IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA EX REL.
JOHNSON & FREEDMAN, LLC,
and DAVID C. WHITRIDGE,**

Petitioners,

Case No.: 19-0772

v.

**THE HONORABLE WARREN R. McGRAW,
Judge of the Circuit Court of Wyoming County,
and NADINE R. RICE,**

Respondent.

**(Arising from the Circuit Court of Wyoming County,
West Virginia, Civil Action No. 10-C-90)**

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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Pursuant to the Court's Order of September 4, 2019, Respondent Nadine R. Rice ("Respondent"), by counsel, hereby responds to the Verified Petition for a Writ of Prohibition presented by Petitioners Johnson & Freedman, LLC and David C. Whitridge (collectively, "Petitioners") and requests that the Court deny the extraordinary prohibition relief sought in this proceeding.

I. QUESTION PRESENTED

Since this case is before the Court on a petition for writ of prohibition, the question posed is not simply whether the trial court abused its discretion by denying Petitioners' motion to dismiss under West Virginia Rule of Civil Procedure 41(b), but instead whether such exercise of discretion amounted to a clear error as a matter of law sufficient to warrant prohibition relief under the five-factor test set forth in Syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1997). Respondent specifically disputes the factual predicate of Petitioners' statement of the question presented to the effect that it implies that she did nothing to prosecute her claims from the time she served her complaint in July of 2011 until the filing of the subject motion to dismiss in February of 2019.

II. STATEMENT OF THE CASE

In accordance with West Virginia Rule of Appellate procedure 16(g), Respondent states only those facts necessary to correct inaccuracies and/or omission set forth in the Petition.

On or about February 27, 2002, Home Loan Corporation made a loan to Kenneth D. Coe, which was secured by a deed of trust encumbering certain real property located in Wyoming County, West Virginia (the "Coe Property"). [Compliant ("Compl."), Petitioners' Appendix ("App.") pp. 5-18, at ¶ 15.] The loan was subsequently sold and beneficial interest in the deed of trust assigned to Homecomings Financial, LLC ("Homecomings"). [*Id.* at ¶ 18.] The deed of trust related to the Coe Property set forth not only a metes and bounds description of the property, but

also referenced it as having a street address of "320 Black Eagle Road, Mullens, West Virginia." The referenced street address was erroneous in that it corresponded to the address of Respondent's home, which she had owned outright since 2001, [*id.* at ¶¶ 9-10], rather than the Coe Property. The confusion possibly arose as a result of Mr. Coe having rented Respondent's home rented between approximately 1999 to 2001. [*Id.* at ¶ 14.]

Mr. Coe apparently became delinquent in his payments, and the Coe Property was sold to Homecomings pursuant to a trustee's sale conducted on January 29, 2007. [*Id.* at ¶ 20.] Homecomings thereafter retained Petitioners as legal counsel, who at the time were domiciled in Georgia. [*Id.* at ¶¶ 4 & 5]. Shortly after the trustee's sale, Petitioners on or about March 8, 2007 commenced an unlawful detainer action on behalf of Homecomings against Kenneth Coe in the Magistrate Court of Wyoming County, West Virginia. [*Id.* at ¶ 22.]

The complaint filed by Petitioners on behalf of Homecomings sought possession of the real property located at "320 Black Eagle Road, Mullens, West Virginia 25882," and did not otherwise include a proper legal description of the Coe Property. [*Id.* at ¶ 23.] Petitioners thereafter filed a "Motion for Service by Publication" as well as an "Affidavit Default Judgment" in the unlawful detainer action, both of which made exclusive reference to the "320 Black Eagle Road" property address. [*Id.* at ¶ 24.]

On June 15, 2007, the Magistrate Court of Wyoming County entered default judgment against Kenneth Coe, and subsequently issued a Writ of Possession on August 13, 2007 commanding the Sheriff of Wyoming County to seize the property located at "320 Black Eagle Road." [*Id.* at ¶ 25.] Following the issuance and purported service of the Writ of Execution, Respondent returned home to find a lock placed on the door of her home. [*Id.* at ¶ 26.] Respondent's subsequent efforts to regain possession of her home by contacting defendants Homecomings and Petitioners were not successful. [*Id.* at ¶ 27.]

