

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

**ESTATE OF SHERRY CLINE TILLEY,
by and through Jesse Graybeal, Candice
Cline, Bradley Graybeal, Ernest Cline,
individually and as Co-Administrators
of the Estate of Sherry Cline Tilley,**

Plaintiffs,

v.

Civil Action No.: 09-C-30-M

JUSTIN JUSTICE,

Defendant.

**FINAL ORDER DENYING "PLAINTIFFS' MOTION TO SET ASIDE, AMEND OR
ALTER JUDGMENT"**

Pending before this Court is "Plaintiffs' Motion to Set Aside, Amend or Alter Judgment" filed March 21, 2022, pursuant to Rules 59(a), 59(e), and 60(b) of the West Virginia *Rules of Civil Procedure*. The motion seeks to set aside this Court's "Final Order Granting Motion to Set Aside Default Judgment" entered March 11, 2022. This Court's March 11, 2022, Order found and concluded that the Court's November 10, 2021, "Amended Final Judgment Order" was unenforceable for the reasons stated therein. *Maynard v. Board of Educ. of Wayne County*, 178 W. Va. 53, 62, 357 S.E.2d 246, 256 (1987).

The Court's March 11, 2022, "Final Order Granting Motion to Set Aside Default Judgment" was entered following a February 18, 2022, hearing during which the Court took the testimony of Defendant Justin Justice and heard arguments from the parties on Defendant's "Motion to Set Aside Default Judgment and For Stay" filed December 8, 2021.

As grounds for relief from the Court's March 11, 2022, Order, "Plaintiffs' Motion to Set Aside, Amend or Alter Judgment" asserts that the Court "erroneously applied the doctrine of laches [and] denied the Plaintiff[s] due process of law by dismissing their claim[.] Although these grounds

are asserted separately by Plaintiffs, they are necessarily interrelated and will be accordingly so discussed. For the reasons set forth below, such grounds are baseless and without merit.

Plaintiffs' motion cites three separate rules of civil procedure. Yet, Rule 59(a) of the West Virginia *Rules of Civil Procedure* is plainly inapplicable here as it provides for relief from judgments which have been entered as a result of trial: "A *new* trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a *trial by jury* ... and (2) in an action *tried without a jury*...." (emphasis added). Although the Court took the testimony of Defendant Justin Justice, it was done solely for the purposes of the then-pending "Motion to Set Aside Default Judgment and For Stay" filed by Defendant Justice. No *trial* occurred during the February 18, 2022, hearing and equity does not compel setting aside, altering, or amending the March 11, 2022, Order.

Additionally, Plaintiffs seek relief from the Court's March 11, 2022, Order under both Rule 59(e) and Rule 60(b) of the West Virginia *Rules of Civil Procedure*. Rule 59(e) provides for the alteration or amendment of a judgment, whereas Rule 60(b) provides for relief from a judgment or order for various reasons listed. Although each of these rules seek to erase the finality of a judgment and to allow further proceedings, the fact remains that they are separate and distinct rules. Unlike Rule 60(b), Rule 59(e) provides that "[a]ny motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment." However, Rule 60(b) provides that motions be filed within a reasonable time or not more than one year after the judgment, order, or proceeding was entered or taken, depending on the grounds asserted.

Here, "Plaintiffs' Motion to Set Aside, Amend or Alter Judgment" was filed on March 21, 2022, ten days after the March 11, 2022, entry of the Court's "Final Order Granting Motion to Set

Aside Default Judgment". Thus, the motion was clearly timely filed under Rule 59(e) and Rule 60(b).

Rule 59(e) is a motion that calls into question the correctness of a judgment. It may be utilized to correct manifest errors of law or fact, or to present newly discovered evidence. *In re Transtexas Gas Corp.*, 303 F.3d 571 (5th Cir. 2002). Rule 59(e) is not appropriate for presenting new issues or evidence that could have previously been argued. *Shuford v. Fidelity Nat. Property & Cas. Ins. Co.*, 508 F.3d 1337 (11th Cir. 2007). "A motion under Rule 59(e) of the *West Virginia Rules of Civil Procedure* should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice." Syl. Pt. 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 50, 717 S.E.2d 235, 237 (2011).

Under Rule 59(e), the reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. *See Palmer v. Champion Mortgage*, 465 F.3d 24, 29 (1st Cir. 2006); *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir.2004); *Pacific Ins. Co. v. Amer. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). *See also* 11 *Wright et. al., Federal Practice and Procedure* § 2810.1 (3d ed.2010). "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.* 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt. 1, *Wickland v. American Travellers Life Ins. Co.*, 204 W.Va. 430, 513 S.E.2d 657 (1998).

Rule 60(b) of the *West Virginia Rules of Civil Procedure* provides, in relevant part: "On motion and upon such terms as are just, the court may relieve a party ... from final judgment order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect or

unavoidable cause; (2) newly discovered evidence ...; (3) fraud ...; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged ...; or (6) any other reason justifying relief from the operation of the judgment.”

