IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTOPHER CHAFIN and
CHEAT LAKE URGENT CARE, PLLC,
Plaintiffs Below, Petitioners,

v. No. **22-0010**

BRIAN R. BOAL and
BOAL & ASSOCIATES, P.C.,
Defendants Below, Respondents.

BRIEF OF RESPONDENTS, BRIAN R. BOAL and BOAL & ASSOCIATES, P.C.

Arising from a December 9, 2021 Order
Denying Plaintiffs' Motion for Relief from Judgment
or Order and Motion to Alter or Amend Judgment

CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 16-C-547

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Respondents Brian R. Boal and Boal & Associates, P.C., by counsel, Avrum Levicoff, Robert L. Hogan and The Levicoff Law Firm, P.C., respectfully ask this Honorable Court to either dismiss Petitioners' appeal as untimely or, alternatively, affirm the Circuit Court of Monongalia County's December 9, 2021 Order Denying Plaintiffs' Motion for Relief from Judgment or Order and Motion to Alter or Amend Judgment ("Final Order").

I. RESPONSE TO ASSIGNMENTS OF ERROR

1. Because Petitioners' Brief frames this appeal as a direct appeal of the Circuit Court's July 30, 2021 Summary Judgment Order, the appeal is untimely and should be dismissed.

2. To the extent Petitioners' appeal is construed as the timely appeal of the Circuit Court's December 9, 2021 Final Order, the scope of the Court's jurisdiction and appellate review is limited to (a) those issues raised and preserved in Petitioners' Rule 59(e) Motion and (b) the Circuit Court's denial of Petitioners' Rule 60(b) Motion.

3. The Circuit Court correctly denied Petitioners' Rule 59(e) Motion because the entry of summary judgment – on the basis that Petitioners could not sustain their claims against Boal without the testimony of a liability expert – was neither "clearly erroneous" nor "obviously unjust."

4. The Circuit Court correctly denied Petitioners' Rule 60(b) Motion as a matter of law because, contrary to the Rule, the Motion challenged an interlocutory order, not a final judgment or other final order.

5. The Final Order denying Petitioners' Rule 59(e) and Rule 60(b) Motions was otherwise correct and proper, and Petitioners' allegations of abuse and prejudice on the part of the Circuit Judge are not only without merit, but ultimately immaterial, because the standard of review of Rule 59(e) motions is *de novo*, and because Petitioners' Rule 60(b) Motion, though ordinarily subject to review for abuse of discretion, was invalid as a matter of law.

II. STATEMENT OF THE CASE

A. Introduction

This appeal is from a professional liability action asserted by Petitioners – Christopher M. Chafin, M.D., and his practice group, Cheat Lake Urgent Care, PLLC ("CLUC") – against defendants including CLUC's former accountant, Brian R. Boal, CPA, and his firm, Boal & Associates, P.C., the Respondents to this appeal (individually and collectively, "Boal"). Though captioned under multiple theories, Petitioners' claims against Boal are essentially two-fold. First, Petitioners allege Boal failed to ensure that CLUC paid Dr. Chafin's estimated quarterly income taxes relating to earnings from the practice. Second, they allege Boal failed to discover David M. Anderson, M.D. was embezzling funds from CLUC, which he co-owned along with Dr. Chafin and a third physician. Unfortunately, Petitioners' Second Amended Complaint [AP[1] at 630-60] is devoid of any factual or temporal specificity with respect to the alleged conduct of Boal, and years of litigation has provided little clarity regarding the matter.

Petitioners' prosecution of this civil action has been characterized by a dilatory approach to discovery and a complete disregard for their expert disclosure obligations. Petitioners filed this action in October 2016 [AP at 1], but never took a single deposition. Although Boal first served an interrogatory requesting the disclosure of expert witness information in May 2017 [*cf.* AP at 2, line 34], Petitioners failed to disclose their experts' opinions and the basis for same by a May 1, 2019 expert disclosure line established in the Circuit Court's first Scheduling Order. [AP at 613.]

[1] "AP" refers to the Amended Joint Appendix.

Then, after Boal filed a motion regarding that omission [AP at 709-11], Petitioners ignored a new, August 9, 2019 deadline to supplement their disclosures with such information [AP at 604, 607.]

In a July 30, 2021 Order Granting Summary Judgment in Favor of Defendants Brian R. Boal and Boal & Associates, P.C. ("Summary Judgment Order") [AP at 64-76], the Circuit Court of Monongalia County granted summary judgment in favor of Boal because Petitioners were unable to offer necessary expert testimony demonstrating Boal breached any applicable standard of care and thereby caused Petitioners to suffer damages. That decision came after the Circuit Court had precluded Petitioners from offering the testimony of their liability expert, Charles P. Russo, CPA, in an August 4, 2020 Order Regarding August 3, 2020 Hearing ("Order to Strike") [AP at 239-40], and after this Court's March 17, 2021 Memorandum Decision [SAP[2] at F] denied Petitioners' request for a writ of prohibition relating to the Order to Strike because they failed to secure an order allowing meaningful review as required by *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998).

Petitioners filed a Motion to Alter or Amend Judgment ("Rule 59(e) Motion") [AP at 43-50] and Motion for Relief from Judgment or Order ("Rule 60(b) Motion") on August 13, 2021 [AP at 51-63]. The Circuit Court denied those Motions in a December 9, 2021 Order Denying Plaintiffs' Motion for Relief from Judgment or Order and Motion to Alter or Amend Judgment ("Final Order"). [AP at 12-20.]

Petitioners' Brief presents as a direct appeal of the Summary Judgment Order and the preceding Order to Strike rather than an appeal of the Final Order. As explained below, if the appeal is construed as presented in Petitioners' Brief, the appeal should be dismissed as untimely. If the appeal is construed as an appeal from the Final Order, the Court should swiftly affirm the

[2] "SAP" refers to the proposed Joint Supplemental Appendix.

denial of Petitioners' Rule 60(b) Motion because the Order to Strike challenged by that Motion is interlocutory, not final; beyond that, this Court's review should focus on the limited but meritless grounds preserved for appeal in Petitioners' Rule 59(e) Motion, which challenged the Summary Judgment Order.[3]

A more detailed procedural history is set forth below.

B. Procedural History

No later than January 24, 2013, Petitioners had reason to believe that Dr. Anderson had been misappropriating funds from CLUC. [AP at 427.] Yet, this civil action commenced more than three and a half years later, on October 27, 2016 [AP at 1], with the filing of a Complaint by Dr. Chafin against Dr. Anderson and Boal. [AP at 683-703.]

On December 21, 2017, after an Amended Complaint [AP at 662-682] had been filed pre-service [*see* AP at 1, line 2], Dr. Chafin filed a Motion for Leave to Amend Complaint, to which all Defendants consented.[4] [*See, e.g.* AP at 3, line 58, AP at 631-32 (referenced Exhibits omitted)]. The Second Amended Complaint [AP at 636-60] added CLUC as a plaintiff and added three entities associated with Dr. Anderson as defendants. As to Boal, the Second Amended Complaint ultimately alleged claims of breach of contract, negligence, malpractice, negligent misrepresentation and breach of fiduciary duty. The substantive allegations against Boal in the

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[3] Petitioners have a propensity to comingle and conflate events in Dr. Anderson's separate criminal action with the issues in this civil action. Thus, Petitioners' Brief repeatedly and improperly interjects arguments based on events in the criminal case which are not matters of record in this action. The Court should ignore, if not strike, these arguments. *See, e.g.*, Syl. Pt. 4, *Martin v. Barbour County Bd. of Educ.*, *supra* ("The appellate review of a ruling of a circuit court is limited to the very record there made and will not take into consideration any matter which is not a part of that record.")

[4] Although the Agreed Order Amending Complaint [AP at 633-35] and the Second Amended Complaint [AP at 636-60] were not formally filed in the record until almost one year later, on December 19, 2018 [AP at 4, lines 79-80], there was no corresponding delay or interruption in the proceedings. In fact, Boal's Answer [AP at 622-30] to the Second Amended Complaint was served on January 9, 2018 [AP at 630] and filed by the Clerk two days later [AP at 3, lines 59-60]; i.e., within three weeks after the Motion for Leave to Amend Complaint was filed.

Second Amended Complaint remained essentially the same as in the two prior versions of the Complaint. However, like the complaints that preceded it, the Second Amended Complaint contained no allegations identifying the time frame or any specifically identifiable act or transaction associated with the claims against Boal.

On May 25, 2017, Boal served written discovery requests on Petitioners, with the certificate of service filed in the record on May 30, 2017. [AP at 2, line 34.] Boal's Interrogatory No. 10 was a comprehensive request for information concerning Petitioners' anticipated expert testimony, including but not limited to information discoverable pursuant to W.Va. R. Civ. P. Rule 26(b)(4)(A)(i).[5] [*See, e.g.*, AP at 720-21.] Dr. Chafin answered Interrogatory No. 10 on November 22, 2017 and in amended answers on December 13, 2017 by stating: "This Interrogatory is premature and will be responded to in accordance with the Court's Scheduling Order. Plaintiff reserves the right to supplement this interrogatory within the Court's Scheduling Order in this case." [*See, e.g.*, AP at 721-22.] Petitioner would go on to ignore those Scheduling Orders.

On December 6, 2018, the Court entered its first Scheduling Order. [AP at 612-14.] The Scheduling Order required Petitioners, as the parties bearing the burden of proof, to make expert disclosures on or before May 1, 2019. [AP at 613.] Petitioners did serve Plaintiffs' Expert Witness Disclosure on May 1, 2019 [AP at 353], and it was filed on May 6, 2019. [AP at 4, line 92.] But this disclosure merely identified Petitioners' experts and broadly described the subject matter of their expected testimony, without providing the substance of the facts and opinions to which they would testify or the grounds for the opinions. [AP at 344-52.]

[5] Among the requests for production served by Boal at the same time was Request No. 13, seeking any reports and *curriculum vitae* of Petitioners' testifying experts. [*See, e.g.*, AP at 727-29.]

