IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0441

STATE OF WEST VIRGINIA ex rel. 3C LLC and JUSTIN JOURNAY,

Petitioners,

vs.

HONORABLE Eric H. O'Briant, Judge of the Circuit Court of Logan County, West Virginia; AND TRI-STATE WHOLESALE, INC. D/B/A TRI-STATE CANNABIS.,

Respondents.

RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION

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I. STATEMENT OF THE CASE

A. Introduction and Summary of Argument

Petitioners (Defendants below), 3C, LLC d/b/a 3Chi ("3Chi") and Justin Journay ("Mr. Journay" and collectively with 3Chi, "Petitioners") attempt to reverse an interlocutory, discretionary decision by the Circuit Court of Logan County. Petitioners' attempt, however, fizzles while still on the launching pad. Petitioners failed to request and obtain an order with findings of fact and conclusions of law sufficient to allow this Court to meaningfully review the circuit court's decision. Issuing a rule to show cause on this petition would be futile when Petitioners never could show entitlement to their desired extraordinary writ. This first failure is dispositive of the misguided petition.

Even if there were a reviewable order, the First Amended Complaint of Respondent, Tri-State Wholesale, Inc. d/b/a Tri-State Cannabis ("Tri-State" or "Respondent"), a Logan County business, and the record in this case fully support the circuit court's determination that it would be unreasonable to enforce a contractual forum selection clause in favor of Hamilton County, Indiana. Petitioners argue that the circuit court's discretionary determination of unreasonableness somehow "amounts to a serious and clearly erroneous mistake of law."[1] Here, however, the circuit court simply applied settled law to determine from well-pleaded facts and additional evidence that forcing Tri-State to litigate its fraud claims in Indiana would be unreasonable. Petitioners fail to point to any clear legal error or flagrant abuse of discretion, as they must if they are to receive an extraordinary writ. This second failure independently warrants a refusal of the petition.

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[1] Pet. at 16.

B. Pertinent Procedural History and Clarifications.

A circuit court order denying a motion to dismiss is sufficient without further explanation of the court's reasons, unless the losing party informs the court that it intends to seek appellate review and requests detailed findings of fact and conclusions of law.[2] The circuit court's May 21, 2021 Order Denying Defendants' Motion to Dismiss and Motion for Protective Order to Stay Discovery Pending Resolution of Defendants' Motion to Dismiss complies with this requirement and reflects a proper exercise of discretion.

The order states that the circuit court considered "the record before it and the oral argument of the parties."[3] The circuit court observed that "the allegations against [Mr. Journay] sound in tort for fraud and tortious interference with a contract, part of which was to be performed here in Logan County."[4] "Mr. Journay, not having been a party to the contract, would not be able to require the Plaintiff to bring suit against him individually anywhere else."[5] With respect to 3Chi, the circuit court correctly applied West Virginia law to find that the dispute resolution provision, containing a pre-suit mediation clause and the forum selection clause, "would not be jurisdictional but would be [a] contract provision[]."[6] Such a contract provision would be "presumptively

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[2] *See* W. Va. Code § 56-1-1(e) ("A court that *grants* a motion to stay or dismiss an action pursuant to this section shall set forth specific findings of fact and conclusions of law.") (emphasis added); Syl. Pt. 6, in part, *State ex rel. Allstate v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998) ("Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.").

[3] App. at 2.

[4] App. at 3. The allegations against Mr. Journay include that he may not take advantage of 3Chi's limited liability shield—that is, he is not entitled to protections normally afforded to his company. *See* App. at 43 (First Am. Compl. ¶¶ 7-8).

[5] App. at 3.

