

**IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA**

**CHRISTOPHER CHAFIN, and  
CHEAT LAKE URGENT CARE, PLLC,**

**Plaintiffs,**

**v.**

**CIVIL ACTION NO. 16-C-547  
JUDGE SUSAN B. TUCKER**

**DAVID ANDERSON, BRIAN R. BOAL and  
BOAL & ASSOCIATES, P.C., GILLEN  
ENTERPRISES, LLC, AFFORDABLE  
CONTRACTORS, LLC and BUILD IT, LLC,**

**Defendants,**

**ORDER DENYING PLAINTIFFS' MOTION FOR RELIEF  
FROM JUDGEMENT OR ORDER AND MOTION  
TO ALTER OR AMEND JUDGMENT**

Presently pending before this Court is Plaintiffs' *Motion for Relief from Judgement or Order* ("Motion for Relief") and Plaintiffs' *Motion to Alter or Amend Judgment* ("Motion to Alter or Amend"), filed by and through counsel, Jason Wingfield, Esq. and the law firm of Gianola, Barnum, Bechtel & Jecklin, L.C. Defendants Brian R. Boal and Boal & Associates, P.C. filed a consolidated response to both motions ("Response"), by and through counsel, Avrum Levicoff, Esq., to both of Plaintiffs' motions on November 29, 2021. Plaintiffs did not submit a reply to Defendants' Response.

Upon review of the Motion for Relief, Motion to Alter or Amend, the Response, and court file, to include the Memorandum Decision issued by the West Virginia Supreme Court of Appeals regarding Plaintiffs' petition for a Writ of Prohibition in this matter, the Court finds it appropriate to issue a ruling without a

hearing. Accordingly, it is this Court's opinion that Plaintiffs' Motion for Relief and Motion to Alter or Amend should be denied based upon the reasons set forth in this Order.

By way of background, Plaintiffs in this matter filed a Second Amended Complaint asserting a variety of claims against Defendants Brian R. Boal (hereinafter "Boal") and Boal & Associates, PC (hereinafter "Boal & Associates"), alleging that Plaintiffs had engaged Boal and Boal & Associates to provide certain accounting and tax services to and for Plaintiffs, but that Boal and Boal & Associates deviated from their duties as accountants and the applicable standards of professional conduct which resulted in damage to the Plaintiffs. This Court issued a scheduling order, and further amended scheduling orders, establishing an August 9, 2019 deadline for Plaintiffs to disclose supplemental experts' opinions. Plaintiffs, having missed the August 9, 2019 deadline to disclose their expert's anticipated testimony and opinions, served on June 3, 2020 the Plaintiffs' Expert Report Disclosure. In response, Defendants Boal and Boal & Associates filed a Motion to Strike Plaintiffs' Expert Disclosure, and this Court held a hearing on said motion on August 3, 2020. By Order entered August 4, 2020, this Court granted the Motion to Strike Plaintiffs' Expert Disclosure, in effect precluding Plaintiffs' expert from testifying in the case. In light of the August 4, 2020 Order, Boal and Boal & Associates filed an Amended Motion for Summary Judgment, arguing that Plaintiffs were therefore unable to make out a *prima facie* case for their claims against Boal and Boal & Associates. Plaintiffs challenged the August 4, 2020 Order by seeking extraordinary relief through a Petition for Writ of Prohibition filed with the West Virginia Supreme Court of Appeals. The Writ was denied on March

17, 2021. Thereafter, on July 12, 2021, this Court held a hearing on the Defendants' Motion and Amended Motion for Summary Judgment and, following review of the motions and Plaintiffs' response and oral argument in support thereof, concluded that summary judgment must be rendered in favor of Boal and Boal & Associates. To that effect, this Court entered an Order Granting Summary Judgment in Favor of Defendants Boal and Boal & Associates, P.C. on July 30, 2021.

#### **MOTION TO ALTER OR AMEND**

In their Motion to Alter or Amend, Plaintiffs assert that the summary judgment previously granted against them by Order entered July 30, 2021 in this case should be altered and/or amended on two grounds. First, the Plaintiffs assert that the summary judgment should be amended as a matter of law because the Court "made a clear error of law in granting the Boal Defendants' motions for summary judgment with respect to Counts II, III, IV, V, and VI since none of those counts involve a standard of care as an element of proof necessary." See *Plaintiffs' Motion to Alter or Amend* at page 3. The Plaintiffs further assert that judgment should be amended in order to prevent an obvious injustice.