On June 10, 2019, Dr. Anderson filed a Motion to Strike Expert Witness Disclosures of Plaintiffs [AP at 609-11], pointing out that Plaintiffs' Expert Witness Disclosure was deficient. On June 17, 2019, Boal filed a Motion for Sanctions and to Compel Compliance with Court Order, and Motion to Compel Complete Answers to Defendants' First Set of Interrogatories. [AP at 704-31.] Boal's Motion specifically cited Petitioners' failure to answer Interrogatory No. 10, seeking information regarding expert opinions, which had been served in May 2017. [AP at 709-11.]

An Amended Scheduling Order [AP at 606-08] was entered on June 19, 2019 following an informal scheduling conference held the preceding day.[6] Based on discussions during the June 18, 2019 scheduling conference, the Amended Scheduling Order extended Petitioners' time for "supplementing" their trial experts' opinions to August 9, 2019. [AP at 607.]

A hearing on August 8, 2019 [AP at 524-57] led to the entry of a Second Amended Scheduling Order [AR 603-05] with a different trial date (June 23, 2020)[7] and corresponding, new deadlines for motions and other pre-trial submissions. However, Petitioners' August 9, 2019 deadline for disclosing expert opinions remained the same. [AP at 504.] Petitioners failed to meet that deadline.

On October 23, 2019, two-and-a-half months after the August 9 deadline for disclosing expert opinions passed, Petitioners produced a "preliminary report" from Andrew Smith, CPA, whom Petitioners' counsel described as an "expert that will establish the embezzlement [by Dr. Anderson]" [AP at 497] or a "damages expert." [AP at 479, ¶k.] Petitioners' counsel represented that Charles P. Russo, CPA, identified as providing standard of care or liability testimony as to

[6] This scheduling conference was held off the record and was led by the Circuit Court's law clerk.

[7] The trial date provided for by the prior, Amended Scheduling Order was March 24, 2020 [AP at 606], an inconvenient time for a case involving multiple accountant witnesses.

Boal, would not provide an opinion until Mr. Smith prepared a "final report."[8] [*Id.*] In a November 7, 2019 letter, Boal's counsel objected, noting that the disclosure of Petitioners' expert opinions was now nearly three months past due. [AP at 499.]

Nearly six months after the August 9, 2019 deadline passed, Petitioners had yet to disclose the substance of their standard of care expert's opinions or the grounds for same. Consequently, on February 5, 2020, Boal filed a Motion in Limine to Preclude Expert Testimony. [AP at 570-88.] The Motion pointed out that Interrogatory No. 10, seeking such information, had been pending since May 25, 2017 with no substantive answer [AP at 572, ¶ 4]; the Court's May 9, 2019 and August 9, 2019 deadlines for making expert disclosures had passed [AP at 571-73, ¶¶ 2, 3, 6]; the January 29, 2020 deadline for completing discovery had passed [AP at 573, ¶ 8; AP at 585]; trial was then scheduled to commence on June 23, 2020 [AP at 573-74, ¶ 9; AP at 584]; and Boal was prejudiced by the inability to prepare a defense against Petitioners' vague allegations of liability. [AP at 573, ¶ 8.] Boal also filed a Motion for Summary Judgment [AP at 502-11], asserting that Petitioners could not establish a *prima facie* case without expert testimony to establish the standard of care for professional accountants, any deviation from that standard, and causation. [AP at 503, ¶ 2.] Boal's Motions were scheduled for hearing on March 20, 2020 [AP at 6, line 130], but the hearing was postponed until the June 8, 2020 pretrial hearing. [AP at 501.] In response, Petitioners offered nothing but excuses [AP at 477-86] that were easily debunked. [AP at 493-500.]

[8] Although Petitioners' Brief (at page 2) implies that Mr. Smith was a standard of care expert, in fact, based on subsequent disclosures, Mr. Smith's testimony would have been directly relevant to Boal, if at all, only on the issue of damages. [*See, e.g.*, AP at 479, ¶k.] Similarly, to the extent Petitioners cite the January 24, 2013 report of forensic accountant Michael D. Kirkpatrick, CPA [AP at 427-36], it suffices to say that this report contains no opinions regarding Boal and, if anything, only begs the question of why Petitioners waited until October 2016 – more than three and a half years later – to file a complaint against anyone, much less failed to meet an August 9, 2019 expert disclosure deadline – more than six and a half years later.

With pretrial motion deadlines approaching, it became apparent that a June 23, 2020 trial was impractical. Consequently, Boal had to file a Motion to Continue Trial on April 8, 2020. [AP at 469-72.] On April 17, 2020, an Agreed Order of Continuance was entered. [AP at 467-68.]

The hearing on Boal's Motion in Limine and Motion for Summary Judgment was rescheduled multiple times. In the interim, on June 8, 2020 – approximately 10 months past the August 9, 2019 deadline and more than three and a half years after the case was filed – Petitioners filed Plaintiffs' Expert Report Disclosure [AP at 299-341], which included the June 1, 2020 report of Mr. Russo. [AP at 301-38.]

On July 14, 2020, Boal filed a Motion to Strike Plaintiffs' Expert Disclosure. [AP at 248-98.] Boal argued that Petitioners' disclosure of Mr. Russo's report was egregiously late and the report was largely conclusory and confusing. In general, the report simply recited various accounting and tax preparation standards with little or no discussion of facts pertinent to their application and negligible analysis supporting the few, conclusory assertions relating to Boal. The Court heard Boal's Motion in Limine to Preclude Expert Testimony and Motion to Strike Plaintiffs' Expert Disclosure on August 3, 2020. [AP at 191-238.] The following day, August 4, 2020, the Circuit Court granted Boal's motion in its Order to Strike. [AP at 239-40.]

On August 31, 2020, Boal filed an Amended Motion for Summary Judgment, arguing that Petitioners were unable to make a *prima facie* case because expert testimony was required to prove a breach of the standard of care and causation as to Boal and, now, the Court's recent Order to Strike had effectively precluded Petitioners from offering such evidence. [AP at 142-66.] A hearing on this Motion was scheduled for September 30, 2020. [AP at 9, line 208.]

However, on September 3, 2020, Petitioners filed a Petition for Writ of Prohibition with this Court [SAP at D.] The Petition challenged the Circuit Court's Order to Strike. [AP at 239-40.]

Notably, the Petition argued that "without the benefit of their expert witness," Petitioners would be "without the ability to properly establish the relevant standards of care." [SAP at D, page 17.] Boal responded to the Petition [SAP at E] and the issues were argued before this Court on February 16, 2021. At oral argument, Petitioners' counsel told the Court: "This is a case that involves accounting malpractice. That is not an issue that we can put to a jury with lay witnesses; we need an expert witness."[9] This Court's March 17, 2021 Memorandum Decision [SAP at F] denied relief, citing *Gaughan, supra,* and reasoning that Petitioners' failure to advise the Circuit Court of their intent to seek an extraordinary writ and request the entry of an order containing detailed findings of fact and conclusions of law precluded the Court from conducting a meaningful review.

Boal's summary judgment motion was argued before the Circuit Court on July 12, 2021 [AP at 77-112], almost four months after this Court's Memorandum Decision issued.[10] The Circuit Court granted summary judgment in favor of Boal, directed that Boal's counsel submit a proposed order and that any objections to the order be submitted in writing. [AP at 97.] Boal's counsel did submit a proposed order; Petitioners submitted their objections [SAP at B]; and on July 30, 2021, the Circuit Court entered its exceptionally detailed, Summary Judgment Order [AP at 64-76; *see also* AP at 10, lines 230-32], which included appropriate W.Va. R. Civ. P. Rule 54(b) findings, citing "no just reason for delay" and directing the entry of judgment. [AP at 75.]

On August 13, 2021, Petitioners' Motion to Alter or Amend Judgment ("Rule 59(e) Motion") was filed. [AP at 43-50; *see also* AP at 10, line 233.] Petitioners' Rule 59(e) Motion challenged the Circuit Court's July 30, 2021 Summary Judgment Order. [AP at 64-76.] In the Rule

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[9] *See, e.g.*, https://www.youtube.com/watch?v=N7JyhWEvCDI&t=8066s @ 2:20:10-20 (last visited June 27, 2022).

[10] Although 13 months had elapsed since Plaintiffs' Expert Report Disclosure was made, Petitioners made no effort during that time to supplement or otherwise cure the deficiencies in Mr. Russo's belated report.

59(e) Motion, Petitioners presented only two arguments. First, Petitioners argued that only one claim alleged against Boal in their Second Amended Complaint – namely, malpractice – required expert testimony to establish a standard of care and breach of same, while the other claims – breach of contract, negligence, negligent misrepresentation and breach of fiduciary duty – may be proven without expert testimony. [AP at 45-47.]

Petitioners' second Rule 59(e) argument was brief, muddled and virtually incomprehensible. So far as Boal can discern, Petitioners argued that the Circuit Court "improperly balanced the evils" in determining that the Petitioners' untimely expert disclosure "affected the substantial rights of" Boal even though Boal purportedly had "not described any [resulting] prejudice." [AP at 47.] The argument seemingly implies, without explanation, that Boal engaged in "the same conduct" as Petitioners. [*Id.*] Petitioners further argued that some unspecified "actions in [the Circuit Court] have actually impeded on the [Petitioners'] ability to recover by shielding [Boal] from scrutiny," suggesting "it is much more detrimental to be late with a disclosure than it is to engage in accounting malpractice." [*Id.*] Reduced to its essence, this one-paragraph argument amounts to nothing more than a raw, vague, fairness argument unsupported by any citation to law.