A second Writ of Possession was issued on May 30, 2008, again commanding the Sheriff of Wyoming County to seize the property located at "320 Black Eagle Road," which writ was subsequently executed on or about June 12, 2008, and the contents of Respondent's house were moved outside and a lock placed upon the door of the house. [*Id.* at ¶ 28.] Thereafter, on or after June 12, 2008, Plaintiff came home to find her belongings, or what remained of them after damage and apparent theft, sitting in the driveway. [*Id.* at ¶ 29.]

This action was filed on May 28, 2010, asserting causes of action against Petitioners for trespass, abuse of process, negligence, negligent infliction of emotional distress, and punitive damages. Following the filing of Respondent's Complaint, the parties engaged in an informal exchange of documents and information. When settlement negotiations failed to bear fruit, Respondent served her Complaint on Petitioners in July of 2011, and Petitioners filed a joint answer to the Complaint on or about August 5, 2011. Importantly, after Homecomings asserted crossclaims for contribution and indemnity against Petitioners in their answer, [*see* Respondent's Supplemental Appendix[1] ("Supp. App.") at pp. 142-45], Petitioners asserted their own crossclaims against Homecomings for contribution. [Supp. App. at 147-154.]

Petitioner's assertion that Respondent "failed to take any steps whatsoever to further the prosecution of her claims" from August 5, 2011 until the filing of the Notice of Bankruptcy and Effect of Automatic Stay on May 25, 2012, is simply false. Respondent was actively engaged in discovery during this time period, having among other things answered interrogatories and requests for documents propounded by Homecomings on December 21, 2011. [Supp. App. at 159-

[1]Petitioners failed to consult with Respondent regarding the preparation of the Appendix, as required by West Virginia Rule of Appellate Procedure 7. Respondent is herewith filing her Motion for Leave to File Supplemental Appendix and Motion for Leave to Supplement the Record with regard to the documents contained in this Supplemental Appendix.

76.] Also, during this period Respondent had the benefit of (1) discovery answers served by Respondent Johnson & Freedman, LLC in response to requests propounded by Homecomings, [*see* Supp. App. at 177-86[2]]; (2) subpoenas issued by Homecomings with regard to documents in the possession of Mr. Coe, [Supp. App. at 187-90]; and (3) access to documents contained the property and magistrate court records of Wyoming County. Consequently, there was no immediate need to for Respondent to serve her own discovery requests prior to the Homecomings' bankruptcy filing.

Following the filing of notice of the bankruptcy stay, Respondent filed a claim against Homecomings on or about July 18, 2013. [Supp. App. at 191-96.] Respondent thereafter received a settlement offer from the bankruptcy trustee on February 6, 2015, [Supp. App. at 197-98], which offer was subsequently accepted by Respondent. Such claim was thereafter paid on or about July 29, 2016. [Supp. App. at 200.]

Petitioners omit important facts relating to Homecomings' bankruptcy filing. While Petitioners are correct that the automatic stay was lifted effective December 17, 2013 by the bankruptcy court's Confirmation Order, they do not mention that it was replaced by a permanent injunction as of that date, which enjoined all parties from "commencing or continuing in any manner or action or other proceeding of any kind" relating to claims released under the bankruptcy plan. [*See* App. at 38.] They also fail to point out that their own crossclaims against Homecomings, which were clearly enjoined by both the automatic stay as well as the subsequent injunction, were not dismissed until Homecomings moved for[3] and obtained an order from the circuit court, entered on October 31, 2016, dismissing such crossclaims. [*See* Supp. App. at 125.]

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[2]In conjunction with these discovery responses, Johnson & Freedman also produced 152 pages of documents, which can be provided to the Court upon request.

[3]*See* App. at 43-45.

