's discretion.

V. Standard of Review

Pursuant to Article VIII, § 3 of the West Virginia Constitution, and West Virginia Code § 53-1-1, this Court possesses original jurisdiction on all cases seeking a writ of prohibition. W. Va. Const. Art. VIII, §3; W. VA. CODE § 53-1-1 (2019) ("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.").

The Supreme Court of Appeals of West Virginia will use prohibition to:

correct only substantial, clear-cut, legal errors plainly in contravention of a 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.

State ex rel. Charleston Mail Ass'n v. Ranson, 200 W. Va. 5, 9, 488 S.E.2d 5 (1997). When considering a petition for a writ of prohibition, this Court has held:

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 not other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petition will be damaged or prejudiced in a way that is not correctable on appeals; (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 fact, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Nationwide Mut. Ins. Co. v. Wilson, 236 W. Va. 228, 232, 778 S.E.2d 677, 681 (2015) (quoting *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 482 S.E.2d 12 (1996)).

This Court reviews a trial court's rulings under Rule 41(b) of the West Virginia Rules of Civil Procedure under an abuse of discretion standard. *Caruso v. Pearce*, 223 W. Va. 544, 547, 678 S.E.2d 50, 53 (2009). "Only where we are left with a firm conviction that an error has been committed may we legitimately overturn a lower court's discretionary ruling." *Id.* at 547, 53 (quoting *Covington v. Smith*, 213 W. Va. 309, 322, 582 S.E.2d 756, 769 (2003)). "The extent of [the trial court's] discretionary authority, however, must be delineated with care, for there is always the unseemly danger of overreaching when the judiciary undertakes to define its own power and authority." *Dimon v. Mansy*, 198 W. Va. 40, 45, 479 S.E.2d 339, 344 (1996).

VI. Argument

This Court should grant Petitioners' Writ of Prohibition because Petitioners possess no other adequate means to challenge the Circuit Court's Order without first facing irreparable harm by proceeding in the underlying action until a final order is in place. Additionally, a Writ of Prohibition is appropriate in this case because the Circuit Court's Order constitutes clear legal error and a flagrant abuse of discretion. Specifically, the Circuit Court flagrantly abused its discretion

when it held in its Order that good cause existed for Respondent Rice's delay in prosecuting her claims against Petitioners because of an automatic bankruptcy stay in the underlying action that never stayed Respondent Rice's claims against Petitioners and, even if it did, ended more than five years prior to Petitioners filing their Rule 41(b) Motion to Dismiss. Likewise, the Circuit Court flagrantly abused its discretion by summarily holding that Petitioners would not suffer prejudice by the Circuit Court denying their Rule 41(b) Motion to Dismiss, despite Respondent Rice failing to take any action to prosecute her claims against Petitioners for nearly a decade. Finally, this Court should grant Petitioners' Writ of Prohibition because the Circuit Court's Order constitutes a complete disregard for the procedural law that governs the judicial system in this State.

A. This Court should grant Petitioners' Writ of Prohibition because the Petitioners possess no other adequate means to obtain relief from the Circuit Court's Order.

This Court should grant Petitioners' Writ of Prohibition because, absent this Writ of Prohibition, the Petitioners possess no other avenue to challenge the Circuit Court's Order denying Petitioners' Rule 41(b) Motion to Dismiss. This Court previously stated:

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts

Syl. pt. 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979).

A direct appeal of the Circuit Court's Order constitutes an interlocutory appeal that is not subject to immediate appellate review. *See* W. VA. CODE § 58-5-1 (2019). Likewise, this Court expressly holds that if a trial court's Rule 41(b) "order is adverse to the defendant, **an appeal [of a Rule 41(b) Motion] may only be taken in conjunction with the final judgment order terminating the case from the docket.**" Syl pt. 2, in part, *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996) (emphasis added). Simply put, if this Court declines to issue a Writ of

Prohibition, the Petitioners will possess no other avenue to address the Circuit Court's flagrant abuse of discretion and will only be able to obtain appellate review after enduring significant time and expense potentially up and through the trial of the underlying action. Accordingly, the first factor contained in *Wilson* weighs heavily in favor of granting Petitioners' Writ of Prohibition.

B. This Court should grant Petitioners' Writ of Prohibition because the Petitioners face irreparable harm should this Court not prohibit the Circuit Court from enforcing its Order.