Petitioners also filed a Motion for Relief from Judgment or Order ("Rule 60(b) Motion") on August 13, 2021. [AP at 51-63; *see also* AP at 10, line 234.] Petitioners' Rule 60(b) Motion attacked the Circuit Court's Order to Strike [AP at 239-40], which had been entered more than one year earlier, on August 4, 2020. [AP at 9, lines 196-98.] In the Rule 60(b) Motion, Petitioners argued that (1) expert reports are not required under the Rules of Civil Procedure, and (2) Boal had not demonstrated prejudice resulting from Petitioners' untimely expert disclosure.[11] Boal filed

[11] The Motion also complained to the extent the August 4, 2020 Order to Strike granted Boal's motion for leave to file an amended answer, a decision not at issue in this appeal.

a Consolidated Memorandum of Law in response to Petitioners' Motions. [AP at 21-42.] The Circuit Court denied Petitioners' Rule 59(e) Motion and Rule 60(b) Motion in its December 9, 2021 Final Order. [AP at 12-20.] Petitioners now appeal.

III. SUMMARY OF ARGUMENT

Petitioners' Brief presents as an ill-conceived, untimely, direct appeal of the Circuit Court's July 30, 2021 Summary Judgment Order. Because Petitioners noticed this appeal over five months after entry of the Summary Judgment Order, the appeal can and should be dismissed, for the Court lacks jurisdiction to hear it in light of West Virginia Code § 58-5-4 and Rules 5(b) and 5(f) of the West Virginia Rules of Appellate Procedure.

Should Petitioners' appeal instead be construed as an appeal from the December 9, 2021 Final Order denying Petitioners' Rule 59(e) Motion and Rule 60(b) Motion, this Court should affirm the Circuit Court's decision. As the Circuit Court recognized, Petitioners' Rule 59(e) Motion failed to identify any specific error of law contained within the Summary Judgment Order. Though Petitioners' claims against Boal are captioned under a variety of legal theories, an analysis of the Second Amended Complaint confirms that the basis for each claim is factually similar, and that the claims are dependent upon Boal's alleged non-compliance with a professional standard of care rather than, for example, the breach of a particular contract provision. In this complex professional liability action, Petitioners' claims involve duties required of accountants that are not ordinarily within the knowledge of lay jurors, and alleged breaches that are not so obvious as to permit the application of *res ipsa loquitor*. Further, the Circuit Court correctly concluded that Petitioners failed to demonstrate that its decision to strike Petitioners' liability expert and enter summary judgment in favor of Boal amounted to an "obvious injustice." Petitioners simply failed to acknowledge their own responsibility for failing to timely disclose the opinions of their liability

expert or the prejudice resulting from Boal's inability to understand the claims asserted against them and prepare an adequate defense.

As for Petitioners' Rule 60(b) Motion, it was properly denied because it attacked an interlocutory order, the Order to Strike, rather than a final order. Even if it was appropriate for this Court to examine the substance of the Rule 60(b) Motion, the motion was without merit. The filing of the Rule 60(b) Motion more than one year after the Order to Strike was entered was unreasonable and untimely. Petitioners could not advance grounds under the first five (5) subparts of the Rule and the subject matter of the Motion was not so extraordinary and unusual as to satisfy the catch-all provision of W.Va. R. Civ. P. Rule 60(b)(6).

Finally, Petitioners' allegations of prejudice on the part of the presiding Circuit Judge are baseless and unworthy of a detailed response. Moreover, those allegations are immaterial to the disposition of this appeal, inasmuch as this Circuit Court's denial of Petitioners' Rule 59(e) Motion is subject to a *de novo* review and because Petitioners' Rule 60(b) Motion, improperly challenging an interlocutory order, was meritless as a matter of law.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This appeal involves assignments of error involving the application of settled law. Oral argument pursuant to W.Va. R. App. P. Rule 19 is requested, if only to the extent Petitioners' Brief hopelessly confuses the issues. This appeal is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Petitioners' Appeal May be Dismissed as Untimely; Alternatively, The Scope of the Court's Appellate Jurisdiction and Review is Limited by the Few Arguments Petitioners Adequately Preserved for Appeal

Petitioners' Brief fails to address the Court's jurisdiction or the scope of appellate review in this matter. Indeed, Petitioners fail to acknowledge and seemingly do not understand that their only potential appeal is from a final post-judgment order resolving motions made pursuant to

W.Va. R. Civ. P. Rules 59(e) and 60(b), not an original judgment order. [*Cf.* Pet. Br. at 7 ("The Petitioners now appeal the Circuit Court's rulings regarding the exclusion of their expert and the resultant grant of summary judgment.")] This distinction is an important one, for in this case, the timing of Petitioners' appeal and the nature of the appealable orders significantly constrain this Court's jurisdiction and the scope of its appellate review.

An appeal to this Court generally must be taken no more than four (4) months from the date of the entry of a final judgment, though a circuit court or this Court may extend the appeal period by up to two (2) months for good cause shown. W.Va. Code § 58-5-4; W.Va. R. App. P. Rule 5(f). West Virginia Code § 58-5-4 is jurisdictional in that the failure to timely appeal precludes the Court from hearing the matter. *See, e.g., W.Va. Dept. of Energy v. Hobet Min. and Constr. Co.*, 178 W.Va. 262, 264, 358 S.E.2d 823, 825 (1987), citing *Kentucky Fried Chicken of Morgantown, Inc.*, 158 W.Va. 708, 214 S.E.2d 823 (1975); *Wheeling Dollar Saving and Trust Co. v. Singer*, 162 W.Va. 250 S.E.2d 369 (1978). Further, a notice of appeal must be filed within thirty (30) days of the judgment being appealed. W.Va. R. App. P. Rule 5(b).

Accordingly, the first task presented by this appeal is to ascertain the date on which a final, appealable order was entered, evaluate the timeliness of Petitioner's notice of appeal in relation to that date, and identify those issues (if any) that have been timely raised and preserved for appeal. This evaluation requires a review of the principles governing appeals from summary judgment orders and orders addressing Rule 59(e) and Rule 60(b) motions.

If a summary judgment order dismisses fewer than all parties or fewer than all claims in a civil action and includes the language required by Rule 54(b) of the West Virginia Rules of Civil Procedure – i.e., "that there is no just reason for delay" together with language directing the entry of judgment – the order is immediately appealable with respect to the dismissed parties and/or

claims. Syl. Pt. 1, *Riffe v. Armstrong*, 197 W.Va. 626, 477 S.E.2d 535 (1996), overruled on other grounds, Syl. Pt. 4, *Moats v. Preston County Comm'n*, 206 W.Va. 8, 521 S.E.28 180 (1999).

A timely motion under Rule 59(e) suspends the finality of a judgment, thereby extending the time for appeal so as to run from the date of entry of the order disposing of that motion. *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 539 S.E.2d 478 (2000). However, only those issues raised in the Rule 59(e) motion benefit from the extended appeal period. Syl. Pt. 3, *Thompson v. Branches-Domestic Violence Shelter of Huntington*, 207 W.Va. 479, 534 S.E.2d 33 (2000). In contrast, a Rule 60(b) motion does not toll or suspend the running of the time to appeal. *Riffe*, 197 W.Va. at 636, 477 S.E.2d at 545. In an appeal of the denial of a Rule 60(b) motion, only the order of denial itself requires review, and not the substance supporting the underlying judgment nor the final judgment order. Syl. Pt. 3, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).

Consistent with Rule 54(b), the Circuit Court's July 30, 2021 Summary Judgment Order contains the express finding that "there is no just reason for delay" and directs the entry of final judgment in favor of Boal.[12] [AP at 75.] Accordingly, the Summary Judgment Order was a final, appealable order. However, Petitioners' Notice of Appeal was not filed until January 6, 2022, more than five (5) months after entry of the Summary Judgment Order. No motion to extend the appeal period was ever made. Thus, Petitioners cannot pursue, and this Court lacks jurisdiction to hear, a direct appeal of the Summary Judgment Order.

Petitioners' Brief does not reflect an understanding of this limitation. Instead, Petitioners' Brief directly argues issues resolved by the Circuit Court's Summary Judgment Order and its August 4, 2020 Order to Strike, by which Petitioners were precluded from offering the testimony of their liability expert, Mr. Russo. As this Court previously observed, the Order to Strike is

[12] Upon information and belief, Petitioners' claims against the other Defendants are still pending.

interlocutory and non-appealable. *See State ex rel. Chafin v. Tucker*, No. 20-0685 (W.Va. Sup. Ct. March 17, 2021)(*memorandum decision*) at *5. [SAP at F, page 5.] A proper appeal from an appealable, original judgment order – such as the July 30, 2021 Summary Judgment Order – ordinarily would permit review of any preceding, non-appealable decision from which an alleged error in the order appealed from arose, no matter how long the decision was rendered before the appeal was taken. *See, e.g.,* Syl. Pt. 6, *Riffe, supra*; Syl. Pt. 5, *State ex rel. Davis v. Iman Mining Co.,* 144 W.Va. 46, 106 S.E.2d 97 (1958); Syl. Pt. 2, *Lloyd v. Kyle,* 26 W.Va. 534 (1885). But because Petitioners did not take a timely appeal from the Summary Judgment Order, that principle is inapplicable here.

Consequently, because Petitioners' Brief is presented as a direct appeal of the Summary Judgment Order and Order to Strike, this Court can and should dismiss the appeal as untimely. If so construed, the Court need not address the merits of any issue raised by Petitioners.

However, if the Court reframes Petitioners' Brief as an appeal from the December 9, 2021 Final Order, as the balance of this Brief assumes, the Court's review is limited to considering the few issues raised and preserved in Petitioners' Rule 59(e) Motion [AP at 43-50], as identified in Section II.B at pages 9-10 above, and to analyzing the Circuit Court's denial of Petitioners' Rule 60(b) Motion. [AP at 51-63.] Petitioners failed to preserve any other arguments for appeal.

B. Standard of Review

To the extent this appeal is deemed a timely appeal from the December 9, 2021 Final Order denying Petitioners' Rule 59(e) and Rule 60(b) Motions, the following standards of review apply.