As represented in the response that Respondent filed before the circuit court with regard to the subject motion to dismiss, following the resolution of her claim against Homecomings before the bankruptcy court, counsel for Respondent contacted Petitioner's counsel by telephone in an attempt to get this matter "back on track." [App. at 68.] Such efforts did not prove successful prior to this case apparently being handed over to other lawyers within the same firm and Petitioner's motion to dismiss being filed.[4]

Petitioner's served their motion to dismiss under West Virginia Rule of Civil Procedure 41(b) on February 25, 2019, asserting, as they do here, that Respondent failed to take any action to prosecute her claims against Petitioners "for nearly eight (8) years." [App. at 54.] Following a hearing conducted on April 17, 2019, the circuit court denied Petitioners' motion by an order entered on May 9, 2019. The lower court concluded that "in light of the matter being stayed in bankruptcy proceedings and lack of any prejudice upon [Petitioners], that good cause exists to allow the matter to remain on the Court's docket." [App. at 2.] It is this order denying Petitioners' Rule 41(b) motion that they now challenge by seeking a writ of prohibition.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. However, Respondent is willing to present oral argument if the Court so desires, or if it would expedite the decision in this matter.

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[4]For unknown reasons, the lawyer to whom Respondent's counsel spoke with, Gerald Stowers, Esquire, who was listed as counsel for Petitioners in all of the pleadings filed up to and including the 2016 Order dismissing Homecomings, was dropped from pleadings beginning in February of 2019 with Petitioners' motion to dismiss. No notice regarding such change of counsel has ever been filed with the clerk of the circuit court.

IV. SUMMARY OF ARGUMENT

Petitioners ask the Court to do something that it has not done since it adopted West Virginia Rule of Civil Procedure 41(b) in 1959: to issue a writ of prohibition overturning a trial court's exercise of discretion in refusing to dismiss a case for alleged failure to prosecute. In an attempt to justify such extraordinary relief, Petitioners distort the record by repeatedly asserting that Respondent failed to prosecute her claims against Petitioners for "approximately 91 consecutive months." [*See, e.g.*, Verified Petition for a Writ of Prohibition ("Pet.") at 3.] In fact, Plaintiffs were deeply involved in both discovery and efforts at resolution up to the very moment that the notice of bankruptcy and automatic stay was filed in this matter on May 25, 2012. Petitioners likewise oversimplify the effect of the automatic stay and later injunction occasioned by the bankruptcy filing of their co-defendant, Homecomings, and tellingly fail to disclose that they themselves had pending crossclaims for contribution against Homecomings that were not resolved until they were dismissed on October 31, 2016. Moreover, while Petitioners attempt to demonstrate that they would be prejudiced if this case were allowed to proceed, they made no such argument or offer of proof in proceedings before the trial court, a fact that alone justifies rejecting their present request for a writ of prohibition.

When the full record of this matter is considered, it becomes abundantly clear that contrary to the picture painted by Petitioners, the trial court did not abuse its discretion in refusing to dismiss Respondent's case for lack of prosecution, and in any event this case does not present a set of circumstances warranting the Court taking the unprecedented step of disturbing the trial court's simple exercise of discretion in denying Rule 41(b) dismissal.

V. ARGUMENT

As this Court frequently emphasizes, "'[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code, 53-1-1.'" Syl. pt. 1, *State ex rel. Vanderra Res., LLC v. Hummel,* 829 S.E.2d 35 (W. Va. 2019) (quoting Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)). Instead, the Court has frequently stated that it

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

Id. at 40 (quoting Syl. pt. 1, in part, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), superseded by statute on other grounds as stated in *State ex rel. Thornhill Grp., Inc. v. King*, 233 W. Va. 564, 759 S.E.2d 795 (2014)).

Moreover, a petitioner's right to the extraordinary remedy of prohibition must clearly appear before they are entitled to such remedy. *State ex rel. Maynard v. Bronson*, 167 W. Va. 35, 41, 277 S.E.2d 718, 722 (1981); *Sidney C. Smith Corp. v. Dailey*, 136 W. Va. 380, 390, 67 S.E.2d 523, 528 (1951). The Court has more recently articulated the following five-part test to determine whether a writ of prohibition should issue:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a

> discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1997); *accord State ex rel. U.S. Bank Nat'l Ass'n v. McGraw*, 234 W. Va. 687, 691-92, 769 S.E.2d 476, 480-81 (2015); *State ex rel. Fillinger v. Rhodes*, 230 W. Va. 560, 564, 741 S.E.2d 118, 122 (2013). "[P]rohibition is a drastic, tightly circumscribed, remedy which should be invoked only in extraordinary situations." *State ex rel. West Virginia v. Bedell*, 223 W. Va. 222, 228, 672 S.E.2d 358, 364 (2008) (citations omitted).