Second, Petitioners will suffer irreparable harm if they are forced to litigate the underlying case after the Circuit Court flagrantly abused its discretion and erroneously denied Petitioners' Rule 41(b) Motion to Dismiss. Writs of Prohibition are "preventative remed[ies.] One seeking relief by prohibition in a proper case is not required . . . to . . . wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed." Syl. pt. 5, *State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 143 S.E.2d 535, 536 (1965).

If the Circuit Court's Order is permitted to stand, it will subject Petitioners to discovery, pre-trial motions, trial preparation, and trial of the underlying action. As such, Petitioners face irreparable harm from the time and expense associated with litigating the underlying action, which should have been dismissed, but for the Circuit Court's flagrant abuse of discretion in denying Petitioners' Rule 41(b) Motion. The time and expense incurred in the underlying action constitute irreparable harm because the time and expense spent on litigating an entire action is not correctable on appeal. Accordingly, because writs of prohibition are preventative remedies, they should be issued in cases like this because they can help parties avoid substantial litigation fees when those fees are premised on a lower court's abuse of discretion and clear legal error. Therefore, this Court should grant Petitioners' Writ of Prohibition in this case so that Petitioners are not forced to suffer the irreparable harm of litigating a case that should have

been dismissed based upon Respondent Rice's failure to prosecute her claims for a period of approximately 91 consecutive months.

- C. This Court should grant Petitioners' Writ of Prohibition because the Circuit Court's Order denying Petitioners' Rule 41(b) Motion after Respondent Rice failed to prosecute her claims since July of 2011 constitutes clear legal error and a flagrant abuse of discretion.**

Rule 41(b) of the West Virginia Rules of Civil Procedure, in relevant part, states as follows:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant . . . Any court in which is pending an action wherein for more than one year there has been no order or proceeding . . . may, in its discretion, order such action to be struck from its docket.

W. VA. R. CIV. P. 41(b). Specifically, Rule 41(b) permits a trial court to dismiss a matter "[f]or failure of the plaintiff to prosecute" plaintiff's claims "for more than one year." W. VA. R. CIV. P. 41(b). "This rule functions as a docket-clearing mechanism which enables trial courts to purge themselves of stale cases, while prodding dilatory plaintiffs to proceed to trial." Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, § 41(b), 938 (4th ed. 2012). As shown below, the Circuit Court's Order constitutes clear legal error and a flagrant abuse of discretion because the Order ignores significant West Virginia authority, erroneously determines that good cause existed for Respondent Rice's delay, and fails to consider the prejudicial effect the Order has on Petitioners.

- 1. The Circuit Court committed clear legal error when it denied Petitioners' Rule 41(b) Motion to Dismiss because West Virginia precedent routinely dismisses a plaintiff's claims for failure to prosecute when a plaintiff fails to prosecute their claims for a period of time far shorter than Respondent Rice's failure to prosecute her claims since July of 2011.**

Under West Virginia law, a plaintiff's failure to prosecute their claims for a period of time exceeding one (1) year constitutes grounds for dismissal. W. VA. R. CIV. P. 41(b). Indeed, the Supreme Court of Appeals of West Virginia routinely upholds Rule 41(b) dismissals when a party fails to prosecute their claims for over one (1) calendar year. *See, e.g., Meade v. W. Va. Div. of Corrs.*, No. 13-0983, 2014 WL 1672938 (W. Va. Apr. 24, 2014) (memorandum decision) (affirming trial court's Rule 41(b) dismissal because plaintiff failed to prosecute her case for 13 1/2 months); *Raab v. Marshall*, No. 13-0249, 2013 WL 5966972, at *5 (W. Va. Nov. 8, 2013) (affirming trial court's Rule 41(b) dismissal after plaintiff failed to prosecute claims for 13 months); *Arbogast v. Ally Fin., Inc.*, No. 12-0363, 2013 WL 1632150, at *1 (W. Va. Apr. 16, 2013) (affirming trial court's Rule 41(b) dismissal after plaintiff failed "to prosecute the case for approximately eighteen months"); *Whiting v. Marion Cty. Sheriff's Dep't*, No. 11-0575, 2012 WL 4373177, at *2 (W. Va. Sept. 21, 2012) (affirming trial court's Rule 41(b) dismissal against a *pro se* plaintiff after approximately 13 months of inactivity).