1. Motion to Alter or Amend a Judgment Pursuant to W.Va. R. Civ. P. Rule 59(e)

The standard of review applicable to an appeal from a motion to alter or amend a judgment made pursuant to W.Va. R. Civ. P. Rule 59(e) is the same standard applicable to the underlying judgment upon which the motion is based. Syl. Pt. 1, *Wickland v. American Travellers Life Ins.*

Co., 204 W.Va. 430, 513 S.E.2d 657 (1998). Where, as here, the judgment subject to the Rule 59(e) motion is a summary judgment ruling, the standard of review is *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. Motion for Relief from Judgment or Order Pursuant to W.Va. R. Civ. P. Rule 60(b)

In reviewing an order denying a motion under W.Va. R. Civ. P. Rule 60(b), the function of the appellate court is limited to deciding whether the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner. Syl. Pt. 4, *Toler, supra*. The resolution of a motion made pursuant to W.Va. R. Civ. P. Rule 60(b) rests within the sound discretion of the trial court, whose ruling will not be disturbed on appeal unless an abuse of that discretion is demonstrated. Syl. Pt. 5, *Toler, supra; Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996).

C. The Circuit Court Properly Denied Petitioners' Rule 59(e) Motion Because Petitioners Failed to Demonstrate that the Summary Judgment Order was the Product of a "Clear Error of Law" or Resulted in "Obvious injustice".

In West Virginia, a trial court may grant a motion to alter or amend a judgment made pursuant to W.Va. R. Civ. P. Rule 59(e) if the movant demonstrates (1) an intervening change in controlling law, (2) newly discovered, previously unavailable evidence, (3) a clear error of law for which a remedy is necessary or (4) obvious injustice. Syl. Pt. 2, *Mey v. Pep Boys - Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011). Rule 59(e) is intended to allow a trial court to correct its own errors and avoid unnecessary appellate procedures. *See, e.g., Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). "Rule 59(e) is not a vehicle for a party to undo his/her own procedural failures or to advance arguments that could have been presented to the trial court prior to judgment." *Corporation of Harpers Ferry v. Taylor*, 227 W.Va. 501, 711 S.E.2d 571 (2011)(*per curiam*), quoting Franklin D. Cleckley, et al., Litigation Handbook on the West Virginia Rules of Civil Procedure, § 59(e), at 1179 (3rd ed. 2008). Further, it has been said that a trial court

> . . . has considerable discretion to grant or deny a motion under Rule 59(e). A court's reconsideration of a prior order is an extraordinary remedy which should be used only sparingly.

Flynn v. Terrebonne Parish School Bd., 348 F.Supp.2d 769, 771 (E.D. La. 2004)(citations omitted); *see, e.g., Parrish v. Sollecito*, 253 F.Supp.2d 713, 715 (S.D. N.Y. 2003); *Guttierrez v. Ashcroft*, 289 F.Supp.2d 555, 561 (D. N.J. 2003).

In attacking the Court's July 30, 2021 Summary Judgment Order, Petitioners' Rule 59(e) Motion did not rely on a change in law or newly discovered evidence. Instead, Petitioners briefly rehashed a couple of old arguments, suggesting the Court's entry of summary judgment constituted "a clear error of law" because some of their claims against Boal purportedly require no expert evidence on standard of care issues. To the extent Petitioners' Rule 59(e) Motion might be construed to contain an argument predicated on alleged, "obvious injustice," Petitioners made only a bald, vague contention of unfairness, asserting that Boal was not prejudiced by Petitioners' untimely expert disclosure, and had engaged in the same or similar conduct as Petitioners.[13]

As explained below, the Circuit Court properly denied Petitioners' Rule 59(e) Motion because it failed to meet the high standards of clear, manifest error or obvious injustice.

1. The Circuit Court Correctly Found that Petitioners' Rule 59(e) Motion Failed to Identify Any "Clear Error of Law" Embodied in the Summary Judgment Order

Courts recognize that the threshold for demonstrating a "clear error of law" sufficient to warrant relief under Rule 59(e) is a very high one. One appellate court has opined that "manifest error" of the sort sufficient to satisfy Rule 59(e) amounts to a "wholesale disregard, misapplication, or failure to recognize controlling precedent on the part of the court." *Oto v. Metro. Life Ins. Co.,*

[13] The adequacy of Boal's expert disclosures is not material to the Circuit Court's ruling regarding Petitioners' non-compliance with expert disclosure deadlines. After all, Petitioners have the burden of proof and, in light of the vague allegations in the Second Amended Complaint, it was impossible for Boal to provide detailed expert opinions when Petitioners' noncompliance prevented Boal from adequately understanding the claims made against them.

224 F.3d 601, 606 (7th Cir. 2000) (also noting that "[a] 'manifest error' is not demonstrated by the disappointment of the losing party"). Another court has opined that a party seeking relief under Rule 59(e) "must demonstrate that errors were made which were so egregious that an appellate court could not affirm the [trial] court's judgment." *Kelly v. City of Fort Thomas*, 610 F.Supp.2d 759, 781 (E.D. Ky. 2009). Petitioners' Rule 59(e) Motion fell far short of such a threshold.

Petitioners' need to support all of their claims with expert evidence demonstrating that Boal breached applicable standards of care was fully briefed[14] and argued before the Circuit Court. The arguments in Petitioners' Rule 59(e) Motion mirrored those Petitioners previously briefed and argued.[15] The Circuit Court considered those arguments and resolved them in its detailed, July 30, 2021 Summary Judgment Order.[16] In doing so, the Circuit Court found that although captioned under different legal theories, all of Petitioners' claims arose from the same core of operative facts and allegations [AP at 64-65, ¶ 2]; expert testimony is required to sustain an evidentiary burden on issues beyond the common knowledge and experience of average jurors [AP at 68, ¶ 8]; actions against accountants are typical of actions against other learned professionals, in that such actions require proof of the duties owed to the client and the standards to which the professional must ordinarily conform [AP at 69, ¶ 9]; all of Petitioners' claims against Boal stem from the alleged failure to perform professional duties owed to the clients and the alleged failure to perform such duties consistent with the applicable standard of care [*id.*]; expert testimony was therefore required

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[14] *See, e.g.*, Defendants' Brian R. Boal and Boal & Associates' Brief in Support of Motion for Summary Judgment [AP at 515-21]; Defendants' Brian R. Boal and Boal & Associates' Revised Memorandum in Support of Amended Motion for Summary Judgment [AP at 171-77]; Reply Memorandum of Brial R. Boal and Boal & Associates' in Support of Amended Motion for Summary Judgment [AP at 115-21.].

[15] *See, e.g.*, Response in Opposition to Amended Motion for Summary Judgment [AP at 125-37]; *see also* Plaintiffs' Objections to Proposed Order Granting Summary Judgment in Favor of Defendants Brian R. Boll and Boal & Associates, P.C. [SAP at B.]

[16] *See, e.g.*, Summary Judgment Order [AP at 64-76, including ¶¶ 2, 8-11, 15, 17].

to make out a *prima facie* case against Boal [*id.*]; courts in other jurisdictions consistently hold that expert testimony is generally required to support claims against accountants [AP at 69-71, ¶ 10]; Petitioners' counsel had acknowledged the need for liability expert testimony in proceedings before this Court [AP at 74, ¶ 15]; and none of Petitioners' claims against Boal would render the doctrine of *res ipsa loquitor* applicable. [AP at 75, ¶ 17.]

Though Petitioners' Rule 59(e) Motion argued there were "clear errors of law" in the Summary Judgment Order, it failed to identify any specific error embodied in the Order's conclusions and failed to address the impressive array of legal authority recited in the Order, much less explain how the Circuit Court erroneously misapplied or misinterpreted it. The Circuit Court recognized the deficiency of this part of Petitioners' Rule 59(e) Motion, stating in the Final Order:

> While [Petitioners] argue that the malpractice count is the only cause of action requiring expert testimony to establish the standard of care, [Petitioners] 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 [Petitioners'] claims against [Boal] stem from the alleged failures 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 [Petitioners'] Second Amended Complaint are claims of professional liability, where [Petitioners] allege a failure by [Boal] to discover the embezzlement of funds and to ensure payment of personal income taxes.

[AP at 15.] Ultimately, Petitioners made no challenge to any of the legal conclusions in the Summary Judgment Order, and the bald, impassioned pleas of error in their Rule 59(e) Motion were wholly insufficient to meet the demanding standards governing such motions.

2. The Circuit Court's Conclusion that All of Petitioners' Claims Require Expert Proof, and that Summary Judgment Was Warranted in the Absence of Such Proof, Was Plainly Correct, *Not* Clearly Erroneous

As noted, Petitioners' claims against Boal are two-fold. First, they allege Boal failed to discover Dr. Anderson's embezzlement of funds from CLUC. Second, Petitioners assert that Boal

failed to ensure payment of Dr. Chafin's personal income taxes. The Rule 59(e) Motion was flawed because, like prior Petitioners' prior arguments, it addressed their causes of action in the abstract, essentially placing form over the substance of the claims actually alleged in this case.

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the non-moving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). While the underlying facts and inferences are viewed in the light most favorable to the nonmoving party, the nonmoving party must nonetheless offer some "concrete evidence from which a reasonable . . . [finder of fact] could return a verdict in . . . [its] favor" or other "significant probative evidence tending to support the complaint." *Williams,* 194 W.Va. at 59-60, 459 S.E.2d at 336-337, *citing Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S.Ct. 2505, 2514 (1986). To withstand the motion, the nonmoving party must show there will be enough competent evidence available at trial to enable a finding favorable to the nonmoving party. *Williams,* 194 W.Va. at 60-61, 459 S.E.2d at 337-338, citing *Hoskins v. C&P Tel. Co. of W. Va.*, 169 W.Va. 397, 400, 287 S.E.2d 513, 515 (1982).