This Court should deny the requested writ of prohibition because Petitioners have not established that the lower court abused its discretion in denying their motion to dismiss on Rule 41(b) grounds, much less demonstrated a clear error of law sufficient to support the extraordinary writ of prohibition requested. Importantly, while Petitioners attempt in these proceedings to demonstrate that they would be prejudiced if this case were allowed to proceed, they made no such argument or offer of proof before the trial court, a fact that alone justifies rejecting their present request for a writ of prohibition. Moreover, Petitioners have failed to satisfy the other factors bearing upon the issuance of such writ in that they have not shown that the purported error on the part of the circuit court could not be corrected by means of a direct appeal or that they would sustain damages or prejudice that could not be corrected in such proceeding. Nor have Petitioners established that this case presents any "oft repeated error" warranting expedited consideration, or that the order issued by the circuit court presents a newfound problem or issue of first impression.

A. THE CIRCUIT COURT'S DENIAL OF PETITIONERS' RULE 41(b) DISMISSAL MOTION WAS NOT AN ABUSE OF DISCRETION, MUCH LESS A CLEAR LEGAL ERROR JUSTIFYING RELIEF IN PROHIBITION.

As this Court emphasized when it adopted the current test for prohibition relief set forth in Syllabus Point 4 of *State ex rel. Hoover v. Berger*, "although all five factors [of the test] need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." In this case, there is no evidence that the circuit court's decision to deny Petitioners' motion to dismiss under West Virginia Rule of Civil Procedure 41(b) was at all an abuse of its discretion, much less an abuse of such proportions as to justify this Court invoking its power to issue an extraordinary writ of prohibition.

This Court has recognized that "dismissal based on procedural grounds is a severe sanction which runs counter to the general objective of disposing cases on the merit." *Dimon v. Mansy*, 198 W. Va. 40, 45-46, 479 S.E.2d 339, 344-45 (1996). Consequently, because dismissing an action for failure to prosecute is such a harsh sanction, dismissal with prejudice under Rule 41(b) is reserved for "flagrant" cases. *Id.* at 45, 479 S.E.2d at 344; *see also Caruso v. Pearce*, 223 W. Va. 544, 550, 678 S.E.2d 50, 56 (2009).

> When dismissing a case under Rule 41(b), in order to preserve the integrity of the judicial process, *Dimon v. Mansy, supra*, makes clear that various interests must be weighed including the interest in judicial efficiency, the rights of plaintiffs to have their day in court, any prejudice that might be suffered by defendants, and the value of deciding cases on their merits.

Caruso, 223 W. Va. at 550, 678 S.E.2d at 56; *see also Howerton v. Tri-State Salvage, Inc.*, 210 W. Va. 233, 236, 557 S.E.2d 287, 290 (2001) (per curiam). In light of such varied interests, Rule 41(b) "cannot be automatically or mechanically applied." *Davis v. Sheppe*, 187 W. Va. 194, 197, 417 S.E.2d 113, 116 (1992). Accordingly, this Court has traditionally afforded considerable deference to the rulings of trial courts in the context of Rule 41(b) dismissals. *See Dimon*, 198

W. Va. at 46, 479 S.E.2d at 345 ("Traditionally, our scope of review . . . is limited. It is only where there is a clear showing of an abuse of discretion that reversal is proper.").

In this case, Petitioners cannot establish that the circuit court abused its discretion in denying their motion to such a degree as to amount to "clear error as a matter of law." In fact, they have neither demonstrated that Respondent was unreasonably dilatory in prosecuting this case, nor that they have been any prejudiced as a result of such purported conduct.

1. The Trial Court Was Within Its Discretion to Determine that there was Good Cause for the Delay in the Prosecution of Respondent's Case.

The Court in *Dimon* stated that "[i]n the course of discharging their traditional responsibilities, circuit courts are vested with inherent and rule authority to protect their proceedings from the corrosion that emanates from procrastination, delay and inactivity." 198 W. Va. at 45, 479 S.E.2d at 344. Given such authority, "the determination whether the plaintiff has failed to move the in a reasonable manner is a discretionary call for the circuit court." *Id.*

As previously pointed out, there is no merit whatsoever to Petitioner's assertions that Respondent was not actively engaged in discovery prior to the bankruptcy stay being imposed in this case. Importantly, Respondent did considerable research prior to the filing of her complaint, which pleading specifically referenced the publicly available documents supporting her case. Moreover, Respondent answered discovery requests propounded by defendant Homecomings, [Supp. App. at 159-76], and had the benefit of discovery produced by the other parties including Petitioners. [Supp. App. at 177-86.]