In *Whiting*, a *pro se* plaintiff filed a complaint against the Marion County Sheriff's Department ("Sheriff's Department") on November 2, 2009, alleging the Sheriff's Department illegally sold the *pro se* plaintiff's property at a tax sale and asserting \$750,000.00 in alleged damages. *Whiting*, No. 11-0575, 2012 WL 4373177, at *1. The Sheriff's Department subsequently moved to dismiss, and the *pro se* plaintiff filed a response on December 7, 2009. *Id.* After the *pro se* plaintiff responded, the case fell dormant until the circuit court sent both parties a letter on January 24, 2011, which set a hearing to show good cause for the delay. *Id.* At the

hearing, the *pro se* plaintiff advised he wanted to proceed with his case but failed to produce any evidence showing good cause for his delay. *Id.* at *2. The circuit court subsequently dismissed the *pro se* plaintiff's claims, which the *pro se* plaintiff appealed to this Court. *Id.* This Court upheld the trial court's dismissal of the *pro se* plaintiff's case holding that *pro se* plaintiffs—just like plaintiffs represented by counsel—possess a “continuing duty to monitor a case from the filing until the final judgment.” *Id.* (internal citations and quotations omitted). Accordingly, in *Whiting* this Court upheld a trial court's holding that dismissed a *pro se* plaintiff's claims after just thirteen months of inactivity.

The *Whiting* decision highlights the Circuit Court's clear legal error and flagrant abuse of discretion when it denied Petitioners' Rule 41(b) Motion to Dismiss. First, it is notable that in the underlying action Respondent Rice has been represented by legal counsel since at least May of 2010. In *Whiting*, the *pro se* plaintiff never obtained legal representation, and the *Whiting* court still held that the *pro se* plaintiff possessed a duty to monitor his case. Surely, if a *pro se* plaintiff possesses a duty to monitor his case, then Respondent Rice, which retained legal counsel to represent her interest in the underlying action for nearly a decade, should be held to the same, if not a higher, standard.⁴ Second, in *Whiting*, the court dismissed a *pro se* plaintiff's claims for failure to prosecute after just thirteen months. In this case, Respondent Rice possessed the ability to prosecute her claims from July of 2011 when she served her Complaint on Petitioners until February of 2019 when Petitioners filed their Rule 41(b) Motion to Dismiss—a **period of approximately 91 months**. Despite possessing approximately 91 months to prosecute her claims against Petitioners, Respondent Rice failed to do so. The tremendous passage of time with no

⁴ The Supreme Court of Appeals of West Virginia acknowledges that *pro se* parties are held to a different standard than parties represented by legal counsel. *See, e.g., State v. Myers*, 216 W. Va. 120, 124 n. 4, 602 S.E.2d 796, 800 n. 4 (2004) (“Pro se pleadings and motions are held to less stringent standards than those drafted by lawyers.”).

attempt by Respondent Rice to prosecute her claims highlights the Circuit Court's clear legal error and abuse of discretion when it denied Petitioners' Rule 41(b) Motion for Respondent Rice's failure to prosecute her claims.

2. The Circuit Court committed clear legal error when it held in its Order that Respondent Rice showed good cause for her delay in prosecuting her claims against Petitioners due to a bankruptcy stay that never stayed Respondent Rice's claims against Petitioners.

Once a party or the court moves to dismiss under Rule 41(b) of the West Virginia Rules of Civil Procedure, "the plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action" Syl. pt. 1, in part, *Caruso v. Pearce*, 223 W. Va. 544, 678 S.E.2d 50 (2009) (emphasis added). "The court, in weighing good cause . . . should also consider (1) the actual amount of time involved in the dormancy of the case, (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and (3) other relevant factors bearing on good cause" *Id.* "Our jurisprudence has long held that . . . good cause can only appear by showing . . . some . . . circumstances beyond the control of the party, and free from neglect on his [or her] part." *Covington v. Smith*, 213 W. Va. 309, 322, 582 S.E.2d 756, 769 (2003) (internal quotations and citations omitted).