This Court has recognized that where an issue is beyond the common knowledge and experience of the average juror, expert testimony is required. Syl. Pt. 7, *J.C. v. Pfizer, Inc.*, 240 W.Va. 571, 814 S E. 2d 234 (2018). Under West Virginia law, lack of professional skill generally can be proven only through the testimony of expert witnesses. Syl. Pt. 3, *Totten v. Adongay*, 175 W.Va. 634, 337 S.E.2d 2 (1985). Similarly, other courts have routinely found that expert testimony is necessary in professional liability cases.[17] "Expert testimony is generally necessary to explain

[17] This Court has found the law of other jurisdictions concerning the necessity of expert testimony in professional liability cases to be persuasive. *See, e.g., First Nat'l Bank of Bluefield v. Crawford*, 182 W.Va.

the applicable standard of conduct, and a plaintiff's failure to present expert testimony to support a professional malpractice claim is usually fatal." *Buke, LLC v. Cross Country Auto Sales*, LLC, 331 P.3d 942, 954 (N.M. Ct. App. 2014). As a North Carolina court put it,

> "Where common knowledge and experience of the jury is [not] sufficient to evaluate compliance with a standard of care', the plaintiff is required to establish the standard of care through expert testimony. 'The standard of care provides a template against which the finder of fact may measure the actual conduct of the professional. The purpose of introducing evidence as to the standard of care in a professional negligence lawsuit is to see if this defendant's actions lived up to that standard[.]"

Frankenmuth Ins. v. City of Hickory, 235 N.C. App. 31, 35, 760 S.E. 2d 98, 101 (2014), quoting *Michael v. Huffman Oil Co.*, 190 N.C. App. 256, 271, 661 S.E.2d 1, 11 (2008) and *Associated Indus. Contr'rs, Inc. v. Fleming Eng'g, Inc.*, 162 N.C. App. 405, 410, 590 S.E.2d 866, 870 (2004).

More specifically, many jurisdictions examining the issue have found that expert testimony is generally required in an accounting malpractice case. In *Kemmerlin v. Wingate*, 274 S.C. 62, 261 S.E.2d 50 (1979), the Supreme Court of South Carolina affirmed the entry of a nonsuit in favor of the defendant accountants due to the plaintiffs' failure to introduce expert testimony addressing the standard of care applicable to accountants and whether the defendants' acts or omissions caused damages to plaintiffs. The South Carolina court held:

> . . . The standard of care applicable to accountants is "the same as those applied to . . . , doctors, . . . and other professional men . . . furnishing skilled services for compensation" and that standard requires reasonable care and competence therein. Reasonable care and competence in this context means that they will render their services with that degree of skill, care, knowledge, and judgment usually possessed and exercised by members of that profession in the particular locality, in accordance with accepted professional standards and in good faith without fraud or collusion.

107, 111, n.9, 386 S.E.2d 310, 313 n.9 (1989) ("As in most cases involving the question of professional malpractice, the issue is ordinarily resolved through expert testimony." *Margolies v. Landy & Rothbaum*, 136 Ill. App.3d 635, 483 N.E.2d 626 (1985); *Bonhiver v. Graff*, 311 Minn. 111, 248 N.W.2d 291 (1976); *Kemmerlin v. Wingate*, 274 S.C. 62, 261 S.E.2d 50 (1979); *Blue Bell v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408 (Tex. Civ. App. 1986)).

> Since this is an area beyond the realm of ordinary lay knowledge, expert testimony usually will be necessary to establish both the standard of care and the defendant's departure therefrom. Juries must be informed of the criteria upon which a defendant's conduct is to be judged.

Kemmerlin, 274 S.C. at 65, 261 S.E.2d at 51 (internal citations omitted). Other courts agree that expert testimony is required to sustain an accounting malpractice claim.[18]

This matter is squarely on point with *Hassebrock v. Bernhoft*, 815 F.3d 334 (7th Cir. 2016), where the Court of Appeals affirmed a trial court's ruling that granted summary judgment after disallowing a belated expert disclosure in an accounting malpractice case. *Hassebrock* involved malpractice claims in which plaintiffs' former accountants allegedly failed to file accurate tax returns on plaintiffs' behalf, resulting in substantial penalties and interest. Plaintiffs' claims against the accounting defendants included negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation and "aiding and abetting" the torts of plaintiffs' attorneys.[19] Plaintiffs failed to timely disclose their expert witness report and the trial court refused plaintiffs' belated request for an extension of time to disclose the report. Defendants moved for summary judgment on the basis that plaintiffs would be unable to prove their claims without expert testimony. The trial court granted summary judgment, concluding that without an expert, plaintiffs would be

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[18] *See, e.g., In re Puda Coal Sec., Inc.*, 30 F.Supp.3d 230, 249 (S.D. N.Y. 2014) ("In accounting malpractice cases, in which a mere negligence standard could be sufficient to establish liability, expert testimony is typically required."); *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 218 (Minn. 2007) ("[I]n an accountant malpractice case, a plaintiff must present expert testimony that identifies the applicable standard of care and opines that the accountant deviated from that standard and that the departure caused the plaintiff's damages."); *Buke, supra* ("[W]e hold that the same principles that govern the necessity for expert testimony in other kinds of professional malpractice cases apply to accountant malpractice cases."); *S.E.C. v. Guenthner*, 395 F. Supp. 2d 835, 846 (D. Neb. 2005) ("Establishing that an accounting practice or method is inconsistent with GAAP requires expert testimony.") citing *In re Burlington Coat Factory Securities Litigation,* 114 F.3d 1410, 1421 (3rd Cir. 1997).

[19] The plaintiffs' former attorneys, who hired the accountants to perform the tax services and who allegedly negligently represented plaintiffs in a civil action for investment losses, were also named as defendants. The court engaged in a combined discussion regarding the requirement of expert testimony to establish a *prima facie* case against both the accountant and attorney defendants.

unable to establish the standard of care. *Hassebrock,* 815 F.3d at 340. The Court of Appeals agreed, first noting that "[a]ll claims in this case sound in professional negligence (i.e., negligence and malpractice) or are duplicative or derivative of the claims for professional negligence." *Hassebrock,* 815 F.3d at 341. The Court of Appeals further held: "The standard of care for accountants is established in the same manner as it is for attorneys – with expert testimony." *Hassebrock,* 815 F.3d at 342. As to the breach of contract claim, the Court of Appeals concluded that the alleged breach did not "turn on whether the defendants complied with specific terms in the contract but rather whether they rendered professionally competent services within the standard of care." *Hassebrock,* 815 F.3d at 343. The breach of fiduciary duty and negligent misrepresentation claims required expert testimony to establish the alleged duty breached and the accountants' negligence, while the "aiding and abetting" claim was derivative of the alleged breaches of duty by plaintiffs' attorneys, for which there also was no timely disclosed expert testimony. *Id.*

That all of Petitioners' claims are professional liability claims requiring expert testimony, as in *Hassebrock,* is evident from how they are pled in the Second Amended Complaint. [AP at 636-60.] Count I of the Second Amended Complaint alleges claims of accounting malpractice against Boal. [AP at 640-42]. Petitioners do not dispute that expert testimony is necessary to prove the malpractice claims. [*See, e.g.*, Pet. Br. at 15.] Petitioners captioned the claims in Count IV simply as "negligence" [AP at 646-49], apparently failing to recognize that there is no real distinction between "malpractice" and "negligence" by a professional. If that were not enough, a simple comparison of the "malpractice" allegations contained in Paragraphs 31 and 32 of Count I [AP at 641-42] with the "negligence" allegations contained in Paragraphs 64 through 75 of Count IV [AP at 647-48] reveals that those allegations are substantially coextensive.

Indeed, the same comparison to Paragraphs 31 and 32 of Count I (captioned as malpractice) [AP at 641-42] holds true with respect to Paragraph 41 of Count II (breach of contract) [AP at 643-44]; Paragraph 51 of Count III (also, breach of contract) [AP at 645-46]; Paragraphs 81 and 82 of Count V (negligent misrepresentation) [AP at 649-50]; and Paragraph 91 of Count VI (breach of fiduciary duty) [AP at 651]. However captioned, all claims asserted against Boal in the Second Amended Complaint turn on fundamental questions such as what duties (if any) were imposed on Boal by the nature of the professional engagement, including (a) whether Boal owed a duty to ensure Dr. Chafin's personal, quarterly estimated income tax payments were made, and (b) whether Boal owed a duty to discover and report the defalcations of Dr. Anderson. In turn, those issues require evidence of the standards with which a professional accountant must comply in performing the relevant duties and, whether or not Boal met those standards.

Petitioners' Brief relies on the "gist of the action" doctrine, a doctrine notably absent from both Petitioners Rule 59(e) and Rule 60(b) Motions. Even if it were appropriate for this Court to pass on a theory not presented for the Circuit Court's consideration in resolving those Motions, *cf., e.g.*, Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958), the doctrine is inapplicable and misapplied. The "gist of the action" doctrine may bar a tort claim when (1) liability arises solely from the parties' contractual relationship, (2) the alleged duties breached are grounded in the contract itself, (3) the liability, if any, stems from the contract, and (4) the tort claim essentially duplicates the breach of contract claim, or the success of the tort claim is dependent on the success of the breach of contract claim. *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*, 2231 W.Va. 577, 586, 746 S.E.2d 568, 577 (2013). But none of the allegations against Boal are technically contractual in nature. Neither Petitioners' Second Amended Complaint nor any of their arguments in the Circuit Court or this Court point to any

specific provision of an agreement or contract and argue same was breached. In fact, there is no contract in the appellate record for this Court's review. And certainly, Petitioners have never sought to bar *themselves* from a recovery in tort. As in *Hassebrock, supra,* all claims pled against Boal in the Second Amended Complaint require expert testimony to establish Boal's alleged duties, the standard of care to which Boal's services should have conformed, and any breach.