As the circuit court found, the primary factor causing the delay in the prosecution of this case was the stay and later injunction occasioned by Homecomings' bankruptcy filing. In that regard, this case is closely analogous to *Belington Bank v. Masketeers Co.*, 185 W. Va. 564, 408

S.E.2d 316 (1991) (per curiam), where the Court held that the trial court abused its discretion in not reinstating a case previously dismissed under Rule 41(b). In *Belington*, an automatic bankruptcy stay was imposed with respect to claims being asserted against a corporate defendant for failure to pay under a promissory note, as to which the remaining co-defendants were shareholders who alleged crossclaims for contribution arising from their obligations under certain guarantees executed in favor of the plaintiff bank. The Court held that in light of the relationship between the parties and the existence of the crossclaims being asserted against the bankruptcy debtor, the delay in prosecuting the action was properly attributable to the bankruptcy stay since it was applicable to the non-bankrupt co-defendants under *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986).[5] *Belington*, 185 W. Va. at 568, 408 S.E.2d 320.

Similar to the circumstance involved in *Belington*, in the present case the relationship between Homecomings and its counsel, with each having asserted crossclaims against the other, was sufficiently close to cause the bankruptcy stay and subsequent injunction to require the

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[5]The Fourth Circuit in *A.H. Robbins* reasoned:

> [T]here are cases where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants but, . . . in order for relief for such non-bankrupt defendants to be available under (a)(1), there must be unusual circumstances and certainly [s]omething more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties. This unusual situation, it would seem, arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute.

788 F.2d at 999.

suspension of activity in the case until such time as the crossclaims were extinguished. Again, Petitioners did not dismiss their crossclaims against Homecomings until October 31, 2016.

Importantly, during the hiatus caused by bankruptcy proceedings, Respondent was active in pursuing her claims against Homecomings in such forum, which resulted in a monetary settlement where payment was made by the bankruptcy trustee in July of 2016. (*See* Supp. App. at 200.) Petitioners no doubt stand ready to attempt to benefit from such settlement by asserting such recovery as an offset against any damages that may be awarded to Respondent in this case. Thus, to say that Respondent did nothing to move this case forward during bankruptcy proceedings is false, since it has the potential to influence the final judgment.

Moreover, even if the stay and subsequent injunction were not technically applicable, there was sufficient uncertainty regarding this issue that Respondent should not be punished in the context of Rule 41(b) for taking a cautious approach concerning the applicability of the bankruptcy court's orders. While state courts have jurisdiction to determine whether their own proceedings are subject to an automatic stay or injunction, litigants who move forward on such basis "proceed[] at [their] own risk." *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 940 (6th Cir. 1986); *see also Hamilton v. Herr (In re Hamilton)*, 540 F.3d 367, 375 (6th Cir. 2008) ("state courts are allowed to construe the discharge in bankruptcy, but what they are not allowed to do is construe the discharge incorrectly, because an incorrect application of the discharge order would be equivalent to a modification of the discharge order.")

To impose the harsh sanction of Rule 41(b) dismissal in the context of a bankruptcy stay places the plaintiff in the unenviable position of choosing whether to risk, on the one hand, the dismissal of her case, or, on the other, potentially being subjected to sanctions and damages claims for disregarding the orders of the bankruptcy court. Thus, at the very least, the existence of the

bankruptcy stay and later injunction constituted good cause for any delay in moving forward with this case prior to the resolution of Petitioner's claims against Homecomings on October 31, 2016.