In West Virginia, a motion under W.Va. R. Civ. P. Rule 59(e) should be granted where the movant can establish (1) an intervening change in controlling law; (2) newly discovered evidence not previously available; (3) a clear error of law for which a remedy is necessary; or (4) to prevent an obvious injustice. Syl. Pt. 2, *Mey v. Pep Boys – Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2001). Plaintiff argues in its Motion to Alter or Amend that it was a clear error of law to grant summary judgment with respect to claims captioned as either breach of a contract or negligence.

Specifically, the claims made in Plaintiffs' Second Amended Complaint appear as: (1) Count I – Malpractice by Defendants Boal and Boal & Associates, (2) Count II – Breach of the CLUC Contract by Defendants Boal and Boal & Associates, (3) Count III – Breach of the Chafin Contract by Defendants Boal and Boal & Associates, (4) Count IV – Negligence by Defendants Boal and Boal & Associates, (5) Count V – Negligent Representation by Defendants Boal and Boal & Associates, and (6) Count VI – Breach of Defendant Boal's Fiduciary Duty. While Plaintiffs argue that the malpractice count is the only cause of action requiring expert testimony to establish the standard of care, Plaintiffs fail to properly address this Court's prior findings in the July 30, 2021 summary judgment order, where the Court opined, and held, that all of Plaintiffs' claims against Boal and Boal & Associates stem from the alleged failure to perform professional duties owed to the clients, and the alleged failure to perform such obligations in accordance with the applicable standard of professional care and conduct. Plaintiffs seemingly echo their argument previously filed with, and argued in front of, this Court, and resolved through the July 30, 2021 summary judgment order. However, this Court found that, when whittled down to their core, all counts of Plaintiffs' Second Amended Complaint are claims of professional liability, where Plaintiff alleges a failure by Boal and Boal & Associates to discover the embezzlement of funds and to ensure payment of personal income taxes.

Arguing its second ground for altering or amending the summary judgment order, Plaintiffs assert that it is their strong belief that the law favors this Court ruling that the expert should not have been struck in its Order Regarding August 3, 2020 Hearing ("Order to Strike"), thus precluding an order granting summary judgment to

Boal and Boal & Associates. The Court has previously explained the basis for its ruling related to the Order to Strike, and that basis remains unchanged today. It is undisputed that Plaintiffs failed to timely disclose the necessary testimony and opinion from its trial expert as required by the scheduling orders entered by this Court. While Plaintiffs contend that this Court “improperly balanced the evils” by “reveal[ing] that it is much more detrimental to be late with a disclosure than it is to engage in accounting malpractice,” Plaintiffs entirely ignore the substantial delay in their provision of the necessary expert disclosures and corresponding prejudicial effect on Defendant Boal and Boal & Associates, and avoid recognizing the lack of such disclosures as being necessary to support an allegation of accounting malpractice. As such, the Order to Strike was not an obvious injustice.

Finally, this Court recognizes that Plaintiffs continue to attempt to moderate their untimeliness. Rule 59(e) of the West Virginia Rules of Civil Procedure provides: “Motion to alter or amend a judgment. — Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.” See *Plaintiffs’ Motion to Alter or Amend Judgment* at page 2. Although Plaintiffs have acknowledged this requirement in their motion, Plaintiffs apparently fail to recognize the untimely filing of this very motion. The Order Granting Summary Judgment in Favor of Defendants Boal and Boal & Associates, P.C. was entered on July 30, 2021, and Plaintiffs’ Motion to Alter or Amend was subsequently filed on August 13, 2021, 14 days after entry of the summary judgment order.

#### **MOTION FOR RELIEF**

In their Motion for Relief, pursuant to Rule 60(b) of the West Virginia Rules

of Civil Procedure, the Plaintiffs request relief from the Order to Strike previously entered on August 4, 2020 in this case, following a hearing on the corresponding motion held on August 3, 2020. Specifically, the Plaintiffs request relief on the basis that their expert disclosure was made timely, even if detailed expert reports were not disclosed, as well as relief from the Court's ruling permitting Boal and Boal & Associates to amend their answer, even though the Court's scheduling orders "never addressed a deadline for the amendment of pleadings as required." See Plaintiffs' *Motion for Relief from Judgment or Order* at page 3. Finally, Plaintiffs also request this Court compel the Anderson Defendant(s) to comply with discovery requirements.