Similarly, Petitioners' reliance on the doctrine of *res ipsa loquitor* is misplaced. Petitioners admit that this doctrine is generally unavailable where a plaintiff must show their case rests on lack of professional skill. [Pet. Br. at 19.] But Petitioners claim that this matter presents as the unique case that lay jurors can understand without expert testimony, even after characterizing the matter as a "sophisticated case." [Pet. Br. 13.] Petitioners' efforts to oversimplify a case they know to be complex is unpersuasive, if not disingenuous. This is not a case akin to the surgeon who mistakenly leaves a clamp or scalpel inside his patient. Petitioners' claims of simplicity depend on little more than hope and hypotheticals in a matter in which they never took a single deposition. Thus, for example, when Petitioners attempt to cite an internal Boal email [AP at 141] as evidence of a breach of duty [Pet. Br. at 20] without contextual testimony or other evidence, they ask this Court to guess: was the sum referenced in the email returned to Dr. Chafin, used to pay estimated taxes, or did something else happen? Such abstract evidence – which incidentally is not referenced in Petitioners' Rule 59(e) and Rule 60(b) Motions – does not suggest negligence or resulting harm, much less rule out other causes or outcomes as *res ipsa loquitor* contemplates. *Cf.* Syl. Pt. 4, *Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997).

None of the issues raised by Petitioners' claims fall within the common knowledge and experience of average lay jurors. When that is so, West Virginia law is clear that expert testimony is required to aid in the jury's understanding and resolution of those issues. *See, e.g., J.C. v. Pfizer,*

Inc., 240 W.Va. at 584, 814 S.E.2d at 246. Notably, in seeking a writ of prohibition from this Court, Petitioners admitted in their brief [SAP at D, page 17] and at oral argument[20] that expert testimony was an essential part of their proof. It is too late to disavow that admission.

Having excluded the testimony of Petitioners' liability expert, the Circuit Court's entry of summary judgment in Boal's favor as explained in Section V.C.1 above was clearly correct, and the arguments presented in Section 1 of Petitioners' Rule 59(e) Motion were without merit.

3. Petitioners' Rule 59(e) Motion Failed to Demonstrate that the Disposition Effectuated by the Court's Summary Judgment Order Was Unjust at All

The vague fairness arguments in Section 2 of Petitioners' Rule 59(e) Motion were presumably advanced in an attempt to demonstrate "obvious injustice." To satisfy that prong of a Rule 59(e) analysis, something more than an "ordinary" wrong must be shown. Courts agree that obvious or manifest injustice in the context of Rule 59(e) is "an exceptionally narrow concept" that requires more than simple prejudice to the movant but, rather, a judgment that is "dead wrong" and "fundamentally unfair in light of governing law." *Nanko Shipping, USA v. Alcoa, Inc.*, 118 F.Supp.3d 372, 375 (D. D.C. 2015). As another court aptly put it:

> In order to prevail on a "manifest injustice" or "clear error" theory, the prior decision cannot simply be "'just maybe or probably wrong,'" it must "'strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish.'"

Timpson v. McMaster, 437 F.Supp.3d 469, 480 (D. S.C. 2020), quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009), quoting *Bellsouth Telesensor v. Info. Sys. & Networks Corp.*, 1995 WL 520978, *5 n.6, 65 F.3d 166 (4th Cir. 1995)(*unpublished*). The arguments in Petitioners' Rule 59(e) Motion did not approach that high standard.

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[20] *See, e.g.*, https://www.youtube.com/watch?v=N7JyhWEvCDI&t=8066s @ 2:20:10-20 ("This is a case that involves accounting malpractice. That is not an issue that we can put to a jury with lay witnesses; we need an expert witness.") (last visited June 27, 2022).

The bald contention of unfairness presented in Petitioners' Rule 59(e) motion, i.e., that the Circuit Court "improperly balanced the evils" in striking expert Russo, was presented in a single paragraph without any citation of authority. [AP at 47.] All of Petitioners' arguments concerning the untimeliness of their expert disclosure had been previously presented to the Circuit Court.[21] The Circuit Court thoroughly explained the basis for excluding Mr. Russo's testimony in its Summary Judgment Order.[22] Yet, Petitioners' cursory Rule 59(e) argument failed to address any finding or conclusion in the August 4, 2020 Order to Strike or the July 30, 2021 Summary Judgment Order, much less present a cogent contention that the Circuit Court's findings, conclusions or overall decision were "dead wrong," "fundamentally unfair," or manifestly unjust. Unsurprisingly, in denying Petitioners' Rule 59(e) Motion, the Circuit Court opined:

> 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 [Petitioners] failed to timely disclose the necessary testimony and opinion from its trial expert as required by the scheduling orders entered by the Court. While [Petitioners] 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," [Petitioners] entirely ignore the substantial delay in their provision of the necessary expert disclosures and corresponding prejudicial effect on [Boal], 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.

[AP at 16.]

Finally, the continuing refrain that Boal was not prejudiced by Petitioners' failure to timely disclose essential expert opinions is just folly. Boal has repeatedly pointed out the prejudice caused by Petitioners' dilatory conduct. [*See, e.g.*, AP at 37-38, 251-53, 573.] Petitioners' non-compliance

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[21] *See, e.g.*, Response in Opposition to Amended Motion for Summary Judgment [AP at 125-37]; *see also* Plaintiffs' Objections to Proposed Order Granting Summary Judgment in Favor of Defendants Brian R. Boll and Boal & Associates, P.C. [SAP at B.]

[22] *See, e.g.*, Summary Judgment Order [AP at 64-76, including ¶¶ 3, 12]; *see also* Order to Strike [AP at 239-40].

inhibited Boal's ability to understand the claims made against them, work with their own expert(s) to develop responsive opinions, and otherwise prepare a defense in a timely fashion. Petitioners' non-compliance delayed any potential deposition of Petitioners' experts. *Cf. State ex rel. Tallman v. Tucker*, 234 W.Va. 713, 718, 769 S.E.2d 502, 507 (2015) ("[A] party is not required to depose an expert in the dark. The very basis of expert disclosure under Rule 26(b)(4) is so that a party does not have to go on a fishing expedition in trying to determine what opinions the expert will rely upon at trial."). Boal incurred unnecessary expense in attempting to persuade or compel Petitioners to comply and in defending against Petitioners' vague allegations. Finally, had Petitioners' non-compliance been disregarded, it would have greatly delayed the ultimate resolution of the claims made against Boal. Ultimately, the record suggests that Petitioners' failure to make critical, mandatory disclosures of Mr. Russo's anticipated standard of care testimony was either willful or inexplicably negligent. The Circuit Court clearly recognized and correctly found that Petitioners' conduct was prejudicial to Boal. [*See, e.g.*, AP at 16 ("[Petitioners] entirely ignore the substantial delay in their provision of the necessary expert disclosures and corresponding prejudicial effect on on [Boal], ...")]

It is important to remember that though Petitioners' Brief (at page 11) implies that the issue is a failure to *supplement* expert disclosures, Petitioners' actual transgression here was *failing to disclose liability expert opinions at all* prior to prescribed deadlines, and never attempting to seek extensions of those deadlines through years of litigation that commenced in 2016. Even if the factors recognized in *Prager v. Meckling*, 172 W.Va. 785, 790, 310 S.E.2d 852, 856 (1983) and its progeny[23] applied in this context, Petitioners can find no comfort in them. The prejudice to Boal

[23] *Prager* and other cases suggest that a court considering a failure to supplement discovery responses under W.Va. R. Civ. P. Rule 26(e) should consider (1) the prejudice or surprise in fact of the party against whom the excluded evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith

is clear. Boal had no ability to cure the prejudice and expense resulting from Petitioners' interminable delay. A defendant should not be required to wait indefinitely for expert disclosures, particularly when the obligation to make the disclosures is clear and Petitioners' failure to comply was continuing and grossly negligent, if not willful. Given the vague allegations against Boal in the Second Amended Complaint and the complaints that preceded it, the disclosure of liability expert opinions was critical in order to allow Boal to understand the specific claims made against them and prepare an adequate defense.

In sum, the notion that the entry of summary judgment in favor of Boal was unjust simply is not supported by the record or any cogent argument. Because Petitioner did not and cannot demonstrate a clear error of law or obvious injustice in the resolution of Petitioners' Rule 59(e) Motion, the Circuit Court' Final Order should be affirmed.

D. The Circuit Court Properly Denied Petitioners' Rule 60(b) Argument Because it Challenged an Old, Interlocutory Order and Otherwise Failed to Satisfy the Criteria of That Rule

This Court's review of the Circuit Court's denial of Petitioners' Rule 60(b) Motion should be brief, because the order addressed by that motion was interlocutory, not final. In their Rule 60(b) Motion, Petitioners attempted to challenge the Circuit Court's Order to Strike. [AP at 53.] In doing so, the Rule 60(b) Motion neither quoted any portion of that Rule nor analyzed any authority applying or interpreting it. When such an analysis is undertaken, Petitioners' Rule 60(b) Motion is quickly seen to be misguided and meritless.

Rule 60(b) states, in its entirety, as follows:

> 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

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or willfulness of the party who failed to supplement; and the practical importance of the evidence excluded. *See W.Va. Dept. of Trans. v. Parkersburg Inn, Inc.*, 222 W.Va. 688, 699, 671 S.E.2d 693, 704 (2008).

> 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 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.

Petitioners' Rule 60(b) Motion did not identify the specific grounds upon which relief is pursued. Because neither Boal nor the Circuit Court should have been required to speculate regarding the grounds alleged, Petitioners' Rule 60(b) Motion could have been denied on that basis alone. However, a straightforward analysis of the Rule swiftly eliminates all potential grounds.

1. The Order to Strike is an Interlocutory Order, Not a Final Order, and Therefore is Not Properly Subject to Reconsideration Under W.Va. R. Civ. P. Rule 60(b)

The Order to Strike granted Boal's motion to strike the disclosure and testimony of Petitioners' standard of care expert, Mr. Russo.[24] The Order to Strike is indisputably interlocutory; indeed, this Court has already recognized it as such. *See State ex rel. Chafin v. Tucker*, *supra* at *5. [SAP at F, page 5.]