With regard to the time period from October 31, 2016 until February 25, 2019—the date when Petitioners served their motion to dismiss—there were discussions between counsel for both parties regarding the means by which this case could be resumed. (*See* Transcript of 4/17/2019 Hearing, App. at 96; *see also* Pl.'s Resp. to Def.'s Rule 41(b) Mot. to Dismiss, App. at 66 (Respondent's counsel representing that he had been in contact with Petitioners' counsel "on numerous occasions to discuss a plan [to] get the case back on track").) Even assuming that such discussions did not rise to the level of constituting a "proceeding" as contemplated by Rule 41(b),[6] this slightly more than two-year period is not so long as to exceed the legitimate discretion exercised by the lower court in denying Petitioner's motion to dismiss. Indeed, this Court in *Caruso* held that the trial court abused its discretion in dismissing a case where the period of inactivity was slightly more than one year. *Caruso*, 223 W. Va. at 550, 678 S.E.2d at 56 (stating that "although the plaintiff's former counsel was less than diligent, the outright dismissal of the plaintiff's action carries serious implications and—because the lack of activity was scarcely more than one year—was unwarranted"); *see also Howerton*, 210 W. Va. 233, 557 S.E.2d 287 (reversing circuit court's ruling denying reinstatement, where plaintiff had failed to prosecute case for over 14 months following defendant's filing of Rule 12(b)(6) motion); *Evans v. Gogo*, 185 W. Va. 357, 407 S.E.2d 361 (1990) (per curiam) (reversing circuit court's ruling denying reinstatement, where

[6]*See Taylor v. Smith*, 171 W. Va. 665, 667, 301 S.E.2d 621, 624 (1983) ("the word 'proceeding' as used in Rule 41(b) must be broadly construed to include any step or measure taken in either the prosecution or the defense of the action, except a continuance.") (quoting Syl. pt. 1, *Millar v. Whittington*, 87 W. Va. 664, 105 S.E. 907 (1921)).

plaintiff asserted withdrawal of out-of-state associate counsel as good cause for failure to prosecute case for over two and one-half years).

While Petitioners point to numerous instances where this Court has upheld the discretion employed by lower courts in dismissing cases under Rule 41(b), they have not cited a single case where this Court has overturned a trial court's refusal to dismiss a case under such rule for lack of prosecution by the plaintiff. The Court, has, on rare occasion, granted prohibition relief where lower courts have used Rule 41(b) to reinstate cases outside of the three-term time limitation imposed by such rule.[7] But what this Court has apparently never done is overturn a trial court's refusal in the first instance to dismiss a case for lack of prosecution. Such a result is not surprising given the Court's statements that Rule 41(b) acts "as a docket-clearing mechanism," *Brent v. Board of Trustees of Davis and Elkins College*, 173 W. Va. 36, 39, 311 S.E.2d 153, 157 (1983), and that accordingly determinations regarding whether a plaintiff has reasonably moved his or her case forward are matters best left to the discretion of the trial court. *See, e.g., Dimon*, 198 W. Va. at 45, 479 S.E.2d at 344.

Consequently, this Court should not disturb the trial court's conclusion that good cause existed for the delay in Respondent's prosecution of this case.

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[7]In *Arlan's Dept. Store of Huntington, Inc. v. Conaty*, 162 W. Va. 893, 253 S.E.2d 522 (1979), the trial court granted reinstatement of a case over two and one-half years after it was dismissed for failure to prosecute. This Court granted a writ of prohibition foreclosing further prosecution of the case, concluding that the trial court had "no jurisdiction to act outside of the Rules of Civil Procedure in the circumstances of [such] case." *Id.* at 895, 253 S.E.2d at 524. More specifically, the Court held that to warrant reinstatement outside of the three-term rule, the plaintiff was required "to allege and prove good case, such as fraud, accident or mistake." *Id.* at Syl. pt. 2 & 162 W. Va. at 899, 253 S.E.2d at 526. Having failed to make such a showing of good cause as well as not providing notice of the reinstatement proceedings to all parties, the *Arlan's* Court granted a writ of prohibition with regard to the trial court's reinstatement order. Importantly, in this case we are not dealing with a motion for reinstatement, much less one filed outside of the time period permitted by Rule 41(b).

2. Petitioners Did Not Assert or Establish Before the Circuit Court that They Would Be Prejudiced by Permitting This Case to Proceed.