The West Virginia Supreme Court of Appeals accords broad discretion to a circuit court deciding a Rule 60(b) motion. “A motion to vacate a judgment made pursuant to Rule 60(b), *W.Va. R.C.P.*, is addressed to the sound discretion of the court and the court’s ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion.” Syl. Pt. 5, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974).

Here, Plaintiffs most certainly were not denied due process of law. As this Court stated in its March 11, 2022, Order, “[d]uring the February 18, 2022, hearing, counsel for the Plaintiffs waived the lack of a certificate of service on Defendant Justin Justice’s motion, as well as the lack of a formal notice of the hearing. The Court notes that counsel for the parties were sent a link for the Microsoft Teams hearing by the Court’s staff via e-mail. Counsel for the Plaintiffs further stated he was aware of the motion through a notification from the West Virginia E-filing System.” “Final Order Granting Motion to Set Aside Default Judgment”, p. 1, n.4.

Counsel for Plaintiffs was permitted to cross-examine Defendant Justin Justice during the February 18, 2022, hearing. Counsel for Plaintiffs called no witnesses during the hearing despite having ample opportunity to procure the same. Indeed, the “Motion to Set Aside Default Judgment and For Stay” was on filed December 8, 2021, and did not come on for hearing until February 18, 2022.

Counsel for Plaintiffs was permitted to present evidence during the February 18, 2022, hearing. See “Final Order Granting Motion to Set Aside Default Judgment”, p. 10, n.11. Counsel for Plaintiffs was also permitted to ask John W. Street of the West Virginia Supreme Court of

Appeals questions during the hearing. Counsel for Plaintiffs was further permitted to make an oral argument to respond to the grounds asserted in Defendant's "Motion to Set Aside Default Judgment and For Stay" filed December 8, 2021, which included the doctrine of laches.

As this Court noted in its March 11, 2022, Order, "[a]lthough counsel for the Plaintiffs strongly advocated against Defendant Justin Justice's contention that he was not properly served in this matter, counsel indicated that he would defer to the Court's "wide discretion" regarding Mr. Justice's equity and fairness arguments." "Final Order Granting Motion to Set Aside Default Judgment", p. 13, ¶ 36. Finally, and most importantly, Defendant's "Motion to Set Aside Default Judgment and For Stay" filed December 8, 2021, specifically sought the dismissal of this action. Plaintiffs clearly knew or should have known that this was a possible outcome of the February 18, 2022, hearing upon receipt of Defendant's motion. See *Maynard, supra*.

Plaintiffs' motion makes no claim that new evidence not previously available has come to light. Plaintiffs did not move to continue the February 18, 2022, hearing upon the conclusion of Defendant Justin Justice's testimony to allow presentation of additional evidence. The findings and conclusions set forth in this Court's March 11, 2022, Order are neither erroneous nor incorrect and are hereby adopted and incorporated as if fully set forth herein. This Court's March 11, 2022, Order conducted an extensive and detailed analysis of the issues presented after thorough research.

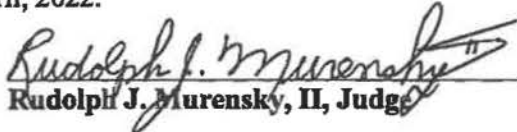
Plaintiffs are clearly dissatisfied with the Court's ruling and merely seek another bite at the apple to advance legal arguments that could have and should have been previously presented to the Court. See *Freeman v. Busch*, 349 F. 3d 582 (8th Cir. 2003). No grounds for altering or amending the Court's March 11, 2022, Order under the *Mey* Rule 59(e) factors are present here. Plaintiffs' motion identifies no intervening change in controlling law, new evidence, clear error of law, or obvious injustice as a result of the entry of the March 11, 2022, Order. Plaintiffs' motion

further fails to set forth any allegations of mistake, inadvertence, surprise, excusable neglect, unavoidable cause, fraud, that the judgment is void, satisfied, released or discharged, or any other reason justifying relief from the operation of the judgment in accordance with Rule 60(b). Plaintiffs' motion fails to set forth compelling reasons to relitigate that which has already been decided and is accordingly **DENIED** in this Court's discretion.

Based on all of the foregoing, it is **ADJUDGED** and **ORDERED** that Defendant Justin Justice's "Plaintiffs' Motion to Set Aside, Amend, or Alter Judgment" should be and is hereby **DENIED**. This is a **FINAL ORDER**. This matter shall be removed from the Court's active docket. Plaintiffs' objections and exceptions to this Order are noted and preserved.

The Circuit Clerk is directed to forward a certified copy of this order to the following: (1) Clinton W. Smith, Counsel for Plaintiffs; and (2) Timothy P. Lupardus, Counsel for Defendant Justin Justice.

ENTERED this 15th day of April, 2022.


Rudolph J. Murensky, II, Judge