Because the Order to Strike is a non-appealable, interlocutory order, Rule 60(b) is not a proper procedural device for challenging it. Rule 60(b) applies only to "a *final* judgment, order or

[24] The Order to Strike also granted Boal leave to amend their answer to assert a statute of limitations defense, and deemed a motion to compel filed by Petitioners to be moot. These decisions are not material to Petitioners' appeal.

proceeding. . . ." (*emphasis* added). This Court has repeatedly held: "Interlocutory orders and judgments are not within the provisions of 60(b) . . . ." *Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 551, 584 S.E.2d 176, 185 (2003) quoting *Caldwell v. Caldwell,* 177 W.Va. 61, 63, 350 S.E.2d 688, 690 (1986) (quoting 7 J. Moore, Moore's Federal Practice, ¶ 60.20 (2nd ed.1985)); *see also Taylor v. Elkins Home Show, Inc.*, 210 W.Va. 612, 617, n. 7, 558 S.E.2d 611, 616, n. 7 (2001)("By its own terms, Rule 60(b) applies only to motions for relief from 'a *final* judgment, order or proceeding'."); *State ex rel. Crafton v. Burnside*, 207 W.Va. 74, 77, 528 S.E.2d 768, 771 (2000). The Circuit Court recognized this shortcoming [AP at 24], and though it went on to further analyze Petitioners' Rule 60(b) Motion, that analysis was unnecessary.

Similarly, this Court's appellate review of the denial of Petitioners' Rule 60(b) Motion need go no further than to recognize the Order to Strike was interlocutory and, therefore, not subject to reconsideration under Rule 60(b). The Circuit Court could not possibly have abused its discretion in denying a Rule 60(b) Motion that did not challenge a final order and, therefore, was invalid as a matter of law. The Circuit Court's Final Order therefore should be affirmed.

2. Any Request for Relief Under Subparts (1), (2) or (3) of Rule 60(b) Would Be Barred By the Expiration of the Express, 1-Year Limitation Period

Even if the Order to Strike could be challenged under Rule 60(b), Petitioners' Motion was without merit and the Circuit Court's Final Order should be affirmed. The Order to Strike was entered on August 4, 2020. [AP at 9, lines 196-98; *see also* AP at 239-40.] Petitioners' Rule 60(b) Motion attacking that Order was filed on August 13, 2021, more than one year later. [AP at 10, line 234; *see also* AP at 51-63.] Because more than one year elapsed between entry of the Order to Strike and the filing of Petitioners' Rule 60(b) Motion, Petitioners are time-barred from pursuing the grounds set forth in subparts (1), (2) and (3) of Rule 60(b) as a matter of law, including any arguments based on alleged "mistake, inadvertence, surprise, excusable neglect, [and] unavoidable

cause"; "newly discovered evidence"; and "fraud . . . , misrepresentation, or other misconduct of an adverse party." The Rule expressly states that any request for relief on the grounds addressed in these subparts must be asserted "not more than one year after" entry of the challenged order. As to these subparts of the Rule, there can be no dispute that Petitioners' Rule 60(b) Motion was untimely. Thus, separate and apart from the Order to Strike being an interlocutory order not subject to Rule 60(b) review, the Circuit Court correctly concluded that any request for relief pursuant to subparts (1), (2) and (3) of the Rule was untimely. [AP at 18.]

Moreover, Petitioners did not seek relief on the basis of mistake, inadvertence, surprise, excusable neglect, or unavoidable cause, as contemplated by subpart (1) of the Rule. Their Motion did not rely upon newly discovered evidence, as contemplated by subpart (2). Petitioners did not – and cannot – claim the Court's ruling was adduced by fraud, misrepresentation or other misconduct, as contemplated by subpart (3). Thus, even if Petitioners' Rule 60(b) Motion was proper and timely, the Circuit Court properly held that Petitioners advanced no grounds for relief under these subparts of the Rule. [AP at 18.] In fact, any attempt do so would have been frivolous.

Accordingly, to the extent Petitioners' Rule 60(b) Motion might be construed as seeking relief pursuant to subparts (1), (2) or (3) of the Rule, it was properly denied.

3. Subparts (4) and (5) of Rule 60(b) Are Clearly Inapposite, and Afford No Basis for Relief

Petitioners likewise had no right to relief under subparts (4) and (5) of Rule 60(b). Subpart (4) applies only to judgments that are challenged as "void." Subpart (5) only applies to judgments that have been "satisfied, released or discharged." The Order to Strike met none of these criteria. Accordingly, the Circuit Court appropriately opined that Petitioners had no basis to seek and did not seek Rule 60(b) relief under either of these subparts. [AP at 19.]

4. Petitioners Failed to Seek Rule 60(b) Relief "Within a Reasonable Time" and, for that Independent Reason, Petitioners' Rule 60(b) Motion Was Properly Denied

If Rule 60(b) applied at all and the essential prerequisite of a final order was ignored, the discussion above demonstrates that Petitioners' Rule 60(b) Motion would, at best, be relegated to subpart (6) of the Rule – the catch-all provision encompassing "*any other reason* justifying relief from the operation of the judgment." Even then, Petitioners have no plausible basis for Rule 60(b) relief, because Petitioners' Rule 60(b) Motion was not made within a reasonable time.

What constitutes a reasonable time depends upon the circumstances of each case. Factors that should be considered include: "(1) the length of the delay, (2) the justification for the delay, and (3) the prejudice associated with granting relief." *See, e.g.*, Franklin D. Cleckley, et al., Litigation Handbook on West Virginia Rules of Civil Procedure, §60(b)(6)[2] at 1319 (4th ed. 2012). Where the purported grounds are known, a "reasonable time" is short. *Id.* Here, the Order to Strike was entered on August 4, 2020; yet, Petitioners' Rule 60(b) Motion was not made until August 13, 2021, more than one year later. Given this lapse of time, the Motion clearly was not "made within a reasonable time." Petitioners, of course, offer no justification for the lengthy delay. This Court's March 17, 2021 Memorandum Decision [SAP at F], which denied Petitioners' Petition for Writ of Prohibition, helps further illustrate why the delay in bringing the Order to Strike before the Circuit Court for reconsideration was objectively unreasonable.

Petitioners' protest that the Circuit Court "never explained the basis for [the Order to Strike] or what substantial justice this Order was intended to provide" [AP at 53] was dissembling and disserving.[25] If Petitioners desired explanatory findings and conclusions, the time for requesting clarification was before petitioning this Court for an extraordinary writ, as is clearly

[25] Indeed, the findings and conclusions that justify and support the Order to Strike are addressed in exquisite detail in Paragraph 3 of the Summary Judgment Order. [AP at 65-67.]

reflected in the Memorandum Decision refusing the writ. The responsibility for securing an explanation for the decision embodied in the Order to Strike rested with Petitioners. In fact, it was incumbent upon Petitioners to "request the trial court [to] set out in an order findings of fact and conclusions of law that support and form the basis of its decision."[26] *State ex rel. Chafin v. Tucker*, *supra*, at *4, citing Syl. Pt. 6, *State ex rel. Allstate Ins. Co. v. Gaughan*, *supra*. Petitioners instead embarked on a fruitless, 6-month expedition to this Court that ended with a predictable result.

To the extent Petitioners wished to challenge the interlocutory rulings embodied in the Order to Strike, the "reasonable time" for seeking relief from same was immediately upon its entry; certainly instead of and before petitioning this Court for extraordinary relief; and definitely before Boal prepared, briefed and presented their summary judgment motion. Instead, Petitioners allowed months to elapse even after this Court refused to grant relief, during which time Petitioners knew that summary judgment would be sought by Boal and, likely, awarded.

Petitioners' delay in seeking relief pursuant to Rule 60(b) was objectively unreasonable. Accordingly, the Circuit Court's determination that it was "not persuaded that the filing of the [Rule 60(b) Motion] over a year after entry of the Order to Strike could be considered to have been made within a reasonable time" [AP at 18-19] was a valid, appropriate exercise of its discretion.

5. Even if Raised and Applicable, Rule 60(b)(6) Arguments Are Appropriate Only in Extraordinary Circumstances Not Presented Here, and Are Not an Alternative to the Timely Presentation of Legal Arguments

Petitioners' Rule 60(b) Motion attacked the Order to Strike using arguments substantially similar to those the Circuit Court previously considered and rejected on multiple occasions.[27] But

[26] Even without detailed findings of fact and conclusions of law, the Order to Strike was nonetheless sufficient to satisfy W.Va. R. Civ. P. Rule 52(a) and, therefore, effective. *Chafin, supra,* at *4.

[27] *See, e.g.,* Response in Opposition to Defendants Brian R. Boal and Boal & Associates' Motion in Limine to Preclude Expert Testimony . . . [AP at 477-86]; Response in Opposition to Amended Motion for

it is generally accepted that Rule 60(b) motions which merely seek to relitigate legal issues heard at the underlying proceeding are without merit. *Powderidge*, 196 W.Va. at 705, 474 S.E.2d at 885. Such motions are not an opportunity to reargue facts and theories upon which a court has already ruled. *Powderidge,* 196 W.Va. at 706, 474 S.E.2d at 886.

It is uniformly accepted that relief under Rule 60(b)(6) is available and appropriate only in 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 (4th ed. 2012). Unsurprisingly, West Virginia cases in which Rule 60(b)(6) relief has been granted *are* unusual and extraordinary.[28]

The arguments in Petitioners' Rule 60(b) Motion did not arise from extraordinary circumstances, nor were Petitioners' arguments novel. Rather, Petitioners simply rehashed arguments the Circuit Court had already rejected in striking the testimony of Petitioners' standard of care expert. The Circuit Court's decision to strike Petitioners' liability expert and, thereafter, deny Petitioners' Rule 60(b) Motion, was well within its discretion. For these reasons also, and because it does not raise arguments that fit or satisfy the criteria of subparts (1) through (6), the Circuit Court's denial of Petitioners' Rule 60(b) Motion should be affirmed.