As this Court often stresses, "[i]nvoluntary dismissal for failure to prosecute should only occur when there is lack of diligence by a plaintiff ***and*** demonstrable prejudice to defendant." *Gray v. Johnson*, 165 W. Va. 156, 163, 267 S.E.2d 615, 619 (1980) (citations omitted) (emphasis added); *cf. Covington v. Smith*, 213 W. Va. 309, 322, 582 S.E.2d 756, 769 (2003) (court "must not only consider the plaintiff's evidence of good cause but also the defendant's submissions regarding the substantial prejudice he/she would endure if the dismissed case were reinstated"). In *Dimon*, the Court expounded on *Gray* to quantify the amount of prejudice that must be demonstrated by a defendant to support a dismissal on Rule 41(b) grounds as "substantial." 198 W.Va. at 43, 479 S.E.2d at 342, Syl. pt. 3; *see also State ex rel. Lloyd v. Zakaib*, 216 W. Va. 704, 707, 613 S.E.2d 71, 74 (2005) (per curiam).

Petitioners have failed to demonstrate any prejudice resulting from the purported delay in the prosecution of this action. Importantly, while Petitioners allege that "Respondent Rice failed to engage in any discovery in this matter to preserve firsthand accounts and evidence," [Pet. at 16], Petitioners in fact did respond to discovery propounded by its co-defendant, Homecomings. One can only presume that such discovery responses were thorough, complete, and otherwise satisfied the requirements of the West Virginia Rules of Civil Procedure. It would have obviously been redundant for Respondent to serve the same discovery requests upon Petitioners.

More importantly, while Petitioners now speculate that they may experience difficulties in obtaining documents because defendant Johnson & Freedman is apparently no longer in business, [*see* Pet. at 17], such evidence was never presented to the lower court, and therefore should not be considered in these proceedings. Indeed, in their filings before the circuit court on the subject motion to dismiss, Petitioners made no mention whatsoever of suffering prejudice in either their

initial memorandum in support of the motion, [App. at 54-59], or in their reply, [*id.* at 72-77]. Nor was any argument or evidence presented at the hearing conducted on the motion to dismiss. [*See* App. at 86-100.] Such failure to raise the issue of prejudice or present any evidence bearing upon the same before the trial court is, by itself, enough to warrant rejecting the relief sought by Petitioners in this proceeding.

In any event, the need to preserve such documents should have been evident from the inception of this litigation, and to the extent that relevant documents were not already produced in response to the discovery requests made by Homecomings, Petitioners nevertheless had an obligation to preserve the same. *See Tracy v. Cottrell*, 206 W. Va. 363, 371, 524 S.E.2d 879, 887 (1999) ("It is a fundamental principle of law that a party who reasonably anticipates litigation has an affirmative duty to preserve relevant evidence.") (citation omitted). Consequently, Petitioners should not now be heard to complain that they are unable to obtain documents that they were clearly under an obligation to preserve and maintain.

Also, much of the evidence in this case will come from filings made by Petitioners in the Magistrate Court of Wyoming County, which public documents are and will remain available to the parties. In short, if any party is likely to be prejudiced by the delay in the proceedings of the case below, it is Respondent.

B. PETITONERS HAVE FAILED TO ESTABLISH ANY OF THE OTHER FOUR FACTORS SET FORTH IN *HOOVER* SUFFICIENT TO WARRANT THE GRANTING OF PROHIBITION RELIEF.

The other four factors that must be considered under *State ex rel. Hoover v. Berger* likewise do not support Petitioners' request for prohibition relief. Specifically, Petitioners have not presented any evidence showing that the purported error on the part of the circuit court could not be corrected by means of a direct appeal, or that they would sustain damages or prejudice that

could not be corrected in such proceeding. Likewise, Petitioners have not established that this case presents any "oft repeated error" warranting expedited consideration of any matter at issue, or that the order issued by the circuit court presents a newfound problem or issue of first impression.

Petitioners have clearly failed to make any credible showing under the first and second prongs of the *Hoover* test, which require Petitioners to both show that they have no other adequate means of obtaining relief from the trial court's order, and that they will face irreparable harm in the absence of prohibition relief. With regard to the necessity of having no other adequate means of obtaining relief, this Court stated in Syllabus point 2 of *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973), that "[w]here prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue." More recently, Justice Cleckley expounded on the necessity of limiting prohibition relief to only those circumstances were error is not correctable upon direct appeal:

> When appropriate, writs of prohibition and mandamus provide a drastic remedy to be invoked only in extraordinary situations. . . . To justify this extraordinary remedy, the petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy. Thus, writs of prohibition, as well as writs of mandamus and habeas corpus, ***should not be permitted when the error is correctable by appeal.***

State ex rel. Allen v. Bedell, 193 W. Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring) (emphasis added).