[6] App. at 3. This statement summarizes the state of West Virginia law as Tri-State presented it to the circuit court. *See* App. at 115-17 (explaining that pre-suit mediation requirement in dispute resolution provision is not jurisdictional).

enforceable unless the Court would deem [it] to be unreasonable or unjust."[7] "The complaint taken as a whole, would indicate that this Defendant, 3C LLC, has engaged in fraudulent acts which affect the contract, part of which was to be enforceable here."[8] Taking the allegations of the Complaint as true, the circuit court found that enforcement of the forum selection provision, as 3Chi requested, "would be unreasonable and unjust as to the Plaintiff."[9] Nothing more was required to deny Petitioners' Rule 12 motion to dismiss.[10]

When the circuit court made these rulings from the bench on April 28, 2021, Petitioners did not inform the court that they intended to petition so they would need a more detailed order.[11] Neither did Petitioners request an order with detailed findings and conclusions during the nearly three weeks before Tri-State submitted the proposed order to the circuit court. And, as the entered order reflects, it was "[r]eviewed by" Petitioners' counsel.[12] In sum, Petitioners had ample opportunity to request and obtain a reviewable order but failed to do so.

While Petitioners' failure to obtain a reviewable order is dispositive here, Respondent also clarifies assertions by Petitioners, as follows:

First, Petitioners' question presented depends on their assertion that "there [was] no allegation of fraud in the formation of the [forum-selection] clause."[13] Tri-State, however, pleaded

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[7] App. at 3. This statement by the circuit court paraphrases Syllabus Point 4 of *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 690 S.E.2d 322 (2009).

[8] App. at 3.

[9] App. at 3.

[10] *See* W. Va. R. Civ. P. 52(a) (stating that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule [pertaining to bench trial rulings]").

[11] *See* App. at 280–81 (Petitioners' counsel stating that he had no questions following bench ruling).

[12] App. at 4–5.

[13] Pet. at 1.

that "the entire Agreement, including the dispute resolution provision [containing the forum selection clause], was procured with the intent to defraud Tri-State."[14] Tri-State also argued to the circuit court that "the forum selection clause setting Hamilton County, Indiana as the only venue for litigation between Tri-State and 3Chi is both 'invalid for such reasons as fraud [and] overreaching' and its 'enforcement would be unreasonable and unjust.'"[15] Petitioners, themselves, argued against these assertions.[16] Petitioners, then, have not presented a correct question to this Court.[17]

Second, Petitioners incorrectly assert that "3Chi's business operations are located in Hamilton County, Indiana and Mr. Journay both works and lives there."[18] The cited affidavit from Mr. Journay merely states that 3Chi first "moved its manufacturing to Hamilton County, Indiana," and later "moved its principal place of business to Hamilton County, Indiana, which, to date, remains the principal place of business for [3Chi]."[19] These conclusory allegations are not evidence of 3Chi's business location. Mr. Journay fails to state even a street address for 3Chi. The affidavit also says nothing about where Mr. Journay "both works and lives." The evidence

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[14] App. at 44–5 (First Am. Compl., ¶ 13).

[15] App. at 120 (quoting Syl. Pt. 4, *Caperton v. A.T. Massey Coal Co.*, 225 W. Va. 128, 690 S.E.2d 322 (2009)).

[16] *See, e.g.*, App. at 278–79 (oral argument by Petitioners that "it doesn't matter when that [Hamilton County, Indiana] provision was brought into the agreement[,] [s]o all these allegations, all these comments about it wasn't in there till the end, that doesn't make any difference.").

[17] Petitioners also state that the question depends on the existence of "a forum-selection clause between two sophisticated commercial parties." Pet. at 1. Those commercial parties are only Tri-State and 3Chi. Tri-State, however, also sued Mr. Journay individually for fraud and tortious interference with contracts. App. at 43, 52–59. Although Petitioners make a weak attempt to argue that the circuit court erroneously determined Mr. Journay cannot benefit from the forum selection clause, Pet. at 12–14, they have not squarely presented this particular question to the Court. This Court has granted requested writs as moulded to *narrow* the relief requested, *see, e.g.*, *State ex rel. Tacket v. Poling*, 243 W. Va. 266, 269, 843 S.E.2d 518, 521 (2020), but it does not grant a writ as moulded to *expand* the relief requested.

[18] Pet. at 2 (citing App. at 166).