Summary Judgment [AP at 130-32, ¶¶ 26-33]; *see also* Plaintiffs' Objections to Proposed Order Granting Summary Judgment in Favor of Defendants Brian R. Boll and Boal & Associates, P.C. [SAP at B].

[28] *See, e.g., State ex rel. St. Clair v. Howard*, 244 W.Va. 679, 856 S.E.2d 638 (2021) (ex-wife relieved from monetary provisions of substantial property settlement agreement in divorce where her ex-husband, an attorney, prepared and filed all paperwork, and order was entered without notice or hearing); *State ex rel. First State Bank v. Hustead*, 237 W.Va. 219, 786 S.E.2d 479 (2015) (borrower relieved from agreed order confessing judgment after loan officer pled guilty to embezzlement); *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W.Va. 309, 664 S.E.2d 531 (2008)(*per curiam*) (mineral lessee relieved of default judgment for conversion damages where plaintiff landowner's complaint included deed excepting mineral rights from ownership and trial court found landowners lacked ownership in granting summary judgment to other defendants); *State ex rel Consolidation Coal Co. v. Clawges*, 206 W.Va. 202, 523 S.E.2d 222 (1999)(*per curiam*) (insurer relieved from order requiring additional insurance coverage entered prior to determining the actual existence of a settlement agreement requiring same).

6. The Decision to Strike the Testimony of Petitioners' Standard of Care Expert Was Just and Proper

Based on the discussion above, this Court need not and should not reach or consider the substantive issues underlying Petitioners' Rule 60(b) Motion. Boal fully briefed and argued these issues before the Circuit Court, and addresses Petitioners' arguments here only briefly, for context.

Petitioners persist in dwelling on whether expert *reports* were required when the real issue was Petitioners' longstanding non-compliance with the Circuit Court's scheduling order deadlines [AP at 604, 607, 613] and Boal's interrogatory seeking the disclosure of expert *opinion* information discoverable pursuant to W.Va. R. Civ. P. Rule 26(b)(4)(A)(i). [*See, e.g.*, AP at 572, 709-10, 718-30.] Rule 26(b)(4)(A)(i) provides that:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, state the subject matter on which the expert expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(emphasis added). Rule 26(b)(4)(A)(i) outlines the minimum expert disclosure required when another party requests such disclosure. In turn, a trial court's scheduling or case management order specifies the deadline by which the disclosure must be made.

In civil matters litigated in West Virginia state trial courts, requests for expert disclosures are routinely made in written interrogatories; deadlines for such disclosures are almost universally established by case management or scheduling orders; and lawyers have been timely and competently producing fair, adequate expert disclosures consistent with Rule 26(b)(4)(A)(i) for decades. The process and timing of expert disclosures – including methods for handling difficulties that sometimes arise in connection with same – are or should be well known to and commonly understood by all litigators. Likewise, the potential consequences of failing to make timely, sufficient disclosures for any issue for which expert testimony is necessary are or should be clear.

That Petitioners failed to timely make a disclosure of opinions and grounds with respect to their liability expert, Mr. Russo, whether in a report prepared by the expert or by other means, is beyond dispute. Rule 26(b)(4)(A)(i) is not "some imagined standard" or a "vague, unknown standard" as Petitioners' Rule 60(b) Motion [AP at 55-56] and Petitioners' Brief (at page 14) assert. Rather, it is a very real, crystal clear standard that is or should be known by any civil litigator who enters a West Virginia courtroom. That Petitioners' counsel seemingly fails to recognize and acknowledge that standard is beyond explanation.

Petitioners' Brief (at page 10), like the Rule 60(b) Motion before it [AP at 56], acknowledges that expert disclosure requirements are intended to "prevent surprise and otherwise stop the fabled 'trial by ambush'." Yet, Petitioners also assert that the disclosures are due only "a reasonable amount of time before trial." [*Id.*] This inconsistency is the product of selectively citing from *State ex rel. Tallman v. Tucker*, *supra*, in cut-and-paste fashion while ignoring the over-arching message of that opinion. *Tallman* teaches that expert disclosure and discovery is a dynamic process which, when undertaken fairly and in good faith, requires timely initial disclosures *as well as* timely, continuing supplementation as the evidence develops. Here, Petitioners made no timely, initial Rule 26(b)(4)(A)(i) disclosure of expert testimony on the standard of care issue. Petitioners persisted in a state of non-compliance – without explanation, good cause or any request for extension – for a period of 10 months beyond the Circuit Court's prescribed deadline for disclosures.

Finally, the suggestion that Petitioners' delay in making expert disclosures can be excused because they experienced difficulty in obtaining discovery is not well taken. First, Petitioners were on notice that Dr. Anderson had been misappropriating funds from CLUC as early as January 24, 2013. [AP at 427.] They filed their original Complaint on October 27, 2016. [AP at 1, line 1.] Boal

served discovery requesting expert disclosures in May 2017. [AP at 2, line 34.] Then, Petitioners blew past two expert disclosure deadlines - May 1, 2019 [AP at 613] and August 9, 2019 [AP at 604, 607] – without disclosing expert liability opinions or seeking leave of court for additional time, whether to conduct additional discovery or for other reasons. They ignored a November 7, 2019 letter protesting their failure to make timely disclosures. [AP at 499.] Their first, inadequate disclosure of opinions from their liability expert, Mr. Russo, was not made until June 8, 2020 [AP at 299-342], four months after Boal filed a February 5, 2020 Motion in Limine to Preclude Expert Testimony. [AP at 570-88.]. In the face of this long, drawn-out history – during which Petitioners did not conduct the deposition of Boal or anyone else – Petitioners' criticism of Boal's responsiveness to discovery boils down to a 15-day extension for responding to written discovery requests that notably occurred over the holiday period from December 22, 2019 through January 6, 2020. [Pet. Br. at 12; *see also* AP at 480, ¶¶ q-u.] Petitioners had plenty of time to obtain all of the information they needed to prosecute this action. Indeed, a well-prepared plaintiff would have procured a great quantity of the most relevant documentation – including tax return information from the IRS – long before they filed a professional liability complaint.

E. Petitioners' Allegations of Prejudice on the Part of the Circuit Judge Are Meritless and, In Light of Petitioners' Misuse of Rule 60(b), Immaterial

Section D of the Argument presented in Petitioners' Brief is a lengthy screed in which Petitioners claim the Circuit Judge, the Honorable Susan B. Tucker, holds some sort of animus or prejudice towards them. According to Petitioners' screed, this prejudice has manifested itself through words and actions in a variety of contexts, and has thereby infected Judge Tucker's exercise of discretion. In advancing this contention, Petitioners frequently rely on information that is not a matter of record in this civil action and therefore not properly considered by the Court, such as matters occurring in Dr. Anderson's criminal case to which Boal is obviously not a party.

See, e.g., Syl. Pt. 4, *Martin v. Barbour County Bd. of Educ.*, 228 W.Va. 238, 719 S.E.2d 406 (2011) (appellate review limited to the record below).

Boal declines the invitation to sift through the details of Petitioners' allegations of prejudice. It suffices to assert that Petitioners' argument is a misguided effort to deflect their own shortcomings upon others. This Court can and should readily dispose of this issue.

On May 18, 2017, the Honorable Phillip D. Gaujot voluntarily recused himself from presiding in this action, which was then reassigned to Judge Tucker. [AP at 2, lines 30-31.] On September 5, 2017, Petitioners filed a Motion to Recuse Judge Tucker. [AP at 2, line 35.] On October 11, 2017, the then-Chief Justice of this Court entered an Administrative Order denying the Motion to Recuse. [AP at 661.] That Administrative Order is interlocutory and not appealable. *See, e.g.,* W.Va. T.C.R. Rule 17.05. No subsequent motion to recuse was ever filed, though Petitioners' hostility toward the presiding Judge continued, unabated.

Ultimately, Petitioners connect Judge Tucker's alleged prejudice with an abuse of discretion which, for purposes of this Court's appellate review, could be pertinent only to the Circuit Court's denial of Petitioners' Rule 60(b) Motion, an issue subject to review under an abuse of discretion standard. Nonetheless, this Court should not even reach the question of whether the Circuit Court abused its discretion in denying the Rule 60(b) Motion because that Motion – which attacks an interlocutory order, not a final order – was invalid as a matter of law. Because the dispositive issues in this appeal can be resolved as a matter of law, an evaluation of Judge Tucker's alleged prejudice and exercise of discretion is unnecessary and immaterial.

VI. CONCLUSION

Petitioners filed dubious claims against Boal more than three years after discovering that a co-defendant, Dr. Anderson, had been misappropriating funds from CLUC. After nearly six years of litigation, Petitioners' claims against Boal remain vague and no factual basis for same has been

developed. Petitioners' failure to make timely disclosures of their liability expert's opinions was not only egregious, but probably inevitable. Likewise, the entry of judgment in favor of Boal and the denial of Petitioners' post-judgment motions was predictable, just and appropriate.

For reasons expressed above, the Court should dismiss this appeal as untimely if it is construed, as Petitioners' Brief implies, as a direct appeal of the Circuit Court's Summary Judgment Order. If construed as an appeal of the Circuit Court's December 9, 2021 Final Order, this Court should affirm the judgment of the Circuit Court because its resolution of Petitioners' Rule 59(e) Motion was neither clearly erroneous nor unjust, and because Petitioners' Rule 60(b) was legally defective, in that it attacked an interlocutory order, not a final order.

BRIAN R. BOAL AND
BOAL & ASSOCIATES, P.C.,

By Counsel.

Dated: July 22, 2022

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTOPHER CHAFIN and
CHEAT LAKE URGENT CARE, PLLC,
Plaintiffs Below, Petitioners,

v. No. **22-0010**

BRIAN R. BOAL and
BOAL & ASSOCIATES, P.C.,
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I served a true and correct copy of the foregoing ***Brief of Respondents, Brian R. Boal and Boal & Associates, P.C.*** upon the following counsel via email and regular, U.S. Mail, postage prepaid:

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