In this case, Petitioners readily acknowledge that this Court expressly stated in Syllabus point 3 of *Dimon* that the denial of a defendant's motion to dismiss under Rule 41(b) is subject to

review upon direct appeal. (*See* Pet. at 7.)[8] Consequently, they have no basis whatsoever to claim that they have no access to an alternative means of relief.

With regard to the second *Hoover* factor, Petitioners posit that the "time and expense" related to continued litigation of this matter favors relief. (*See* Pet. at 8.) However, if the potential for having to endure continued expense was the touchstone for relief, then practically every trial court ruling with the potential to bring a case to an immediate conclusion would be an appropriate subject for this Court's prohibition jurisdiction. But the Court has made clear in the context of other potential litigation-ending rulings that this is not the case. For example, in the context of West Virginia Rule of Civil Procedure 12(b)(6), this Court has made clear that such interlocutory rulings are not subject to immediate review in prohibition. *See State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 246, 460 S.E.2d 54, 60 (1995) ("we hold that ordinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to West Virginia Rules of Civil Procedure 12(b)(6) is interlocutory and is, therefore, not immediately appealable. Thus, the defendants may not indirectly raise this issue by seeking a writ of prohibition . . . ."). The Court has exhibited the same reluctance to use prohibition to address issues of personal jurisdiction under Rule 12(b)(2). *See State ex rel. Owners Ins. Co. v. McGraw*, 233 W. Va. 776, 780, 760 S.E.2d 590, 594 (2014) (per curiam) (denying prohibition relief with regard to, *inter alia*, trial court's denial of Rule 12(b)(2) motion to dismiss on basis of personal jurisdiction, finding that subject defendant "would have an opportunity to appeal the decision of the lower court upon

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[8]Petitioners site to Syllabus point 2 of *Dimon* in their Petition, but quote language from Syllabus point 3, which states, in part: "if a motion opposing dismissal has been served, the court shall make written findings, and issue a written order which, if adverse to the plaintiff, shall be appealable to this Court as a final order; ***if the order is adverse to the defendant, an appeal on the matter may only be taken in conjunction with the final judgment order terminating the case from the docket***. If no motion opposing dismissal has been served, the order need only state the ground for dismissal under Rule 41(b)." (Emphasis added.)

entry of a final order"). There is no logical reason why the Court's restrained approach to using its prohibition jurisdiction should not apply to adverse rulings made against defendants under Rule 41(b).

Indeed, permitting the instant case to proceed is all the more appropriate where Petitioners have alleged, for the first time ever, that they would be prejudiced in being required to defend themselves because of purported difficulties associated with obtaining documents. (*See, e.g.,* Pet. at 17.) Permitting this litigation to continue would put Petitioners to the test with regard to whether they have, in fact, been prejudiced by any delay in the prosecution of this case.

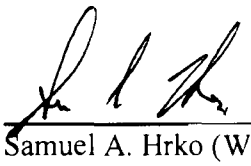
The fourth and fifth factors required to be considered by *Hoover* involve whether the lower court's order is an often-repeated error or whether it manifests persistent disregard for either procedural or substantive law, and whether the lower court's order raises new and important problems or issues of law of first impression. With regard to these factors, Petitioners assert that the Court should use this case as a means to more clearly define the "breadth of [a] trial court's discretion to deny Rule 41(b) motions." (Pet. at 18.) However, this Court has clearly and consistently articulated the contours of a trial court's discretion in considering motions to dismiss under Rule 41(b) for failure to prosecute, and, as set forth above, the fact that there was clearly no abuse of such discretion by the lower court considering the unusual circumstance of the bankruptcy of Petitioners' co-defendant, makes this case a very poor candidate for prohibition relief.

VI. CONCLUSION

WHEREFORE, for the reasons set forth above, Respondent Nadine Rice respectfully requests that the Court refuse to issue a rule to show cause in this matter, and otherwise deny Petitioners' request for an extraordinary writ of prohibition in this matter.

Dated: October 4, 2019

Respectfully submitted,



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