[19] App. at 166.

before the circuit court was that an Indiana private investigator could not find that 3Chi or Mr. Journay has property or a physical address in Indiana other than 3Chi's post office box.[20] Governmental records presented to the circuit court show that 3Chi is a Colorado limited liability company with a principal address in Strongsville, Ohio.[21]

Third, Petitioners state that "Tri-State has not argued or produced an iota of evidence indicating 3Chi or Mr. Journay engaged in fraud or overreach regarding the formation of the forum-selection clause contained in the Agreement."[22] This statement ignores, however, the affidavit from the private investigator describing her search, governmental records, and other facts and evidence produced to support Tri-State's allegation that the forum selection clause was procured by fraud.[23]

Fourth, while Petitioners point out that 3Chi sued Tri-State in Hamilton County, Indiana,[24] 3Chi now has asserted identical claims as a counterclaim in this action in Logan County, West Virginia. On June 7, 2021, Petitioners filed an Answer and Counterclaim in this action that repeats the allegations and claims in the 3Chi's Indiana action.[25] All the parties' claims are now joined in this first-filed action.[26]

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[20] *See* App. at 120–121 (citing investigator's affidavit, App. at 127–29).

[21] *See* App. at 121 (citing App. at 129, which cites Colorado Secretary of State's website). As of June 30, 2021, the referenced website continues to show that 3Chi's principal address is in Strongsville, Ohio, which also remains listed as Mr. Journay's address.

[22] Pet. at 16.

[23] App. at 120–121.

[24] Pet. at 3.

[25] A copy of the Answer and Counterclaim filed below are attached here as Exhibit A. Tri-State is contemporaneously filing a motion to supplement the appendix record with these new pleadings so that the Court can consider these additional records in deciding the Petition.

[26] Tri-State moved to dismiss the Indiana action under Indiana's "first filed" rule and for *forum non conveniens* reasons. That motion remains pending and is scheduled for hearing in late July. Tri-State also answered 3Chi's counterclaim and asserted affirmative defenses in this action on June 28, 2021. 3Chi's

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petition is a plainly deficient challenge to a discretionary determination by the circuit court. Because the petition is so plainly deficient, no rule to show cause should issue. Nonetheless, should one issue, the circuit court's discretionary determination that it would be unreasonable to enforce a contractual forum selection provision is based on well-settled law. Respondent respectfully asserts that oral argument is unnecessary or, alternatively, the Court need only hear argument under W. Va. R. App. 19(e), because (1) this case involves assignments of error in the application of settled law, (2) the law governing the circuit court's discretion is settled, and (3) the petition asserts a narrow issue of law.

III. ARGUMENT

A. Petitioners fatally failed to request and obtain an order that permits this Court to determine whether they are entitled to an extraordinary writ.

If a party wishes to obtain an extraordinary writ on a discretionary, interlocutory decision, such as the denial of Petitioners' motion to dismiss, the party

> must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.[27]

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identical counterclaim in this action confirms that 3Chi's Indiana action, filed more than four months after this action, is unnecessarily duplicative and should be dismissed.

[27] Syl. Pt. 8, *State ex rel. Vanderra Resources, LLC v. Hummel*, 242 W. Va. 35, 829 S.E.2d 35 (2019) (quoting Syl. Pt. 6, *State ex rel. Allstate v. Gaughan*, *supra*).

Petitioners failed to meet these requirements. Petitioners failed to request and obtain an order with findings of fact and conclusions of law sufficient to allow this Court "to ascertain the rationale underlying [the circuit court's] denial of [Petitioners' motion to dismiss] and determine whether the factors for issuing an extraordinary writ have been met."[28] Issuing a rule to show cause on this petition makes no sense when Petitioners never could show entitlement to their desired writ of prohibition. This Court recently denied petitions for extraordinary writs in identical circumstances.[29] Proceeding with this petition would be futile, so no rule to show cause should issue.

B. Even if the order were sufficient, Petitioners fail to show clear legal error or a flagrant abuse of discretion.

Petitioners fatally failed to follow this Court's instructions for obtaining interlocutory review, but even if they had a reviewable order, their entitlement to an extraordinary writ would require them to show that the circuit court's order reflects "a substantial and clear legal error or a flagrant abuse of discretion."[30] Petitioners have failed to make either showing.