The Circuit Court's Order found good cause for Respondent Rice's delay in prosecuting her claims "in light of the matter being stayed as a result of bankruptcy proceedings." [Appendix at 2.] However, the Circuit Court's Order failed to consider that the bankruptcy stay ended in December of 2013, and, more importantly, that **the bankruptcy stay never placed a stay on Respondent Rice's claims against Petitioners**. As indicated in the Bankruptcy Notice, by operation of 11 U.S.C. § 362(a), an automatic stay was placed on Respondent Rice's claims against Homecomings. [Appendix at 34-35.] Importantly, 11 U.S.C. § 362(a) does not place an automatic stay on the entirety of the underlying proceeding, but, rather, only places an automatic



stay on claims made against the bankruptcy-declaring debtor. 11 U.S.C. § 362(a). As such, 11 U.S.C. § 362(a) permits a plaintiff's claims against nondebtors to continue in an underlying proceeding even while the underlying proceeding is stayed as to the bankruptcy-declaring debtor. *See A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) (“Subsection (a)(1) [of § 362] is generally said to be available only to the debtor, not third party defendants or co-defendants.”).⁵ The automatic stay of proceedings under section 362 only extends to non-debtor parties in “unusual circumstances” that require “something more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy[.]” *Id.* (internal quotations omitted). An “unusual circumstance” is present only when “there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.” *Id.*

In the underlying proceedings, there is no such “unusual circumstance” present because Homecomings, the debtor party, engaged in mortgage servicing, and Petitioners engaged in the practice of law. A judgment for or against Petitioners would not be a judgment against Homecomings. Additionally, the Circuit Court never engaged in the analysis set forth in *A.H. Robins Co., Inc. v. Piccinin* and its progeny to determine whether unusual circumstances warranted the application of the section 362 automatic stay to non-debtor parties. As such, Respondent Rice's claims against Petitioners remained active throughout the pendency of Homecomings's bankruptcy proceedings.

The Circuit Court committed clear legal error and flagrantly abused its discretion when it held in its Order that the Homecomings bankruptcy stay constituted good cause for

⁵ It is axiomatic that a Chapter 11 bankruptcy stay—absent unusual circumstances—only applies to the debtor party filing for bankruptcy and not non-debtor co-defendants. *See, e.g., U.S. v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 (9th Cir. 1993) (“The automatic stay does not extend to actions against parties other than the debtor”)

Respondent Rice's failure to prosecute her claims because, again, the Homecomings bankruptcy stay did not stay Respondent Rice's claims against Petitioners. As such, at the time that Petitioners filed their Rule 41(b) Motion in February of 2019, Respondent Rice had failed to prosecute her claims against Petitioners since she served her Complaint on them in July of 2011—a period of approximately 91 months of inactivity. Assuming *arguendo* that the Circuit Court would have found “unusual circumstances” present in the underlying proceedings and stayed Respondent Rice's claims against Petitioners as a non-debtor party, the Circuit Court still would have committed clear legal error and flagrantly abused its discretion because Respondent Rice possessed over five years to prosecute her claims against Petitioners after the hypothetical bankruptcy stay would have ended. [Appendix at 20-21, 37-38.] Additionally, even if Respondent Rice possessed a mistaken belief that an automatic stay applied to her claims against Petitioners, Respondent Rice could still not show good cause for her delay because she failed to ever seek a lift of any purported bankruptcy stay.

Therefore, the Circuit Court flagrantly abused its discretion and committed clear legal error when it held that the Homecomings bankruptcy stay, which never even applied to Respondent Rice's claims against Petitioners, constituted good cause for Respondent Rice's failure to prosecute her claims up through February of 2019 when Petitioners filed their Rule 41(b) Motion. As such, this Court should grant Petitioners' Writ of Prohibition to prevent the Circuit Court from enforcing its Order because no good cause existed for Respondent Rice's failure to prosecute her claims for approximately 91 consecutive months.

3. The Circuit Court committed clear legal error when its Order failed to consider the substantial prejudice caused to the Petitioners by the denial of Petitioners' Rule 41(b) Motion.

Even assuming that Respondent Rice possessed a bona-fide justification for the significant delay in prosecuting her claims against Petitioners, the Circuit Court's Order failed to

consider the substantial prejudice borne upon Petitioners as a result of the Circuit Court's denial of Petitioners' Rule 41(b) Motion to Dismiss. "[A] defendant does not have to prove substantial prejudice unless the plaintiff first comes forward with evidence of good cause for the delay." *Raab v. Marshall*, No. 13-0249, 2013 WL 5966972, at *4 (W. Va. Nov. 8, 2013).⁶ Rather, the Circuit Court's Order summarily, and without factual support, "finds that in light of the matter being stayed as a result of bankruptcy proceedings and lack of any prejudice upon [Petitioners], that good cause exists to allow the matter to remain on the Court's docket." [Appendix at 2.] For the reasons set forth below, the Circuit Court flagrantly abused its discretion when it erroneously concluded that its ruling would not prejudice Petitioners.