Although Plaintiffs respectfully seek relief pursuant to Rule 60(b), Plaintiffs neglect to reference any specific subpart of the rule as it pertains to the grounds upon which relief is sought. Thus, this Court will itself analyze the rule and its subparts for the potential application of such to the requested relief. Rule 60(b) sets out the following:

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. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve

a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearing, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As an initial matter, it is important to identify the types of judgments or orders to which Rule 60(b) applies, namely that the rule may provide relief “from a *final* judgment, order, or proceeding . . .” (emphasis added). The Order to Strike issued by this Court is undeniably one of interlocutory nature, and as such, the Motion for Relief is an improper use of Rule 60(b). The West Virginia Supreme Court alluded to such a distinction in its Memorandum Decision denying Plaintiffs’ Writ of Prohibition in March 2021 when it recognized that “petitioners seek extraordinary relief based upon a non-appealable interlocutory order.” See *State of West Virginia ex rel. Chafin, MD et al. v. Honorable Susan B. Tucker, et al.*, No. 20-0685 (W.Va. Supreme Court, March 17, 2021) at page 5.

Even if this Court were to find Rule 60(b) applicable to the Plaintiffs’ Motion for Relief from the Order to Strike, Plaintiffs requested relief is again barred by the requirements of the rule. Inasmuch as Plaintiffs’ argument relies on the grounds in subparts (1), (2), or (3) of Rule 60(b), Plaintiffs’ Motion for Relief is untimely, as it was filed more than one year after entry of the Order to Strike. Even if the Motion for Relief had been timely filed, Plaintiffs make no reference and offer no analysis for relief under the initial three subparts of the rule. Moreover, Rule 60(b) requires that Plaintiffs’ Motion for Relief “be made within a reasonable time . . .” This Court is not persuaded that the filing of the Motion for Relief over a year after entry of the Order



to Strike could be considered to have been made within a reasonable time. Undeniably, the Supreme Court of Appeals denied Plaintiffs' Petition for Writ of Prohibition on March 17, 2021, yet Plaintiffs did not file their Motion for Relief with this Court until approximately five (5) months after the Supreme Court's denial of the Writ.

Additionally, this Court recognizes that subparts (4) and (5) of Rule 60(b) do not provide Plaintiff with any basis for relief where subpart (4) is specific to judgments that are void and where subpart (5) deals with judgments that have 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." Again, Plaintiffs make no attempt to relate their request to these subparts.

Lastly, this Court is left with the final subpart of Rule 60(b), subpart (6), which provides a more inclusive basis for relief as it applies to "any other reason justifying relief from the operation of the judgment." In Boal and Boal & Associates' Consolidated Memorandum of Law opposing Plaintiffs' motions, Defendants argue that "it is uniformly accepted that relief under Rule 60(b)(6) is available and appropriate only in the context of novel, extraordinary circumstances." *See, e.g., Franklin D. Cleckley, et al., Litigation Handbook on West Virginia Rules of Civil Procedure* §60(b)(6)[2] at 1319 (4<sup>th</sup> ed. 2012). This Court agrees, and further recognizes that the requests made in Plaintiffs' Motion for Relief are neither novel, nor are they extraordinary, and not of the ilk found in West Virginia Supreme Court cases where Rule 60(b)(6) relief has been granted.



Therefore, based upon the foregoing, this Court **ORDERS** that Plaintiffs' *Motion for Relief from Judgement or Order* and *Motion to Alter or Amend Judgment* are hereby **DENIED**. Further, the hearing scheduled in this case for December 13, 2021 at 11:00 a.m. is hereby **CANCELLED**.

The Clerk of this Court is directed to forward copies of this Order to all counsel of record.

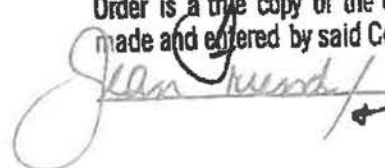
ENTER this 9<sup>th</sup> day of December 2021.

  
SUSAN B. TUCKER, JUDGE

ENTERED: Dec 9, 2021  
DOCKET LINE 238, Jean Friend, Clerk

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and Family Court of Monongalia County State aforesaid do hereby certify that the above Order is a true copy of the original Order made and entered by said Court.

 Circuit Clerk