This Court's 2020 decision in *State ex rel. Johnson & Freedman, LLC v. McGraw* is instructive. In that case, the petitioners, defendants below, sought a writ to reverse the circuit court's denial of their motion to dismiss for non-prosecution. This Court first stated that for petitioners to satisfy the "exacting standard" for an extraordinary writ, they "may demonstrate that the court has committed a clear error of law that is substantial, clear-cut, and plainly in

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[28] *Id.* at 44-45, 829 S.E.2d at 44–45.

[29] *See id.* at 45, 829 S.E.2d at 45 (denying alternative writs of prohibition and mandamus following denial of summary judgment when petitioner failed to obtain reviewable order); *State ex rel. Chafin v. Tucker*, No. 20-0685, 2021 WL 1030320, at *5 (W. Va. Mar. 17, 2021) (mem. dec.) (stating that "[t]he failure of petitioners to inform the circuit court of their intent to file a petition for extraordinary relief and their failure to request a detailed order has left this Court with no ability to conduct a meaningful appellate review," and denying writ of prohibition).

[30] *State ex rel. Johnson & Freedman, LLC v. McGraw*, 243 W. Va. 12, 17, 842 S.E.2d 216, 221 (2020).

contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts," or they "may show that the court has abused its discretion in an extraordinary way, that is, in circumstances demonstrating more than a simple abuse of discretion by the trial court."[31] This Court then denied the requested writ because petitioners did neither.[32]

That also is the case with this petition for an extraordinary writ. Well-pleaded allegations in Tri-State's First Amended Complaint and evidence before the circuit court fully support the circuit court's determination that it would be unreasonable to force this case to Hamilton County, Indiana.[33] Petitioners argue that the circuit court's discretionary determination of unreasonableness somehow "amounts to a serious and clearly erroneous mistake of law."[34] Here, however, the circuit court simply applied the fourth *Caperton* factor: "whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that enforcement [of the forum selection clause] would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching"[35] The circuit court determined that enforcement of the contractual forum selection clause would be unreasonable "[u]pon consideration of the record before it and the oral argument of the parties."[36]

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[31] *Id.* at 16, 842 S.E.2d at 220 (internal quotation marks and alterations and footnotes omitted).

[32] *Id.* at 20, 842 S.E.2d at 224.

[33] *See supra* 4–5 (showing that evidence presented to circuit court establishes no connection with Indiana).

[34] Pet. at 18.

[35] Syl. Pt. 4, in part, *Caperton*, *supra*.

[36] App. at 2.

Petitioners do not and cannot argue that the circuit court's decision was "so flagrant and violative of [their] rights as to make a remedy by appeal inadequate."[37] Petitioners, alleged fraudsters, have no absolute right to enforce a contractual forum selection provision in the instrument of their alleged fraud. Instead, Petitioners argue only that they view the facts differently than the circuit court did. Petitioners' difference of opinion with the circuit court is no basis for obtaining an extraordinary writ, however.[38]

IV. CONCLUSION

Accordingly, Respondent, Tri-State Wholesale, Inc. d/b/a Tri-State Cannabis, respectfully requests that the Court refuse to issue a rule to show cause on the Verified Petition for Writ of Prohibition of Petitioners, 3C, LLC d/b/a 3Chi and Justin Journay.

Dated this 30th day of June, 2021.

Respectfully submitted,

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[37] *Johnson & Freedman*, 243 W. Va. at 15, 842 S.E.2d at 219 (quoting Syl. Pt. 2, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973)).

[38] *See id.* at 20, 842 S.E.2d at 224 (denying writ of prohibition because petitioners failed to show "that this case is extraordinary" by demonstrating "clear legal error or a flagrant abuse of the court's discretion").

CERTIFICATE OF SERVICE

I, Russell D. Jessee, do hereby certify that I served this "RESPONSE TO VERIFIED PETITION FOR WRIT OF PROHIBITION" on June 30, 2021, by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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