This Court in *Dimon v. Mansy* set forth the procedure that a trial court must follow in considering a Rule 41(b) motion to dismiss. In relevant part, the *Dimon* court held:

[T]he plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action; if the plaintiff does come forward with good cause, the burden then shifts to the defendant to show substantial prejudice to it in allowing the case to proceed; if the defendant does show substantial prejudice, then the burden of production shifts to the plaintiff to establish that the proffered good cause outweighs the prejudice to the defendant . . . the court, in weight the evidence of good cause and substantial prejudice, should also consider (1) the actual amount of time involved in the dormancy of the case, and (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy.

Id. at 50, 349.

Respondent Rice's Complaint alleges claims against Petitioners for alleged conduct that occurred between 2006 and mid-2008. [Appendix at 4-19.] Respondent Rice's significant

⁶ Again, it should be noted that Respondent Rice failed to come forward with evidence showing good cause for her delay in prosecuting her claims against Petitioners. However, the Circuit Court's Order erroneously found that good cause existed, so the Circuit Court should have then weighed the good cause against any prejudice borne by Petitioners. The Circuit Court failed to do so and, instead, summarily stated in the Circuit Court Order that Petitioners would not be prejudiced.

delay in prosecuting her claims against Petitioners would make collecting evidence, obtaining depositions, and preparing a sufficient defense a near impossibility. As time moves on, memories fade, potentially relevant testimony is lost to the sands of time, and relevant documents are more difficult, if not impossible, to locate. For those reasons, many courts hold that “[p]rejudice occurs when a plaintiff’s failure to prosecute burdens a defendant’s ability to prepare for trial.” *Gillis v. Pierce*, 320 F.R.D. 123, 124 (D. Del. 2017)⁷; *see also Holder v. Orange Grove Med. Specialties, P.A.*, 54 So.3d 192, 200 (Miss. 2010) (“Actual prejudice may arise [under Rule 41(b)] when, because of [the plaintiff’s] delay, witnesses become unavailable or the memories of witnesses fade . . . we find that the delay alone may result in presumed prejudice to the defendant. This presumed prejudice strengthens the defendants’ case for dismissal under Rule 41(b).”).

In the underlying action, the Circuit Court committed clear legal error when it failed to find that Petitioners would be prejudiced if forced to litigate an action that—because of Respondent Rice’s extreme dilatory conduct—has languished in the Circuit Court since May of 2010. All the while that Respondent Rice sat on her case, memories faded, witnesses moved away or are no longer with us, and evidence became lost to the sands of time. Undoubtedly, any witnesses still available would possess very little, if any, first-hand recollection of the events alleged in Respondent Rice’s Complaint. Worst still, Respondent Rice failed to engage in any discovery in this matter to preserve firsthand accounts and evidence. [Appendix at 20-21.] Therefore, Petitioners would suffer substantial prejudice if forced to litigate a case concerning allegations from 2006 through mid-2008 wherein no party still possesses a solid first-hand

⁷ “[W]e give substantial weight to federal cases in determining the meaning and scope of our rules [of civil procedure].” *Brooks v. Isinghood*, 213 W. Va. 675, 682, 584 S.E.2d 531, 538 (2003).



recollection of the facts and circumstances underlying the allegations contained in Respondent Rice's Complaint.

Specific to the underlying action, Petitioner Johnson & Freedman stopped operating as a business on or around June 30, 2013, when Johnson & Freedman's principals and staff joined another law firm, RCO Legal, PS. At that time, RCO Legal, PS ("RCO Legal") took over all of Johnson & Freedman's physical and electronic files. The principal of Johnson & Freedman, Larry Johnson ("Mr. Johnson"), went to work with RCO Legal until September of 2015 before leaving to pursue other work. As such, Mr. Johnson does not even currently possess documents relevant to Respondent Rice's claims, if any exist, because, upon information and belief, they remain in the possession of a third-party, RCO Legal. Subsequently, RCO Legal entered receivership, and, upon information and belief, any documents maintained by RCO Legal would now be in the possession of the receiver. Likewise, Petitioner David C. Whitridge stopped practicing law with Petitioner Johnson & Freedman on or around March 7, 2008. As such, conducting discovery in the underlying proceeding wherein Respondent Rice failed to prosecute her claims against Petitioners for approximately 91 consecutive months, would be extremely difficult, costly, and burdensome for Petitioners.

Accordingly, the holding contained in the Circuit Court Order stating that Petitioners suffered no prejudice constituted clear legal error and a flagrant abuse of discretion, and this Court should grant Petitioners' Writ of Prohibition to prevent the Circuit Court from enforcing its Order.

D. This Court should grant Petitioners' Writ of Prohibition because the Circuit Court's Order completely disregards West Virginia procedural law.

The Circuit Court's Order presents this Court with the question of whether a trial court's discretion to deny Rule 41(b) motions to dismiss is unlimited. This Court previously

considered the breadth of the trial court's discretion to grant Rule 41(b) motions but has not yet considered the breadth of the trial court's discretion to deny Rule 41(b) motions.⁸ This case presents this Court with an opportunity to clarify the scope of a trial court's discretion to deny Rule 41(b) motions when a plaintiff fails to prosecute their claims for years-on-end.

Undoubtedly, the question presented by this Writ of Prohibition is important to the administration of justice in West Virginia state courts. This Court previously acknowledged that “[i]t is our task to supervise the administration of justice in the circuit courts, and to that end, we must ensure that fair standards of procedure are maintained.” *Dimon v. Mansy*, 198 W. Va. 40, 46, 479 S.E.2d 339, 345 (1996). “Judicial supervision and responsibility ‘implies the duty of establishing and maintaining civilized standards of procedure and evidence.’” *Id.* (quoting *McNabb v. United States*, 318 U.S. 332, 340 (1943)). “Our supervisory and rulemaking authority extends to issuance of sanctions under Rule 41(b), particularly where we are dealing with a procedure for which a uniform practice is desirable.” *Id.* The West Virginia Supreme Court of Appeals “may require lower courts to adhere to procedures deemed desirable as a matter of sound judicial practice” *Id.* at 50, 349.

Additionally, Rule 1 of the West Virginia Rules of Civil Procedure states that “[t]hese rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature . . . [the West Virginia Rules of Civil Procedure] shall be construed and administered to secure the **just, speedy, and inexpensive determination of every action.**” W. VA. R. CIV. P. 1 (emphasis added). “An integral part of this just, speedy and inexpensive system is the establishment of time periods within which actions must be taken, if they are to be taken at all.” *Caruso v. Pearce*, 223 W. Va. 544, 547, 678 S.E.2d 50, 53 (2000).

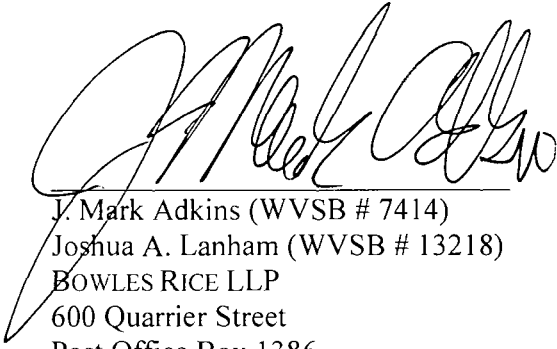
⁸ See *supra* note 1.

To permit the Circuit Court Order to stand would create a precedent wherein defendants haled into court in West Virginia are faced with suit in perpetuity. That precedent would create uncertainty in our judicial system, discourage entities from conducting business in the State for fear of decades-long litigation, and would directly contravene Rule 1 of the West Virginia Rules of Civil Procedure, which is the prism that all other rules of civil procedure—including Rule 41(b)—are viewed through. Accordingly, the Circuit Court’s Order constituted clear legal error and a flagrant abuse of discretion and, as such, this Court should grant Petitioners’ Writ of Prohibition.

VII. Conclusion and Relief Prayed For

This Court should issue a rule to show cause, stay the underlying proceedings should the Circuit Court deny Petitioners’ outstanding Motion to Stay,⁹ and, after sufficient time to show cause, grant Petitioners’ Writ of Prohibition that prevents the Circuit Court from enforcing the Circuit Court’s Order denying Petitioners’ Rule 41(b) Motion to Dismiss. Petitioners meet the requirements set forth by this Court when considering whether the issuance of a Writ of Prohibition is appropriate, and, most importantly, the Circuit Court’s Order is a flagrant abuse of discretion that is clearly erroneous as a matter of law. Accordingly, this Court should grant Petitioners’ Writ of Prohibition and take this opportunity to correct the Circuit Court’s erroneous ruling and clarify the law regarding the scope of a trial court’s discretion to deny Rule 41(b) motions to dismiss when the plaintiff fails to prosecute their claims for years-on-end.

⁹ [Appendix at 114-24.]



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